Justice Committee

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

Written submission from the Medical and Dental Defence Union of Scotland

Introduction

1. The Medical and Dental Defence Union of Scotland ("MDDUS") welcomes the opportunity to make written submissions on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

2. MDDUS, founded in 1902, is one of three medical defence organisations that provide indemnity to health professionals working out with the NHS hospital sector. MDDUS is the main provider of such indemnity in Scotland and are the UK's second largest indemnifier of GPs. The MDDUS provides occurrence-based indemnity to its members, allowing for claims to be met even after the conclusion of a membership period, as long as the incident occurred during the member's period of membership. As with all UK medical defence organisations, MDDUS is a mutual "not for profit" organisation, which does not have shareholders. MDDUS reserves membership funds responsibly to ensure that they are sufficient to meet current and future claims of established clinical negligence against the current and former membership.

3. The impact of this Bill, in introducing Qualified One Way Costs Shifting (QOCS), is likely to lead to an impact on pricing decisions and may result in increased subscriptions for our members to account for the increased expenses which will be incurred in defending unsuccessful actions. Commercial and economic considerations are not the only relevant matters in cases involving serious allegations of clinical negligence against healthcare professionals, where unproven allegations can have a major effect on professional morale and operational effectiveness of health services as effort is diverted into fighting a claim. There are also, of course, potential reputational and regulatory consequences of any extra-judicial settlement.

4. Although the total numbers of clinical negligence cases raised in the Scottish Courts might be deemed a relatively modest proportion of the Courts' overall business, it is worth highlighting that there is the potential for significant fluctuations from year to year (as demonstrated by the relative increase of clinical negligence cases initiated in 2014-2015, largely attributed to the influx of compensation claims associated with gynaecological mesh products and breast implants). Indeed we are presently instructed in relation to a potential group litigation resulting from care provided by a single dental practitioner, where we are advised by the claimants' solicitors that some 700 actions are to be raised in coming months. In addition, it is anticipated that the total number of clinical negligence cases is likely to rise following implementation of the measures incorporated within this Bill (indeed that is the very purpose of the Bill, to increase access to justice). In this context, we comment below on the need for a Compulsory Pre-Action Protocol for Clinical Negligence Cases prior to implementation of QOCS for clinical negligence cases.

5. In the context of a Bill which is shortly to be considered by the Justice Committee, we are not devoting any significant column space to decrying the merits of QOCS in principle in terms of their impact on incentive structures; such fundamental issues are well known and well-documented elsewhere. Nor will we rehearse in any great detail our experience from the English market, where we have seen a significant increase in the number of unmeritorious claims being pursued and in non-specialist representatives entering the market. We should be clear, however, that the absence of such commentary should not be read as an acceptance of QOCS as the right solution to achieve greater access to justice. Taking a pragmatic approach, given the stated intention to proceed with introduction of QOCS, we trust the following constructive comments will be of relevance to the Committee's consideration.

Chapter 1: Success Fee Agreements

Terminology

6. In the context of the Scottish market where Speculative Fee Agreements already exist and are intended to continue, we suggest that it may avoid confusion if reference was to be made to Damages Based Agreements, rather than to Success Fee Agreements. For clarity, we refer throughout these submissions to DBAs.

Section 3: Expenses in the event of success

7. This section gives effect to Sheriff Principal Taylor's recommendation that the solicitor should retain the judicial expenses in addition to the success fee (para 81 of Chapter 9). We understand that one of the main drivers behind this is the suggestion that the success fee may often be taken up with outlays, pursuant to section 6(2). This is a false economy, given that reasonable disbursements will be incorporated within the Judicial Account and met by the paying party. The other argument in favour of this approach is that claimants' solicitors deserve to retain the success fee, in additional to judicial expenses, as recompense for the costs incurred in other cases in which they are unsuccessful. In our submission, this provision is a disincentive for claimants' solicitors to properly assess the merits of such cases before agreeing to enter into a DBA.

