Conditional fee agreements in Scotland, risk assessments in After – the- Event insurance and Professional Conduct rules

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Abstract

The Scottish rules of civil procedure have undergone recent changes under the civil justice reforms and there has been legislation that has impacted on solicitors negotiating conditional fee agreements in personal injury cases The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the "2018 Act") came into force in June 2018 with the aim of reforming civil litigation funding in Scotland and this has allowed conditional fee agreements and damages based agreements. This has been supplemented by the Civil Litigation (Success Fee Agreements) Regulations 2020,which has placed limit or a cap on the amount of success fee claimed from the compensation recovered from the other party. The incentive for the solicitor to act for their clients in personal injury compensation claims has increased with the availability of After- the -Events- insurance which is now more competitive. The fiduciary duties of the solicitor in assessing the civil litigation costs implications on litigants in tortious claims will have to abide by the Professional Conduct rules that are likely to be engaged when these agreements are formulated and which have now have a framework of Style Success Fee Agreements (SSFA) framed by the Scottish Law Society. The argument in this paper is that CFEs are by their formulation risk bearing instruments and the to cover the party for loss in civil litigation the solicitors have to take a calculated risk to offer sufficient protection for their clients.

Key words

Pactum de quota liti, personal injury claims, access to justice, Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, Conditional fee agreements. Style Success Fee Agreements, ATE, Professional Conduct rules.

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Introduction

The rules of civil litigation have undergone key changes in Scotland because of reforms that are the consequence of the Courts Reform (Scotland) Act (CRA) 2014. This was enacted to implement " a cost-efficient, effective and accessible civil justice system for all individuals". [2] This has brought about procedural changes but also served as platform for legislation regarding the agreements between legal professionals and their clients that are based on no win no fees agreements in personal injury claims. The rationale behind the prohibition of the conditional fee agreements or the damages based agreements in Scotland has always been the conflict of interest.[3] The Scottish solicitors can enter into agreement either by way of Conditional Fee Agreement (CFA) or Damages Based Agreements (DBA)s after 2018 and the issue is if the after the events insurance (ATE) places unreasonable burdens on the losing party as a consequence of the risks imposed in personal injury litigation for tortious acts. It is necessary to consider the impact of specultative fee agreements to cover the loss in civil litigation. The evidence is that the risk element is not substantial and a solicitor can stipulate condition within the professional rules when formulating an agreement with ATE liability with their clients.

The CFA is a a relatively new phenomen in Scotland and it was given effect by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. It has three main objectives: (1) to make the costs of court actions more predictable; (2) increase funding options for the pursuer; and (3) deliver a more streamlined approach to mass litigation through the introduction of group proceedings.[4] It was followed by the Success Fee Agreements Regulations 2020 that provide the basis for agreements that the solicitor negotiated on a CFAs with their clients.[5] These regulations place a Success fee cap for personal injury claims which limits compensation under the 2018 Act. [6]

[2]Civil Justice Statistics in Scotland in 2020-21. Government of Scotland. https://www.gov.scot/publications/civil-justice-statistics-scotland-2020-21/pages/6/

[3] The jurist Stair described it as a promise or contract "whereby advocates, in place of their honorary, take a share of the profit of a plea. ". Stair, '*Institutions, 1.10.8: 'A Linguistic Note'*, Edinburgh Law Review, (1997)pp 368-370 Begg stated it is "an arrangement that he should receive, instead of the usual honorarium, a share of the property forming the subject of the litigation"; J. Henderson-Begg, in '*A treaties on the law of Scotland relating to law agents including the law of costs as between agent and client'* argues "that it is an arrangement that he (solicitor) should receive, instead of the usual honorium, a share of the property forming the subject of the litigation". Edinburgh: Bell & Bradfute (1883), pp 123-124

[4] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 Explanatory Noteshttps://www.legislation.gov.uk/asp/2018/10/notes/division/2

[5] The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020, Statutory Instrument Order 10

[6] Section 2.—(1) Subject to section 4 (power to cap success fees) of the 2018 Act, a success fee agreement must not require the recipient of relevant services to pay to the provider a success fee which, including VAT, exceeds the maximum amount provided for by these Regulations ("the success fee cap").

