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

Letter from Sheriff Principal Taylor to the Minister for Community Safety and Legal Affairs

Ms Annabelle Ewing MSP
Minister for Community Safety and Legal Affairs
The Scottish Parliament
Holyrood
Edinburgh,
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8 March 2018

Dear Minister

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

I understand that an amendment has been made to the above Bill the effect of which is to exclude all future damages from the calculation of the success fee in Damages Based Agreements (DBAs).

At the outset I should state that I am not a member of The Law Society of Scotland. Further, when in private practice before going on to the bench, my firm, if involved in personal injury litigation, acted almost exclusively for insurance companies. I approached my Report with a view to increasing access to justice, which must, by definition, include access to the courts.

My research disclosed that members of the public like DBAs. That has been reinforced by the number of DBAs which have been entered into since I reported. One Claims Management Company (CMC) closely affiliated to a well known firm of solicitors who normally act for pursuers entered into over 17,000 DBAs in a three year period. At present, the percentage of the damages the solicitor is entitled to retain as a fee can range from 20% to as much as 35% of ALL damages recovered. But such excessive levels of deduction do not deter claimants who have been injured from entering into DBAs; 65% of something is better than 100% of nothing. And nothing is what they would receive if DBAs did not exist. The alternative ways in which a pursuer can fund a personal injury litigation are unattractive and usually beyond the means of most people. In a sense DBAs are a bit like a cooperative or a form of insurance; the successful pursuer subsidises the pursuer who is unsuccessful.

When addressing the excessive deductions from damages, I felt that I had to walk a narrow line. I had to ensure that the percentage a solicitor could deduct as a fee from the damages recovered was sufficient to allow solicitors to continue to offer DBAs to those who had been injured by the fault of another. If I did not permit a sufficient

percentage deduction, solicitors would not offer DBAs as a funding mechanism. They would not recover sufficient in the successful cases to compensate for the unsuccessful cases. One has to remember that should a case be unsuccessful not only does the solicitor not get paid for his or her own time but must also meet court dues, expert witness fees, medical reports etc out of the solicitor's own pocket. I had to create an environment in which DBAs were sufficiently attractive to solicitors but still fair to the injured pursuer.

By the time I reported to the Scottish Government, Lord Justice Jackson's Report, in England & Wales, had been completed. He had recommended that future pecuniary loss should not be included in the calculation of the success fee in personal injury litigation. As a consequence, most solicitors in England and Wales have come to the view that they will not offer DBAs in higher value personal injury cases. It is in higher value claims that future loss is most significant. Although not relevant to the present issue, Jackson LJ also recommended that solicitors should not be entitled to retain any award of judicial expenses. As a result, solicitors in England and Wales came to the view that the reward in relatively low value cases did not make DBAs sufficiently attractive. Thus in England & Wales, DBAs are seldom used to fund a personal injury actions. I consider that to be unfortunate, to say the least.

My concern is that the recent amendment to the Bill will have the same consequence in higher value cases in Scotland as has happened in England & Wales; DBAs will not be offered to pursuers who have sustained catastrophic injury. The recent amendment thus poses an existential threat to DBAs being offered in higher value cases in Scotland. What will be the consequence of the amendment? The likely outcome is that cases will either not be raised at all or will settle for considerably less than the true value of the claim.

I accepted in my Report that most would intuitively consider that all the damages a pursuer recovers should go to the pursuer. But if the only way a litigation can be funded is to allow a deduction from damages, I came to the view that our legislation should allow DBAs to continue albeit with a) the provider and b) the amount of the deduction, being properly regulated. The popularity of DBAs with the public was and is overwhelming.

At risk of repeating the terms of my Report and what I said in evidence to the Justice Committee, there are a number of general points I should make.

- By excepting future loss from the calculation of the success fee, one is providing an incentive to the less reputable solicitor to delay raising court proceedings. Delay always results in higher past loss and, usually, anguish for the client. All recent initiatives in personal injury litigation have been designed to eliminate delay and for good reason.
- Excepting future loss from the calculation of the success fee also penalises the efficient solicitor and rewards the inefficient who takes far too long to

process a case thus maximising, perhaps unwittingly, the inefficient's fee. Members of the judiciary are all too familiar with the inefficient lawyer.

- I can see no reason why, for example, future wage loss should be treated any differently from past wage loss. Yet that is the effect of the recent amendment to the Bill.

Perhaps it is even more intuitive that an injured party should retain all future care costs. I doubt it would be challenged that for claims in excess of £500,000 it is future loss which is likely to be the most contentious and largest element. But again I am driven to the view that overall a deduction from future care costs is justified for the following reasons:-

- Few judges would claim that the award of damages which they make is accurate to 2.5%. Making awards of damages is not an exact science. It is a broad brush approach which is necessary. Thus a deduction of 2.5% is unlikely to have a significant impact on future care.
- Few Care Plans produced to the judge and upon which future care costs are calculated, are followed to the letter. When assessing future care costs, and one could be looking at tens of years into the future, one has to make a whole raft of assumptions some of which will not come to pass. The circumstances of the injured party change. The change can be social and medical. If there are medical advances, the pursuer may be able to benefit thus reducing the cost of care.
- On many occasions when a case settles there is not a careful breakdown of the various heads of loss. The insurer offers a sum which it is prepared to pay and that lump sum is accepted by the pursuer. The settlement can take the form of a judicial tender and acceptance or an exchange of correspondence between solicitors. In such circumstances, who is to decide how to divide the damages paid into future and past loss? It cannot be the solicitor for the pursuer as he or she is hopelessly conflicted. Some mechanism will require to be set out in the legislation to achieve an equitable outcome.
- Lawyers are entitled to be rewarded for the work which they do particularly when working on the most contentious and difficult element, which is very often future care costs.
- As I seek to explain in my Report, Jackson LJ excluded future loss from the calculation of the success fee not for reason of principle but due to pressure from organisations such as APIL. By the time APIL and others recognised the mistake they had made, it was too late.

The proposed legislation follows my recommendation that there should be a sliding scale for calculating the success fee. To recap, on all damages up to £100,000 the maximum deduction should be 20% inclusive of VAT, between £100,000 and £500,000 it should be 10% of all damages and above £500,000 it should be 2.5% on all damages. That is a long way from the deductions presently being taken by

solicitors who enter into DBAs. But I believe I struck the correct balance. Solicitors and claimants alike have welcomed these recommendations in equal measure. Some may think it conclusive that when APIL and others gave evidence to the Justice Committee they accepted such percentages. Even more telling is that when Thomas Docherty of Which?, Paul Brown of the Legal Services Agency and Professor Alan Paterson, a well known champion of the consumer, gave evidence to the Justice Committee, not one of them suggested that future loss should be excluded from the calculation of success fees. The only unhappy interest would appear to be the insurance industry. The Scottish Parliament might consider such serves to confirm that my recommendations are well judged and should not be cast aside.

The reason for this letter is that if my understanding is correct, my Report will, if implemented in this manner, make access to justice less accessible to the man in the street than if I had not reported. You will understand why I should like to avoid such an epitaph.

I am prepared to meet with you, or anyone, should you consider a further discussion would be of benefit.

Yours sincerely

Sheriff Principal James A Taylor BSc LLB LLD