EXPENSES AND FUNDING OF CIVIL LITIGATION BILL

A CONSULTATION

A response from the Association of Personal Injury Lawyers (APIL)

April 2015

For further details please contact:

Lorraine Gwinnutt, Head of Communications, APIL
Tel: 0115 943 5404; email lorraine.gwinnutt@apil.org.uk

Introduction

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with 25 years' history of working to help injured people gain the access to justice they need. APIL currently has around 4,000 members, 176 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

In our answers to the consultation questions we have limited ourselves to commenting on the impact of proposals on pursuers.

CHAPTER 1

Speculative fee agreements

We agree with Sheriff Principal Taylor that market forces are likely to decide what may be taken from a pursuer's damages as a success fee. We also, however, welcome his acknowledgement of the vulnerability of injured people, particularly in light of occasional examples of which we are aware, when a substantial amount of damages has been deducted as a success fee. While these incidents are rare, injured people need their damages to put their lives back on track and do, therefore, need to be protected with a cap on the level of success fee.

The impact of the cap is likely to be minimal given that the marketplace regulates most agreements at present. What the cap will provide, however, is a degree of certainty for pursuers. We accept Sheriff Principal Taylor's proposal that the cap for personal injury claims should be 20 per cent of the first £100,000 damages, ten per cent of damages between £100,001 and £500,000 and 2.5 per cent of damages over £500,000.

Damages Based Agreements (DBAs)

The introduction of DBAs in the form suggested by Sheriff Principal Taylor and adopted by the Scottish Government will provide transparency and certainty across the board, which can only be of benefit to the pursuer. We have always held that injured people are best served by qualified and experienced specialist practitioners. It makes no sense that claims management companies are able to offer a funding service which is not available to the clients of solicitors. We would support the proposed cap for the reasons outlined above and also because it provides consistency between the two forms of funding.

We agree absolutely that the proposed statutory controls should apply to anyone offering a DBA. While there may be little evidence of complaints against claims management companies, we have heard anecdotal reports of one such company taking 30 per cent of damages. Injured people need all the protection available to them, and bringing unregulated claims management companies under some form of control is a first step in ensuring this is provided for them. The proposal that any breach of the rules results in the agreement becoming void is a very practical and welcome suggestion.

Future loss

We agree with Sheriff Principal Taylor that to ring-fence future loss could generate a risk that people will delay cases so that more of the value of the case will be attributable to the past rather than the future.

In addition, we know from the experience of colleagues in England and Wales that ring-fencing future loss can limit the amount of costs recoverable which, in some cases, will make the financial reward for the work done so low as to be unviable. It should be remembered that the work which needs to be done to bring a high value case with the element of future loss to a successful conclusion is substantial. Lawyers 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.

Furthermore, in addition to the sheer level of work involved in, for example, a case involving a child who has cerebral palsy as a result of clinical negligence, there is the additional consideration that if the case is ultimately lost the financial implications for the solicitor can be extremely serious. Lawyers are simply not going to take these cases on unless the reward not only reflects the work involved but also the financial risk.

Ring-fencing periodical payments and capping the success fee to only 2.5 per cent of damages over £500,000 provides a valuable safeguard to people with catastrophic injuries. Certainly, many high-value medical negligence cases are now settled with periodical payments and the level of the cap on lump sum payments offers pursuers who settle for a lump sum a degree of certainty about the level of success fee which will have to be paid. It should also be noted that Taylor made specific recommendations in relation to protecting clients' interests where the future loss element is valued over £1 million, and that is an important part of the overall package.

Code of good practice

We agree that there should be a code of good practice, and welcome in particular the suggestion of a 14 day cooling-off period. We also believe it would be helpful if the Law Society, APIL and the Forum of Insurance Lawyers were to liaise on the development of the code.

Qualified one-way costs shifting

We agree with the introduction of a system of one-way costs shifting (QOCS) for the reasons set out in the consultation, and also with the principle that losing QOCS should be the exception not the rule. We fully support Sheriff Principal Taylor's recommendations that QOCS should only be lost where the Scots law test of fraud is met, or there is abuse of process, or in cases of 'Wednesbury' unreasonable behaviour.

We think it appropriate to address the issue of so-called 'fundamental dishonesty' here. While this is not specifically raised within the consultation paper, we anticipate that, given recent developments in England and Wales, it is likely that it will be an issue referred to by other respondents to this consultation.

