

Justice Committee

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

Supplementary written submission from the Forum of Insurance Lawyers

1. In our evidence on 26 September 2017, I indicated in answer to a question from Mairi Gougeon MSP that I would write to the Committee with further details on the steps taken in England and Wales to balance the effect of Qualified One-Way Cost Shifting (QOCS).
2. The measures taken in England and Wales were as follows:

Capping of costs in low value claims

3. Claimants' recoverable legal costs in lower value litigated cases (worth up to £25,000) were capped, so that they became more proportionate to the claim's value. The Justice Committee has already heard some evidence on the substantial differential in costs between England and Scotland from Calum McPhail on 26 September. Setting costs at a fixed level means they are more predictable, transparent and proportionate. That step reduced the incentives to generate fraudulent claims, while continuing to protect the genuine claimant, who still had the benefit of QOCS. With a cap on DBAs the claimant is also protected from being charged excessive fees by his solicitor. Sheriff Principal Taylor appears to have accepted that costs in lower value cases are currently disproportionate (see Chapter 4, para 64 of his report) and recommended fixing costs in low value cases, although not for personal injury actions. Since the Taylor Report was produced, there has been an increase in personal injury claims in Scotland, and the compulsory pre-action protocol has come into effect. In the light of those developments, the Committee may wish to consider whether excluding lower-value personal injury cases from a fixed costs regime remains appropriate, especially when many claimants have financial backing from a claims management company or a solicitors' firm.

Ban on referral fees

4. Referral fees were banned in England and Wales, in order to reduce the incentives to generate and sell claims. Again this did not affect claimants who still had QOCS protection, but it disrupted the business model of the less reputable claims management companies. While any ban can be circumvented to some extent, the result has been that claimant solicitors have created new business models and have developed new marketing strategies (according to a 2016 report prepared by ICF for the Solicitors Regulation Authority in England: <https://www.sra.org.uk/sra/how-we-work/reports/pi-report.page>)

Regulation of Claims Management Companies

5. Claims management companies are regulated in England and Wales and subject to audit, inspection, and a code of conduct. A number have now been closed down by the regulator. His annual reports set out the steps he has taken in this regard:

Fundamental dishonesty leads to dismissal of the claim

6. A claimant who is found to have been "fundamentally dishonest" will not simply lose QOCS protection, but will have his or her claim dismissed its entirety (section 57 of the Criminal Justice and Courts Act 2015). In very few cases has fundamental dishonesty been established, but this measure acts as a further disincentive to act fraudulently, while continuing to protect the genuine claimant.

Failure to beat a tender

7. A claimant in England who fails to beat a Part 36 Offer (a formal sealed offer made by the defender, known in Scotland as a tender), is not entitled to QOCS protection up to the value of their damages (Rule 36.17 of the English Civil Procedure Rules). The defender can therefore recover costs up to the full value of the claimant's damages on the basis that the claimant has prolonged the litigation unnecessarily. It was fundamental to the Taylor Report that a similar provision (but limited to 75% of the pursuer's damages) be brought into effect in Scotland (Recommendation 50) but no such provision is made in the Bill. It may be that the Scottish Government intends that the Scottish Civil Justice Council should consider this matter, but as this was a recommendation in the Taylor Report upon which the recommendation to implement QOCS was predicated, we would expect to see it in the Bill, especially when any decision on this matter by the Scottish Civil Justice Council is presently unknown. A similar point was made in evidence by the Law Society of Scotland on 26 September.

Failure to beat a pre-litigation offer

8. A claimant in England who fails to beat an offer made under the pre-litigation Protocol will also lose QOCS protection up to the value of their damages (Rule 36.21 of the English Civil Procedure Rules). This has the effect of discouraging unnecessary litigation so that court resources, and the parties' resources, can be focused on claims which genuinely cannot be settled. At present, the Compulsory Protocol in Scotland states that where a party has unreasonably failed to accept a settlement offer made pre-litigation, then the Sheriff "*may*" make an award of expenses against that party. The rule in England is that the claimant "*will be liable*" for the defendant's costs. The Scottish rule is discretionary whereas the rule in England is mandatory. A clear rule such as that in place in England has obvious benefits in terms of clarity and predictability.

Incidental awards of expenses/costs

9. A court's power to impose incidental awards of costs against either party acts as a discipline on parties to comply fully and timeously with court rules and timetables. This is especially the case where a party's conduct is not so bad that it reaches the high test of *Wednesbury* unreasonableness, or abuse of process. The conduct may be something incidental such as late lodging of documents, a requirement to postpone a court hearing, late amendment of

pleadings, etc. There is no provision for incidental awards of costs in the Bill. In England, Rule 45 of the Civil Procedure Rules provides that incidental awards made against a claimant can be offset against a claimant's damages. That acts as an incentive to adhere to the court's timetables and rules, and ensures that QOCS protection does not act as a carte blanche and inadvertently lead to inefficient use of court resources.

Other court rules

10. In England the claimant is required to sign a "Statement of Truth" to confirm that the content of his statement of claim is true and accurate. The defendant is entitled to ask what are known as "Part 18 questions" directly of the claimant and which the claimant is required to respond to, again with a signed Statement of Truth. Part 18 questions can be designed to identify whether the claim was generated by a claims management company, or is genuine. That has the benefit of allowing genuine claims to be identified at an early stage.

Professional rules

11. Chapter 9 of the SRA's Code of Conduct for English solicitors prohibits the payment of a referral fee for introduction of a personal injury claim. The Justice Committee has heard some evidence about Sheriff Principal Taylor's recommendation that the Law Society of Scotland should make it a ground of professional misconduct for a solicitor knowingly to accept referrals from a claims management company which obtains clients by means of cold calling (recommendation 75 in the Taylor Report). It does not seem that that recommendation has yet been considered by the Law Society of Scotland, however. That being so the Scottish consumer is at a disadvantage compared to the consumer south of the border.

12. It is FOIL's position that the above safeguards retain the protections QOCS confers on a genuine claimant, while providing sufficient balance to ensure that there is a lower incentive to generate, buy and sell claims; better protection for the public; and a stronger incentive to act efficiently and appropriately within the court process.

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