



**PROFESSIONAL NEGLIGENCE
AND LIABILITY UPDATE**

EDINBURGH CONFERENCE

Thursday, 19th September 2024

The WS Society & The PNLA
EDINBURGH CONFERENCE
Thursday, 19th September 2024

0830–0900 Registration and Refreshments

0900–0915

“Joint Chairs Introduction”
Tim Edward – Partner – BTO
Andrew Foyle – Partner – Shoosmiths

0915–0955

“Keynote Address”
The Honourable Lord Richardson
Judge of the Supreme Court

0955–1035

“E&W Keynote Address”
Nicholas Davidson KC – Deputy Head – Hailsham Chambers

1035–1050 Refreshments

1050–1130

“Developments in Professional Liability in the Scottish Courts”
Alastair Duncan KC – Axiom Advocates

1130–1210

“Recent developments in Professional Negligence & Liability”
Simon Wilton KC – Hailsham Chambers

1210–1250

“AI Litigation Risks”
Rory Thomson – CMS

1250–1300

Questions and discussion

1300–1400 Lunch

1400–1440

“The advantages of Sheriff Court Commercial Procedure”
Sheriff Kenneth Campbell KC

1440–1520

“The challenges of being a litigant”
Karen Cornwell - DWF Law
Joint PNLA Scotland Representative

1520–1530 Refreshments

1530–1610

“Developments in Forensic Accounting and Investigations”
Christine Rolland – Director – Henderson Loggie

1610–1620

“Questions and discussion / Joint Chair’s Closing remarks”

1620–1630

Thank you from Katy Manley – PNLA President/BPE Solicitors

5 hours Talk time
1 hour Pack review
6 hours CPD

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

**Thursday 19th September 2024
ATTENDEES (1 of 3)**

The Honourable Lord Richardson	Judge of the Supreme Court
Sheriff Kenneth Campbell KC	Lothian and Borders Sheriff Court
Victoria Arnott	Axiom Advocates
Rachel Auld	Indemnity Law
Rachael Bicknell	Squaring Circles
Matthew Bruce	WS Society
Lynne Cardow	DAC Beachcroft Scotland LLP
Patricia Cheney	WS Society
Louise Chopra	TLT LLP
Bruce Clayson	Nolans Law
Karen Cornwell	DWF Solicitors/PNLA
Nicholas Davidson KC	Hailsham Chambers
Alastair Duncan KC	Axiom Advocates
Alan Eadie	DAC Beachcroft Scotland LLP
Tim Edward	BTO/PNLA
Nick Ellis KC	Westwater Advocates
Colette Finnieston	Kennedys Law
Andrew Foyle	Shoosmiths
Iain Franklin	DWF LLP
Iain Grant	Gilson Gray LLP
Paul Haniford	Thorntons Law LLP
Stephanie Hepburn	Shepherd & Wedderburn LLP
Ashley Jones	Burness Paull LLP
Sukhbir Kaur	Temple Legal Protection

Sian Keddie	BTO Solicitors LLP
Anne Kentish	Kennedys Law
Callum MacKinnon	Dentons UK
Katy Manley	President PNLA/BTO Solicitors
Scott Manson	Axiom Advocates
Paul McIntosh	Aberdein Considine
Adam McKinlay	Axiom Advocates
Alan McLean KC	Themis Advocate
Richard McMeeken	Morton Fraser MacRoberts LLP
Meriel Miller	Burness Paull LLP
Sophie Mills	WS Society
Faith Milne	Laurie and Co Solicitors LLP
Mhairi Morrison	Burness Paull LLP
Paul Motion	BTO Solicitors LLP
Tom Pangbourne	Indemnity Law
Matthew Pascall	Temple Legal Protection
Jilly Petrie	DAC Beachcroft Scotland LLP
Matthew Raftery	DAC Beachcroft Scotland LLP
Bethany Reed	Morton Fraser MacRoberts LLP
Pamela Robb	Thompsons
Christine Rolland	Henderson Loggie
Eileen Sherry	DWF LLP
Murray Steel	Axiom Advocates
Diana Stoica	WS Society
Rory Thomson	CMS
Kirsty Tyre	Advocates

Michael Upton

Brian Walker

Sarah Wardell

Simon Wilton KC

Themis Advocate

Walker McDonald

Dentons UK

Hailsham Chambers



Tim Edward
Partner – BTO
&
Andrew Foyle
Partner – Shoosmiths

“Joint Chairs Introduction”



Tim Edward

Partner

Dispute Resolution/Professional Liability

Edinburgh

tje@bto.co.uk

0131 222 2939



Tim is a Solicitor Advocate and qualified mediator in our Dispute Resolution team.

An accredited specialist in Professional Negligence, and a member of The Legal 500's 'Hall of Fame' for both commercial litigation and professional negligence, Tim has over three decades of litigation experience.

In the Professional Negligence sphere, Tim has handled multiple negligence cases across a range of professions, in particular solicitors' negligence, for both defenders and pursuers.

He has also handled a wide variety of commercial disputes, including insolvency and company disputes.

High profile cases handled by Tim include acting for the defenders in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group* [2011] CSIH 87 and *Trustees of Rex Proctor RBS v Scottish Widows* [2015] CSOH 83, and most recently acting for the pursuer in *Gavin Loudon v Stewart Milne Group* [2022] CSIH 3]

Tim's priority in handling all disputes is to seek out the best commercial solution for clients.

Out of the office, Tim is a keen golfer and skier and enjoys running with his rescue lurcher at weekends.

"The level of service has always been excellent, with properly experienced solicitors dealing with appropriate cases" - Legal 500

SHOOSMITHS

Andrew Foyle

Partner / Solicitor Advocate
Dispute resolution & litigation
Edinburgh
07841 322 537
andrew.foyle@shoosmiths.com



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 Homeowner & 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 2 2024, Chambers and Partners - Banking Litigation
Leading individual 2024, Legal 500 - Debt recovery
Recommended lawyer 2024, Legal 500 - Commercial litigation



**The Honourable Lord Richardson
Judge of the Supreme Court**

"Keynote Address"



The Honourable Lord Richardson

Judge of the Supreme Courts

Lord Richardson was appointed as a judge of the Supreme Courts in February 2021.

He studied at Edinburgh University (LL.B) and Universiteit Leiden (LL.M). He practised as a solicitor from 2000 and, following a stage at the European Commission, became an advocate in 2003.

During his career as an advocate, he specialised in commercial law and was Standing Junior to the Scottish Government and to the Office of the Advocate General. He was appointed as a Queen's Counsel in 2017. Between 2016 and 2018, he served as an advocate depute.



Notes: -

A series of horizontal dashed lines for writing notes.



Nicholas Davidson KC
Hailsham Chambers

"E&W Keynote Address"

Nicholas Davidson KC

Call: 1974 | Silk: 1993 | Deputy Head of Chambers



Overview

Nicholas Davidson KC is Deputy Head of Chambers.

Nicholas 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.

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.

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.

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 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.

What others say

"Nicholas has a brilliant mind, his knowledge is second to none, but it is his ability to impart that, both in writing and orally, which sets him apart." *Legal 500, 2024*

"Nicholas is excellent and a leading expert in the field." *Chambers UK, 2024*

"Nicholas has a keen mind - he is precise and commercial." *Chambers UK, 2024*

"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*

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**.

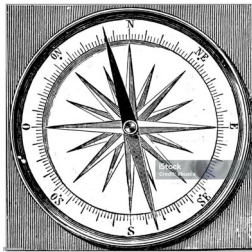
Nicholas Davidson KC is a barrister regulated by the Bar Standards Board. [Click to view Nicholas Davidson KC Privacy Notice.](#)

True North or Magnetic North?

How's your Moral Compass?

Nicholas Davidson KC

1



2

Ordnance Survey marks 2014



3



4

A compliment or a criticism?

“... possibly more loyal to her professional conduct requirements and put her integrity as a lawyer above the interests of the business.”