Following the introduction of QOCS as a result of the Jackson reforms in England and Wales, 'fundamental dishonesty' has emerged as a significant issue. Where a claimant has been found to be fundamentally dishonest, he loses the protection afforded by QOCS. This has now been enshrined in section 57 of the Criminal Justice and Courts Act 2015. Essentially a claimant, in respect of any part of whose claim a court finds to be 'fundamentally dishonest', will have his claim struck out and an award of costs made against him. This applies even where liability has been admitted and where there is no dispute that the claimant has suffered an injury. The only exception is where the claimant would suffer 'substantial injustice'. Crucially, there is no definition of 'fundamentally dishonest' or 'substantial injustice' in the Act.

This is likely to lead to a raft of satellite litigation in relation to the definitions. Should exaggeration of a medical condition be regarded as 'fundamentally dishonest' when it could simply be the result of a perception skewed by the fact that a person is depressed or vulnerable due to illness or injury? The introduction of this test in England and Wales may well lead to more allegations of fraud or dishonesty by insurers, thereby extending the litigation process. There is also a significant risk that claimants will not pursue claims due to a fear of being falsely accused.

Conversely, the exceptions to QOCS protection identified by Sheriff Principal Tayler were well thought-out and cover very sensibly those situations where a pursuer ought to lose that protection, particularly in relation to the difference between fraud and what may be considered by some to be dishonesty. In paragraph 75 of chapter 8 of his review, he writes:

> "Trauma can have considerable impact upon the ability of a pursuer to accurately recall the events surrounding and central to an accident occurring. The line between a witness being incredible and unreliable can be fine. It is placing too much faith in the ability of the judiciary to distinguish one from the other in every case and to put some financial consequences on the correct distinction being made. There are some cases in which there is little doubt that the pursuer is not telling the whole truth. But there are many cases in which it is less than clear whether the pursuer's evidence, albeit unacceptable to the court, is unreliable as opposed to incredible. On the other hand, for what should be obvious reasons, a pursuer who is held by the court to have acted fraudulently should not have the benefit of QOCS."

Clearly, if there is behaviour which could be considered as exaggeration, this can be dealt with as it is currently dealt with – by the court sanctioning expenses.

Overall impact of the package

The purpose of Sheriff Principal Taylor's recommendations is to introduce balance to what he has described as 'in many cases… a true David and Goliath relationship'. In the foreword to his report he writes:

> "It is often said that in Scotland there is no meaningful right of access to the courts unless one is sufficiently poor to qualify for legal aid (albeit the present upper limit for disposable income is £26,239) or very rich. It has been said that the law may look impressive but is empty of all practical meaning. A recent letter to the Financial Times commented: *"Worse still, those in the 'excluded middle' have no choice but to accept 'out of court' settlements on all manner of insurance and negligence cases."* That will no longer be the case, at least in the context of personal injury litigation, should my recommendations be implemented."

There may well be a slight increase in the level of genuine claims as a result of these proposals, but this will simply mean that people will have access to the courts which they don't have at present, thereby addressing an imbalance in the system.

The argument that all risk is removed to pursuers is both weak and inaccurate. A pursuer is still at risk of losing his own outlays, including court fees which, from September this year, will be increased by two per cent to cover the rate of inflation, plus an additional two per cent to help cover the cost of funding new court reforms. In addition, the pursuer is likely to lose up to 75 per cent of damages if he fails to beat a tender. This is a significant backstop against irresponsible prosecution of weak cases.

Furthermore, robust pre-action protocols 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. The use of fraud to remove QOCS protection from a pursuer also provides protection to defenders and defenders' insurers.

Taylor's review also negates overblown arguments about the courts being 'flooded with unmeritorious cases'. In the foreword to his report he writes that data available did not suggest the appearance of any so-called 'compensation culture' in Scotland. Indeed, figures quoted in the report suggest the trend for personal injury litigation is very much on a downward trajectory.

Counsel's fees

We agree that there should be a table of fees for counsel in the Court of Session, for counsel in the sheriff court where sanction for counsel has been granted, and for solicitor advocates. This move will provide certainty for all parties concerned.

We are content for the Scottish Civil Justice Council to oversee the development of the fee tables, on the understanding that the development and maintenance work itself is undertaken by the council's costs and funding sub-committee.

Sanction for counsel

Although the issue of sanction for counsel is not addressed in the consultation paper, it is appropriate here to highlight emerging concerns that rules proposed by the Sheriff Court Rules Council (SCRC) and which came into force in 2012 are not being applied as the SCRC intended. In essence, the rules were meant to allow a sheriff principal or sheriff to sanction the employment of counsel in a case before, at, or after the event. This means the pursuer knows in advance if counsel can be employed.

