

Justice Committee

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

Written submission from the Glasgow Bar Association

1. The Glasgow Bar Association is an independent body that for over half a century has been active in promoting, representing and protecting the rights and interests of its members in the practice of law and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society. It advocates on behalf of access to justice. It considers and monitors proposals for law reform and, if necessary, formulates responses to such proposals. In addition the Association operates an extensive professional development Programme for members.
2. The Bill comprises 5 parts. Parts 1 and 2 will directly affect our members. Parts 3 and 4 will not generally do so because they deal with, respectively, Auditors of Court and Court of Session Group Proceedings. Accordingly, this response does not refer to them. Part 5 is administrative.

Part 1: Success fee agreements (sections 1 – 7)

3. Section 1 defines a "success fee agreement" as one in which, broadly speaking, a client pays a sum to his or her lawyer if the client obtains a financial benefit in relation to a litigation (or one which is in contemplation) or pays nothing, or an amount lower than the success fee, if no such benefit is obtained.
4. Section 2 states that such an agreement is not unenforceable by reason only that it is a *pactum de quota litis* (ie an agreement for a share of a litigation).
5. Section 3 says that where there is a success fee agreement then, unless the agreement states otherwise, where a successful party obtains expenses the lawyer is entitled to recover and retain them. This does not affect the amount of the success fee payable. Section 3(3) provides that this is subject to Section 17(2A) of the Legal Aid (Scotland) Act 1986, which deals with the payment, in the first instance, to the Scottish Legal Aid Board (SLAB) of the expenses recovered.
6. Section 4 allows the Scottish Ministers to cap success fees.
7. Section 5 excludes family proceedings or other types of action which the Scottish Ministers can specify by regulation.
8. Section 6 regulates personal injury claims specifically. It states that the agreement must say that the client is not liable to make any payment to the lawyer (including outlays) except the success fee. The section also deals with how damages for future awards are to be covered.
9. Section 7 requires that a success fee agreement must be written and must say how the success fee is to be determined. The Scottish Ministers may make regulations about such agreements.

Comments

10. In the absence of secondary legislation, as envisaged by sections 4, 5 and 7, the position is incomplete.
11. At common law a “success fee agreement” is a *pactum de quota litis* and is unenforceable. Section 2 changes the law, as long as the agreement complies with the terms of the Bill and associated regulations.
12. Section 3 contemplates a situation where a litigant is both in receipt of legal aid and a party to a success fee agreement. This seems odd. We would expect that a litigant would be proceeding under one or other of these funding arrangements. Under the legal aid legislation the whole expenses sum recovered by a successful assisted person must be paid in the first instance to SLAB. This is so that the Board can be re-imbursed the sums for which it is liable. But if a success fee agreement is in place it we would expect that the Board would have no involvement, or liability.
13. Section 6 is less than clear in explaining what is meant by “outlays incurred in providing the [legal] services”. Does this include court dues, expert report fees etc? If so, it will have the effect that the lawyer will be left paying these costs in a personal injury action where his client loses the case. We do not see why the parties should not be able to agree otherwise.

Part 2: Expenses in civil litigation (sections 8 – 12)

14. Section 8 provides that where someone raises an action for damages for personal injuries and “conducts the proceedings in an appropriate manner.” the court must not make an award of expenses against the pursuer. There is a presumption that the case is conducted in an appropriate manner unless he makes a fraudulent representation, behaves in a way that falls below the standards reasonably expected of a party in civil proceedings or otherwise conducts the case in a way that amounts to an abuse of process.
15. Section 9 covers the situation where a litigant is represented free of charge; the court can order a person to make a payment to a charity which has a purpose of improving access to justice in Scotland.
16. Section 10 concerns “Third party funding of civil litigation”, and applies where a litigant “receives financial assistance” from someone who is not a party but who has a financial interest in the outcome. This person is defined as “the funder” The party receiving assistance must disclose details to the court and the court may make an award of expenses against the funder. “Financial assistance” does not include a payment from SLAB.
17. Section 11 states that the court may make an award of expenses against a “legal representative” where he or she has “committed a serious breach of that representative’s duties to the court”.
18. Section 12 carries out amendments to other legislation.

