

Justice Committee

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

Written submission from the Association of British Insurers

1. The Association of British Insurers (ABI) is the voice of the insurance and long term savings industry. Our members constitute over 90% of the insurance market in the UK and 20% across the EU. Employing more than 23,000 people in Scotland including almost 10,000 people in General Insurance in Glasgow, and 300,000 people in the UK, it is an important contributor to the Scottish and UK economies.
2. Insurers are a major user of the Scottish courts service, principally as a defender in personal injury (PI) and damages actions on behalf of our customers. Civil Justice Scotland statistics for 2015-16 show 8,766¹ personal injury cases were initiated in the Scottish courts – 11% of all civil court cases. The majority of personal injury actions (56%) were road traffic cases, followed by accident at work cases (20%) and clinical negligence (4%).
3. Insurers' priority in every personal injury or damages action is to settle valid claims as quickly as is practical. Our members want to get the right amount of compensation paid to the person who has suffered an injury as soon as liability has been established. There is no benefit to insurers, and there can be considerable cost to them, if settlements are delayed due to legal disputes. Insurers will only take personal injury claims to proof (trial) if there are sufficient grounds and genuine reasons to do so.
4. The measures proposed in this Bill would mean major changes to personal injury litigation in Scotland which are not in the best interests of all parties and will not improve access to justice.

Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system

5. We support access to justice for all parties under Scots law, especially in a financial climate where legal aid funding and trade union funding for litigation has declined and speculative fee agreements and damages based agreements have increased. Insurers want to see the cost of civil court actions becoming more predictable and “equality of arms” in the funding relationship between pursuers and defenders but that must mean equality for all parties.
6. The Bill seeks to improve access to justice based on the recommendations of Sheriff Principal Taylor's 2013 Review of the Expenses and Funding of Civil Litigation. We did not agree with Sheriff Principal Taylor's analysis in 2013 and in the intervening period civil litigation in Scotland has changed significantly rendering the Taylor recommendations out of date.

¹ <http://www.gov.scot/Publications/2017/03/5915/9>

7. In his report Sheriff Principal Taylor noted that between 2008 and 2011 the number of compensation claims registered in Scotland by the Department for Work and Pensions Compensation Recovery Unit increased by 7%, while in England and Wales it rose by 23%. However, DWP statistics published under Freedom of Information² show that between 2011 and 2016 the number of compensation claims in Scotland increased by 16.6% whereas in England & Wales the volume decreased by 4.5%. This demonstrates that Scotland does not have a problem with access to justice for personal injury (PI) claims and challenges the premise of this Bill.
8. The measures in the Bill offer no incentive for pursuers or their agents to agree an early settlement in a PI claim. Instead, the provisions in the Bill for success fees, damages based agreements and Qualified One-way Costs Shifting (QOCS) make it more attractive to run claims to proof when a pursuer will not need to pay costs if they are unsuccessful. Running claims to proof will also extend the length of time the claim takes to settle which delays any payment of compensation to the pursuer. We anticipate this Bill will see an increase in the volume and cost of litigation in Scotland which will mean additional costs and reservations for insurers writing business in Scotland. This is likely to result in an increase of insurance premiums for consumers in the Scottish jurisdiction.
9. The introduction of QOCS would indeed reduce the financial risk for a pursuer raising a PI action. However, from a defender's perspective it would make Scotland a more expensive jurisdiction to defend PI claims and in turn a more expensive market in which to write insurance. At the moment the proposed Qualifications in QOCS all favour the pursuer and the pursuer's solicitor and we do not believe this creates an equitable justice system. We set out our concerns and recommendations on QOCS below.
10. We are surprised and concerned that the Bill excludes the regulation of Claims Management Companies (CMCs). One outcome of the Bill as currently drafted is that CMCs will continue to operate without any regulation in Scotland and are likely to increase their operations and activities including nuisance calls encouraging people to raise personal injury claims. This concern is particularly pertinent in light of the strengthening of CMC regulation in England and Wales. This Bill will make Scotland a more attractive market for CMCs, undermining Scottish Government action to tackle nuisance calls, which are a greater problem in Scotland than in any other part of the UK. We address this in more detail below.
11. We support the principle of improving access to justice by success fees and predictability in fees, but if the Bill is not amended to provide more safeguards for QOCS then it will simply be replacing one perceived inequality of arms with another.

