

Justice Committee
Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Written submission from Brodies LLP

Introduction

1. Brodies LLP is Scotland's largest law firm, delivering legal services of the highest quality to Scottish, UK and global organisations. With offices in Edinburgh, Glasgow, Aberdeen and Brussels, the firm offers legal advice to private and public sector clients both in the UK and internationally.
2. Brodies LLP has the largest dispute resolution and litigation team in Scotland, with more specialists who are named as leading practitioners in the independent legal directories than any other law firm. Our practice benefits from a national and international reach, whilst retaining local expertise and knowledge across Scotland's major cities. We offer legal advice to private and public sector clients in every sector of the Scottish economy.

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

3. We support the broad policy aims of the Bill although some aspects of the Bill do cause us concern. We have outlined those concerns below but wish to highlight at the outset that the proposed introduction of qualified one way cost shifting (QOCS) for personal injury claims is a major change to the current system and one that could, in our view, have a detrimental effect on the overall aims of the Bill. If introduced as currently proposed by the Bill, we consider that QOCS would introduce inequity to the current system.

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**
4. We agree that, in principle, success fee agreements including damages based agreements (DBA) can be useful in increasing access to justice. The Bill provides Scottish Ministers with the power to cap success fees at a proportion of the damages recovered. We consider that such caps are essential.
5. Monitoring will be required following commencement to ensure that the caps have been set at the appropriate level.

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

6. As indicated above we consider that the provisions allowing solicitors to enter into and enforce damages based agreements must be accompanied by a cap at an appropriate level.

Future losses

7. The Bill contains provisions in relation to the calculation of success fees in cases where sums are paid in respect of future losses in personal injury claims.
8. Our view is that damages for future losses in these cases should be ring-fenced so that they are excluded entirely when calculating the sum payable by the client under the DBA. There should be no DBA deduction from damages payable to a pursuer in respect of future losses.
9. Excluding future losses will also avoid the need for the very complex safeguarding mechanism set out in s.6 (5) and (6) of the Bill. That mechanism relates solely to calculation of the sum due under the DBA. It will involve time-consuming and expensive consideration by the court or an independent actuary (depending on circumstances) purely in order to determine whether or not it is appropriate for a deduction to be made from damages.
10. The difficulties inherent in the proposed safeguarding mechanism are exacerbated by the fact that, at present, the Scottish courts do not have the power to insist on the making of an award which takes the form of periodical instalments.

(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

11. Section 8 of the Bill applies where the person bringing the proceedings makes a claim for damages for personal injury or death of a person from personal injuries provided the person bringing the proceedings "*conducts the proceedings in an appropriate manner*".
12. The section generally prohibits the court from making any award of expenses against the person bringing such proceedings. An award of expenses can only be made in certain specified circumstances.
13. In our written response to the Taylor Review we expressed the view that the general rule that the losing party pays the successful party's reasonable costs incurred in conducting personal injury litigation should remain in place. We remain of that view.

14. On the assumption that the restriction on liability for expenses is to be introduced then our view is that it should be restricted to cases where the defender is either insured or is a public body. Brodies represents businesses that are not insured. They defend litigation at their own cost. If QOCS was applied to litigation involving those businesses, it would mean that those businesses would have to bear the costs of successfully defending a spurious or fraudulent claim. This increased cost would inevitably be passed onto consumers. QOCS will encourage more claims to be made which in turn will increase the financial burden on those businesses.
15. In Brodies experience most pursuers in personal injury actions have third party backing if their court action fails, either from an insurance policy covering their legal expenses, from their solicitors, or from another funder (e.g. a credit hire company). Those pursuers do not personally pay the defender's expenses if the pursuer's action fails. QOCS should not apply to such pursuers as there is no inequality between the parties.
16. The proposed change is a significant departure from the current system whereby expenses follow success. It is our view is that the removal of the risk of an adverse finding of expenses will almost inevitably lead to an increase in the volume of personal injury litigation commenced in Scotland.
17. Historically, disputes in the Scottish courts have not generated much "satellite litigation" in respect of expenses. The rules on expenses have been well understood and clear cut. More recently, particularly in personal injury actions, there has been a marked increase in disputes over awards of expenses. Arguments have tended to focus on modification on the grounds of unnecessary or premature litigation. The provisions contained in s.8 of the Bill will result a further increase in arguments over expenses particularly given that a successful defender who is denied an award of expenses against an opponent will have much to gain if they can establish that one of the exceptions set out in s.8(4) applies.
18. The threat of this kind of satellite litigation makes it even more important to define the s.8(4) exceptions as clearly as possible. That will also tend to promote one of the aims of the Bill – to make the costs of civil court action more predictable.

