Taylor Review

Review of Expenses and Funding in Civil Litigation in Scotland

Consultation Paper

November 2011

RESPONDENT INFORMATION

Name/Organisation

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Forum of Scottish Claims Managers

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PREFACE

The Forum of Scottish Claims Managers (FSCM) is a lobbying organisation made up of members from major insurers, financial institutions together with claims handling companies and Local Authorities.

The Forum exists to represent the interests of the members in the handling of insurance claims and aims to promote improvements to the law to enable consumers easier and quicker access to justice by engaging with all interested parties in discussions and debate relating to Third Party claims in Scotland including Pre and Post-litigation.

LIST OF QUESTIONS

CHAPTER 2: ACCESS TO JUSTICE

1. What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?

The Forum of Scottish Claims Managers (FSCM) believe that there are few barriers which discourage potential litigants or their advisors.

We note at 2.9 of the Consultation that claims registered with the CRU in the 3 years from 2008 to 2011 have increased by 7%. In the same period, statistics from DfT and HSE show that the number of incidents are actually falling, therefore this trend shows that there is a clear increased awareness by Consumers of their rights and the remedies available, given the net increase in numbers of claims.

The supply of Before the Event Insurance is readily available and a wide spectrum of insurers provide this cover automatically within household and motor insurance policies.

CHAPTER 3: THE COST OF LITIGATION

2. Should solicitors' fees for litigation be recovered as expenses on the basis of time expended, value of the claim or some other basis?

FSCM believe that the present system of block fees works well in the main, however, where there is a disproportionate outcome is on the lower value cases. (under £25,000)

FSCM have commenced a study from the start of 2012 analysing our memberships settled litigated cases where Personal Injuries were involved.

In January and February this year, our members settled 670 cases in the Sheriff Court and Court of Session.

The Pursuers Costs (inclusive of Counsels Fees where appropriate) exceeded the agreed damages paid to the Injured Party in 279 of those cases, or to put it another way, in 41.64% of cases.

The make up of the 279 cases showed that the highest pay out in damages was £16,000 and in fact, 98.2% (or 274 cases) actually had damages paid out of £10,000 or less.

82 of the 279 cases – over 29% were litigated in the Court of Session.

This shows a clear lack of proportionality in our present system for lower value cases and it's this area we believe requires the most reform.

Pre-Action Protocols are universally agreed as working well as was recognised in the original Gill Review. The gap at present is the linkage between pre-litigation and post litigation.

We believe the implementation of compulsory protocols with sanctions for any party who litigate unnecessarily, prematurely or unreasonably delay settlement will cure this problem and help bring about proportionality and access to justice for the consumer on lower value cases.

3. Is LPAC, as currently constituted, an appropriate body to review the level of fees for litigation which may be recovered as expenses? If not, what alternative body should carry out this function and what should be its composition?

FSCM believe that the LPAC as currently constituted should come under the control of the Scottish Civil Justice Council so that all court reform and review of legal fees come under the same umbrella.

We believe that membership of the LPAC should be extended to include fair representation from the actual users of the court system in the same way we responded to the proposed membership of the membership of the Scottish Civil Justice Council:

The proposed membership should reflect a fair representation of the actual users of the court system, by which we mean not only the legal professionals, but insurers, consumer bodies, local authorities and specific interest groups representing areas such as family law which together with insurance matters would account for the majority of court time.

We would submit that insurance companies are the single largest body of civil court users in Scotland, funding or having a financial interest in 80% of cases going through the courts.

Also, it is important to recognise that the rules the Council implement not only impact on the cases which go to court, but of course, the cases that can be settled without the need for litigation. (this was recognised by Lord Gill in the discussion regarding Pre-Action Protocols)

The proposed membership as stated makes no allowance for insurance and family law accounting for the majority of court time – both these areas need at least 1 member each to ensure fair and accurate representation.