5

<https://richardmoorhead.substack.com/p/the-post-office-scandal-and-lawyers>

The Hamlyn Lectures 2024

6

The Law Society of Scotland:

"The standards that they work to reflect the legal, moral and professional obligations of solicitors to clients, the courts, the public and others in the legal profession."

7

The Faculty of Advocates:

"The work of an Advocate is essentially the work of an individual practitioner whose conscience, guided by the advice of his seniors, is more likely to tell him how to behave than any book of rules."
"An Advocate owes a variety of legal and moral obligations ..."

8

Plevin v. Paragon Personal Finance Ltd
[2014] UKSC 61 [2014] 1 W.L.R. 4222

9

No win, No fee!

10

No win, No fee!
No risk???

11

No win, No fee!
No risk???
SSB Law – in administration – clients pursued for costs

12

How do you win promotion?

13

How do you win promotion?
“The solicitor also has a responsibility to treat colleagues, other members of the legal profession and the public with similar politeness and respect.”

14



15

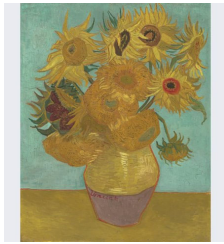
Why everyone should think like a lawyer

The unloved profession has a lot to teach managers

The Economist, 27 June 2024

16

Let the artist remind you



17

Let the artist remind you

Great things are done by a series of small things
brought together

Vincent van Gogh

18

How do *you* think?

What do *you* think?

Nicholas Davidson KC
Hailsham Chambers



Alastair Duncan KC
Axiom Advocates

***"Developments in Professional Liability
in the Scottish Courts"***



Alastair Duncan KC

Year of Call
1999

Year of Silk
2012

Email
alastair.duncan@axiomadvocates.com

Telephone
07739 639016

Areas of expertise

- Civil liberties and human rights
- Clinical liability
- Commercial
- Professional Liability and Regulation
- Public Law

Professional information

- 2020: Counsel to the Scottish Hospitals Inquiry
- 2017-2019: Stable Director of Axiom Advocates
- 2012: Took silk
- 2006-2012: Standing junior to the Scottish government
- 1999: Called to the Bar

Professional experience

Alastair has a broad civil practice that takes in most of the areas in which Axiom specialises. He is instructed regularly in commercial and public law cases. In those areas, and especially in professional liability and regulation, Alastair has been instructed in many of the leading cases in Scotland. He has a particular interest in professional discipline and regularly acts on behalf of solicitors and members of the Faculty of Advocates against whom complaints have been brought.

Notable cases

Commercial

- *Grier & Others v Police Scotland and Lord Advocate* [2020] CSOH 33: A series of commercial actions arising from the failed prosecution connected to administration and liquidation of Rangers FC.
- *A&E Investments v Levy McRae & Another* [2020] SLT 133: Action to challenge the legality of a success fee charged by solicitors and client to a client.
- *Fife Council v Atkins* [2019]: Action for breach of contract brought in connection with alleged defects with and delays in the creation of the Dunfermline flood prevention scheme.
- *Midlothian Council v Bracewell Stirling* [2018] CSIH 1821: Interpretation of contract: whether an architect was strictly liable under its contract for work undertaken by others.
- *Royal Bank of Scotland v Carlyle* 2015 SC (UKSC) 93: Action brought against Bank on the question of whether an oral exchange between property developer, customer and bank employee constituted a binding agreement of loan.

Professional Liability and Regulation

- *McManus v Scott Wilson* [2020] CSOH 47: Action brought by residents of large housing estate against firm of engineers involved in investigation and remediation of contamination on the brownfield site on which the estate was built.
- *McLennan v GMC* 2020 SC 305: Appeal against decision to strike off doctor for writing allegedly dishonest medical report.
- *NRAM v Steel* 2018 SC (UKSC) 141: Whether a solicitor acting for a borrower owed a duty of care to the lender on the other side of a transaction.
- *DK v Investigating Committee of the General Dental Council* [2018] CSOH 99: Judicial review of decision to discipline a dentist in connection with a conviction.
- *Heather Capital v Levy & McRae* 2017 SLT 376: Breach of trust, prescription and other issues arising against the background of multi-million pound fraud of which the solicitors were unaware.

Clinical Liability

- *Scottish Hospitals Inquiry* (2020): Inquiry into whether issues in the construction of two new hospitals in Scotland impacted adversely upon the health of patients including in particular children suffering from cancer.
- *Fatal Accident Inquiry into the death of Declan Hainey* (2015): Inquiry into the death of an infant whose badly decomposed remains were found in the home formerly occupied by his substance addicted mother, and the role of health professionals in relation to his death.
- *Gair v Dumfries & Galloway Health Board* 2020 SLT 253: Judicial review of decision to suspend dentist whose clinical practice was said to be incompetent.
- *Taylor v Dailly Health Centre* 2018 SLT 1324: Action brought against GP by relatives of a woman who died of heart attack on the basis of alleged negligence and failure in relation to consenting procedure.

Administrative & Public Law

- *Inquiry into the death of Sheku Bayoh* (2021): Appointed to represent the Lord Advocate in relation to decisions around whether to prosecute police officers following death in custody.
- *Short v Scottish Police Authority* 2019 SLT 503: Judicial review of decision to refuse two police officers medical retirement pensions.
- *Congregation of the Sisters of Nazareth v Scottish Ministers* 2015 SLT 445: Judicial review of the appointment of the chair to the Scottish Child Abuse Inquiry, and whether that appointment was tainted by apparent bias.
- *Main v Scottish Ministers* 2015 SC 639: Judicial review of sex offender notification requirements.
- *Scotch Malt Whisky Association v Scottish Ministers* [2016] CSIH 77: Judicial review challenging the introduction of a minimum price for units of alcohol sold in the off-trade in Scotland.

Directories

- Chambers UK Bar – Recommended as leading silk in Clinical Negligence (Band 2); Commercial Dispute Resolution (Band 1); Professional Discipline (Band 2); and Professional Negligence (Band 1)

Select publications



FIVE QUESTIONS NOT SIX

PROFESSIONAL LIABILITY IN THE SCOTTISH COURTS 2024

ALASTAIR DUNCAN KC

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QUESTION 1: WHEN DOES/DID THE RIGHT OF ACTION PRESCRIBE?

- (a) What is loss; when does it occur and when does awareness happen?
- (b) What is required for reliance on s.6(4) of the 1973 Act?
- (c) When do we start talking about the new provisions (and what do we say)?

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Tilbury Douglas Construction Limited v Ove Arup 2024 SLT 811 (First instance: 2023 SLT 1047)

The pursuer's case:

OA provide a design for works on two railway tunnels. On the faith of that, TD enter into a fixed price contract to do the enabling works: risk of unanticipated cost falls on TD. The design is said to have been erroneously optimistic. Substantial redesign is required. The cost of that falls on TD.

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For the purposes of s.11(1) of the 1973 Act, what was the loss; when did it occur?

Lord Harrower: "I agree with the pursuer that the primary component of [its] loss, the need for the enabling works [to be redesigned], occurred as soon as the pursuer relied upon the defender's design...".

First Division: We agree: §§ [14], [39]: "the contract was worth commensurably less to Tilbury than it would have been had Arup provided a competent design."

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For the purposes of s.11(3), when was there awareness of loss?

First Division (disagreeing with Lord Harrower) at § [40], [43] and [49]: the same date as for s.11(1).

"In November 2013 Tilbury were aware of the contract, albeit they did not appreciate that in due course there would need to be an extensive redesign with the costs falling on them. ... It matters not that the financial damage could not be quantified till later, nor that at the time Tilbury did not see the agreement as detrimental and could not appreciate that the design was flawed."

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Post-script questions

(1) The difference between loss caused by services and consideration paid for services: Lord Harrower at § [79] and in **Legal and General Assurance (Pensions) Limited v Halliday Fraser Munro and Fairhurst v Stewart Milne Group Limited** [2023] CSOH 81:

"[T]he price paid is consideration for services supplied, rather than loss caused by breach."