² Obtained by DWF solicitors

The specific provisions in the Bill which:

(i) regulate success fee agreements (sometimes called ‘no win, no fee’ agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements

12. Success fee agreements pose a real prospect of general damages inflation. While there is merit in a successful pursuer contributing from their damages to the costs of the case in some cases, the potential for unintended consequences needs to be carefully considered. The existence of a success fee agreement may encourage judges or juries to increase the amount of compensation awarded to offset the amount a pursuer has agreed to pay their agents if their case is successful. The Bill currently provides no safeguards or guidance on how that situation would be dealt with. If the Courts were to start increasing general damage awards, this would eventually filter through to all compensation awards, which could ultimately drive up the cost of insurance for consumers.
13. The level of success fee should be ultimately based on an assessment of the risks of the individual case. The success fee must be proportionate to the true risk of the pursuer’s solicitor undertaking the work. Should success fees become payable by defenders this will drive up the cost of litigation and is likely to result in increased insurance premiums for consumers.
14. To protect the pursuer against the loss of a significant portion of their damages we strongly support an overall cap on the success fee. It is essential that the Scottish Government collects and publishes data on the share of damages currently taken from pursuers under speculative fee arrangements as this would assist the Justice Committee in its understanding of the current market in speculative fee agreements. Such data would allow a more comprehensive analysis on the current range of percentages being taken from damages. Success fees are capped at 25% of damages in England and Wales and history shows that there is little competition between solicitors. A survey of personal injury clients was carried out by Yarrow and Abrams, this showed that clients’ understanding of CFAs was limited, they rarely shopped around and were unaware that success fees could vary between firms³. This lack of competition led to the Civil Justice Council in England and Wales having to mediate fixed success fees to create a fair system.
15. Success fee arrangements are already permitted in Scotland and are based on either a percentage of recovered judicial expenses or a mark-up of the hourly rate bill between solicitor and pursuer. A cap is in place set out in Regulations that the success fee can equate to no more than 25% of the pursuer’s damages.
16. The Bill conflates success fees with damages based agreements, allowing a success fee to be based on damages, including future losses up to the sum of £1,000,000.

³ Yarrow and Abrams “Nothing to Lose?”, a report published in 2000 by the Nuffield Foundation and Westminster University

17. We oppose the proposal that success fee agreements be permitted to apply to future losses not exceeding £1,000,000. In particularly high value claims this could lead to a significant loss of damages to the pursuer which is meant to pay for their care and support. There is no reason a pursuer's solicitor should benefit from future loss payments when they have carried out no further work to justify such a payment. The success fee should only apply to past losses and damages, which should be more than sufficient to cover the risks of a case faced by the pursuer's solicitor. It is important to remember that the success fee is an addition to the solicitor's regular fee, paid at the expense of an element of the pursuer's damages.

18. For example where a catastrophically injured pursuer requires a care regime for the remainder of their life, the cost of that care will be calculated with reference to the pursuer's life expectancy, anticipated cost of care (as evidenced by expert reports) and expected investment return. The resulting sum should be sufficient to provide the pursuer with the care they require for the rest of their life. If however their solicitor is to receive a portion of this figure by way of a success fee, the result would be likely to leave the claimant with a shortfall, putting eventual pressure on the public care system and public purse to provide the necessary care. The introduction of success fees applied to future losses leads to a real risk of damages inflation.

19. At present it is possible for a pursuer's solicitor to apply a success fee payable to the pursuer, as well as an unregulated CMC taking a percentage of the pursuer's damages under a damages based agreement. It is vital that any fee capping provisions are set out in the Bill from the outset rather than being left to future regulation, and prevent the recovery of expenses from the pursuer's damages by multiple parties.

