



ASSOCIATION OF PERSONAL INJURY LAWYERS

Standard of competence for

Accredited Specialist Counsel in Personal Injury

SCOTLAND

INTRODUCTION

Standards of occupational competence

Standards of occupational competence are widely used in many fields of employment. They are based on an analysis of the main functions of a job, and state what it is the job holder must be able to do to perform effectively. That analysis enables an identification of the knowledge, understanding, know-how, skill and behaviour required for effective performance.

A Standard may be used both to identify those who have achieved a level of specialist competence, and to provide a basis for a development plan for an individual who aspires to the role concerned.

The Accredited Specialist Counsel in Personal Injury

Accredited Specialist Counsel in Personal Injury (ASCPI) is a personal accreditation status awarded by the Association of Personal Injury Lawyers to its members. There is no requirement to have served any specified period of time to secure ASCPI status, as the time taken to develop competence will vary according to the mix of work undertaken by individual counsel (in this Standard “counsel” refers to advocates and solicitor advocates with rights of audience in the Court of Session). Whilst it is likely that an ASCPI will devote most of their time to personal injury work, it is recognised that advocates and solicitor advocates may practise in more than one area of law.

An ASCPI is likely to have acted in a range of personal injury cases, and may specialise in the more complex and higher value cases, for example those involving clinical negligence, industrial disease, and catastrophic injuries.

The scope of the Standard

The Standard assumes possession of the legal knowledge and understanding required for qualification as an advocate or solicitor advocate, together with the skills and experience likely to have been developed in the years following call.

The Standard reflects the law, regulations, Rules of the Court of Session, and Sheriff Court Ordinary Cause Rules.

Related standards

The Standard deals with personal injury litigation only. It is in addition to the requirements of the Guide to the Professional Conduct of Advocates (5th edition) and the Law Society of Scotland Practice Rules 2011.

APIL accreditation

A separate guide is available on the use of the Standard in determining eligibility for personal accreditation as an Accredited Specialist Counsel in Personal Injury.

THE STANDARD

An ASCPI acts on the instructions of a solicitor to advise, draft documents, provide oral representation in meetings and to act as counsel in court proceedings in personal injury cases so as to establish, assert and enforce the rights of an injured client in an effective and efficient manner. The range of required competences covers:

- Accepting instructions
- Advising – general
- Advising – specific issues
- Drafting
- Court advocacy and other oral representation

A person will be regarded as competent if they have the knowledge, understanding, know-how and skill to demonstrate the outcomes of effective performance listed below, whilst displaying the behaviours which underpin effective performance.

KNOWLEDGE AND UNDERSTANDING

To meet the Standard, you need to have knowledge and understanding of:

1. The general law and legal system of Scotland

- The core knowledge and understanding of the law applied in Scotland as required of an advocate or solicitor advocate on qualifying.

2. Law relating to personal injury litigation generally

- Common law principles, legislation and court decisions relating to liability, causation and damages.

3. Law relating to types of personal injury covered by your field of practice

- Depending on your field of practice, you will have knowledge and understanding of statutes and regulations relating to occupiers' liability, employers' liability, workplace accidents, public liability, road traffic accidents, the MIB, and occupational disease.

4. Rules of procedure, etc.

- Rules of the Court of Session, Practice Notes and Directions
- Sheriff Court Ordinary Cause Rules
- UK Rehabilitation Council standards

5. Professional conduct

- Guide to the Professional Conduct of Advocates or, as the case may be, The Law Society of Scotland Practice Rules 2011
- Association of Personal Injury Lawyers Code of Conduct
- Association of Personal Injury Lawyers Consumer Charter

KNOW-HOW

To meet the Standard, you need to know how to find up to date law and precedents using different methods of conducting research for current precedents on matters of law and quantum. You will be able to use publications such as *McEwan and Paton on Damages*; *Current Law, Butterworths Personal Injury Service*, *Kemp on Procedure* and *Kemp and Kemp: the Quantum of Damages*, *Judicial College Guidelines for the Assessment of Damages*, *the Ogden Tables*, *Facts and Figures: Tables for the Calculation of Damages*, and electronic databases such as *Scotcourts.gov.uk Court judgements*, *Lawtel*, *Bailii* and *JustCite*. You will make appropriate use of seminars, networking and knowledge sharing activities to keep yourself up to date and adhere to APIL's 16 hour CPD requirement.

THE OUTCOMES OF EFFECTIVE PERFORMANCE

The outcomes of effective performance are grouped in to five units, each made up of a number of elements, each of which in turn reflects a specific function, or a group of related functions.

1. Accepting Instructions

When considering whether to accept instructions, you must be able to:

- a) conduct an initial risk assessment;
- b) exercise vigilance in satisfying yourself that the claim the client is pursuing is not fraudulent;
- c) identify the circumstances in which it may be appropriate to instruct leading counsel.

2. Advising - general

To the extent required by instructions from your instructing solicitor, you must be able to advise, in writing, in consultation or by telephone, of:

- a) your analysis of the case and the relevant law;
- b) the likely outcomes, including best and worst case scenarios, and possible compromise solutions;
- c) the available options for resolving the matter, including negotiation, mediation or other alternative dispute resolution, and litigation;
- d) options for choosing to litigate in the Court of Session, the All Scotland Specialist Personal Injury Court or the Sheriff Court, proof and jury trial, the choice between these, and the consequences in terms of procedure and time likely to be taken;
- e) rights and duties in relation to disclosure of information, dealing with the defender, third parties, after-the-event and before-the-event insurers, experts and the court.