(2) A different outcome from that in Tilbury Douglas? **Leonardo Hotel Management v Galliford Try Building Ltd & An'r** [2024] CSOH 43

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What is required for reliance on s.6(4)?

Section 6(4) excludes from the calculation of time

"any period during which by reason of—

- (i) fraud on the part of the debtor or any person acting on his behalf, or
- (ii) **error induced** by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to **refrain** from making a relevant claim in relation to the obligation... [but the excluded period] shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error ..."

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Three points in particular:

- (1) The necessity to show the erroneous state of mind: § [56], per *BP v Chevron* (and see *Centenary 6 Ltd v TLT...*)
- (2) refrain does not mean a "conscious act of self restraint": § [58]
- (3) Can the negligent advice be the basis for the claim as well as for the s.6(4) inducement?

"If merely tendering a design or sending an invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence." § [61]

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(Some of) the new provisions: s.11(3A)

Only relevant to those provisions not prescribed before 1 June 2022.

The three facts: (a) that loss injury or damage has occurred; (b) that [it] was caused by a person's act or omission; and (c) the identity of that person.

Will this limitation-influenced regime be more sympathetic to late claims?

Cf. *Tilbury Douglas* at § [66]

"[As] time passes it becomes increasingly difficult for a court to reach a just solution. ... 'the court's decision (cannot) depend on speculation as to acts, omissions or motives.'"

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**QUESTION 2: DO I NEED AN EXPERT TO MAKE AND PROVE
AVERMENTS OF PROFESSIONAL NEGLIGENCE IN SCOTLAND?**

Lord Braid: yes: **Ronnie O'Neill Freight Solutions Ltd v MacRoberts LLP**
2023 SLT 1196

Lord Sandison: no: **Hope v Cockburn** [2024] CSOH 69: Lord Sandison:

"Despite the popularity of the view that an allegation of professional negligence must in every case be supported by a suitable expert report, I remain unconvinced that any such universal proposition is warranted in principle or authority. ...

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In search of authority...

- The "curious gravitational pull" of **Tods Murray v. Arakin**: Lord Sandison.
- Does the answer lie in the threshold questions in **Kennedy v Cordia** 2016 SC (UKSC) 59 at § [43], namely:
 - For expert factual evidence: will the evidence assist the court?
 - For expert opinion evidence: is the evidence necessary; would the court "without instruction" from an expert be able to decide the question?

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QUESTION 3: WHAT IS THE LOSS?

- The particular case of loss of a chance: **Centenary 6 Ltd v TLT LLP** 2024 SLT 681
- The mathematical or arithmetical approach to chance: § [69]:

"Although there may be circumstances in which it would be appropriate to adopt a mathematical approach to the loss of a chance, it is less obviously attractive in the context of litigation risks."

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Is there no escaping prescription?

Prescription and loss of chance

Where liquidators are in post, attribution of knowledge for the purposes of s.6(4) of the 1973 Act.

A different approach in England "would not occasion surprise or concern". § [32]

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QUESTION 4: SCOPE OF DUTY: TWO QUESTIONS NOT ONE

(1) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?

(2) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed?

(Manchester Building Society v Grant Thornton [2022] AC 783; & Khan v Meadows [2022] AC 852)

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Scottish treatment of

Manchester Building Society v Grant Thornton & Khan v Meadows

SD v Grampian Health Board [2024] CSIH 7

D v NHS Fife Health Board [2022] SAC (Civ) 27

[Glasgow City Council v First Glasgow 2022 SLT 164]

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QUESTION 5: AFTERS?

LPP & client confidentiality in third party complaints

SLCC v Murray 2023 SC 10

Explanatory notes to legislation: "*In making a request for information, the Commission is not given the right to override the existing rules of legal privilege.*"

SLCC v Murray 2023 SLT 17 at § [5]

"...while privileged material has a special status, the residual duty of confidentiality can be overcome in the public interest."

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Simon Wilton KC
Hailsham Chambers

***"Recent developments
in Professional Negligence & Liability"***

Simon Wilton KC

Call: 1993 | Silk: 2024



Overview

Simon is a highly experienced barrister specialising in professional liability , professional regulation, and commercial and insurance disputes. He has wide experience of interlocutory, trial and appellate advocacy, arbitration work, and all kinds of alternative dispute resolution including acting as an adjudicator under the PNBA adjudication scheme (which he was partly responsible for developing).

Simon was short-listed (one of three) by Chambers & Partners as professional negligence junior of the year in 2014, 2016 and 2021.

Simon was head of the Professional Liability Group at Hailsham Chambers from 2016-2021 and has since acted as deputy to William Flenley KC.

Professional liability

Simon has advised and appeared in cases involving all kinds of professionals including solicitors, barristers, surveyors, valuers, accountants, professionals acting as expert witnesses, financial advisers, construction professionals (including specialist sub-contractors), insurance brokers, and professional trustees. Typical cases include lenders' claims against solicitors or valuers or mortgage brokers, and indeed property finance litigation of all kinds, claims against lawyers arising from mishandled litigation or transactional work or private client work including wills and probate, claims arising from poor financial advice or dubious investment or tax avoidance schemes promoted by financial advisers or accountants, claims referable to the acts and omissions of solicitors or accountants acting as professional trustees, claims against professionals (usually surveyors) acting as LPA receivers, and litigation against specialist sub-contractors arising out of failed construction projects.

Simon undertakes work for claimants although the staple of his practice is work for the leading professional indemnity insurers and specialist solicitors active in these fields.

Simon particularly relishes document-heavy cases, cases involving points of law or contractual construction, cases with a specialist Chancery or commercial bent or cases involving allegations of fraud.

Regulatory and disciplinary

Simon has wide experience advising and representing professionals such as accountants, solicitors, architects, nurses and estate agents involved in regulatory disputes or disciplinary inquiries. He represents individuals and firms before their professional regulatory bodies or, should it be necessary, on appeal to the High Court or by way of a judicial review challenge.

His recent experience also extends to representing a GP expert facing allegations of contempt of court, believed to be the first case of its kind, representing an account to a national icon before his professional body, and successfully defending a surveyor against a charge of dishonesty before his professional body in circumstances where the Court of Appeal had previously said he was dishonest.

Insurance

Simon has extensive experience of disputes between insureds and insurers, including claims against insurers and insurance brokers following avoidance for misrepresentation or non-disclosure, and policy disputes turning on points of construction, coverage issues, excess layer issues, and double insurance problems. He is also instructed in disputes between insurers, whether primary or excess layer insurers or reinsurers. In conjunction with his professional negligence work he has developed particular experience of cases involving professional indemnity insurance, especially PI insurance for solicitors (and he is unafraid of grappling with the intricacies of successor practice disputes). His advisory work includes joint instructions from insurers wishing to resolve disputes between themselves. He also has extensive experience of contested arbitrations and litigation, including litigation in the Commercial Court, the Circuit Commercial Courts, and the Technology and Construction Court.

Commercial law

Simon has extensive experience of commercial litigation, both by way of advisory work in respect of contractual disputes and by way of court appearances in the Chancery Division, the Commercial Court and the Circuit Commercial Courts. Recent work has included:

- advising a company active in the transport sector as to the scope for litigation against it following the breakdown of a commercial relationship.

- advising in a £10m litigated dispute between an insured and his insurers and brokers arising out of a devastating fire at a logistics warehouse
 - acting for a UK company in respect of a claim against a German manufacturer and featuring an exposure to liabilities consequent upon exports to Thailand of defective chemical products
 - advising on and appearing in a wide-ranging and high-value contractual dispute between online motor insurers and their broker counterparties which led to high-profile litigation mentioned in the Financial Times, comprising 3 linked actions which featured allegations of various economic torts
 - advising on a technically complicated contractual dispute between an insurer and its information technology partner
 - advising on limitation of liability and exemption clauses in connection with a series of disputed food supply contracts
-

Costs

Simon's costs practice focuses upon contractual disputes between solicitors and clients and cases involving applications for wasted costs or third-party costs orders or disputes about BTE or ATE cover. He successfully defended a solicitor against a wasted costs and non-party costs order in *Tinseltime Limited v Roberts* [2012] EWHC 2628 (TCC); [2013] PNL R 4; [2012] 6 Costs LR 1094.