(ii) allow solicitors to enforce damages based agreements (a form of 'no win, no fee' agreement, where the fee is calculated as a percentage of the damages recovered)

20. Like success fee agreements, Damages Based Agreements (DBAs) are a contract between a pursuer and their solicitor or other agents but we have greater concerns about the effects they will have on civil litigation in the Scottish courts.

21. We do not see how a DBA could be a more attractive funding arrangement than a success fee for a pursuer and so question the need for DBAs to be introduced via this Bill. We note that the take up of DBAs in England & Wales has been low following their introduction in 2013.

22. As with our view on success fee agreements, if DBAs are introduced then they should not apply to any element of a pursuer's future losses. If DBAs were applied to future losses then it would pay solicitors for no further work and risk the pursuer running out of damages meant to pay for their care and support. This could in turn mean additional demand for health and social care services even when a damages award is meant to cover these costs.

(iii) introduce ‘qualified one way costs shifting’, which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender’s legal expenses even if the action is unsuccessful

23. The Policy Memorandum to the Bill states that the policy objective will contribute to the realisation of the Scottish Government’s Purpose and National Outcome 1 “on living in a Scotland that is the most attractive place for doing business in Europe”. The introduction of QOCS as currently proposed in this Bill may have the opposite effect for insurers making it more expensive and less attractive to write insurance in Scotland compared to other parts of the UK or Europe. It may well also increase costs to businesses in increased insurance premiums that will not apply to businesses elsewhere in the UK.

24. The introduction of QOCS would mean that in unsuccessful PI actions a pursuer will no longer be liable for the defender’s costs. This means in most cases there is no adverse cost risk for the pursuer and their agent to run a claim to proof or any incentive for them to agree a settlement before court. Sheriff Principal Taylor’s Review did not quantify or even seek to estimate the number of unmeritorious claims which did not reach court because pursuers were deterred by the potential costs if they were not successful. We anticipate these reforms will lead directly to an increase in PI claims and that within that there could be an increased volume of unmeritorious or fraudulent claims.

25. The introduction of QOCS into Scots law to improve access to justice for pursuers in PI claims should be accompanied by safeguards to provide some protection for defenders’ financial exposure in the following circumstances in order to deter unmeritorious claims or unacceptable behaviour by pursuer’s agents. We would propose that QOCS is withdrawn from the pursuer:

- if (any aspect of) the claim is found to be fundamentally dishonest on the balance of probabilities;
- where the pursuer fails to beat a defender’s written tender to settle a claim (with expenses payable by the pursuer, limited to the level of the pursuer’s damages); and
- where the claim has been summarily dismissed on the basis of no reasonable cause of action, inordinate delay, or abuse of the court’s process.

26. We note the provisions set out in the Bill for circumstances in which a pursuer will not be deemed to have conducted proceedings in ‘an appropriate’ manner and where QOCS cost protection will therefore be lost. However, the lack of detail in the Bill to define “an appropriate manner” is a major concern as it is not clear what is and is not considered appropriate behaviour. This would set the bar for proving fraudulent or other inappropriate behaviour too high and leaves the courts vulnerable to an influx of unmeritorious claims. Scottish Ministers need to provide further detail on the face of the Bill as to what circumstances would be considered fraudulent and what sort of behaviour would be deemed to fall ‘below the standards reasonably expected of a party in civil proceedings’. If this is not clarified then we can expect satellite litigation following implementation of the Bill

in order to establish the exact types of behaviour that will lead to QOCS not applying in certain personal injury cases.

