

CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018**REQUEST FOR CIVIL COURT RULES UNDER SECTION 8 – RESTRICTION ON PURSUER’S LIABILITY FOR EXPENSES IN PERSONAL INJURY ACTIONS****Purpose**

1. This policy paper describes the policy behind section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018¹ (“the 2018 Act”) and asks that the Scottish Civil Justice Council considers drafting appropriate rules of court to be made by Act of Sederunt to implement the policy purpose.

Timing

2. The Scottish Government envisages that section 8 and other provisions in Part 2 of the 2018 Act will be commenced in 2019 but this will be dependent on appropriate rules of court being brought forward for commencement at the same time.

Background*Review of the Expenses and Funding of Civil Litigation in Scotland*

3. The introduction of Qualified One-Way Cost Shifting (QOCS) was recommended in Chapter 8 of Sheriff Principal Taylor’s 2013 Review of the Expenses and Funding of Civil Litigation in Scotland². It is ‘one-way’ because it would only be the pursuer who would be awarded expenses if successful, and ‘qualified’ because there would be circumstances in which the pursuer might lose the benefit of QOCS.
4. Questions around the proposed introduction of QOCS were included in the Scottish Government consultation paper³ in 2015. Views were more or less evenly divided between defender and pursuer responses on whether the introduction of QOCS would increase access to justice. Respondents representing the interests of insurers/defenders observed that the expense of litigating was an issue for both sides and it was disproportionate to defenders to remove all cost risks from one side. It was suggested that the proposals would lead to an increase in unmeritorious claims and that defenders would be forced to settle actions based on business considerations rather than the factual or legal merits of the case.

¹ <http://www.legislation.gov.uk/asp/2018/10/contents/enacted>

² <http://www.gov.scot/Publications/2013/10/8023>

³ <http://www.gov.scot/Publications/2015/01/9932>

5. In direct contrast, respondents representing the interests of pursuers viewed QOCS as necessary to remove obstacles and increase access to justice for those with meritorious claims. They observed that the current system accentuates the “asymmetrical relationship” identified by Sheriff Principal Taylor between pursuers, who are usually private individuals, and defenders, who are usually well-resourced insurance companies, and that QOCS would level the playing field.
6. Sheriff Principal Taylor proposed the introduction of QOCS in personal injury, including clinical negligence, litigation. Section 8 introduces a general rule that the pursuer in an action for reparation in respect of personal injuries should not be found liable in expenses (the Explanatory Note for section 8 is appended in an Annex). The general rule is subject to exceptions, set out in section 8(4), with the pursuer losing the benefit of QOCS:
 - where the court finds that fraud on the part of the pursuer is established on the balance of probabilities;
 - where the pursuer’s conduct is found by the court to have been an abuse of process; or
 - where the pursuer has acted unreasonably in bringing or conducting the litigation.
7. Sheriff Principal Taylor also, however, suggested other circumstances in which the benefit of QOCS should be lost. These were:
 - Failure to beat a tender;
 - Summary dismissal; and
 - Abandonment.
8. These other exceptions to the rule on QOCS were not included in the primary legislation since the law on these matters appeared to be mainly in common law or rules of court, especially in relation to tenders and summary dismissal. Moreover, in the case of summary dismissal, the Council is yet to implement Lord Gill’s recommendation 123 about summary dismissal.
9. Sheriff Principal Taylor in his oral evidence before the Justice Committee indicated that:

“I am persuaded that qualified one-way costs shifting should not be available, and should be specified as not being available, in the event that the pursuer has failed to beat a tender....”

“I do not think that what I propose in regard to tenders should be dealt with in the Bill.... I think that that should properly be in an act of sederunt”

10. Kim Leslie, the Convener of the Civil Justice Committee of the Law Society of Scotland, when asked by the Convenor whether failure to beat a tender should be in the Bill, replied:

“The Law Society suggests in its submission that the issue be addressed by an act of sederunt.”

11. The Scottish Government agrees with Sheriff Principal Taylor that the benefit of QOCS should be lost if a pursuer fails to beat a tender. It also agrees with him that it is more appropriate to deal with tenders through secondary legislation. If tenders and settlement offers are mainly dealt with in secondary legislation, that is the appropriate place for any provision on failure to beat a tender or a settlement offer.
12. At a recent meeting, LPPO indicated that it would be unwise to include the word “tender” in primary legislation since the civil court rules rewrite project may lead to this terminology changing. Officials have checked and “tender” is indeed not a word that has been used in primary legislation to date.
13. The Lord President wrote to the Convener of the Justice Committee on 22 February 2018 (copy attached) indicating that a specific reference to tenders in primary legislation would be problematic and would restrict the Court’s ability to regulate practice in this area.
14. The Personal Injury Committee (PIC) of the SCJC was invited to lead on the development of policy for rules on the issue of other exceptions to the rule on QOCS (beyond those specified in the 2018 Act), and the issue was discussed at their meeting in April. A copy of the discussion paper considered by PIC on that occasion which has been marked up to show the result of their deliberations is attached.
15. The Scottish Government agrees with and endorses the conclusions of the Personal Injury Committee and believes that rules of court are required in order to provide further exceptions from the general rule whereby the pursuer will lose the benefit of QOCS where:
- There is failure to beat an offer (tender);
 - The case is summarily dismissed;
 - The case is abandoned.
16. Section 8(6) specifically provides for the exceptions to the general rule on QOCS to be specified in an act of sederunt.

Transitional arrangements

17. The Scottish Government's provisional view is that QOCS should apply to civil proceedings which are brought on or after the day of commencement of section 8 of the 2018 Act.

Suggested areas for consideration of rules of court

18. The Scottish Government requests the Council to consider bringing forward rules of court which will have the effect of adding to the exceptions to the section 8 of the 2018 Act. These would appear to be required in relation to:

- failure to beat a tender;
- summary dismissal; and
- abandonment;

as set out in the paper considered by the PIC in April. For the avoidance of doubt the Scottish Government endorses all the detailed proposals in that paper. The Scottish Government is grateful for the proactive approach of the PIC in this regard.

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ANNEX*Section 8 – Restriction on pursuers’ liability for expenses in personal injury claims*

Section 8 makes provision for a qualified one-way costs shifting (“QOCS”) regime in Scotland for claims for personal injuries and appeals in civil proceedings for personal injuries, including clinical negligence. Subsection (2) provides that the court must not make an award of expenses against the pursuer of the claim or appeal for personal injuries where they have conducted proceedings in an appropriate manner. Subsection (3) makes it clear that this does not prevent the court from making an award of expenses in relation to any other type of claim made in the same set of proceedings. Subsection (4) sets out the tests for considering if the person has acted in an inappropriate manner; these are fraudulent acts (including but not limited to fraudulent representations), manifestly unreasonable behaviour, and other abuses of process. Subsection (5) sets out that the standard of proof for fraudulent actings in subsection (4)(a) is the balance of probabilities. Subsection (6) gives the court the power to restrict the types of claims to which QOCS can be applied by an act of sederunt under section 103(1) or section 104(1) of the Courts Reform (Scotland) Act 2014. Subsection (7) explains what is meant by “personal injuries” in this section. That term includes diseases as well as physical or mental impairment.

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