It is clear to us, that to properly consider change for the better and adapt the courts, the Council must have representatives who understand what processes and drivers precede litigation to ensure that the courts do not become clogged up with unnecessary litigation or rules which promote same. Any reforms or changes made by the Council will influence pre-litigation behaviour and ultimately influence the volume of cases entering the judicial system. Insurers are well placed to advise the Council of any unintended consequences before proposed reforms are implemented and therefore inclusion of Insurers within the Council would hopefully lead to more improved, forward thinking procedural change.

We would submit that the insurance company body of users should be represented as part of the council in the same way that other non legal areas will be recognised

If the Council is not seen as inclusive it may influence corporate users in their choice of jurisdiction for resolving disputes or regulating contracts, and result in them opting to conduct their litigation under English Law rather than using Scotland as their forum of choice.

4. Is the test currently applied by the sheriff court in sanctioning the instruction of counsel appropriate? If the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied?

FSCM believe that sanction for the employment of counsel should take place at the initial case management stage or at the time that a party decides to instruct counsel. (as outlined at 3.25 of the Consultation document)

Similarly, we believe that sanction for approval for senior counsel in the Court of Session should work in the self same manner with the test being restricted to difficulty or complexity of the action.

5. What test should the court apply when considering a motion for certification of an expert witness – should it be necessity, reasonableness or some other test?

FSCM believe the test should flow from greater case management as per the recommendations made by Lord Gill and should be based on reasonableness and proportionality.

Like question 4., we believe certification of expert witnesses should take place as early as possible in the case management process, that way, there is a transparency in costs and tenor of the case.

6. In the sheriff court, should counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of counsel?

Yes.

7. In the Court of Session, should senior counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of senior counsel?

Yes.

8. Should the presiding judicial office holder assess what would be a reasonable fee for counsel in any account of expenses? If so, at what point in the proceedings should that assessment be made?

Yes. As set out in 3.26 of the Consultation paper. We believe the appropriate point is at the point of initial certification for transparency and proportionality.

9. From when should the fees of an expert witness be a competent outlay in a judicial account of expenses?

We believe the fees of an expert witness would become a competent outlay at the point of certification as outlined in our earlier answer. (payment for work done prior to that date can be considered by the court at that point)

10. Should the presiding judicial office holder assess what would be a reasonable fee for an expert witness in any account of expenses? If so, at what point in the proceedings should that assessment be made?

Yes. At the point their appointment is approved.

11. Is it reasonable for counsel to be entitled to charge a commitment fee and, if so, should that be prescribed or left to the discretion of the Auditor?

No. Each individual case will turn on it's own merits and consideration has to be given to duplication of payment if Counsel has more than one Proof or Trial set down.

12. Should the level of fees recoverable by the successful party in a commercial action be greater than in other types of action and, if so, what is the justification?

FSCM has no view to offer.

13. Should a tariff-based system for assessing the level of recoverability of judicial expenses be introduced? If so, how might such a system be structured?

FSCM believe the current system is disproportionate and needs to be re-assessed for the low value cases. (£25,000 and under)

We would refer you back to our answer on question 2. where we discussed that our membership has embarked upon a study which showed that expenses outstripped damages in 41.64% of all cases – in every single case this occurred, the damages were £16,000 or less.

As such, we would advocate a fixed fee process for these low level personal injury claims, flowing from a compulsory pre-action protocol.

The level of fixed fees should be set by LPAC with proportionality the foremost consideration. (sanctions for pre and post litigation behaviour should also be available)

14. Should any table of fees provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor and/or for an accredited specialist to recover at a higher rate than a solicitor without accreditation?

Yes. Provided proportionality is kept foremost in mind.

15. Is the ability to request an additional fee a reasonable procedure for regulating the recoverability of judicial expenses?

Yes. Subject to transparency and a robust process for consideration of additional fee in complex cases.

16. If the concept of an additional fee is retained:

a. At what stage in the proceedings should a motion for an additional fee be made?

