Written submission to the Justice Committee of the Scottish Parliament on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Response from the Motor Accident Solicitors Society (MASS)
August 2017

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by Brian Castle, Regional Co-ordinator for MASS Scotland and a Partner at Digby Brown Solicitors.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI) MASS has 120 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

MASS has 16 member firms in Scotland and represent the majority of solicitors who deal with motor accident cases that occur in Scotland. Scotland is considered a separate region from the rest of the UK for the purpose of membership. Membership is by office rather than individual. This response represents the collective view of MASS Scotland members.

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Overview of Bill

MASS fully support the declared aims of the Bill - namely to increase access to justice in civil actions in Scotland by making civil court costs more predictable; to increase funding options for those pursuing civil actions; and to introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

MASS were supportive of the recommendations of Sheriff Principal Taylor in his Review of Expenses and Funding in Civil Litigation (2013) and the declared intention to introduce Qualified One Way Cost Shifting (QOCS) and a Group Proceedings framework in Scotland.

Out of that review came a perception that many injured people with valid claims for damages in Scotland were prevented or dissuaded from asserting their right to recover appropriate compensation because of the potential costs implications in doing so, and the inequality of arms in any dispute against a defender and his insurance-backed and funded legal team.

There was also clearly a desire to have a level playing field with the position of injured claimants in England and Wales following the introduction of rules there on Qualified One-Way Costs Shifting (QOCS) and where the general proposition is now that an injured claimant does not require to pay costs to a defendant even if his claim is unsuccessful in court.

One concern we have is that there appears to have been little or no proper analysis of whether the relatively recent introduction of QOCS in England has delivered the proposed benefits to claimants, and whether anything can be learned from the English experience.

MASS is concerned that the wording of certain sections of the Bill as it stands, might not actually implement the recommendations of the Taylor review as envisaged, nor achieve the declared aims of the Bill as set out above.

Part 2 of the Bill seems to go further than the position in England and the provisions, as they stand, might have the practical effect of rendering QOCS irrelevant in a great many cases. This would appear to run contrary to the stated aims of improving access to justice and would, in our view, add an imbalance in the system that would favour defenders of claims.

Particulars of Bill

Part 1 – Success fee arrangements

MASS can understand the desirability of regulating success fee arrangements and broadly welcome the provisions contained in the draft Bill. One practical consideration which we can see arising with the draft Bill as it currently stands is the wording contained in Section 6(2). We can see it is desirable from a policy point of view to provide that an injured pursuer subject to a success fee agreement ordinarily should pay nothing other than the success fee. That said, there are situations in practice where a pursuer might choose to be responsible for particular outlays incurred whilst proceeding with a claim regulated by a success fee agreement – for example, a pursuer may choose to obtain a secondary medical report at their expense where they are unhappy with the terms of an original medical report and opinion. Moreover, Section 6 also needs to make clear that the provisions of Section 7(3) may override Section 6(2) so that a pursuer would not be able to avoid the payment of outlays incurred if they chose to voluntarily terminate any success fee agreement already entered into.

MASS are pleased that the Bill as drafted at Section 6(4) permits a success fee to be applied to past and future damages recovered, and thus recognises the particular work and expertise agents bring in securing a final award of damages. This will ensure all cases are progressed without any delay to the detriment of the injured pursuer.

MASS are concerned about the provisions as they currently stand in Section 6(6). We support checks and balances being implemented regarding any decision surrounding future damages being paid in periodical instalments that ensure independence and impartial advice being provided. We would welcome a change to the wording of Section 6(6)(b) to ensure the injured person has their legal representative present at the consultation with an independent actuary. The independent actuary should be appointed with the agreement of the representative of the pursuer and the cost of this appointment and all work undertaken by the independent actuary should not be met by the injured person or their representative if actuarial involvement is to be a mandatory step in procedure - this cost should be met by the defenders.

Moreover, MASS do not accept the rationale whereby an actuary is the final arbiter on what a client must accept. The actuary should properly provide the relevant figures; calculations and advice to the pursuer as to whether in their view damages payable via a periodical payment order would be more beneficial to the pursuer than a lump sum damages payment. Notwithstanding that advice, the final decision should be left to the pursuer to choose, having had the benefit of all the necessary advice.