8. Sheriff Principal Taylor made his recommendation with the caveat that he considered a balance to be struck by a sliding scale. Given that the sliding scale is not to be incorporated within primary legislation, it is critical that implementation of this provision does not come into force until such time as Regulations (which should be the subject of detailed consultation before being finalised) are made under section 7(3) setting out the sliding scale for personal injury cases, as per Sheriff Principal Taylor's recommendations (para 88 of Chapter 9), as well as the matters set out in para 116-117 of Chapter 9. By the same token, it is also critical that any such Regulations will incorporate Sheriff Principal Taylor's recommendation (para 115 of Chapter 9) that only solicitors, members of the Faculty of Advocates and regulated claims management companies (CMCs) should be entitled to enter into success fee agreements (with the caveat that we

appreciate that regulated CMCs will be considered further in the context of the forthcoming Review of the Regulation of Legal Services).

9. It is our submission that the introduction of section 3 requires modification of the existing provisions on additional fees. Were there to be no such modification, a claimant's solicitor would potentially be entitled to the judicial expenses, a success fee as agreed with the claimant and an additional fee on top of that. In a case where there are few or inexpensive outlays, this potentially amounts to triple counting and cannot be said to be in the interests of justice. We therefore submit that provision should be added to section 3 (with consequent amendment to Rules of the Court of Session (RCS), rule 42.14(3)) to provide that when determining whether to allow an additional fee, the Court or the Auditor, as the case may be, shall take account of the extent of any success fee agreement in place.

10. This Bill presents the opportunity to implement the following recommendations within the Taylor report in respect of additional fees:
    - The maximum percentage increase should be 100% (para 79 of Chapter 2)
    - Any application for an additional fee should not have retrospective effect (para 79 of Chapter 2). N.B. This was considered necessary to combat the concern that *"[a]s motions for an additional fee are normally made at the conclusion of the proceedings, this makes it more difficult for unsuccessful litigants to predict what their likely exposure to judicial expenses may be."*
    - The criteria for additional fees (per RCS 42.14((3)) should be given a weighting and solicitors required to complete a pro-forma setting out their assessment of the case under each of the criteria when arriving at their view on the level of additional fee which should apply (para 66 of Chapter 2). This would encourage predictability.

11. For completeness, we should note that we take the view that the Auditor remains best placed to determine what the percentage of additional fee should be in the absence of the type of training for the judiciary envisaged by Sheriff Principal Taylor (para 81 of Chapter 2) and sufficient judicial resources to enable sufficient judicial attention to be given to such matters.

12. For the avoidance of doubt, we should be clear that we reject any argument that may be made to the effect that the percentage uplift should be agreed at the outset of the proceedings. We suggest that cases should be more developed before an assessment is made. Given the introduction of QOCS, this does not impact upon claimants to any significant degree, but would allow for a more informed assessment of cases once developed and considered by the Court. It is therefore our position that the additional fee should remain to be determined at the conclusion of proceedings, by the Auditor, in the context of wider consideration of the judicial account.

Section 4: Power to cap success fees

13. Section 4(1) provides that Regulations may be made to make provision for or about *"the maximum **amounts** of success fees that may be provided for under*

success fee arrangements" [emphasis added]. We agree that if such Damages Based Agreements (DBAs) are to be rendered enforceable, it is vital for there to be caps in place; however, we suggest that "amounts" should be replaced with "percentages" or "proportions". The same amendment would require to be effected in sections 3(2), 4(3), 4(4), 4(5) and 7(2).

Section 6: Personal Injury Claims

14. Section 6(4) provides that any damages for future loss will be included in the amount of damages by reference to which the success fee is to be calculated. We suggest that this is inappropriate and should be amended to provide that the success fee should instead be calculated on past loss alone. Sheriff Principal Taylor's report was prepared long before the Damages (Personal Injury) (Scotland) Order 2017, which reduced the Discount Rate to minus 0.75%, following the decision taken by the Lord Chancellor in England & Wales. The proposal to include future loss in the calculation of a success fee is in direct contradiction to the reasoning of the Lord Chancellor[1], adopted by Scottish Ministers[2], to fix a Discount Rate based on the need to ensure that claimants awarded damages for future loss are able to ensure that the award given remains able to meet their future care needs. These points are well summarised by Sheriff Principal Taylor at para 99-100 of Chapter 9.

15. We reiterate that the sliding scale for personal injury cases, as per Sheriff Principal Taylor's recommendations (para 88 of Chapter 9), is critical in relation to higher value settlements and particularly in relation to cases involving large elements of future loss.