As early as possible in the proceedings, but we accept it would be competent at any time.

b. Should motions for an additional fee, and the percentage increase, be determined by an auditor of court or by the member of the judiciary hearing the motion?

By the member of the judiciary hearing the motion

17. Should a litigant be entitled to claim interest on an award of judicial expenses and, if so, from what date and at what rate?

Yes. From 28 days after the award or agreement.

The current rate of judicial interest bears no relation to current interest rates, therefore, we believe the interest rate should be the prevailing bank rate at the appropriate date.

CHAPTER 4: FURTHER ENHANCING THE PREDICTABILITY OF THE COST OF LITIGATION

18. Should the court have a discretion to restrict recoverable expenses in a small claim even in cases where a defender, having stated a defence, has decided not to proceed with it?

Yes. The Court should have discretion to restrict expenses as they see fit based upon the conduct of the individual case.

19. Should more cases in Scotland come under the scope of a fixed expenses regime? If so, what types of case should be included?

Yes. See answers for 2. and 13. We believe cases below £25,000 should fall within a fixed expense regime.

20. Should each party to a litigation in Scotland bear their own expenses? If so, in what types of litigation? Should the rule be qualified and, if so, in what circumstances? In particular, is the general rule in family cases appropriate?

the present system should remain that costs follow success.

The problems faced in England and Wales are well reported in Lord Jackson's report and can be traced back to the abolition of legal aid for Civil cases together with the satellite litigation surrounding costs.

In Scotland, we've retained Legal Aid for civil cases which fulfil the funding criteria and do not have the satellite costs litigation issues so it would seem unreasonable to introduce measures to fix issues which don't exist.

Family cases are outwith our area of expertise, therefore, we are unable to comment further.

21. Should a procedure for the summary assessment of expenses be introduced into the civil courts in Scotland?

No. This would lead to endless satellite litigation as can be witnessed in the current England and Wales system. In our opinion, the current system works well and is flexible enough (e.g. block fees and additional fee / uplift criteria) to be fit for purpose with small changes to allow for sanctions and our suggestions for a fixed fee scheme on lower value value cases.

22. If a procedure for summary assessment was introduced, in what circumstances should the summary assessment of expenses take place and should it be restricted to any particular types of action?

We do not support summary assessment.

23. Would there be any benefit in introducing a procedure of submitting schedules of expenditure similar to the pilot scheme operating in the Birmingham Mercantile Court and TCC?

No.

24. Apart from imposing sanctions, what other powers, if any, should be made available to the courts to promote predictability and certainty of judicial expenses?

The Court should have the ability to enforce a meeting of the parties to resolve issues (e.g. early Pre-Trial Meetings or joint settlement discussions) if it is clear during case management that the case is ready and warrants such action, rather than allow cases to simply drift on towards a Proof and taking up court time and resource unnecessarily. Too

often at present, the parties are left without focus until the Proof date almost arrives and the Pre-Trial Minute is due. (4 weeks before any Proof)

CHAPTER 5: PROTECTIVE EXPENSES ORDERS

25. Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?

FSCM has no view to offer.

26. Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?

FSCM has no view to offer.

CHAPTER 6: REFERRAL FEES

27. Should lawyers be permitted to pay a sum of money to a third party in return for referrals or instructions for other business?

FSCM believe that there should be a blanket ban on referral fees since they create a 'feeding frenzy' at the point of accident and a behind the scenes vested interest for the Solicitor to recoup the referral fee paid at all cost and regardless of the client.

This increases legal costs unnecessarily and delivers no discernible value, which subsequently affects the end Consumer through higher insurance premiums.

We believe a UK wide blanket ban, properly regulated will take out this layer of cost without any detriment to any party.

28. Should lawyers be permitted to provide legal or other services to a third party at no cost to the third party in return for referrals or instructions for other business?

