

Justice Committee of the Scottish Parliament

Call for evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill



The Association of Personal Injury Lawyers

August 2017

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 3,000 members, 148 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. In the review of costs on which it 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 also welcome recognition of the need for clarity and certainty for pursuers.

The importance of the rule of law and realistic access to the courts has recently been emphasised by Lord Reed in the Supreme Court in *Re on the Application of UNISON (Appellant) v the Lord Chancellor* [2017] UKSC. 51:

"Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade." (Para 68.)

People with arguable injury cases should, in particular, be allowed to seek the adjudication of the courts without fear of personal bankruptcy if they lose. Cases should be settled or compromised on the grounds of relative strengths and weaknesses on merit, without the fear of swingeing expenses awards, which currently results in cases not being brought or routine undersettlement in our jurisdiction.

While we are clear that the Bill is a very positive development, certain aspects of it have raised concerns because they risk undermining its core purpose. These aspects are addressed below.

Part 2 – Expenses in Civil Litigation

Section 8 – Restriction on pursuer's liability for expenses in personal injury claims

Qualified one-way costs shifting (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.

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.

Sub-section 4(a) is a particular concern as it disqualifies QOCS where there has been a ‘fraudulent representation’. In paragraph 38 of the policy memorandum this is defined as an occasion where the court finds that ‘fraud on the part of the pursuer is established on the balance of probabilities’. While this appears to reflect the original intention of the Review, it does not specifically reflect Taylor’s discussion of the definition of fraud in Scots law as set out in chapter eight of his 2013 report.

In paragraph 74, Taylor explains that the test for fraudulent representation in Scots law is found in the English case of *Derry v Peek*¹ where it was held that “Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.”² Taylor goes on to point out that, in that case, it was held that “making a statement through want of care falls far short of, and is very different from, fraud.”

There is no definition of “fraudulent representation” in the Bill.

The other and perhaps more important issue is proportionality. In the proposed format any minor exaggeration, if done deliberately, risks losing the protection of the section. So, for example, where a claimant schedule has time for care set at 20 hours a week and the evidence at trial is that only ten hours were spent, defenders will argue that QOCS should not apply. No-one can be in favour of fraud of any kind but a balance must be struck, so that minor breaches are not elevated into reasons for the loss of QOCS protection.

We recommend including a definition of ‘fraudulent representation’ in section 8 sub-section 7 as follows:

“A fraudulent representation is one which is made deliberately or recklessly in connection with the proceedings and with a view to significantly affecting their outcome.”

¹ (1889) 14 App Cas 337

² *Ibid*, page 374

We also have concerns about the wording of the current section 8(4)(b). The Review speaks of “Wednesbury unreasonableness” which is a very high bar, with much of the jurisprudence long established through judicial review. The normal formula is:

“The decision of the public authority was so unreasonable that no reasonable person acting reasonably could have reached it.” (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223.

The current wording does not replicate the traditional Wednesbury formula but merely sets an “unreasonable” test and invests a huge discretion in the presiding judge. That is unhelpful and is an invitation to frequent satellite litigation.

The common theme in all of this is that the non application of QOCS should apply only to egregious behaviour by the pursuer. That is what the Review says. Otherwise any protection extended by the Bill will be illusory.

Section 10 – Third Party Funding of Civil Litigation

This section has raised fundamental concerns among APIL members, who fear 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 essence, this section conflates two linked but separate issues as discussed by Taylor in chapter 11 of his report: the principle of a ‘professional’³ funder being potentially liable for the judicial expenses of the opposing party; and the principle of disclosing the funding mechanism for every case.

³ Taylor Review of Expenses and Funding of Civil Litigation in Scotland 2013, page 251, paragraph 57

While the Taylor report is clear that third party funders are commercial companies “motivated by a desire to make a profit, who effectively purchase a stake in the outcome of a litigation”⁴ 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.

In paragraph 15 of chapter 11 of his report, Taylor makes the distinction between third party funders who are reliant on a successful outcome for their income and “trade unions....which were concerned with judicial expenses but not reliant on damages for their income.” While discussing the state of the market in Scotland in relation to third party funding he wrote: “I am aware of one funder that is seeking to fund several high value claims (over £750,000) with a 65% chance of success and is ready to consider cases that involve breach of contract, professional negligence, intellectual property, insolvency, and international arbitration and mediation.”⁵

There is clearly an ocean of difference between such commercial considerations and a solicitor supporting his client on a DBA or a trade union supporting one of its members.

The language of the Bill and its accompanying documents are, by comparison, vague and confusing, referring (in the Bill) to a funder as having ‘a financial interest in respect of the outcome of the proceedings’. Paragraph 50 of the policy memorandum to the Bill refers to ‘commercial’ funders but does not explain how that is defined. Paragraph 67 of the financial memorandum refers to the funder as someone who funds a case ‘in whole or in part, and who has a financial stake in the outcome.’ In this case ‘financial stake’ is not defined.

⁴ *ibid*

⁵ Taylor Review, page245, paragraph 32

Taylor does not refer to trade unions again until the end of chapter 11 of his report when he deals with the principle of disclosure of the funding mechanism. Here he recommends:

...that in all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case.

Nowhere in this recommendation does he suggest that trade unions or solicitors acting under DBAs should be potentially liable for judicial expenses, only that the funding mechanisms should be disclosed. Indeed, to make these funding arrangements liable for expenses completely contradicts the purpose of QOCS and profoundly undermines the purpose of the Bill.

For the aims of the Bill to be achieved, and real access to justice for injured people delivered, solicitors should be able to act for clients on what is popularly known as a "no win no fee" basis. This will mean the solicitor assuming the risk of many hours of unremunerated work, with the reward of a success fee in the form of a percentage of the damages under a DBA agreement if successful.

It should be borne in mind that Taylor recommended a cap on the level of success fee that may be charged in personal injury cases. The cap is lower than the cap recommended for commercial actions.

In terms of section 6(2) any lawyer acting under a DBA agreement must undertake to pay all the considerable costs of running the case. Typically, with court fee fund dues and expert witness costs, these outlays will run from around £1,500 in a modest value sheriff court case to tens of thousands of pounds in a high value catastrophic injury case.

So the solicitor will be providing financial assistance to the claimant, while at the same time obtaining a hoped-for financial benefit by way of a success fee. The language of section 10 appears to mean that the client will have the protection of QOCs, with the solicitor personally on the hook for expenses. That is emphatically not what the Review intended and would do very little to further access to justice for pursuers.

A simple and effective solution would be to say in section 10(1):

“...where a party to civil proceedings (except personal injury proceedings) ...”

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