Chapter 2: Expenses in Civil Litigation

Importance of Pre-Action Protocols

16. It is submitted that implementation of QOCS should be delayed in cases involving clinical negligence, until such time as a compulsory pre-action protocol has been implemented in Scotland[3] and the effects of this are more clearly known and understood. The regulation of pre-litigation conduct is an important counter-balance to the introduction of costs shifting, in the interests of justice to both parties. Whilst we appreciate that pre-action protocols are already in existence in relation to other practice areas, there is nothing to prevent a phased implementation of the QOCS provisions. Along with a compulsory pre-action protocol for clinical negligence cases, we would like to see introduction of a power for the Courts to make an award of expenses against a party who has failed to comply with the protocol and unreasonably failed to accept a settlement offer made under the protocol, along the lines of the power introduced in the

[1] Statement placed by the Rt Hon Elizabeth Truss MP, Lord Chancellor, in the libraries of the Houses of Parliament on 27 February 2017
[2] Policy Note on the Damages (Personal Injury) (Scotland) Order 2017
[3] There is a voluntary pilot at present, further to the work of the Scottish Civil Justice Council Working Group, in which MDDUS is participating.

Sheriff Courts by Ordinary Cause Rules (OCR) 3A.3 in respect of the compulsory Personal Injury Pre-Action Protocol.

Tenders

17. Continuing the theme of a claimant's failure to accept a reasonable offer, we are disappointed to see that the Bill as drafted does not deal with the scenario in which a tender lodged by the defender is not beaten by the pursuer at Proof, a subject considered at length in the Taylor review. Again, this is an important counter-balance to the potentially deleterious impact of the introduction of QOCS. In the words of Sheriff Principal Taylor, *"it would…be perverse to permit a pursuer to continue to litigate free of cost against a defender who has offered to pay damages for the loss caused along with the judicial expenses of the proceedings"* (para 66 of Chapter 8).

18. Sheriff Principal Taylor's recommendations were dependent upon the extent to which SCCR recommendation 110[4] was implemented in Scotland: *"I recommend that in the event that the recommendation of the Scottish Civil Courts Review to adopt the rule in Carver is implemented in Scotland, the court should have a discretion to determine whether the pursuer acted reasonably in not accepting a defender's tender and thus the extent to which the pursuer should be liable to meet the defender's entitlement to judicial expenses from the date of the tender.* ***In the event that the recommendation of the Scottish Civil Courts Review is not implemented, I recommend that the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded****"* (para 72 of Chapter 8) (emphasis added).

19. As SCCR recommendation 110 has not been implemented, the bold highlighted recommendation should, as a minimum be incorporated by way of amendment to section 8. On this point, however, it should be noted Sheriff Principal Taylor was *"**just persuaded** by the argument that it is too drastic for a pursuer to find that his or her whole award of damages may be exhausted by an award of expenses following the pursuer's failure to beat a tender"* (emphasis added). In short, it seems that he considered this issue to be finely balanced. It would be open to Parliament to go further and to determine that there should be either no cap or a cap of 100% on a pursuer's liability for the post-tender expenses of a defender in the event that they do not beat the tender at Proof.

Section 8(4): QOCS exceptions

20. Section 8(1)(b) provides that QOCS will apply where *"the person conducts the proceedings in an appropriate manner."* We are pleased to note that claimants will not retain the benefit of QOCS in the event that one of the heads in section 8(4) is established.

21. Section 8(4)(a): A pursuer will lose the benefits of QOCS where fraud is established and that the civil standard of proof (i.e. balance of probabilities) is to

[4] i.e. "that the rules on tenders should be subject to the overall discretion of the court, to be exercised as laid down in *Carver v BAA plc* [2008] EWCA Civ 412: success should be judged by looking at the conduct of the parties and the whole circumstances of the case."

be applied to assessment of "fraudulent representation". It is our submission that the civil standard of proof is the correct standard.

22. We are also pleased to note inclusion of Section 8(4)(b), which allows disapplication of QOCS in circumstances where abuse of process has not been made out, but where *"the person…behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings."* This is an important inclusion, and whilst we can see the argument against setting out a rigid definition (which is unlikely to be able to accommodate all eventualities), we do consider that it would be prudent for reference to be made to summary decree as one such matter which would trigger this exception.