No. This mechanism could be used to overcome the prohibition on payment of referral fees in Scotland and therefore, should be banned.

We accept there may be acceptable exceptions, such as charities and these should be taken into account by the body drafting the rules.

29. Should lawyers be permitted to make payment to a company, or some other body, either in money or by some other consideration, in order to have their name placed on a panel for the purpose of securing a flow of instructions in litigation?

No. This is simply another way of circumventing the ban.

30. Should the answers to questions 27, 28 and 29 be different, please explain why the situations should be distinguished.

In view of our consistent response, FSCM have no further comment to make.

31. In the event that payment for referrals, whether by money or provision of services, is permitted, should there be a limit upon the value of the referral fee or services provided?

We believe there should be an outright ban. Should this not occur, we believe that referral fees should be capped.

CHAPTER 7: BEFORE THE EVENT INSURANCE

32. Do BTE insurers adversely influence the conduct of the litigations which they are funding?

No. All BTE insurers are subject to the Principles and Regulations created by the Financial Services and Market Act, which have at their core the avoidance of any conflicts of interest between the insurer and the policyholder.

In our view, the BTE insurer has a vested interest in ensuring the best possible outcome for their policyholder, therefore there is common aim between the BTE insurer and the policyholder consumer.

33. Is it appropriate for a lawyer in the direct employment of an insurance company to assess whether a policy holder's claim falls within the terms of the policy?

FSCM see no difficulty in a lawyer in the direct employment of an insurance company assessing whether a policyholder's claim falls within the terms of the policy as suitable safeguards exist i.e. complaints procedures, Insurance Ombudsman referral and FSA regulation.

34. Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage?

No. By agreeing fee charging structures with their panels, BTE insurers can monitor both costs and quality of service to their policyholders. Current EU legislation means the consumer has the ultimate choice of lawyer at the point of commencing litigation.

35. Should BTE insurance be encouraged and, if so, what suggestions would you make to address some of the criticisms levelled against it?

Yes, BTE insurance should be encouraged and indeed, more widely promoted as it is a clear method of allowing consumers access to justice. In our view, the criticisms levelled against it are unfounded and we have previously referred to the remedies available to any unsatisfied consumer.

CHAPTER 8: SPECULATIVE FEE AGREEMENTS

36. Are there any aspects of speculative fee agreements that require regulation?

FSCM believe that speculative fee arrangements are purely a matter for claimants and their lawyers since they are not recoverable from the paying party in Scotland.

We firmly believe this should remain the position.

37. What should be the maximum uplift for success fees in Scotland?

Our view is that success fees are a matter between the claimant and their lawyer and should remain so as long as there is no suggestion of recoverability from any other party.

38. Should there be a cap on success fees as a percentage of damages? If so, at what percentage and at what level and heads of damages?

Our view is that success fees are a matter between the claimant and their lawyer and should remain so as long as there is no suggestion of recoverability from any other party.

39. Should success fees be recoverable in Scotland? If so, under what circumstances?

No. They should not be recoverable in Scotland under any circumstances.

40. Should ATE insurance premiums be recoverable in Scotland? If so, under what circumstances?

No. They should not be recoverable in Scotland under any circumstances.

41. If success fees and ATE insurance premiums remain irrecoverable in Scotland, is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees and insurance premiums? If not, what are the alternatives?

FSCM believe success fees and ATE insurance should remain irrecoverable and in that event, this remains a matter wholly between the solicitor and their client.

CHAPTER 9: DAMAGES BASED AGREEMENTS ('CONTINGENCY FUNDING')

42. Should the law be changed to allow solicitors and counsel to enter into DBAs?

In our view DBAs are a matter between the claimant, their solicitor and if applicable, the management company.

Our concern in relation to DBAs themselves lies in their direct link to the eventual value of any claim. Claims values may be artificially inflated, and the direct stake that a solicitor / adviser / counsel / management company would have in the outcome calls the independence of advice into question.

