Justice Committee
Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Written submission from Watermans Accident Claims and Care

1. This response is sent on behalf of Watermans Accident Claims and Care and is sent in response to the areas of the Bill which deal with personal injury.

2. The Bill as a whole is a welcomed addition to the civil justice area and we would hope that the legislation will help to address the David and Goliath issues that are ongoing at the moment.

3. There are many positives contained within the Bill such as the fact that there is clear guidance as to what has to be contained in the agreement and therefore solicitors and pursuers will have a clear understanding of what the agreement between them is thus providing for a clear transparency for all sides in the action.

4. In addition it should allow there to be a level playing field for pursuers as individuals by ensuring that agents cannot exploit potential costs obtained from the action by capping the percentage levels that can be deducted from the person’s damages.

5. There are not many areas of the Bill that we would disagree with but there are a few areas of concern and we wish to draw your attention to these areas.

Personal injury claims – section 6(2)

“The agreement must provide that the recipient of the relevant legal services is not liable to make any payment (including outlays incurred in providing the services) to the provider in respect of the services apart from the success fee, regardless of whether damages are obtained.”

6. This would be prejudicial to pursuer’s agents as there are times when clients disappear after outlays have been incurred or they wish a second opinion in relation to a liability or a medical report. If pursuer’s agents are unable to pursue people for the cost of the report which would then be unrecoverable then they would be in the position of being out of pocket. This does occur on a relatively regular basis. It could also potentially mean that the pursuer requires to pay for the second option out of their own pocket before any damages are paid. At present the monies for this, where liability is admitted, are taken from the damages once received.

7. In addition to ensuring that no litigation is brought where it could be argued that it was an abuse of process; the agents for the pursuer need to have a contract with the client that allows them to use the “threat” of expenses to make them see the reality of the situation; if this was not there then this would be difficult.
Section 6(5)(b)

“In the case where the damages are obtained by agreement, that an independent actuary has, after having consulted the recipient personally in the absence of the provider, certified that in the actuary’s view it is in the recipient’s best interests that the future element be paid as a lump sum rather than in periodical instalments.”

8. Whilst we appreciate the checks and balances that are in place there is no provision to determine who will pay for the actuarial report. The obvious answer would be for the defenders to pay for it as they are guilty party but there would concern that the advice being given could be tainted by whomever pays for the report.

How will this be completely independent?

9. One suggestion would be that there could be Court appointed actuaries who give the advice and there would have to be some way of agents approaching the Court for such an order – e.g. would the way in which family actions have Court appointed Bar reporters who are completely independent be a model to follow?

10. The other concerning factor is that the pursuer would then be faced with receiving advice from someone they have never had any dealings with before. This could be a very daunting experience for them and whilst it appreciated that there is a check there to ensure that the client receives the best possible advice there has to be some recognition that Solicitors are officers of the Court and if they are advised that periodical payments are the best way forward for a client we would like to think that it is unlikely that a Solicitor would advise their client to go against that. To do so would be unethical and negligent.

Qualified one way costs shifting (QOCS) – section 8(4)

11. Whilst it is clear in Taylor’s report that the fraud has to be material this should be made clear at least within the explanatory notes what this actually means. Defenders may rush to try and use this to avoid QOPS where an honest mistake has been made either by agents or the client.

12. An example of this would be where a client has advised that there is a wage loss of £1,000. There is then a difficulty in obtaining the earnings information and when a SOV is prepared, an estimate is substituted pending receipt of full earnings information so as not to prejudice the client’s position. The information is then obtained from the client’s accountants and the true figure appears nearer £300. By way of explanation, it transpires that the client has advised his Solicitor of gross figures rather than net or has simply become confused. In such circumstances, it would need to be made clear that this is not a fraudulent misrepresentation.
Third party funding of civil litigation – section 10

13. In light of the fact that there is a lack of definition as to what constitutes “financial assistance” or what having a financial interest in a case means and this needs to be clarified. There is a concern that Solicitors themselves will be held accountable for this as they have a financial interest in the matter and therefore remove the ability for a pursuer to receive the benefit of cost shifting.

14. What costs shifting does is remove the danger that Solicitors will not take on cases that are slightly more difficult because of the costs implications and allow new law to be made as that has been the criticism of these types of agreements in the past.

15. Another concern would be that the terms of the agreement i.e. the percentage terms would have to be disclosed to the defenders and then the defenders may then make their offers with this in mind. This would clearly be prejudicial to the pursuer and it would have to be made clear that the percentage terms would remain confidential between the pursuer and their agents.

Auditors of court – sections 13 and 14

16. In relation to the Auditor there should be timescales put into place as to how many days after a hearing a decision will be issued as it is known to take many months for decisions to come through and this is detrimental to the pursuer’s agents who have paid for many of the outlays and are still awaiting payment. This then allows for monies to be freed up for further litigation to take place.

Watermans Accident Claims and Care
17 August 2017