Scottish Government

Success fee agreements in Scotland

A consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

A response by the Association of Personal Injury Lawyers

January 2019

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the Scottish Government on its consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. APIL is content with the success fee model recommended by Sheriff Principal Taylor. Regarding the content of success fee agreements, there should not be an absolute duty to put in writing every minor update in the case – bespoke update meetings and phone calls will be far more beneficial for the client. Success fee agreements should not be required to include an indicative statement of the value of the claim from the outset, as this would be extremely difficult, and could mislead the client.

Q1) Please indicate if you are content with the success fee caps recommended by Sheriff Principal Taylor

The package of measures proposed by Sheriff Principal Taylor was very carefully thought through. We are content with the success fee caps recommended by Sheriff Principal Taylor. The caps ensure vulnerable injured people are protected, and that they retain the damages they need to put their lives back on track. The caps also provide a degree of certainty to pursuers. Together with the ring fencing of periodical payments, and the provisions in relation to obtaining actuarial advice, the cap of 2.5 per cent of damages over £500,000 provides a safeguard in cases of catastrophic injury where the claimant is entitled to a very large settlement in respect of future loss. We agree that counsel's fees and VAT should be included in the success fee cap, to give certainty to the total cost of the client's legal representation. It is incredibly important that the funding mechanism gives the client certainty from the outset.

The success fee model, where both the success fee and judicial expenses are recoverable, is essential to ensure that Damages Based Agreements are a viable funding mechanism. The justification for the success fee model is that solicitors recover between around two thirds to one half of their actual expenses incurred in a case. The success fee helps to bridge the gap between the cost of running the case and the amount of those costs that are recoverable as judicial expenses. This helps to ensure that solicitors can continue to provide representation.

If the success fee model applies, the claimant must also be left with sufficient damages to warrant the trouble and anxiety most litigants experience. The balance is struck by the sliding scale cap proposed by Sheriff Principal Taylor.

The take up of Damages Based Agreements in England and Wales in personal injury cases, where the success fee cap is set at 25 per cent as a total, and is inclusive of judicial expenses, is extremely low. Sheriff Principal Taylor's proposals ensure that the correct balance is struck, to ensure that the pursuer obtains the damages that they need, and that the solicitor is rightly rewarded for taking on the risk of the case.

Damages Based Agreements for Criminal Injuries Compensation Scheme claims

Practitioners comment that firms may struggle to provide representation for those pursuing Criminal Injuries Compensation Authority (CICA) cases, as it is simply not economic for them to do so, as no judicial expenses are awarded in these cases. The success fee for these cases should be capped at a higher level – we suggest 35 per cent, in line with employment cases - to account for no judicial expenses being awarded. This will ensure that practitioners can continue to provide representation for pursuers in these cases.

Q3) Do you agree with the proposed content of regulations to make further regulatory provision about success fee agreements in Scotland? Do you think that any of the material need not be included? Do you think that there are other areas which should be covered?

41h) If the value of the claim should change as a result of further information from experts or other reliable sources, the provider of the relevant services must inform the recipient in writing

There is no definition of "value" and no qualification of materiality here. In a large and complex claim, information in the form of expert reports, wages information etc. can come in frequently and may potentially alter the value of a client's claim. The defenders will also produce information and their own reports and version of value. Those may be discussed at meetings or on the telephone but having to report any potential change, however small, in writing, is not helpful. For example, if the defenders enter a plea of contributory negligence, this could materially impact the value of a client's claim. However, writing and telling the client this will not assist them. Instead, it is far more beneficial to meet with the client to talk over developments. Keeping the client well informed is part of the general duty of a solicitor. There are stages in the life of a PI action, such as when an offer is made, when a statement of valuation is being prepared, when an action is raised, etc, where the client will benefit from a meeting or phone call to summarise all the information obtained to date, and this will result in them having better quality information than standard form letters for every development in a case. An absolute duty to write with every development would serve no purpose, and in many cases face to face meetings are a far better way of communicating.

41 i) "The statement of indicative likely payment due by the recipient". This should not include the likely settlement. It would not be possible, at the stage that you are signing the client up, to know how much the case is going to be worth.

It is not beneficial to consumers to be asked to set out likely damages at an early stage. There is no objective basis on which an accurate predictive value can be made, and no information is better than the wrong information. Whether an accurate estimate of damages can be made very much depends on what stage medical treatment has reached when a client consults a solicitor. Very frequently, a client's medical treatment is incomplete and factors which might make a considerable difference to the claim are not yet known, including whether the client can return to work, whether they have been left with long term pain, etc. Even trying to give a broad range of damages is unhelpful because the range will be too large to be useful to the client.