Notable cases

Various professional indemnity insurance arbitrations of a confidential nature before well-known arbitrators including Colin Edelman KC, Stephen Hofmeyr KC and William Flenley KC.

Various PNBA Adjudications: Acting as adjudicator in confidential adjudications under the auspices of the PNBA Adjudication Scheme.

Acting (2020-2024) for various solicitor defendants in a variety of claims by purchasers of apartments or hotel rooms or of fractional interests in apartments or hotel rooms or care homes, both newly constructed developments and proposed developments.

Niprose Investments Ltd v Vincents Solicitors Ltd [2024] EWHC 801(Ch), [2024] PNL R 22: strike-out application by solicitors sued in respect of a 'buyer-funded' development scheme.

Dr Mohamad v Goodman Grant Solicitors (2023): successful defence at a 4-day trial of a claim by a dentist that his solicitors negligently failed to ensure the successful completion of his sale of a dental practice and thereby exposed him to a multitude of losses flowing from the failure of his practice.

Defending solicitors (2023) alleged to have failed to identify a claim against leading

tax QCs which, if pursued by a successful businessman, would allegedly have generated over £3 million in damages. The claim was discontinued in 2024.

Griffin v Brown [2021] EWHC 2810 (Ch): extended civil restraint order obtained against claimant bringing claims against a series of legal advisers on basis of abuse of process and collateral attack.

Witcomb v J Keith Park Solicitors [2021] EWHC 2038 (QB), [2021] PNLR 24: preliminary issue as to when time ran under section 14A when a claimant alleged his solicitors and counsel had negligently failed to ensure he received a provisional damages award in an underlying personal injury claim.

Sukul v Bar Standards Board and Others (June 2021): striking out of claim against KC alleged to have misconducted disciplinary proceedings against a barrister on grounds no duty of care owed in the circumstances and abuse of process/collateral attack.

Various Claimants in the Angelgate, Baltic House and NPPM Developments v Various firms of solicitors: Led by Michael Pooles KC, acting (2020-2021) for solicitors sued by large numbers of claimants in multiple actions arising from the failure of buyer-funded developments in Liverpool and Manchester, in which the court has held [2020] EWHC 3643 (Ch) [2021] PNLR 15, that the schemes were not collective investment schemes.

Hart v Large [2020] EWHC 985 TCC, Large v Hart [2021] EWCA Civ 24 [2021] PNLR 13. Representing a surveyor in a multi-party case arising from the purchase of a coastal property riddled with almost entirely latent defects. Extensive consideration at first instance and on appeal of the proper measure of loss, involving a departure from the orthodox Watts v Morrow measure.

Acting for a public figure in a substantial negligence claim against solicitors arising out of mishandled defamation litigation (2019-2020).

Trainer v Cramer Pelmont (2019) EWHC 2501 (QB), [2020] PNLR 3, reasonable arguability of section 14A limitation arguments in solicitors' negligence claim

Dr Mahdavi v (1) Sterling Avram; (2) Healys (2018) - acting for a solicitors' practice accused of breach of trust, of breaching an undertaking, and of being vicariously responsible for deceit following a £7m fraud perpetrated by consultant engaged by the firm.

Acting for accountant to national icon accused of professional wrongdoing by his professional body (2018).

Kirk v Aviva & Ors (2017): junior counsel led by Patrick Lawrence KC in a £10m dispute between a commercial property owner and his commercial property insurers and insurance brokers following a devastating fire at a logistics warehouse.

Kashourides v Allsop LLP (2017): defending LPA receivers against a Commercial Court case valued at £10 million by the claimant and involving multiple allegations of

underselling in relation to two investment property portfolios.

Liverpool Victoria Insurance Company Limited v Khan & Ors. [2016] 6 WLUK 505; [2017] EWHC 1314 (QB): defending a GP expert accused of contempt of court in relation to expert evidence given in a road traffic claim.

Bridging Loans Ltd v Toombs [2017] EWCA Civ 205 Court of Appeal: successful defence of appeal to the Court of Appeal seeking to overturn an order giving summary judgment to the defendant valuer in a claim brought by a bridging lender.

DB UK Bank Ltd v Jacobs Solicitors [2016] EWHC 1614 [2016] 4 WLR 184: a successful determination of the issue of whether a cross-offer rendered an earlier non-part 36 offer incapable of acceptance, such that a supposed compromise had not been effected when that non-part 36 offer was purportedly accepted shortly prior to trial.

Ahmad v Bank of Scotland [2014] EWHC 4611 (Ch), [2016] EWCA Civ 602: striking out of a multi-million pound claim against various defendants including LPA receivers: the result at first instance was upheld in the Court of Appeal.

Venus Asset Management Ltd v Matthews & Goodman (2014-2016) [2015] EWHC 2896 (Ch). Defending a surveyor accused of negligence leading to what are alleged to be very large losses referable to the compulsory purchase of commercial premises for the London Olympics.

Southern Rock v Brightside Group Limited (2014-2016) [2015] EWHC 757 (Comm). Led by Michael Pooles KC in a high value commercial dispute between insurers and brokers involving 3 concurrent actions.

Acting (2014-2015) in an asset-recovery action (featuring freezing injunctions and asset tracing in the UK and Pakistan) for a City of London solicitors' practice defrauded (initially) of almost £7m.

Acting (2014) for excess layer insurers, RSA and SIMIA, led by Justin Fenwick KC in Commercial Court case where the issue was whether notification of a potential multi-million pound claim to the excess layer was required under the terms of the excess layer policy.

Johnson v Hibberts (2014): Chancery Division, John Jarvis KC, solicitors' negligence trial: nature of duty owed by solicitor concerning rule that marriage revokes a will.

Valentine Rainer Ltd v Henderson (2013), Chancery Division, HHJ Hodge KC, acting for receivers, defeated claim for damages for acting after funds in hand to pay off appointing creditor.

Hotel Installations (Project Support) Limited v Plummer Parsons (2013): acting for defendant accountant: striking-out of £1m claim on scope of duty/causation grounds.

Tinseltime Limited v Roberts [2012] EWHC 2628 (TCC); [2013] PNL R 4; [2012] 6 Costs LR 1094: successfully defended wasted costs/non-party costs application against claimant's solicitor who bore the cost of disbursements under a CFA.

Led by Michael Pooles KC, successfully defending City firm in arbitrated professional negligence claim before a panel of arbitrators (2011).

Acting (2010) for financial adviser sued in part 20 proceedings as part of the Innovator and Gentech Technology Scheme litigation.

Coomber v Alan Bloom (& Ors) (2010): Acting for LPA receivers in multi-party action arising out of the collapse of 'The Icelandic Bank'. Claim struck out after 3-day hearing before Lewison J.

Nationwide BS v Barnes Kirkwood Woolf v Hiscox (2010): Led by Christopher Symons KC, acting for insurer defending declinature on grounds of dishonesty of valuer's claim for indemnity for £2.5m lender's claim. Claim withdrawn on the eve of trial with indemnity costs payable.

Bonham v (1) Fishwick; (2) Fenner [2008] Pens LR 289 and [2008] 2 P&CR DG6. Acted for accountant trustee sued for breach of trust. Case struck out by Evans-Lombe J in 2007 [2007 EWHC 1859 (Ch)] 10 ITELR 329. Appeal dismissed by Court of Appeal.

Leonard v Byrt & Ors [2008] EWCA Civ 20. Acting for solicitors. Court of Appeal upholds summary judgment in a 'lost litigation' claim.

CHRE v (1) NMC; (2) Kingdom [2007] EWHC 1806 (Admin). Administrative Court. Beatson J. Acting for nurse defending statutory appeal brought by the CHRE. The case establishes there is a judicial discretion whether or not to remit a case 'under-prosecuted' by the NMC.