If DBAs are to become a feature of Scottish litigation, it is our position that they should remain irrecoverable. It is also our view that they should be regulated.

43. Should claims management companies continue to be entitled to enter into DBAs?

In our view DBAs are a matter between the claimant, their solicitor. (and if applicable, the management company)

Our concern in relation to DBAs themselves lies in their direct link to the eventual value of any claim. Claims values may be artificially inflated, and the direct stake that a solicitor / adviser / counsel / management company would have in the outcome calls the independence of advice into question.

If DBAs are to become a feature of Scottish litigation, the it is our position that they should remain irrecoverable. It is also our view that they should be regulated.

44. If DBAs are permitted in Scotland:

a. Is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees?

Our view is that DBAs are a matter between the claimant and their lawyer and should remain so as long as there is no suggestion of recoverability from any other party.

b. Should there be a cap on the percentage of the damages that lawyers are entitled to charge?

Our view is that DBAs are a matter between the claimant and their lawyer and should remain so as long as there is no suggestion of recoverability from any other party.

c. Should the percentage recoverable under a DBA be applicable to all heads of loss?

Our view is that DBAs are a matter between the claimant and their lawyer and should remain so as long as there is no suggestion of recoverability from any other party.

d. Should there be an increase in the level of damages awarded? If so, by what percentage and how is this to be achieved?

No. Levels of compensation should be set by the courts and should not be influenced by legal expenses.

e. What forms of protection may be required for clients entering into such an agreement?

Should be regulated and governed by Consumer protection legislation.

45. If the current prohibition on solicitors and counsel entering into DBAs is retained, should steps be taken to prevent its circumvention by the formation of a Claims Management Company in which solicitors are directors or shareholders?

In our view DBAs are a matter between the claimant, their solicitor. (and if applicable, the management company)

Our concern in relation to DBAs themselves lies in their direct link to the eventual value of any claim. Claims values may be artificially inflated, and the direct stake that a solicitor / adviser / counsel / management company would have in the outcome calls the independence of advice into question.

If DBAs are to become a feature of Scottish litigation, the it is our position that they should remain irrecoverable. It is also our view that they should be regulated.

46. Should there be regulation of claims management companies operating in Scotland? If so, what are the mischiefs to be addressed and how should regulation be achieved?

In our view DBAs are a matter between the claimant, their solicitor. (and if applicable, the management company)

Our concern in relation to DBAs themselves lies in their direct link to the eventual value of any claim. Claims values may be artificially inflated, and the direct stake that a solicitor / adviser / counsel / management company would have in the outcome calls the independence of advice into question.

If DBAs are to become a feature of Scottish litigation, the it is our position that they should remain irrecoverable. It is also our view that they should be regulated.

CHAPTER 10: THIRD PARTY FUNDING

47. What are the risks/potential abuses involved in third party funding and how might these be addressed?

The risk and potential abuse comes in where a third party funder controls the litigation with little or no regard for the claimant themselves i.e. credit hire.

FSCM have no issue with types of Third Party Funding like trade unions or professional associations whereby their aim does not conflict with that of the claimant and the claimant retains a financial interest.

48. If regulation is desirable, what form(s) should it take?

FSCM has no firm view to offer.

49. Should a party to a litigation who has entered into a funding arrangement be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances?

FSCM believes there should be disclosure to ensure an open and transparent process.

CHAPTER 11: ALTERNATIVE SOURCES OF FUNDING

50. Is a disproportionate amount of the civil legal aid budget allocated to family actions and, on any view, are there ways in which this might be reduced?

FSCM have no view to offer.

51. Should a CLAF or SLAS be introduced in Scotland? If so, which is preferable?

FSCM have no view to offer.

52. If such schemes were to be introduced, what types of litigation should be covered?

FSCM have no view to offer.

53. If such schemes were to be introduced, what should be the minimum and maximum disposable income of successful applicants?

