Justice Committee

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

Supplementary written submission from the Association of Personal Injury Lawyers

The need for reform

1. Sheriff Principal Taylor identified a need to change the way civil litigation is funded based on the vulnerability of injured people and the 'asymmetric relationship' between pursuers and defenders. That need has not changed since he published his report in 2011. He also identified the fact that the true cost of litigation is generally not recovered by pursuers' solicitors, and his proposal to introduce damages based agreements (DBAs) helps to address that.

2. The Committee has heard that since the report was published, there has been an increase in claims registered with the Department for Work and Pensions' Compensation Recovery Unit (CRU). While there is no doubt that this is the case, the statistics which are relevant to this discussion are those which show the number of cases actually raised in the courts. Civil justice statistics (reproduced in the table below) show that the number of cases initiated in the courts since publication of Taylor's report has fluctuated from year to year. In fact, there were fewer cases initiated in 2015/16 (at 8,766) than in 2010/2011 (9,099)[1].

Cases	Case type	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	% change since 2014-15	% change since 2008-09
Initiated	Road traffic accident	3,441	4,635	5,790	4,613	5,106	4,770	5,143	4,897	-5	42
	Accident at work	1,921	1,844	1,802	1,750	1,758	1,797	1,817	1,721	-5	-10
	Clinical negligence	173	189	207	222	203	262	629	388	-38	124
	Asbestos	242	541	345	294	436	320	458	300	-34	24
	Other	1,211	2,557	955	931	1,190	1,138	1,163	1,460	26	21
	Total initiated	**6,988**	**9,766**	**9,099**	**7,810**	**8,693**	**8,287**	**9,210**	**8,766**	**-5**	**25**

3. By contrast, cases registered with the CRU can be disposed of without reaching the courts, either by settlement between the parties, or by offers of compensation made direct to pursuers by insurers.

Claims which do not proceed

4. The Committee requested information about people who are unable to bring claims. Workplace injuries provide a very good example. The Health and Safety Executive (HSE) publishes regular statistics about accidents at work, but has long acknowledged that there has been a history of under-reporting, and that a more accurate reflection of the actual number of workplace accidents is to be found in reports from the Labour Force Survey (LFS).

[1] Civil Justice Statistics in Scotland 2015-2016, table 13

5. The HSE figures for 2015-16[2], for example, report 4,841 workplace accidents involving a seven day absence, or longer.

6. LFS figures for the same period[3] show that the estimated number of accidents in the workplace which led to an injury, was around 51,000 in Scotland. Of these, around 19,000 led to a three-day absence from work (or more) and 16,000 led to an absence of seven days or more.

7. The CRU figures for the same period show that 4,252 claims relating to accidents at work were registered[4].

8. The civil judicial statistics for the same period confirm that 1,721 court actions were raised in relation to accidents at work.

9. This clearly demonstrates that the number of cases litigated was around nine per cent of the total number of accidents estimated to have taken place in the workplace in Scotland, which led to the injured person needing to take three or more days off work.

Damages for future loss

10. We agree with Sheriff Principal Taylor that to exempt damages for future loss from success fees could generate a risk that cases will be delayed so that more of the value of the case will be attributable to the past rather than the future.

11. In addition, we know from the experience of colleagues in England and Wales that ring-fencing future loss in this way 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. Indeed, the inability to allow a deduction from future losses is one of the main reasons why there has been little take-up of DBAs in England and Wales. It should be remembered that the work which needs to be done to bring a high value case with an 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.

12. 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.

13. The case of Robshaw v United Lincolnshire Trust[5], a case decided by the High Court in 2015, offers an example of the issues involved. This was a clinical negligence case involving a 12 year-old boy, and damages were to be assessed partly on a lump sum basis. The case took 11 days, taken up mainly with arguments about life expectancy (particularly the relevance to the UK of the US Strauss research on life expectancy to the UK) and the levels and intensity of

[2] http://www.hse.gov.uk/statistics/regions/tables.htm
[3] ibid
[4] FoI response to APIL
[5] *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB).

care to be provided. This was a long and extremely complex case, resulting in a judgment of 114 pages.

14. These same issues are faced in Scotland. In addition, litigation will always proceed against a background of a judicial tender for a lower amount than the damages which are being claimed. If the case proceeds and the pursuer fails to beat the tender, no costs will be paid for work conducted from the date the tender was made. So, the pursuer's solicitor has to work in an environment which generates huge issues of complexity and a great deal of work, coupled with the prospect of being paid a sum which is less than economically viable if damages for future losses are ring-fenced from success fees.

15. We believe the Bill and the review on which it is based should be viewed as a package. The protection offered by ring-fencing periodical payments and capping the success fee in cases valued at more than £500,000 to just 2.5 per cent are valuable safeguards for people with catastrophic injuries, and will offset the very serious risk that meritorious cases will not be pursued.

16. 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.

Potential increase in claims numbers

17. Concerns have been raised that the legislation could increase the number of claims. There may well be a slight increase in the level of genuine claims, but this will simply mean that people will have access to the courts which they do not have at present, thereby addressing an imbalance in the system. This is the whole purpose of the Bill and the review on which it is based.

18. The argument that all risk is removed from pursuers is both weak and inaccurate, as a pursuer is still at risk of losing his own outlays, including court fees.

19. Furthermore, pre-action protocols, which are now compulsory in cases up to the value of £25,000, 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.

20. Five years ago the summary decree procedure was extended under the ordinary cause rules to allow defenders to apply to have a case dismissed on the basis that the pursuer has no prospect of success. This was a recommendation of the Taylor review and it enables defenders to challenge at an early stage those cases which appear to be without merit. In particular, a pursuer could be obliged to produce affidavits, medical or other expert reports or written supportive evidence at an early procedural hearing.

21. Unmeritorious cases could be weeded out at that stage and cases disposed of in this way would also lose the QOCS protection, which would be a considerable disincentive to frivolous behaviour.

The value of QOCS

22. The current position is that unlike in England and Wales, where QOCS is available, unsuccessful pursuers in high value cases risk ruin and bankruptcy. That is what creates the fear factor which permeates litigation and leads to a culture of under settlement in this jurisdiction.

23. The proposed legislation addresses this partly by limiting defenders' expenses to 75 per cent of damages recovered. The use of fraud to remove QOCS protection from a pursuer also provides protection to defenders and their insurers. Our concern is that a lack of precision in the language of the Bill in relation to exemptions for fraud may undermine the very purpose of QOCS. We are concerned, in particular, about the absence of any definition of 'fraudulent misrepresentation'.

24. In our original response to the committee's call for evidence, we recommended a definition of "fraudulent misrepresentation" as follows: "A fraudulent representation is one that is made deliberately or recklessly in connection with the proceedings and with a view to significantly affecting their outcome."[6]

25. It would be a mistake to rely on the English test of 'fundamental dishonesty', which has already produced considerable satellite litigation, and it is clear this trend will continue. An article from barrister Patrick West (*"Fundamental dishonesty: blind men and elephants?*") illustrates the difficulties experienced in England and Wales. It is a situation we should seek to avoid if at all possible.

26. The requirement for the claimant to act "reasonably" is a vague concept which is very much open to individual interpretation. There will be a whole range of decisions taken by a pursuer which, with the benefit of hindsight, could be deemed to be unwise or unreasonable. That is not the test which the Taylor review suggested. A wording which might meet the recommendation of the review is: "behaves in a manner in which no party in civil proceedings acting reasonably might behave."

Association of Personal Injury Lawyers
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[6] http://www.apil.org.uk/files/parliamentary-room/JusticecommitteeevidenceCivilLitigationBill.pdf, page 4