Importantly there will be an incomplete picture of the litigation prospects. Very frequently different views on deductions for contributory negligence will emerge only after proceedings are intimated or raised, documents recovered, and the nature of any defence is considered.

There is also a risk that a requirement to provide a statement of indicative likely payment provides an opportunity for an unscrupulous provider, (CMC or solicitor) to gain a competitive advantage by overstating expectations, without any requirement to provide any analysis of how damages might be calculated. Such a requirement would not be in consumer/recipient interest, and will lead the uninformed to exercise choice on a wholly unrealistic basis. According to Sheriff Principal Taylor, giving evidence to the Justice Committee in October 2017, one solicitor owned claims management company had already entered into over 17,000 of these Agreements (with no predictive damages statement) without any issue having ever arisen. The proposals regarding predictive value in the

agreement will transform a non-issue into a real problem with people being mis-sold how much their claim is worth.

The example below highlights the difficulties with providing the client with a statement of indicative value on entering a success fee agreement.

> Recipient A suffers whiplash type back symptoms after a car accident. These are ongoing at 12 months.
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> 1. After medical records and reports are obtained medical opinion is that this represents an exacerbation of a pre-existing back complaint. The report makes it plain that only 6 months discrete symptoms can be attributed to the car accident.
> 2. Alternatively, after records and reports are obtained the medical opinion could be that all the symptoms relate to the car accident. Calculation of damages should now also include an ongoing claim for services which will be very significant.
> 3. It could emerge that the recipient was not wearing a seat belt. There is a likely deduction for contributory negligence of between 15 per cent and 25 per cent, but only if the wearing of the seat belt would have materially diminished the extent of injury. That itself is a medical question which requires further medical opinion.
> 4. If the pursuer was the driver, a further question on contributory negligence and accident causation might arise.
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> All of these are considerations before there is even correspondence from the insurers for the defender, who will frequently obtain their own evidence on all of the above as the claim progresses. No provider, acting responsibly, could properly provide a predictive value at the point of agreement. The danger is that some will simply provide a "sales puff" in an attempt to obtain instructions, and this danger will be exacerbated if an indicative statement is required in the agreement.

41l) "A statement of the complaints procedure to be followed in the event of the recipient considering that the provider of the relevant services is failing in their obligations"

This should not need to be repeated in a DBA, as complaints procedure will be dealt with elsewhere in the solicitors' letter of engagement.

41m) "Provision for the resolution of disputes between the provider of the relevant services and the recipient of those services. The Scottish Government believes that the use of a form of alternative dispute resolution such as arbitration or mediation by an independent arbitrator or mediator with experience of success fee agreements should be the default method of resolution, but would welcome views on how best to resolve disputes regarding success fee agreements should be resolved"

We do not agree that these types of case are special cases only suited to mediation/arbitration. There is a cost associated with that which should not be imposed over and above the normal complaints procedure for legal services which is quite suitable for this type of case. There is not to our knowledge any other area in which mediation/arbitration is imposed for complaints and claims. There is nothing in this work type which makes it inherently suitable for mediation/arbitration.

41n)"In circumstances where there is failure by the provider of a success fee agreement to comply with section 7(1) or (2) of the 2018 Act or the regulations made by Scottish Ministers under section 7(3), regulations will provide for:

- *The success fee agreement and any obligation to pay a fee or charge under the agreement being unenforceable or unenforceable to a specified extent;*
- *The recovery of any amounts paid under the agreement; and*
- *The payment of any compensation for any losses incurred as a result of paying amounts under the agreement."*

This should be qualified as being for material breaches only, not minor or inconsequential breaches

Q4) Do you agree that the kind of arrangement described in paragraph 43 should not be permitted in a success fee agreement?

We query paragraph 43 of the consultation document. It should be made clear that this situation refers to where the provider has come to the conclusion that the recipient is unlikely to win at court because they have been made a reasonable offer that they have then rejected, rather than because the prospects of success are low. Where the provider does not believe that the pursuer has a case, and that liability cannot be established, the provider should not be paid any success fee if the pursuer subsequently takes the case to a different solicitor and succeeds. However, there should be a refund of recovered outlays paid by the first solicitor in that event.

If the client decides to move on to another legal provider despite receiving a good offer from the defender which the first provider recommends they accept, the first legal provider should be paid for the work they have carried out. The first provider should recover outlays, and each provider should receive judicial expenses, which should be allocated according to the work carried out by each provider. The client should only have to pay one success fee which is governed by the cap, and which should be divided between the providers on a proportionate basis.

