

Justice Committee

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

Supplementary written submission from the Association of British Insurers

1. Further to my attendance in front of the Justice Committee on 26 September 2017 to give evidence on behalf of the Association of British Insurers, I set out below some further detail on points raised:

Research

2. In relation to the Committee's request for further detail on the research I referred to in my submission, that suggests that clients do not shop around for success fee agreements, I believe this was in reference to the ABI's written submission and research by *Yarrow and Abrams "Nothing to Lose?"*, a report published in 2000 by the Nuffield Foundation and Westminster University. This research found that in a survey of solicitors' personal injury clients, the clients' understanding of CFAs was limited; they rarely shopped around and were unaware that success fees could vary between firms. This research related to conditional fee agreements as opposed to damages based agreements. The ABI has previously sought a copy of the research from Lord Justice Jackson's office but unfortunately it could not be located, though we shall continue to attempt to secure it. It is referred to by Lord Justice Jackson in his review of civil litigation costs, where he highlights the finding that claimants do not shop around. Lord Justice Jackson's review can be located using the following link:
<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>

Insurance premiums in Scotland

3. In response to the Committee's questions at the end of the session on insurance premiums: The UK insurance market sells insurance products on a UK-wide basis. Underwriters at individual insurance companies each take a range of different factors into account when assessing risk in each situation, and calculating the appropriate premium. For example, common factors underwriters will take into account will include where the potential customer lives and the accident rate in that location. Other factors underwriters may take into account might include the different laws and regulations in different parts of the UK, where those laws and regulations have an impact on damages and costs in a particular location.
4. The historic motor premium tracker data collected by the ABI is not broken down between England, Wales, Northern Ireland and Scotland, therefore I cannot provide an analysis of the cost of premiums in Scotland against other parts of the UK. Whilst there may be fewer claims for damages in Scotland compared to England it must be noted that the costs of litigated claims in Scotland are considerably higher than they are in England and Wales. For example if you consider a road traffic claim settlement in which damages of £10,000 are awarded in both jurisdictions; in England, the recoverable costs for a solicitor,

excluding any disbursements, are fixed at £500, whereas in Scotland the figure would be in excess of £2,000.

5. In addition, damages in Scotland are typically higher than the equivalent level paid in England and Wales. When giving evidence before the Committee I referred to a case of *Grubb v Finlay*¹ as an example of the material increase in the value of claims in Scotland. In this particular case the pursuer was awarded a figure of £6,000 (excluding interest) for suffering pain for a period of 12 months following a collision. By comparison the most recent Judicial College Guidelines in England and Wales advise settlement for neck symptoms lasting between 3 and 12 months at between £1,950 - £3,470.
6. Specifically in response to your question about whether consumers in Scotland have benefitted from reduced premiums compared to English consumers as a result of the environment in Scotland being less conducive to spurious claims than in England: at the ABI data is collected on known frauds and suspected fraudulent and exaggerated claims. This data is not collected in such detail that it is split between England, Wales, Northern Ireland and Scotland. I am not aware of whether insurers would make the assumption that there is significantly less fraud or fewer spurious claims in Scotland.

The role of CMCs in personal injury claims

7. There is however evidence obtained by the Institute and Faculty of Actuaries' that shows that the density of third party damage motor insurance claims correspond with the density of claims management companies (CMCs)². My concern is that where financial incentives are increased, as is likely to be the case with the introduction of the Civil Litigation Bill in Scotland, the volume of CMCs will increase, which will in turn lead to an increased volume of litigation in Scotland. As set out in the ABI's written submission the volume of litigation has already increased in Scotland by 16.6% from 2011 to 2016. I am particularly concerned that these reforms will come at a time when there is a lack of regulation of CMCs in Scotland. Consumers should be protected from potential poor service and nuisance calls and texts.
8. During the Committee session it was suggested that the Bill and the Review of the Regulation of Legal Services are running parallel therefore it is not vital that CMC regulation is included in the Bill. However this Bill, if passed, could be expected to be implemented in 2018/19. The Review of the Regulation of Legal Services is not scheduled to report to Scottish Ministers until Summer 2018. The Scottish Civil Courts Review by Lord Gill published its recommendations in October 2009 and the then Justice Secretary Kenny MacAskill did not respond to it until November 2010. Scottish Ministers consulted on the recommendations made by Lord Gill in 2013, and brought forward the Courts reform Bill in 2014 which was passed in 2015. Sheriff Principal Taylor's Review of the Costs and Expense of Civil Justice was published in 2013, Scottish Ministers consulted on

¹ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a42434a7-8980-69d2-b500-ff0000d74aa7>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf - pages 26 and 27

its recommendations in 2015 and the Civil Litigation Bill was published in 2017. This suggests that if the Review of the Regulation of Legal Services reports on time in summer 2018 we may not see a response from Scottish Ministers until 2019, we may not see a consultation until 2020, and we may have to wait until after the Scottish Parliament election of 2021 for legislation. Throughout that period CMCs will be able to continue operation without regulation in Scotland while their activities will be regulated in England and Wales, providing a higher level of protection for consumers in England to those consumers in Scotland. I do not consider this to be an adequate situation.