27. The Scottish courts currently struggle to identify and recognise fraudulent behaviour in PI claims and so we would encourage the Justice Committee to consider how the Bill might be improved to recognise in statute the concept of “fundamental dishonesty” as a further safeguard against unmeritorious or fraudulent claims. If QOCS is disapplied in such claims where fraud or fundamental dishonesty is found by a judge then that would be an important sanction. If a legal representative’s behaviour, such as through negligence or abuse of process results in unnecessary costs being incurred, this should not be passed on to the pursuer or paying party.
28. If such a costs system is to be introduced, it must be done so in conjunction with an extension of the compulsory Pre-Action Protocol for personal injury claims to deter pursuers and solicitors from proceeding with a claim which has no merit.
29. The main factor in paying compensation to pursuers as early as possible once liability has been established is the early disclosure of all parties’ evidence. As such, early disclosure should be compulsory for all cases, whether or not liability is admitted, and apply to all reports and relevant records, rather than just those reports that are to be relied upon. This would be a more effective means of improving access to justice, compared to the introduction of QOCS or encouraging the expansion of CMCs and nuisance calls in Scotland.
30. We would urge the Justice Committee to recommend the Scottish Civil Justice Council consider the introduction of early mandatory disclosure in the personal injury Pre Action Protocol, together with the extension of the Protocol to apply to claims up to the value of £100,000 in line with the threshold for the All Scotland Personal Injury Court. This would encourage the fair, just and timely settlement of disputes before court proceedings are raised, and to narrow the issues for litigation in cases which do not settle before proof. This would improve access to justice, encourage early settlement where appropriate, and mean pursuers who fail to comply with the Protocol would face an award of expenses against them.
31. Under Scots law if parties in a PI action cannot reach agreement before proof then the defender may submit to the court a written tender of a fixed compensation sum plus expenses. If the pursuer wins at proof and secures an award greater than the tender then the pursuer solicitor’s expenses are paid by the defender. If the award is less than the tender the pursuer is responsible for the defender’s expenses incurred from the date the tender was lodged onward. To encourage early resolution of claims before proof, we suggest that a pursuer who fails to beat a tender should lose QOCS protection and be liable to the defender for their expenses, limited to the level of the pursuer’s damages. Without such a safeguard the tender process would be seriously undermined.
32. In the event that QOCS is not applied and a defender is awarded expenses, it is important that any defender expenses awarded as a result of a pursuer failing to

beat a written tender, should be capped at the level of the pursuer's damages so that there is no risk to them failing to have the means to meet an expenses order.

33. We also propose that QOCS is not appropriate and should not be applied in cases where the pursuer has a third party funder and is therefore well resourced. If the Bill is concerned with addressing a perceived "David and Goliath" inequality between a pursuer and defender, if the pursuer has a third party funder we submit that this inequality no longer exists.

(iv) give the courts the power to order that a payment be made to a charity where expenses are awarded to a party represented for free

34. We welcome the inclusion of this provision within the Bill.

(v) require a party to disclose the identity of any third party funder and provide the courts with the power to award expenses against that third party

35. We welcome the introduction of this provision within the Bill. We consider such identification should be made at the very start of a case. We are concerned however as to how the Courts will ensure pursuers abide by this provision and suggest a cost sanction in cases where pursuers fail to identify a third party funder, such that a pursuer's solicitor would not be entitled to receive any payment from the pursuer's damages in addition to their base expenses. Such a sanction should prevent the failure to identify third party funders in all cases.

(vi) make legal representatives personally liable for any costs caused by a serious breach of their duty to the court

36. We welcome the inclusion of this provision within the Bill. If a legal representative's behaviour, such as through negligence or abuse of process, results in unnecessary expenses being incurred, this should not be passed on to the pursuer or the paying party. However, the Bill requires further definition of what would not be considered "appropriate" conduct and the types of circumstances where the Government considers this provision will apply.

(vii) enable auditors (who are responsible for determining the amount of expenses due by one party in litigation to another) to become salaried posts within the Scottish Courts and Tribunals Service

37. We welcome the inclusion of this provision in the Bill, as the present system discourages the paying party from using the taxation process and lacks transparency. We suggest clarification of which body will be responsible for the salaries of the Auditors.

