

These documents relate to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (SP Bill 14) as introduced in the Scottish Parliament on 1 June 2017

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

[As Amended at Stage 2]

## Supplementary Financial Memorandum

### Introduction

1. As required under Rule 9.7.8B of the Parliament's Standing Orders, this Supplementary Financial Memorandum is published to accompany the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (introduced into the Scottish Parliament on 1 June 2017) as amended at Stage 2.
2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced.
3. This Supplementary Financial Memorandum addresses the financial impact of Stage 2 amendments on the Bill where they would substantially alter any of the costs.

### Section 6 – Personal injury claims

4. Section 6 of the Bill was amended at Stage 2 to change the effect of the provisions in section 6(4) in relation to the calculation of a success fee under a success fee agreement insofar as the future loss element of damages is concerned. It means that no success fee can now be taken from the future loss element of an award or agreed settled payment if it is to be paid as a lump sum. Under the Bill as introduced, the legal representative would be entitled to take a percentage of an award for future loss to be paid as a lump sum as a fee in certain circumstances, but not if the award was to be paid by periodical payment.
5. The proposal in the Bill is that solicitors (who are regulated by the Law Society of Scotland) should in future be able to offer DBAs as well as claims management companies (which will become regulated by the

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Financial Conduct Authority under the provisions of the Financial Guidance and Claims Bill currently before Westminster). The Bill also provides for the Scottish Ministers to make regulations setting caps on success fees paid under success fee agreements. The amendment to the Bill provides, however, that both the future and past loss element of damages will not be included in the calculation of the success fee.

6. At present, a claims management company might charge between 20% and 33% of damages awarded or agreed leading to a success fee of between £200,000 and £330,000 for damages of £1 million. If Sheriff Principal Taylor's recommendations are followed in regulations, the success fee on £1 million would be £72,500 – 20% of the first £100,000, 10% of then next £400,000 and 2.5% above £500,000.

7. For claims in excess of £500,000 it is future loss which is likely to be the most contentious and largest element. But Sheriff Principal Taylor was 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, it is not clear how the damages paid will be

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divided 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 incentivised for the work which they do particularly when working on the most contentious and difficult element, which is very often future care costs. It is better for the client that the lawyer strives to secure a better offer or judicial award than to advise the client to a settlement offer initially made at a low level.

8. The financial consequence of the amendment is therefore that firms of solicitors, who have, until the provisions of section 2 of the Bill come into force, been unable to offer DBAs at all may still be unable to offer DBAs in certain circumstances. Some firms of solicitors who have previously offered DBAs though associated claims management companies may suffer financially because this line of work will be uneconomic for them to continue. One claims management company 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. This figure may be drastically reduced in the future with consequences not only for the injured parties who may not be able to access justice, but also for the firms of solicitors themselves.

9. The costs in terms of lost business to these firms of solicitors is unquantifiable but, if future loss were to be excluded from a damages payment of £1 million, then the first problem would be to establish what part of the damages would be attributable to future loss. This may take some time and will set the interests of the solicitor against those of the client.

10. Where future loss is considered to be say, £500,000 of the £1 million, the payment to the solicitor, if future loss were to be included in the calculation of the success fee would be only £12,500. That is a relatively small proportion to pay in return for ensuring that the claim can be made. The lack of such payment may, however, deter solicitors from offering DBAs in personal injury claims. It would be very difficult to estimate how much such business would be lost to solicitors or indeed the number of claims which may not be able to be taken forward. The result is reduced rather than increased access to justice.

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11. If lawyers are not incentivised to strive to secure a better offer or judicial award than to advise the client to a settlement offer made at a lower level, this may mean that the victim of a catastrophic injury will receive 100% of, say, £800,000. This is the effect of the amendment to section 6(4). But if the lawyer is incentivised to pursue a higher award on behalf of the client, even with the 2.5% success fee proposed by Sheriff Principal Taylor, then the client would receive 97.5% of an award which may extend into millions of pounds and would therefore benefit the client's future care much more.

## Summary of additional costs

### Costs on the Scottish Administration

12. The Scottish Government does not anticipate any additional costs on the Scottish Administration as a result of the amendments to the Bill.

### Costs on Local Authorities

13. The Scottish Government does not anticipate any additional costs on local authorities as a result of the amendments to the Bill.

### Costs on other bodies, individuals and businesses

14. The Scottish Government does not anticipate any additional costs on other bodies, individuals and businesses other than those specified above, specifically firms of solicitors. As noted in relation to the amendments on section 6, there will be unquantifiable loss of business to firms of solicitors who may be unable to offer to represent injured parties on the basis of a DBA.

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