

Justice Committee

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

Supplementary written submission from the Association of British Travel Agents (ABTA)

1. This submission provides further detail and clarity relating to ABTA's position on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, following the evidence session at the Committee's meeting on 26 September 2017.
2. The Committee will be familiar with the problems facing the travel industry, which were outlined in some detail within our earlier written submission. Since the introduction of civil justice reforms in England and Wales in 2012/13, the travel industry has seen an increase in claims volumes, on average, of more than 500%. Some individual companies have experienced significantly higher increases.
3. In order to illustrate these figures in more detail for the Committee, total claims volumes across the industry in 2013 were over 6,000. By 2016, they had reached over 41,000. Were this pattern to be repeated in Scotland, and taking account of lower per-capita personal injury claims submitted than in England and Wales, we would estimate that up to 4,000 claims a year could be brought within the jurisdiction. Looking at the financial memorandum produced by the Scottish Government (page 3), this would equate to a growth of around a third in the total of "other" category personal injury claims in Scotland.
4. An important factor that has led to the targeting of the travel industry is the exclusion of the sector from the relevant pre-action protocol in England and Wales, which has created a stark choice for travel companies between settling claims outside of court – without the benefit of a fixed recoverable costs regime, or litigation. We are concerned that the relevant pre-action protocol in Scotland appears to exclude holiday sickness claims, owing to a blanket exclusion of disease claims (disease being defined as any illness, physical or psychological; and any disorder, ailment, affliction, complaint, malady or derangement, other than a physical or psychological injury solely caused by an accident or other similar single event), and will be seeking urgent review of the relevant Scottish Statutory Instrument (2016 No. 215).
5. It is also important to reiterate that travel claims do not typically fit with Sheriff Principal Taylor's assumption that an insurer will be the defender in the majority of personal injury claims, and we do not recognise or accept the "David versus Goliath" narrative of his report. The vast majority of travel claims are not insurance backed, as larger tour operators often have significant deductible values (excesses) within their insurance policies. As such, low-value personal injury claims will fall within these, and the operator will self-defend for the majority of cases. Further, ABTA is concerned that an increase in spurious claims has increased pressure on liability insurance premiums, and excess levels, for small and medium-sized enterprise (SME) businesses operating within the travel industry.

Improving the Bill

6. ABTA is supportive of the general principles of the Bill, in terms of extending access to justice. We have supported many of the provisions within the Bill for this reason, but we believe there are a number of ways the Bill could be usefully improved.

Providing balance within Qualified One-Way Costs Shifting

7. ABTA draws attention to paragraph 59 of the financial memorandum, which accepts that the Bill, as drafted, will incentivise settlement of some cases even where there may be no merit to a case. ABTA does not regard this as the basis for good policymaking.
8. ABTA believes amendments could usefully be made in relation to section 8(4)(a) of the Bill. We believe this could usefully be amended to make clearer reference to fraudulent representation in connection to factors material to the case or similar, and to reference any activity that seeks to increase the value of the award. We note the Law Society of Scotland made similar points during oral evidence.

Increasing transparency

9. ABTA believes it is vital to ensure sufficient transparency within the civil justice regime to enable enforcement against those who seek to undermine the integrity of the system. In this regard, we would note that several recommendations and points made by Sheriff Principal Taylor have been omitted from the Bill, or left to other legislation, which could be usefully incorporated. In particular, there is an urgent need to regulate the activities of claims management companies (CMCs) within Scotland. We welcome indications from the Minister that the Financial Guidance and Claims Bill, being considered in Westminster, could provide for regulation of CMCs in Scotland, at least on an interim basis before specific regulation is adopted in Scotland.
10. ABTA believes Sheriff Principal Taylor was incorrect to assert there is no need to ban referral fees in Scotland. Such fees were banned in England and Wales with the previous reforms, as the ban was recognised as a vital part of enhancing transparency in the relationship between CMCs and legal firms. We urge the committee to consider calling for a ban on referral fees within the Bill.
11. ABTA would also support enhanced conduct rules for solicitors in relation to the taking on claims that have been initiated by unsolicited calls (known as cold-calling or nuisance calls). Whilst we accept the Bill might not be the most suitable place for such rules, we believe the Law Society Scotland should be asked to bring these forward without delay, on similar timescales to the Bill.

Enhancing access to justice

12. ABTA supports the introduction of a provision obliging solicitors offering damages based agreements (DBAs) to inform consumers of the availability of any low-cost, or no-cost, alternative dispute resolution available to them as an alternative to litigation (or pre-litigation). For example, ABTA operates a voluntary free

conciliation scheme for consumers that suffer personal injury on holiday with an ABTA Member, and the consumer will retain 100% of any award made. We believe that consumers should be fully informed of their choices, and would highlight the Carol Brady Review, undertaken in 2016, which recommended such a provision for CMCs in England and Wales. ABTA sees no reason why such a provision could not be usefully adopted in Scotland, to enhance access to justice, or why this should apply equally to any organisation offering legal services.

13. Whilst ABTA supports the general principles of the Bill, we are concerned that should the provisions within the Bill be implemented as they currently are, Scotland would see a significant rise in the claims volumes, as we have seen in England and Wales. Such an outcome would not only be problematic for the civil justice regime, but also risks serious consumer detriment as experience in England and Wales has shown consumers can easily be enticed into making exaggerated or fraudulent claims, risking prosecution in the UK and overseas.

Luke Petherbridge
Senior Public Affairs Manager
ABTA
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