(viii) allow for the introduction of a group procedure in Scotland, which would enable people with similar claims to bring a joint action

38. We support the introduction of the option for multi-party actions in Scotland. Such case management should result in better efficiency and minimise expenses in the costs of running several related actions individually. There would be financial savings for pursuers, defenders and their insurers. Strict court control remains important to group procedures in Scotland and appropriate safeguards should be put in place for such actions.

Any other matters relating to the Bill, such as any financial impacts or whether there are other provisions which should be included

39. We are concerned that the Financial Memorandum to the Bill acknowledges that there is significant financial liability to public bodies and local authorities as a result of the Bill, however the memorandum is unable to quantify the likely cost. It is not clear why no actuarial projections or other research has been commissioned to consider the impact of this Bill. Further investigation should be carried out by the Government to model different rates of potential costs to public bodies and local authorities to ensure they are able to meet the financial obligations of the Bill whilst continuing to provide the vital services they currently do.

40. As stated above, the lack of regulations for CMCs in Scotland is a concern. We are also aware of some solicitors firms establishing their own CMCs to avoid the prohibition on contingency fees. There should be further regulation of this industry as a whole and certainly statutory controls should apply to anyone offering a damages based agreement. Non-compliance or breach of any of the provisions of the agreement should render the agreement void. There should also be potential financial sanctions for non-compliance.

41. In a report published by the Citizens Advice Bureau⁴ they stated in relation to CMCs that there “is considerable evidence of unscrupulous firms who cause significant additional consumer detriment by making nuisance calls, providing a poor service and even leaving clients out of pocket, over and above the loss of compensation through paying commission on the settlement.”

42. This Bill incentivises CMCs and pursuer lawyers to bring claims whilst facing limited or no sanctions and where safeguards in relation to QOCS are unclear. CMCs are unregulated in Scotland. On April 25 the Scottish Government announced an independent Review of the Regulation of Legal Services in Scotland to be chaired by Esther Robertson. We understand this review will consider the regulation of CMCs, however it is not due to report its recommendations until summer 2018 and we do not expect subsequent legislation to be laid before the Scottish Parliament until 2019/20. CMCs have been regulated in England and Wales by the Ministry of Justice since 2007 and this responsibility will be transferred to the Financial Conduct Authority

⁴ https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/citizens-advice-the-cost-of-redress.pdf

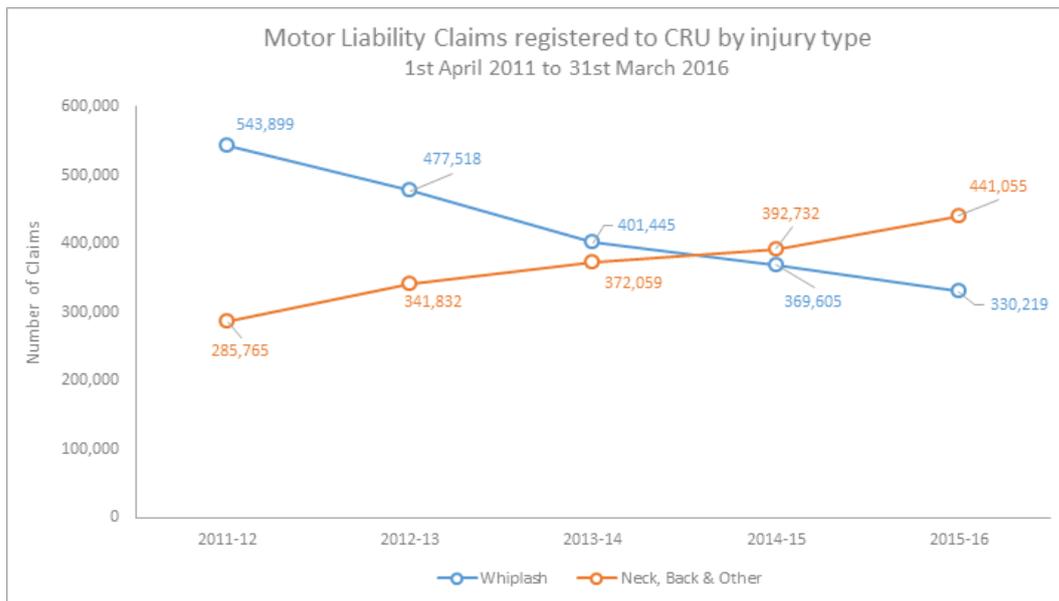
under the Financial Guidance and Courts Bill currently before the UK Parliament. This means the existing regulatory loophole for CMCs in Scotland is likely to be extended until 2020 which means we can expect more CMCs to move their operations to Scotland to exploit this absence of regulation. Any system in which one party to an arrangement is regulated and another is unregulated will always create perverse incentives. CMCs are a major factor in the increase of PI claims since 2011 and we anticipate this Bill as drafted will lead to a substantial rise in CMC activity in Scotland, more nuisance calls, and an increase in the number of PI claims raised and initiated in the Scottish courts.