23. Sheriff Principal Taylor made clear that his recommendation to introduce QOCS was made *"on the basis that the recommendations of the SCCR have been implemented and that there is a procedure whereby a defender may seek to strike out summarily any case which has no real prospect of success"* (para 64 of Chapter 8). It was felt that this would deter unmeritorious cases. Whilst the power to grant summary decree against both parties has been introduced in the Sheriff Courts (OCR 17), it has not yet been implemented in the Court of Session (RCS 21.1 gives the Court the power to grant summary decree against a defender, but not against a pursuer, except in the context of a counterclaim). Whilst this may not be a matter for primary legislation, it was seen by Sheriff Principal Taylor as an important prelude to QOCS and we therefore urge the Scottish Civil Justice Council to implement this important counter-balance at the earliest opportunity.

24. We anticipate that arguments may be made that the test to be applied in the context of section 8(4)(b), when determining whether a party has behaved in a manner which falls below the standard reasonably expected of a party in civil proceedings, should be the test set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 23: *"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."* In our submission, it would not be in the interests of justice to apply a public law test, applicable to public authorities, to a claimant in civil proceedings.

25. As acknowledged by Sheriff Principal Taylor, his recommendations for QOCS were *"not to the exclusion of other methods of protecting litigants from their liability for expenses. The Legal Aid Fund still has an important role to play in this respect"* (para 58 of Chapter 8). We await the conclusions of the Scottish Government's Legal Aid Review, expected in February 2018, with interest. We presume that in cases where the pursuer has the benefit of a Legal Aid Certificate, QOCS will not apply (given the existing provisions on modification of expenses in RCS 42.6) and we therefore suggest an amendment to Section 8(1) to exclude cases in which the pursuer has the benefit of a legal aid certificate.

Section 9: Expenses where a party is represented free of charge

26. Section 9(2) provides that the court may order a person to make *"a payment"* to charity in respect of the representation which was provided free of charge. Whilst we have no fundamental objection to this proposal in principle (and note that it is likely to impact on very few, if any, clinical negligence cases in any event), we are keen to understand how the sum of such a payment would be calculated. Particular questions arising are: whether it is intended that an Account of Expenses be taxed and, if so, who will pay for the preparation of same, whether such an Account would be on a party and party basis (as recommended by Sheriff Principal Taylor, para 161 of Chapter 11) or whether it is intended that the Court simply picks a figure. We suggest that further thought is needed to ensure that the objective of this section is practicably achievable.

Section 10: Third party funding

27. Section 10 providers that an award of expenses can be made against the funder and any intermediary. A *"funder"* is defined as a person *"who is not a party to the proceedings but has a financial interest in respect of the outcome of the proceedings."* Our reading of this provision is that a DBA provider under part 1 (who clearly has a financial interest in the outcome of the proceedings) would therefore constitute a funder and that an award of expenses could be made against the DBA provider. Claimant firms may of course have their own funding products and we see no reason for them being treated differently to other funders.

28. That being the case, it would be helpful to have clarity around the circumstances in which such an award could be made under Section 10(3) and how this dovetails with the wider QOCS provisions.

29. We presume that one would not be required to establish a QOCS exception under Section 8(4), in order for an award of expenses to be made against a funder under Section 10(3), but suggest that this be explicitly stated in terms. A funder is making a commercial decision to take on a case and this would encourage sensible litigation behaviour. This would be consistent Sheriff Principal Taylor's intentions: *"I recommend that if the claim, or an element of it, is made for the financial benefit of someone other than the pursuer, the benefit of qualified one way costs shifting will extend only to the element of the claim which may benefit the pursuer"* (para 54 of Chapter 8). We welcome the inclusion of this provision as we consider it vital to deter third party funders supporting unmeritorious claims.

30. We are also keen to understand the mechanism by which notification of funding is intended to be given to the Court. We suggest that all compulsory Pre-Action Protocols are revised to include a requirement in the Letter of Claim (or Letter of Response, as appropriate) to set out the matters identified in Section 10(2)(a) and (b).

31. We would also welcome clarity on what would happen if a funder withdrew mid-way through proceedings. It is our submission that, in that case, the defender would only be liable for costs incurred after the date of the funder's withdrawal.

