

Scottish Civil Justice Council
Parliament House
Edinburgh
EH1 1RQ

23 January 2026

By email only: SCJC@scotcourts.gov.uk

Dear Sir/Madam,

Call for Evidence - Group Procedure

APIL is grateful for the opportunity to respond to the Scottish Civil Justice's call for evidence on the introduction of opt-out group proceedings.

Views on the introduction of opt-out procedures and on areas of litigation which should be exempted from opt-out group proceedings

We believe opt-out procedures should not be introduced for personal injury claims. Our members' experience to date with the opt-in group procedure rules in force has not been entirely positive, and they do not consider class actions appropriate for personal injury cases due to the highly individualised nature of claims and the risk of limiting the compensation the pursuer could have been awarded in an individual claim. Personal injury cases and product liability cases require a more nuanced approach due to the nature of claims, prescription and limitation issues, complex technical evidence, and challenges in defining common issues. For example, in *Michelle Donnelly v Johnson & Johnson*¹ the court noted that the differences in the design and application of the five hernia mesh products meant that generic evidence would be limited, and technical evidence would need to be specific to each product. This reduces the efficiency of group proceedings for personal injury and product liability claims.

Group proceedings are also most efficient when there is a large number of claimants, as seen in, for example, the diesel emissions litigation. Most personal injury claims can be managed more efficiently through individual actions with case management powers under the existing Rules of Court, such as lead cases or joint minutes. This allows a more individualised approach which caters for the needs of each pursuer and avoids compromising the level of compensation or leaving the solicitor without input in decisions if they are not the representative party in the action.

While our preferred position is that personal injury is excluded from the application of opt-out procedures, we would be willing to consider further evidence in the future regarding the benefits of such an approach. We believe it is too early to consider an opt-out approach, given that the experiences with the opt-in rules have not been entirely positive and the application of the rules in practice is still developing. The opt-in procedure has not been in force for long enough to accurately assess its benefits, drawbacks, and overall impact. Our

¹ [2025] CSOH 77

members have concerns that the issues and complexities experienced with the opt-in rules would be replicated in the opt-out approach. For instance, the current rules provide that parties who are not the representative party have no say as to how the case is conducted, which impacts communication with clients about strategy and raises issues regarding the client's best interest. The rules are also unclear on costs, and the lawyer for the representative party may be short-changed under the current judicial table of fees if they have to take instructions from a large number of clients. There is also no specific provision allowing the lawyers of those parties other than the representative to be paid judicial costs by the losing defendant.

Procedure, settlement, funding, and expenses

As above, we believe that personal injury should be exempt from opt-out group proceedings. However, if the Scottish Civil Justice is not minded to exclude personal injury from the application of the rules, we believe the rules drafted by the SCJC must be considered very carefully.

Our members have concerns regarding class definition, distribution and approval of settlements, and judicial expenses for representatives. It may be difficult to identify the individuals within the class who have received a product and whether they will be injured by it within the prescription period (10 years from the date of last supply by the producer). That then gives rise to issues with notification/advertisement, allowing individuals to opt-out within the relevant period, quantifying the claim and whether any funds need to be set aside for those who have received the product but have not yet been injured (unless the class is narrowly defined as those injured by the product within a certain period and then the door is left open for future representative actions against the same defendant(s)).

Considering solicitor expenses, we believe the opt-in rules do not provide the necessary clarity on this aspect, in particular if the party is not the representative party. The judicial table of fees should be amended to address this.

Again, we do not support the introduction of opt-out procedures for personal injury, however, if it is considered, we suggest that the Australian approach includes important safeguards regarding 1) defining the class, 2) sharing the burden of funding across the group on a contingency fee basis, 3) approval of settlements, 4) registering for a share of settlements, and 5) appeals.

We hope our comments prove useful.

Sincerely,



Ana Ramos

APIL Legal Policy Officer