Association of British Insurers
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The experience from another jurisdiction

43. One reason for the contrast in PI claims between Scotland and England and Wales is reforms which were implemented in the latter jurisdiction which removed the majority of money damages claims from the scope of civil legal aid. Legal aid was replaced in England and Wales by an insurance-based funding scheme, with the use of Conditional Fee Agreements (CFAs) underpinned by After the Event (ATE) insurance. The rationale for this change was to increase access to justice for all individuals.
44. It should be noted that although the objective to increase access to justice was broadly achieved in England and Wales, there were undesirable consequences; namely a rise in the number of spurious claims coupled with increasingly disproportionate legal costs. These undesirable consequences were in part addressed through the implementation of the civil provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the introduction of fixed recoverable costs for the majority of personal injury claims below £25,000. These reforms were implemented following a review of civil litigation costs by Lord Justice Jackson.
45. However, the LASPO reforms were not entirely effective, and there is an opportunity to learn from that experience to improve the reform of civil litigation in Scotland and indeed create a better civil justice system than that which exists in England & Wales. The LASPO reforms lead to a significant initial increase in road traffic accident (RTA) claims. Although these reforms did tackle the cost of individual claims, it did not have a discernible impact on claims frequency. The total number of claims submitted to the Compensation Recovery Unit (CRU) in 2015/16 decreased by only 0.3% from the immediate post-LASPO period of 2013/14, and in fact increased by 1.2% from the previous year. The number of car accidents has reduced, vehicle and road safety has improved, while the volume of soft tissue injury claims remains static which makes no logical sense. In addition the number of claims registered with the CRU labelled as “whiplash” has decreased in recent years, but has been coupled with a corresponding sharp increase in the number of soft tissue injury claims for neck and back injuries, as evidenced by the graph below.

Motor accident claims by injury type registered to the Compensation Recovery Unit (CRU)



46. In addition to the LASPO Act, recent further reforms to the Civil Justice system in England and Wales have been announced which include increasing the Small Claims Track limit for road traffic claims to £5,000 and all other personal injury claims to £2,000 as well as implementing a fixed tariff capping whiplash compensation payments. The UK Government estimates that these reforms will lead to savings of approximately £1 billion, which will be passed on to consumers in the form of lower motor insurance premiums.

47. The LASPO and other reforms in England and Wales included the banning of referral fees which are paid by solicitors to CMCs and other agents in return for personal injury claims data. This ban has made England and Wales a less commercially viable jurisdiction and conversely Scotland has become a more attractive jurisdiction for CMCs to operate in with defenders seeing an increase in the numbers. CMCs are not law firms but often operate by calling, texting or writing to potential pursuers to solicit personal injury claims (in some cases speculatively and without knowing if a potential pursuer has even been involved in an accident) which they then refer to solicitors or pursue themselves. Analysis from Which?⁵ and Trading Standards Scotland shows nuisance calls are a greater problem in Scotland than any other part of the UK and that insurance including personal injury claims is the second largest category of nuisance calls.

⁵ https://campaigns.which.co.uk/nuisance-calls-scotland/#_scottish-cities-top-table-nuisance-calls