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Scotland prepares for compensation culture

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The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is currently before the Scottish Parliament's Justice Committee. The Bill proposes significant changes to the way that personal injury and other litigation is funded and managed in Scotland, with the aim of increasing access to justice, providing equality of arms between claimant and defender in litigation and protecting the vulnerable. There is a fear however that, despite its laudable aims in the field of injury claims, the Bill may have unintended consequences that have quite the opposite effect.

The Justice Committee is currently hearing evidence from stakeholders who provided written responses to the Bill back in August. The evidence sessions have been intense and at times heated, which reflects both the potential reach of the Bill and the complexity of its proposed changes.

The Bill marks the end stage of a journey which began as far back as 2007 when Lord Gill began his Scottish Civil Courts Review. Lord Gill concluded that expenses (costs) were too big an issue to be absorbed into his project. In light of that, Sheriff Principal Taylor was appointed to carry out a review of funding in civil litigation and his report was presented in September 2013. The Bill was produced after a subsequent series of consultations with key stakeholders and interested parties.

Some written responses to the Bill have predicted that the effects of the Bill's proposed changes could reach into many areas of Scottish life. The written responses, and the evidence given so far, demonstrate a polarisation of views either side of the claimant/defendant divide. Perhaps notably the majority of those responding are lawyers.

What does the Bill Propose?

In relation to expenses in injury litigation, the Bill proposes two main changes. The first is that solicitors can enter into an agreement with their client whereby the solicitor receives a percentage of the damages received; a damages based agreement (DBA). The second is that a claimant will not be found liable for the defender's expenses, even where the case fails; qualified one way costs shifting (QOCS).

DBAs

The rationale for allowing solicitors to enter into DBAs is to bring transparency, predictability and accountability to litigation funding. However, DBAs are not new in Scotland. At the moment claims management companies (CMCs) can enter into them with potential claimants. The Bill proposes no change to this status quo; nor any regulation of CMCs. Some have linked CMCs with cold calling and other unethical behaviour. However, some of the most vulnerable claimants will continue to be contacted and pressed into agreements with CMCs, before they even reach a solicitor.

In England, CMCs have been regulated since 2006 and, as a result, CMC activity in England has declined sharply. It is possible that organisations, forced out of business by the English regime, will be looking for alternative markets. The lack of any regulation in Scotland, coupled with the other proposals in the Bill, might make Scotland an attractive place for them to do business.

The Bill's failure to propose a regulation scheme for CMCs is noted as a potential problem by most of those who submitted written responses to the Bill. Esther Roberton, Chairman of NHS 24, is currently carrying out a review of the Regulation of the Scottish Legal Profession. However that review is not expected to produce any changes or actual regulation for at least another two years. This two-year window or "loophole" period is regarded by some as unfortunate because of the risk that it will encourage an increase in unmeritorious claims and less scrupulous claimant management behaviour.

There are also potential difficulties with the proposed structure of DBAs. In the highest value claims the future losses generally comprise the cost of necessary care. Damages will be carefully calculated to allow the claimant to secure the care they need for the rest of their life. If the claimant has a DBA, a portion of the settlement sum will be given to the solicitor or CMC in accordance with the DBA.

In his report, Sheriff Principal Taylor concluded that deduction from future losses was justified on the basis that otherwise claimants' solicitors would not be properly remunerated. However claimants can, and do, apply to court for a percentage uplift to the court expenses paid by the defender. The uplift is unlimited and is decided with reference to the particular circumstances of the case. Most significantly, it is not met by the claimant but by the defender or their insurer. Accordingly, as the Bill stands, claimants may suffer substantial and unnecessary deductions from their damages.

The Justice Committee is obviously troubled by this feature of the proposed DBA structure. In England, future damages are excluded from the percentage deduction. In contrast however, to the flat rate percentage deduction in England, the proposed structure here would have a sliding scale for the cap on the reduction, which would mean that only 2.5% would be taken from damages in excess of £100,000. Claimants' solicitors giving evidence to the Committee have submitted that the Bill strikes the appropriate balance between the interests of claimants and those of their solicitors.

Allowing a deduction from future losses also causes practical complications. The deduction is not allowed where future damages are paid by way of periodical payment order (PPO). Claimant's solicitors who have entered into a DBA could arguably find themselves in a conflict of interest situation where the claimant needs advice about whether to seek future losses as a lump sum or a PPO. PPOs are currently only available by agreement in Scotland. However, it is likely that the Court will soon be able to impose PPOs and this conflict could become a common problem.

In recognition of that potential difficulty, the Bill proposes conditions for settlements of more than £1 million. In those cases either the judge at trial or an independent actuary must conclude that a lump sum better meets the claimant's interests than a PPO.

Respondents to the Bill, and indeed the Committee, have noted the lack of clarity and the potential difficulties surrounding who should choose, instruct and pay the actuary. The Bill proposes that the claimant's solicitor is excluded from the consultation with the actuary and this requirement also creates practical and ethical difficulties.

Qualified One Way Costs Shifting

At present, an unsuccessful claimant will normally have to pay the defender's expenses and it is believed that some potential claimants are prevented from raising valid claims because they cannot afford to lose. QOCS is seen as way to remove that barrier and to increase access to justice.

In his report Sheriff Principal Taylor referred to the fact that only a very small percentage of defenders in England enforce costs awards. However, what that statistic overlooks is the effect of incidental costs awards on the behaviour of both parties as the case progresses. Where a party has failed to comply with a procedural step and the failure is not material then a costs award is a neat sanction to discourage such behaviour in the future. The risk of such an award also makes parties careful about making applications to Court and incurring expense. To remove that sanction against only one party, the claimant, would introduce a real imbalance between the claimant and defender.

QOCS will not apply in certain circumstances, including where the claimant makes a fraudulent representation. Those representing claimants have argued in their written responses that the bar in relation to the proposed exceptions is too low, while those representing or insuring defenders have argued that the bar for exceptions is too high. The civil servants who drafted the Bill believe that this dichotomy indicates that the Bill strikes the right balance. However, what respondents do agree on is the need for clarity before the Bill is passed. There is a real risk, as the Bill stands, that the exceptions will lead to significant uncertainty around the extent of claimants' liability for costs.

However, it seems that QOCS will apply to a claimant who has funding, for example, from a CMC or a solicitor's firm. In circumstances where the expenses would be met by a well-funded commercial organisation, it is difficult to understand the rationale for penalising the defender and distorting the litigation process. The CMCs and solicitors' firms can be distinguished by not-for-profit funders, such as trade unions for whom the exception is easier to understand.

This lack of sanction in unsuccessful claims is also likely to entice CMCs north of the border. The risk to them in raising claims would be reduced by QOCS and they can operate in Scotland without regulation or sanction. The Justice Committee has applied for an extension to this stage of the legislative process and the evidence sessions before the Committee are expected to continue into October. This is not an easy piece of legislation and it seems that it will be some time before we know its ultimate shape. The Forum of Insurance Lawyers (FOIL) is actively participating in the scrutiny of the Bill and a FOIL member gave evidence to the Justice Committee on 26 September alongside representatives of the ABI, ABTA and the MDDUS.

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