Q5) Do you think that formal Government regulation is required to make it clear that providers of relevant services may not provide legal aid, whether in the form of advice and assistance or civil legal aid, when a success fee agreement is in prospect or in place?

A distinction should be drawn here between advice and assistance, and civil legal aid. At investigation stage, advice and assistance should be available to those who qualify for it. Advice and assistance should continue to be available for all types of case, to ensure a level playing field as far as possible. Using advice and assistance may be the only way that some firms can properly investigate a claim. Once initial investigations are complete and the solicitor is able to come to a view on prospects, if they take the view that they should enter into a success fee agreement, further advice and assistance and full civil legal aid should not be available.

Both advice and assistance and full legal aid must continue to be available for clinical negligence cases. These cases require a lot of initial and early investigation, and require expert opinions to be gathered early on, so that a view can be taken on prospects. ATE premiums will not be recoverable, and premiums to fund these investigations are expensive. Advice and assistance alone is not sufficient, however, and full legal aid must remain an

option for funding of clinical negligence cases. Pursuers often instruct solicitors in a clinical negligence case close to the time bar, and the solicitor needs to raise proceedings to protect the client's position. Full legal aid must be available to allow proceedings to be raised.

Clinical negligence claims are extremely complex, and it is much more difficult to establish liability in these claims than other negligence claims. There is rarely an admission of liability from the defender, due to reputational issues. After advice and assistance stage, reports are required from a variety of other experts before the claim can be intimated with any certainty. In a cerebral palsy case, for example, reports will be required from a midwife, obstetrician, neonatologist, neuroradiologist, paediatric neurologist, at a minimum. The pursuer also needs to get their own experts' views on the defender's experts' opinions to assess prospects. Without legal aid, firms are exposed to a huge risk in terms of expert costs, court fees, and solicitors' fees. Some firms may not continue at this stage, but to test the defender's experts requires proof.

In clinical negligence claims, a proof could easily last 12 days, even with case management. The pursuer needs to have equality of arms with the defenders who will probably have senior and junior counsel. Obtaining ATE cover for these costs is difficult, and premiums extremely high. Legal aid must be available to ensure an equality of arms.

The availability for legal aid in clinical negligence cases also allows cases of critical importance to be brought. The pursuer in the case of *Montgomery v Lanarkshire Health Board*[1] received legal aid funding. This case changed the law on consent, affirming the requirement for "informed consent" from the patient in relation to medical treatment, with a duty of disclosure on the medical professional to ensure that the patient is informed.

Simply, without the availability of legal aid, it would be far more difficult to ascertain whether a case is worth pursuing, and many individuals and solicitors would be put off from pursuing a claim at all. Scotland is a small jurisdiction, and there are already a limited number of firms with specialism in clinical negligence. To remove the availability of legal aid for clinical negligence claims will limit pursuers' access even further. The uneven allocation of resources would make it more difficult to obtain the expert evidence to pursue a claim, medical professionals who have been negligent would not be held to account, and difficult cases of importance would not be pursued. In successful cases, all of the Scottish Legal Aid Board's costs are repaid by the defenders. Legal aid provides a method of funding the ongoing case, but ultimately does not cost the public purse in successful cases, as all of the outlays are paid through expenses received by the defenders.

Success fee agreements "in prospect"

"In prospect" should be removed from this proposal, as there may be a situation where the client may be eligible for legal aid, but the solicitor would not want to offer a success fee agreement at that stage. The regulation should be that where a success fee agreement is in place, legal aid should not be applied for.

Q6) Do you think that any change in funding, whether from legal aid to a success fee agreement, or the other way about, requires formal Government regulation in relation to information/notification requirements or case-end formalities?

There are issues at present in situations where a solicitor has obtained a legal aid certificate for the client, and then the client changes solicitor. If the second solicitor wishes to proceed on a success fee agreement, rather than continue under legal aid funding, the current

[1] [2015] UKSC 11

provisions of the Legal Aid (Scotland) Act 1986 state that any judicial expenses recovered from the case are to be paid to the Legal Aid Board, if at any point in the case there is a legal aid certificate. The Legal Aid Board maintains that if the firm that completes the case does not have a legal aid certificate, the Board has no statutory power to pay any expenses to that firm.

The 1986 Act must be reviewed to permit solicitors who take on cases on a success fee agreement - that have originally been taken on by a different solicitor via a legal aid certificate - to recoup their expenses from the Legal Aid Board.