Comments

19. Section 8 introduces into personal injury cases the concept known as Qualified One-way Costs Shifting” (QOCS), a creation of the Jackson review in England and Wales and introduced there in 2013. This is a radical innovation. We have concerns over this provision. It subverts the principle that expenses follow success. This seems potentially unfair. Not every defender is a Goliath and not all defenders are insured or wish to rely on insurance. What if a defender chooses not to involve his insurer because the value of the claim is low relative to his policy excess, or he does not want future loadings on his premium? Assume that the case proceeds to a proof; a witness can be found to be incredible (he is a liar) or unreliable (he honestly thinks that he is telling the truth but what he says is not accepted by the court as being correct) or both. Both incredibility or unreliability are grounds for a court to reject evidence. Let us assume that the defender wins the case because the pursuer is found to be unreliable, or because the pursuer fails to lead enough evidence; a lack of corroboration can often swing the outcome of a disputed road traffic case, for example. The defender is still out of pocket even though he has done nothing wrong and has indeed been vindicated in having defended the claim. We presume also that the mere fact that a pursuer is disbelieved would not be enough to trigger one of the exceptions in Section 8 (although that is not entirely clear). There is an analogous effect where a pursuer is in receipt of legal aid, where it is possible, and indeed usual, to seek modification of liability for expenses under S18 of the 1986 Act, but the difference is that in that in legal aid cases the pursuer is necessarily poor. Section 8 would protect even wealthy pursuers. And prejudice even poor defenders. This also happens in small value claims (small claims/simple procedure) because expenses are significantly capped, but the sums involved are relatively modest. Section 8 applies to actions of any value. Expenses could be considerable, and a lot more than the value of the claim itself.
20. One of our members was instructed for the Defender (which happened to be a small limited company) in a personal injury reparation case in Glasgow Sheriff Court. Insurers were not involved. The case proceeded to proof in 2016. The issue was the condition of working equipment on site. The Pursuer and his witness were believed. The Defender’s witnesses were not. The Pursuer was awarded damages of £4250 plus interest. His lawyer’s account of expenses came to over £16,000, including VAT and outlays (and was settled at just under £14,000). In addition, the Defender had to pay the fees of its own lawyer.
21. QOCS would have made no difference, because the Defender lost. But say the Pursuer had lost instead of the Defender; QOCS would have prevented the Defender from recovering any expenses (probably around the £8000 mark) from the Pursuer. Section 8 removes or significantly diminishes the risk faced by someone who is considering bringing a personal injury claim. This may encourage the bringing of weak claims, because a Pursuer will have far less to lose if the case does not go his way. That cannot be reasonable or prudent.
22. Section 10 is a re-statement of the court’s common law powers regarding a *dominis litis* (who is now brought under the broader umbrella of “funder”). In principle we think that it is reasonable to have disclosure of such funding. It may

be a little difficult to police, however, and it still relies upon a party's understanding the scope of the rule, and being honest and candid. What about a parent who pays for the cost of an expert report to help his adult child pursue a claim of negligence against a surveyor? That would not be covered, presumably, but a payment from one spouse or partner to another for the same purpose would be because that kind of funder may well benefit by sharing in any award made at the end of the case.

23. Section 11 seems to be a re-statement of the court's common law powers regarding law agents, although this is not entirely clear. Also, we note that the court is able to make an award of expenses against advocates. A "serious" breach of a duty suggests more than a mistake. This is how it ought to be, since to err is human. But do Sections 10 and 11 completely supersede and, in effect repeal, the court's common law powers? We would hope so, and that the matters are in effect codified.

The Glasgow Bar Association
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