Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Stage 1 debate - briefing

The Association of Personal Injury Lawyers

January 2018

The Association of Personal Injury Lawyers (APIL) is a not-for-profit campaign organisation formed by pursuers' lawyers to represent the interests of personal injury victims. The organisation has 27 years' history of working to help injured people gain the access to justice they need, and currently has around 3,400 members, 152 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

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Introduction

The introduction of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is welcomed by APIL. The association has been involved at every stage of the work to reform the funding expenses of civil litigation in Scotland, from Sheriff Principal Taylor's initial review to the justice committee's scrutiny of the Bill, restricting our comments to personal injury and the impact of reform on injured people.

In his review on which the Bill is based, Sheriff Principal Taylor's recognition of the vulnerability of injured people and the "asymmetric relationship" between pursuers and defenders was a significant development in redressing the balance on behalf of injured people. We welcome recognition of the need for clarity and certainty for pursuers, and recognise that Taylor's conclusions were the result of a significant investigation of every aspect of the litigation process, taking evidence from all stakeholders.

The result has been a tightly-woven package of proposals which offer more effective access to justice for pursuers, along with robust checks and balances necessary to ensure the system works efficiently.

The justice committee has published a very detailed report which recognises that there are problems with access to justice in respect of civil litigation and recommends approval of the general principles of the Bill. This too, is very welcome.

In view of the committee's comprehensive report, and evidence and consultation responses previously submitted, this briefing will focus on our key issues of ongoing concern.

Damages for future loss

People with the types of catastrophic injuries which make future losses an issue (such as loss of earnings, the cost of care, the cost of specialised equipment) are, by definition, embroiled in extremely complex litigation. They need experienced, often specialised, legal advisers, and these advisers need to be paid fairly to enable them to undertake this work if high value, complex and meritorious cases are still to be considered viable.

This is why damages for future losses should not be exempt from payment of success fees to solicitors. The sheer level of work involved in, for example, a case involving a child who has cerebral palsy as a result of clinical negligence is enormous. It usually involves, for example, detailed argument about issues such as life expectancy and the level and type of care the child will need throughout his or her life. There is also always the possibility that such a case, however meritorious, may ultimately be lost, and the resulting financial implications for the solicitor can be extremely serious.

We know from the experience of colleagues in England and Wales, where future losses have been ring-fenced from payment of success fees, that such limiting of the amount of costs recoverable makes, in some cases, the financial reward for the work done so low as to be unviable. Indeed, the inability to allow a deduction from future losses is considered to be one of the main reasons why there has been little take-up of damages based agreements in England and Wales.

In addition, the reality is that litigation in Scotland will always proceed against a background of a judicial tender for a lower amount than the damages which are being claimed. If the case proceeds and the pursuer fails to beat the tender, no costs will be paid for work conducted from the date the tender was made. So, the pursuer's solicitor has to work in an environment which generates huge issues of complexity and a great deal of work, coupled with the prospect of being paid a sum which is less than economically viable if damages for future losses are ringfenced from success fees.

As stated previously, the Bill and the review on which it is based should be viewed as a package. The protection offered by ring-fencing periodical payments and capping the success fee in cases valued at more than £500,000 to just 2.5 per cent are valuable safeguards for people with catastrophic injuries, and will offset the very serious risk that meritorious cases will not otherwise be pursued.

Qualified one way costs shifting (QOCS)

We welcome the committee's conclusion that the introduction of QOCS could improve access to justice for pursuers. We entirely reject, however, the arguments made by insurers and the representatives of defenders that the move could generate an increase in fraudulent claims.

QOCS provides the pursuer with the certainty that he will not be expected to meet the defender's expenses. This addresses directly Taylor's concerns about the 'David and Goliath' situation where an individual with very limited resources, and usually little or no knowledge of the legal system, is required to make his case against the defender's insurer, who will always be well-resourced and experienced in personal injury law.

There may well be a slight increase in the level of genuine claims, but this will simply mean that people will have access to the courts which they do not have at present, thereby addressing an imbalance in the system. This is the whole purpose of the Bill and the review on which it is based.

The argument that all risk is removed from pursuers is both weak and inaccurate, as a pursuer is still at risk of losing his own outlays, including court fees.

Furthermore, pre-action protocols, which are now compulsory in cases up to the value of £25,000, will help to ensure only genuine cases are taken on and, as Sheriff Principal Taylor has pointed out, solicitors who take on cases on a 'no win no fee' basis have nothing to gain by bringing unmeritorious claims. If a pursuer's representative loses too many cases he will no longer be able to maintain a business because of the volume of wasted work and the level of financial outlay with no income to offset it.

Under the new summary decree procedure defenders are able to challenge at an early stage those cases which appear to be without merit. In particular, a pursuer could be obliged to produce affidavits, medical or other expert reports or written supportive evidence at an early procedural hearing. Unmeritorious cases can be weeded out at this stage. Cases disposed of in this way would also lose the QOCS protection, which would be a considerable disincentive to frivolous behaviour.

Circumstances for losing QOCS protection

We fully supported Sheriff Principal Taylor's recommendation that losing the protection of QOCS should be the exception rather than the rule. We are extremely concerned, therefore, that provisions in section 8(4) will dilute those recommendations and we welcome the commitment of the Scottish Government to introduce amendments to ensure greater clarity.

Our concern is that a lack of precision in the language of the Bill in relation to exemptions for fraud may undermine the very purpose of QOCS. We therefore echo the committee's recommendation at paragraph 264 of its report that the Government should take into account Taylor's suggested amendments at paragraphs 247 and 251.

Third party funding

This section of the Bill raises fundamental concerns that a lack of clarity in the language could undermine the purpose of QOCS protection and cause protracted litigation as the definition of certain terms is contested.

In chapter 11 of his report Taylor discusses the principle of a 'professional'[1] funder being potentially liable for the judicial expenses of the opposing party, making it clear that 'professional' funders are commercial companies 'motivated by a desire to make a profit..[2]

The Bill, and its accompanying notes and memoranda, are all far less clear in their definitions of a third party funder. There is a very real danger, therefore, that not-for-profit organisations, such as trade unions, as well as pursuers' solicitors acting under damages based agreements (DBAs) could be liable for the defenders' judicial expenses, when this was never Taylor's intention.

We therefore join the committee in welcoming the Scottish Government's commitment to address these concerns and the recommendation in paragraph 286 of its report that the Bill 'should explicity provide that the power to award expenses against third party funders does not apply to (i) trade unions and staff associations and (ii) solicitors acting under a success fee agreement.

[1] Taylor Review of Expenses and Funding of Civil Litigation in Scotland 2013, page 251, paragraph57
[2] *ibid*

Related legislation

APIL fully supports the Scottish Government's intention to introduce a power for the court to be able to make a periodical payment order. We do not, however, believe the provisions of this Bill should be delayed until the legislation to introduce this power is passed. The need for reform was identified when the review process began six years ago. Civil justice procedure has already been introduced through the Courts Reform (Scotland) Act, which came into force more than a year ago. It is inappropriate for these new funding provisions, which will do so much to improved access to justice for injured people, to be delayed any further.

APIL also fully supports more robust regulation of CMCs and has led calls for personal injury cold calling to be banned for many years. We fully support, therefore, the measures in the Financial Guidance and Claims Bill and we have no reason to believe that the Bill will not complete its parliamentary journey in Westminster on time. In the current political climate, however, delays are a possibility and we would not support any delay to the Civil Litigation Bill while there is even the smallest risk that the Financial Guidance and Claims Bill could be delayed due to time pressures of the UK Parliament.

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