Part 4: Group Proceedings

The Case for Reform

32. First and foremost, we acknowledge that there is a real need for more effective control of group proceedings. The current ad hoc system, of proceeding by means of Directions made under Rule 2.2, is inadequate. Our experience of the current arrangements leaves us considering that significant improvement is required.

33. Whilst we appreciate that it is appropriate that the details of any new group action procedure are provided by Act of Sederunt, rather than in primary legislation, there are some further matters of detail which we suggest ought to be incorporated by way of amendment to the Bill. We deal with these below.

34. Whatever system is used to manage multiple actions with similar subject matter – whether under the current system of Directions or a new group procedure – no system will be effective unless adequate judicial resources are allocated to it. Case management in the Commercial Court in the Court of Session works well in large part because judges are able to specialise and to read into individual cases in advance of hearings. Group proceedings are likely to require correspondingly greater judicial preparation time and consistent management by a nominated judge who deals with the particular proceedings.

35. Case management under the current Directions system does not work well. Identifying the reasons for this is inevitably speculative. However, possibilities include:
    - That the system does not allow judges to be fully "up to speed" on the issues raised: they may indeed be overwhelmed by the scale of the actions and the lack of time provided to them for preparation.
    - A lack of continuity, with cases being dealt with by different judges. In this scenario, it is not credible that all of these judges have anything other than a superficial understanding of the individual cases and the issues they give rise to.

36. If this continues to be the case then any new procedure is unlikely to provide an effective and efficient means of dispute resolution. We understand that moves are currently afoot to change the system in the Court of Session, to allow better case management beyond the Commercial Court. Whilst we have been critical of the unsatisfactory current state of affairs, we should be clear that we are supportive of the efforts of the current Lord President to reorganise Court of Session practice.

Pre-conditions

37. The Court should be able to take into account the number of members of a particular group when deciding whether or not to grant permission for group proceedings, and that either (a) the words “two or more” should be deleted from Section 17(2), or (b) a number higher than “two” should be substituted, as the minimum numerical qualifier.

38. The Bill should set out the nature and scope of the relationship between the representative party and the individual claimants: in particular whether the representative party is to act as an agent of the individual claimants, and whether and to what extent the representative party may in an issue with defenders bind the individual claimants. This could be done by the addition of one or more sub-paragraph to Section 17(8).

39. The Bill should provide for minimum requirements necessary for appointment by the Court as a representative person, including financial resources, or indemnity arrangements, sufficient to meet obligations incurred in the authorised capacity to (a) group members, (b) defenders.

40. The Bill should make clear whether the representative party is to obtain authorisation and then bring (in the sense of initiate) proceedings on behalf of the group; or whether individual proceedings are to be brought, and then conjoined under the umbrella of the representative party, when so authorised by the Court; or whether both, or a hybrid process, are to be permitted.

41. Section 17(5) should be clarified by adding at the end, “at any given time.”

Certification

42. It is submitted that the certification requirements in Section 17(7) should provide that the Court may give permission for group proceedings only where it is satisfied: that the adoption of the group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of similar or common issues; and that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues.

43. It is submitted that the certification requirements in Section 17(7) should provide that the Court may give permission for group proceedings only where it is satisfied on the basis of the pleadings and documents presented in support of the application for certification, that the pursuers have demonstrated a prima facie cause of action.

44. It is submitted that the certification requirements in Section 17(7) should include provision whereby certified group proceedings may be re-assessed and, if procedurally appropriate, the group proceedings status revoked on the grounds that the criteria for certification are no longer satisfied.

Opt-in / Opt-out

45. It is submitted that a specific power to make provision for or about the imposition of a cut-off period for opting-in to group proceedings should be added to Section 18(2).

Amendments on other areas

46. Although not directly the subject of this consultation, MDDUS considers that this Bill provides an opportunity to address areas of tort reform, with a view to seeking to reduce the pressure on our members and the NHS from inflated claims which do not reflect the reality of how care is provided. Repeal of section 2(4) of the Law Reform (Personal Injury) Act 1948, which leads to the demonstrably false assumption that all care will be provided by the private sector, is, in our view, essential. Ignoring the likelihood of future care provision under the NHS, does not reflect the reality of care provision, artificially inflates future care costs, and, in consequence, exacerbates the effect of a negative Discount Rate.

MDDUS
18 August 2017