Jessup v Wetherell [2007] 98 BMLR 60, [2007] ACD 79. PNLR 10. High Court. Silber J. Successful application for summary determination of solicitors' negligence claim on limitation grounds.

Sinclair v Woods of Winchester Ltd & Anor (2005) 102 Con LR 127. TCC. HHJ Coulson KC. Appeal from construction arbitration. Successful defence of application to remove the arbitrator.

Sangster v Biddulphs [2005] PNLR 33. High Court. Etherton J. Solicitors' negligence. Preliminary issue whether claimant relied on solicitor held out as partner.

Kessler v Moore & Tibbits [2005] PNLR 17. Court of Appeal. Solicitors' negligence. Claimant suing successor practice. Issue was whether the correct defendant could be substituted after limitation had expired.

Aldi, B&Q, Grantchester v Holmes Building Ltd & Ors (2004). TCC. HHJ Seymour KC. Multi-party construction litigation. Led by Patrick Lawrence KC. Acting for specialist sub-contractor in one of the largest construction cases to come to court in 2004. Arising out of the subsidence of 2 supermarkets on reclaimed land.

Taylor v Anderson and Another, The Times 22 November 2002, (2003) RTR 21. Court of Appeal. Whether a fair trial possible in an apparently stale claim brought by a claimant under a disability.

Griffiths v Last Cawthra Feather [2002] PNLR 27. High Court. Solicitors' negligence. Issue was the date and method the court should adopt in assessing loss in a case arising out of the acquisition of property with an onerous repairing obligation.

Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321. Led by Michael Pooles KC. Successful appeal to the House of Lords. The leading case on nuisance by tree roots.

What others say

"He's absolutely excellent and a leading junior in various practice areas. He was so eloquent and very good at explaining a very difficult topic." Chambers UK, 2023

"Simon is always quick and efficient in dealing with instructions." Legal 500, 2023

"Simon is incredibly good on his feet. He has an exceptional courtroom manner and an effortless ability to get the judge on side. Outstanding depth of knowledge in all aspects of professional negligence." Legal 500, 2023

"He's a heavyweight barrister: exceptionally intelligent, incredibly good on his feet, and has the judge on his side. I tend to give him the big, complex cases." "He has all the qualities of a leading silk. One of the nicest and most user-friendly barristers you can ever come across." "He's really invested in the underlying client, and he goes above and beyond in every way, particularly impressive in his knowledge of the minutiae in complex cases." Chambers UK, 2022

"Simon is incredibly good on his feet. He has an exceptional courtroom manner and an effortless ability to get the judge on side. Outstanding depth of knowledge in all aspects of professional negligence. He is more than ready to be in silk." Legal 500, 2022

"Amazing ability to retain knowledge of the huge number of documents in professional negligence cases and apply them when needed. Excellent cross examiner, really drills down to the issues." Legal 500, 2021

"Incredibly experienced in claims against solicitors and surveyors." "Very intellectual where you have obscure and difficult issues." Chambers UK, 2021

"He was a very impressive performer as sole counsel. He is a very good speaker who is very articulate, bright and quick-witted." Chambers UK, 2020

"His advice is really good across the board: his knowledge of case law is fantastic and he's very pragmatic." Chambers UK, 2020

"He is very professional and calm, but persuasive" Legal 500, 2020

"He is astute, concise and strategic he has gravitas in court, an exceptional knowledge of the law and is very commercial in his approach" Legal 500, 2019

“He offers a technically brilliant, commercial approach and he’s excellent with clients, as well as robust in court” “A very solid performer. He really understands his cases and he’s very thorough and effective” Chambers UK, 2018

“Very bright, responsive, and has an easy manner but is tough when required” Legal 500, 2017

“He has excellent technical knowledge, a great grasp of the law and a very commercial approach.” Chambers UK, 2017

“Very thorough, experienced and good with clients.” Legal 500, 2016

“He is personable, enthusiastic and his advocacy skills are second to none. His manner in conference is impeccable and his pleadings are thorough and robust. He gets to the heart of a case very quickly, is extremely intelligent and makes even the most dry of cases fun. It is always a pleasure to work with him.” Chambers UK, 2016

“He is very good on paper and his advice is very clear and concise.” Legal 500, 2015

“Is concise, clear, practical and commercial. He’s intellectually very able and ‘a very good, confident speaker who doesn’t talk nonsense.” Chambers UK, 2015

“Able to grapple with complex issues very quickly. He provides pragmatic advice in a way which is easy to understand.” Legal 500, 2014

“A clear, practical and commercial barrister, he has an extremely strong reputation amongst his peers. ‘An impressive advocate who is good at thinking on his feet. He’s a skilled draftsman, and provides very thorough analysis of a case.” Chambers UK, 2014

Further information

Education

Simon was educated at the University of Sussex and the Université de Montpellier, where he took a 1st class degree in English with French. He acquired a Diploma in Law from City University, followed by the Bar Vocational Course at the Inns of Court School of Law where he was graded very competent. He was a Karmel scholar at Gray’s Inn.

Memberships

Simon was for many years on the executive committee of the Professional Negligence Bar Association and remains a member. He is also a member of the London Common Law and Commercial Bar Association and the Chancery Bar Association.

Lectures and Publications

He lectures widely to solicitors’ firms and insurers, and has lectured to professional bodies including the Professional Negligence Lawyers’ Association and the

Professional Negligence Bar Association. He was formerly an editor of the much lamented and now discontinued Lloyd's Reports (Professional Negligence) series of law reports. He continues to edit the 'Damages' chapter in Professional Negligence and Liability.

ICO Data protection registration number: Z9162795.

Simon Wilton is a barrister regulated by the Bar Standards Board. Click to view Simon Wilton's Privacy Notice.

News from Down Under – English cases in 2023-24

Simon Wilton KC
Hailsham Chambers
September 2024

1

ENRC v (1) Dechert (2) Gerrard; (3) Serious Fraud Office

- Dechert and Gerrard retained to conduct internal investigation at ENRC and advise re SFO investigation.
- Gerrard leaks privileged and confidential information to the press, and provides to the SFO confidential and privileged information and other information which was against ENRC's interests.

2

ENRC v (1) Dechert (2) Gerrard, (3) Serious Fraud Office [2022] EWHC 1138 (Comm)

- Allegations “extraordinary” and “might be thought would be almost unimaginable”.
- “Mr Gerrard was for the most part motivated by a desire to secure as much fee revenue as possible with a secondary motive, at times, being to ingratiate himself with the SFO”.

3

**ENRC v (1) Dechert (2) Gerrard;
(3) Serious Fraud Office**

- Dechert and Gerrard negligent and in breach of fiduciary duty.
- Limitation of liability clause ineffective in face of reckless or deliberate breaches and in respect of claim to recover fees.
- SFO guilty of tort of inducing breaches of contract and fiduciary duty but not misfeasance in public office.

4

**ENRC v (1) Dechert (2) Gerrard;
(3) Serious Fraud Office [2023]
EWHC 3280**

- ENRC entitled against all defendants to damages for unnecessary work and costs and for wasted management time.,
- SFO entitled to indemnity from Dechert and Mr Gerrard for unnecessary work claim, SFO to pay 25% of liability for costs and wasted management time claims.

5

**Hope Capital v Alexander Reece
Thompson [2023] EWHC 2389**

- Feb 2018 valuation of listed house let from National Trust at £4m. Security for bridging loan of £2.4m to the leaseholder.
- After default and receivers taking the property in Nov 2018 the NT require work to deal with unauthorised alterations, borrower is obstructive, and Covid strikes.
- Delayed sale, for £1.4m, in October 2020.

6

Hope Capital v Alexander Reece Thompson [2023] EWHC 2389

- True value £2.475m. Valuation outside 15% bracket.
- C would not have lent if properly advised.
- D had not accepted responsibility for all consequences of entering transaction on basis of over-valuation.
- Security didn't suffice due to factors D had not accepted responsibility for. No claim.