Fraud and abuse of process

19. We agree that a pursuer should lose the benefit of the restriction on liability for expenses where the claim has been presented fraudulently. However, "fraudulent representation" should be replaced with "fundamentally dishonest". That is the test that has been implemented successfully in England and Wales and being well established, it would avoid unnecessary satellite litigation regarding "fraudulent representation".
20. The phrase "in connection with the proceedings" used in s.8(4)(a) is potentially very wide. That may be the intention. In our view, it would be helpful to explicitly state whether a fraudulent representation made by a pursuer prior to the commencement of proceedings can be taken into account.

The standards reasonably expected of a party in civil proceedings

21. Section 8(4)(b) contains a more general exception which removes the restriction on liability for expenses where the court considers a pursuer has behaved in a manner which “falls below the standards reasonably expected of a party in civil proceedings.” This wording might benefit from more explicit definition with a view to clarifying the type/standard of behaviour expected of a pursuer.
22. It is not clear to us whether the behaviour must relate to the conduct of the civil proceedings as a whole or whether an isolated incident will result in the loss of the restriction on liability for expenses.
23. There does not appear to be provision for making findings of expenses against a pursuer in respect of part of proceedings – either a pursuer has the protection or he loses it for the entire action. At present, a pursuer may be punished by an award of expenses against him as a result of failures on the part of his agents. So, for example, a pursuer who obtains a discharge of a proof diet may be found liable in expenses even if the need for the discharge is a result of a failure on the part of his solicitor or counsel.
24. It would be helpful to clarify whether the behaviour and conduct referred to in s.8(4)(b) and (c) is the personal behaviour or conduct of the individual pursuer or whether a pursuer may also lose the protection as a result of steps taken by his legal advisors.

Tenders

25. Consideration should be given to how the protection against an award of expenses will interact with the current system of tendering which allows a defender to make an offer in settlement while providing them with protection against expenses.
26. We presume this is the kind of issue that may be dealt with in a subsequent Act of Sederunt by virtue of s.8(6) but it might be useful to hear evidence at this stage as to possible approaches which might be adopted.

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

27. We support this proposal.

(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

28. We agree that a party should be required to disclose details of third party funders and that the courts should have power to find third party funders liable in expenses.
29. The intention appears to be to allow the court to make commercial third party funders of civil litigation liable in expenses along with an unsuccessful funded

litigant. We agree with that approach but there is a danger that the current wording is unintentionally wide. We consider that the wording of this section needs to be re-considered to clarify its scope and its interplay with QOCS (where pursuers have third party funding) ought to be clarified. As mentioned above, QOCS should not apply where a pursuer has third party funding protection.

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

30. We support this proposal.

31. The aim appears to be to encourage the courts to exercise powers that already exist at common law. The implication is that the courts should be making findings of expenses against individual solicitors or advocates more frequently than is currently the case. We would hope that such findings will remain rare.

32. It may be appropriate to consider providing the court with power to make an award against firms/employers rather than merely against individuals.

(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

33. We have no difficulty with the proposals. We would however prefer to see a requirement for an auditor of court to give written reasons for the disallowance or abatement of entries in an account of expenses. That may be easier to achieve once auditors are able to make reference to publicly available guidance. The issuing (and wider publication) of written reasons would be of considerable assistance to parties and make the level of recoverable expenses easier to predict.

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

34. We agree with the introduction of group proceedings on an “opt-in” basis. We will welcome the opportunity to comment on detailed draft rules in due course. As the majority of personal injury actions are litigated in the Sheriff Personal Injury Court, the provision should be extended to the Sheriff Court and not restricted to the Court of Session.

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

Regulation of claims management companies

The introduction of DBAs in Scotland, combined with the proposed restriction on a pursuer’s liability for expenses in personal injury cases, is likely to encourage claims management companies (CMCs) to further develop and expand their businesses in Scotland. CMCs are now regulated in England and Wales and the changes

proposed in the present Bill should not be brought into force unless and until similar formal regulation of claims management companies is introduced in Scotland.

Brodies LLP
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