Part 2 – Expenses in Civil Litigation

The declared intention of the Taylor review was to introduce the general proposition of QOCS applying to the bulk of civil litigation cases and for an injured pursuer NOT to be liable for the expenses of litigation where his case was unsuccessful. That reflected a desire to redress an imbalance between pursuers and defenders and to increase access to justice for individuals. MASS supported and welcomed that. We are, however, concerned that the Bill as drafted may well result in a scenario where the majority of civil litigation pursuers would not have the benefit of QOCS applying to their case – entirely contrary to the objectives as set out in the Taylor Review. MASS considers that further refinement of the Bill is necessary to correct that.

Section 8(4) of the Bill sets out the circumstances where behaviour or conduct of the pursuer will permit a Court to dis-apply QOCS. MASS are concerned that the wording in Section 8(4)(a) is unduly restrictive and could permit the removal of QOCS where a pursuer was found, as a matter of fact, to have made a misrepresentation on a matter peripheral or incidental to the subject matter of proceedings. That cannot be right and is contrary to the intention of the Taylor Review. Section 8(4)(a) must also have reference to materiality of any misrepresentation and also look at proportionality of the matter. It is submitted that Section 8 needs to reflect the position of Taylor (see para 74 on page 184 of Taylor Review) on the limited situations when a pursuer should lose the benefit of QOCS as a consequence of his conduct. At present, MASS are concerned that the wording of this Section will effectively encourage repeated challenge by defender agents in relation to the applicability of QOCS and result in increased Court time being taken up with such disputes – that can only impact negatively on the efficiency of the civil litigation process.

Section 10 as drafted currently is unsatisfactory in a number of respects. The Taylor Review identified the desirability of making QOCS available to Scottish pursuers to bring them in line with the general position of personal injury pursuers/claimants in England and Wales. There is no equivalent provision in the English Civil Procedure Rules permitting a Court to make an award of expenses against a Third Party as is currently provided for in Section 10 of the Bill.

The motivation or desirability behind that difference is far from clear – it certainly would not mirror the current position in England and Wales.

As it stands, the lack of definition on what would constitute "financial assistance" by another person; or the specific circumstances where another party is deemed to have "a financial interest" in proceedings despite not being a party to the action - as provided for in Section 10(1) - is unhelpful. Would a family member who had agreed to assist an injured person by way of paying for the costs of medical reports in the context of a claim for personal injury be deemed to have a financial interest in the claim and thus be sufficient to deprive a pursuer of the benefit of QOCS and run the risk of facing a Third Party costs order personally where the case was ultimately unsuccessful? That seems an utterly absurd and inequitable, yet entirely possible scenario, under the Bill as drafted.

MASS members have already seen comment by defendant solicitors to the effect that they would consider that a solicitor acting in a matter speculatively and under the terms of a success fee agreement (as defined in Part 1 of the Bill) or even providing assistance with outlays funding to a pursuer would be deemed to be "financial assistance" in a case and would result in QOCS not being available in such cases. The practical effect of such an interpretation would be that QOCS would not be available to pursuers in the vast majority of cases – that again cannot be right in the view of MASS and cannot be compatible with the declared aims of the Bill (to increase access to justice in civil actions in Scotland by making civil court costs more predictable; to increase funding options for those pursuing civil actions; and to introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions). MASS questions the desirability of having any such restriction on the availability of QOCS by way of Third Party costs provisions where an equivalent provision does not exist in England and Wales. It would appear to be another de facto invitation to defender agents to repeatedly seek to challenge the applicability of QOCS via the Court process with the negative consequences that will bring as already outlined above. If that position is not accepted, then Section 10 needs to be substantially redrafted to reflect the considerations of the Taylor review which identified the involvement of Claims Management Companies or Third Party Funders as the limited situations when a variation of the normal QOCS availability might be justified.

Section 11 permits a cost order to be made in civil proceedings against legal representatives of a party where there has been a "serious breach of that representative's duties to the Court". The phrase "serious breach" requires further definition.

Parts 3 to 5

MASS has no particular comment to make on Part 3 to 5.