7

Miller v Irwin Mitchell [2024] EWCA Civ 53

- Package holiday personal injury claim
- C speaks to D's 'helpline adviser' in 2014 who gave limited preliminary advice
- C supplies documents in 2015 and D agrees to act and formal retainer in 2016
- Letter of claim. Hotel notifies insurers who decline indemnity due to late notification. C sues D.

8

Miller v Irwin Mitchell [2024] EWCA Civ 53

- No retainer until 2016.
- Assumption of responsibility in respect of helpline advice which might require solicitor to warn of legal step needed to keep claim alive eg re limitation.
- But no reason to anticipate the insurance problem or duty to warn client of need for other side's insurers to be notified.

9

Lonsdale v Wedlake Bell LLP
[2024] EWHC 712

- Trust for children of settlor and children of his sister. Share vests when beneficiary 25. Before then trustees can vary entitlement to as little as £100.
- Settlor has 4 children, sister 5.
- Negligent advice that when settlor's first daughter 25 she will get a ¼ share.

10

Lonsdale v Wedlake Bell LLP
[2024] EWHC 712

- Trustees would have varied sister's children's share to £100 before 25.
- Error spotted when 3 of sister's children over 25. Trustees reduce the other sister's children's shares to £10,000.
- Who can sue? The trustees - but no loss? The settlor's children - but owed a duty re a failed inter vivos gift?

11

Lonsdale v Wedlake Bell LLP
[2024] EWHC 712

- Arguable trustees had locus to sue on behalf of beneficiaries, and arguable 'loss' as notional subdivision of the trust fund and diminution of settlor's children's share.
- Duty owed to settlor's children, notwithstanding inter vivos gift, where disposition completed and irrevocable due to negligence.

12

**Nigeria v Process & Industrial
Development [2023] EWHC 2638
(Comm)**

- \$11billion arbitration award set aside under s.68 Arbitration Act 1996.
- Agreement procured by bribery, award by bribes, perjury and misconduct.
- Supply of privileged documents to the other side colluded in by solicitor and KC.

13

**Nigeria v Process & Industrial
Development [2023] EWHC 2638
(Comm)**

- Fees on success: up to £850m for Mr Burke KC, up to £3 billion for Mr Andrew.
- “Mr Burke gave answers in a way that appeared business-like and direct at first, but became increasingly exercised as he was taken through more documents.”
- The regulator knocks...

14

**Nigeria v Process & Industrial
Development [2023] EWHC 2638
(Comm)**

- Importance of professional standards in contract drafting where imbalance of expertise and resources.
- Vulnerability of the arbitration process.
- Disclosure enabled the truth to come out.
- Special measures of *Agouman v Leigh Day* [2016] EWHC 1324

15

Al Sadeq v Dechert, Gerrard & Ors [2024] EWCA Civ 28

- C alleges D involved in criminal investigation leading to C being kidnapped and unlawfully detained, violating his rights and giving rise to claim against D under UAE law.
- Issue of when precisely privilege is lost where there is iniquity.

16

Al Sadeq v Dechert [2024] EWCA Civ 28

- CA hold it is lost where it appears more likely than not that the iniquity exists.
- In such a case no privilege in documents or communications brought into existence as part of or in furtherance of the iniquity.
- Includes documents which reported on or revealed the iniquitous conduct.

17



Rory Thomson
CMS

"AI Litigation Risks"



Law . Tax

Rory Thomson

Senior Associate

CMS Cameron McKenna Nabarro Olswang LLP

Edinburgh

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T 0131 200 7671



Rory is a senior associate in the Insurance & Reinsurance Group. Rory advises on a wide range of commercial and financial disputes, with extensive experience acting for professionals, financial institutions and their insurers in the defence of complex and high-value professional negligence claims, and particular expertise representing solicitors.

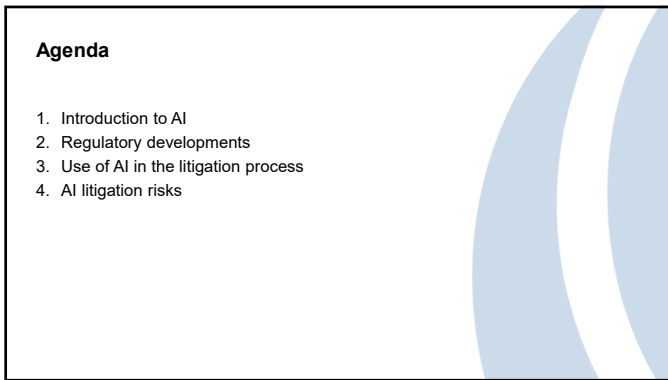
He has represented clients in the UK Supreme Court and courts in Scotland and England. Rory is qualified in Scotland and in England and Wales.

Relevant experience

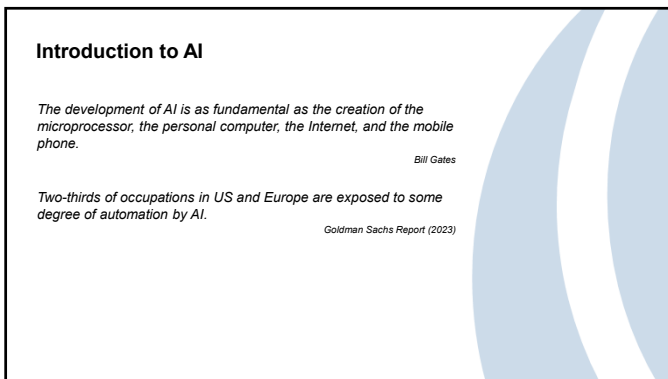
- A solicitor and their professional indemnity insurers in a successful appeal to the UK Supreme Court, in one of the most significant solicitor's negligence cases in recent years.
- A firm of solicitors and their professional indemnity insurers in the successful defence of a complex and high-value claim involving allegations of dishonest assistance and negligence.
- An insolvency practitioner in the successful defence of a multi-million pound claim involving allegations of negligence.
- A major UK company in the successful defence of a high-value contractual claim and subsequent expert determination.
- A secondment to the claims service of one of the London Market's largest insurers and three secondments to the dispute resolution teams of two of the UK's largest financial firms.



1



2



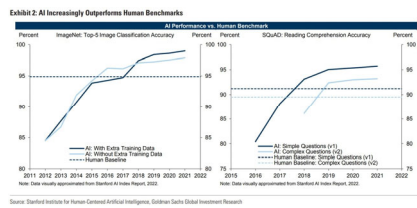
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What is AI?

- Mathematical calculations by computer
- Computers solving cognitive tasks once thought to be the preserve, or beyond the capacity, of humans
- No one single technology or single function
- Systems that do not follow pre-programmed instructions and instead learn for themselves
- "Black box": impossible to predict
- More data, more computing power, better algorithms, larger models

4

Outperforming human benchmarks?



5

Regulatory developments: UK

- UK Government White Paper (March 2023)
 - "A pro-innovation approach to AI regulation"
- Consultation
- AI Safety Summit (November 2023)
- UK Government Response (February 2024)
- "Appropriate legislation"

6

Regulatory developments: EU

- EU Artificial Intelligence Act
 - passed by the European Parliament on 13 March 2024
 - focus is on protecting the rights of EU citizens
 - tiered risk approach
- EU Artificial Intelligence Liability Directive

7

Use of AI in the litigation process

- Mechanical uses
- Generative uses
- Resolution uses
- Issues arising
 - Accuracy and quality of output
 - Equality of arms
 - A complete AI takeover of the dispute process?

8

AI Litigation Risks

- Fraud: deepfakes
- Faking of evidence
- Hallucinations / improper employee use
- Disputes over AI systems
- IP disputes
- Data protection
- Defamation
- Board-level exposures
- Other liability: contractual, delictual, product

9

Broader issues

- Self-referential
- Un-human decisions
- Uncertainty / unknowability

- Lawyer literacy

10

Contact



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11

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12



Sheriff Kenneth Campbell KC

***"The advantages of
Sheriff Court Commercial Procedure"***



Sheriff Kenneth Campbell KC

Lothian and Borders Sheriff Court

Kenneth Campbell QC was appointed as a sheriff, and sits in Edinburgh, in 2020. Prior to calling to the Bar in 1996, Mr Campbell trained with Dickson Minto before working as a civil litigation solicitor with Brodies. He took silk in 2011 and is a practising member of the English Bar.