In fact, the way the legislation has been interpreted in rule 2(3) of the Act of Sederunt (Sanction for the Employement of Counsel in the Sheriff Court) 2011 is that only certain steps can be sanctioned in advance (specifically, appearance at any hearing and preparation of any document). This falls short of what the Sheriff Court Rules Council intended and omits important work counsel is required to undertake, such as consultation with the pursuer.

The only litigation to date on the Act (*Crabbe v Alexander Charles Reid and Others*) seems to confirm this approach, and we urge the Government to address this issue. It is vitally important to ensure the court grants sanction for counsel for all aspects of the case prospectively, so that pursuers will know when they can employ counsel in advance, as the SCRC originally intended.

CHAPTER 2

Multi-party actions

We believe there is a need for a multi-party procedure in the post Gill and Taylor context and that the proposal to introduce DBAs as explored earlier in the consultation could help to facilitate this. On the basis of the experience of our members in Scotland and elsewhere in the UK, we would recommend a system which reflects option two, as set out in the consultation paper. We acknowledge and agree with remarks in the paper that developing a system for multi party actions involves highly complex technical and funding issues, as well as the need for a full impact assessment and research, and we would very much welcome an opportunity to assist with this work.

Proposals as outlined in option 2 would allow greater access to justice for individuals, and greater certainty in relation to funding arrangements than the other options outlined. It would also create greater certainty for defenders as a vehicle could be created to facilitate delivery of a settlement in multi-party cases.

We would suggest the proposed system for DBAs would provide the best form of funding arrangement for option two. A DBA could have the flexibility to deal with dissenting voices among the group as it would allow for the setting up of a contract from the outset of a case so that, for example, if a certain percentage of the group decides to settle the case, the rest of the group would have to abide by that decision. Another option would be to set up a DBA which would allow for the election of a small committee of pursuers to make decisions relating to settlement and other matters on behalf of the rest of the group. The facility for this committee to be able to take advice from independent counsel could also be written into the DBA.

An additional attraction for option two is that this is a system which has been adopted, in various formats, in other jurisdictions. Part of the work involved in the development of such a system could be to draw on the experiences of other jurisdictions to implement the most effective aspects of the systems in other countries.

Options one and three as set out in the consultation would provide considerably less clarity and certainty than the other options considered. Option one – a case management system – is still likely to involve a large number of disparate groups, often with little cohesion, and with all the difficulties of reaching agreement inherent in such a group. A case management system can also be expensive in terms of the judicial time required to manage the case.

Option three is considered impractical, primarily because many third party organisations may not be in a position to give the necessary specialised advice to ensure adequate funding and proper legal argument. Again, it is likely that greater judicial intervention may be required than under option two.

Auditors of court

We agree that auditors of court should be salaried, both for reasons of transparency and because, as set out in the paper, the taxation of accounts is a public service and therefore the fees charged should reflect that service. It is invidious to allow an invidividual's income to be based on fees from the parties involved, almost as if the auditor is working on a commission basis.

If it is accepted that auditors should be salaried for the reasons given, it is logical that the cancellation fee should also be fixed, in preference to the current arrangement where the fee is four per cent of the amount of money in the account.

Court's power in respect of conduct of legal representatives

We fundamentally disagree with this proposal: the system is currently robust in the powers available to the court to find solicitors personally liable for aspects of the case where there is found to be misconduct.

This recommendation takes that provision much further and will encourage almost certain abuse of the system as some defenders will inevitably make specious arguments to the effect that pursuers' solicitors should pay part of the costs of cases. This will generate time-wasting litigation as such allegations are argued before a judge or sheriff.

Scottish Legal Aid Board as a funder of last resort

The Scottish Legal Aid Board's function is to provide people with funding. To define its purpose as a funder of last resort would be a fundamental change to the fund's status which could prove unreasonably restrictive for injured people.

By way of example, the Motor Insurers' Bureau operates as a funder of last resort, and does not deal with any matter where there is a possibility of an alternative source of recourse or funding. If the SLAB were to operate in the same way, it could mean that if an insurance policy was available for a premium of £20,000, for example, the board could refuse funding because an alternative option is available even if that alternative is way beyond the pursuer's means.
In personal injury work there are some other sources of funding available other than legal aid but these options may not always be realistic.

If the purpose of this move is to safeguard the fund, it is completely unnecessary as considerable safeguards already exist. Applications are vetted stringently on their merits and on a costs benefit analysis. Ongoing reporting requirements mean that any weaknesses in cases are quickly identified as more information comes to hand. While it is true that legal aid funding is a diminishing feature of the legal landscape we do not support a statutory definition which relegates it to a role where all other funding options have to be exhausted.

- Ends -

Association of Personal Injury Lawyers

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

● T: 0115 958 0585 ● W: www.apil.org.uk● E: mail@apil.org.uk