FSCM have no view to offer.

54. Should such schemes be liable for payment of the expenses of successful opponents?

If such schemes are allowable, the scheme should be liable for payment of expenses of successful opponents (as costs should follow success) and be enforceable.

55. What further steps, if any, should be taken to promote *pro bono* funding of litigation and by whom?

FSCM have no view to offer.

56. Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a *pro bono* basis and, if so, to whom should such a payment be made?

FSCM have no view to offer.

CHAPTER 12: SCOTLAND'S LITIGATION MARKET

57. What steps could be taken to make Scotland the forum of choice for litigation?

In our view, greater predictability together with transparency of costs, combined with more judicial case management would improve our already enviable system.

There is also a real issue regarding Civil Jury Trials and the present system where by the Jury is given little guidance (if any) in terms of what to award by the Judge and the outcome of Jury Trials are unpredictable for every party involved.

This creates a culture where it is universally acknowledged by Advocates and Solicitors that it is impossible to predict an outcome. This simply does not fit with a modern judicial system being promoted for predictability and certainty.

We would advocate the need for some Judicial intervention in Jury Trials, even to try to introduce a possible range of awards based upon submissions made by Counsel to the Judge with the Jury absent.

There are real delays within the current Judicial system and we would support a change in the privative limit of the Court of Session so that valuable court resources are retained at the correct level to ensure Scotland operates a judicial system which allows speed of access to justice while offering predictability over costs and outcome.

In essence, more judges (or judicial time) would mean a greater capacity within the system overall and that greater capacity should mean that cases can be dealt with more quickly – speed, access to justice and predictability would make Scotland the forum of choice for litigation.

58. Apart from the introduction of a tariff-based system as described in Chapter 3, what measures might be introduced to reduce the difference between the actual cost of a litigation and the amount recoverable as judicial expenses?

The disproportionate costs which presently exist in low value personal injury cases requires redress and the best way we can see would be a fixed fee regime for cases with damages of £25,000 and under.

We do not accept there is a significant difference between the actual cost of litigation and the amount recoverable as judicial expenses and we demonstrate in our answers to questions 2. and 13. that in cases where the damages are £25,000 or less there is clear evidence that the Pursuers costs are higher than the damages sum at issue in a majority of cases.

The Forum of Scottish Claims Managers study showed that in January and February 2012 settled cases, there were 603 cases where the damages were £25,000 or less.

In almost half of those cases, (46.27% or 279 cases) the Pursuers costs were higher than the level of damages.

We believe this is the area in need of reform.

59. If a one way costs shifting regime is introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

No. We believe the introduction of one way costs shifting in England and Wales would be as a solution to a problem which does not presently exist within the Scottish system.

In our view, one way costs shifting would not create any incentive to litigate in England and Wales over Scotland.

60. If damages based agreements are introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

No. We do not believe there would be any significant impact or incentive.

CHAPTER 13: SPECIAL CASES AND CONCLUDING REMARKS

61. Do clinical negligence claimants face particular difficulties in the funding of claims? If so, what measures might be taken to address these difficulties?

FSCM have no view to offer.

62. In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?

FSCM have no view to offer.

63. If DBAs are not recommended for multi-party actions, how else may lawyers be remunerated for the additional responsibility involved in such actions?

FSCM have no view to offer.

64. Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?

FSCM have no view to offer.

65. Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?

FSCM have no view to offer.

66. In addition to the cases identified in Chapter 13, are there any other cases that may require special consideration? If so, what are they and why?

FSCM have no view to offer.

67. Can you suggest any means, other than those raised in this consultation paper, which would enable litigation to be more affordable?

FSCM have no view to offer.

68. What other recommendations might this Review make to enable individuals to fund a litigation when they are not eligible for legal aid, have no BTE insurance cover or their cover is inadequate, cannot afford the ATE insurance premium and are not members of an organisation that meets its members' legal fees?

FSCM have no view to offer.