Kenneth Campbell appeared in courts and tribunals at all levels across Scotland as well as on a number of occasions before the UK Supreme Court. His varied practice covered a range of areas of civil work. Amongst his many appointments Kenneth served as the Director of Training and Education at the Faculty of Advocates from 2002 to 2005. He served as a legal member of the Mental Health Tribunal for Scotland and the First Tier Tribunal for Scotland (Tax Chamber).

**Commercial Actions in the Sheriff Court
Sheriff K J Campbell KC**

PNLA conference 19 September 2024

Distribution of commercial business

2019

1481 new commercial actions were registered across all sheriff courts, including insolvencies.

Edinburgh - 224

Court of Session commercial court - 237

Removing the insolvency business

364 commercial actions registered across the sheriff courts

151 in the Court of Session.

2023

345 new commercial actions registered across all sheriff courts

105 in the Court of Session commercial court.

2024

To July 2024

166 new actions registered across all Sheriff Court.

75 in the Court of Session commercial court.

Procedural Tools – a reprise

Technology and commercial courts

Q: What might be the advantages and disadvantages of using AI to prepare legal argument for court?

A: Using AI to prepare legal arguments for court can have several advantages and disadvantages:

Advantages:

1. **Efficiency and Speed:** AI can process vast amounts of data quickly, helping lawyers to prepare arguments more rapidly. This can be particularly beneficial in cases with extensive documentation or when time is of the essence.
2. **Data Analysis:** AI can analyze large volumes of legal texts, case law, and precedents to identify relevant information that might be missed by a human. This can help in building a stronger, more informed argument.
3. **Consistency:** AI can ensure that legal arguments are consistent with relevant legal precedents and statutes, reducing the risk of errors or contradictions in the argument.
4. **Cost Savings:** By automating routine tasks, AI can potentially reduce the costs associated with legal research and argument preparation, making legal services more affordable.
5. **Predictive Analytics:** AI can analyze patterns in previous cases to predict possible outcomes and suggest strategies that have been effective in similar situations.
6. **Accessibility:** AI tools can make legal resources more accessible to individuals and smaller firms that may not have the resources to conduct extensive research manually.

Disadvantages:

1. **Lack of Human Judgment:** AI lacks the nuanced understanding and judgment that human lawyers bring to complex legal issues. It might miss subtleties or context that are critical for crafting effective arguments.
2. **Bias and Errors:** AI systems can inherit biases present in the data they are trained on, leading to biased or inaccurate legal advice. This can be problematic if the AI's suggestions are not carefully reviewed.
3. **Dependence on Data Quality:** The effectiveness of AI depends heavily on the quality and comprehensiveness of the data it has been trained on. Inaccurate or incomplete data can lead to flawed arguments.
4. **Ethical and Confidentiality Concerns:** Using AI involves sharing sensitive client information, which raises concerns about data privacy and security. There are also ethical considerations regarding the reliance on automated systems in legal practice.
5. **Over-reliance:** There is a risk that lawyers might become overly reliant on AI tools, potentially diminishing their own skills and judgment. It's important for legal professionals to maintain critical thinking and analytical abilities.
6. **Legal and Regulatory Issues:** The use of AI in legal practice is still evolving, and there may be legal and regulatory challenges regarding its use. Compliance with existing legal standards and the potential for new regulations must be considered.

Overall, while AI can significantly enhance the efficiency and effectiveness of legal argument preparation, it is crucial for legal professionals to use it as a tool rather than a replacement for human expertise.



Karen Cornwell
DWF Law
Joint PNLA Scotland Representative

"The challenges of being a litigant"

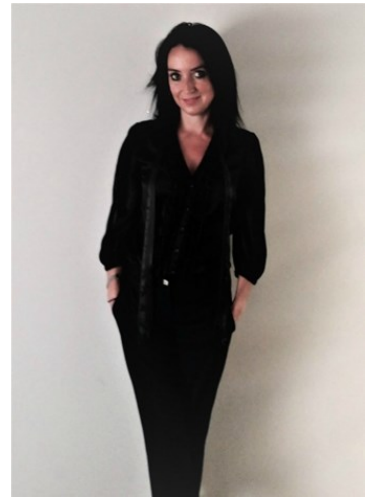


Karen Cornwell

Snr Associate – Edinburgh

Joint PNLA Scotland Representative

E: karen.cornwell@dwf.law



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 defenders 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 a former member of the Law Society of Scotland Professional Negligence Pursuer Panel and is the only female to hold that role. She is also a Notary Public.

Karen is a former tutor at University of Dundee and is now Tutor on the Diploma in Legal Practice (Civil Procedure) at the University of Edinburgh. 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.

Karen (Cornwell) Motion
19th September 2024

Dealing with Insurers and Policyholders – making claims or avoiding claims

1

BACKGROUND – THE PREVIOUS YEAR

- Austria – January and February 2024.
- The Accident – 12 February 2024.
- Kufstein Hospital, Austria.

2



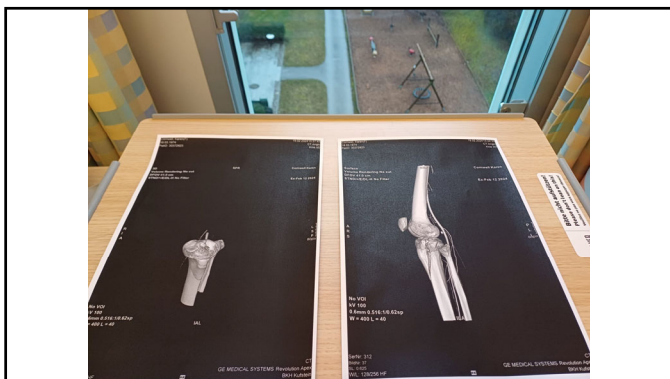
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Surgery

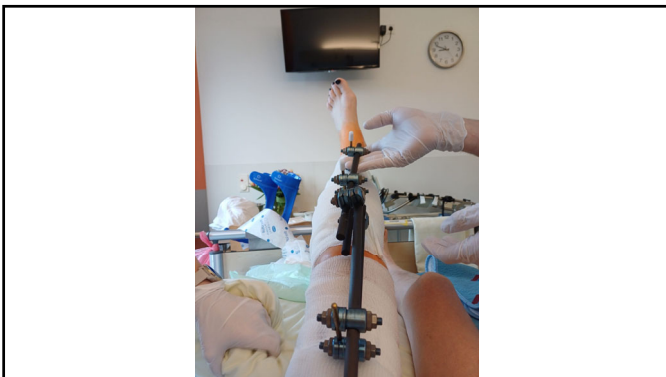


- ❑ 12 February 2024.
- ❑ 22 February 2024.
- ❑ External and internal fixators.