3. Advising – specific issues

To the extent required by instructions from your instructing solicitor, you must be able to advise, in writing, in consultation or by telephone, on the following matters:

(i) INITIAL MATTERS

- a) potential issues relating to capacity (e.g. if the claimant is a minor, suffering from a serious head injury, etc), evidence necessary to support a course of action arising from any incapacity, and advising on steps necessary under the Adults with Incapacity (Scotland) Act 2000;
- b) whether a personal injury trust ought to be set up to protect any of the claimant's means-tested benefits;
- c) whether a provisional damages award should be considered;
- d) whether periodical payments should be considered as a part of the damages award, and if so, the evidence required to support such a claim.

(ii) EVIDENCE, QUANTUM AND OFFERS

- a) the strength of available evidence, and any need for additional medical, expert or other evidence;
- b) valuation of the claim and calculation of heads of damages and rehabilitation;
- c) the merits and significance of offers or tenders made by the defender;
- d) whether to make a pursuer's offer and, if so, for how much.

(iii) PRE-TRIAL PROCEDURES

- a) when proceedings should be issued to protect the pursuer's rights and interests;
- b) selection of the Court of Session, the All Scotland Specialist Personal Injury Court or the Sheriff Court appropriate to the domicile of the defender or locus of the delict);
- c) identification of the issues the court will be asked to determine, and the potential value of the claim;
- d) whether to seek proof or jury trial;
- e) identification of experts to be called;
- f) identification and resolution of any limitation or jurisdictional issues;
- g) whether it is appropriate to apply for interim damages or summary decree;
- h) evaluating, testing and challenging expert evidence;
- i) the adequacy of any offer made;
- j) whether a joint settlement meeting, or other form of alternative dispute resolution procedure would be appropriate;
- k) conduct pre-trial meetings;
- l) preparation of list of authorities.

(iv) POST-TRIAL OR POST-SETTLEMENT

- a) advice to your instructing solicitor and the pursuer on the implications of the judgment;
- b) advice to your instructing solicitor and the pursuer on the merits of a possible appeal;
- c) advice on the need for your instructing solicitor to retain the file where there are long term procedures to be dealt with, for example where a provisional damages award is made, or where the pursuer is a minor or incapax.

4. **Drafting**

To the extent required by your instructing solicitor, or by court procedures, you must be able to:

- a) draft summonses, initial writs, issues, minutes of sist, minutes of amendment, answers, acceptances of tender, grounds of appeal, notes of argument, specifications of documents and property, letters of request, notes of exception and other documents required for litigation;
- b) draft valuations; understand and use Ogden tables;
- c) draft formal notes on the line of evidence, quantum and liability;
- d) if unattended at a hearing, keep a full note of the proceedings;
- e) draft documents which:
 - are succinct but comprehensive and are written in good English
 - are produced in a format and style appropriate to their intended purpose and audience
 - are designed to further pursuers' interests
 - fulfil legal requirements, are accurate in law and make critical use of authorities
 - if formal court documents, conform to court rules
 - are produced in an efficient and timely manner.

5. Court advocacy and other oral representation

- (i) You must be able to prepare for and conduct all types of court proceedings, including:
 - a) Proofs
 - b) Jury trials
 - c) hearings on the motion or by order roll
 - d) debates
 - e) appeals

- (ii) You must be able to prepare for, conduct and negotiate effectively within:
 - a) Pre-trial meetings
 - b) Joint consultations
 - c) other formal or semi-formal meetings or ADR events presenting an opportunity of obtaining a settlement.

- (iii) In consultations with instructing solicitors and pursuers you must be able to:
 - a) manage the expectations of the solicitor and pursuer by advising them of the prospects of success, the range within which any award of damages might fall, the significance of issues raised by the defence; and the risks inherent in litigation;
 - b) test the robustness and veracity of the evidence available;
 - c) advise on any need for further evidence to be collected;
 - d) assess the credibility of the pursuer as a witness.

- (iv) In consultations with experts you must be able to:
 - a) assess the credibility of an expert as a witness;
 - b) display an understanding of the subject matter;
 - c) identify from medical or other records the issues on which a case might turn;
 - d) formulate appropriate questions to medical or other experts to enable their evidence to be interpreted in the light of the law.

BEHAVIOURS WHICH UNDERPIN EFFECTIVE PERFORMANCE

1. At all times you act in a manner which reflects your duty to act in the best interests of the pursuer, and your duty to the court.
2. You conduct all of your work to a proper professional standard and safeguard your independence and integrity as a lawyer.
3. You have an awareness of the limits of your own knowledge and competence, you seek advice where necessary, and you refer on matters which are outside your field of expertise.
4. You present information clearly, concisely, accurately and in ways which promote understanding.
5. You use communication styles which are appropriate to different people and situations, and display empathy with the injured pursuer and their family.
6. You respond promptly and positively to problems with a proposed course of action.
7. You are active in keeping up to date with developments in the law, through reading journals and participation in conferences and training.
8. You share your expertise through speaking at conferences, writing for journals and teaching.