9. It was also suggested during the evidence session that the business model of insurance companies is not in any way dissimilar to CMCs. I would like to reiterate my sentiments of the day and add the fact that the insurance business model is one which is regulated by the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) to a very high level with recourse to the Financial Ombudsman Service. Insurance companies provide risk management and protection products for people and organisations to draw upon when they suffer injuries or losses. Insurance companies are responsible, sustainable, long term businesses which in some cases have traded for decades and centuries. In contrast CMCs are often short-term businesses designed to make large sums of money for their owners in a period of months before they are shut down and phoenix companies are created by the same company directors to carry on trading with the same assets including people's personal data. CMCs operate in an unregulated space in Scotland and are one of the main sources of nuisance calls. In 2014/15 nearly a quarter (23%) of all CMCs in England and Wales faced some sort of regulatory intervention from the Claims Management Regulator³. The Insurance Fraud Bureau also reported that as of November 2015 it had 56 CMCs under investigation as part of staged motor accident scams making up approximately 50% of their overall caseload⁴.

Fraudulent misrepresentation

10. In terms of measures to improve the Bill at section 8(4), I disagree that fraudulent representation by pursuers should be restricted to "material fraud" and exclude other fraudulent elements of a claim and attempts to exaggerate the value of a claim, something which I note the Fire Brigades Union appears to consider acceptable in its written evidence submission. Fraudulent behaviour is fraudulent behaviour and if the pursuer is at fault they should lose the protection of qualified one way costs shifting (QOCS). Pursuers should not benefit or be protected if any element of fraud exists in their claim.

Bill improvements

11. In terms of other ways in which the Bill could be improved, I would recommend a referral to the Scottish Civil Justice Committee for consideration of the current limit applying to the Personal Injury Pre-Action Protocol being increased to £100,000 in line with the limit for claims raised in the All Scotland Personal Injury

³ <https://www.abi.org.uk/news/news-articles/2015/11/clampdown-on-the-compensation-cowboys/>

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf - page 26

Court. I would also propose a tariff of fixed fees is set to cap the legal costs incurred by pursuers solicitors and CMCs, and that the protection of QOCS should be lost if the pursuer fails to beat a tender. I consider that the issue of tenders should be included in the Bill and not be left as a matter to be dealt with by the Courts.

12. I remain concerned that the introduction of QOCS in Scotland could lead to an increased volume of unmeritorious claims. I attach details of a case of *Steven Paterson v Highland Council & Others*;⁵ I had hoped that this case would act as a deterrent to pursuers with meritless claims in terms of the potential grave financial repercussions they could face. However, the introduction of QOCS would mean that in cases such as this, financial concerns on the part of pursuers are lost.

Local authority insurance provisions

13. By way of clarification, during the evidence session I referred to the risk that local authorities would not have the public funds available to meet their financial obligations, should the volume of personal injury claims significantly increase in Scotland. This is a result of the fact that local authorities often have high deductibles before their insurance provisions take effect, meaning that most personal injury claims will be settled by way of the local authorities own funds. It is usual for local authorities only to purchase insurance that covers them for high value claims.

Clarification of evidence provided

14. Following a question about the profits made by insurance companies, I told Members that “I think that I am correct in saying that, in the UK motor insurance market in the past 25 years, two companies have made underwriting profits on their motor books in individual years. Only two companies have done that in 25 years”.⁶
15. Having checked the information available, I would clarify that since 1994 the entire UK motor insurance business has only made a profit in two of 22 years (1994-2016). In 2010 the UK motor insurance industry had net claims incurred of £10.4bn, resulting in a Combined Operating Ratio (COR) of 113% and an underwriting loss of £1.8bn. This loss is unsustainable if the industry is to survive. In 2015, the UK motor insurance industry had net claims incurred of £7.8bn. This was partly due to a drop in premiums and resulted in a COR of 100% and the industry breaking even. The £2.6bn reduction in in claims is not a windfall for insurers. The drop has allowed motor insurers to continue trading and providing cover in a sustainable environment.

Calum McPhail
Association of British Insurers
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⁵ <http://newsandviews.zurich.co.uk/news/court-success-highland-council-successfully-recover-228000-fault-motorist/>

⁶ Justice Committee, [Official Report 26 September 2017](#), col. 40.