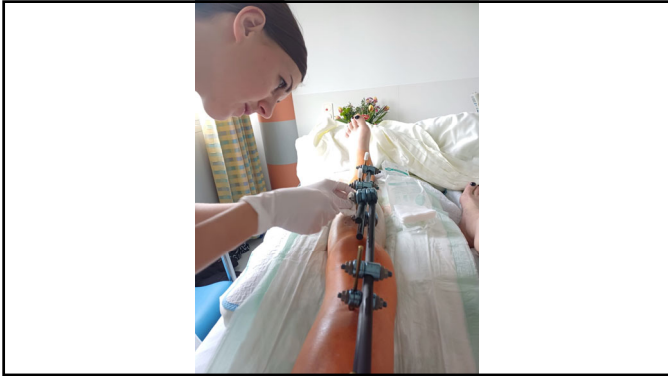
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Key Documents

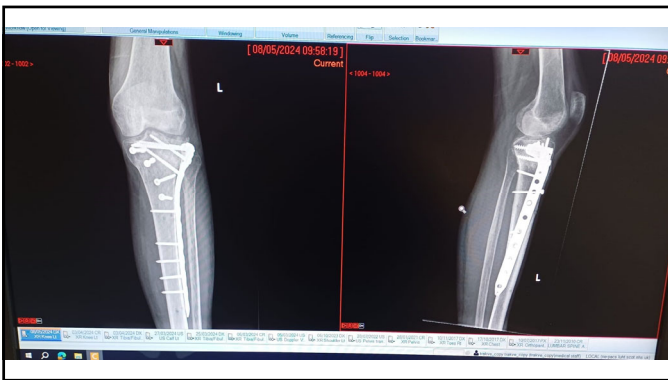
- European Health Insurance Card (EHIC).
- Global Health Insurance Card (GHIC).
- Procedure for obtaining these at short notice – should policyholders be advised/required to get them.
- Travel insurance (accessibility of policy documents).



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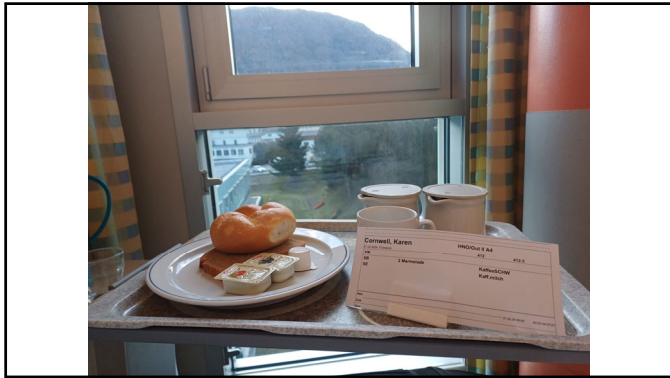
Travel Insurance Issues

- Notification of a claim (info required).
- Delegation of authority to travel companion.
- Consent to treatment.
- Capacity (particularly if taking strong pain relief).
- Language barriers.



PNLA
Professional Negligence
Lawyers Association


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Travel Insurance Issues (2)

- Language barriers.
- Multiple claims offices.
- Multiple claims handlers.
- Poor information management – repetitive requests by claims handlers for vital information.



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19



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Repatriation



- ❑ Criteria for repatriation?
- ❑ Repatriation vs surgery in place of accident.
- ❑ Flights/travel "fit to fly" certificate.
- ❑ Practicalities of arranging travel – insurer travel agency opening hours different from insurance claims handler hours.
- ❑ Translation of documents – delays.
- ❑ Medical reports.
- ❑ Connectivity issues – hospital wi-fi.
- ❑ Difficult decision for insured companions – minimise loss by enjoying holiday but risk being out of signal coverage and missing vital communications from hospital or insurer.

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Practicalities of repatriation



- ❑ Flights home (commercial vs air ambulance).
- ❑ Taxi vs ambulance (difficult judgement calls for insured as to whether transport offered is adequate (e.g. present case where 3 seats needed to accommodate immobile leg).
- ❑ Practicalities of air travel at all – with external fixator in place – claims handler encouraging return travel to UK for surgery in UK.
- ❑ Austrian surgeons far more experienced in ski injuries – reasonable to wait for a place on Austrian operating list? Increases need for temporary accommodation, meals etc.

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Potential heads of claim



- Medical treatment.
- Hospital costs.
- Transport for loved ones.
- Food/drink/taxis.
- Loss of enjoyment of holiday .
- Refund of ski passes/equipment hire.
- Cost of accommodation and meals for policyholder's loved one(s).
- Loss of enjoyment of unrelated holidays.

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Inconvenience claims



- If claim not dealt with efficiently insured can have a claim for compensation.
- Check policy wording for heads of compensation and procedures whereby insured can complain.

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Top tips for insurers and policyholders



Insurers

- Organised claim files.
- Synopsis/executive summary updated and accessible with ease.
- Empathetic to insured.
- Consistent interpretation of important terms e.g. fit to fly.
- Avoid numerous calls with insured.
- Avoid repetitive requests for information.
- Avoid delays.
- Delays will lead to claims for inconvenience against the insurer and potential loss of business in future.
- Objective should be to reduce the stress on the insured and loved ones who are already subject to stress.
- Office hours – frustration in not being able to contact key personnel for example claims department worked until 9pm, travel agent closed at 5pm and did not work weekends – this led to the opportunity of missing a direct flight and resulted in Manchester plus three hour taxi.
- Is travel agent a sub-contractor or within the insurer?

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Top tips



Policyholders

- Get your EHIC/GHIC card before travel.
- Make a note of your GP and contact details.
- Take out travel insurance!
- Complete the emergency contacts on your passport.
- Take pictures daily to confirm location and weather conditions.
- Retain all vouchers.

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Top tips



Policyholders (cont)

- If travelling with companion and you sustain injury, given them delegated consent to deal with insurer and hospital.
- Frequently request relevant information from medics e.g. diagnosis, prognosis, treatment.
- Keep your own records of progress and photographs of your injury.
- If injury involved sporting equipment keep equipment in tact and exactly as it was at time of accident.
- Discuss surgical procedures/recommendations/options/risks/alternative treatments.

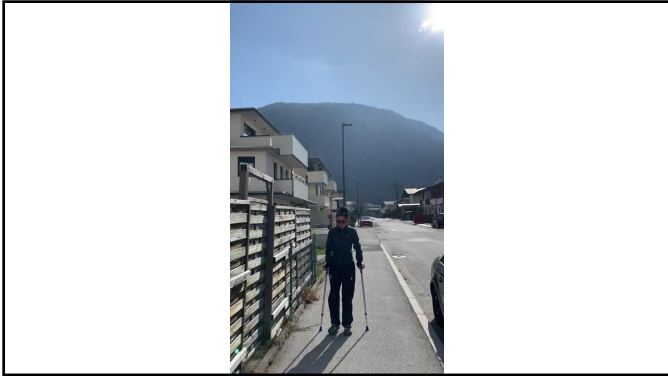
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If you have to stay overseas for longer than expected



- It is worth packing your laptop to ease working from home or working from a hotel.

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**Conclusion – current position
questions and answers**

I hope you found the presentation helpful, insightful,
interesting and perhaps even motivational.

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Christine Rolland
Director
Henderson Loggie

*"Developments in Forensic
Accounting and Investigations"*

Henderson Loggie



Christine Rolland

Director

Edinburgh

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Christine has specialised in forensic accounting since 2009 spending seven years at BDO, before working for four years as a forensic accountant for HMRC.

She joined Henderson Loggie as director of forensic accounting in 2020.

She has extensive experience in both civil and criminal litigation, with a focus now on civil litigation. She has worked on a range of forensic accounting assignments such as contentious share and business valuations, including matrimonial valuation; business interruption and consequential loss claims, particularly those arising from professional negligence; breach of contract and personal injury claims; analysis of incomplete records; and providing accounting advice and opinion to investigators in tax-related criminal investigations and to insolvency practitioners in contentious insolvency situations.

She has prepared over 100 expert witness reports and has given evidence as an expert witness in the Court of Session and Sheriff Court.

Developments in forensic accounting
Professional Negligence Lawyers' Association
Edinburgh conference
19 September 2024




Christine Rolland

Henderson Loggie III.

1

Henderson Loggie III.

- Trends in types of instruction
- Technology – tools available
- Changing role of expert



III.

2

Trends in instructions



-  Increasingly complex disputes
-  Increase in publicly available information
-  Claims against experts...

III.

3




Technology available


-  - OCR
-  - Office 365
-  - AI




4

Changing role of the expert


-  Hot tubbing
-  Joint meetings and Scott schedules
-  More female experts?





5

Henderson Loggie 

Any Questions?



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“Questions and Joint Chairs closing remarks”



Total CPD – 6 hours

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<https://www.pnla.org.uk/event/pnla-annual-conference-in-scotland-professional-negligence-liability-update-19-september-2024/>