If the Solicitor recieves instructions on a CFA, then ATE can provide the client with an indemnity for legal costs, in the event that the client's litigation or arbitration is unsuccessful. In addition to the legal fees and disbursements, the policy will cover potential liability for adverse costs. The DBAs have been extended under the 2018 Act and they are intended to cover all civil disputes under which a solicitor is paid only if the client's case is successful, and the fee is calculated as a percentage of the damages awarded to the client. The intention is that the DBAs might enable the legal services market to expand and to open up "*a wider choice of funding options, which will increase access to justice for pursuers of civil litigation. The Law Society will presumably benefit if a regulated profession can take market share from an unregulated one*".[7]

The speculative fee agreements have been extended to apply to all civil disputes under which a solicitor is paid only if the client's case is successful, and the fee is calculated as a percentage of the damages awarded to the client. In order to ensure compliance with both the 2018 Act and the 2020 Regulations, the Civil Justice Committee, through the Law Society of Scotland Success Fee Agreement has introduced a template Style Success Fee Agreement (SSFA) that may be used in personal injury cases together with a style Cooling off Notice. Both the SSFA and the accompanying Cooling off Notice have the status of guidance, which is not mandatory, but a solicitor will have to show good reason for departing from it.[8]

The CFA and the DBA has expanded the basis for a retainer and is not "unenforceable by reason only that it is a *pactum de quota litis* (that is, an agreement for a share of the litigation)". [9] It provides costs protection for the solicitor to cover the entering into a 'no win no fee' based contract with the client. [10] The CFA allows the solicitor to retain compensation up to the level of 50 % in recovering costs in commercial cases and 35 % in employment tribunal awards from the

(2) The success fee cap is determined by reference to the financial benefit obtained by the recipient ("the financial benefit").

(3) In a matter that is, or could become, a claim for damages for personal injuries) or the death of a person from personal injuries, the success fee cap is—

(a)in respect of the first £100,000 of the financial benefit, 20%,

(b)in respect of the amount of the financial benefit over £100,000 but not exceeding £500,000, 10%,

(c)in respect of the amount of the financial benefit over £500,000, 2.5%.

[7] Andrew Lothian, Litigation : A Bill to Settle, Scottish Law Society, 17/7/17 https://www.lawscot.org.uk/members/journal/issues/vol-62-issue-07/litigation-a-bill-to-settle/

[8] New guidance on Law Society Style Success Fee Agreement, Professional Support Regulation, 7/4/22 https://www.lawscot.org.uk/news-and-events/law-society-news/new-guidance-on-law-society-style-success-fee-agreement/

[9] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 section 2

[10] Section 8

opponent which is a charge that can elevate the costs to be paid out of the damages received by the client. [11]

Alternatively, in DBAs, the solicitor's fee can be calculated as a percentage of the damages, in which case the solicitor would receive an agreed ratio from the compensation on top of the costs recovered from the opponent.[12] The intention behind these reforms is to provide greater certainty for clients entering into CFA or DBAs. The 2020 Regulations also impose caps on success fees for different areas of civil liability including personal injury and it should be noted that success fee agreements cannot be used in family proceedings, unless the success fee is contained in a CFAs, as opposed to DBA.

The After the Event (ATE) is an insurance policy against the compensation that the losing party in a compensation claim for personal injury. The concept behind the inception of the ATE is that " legal information, and easy access to a neutral forum, are more cost effective, and more likely to enhance self reliance on the market for justices services, and more likely to lead to legal empowerment".[13] It can be contrasted with the Before the Event Insurance (BTE) which is an "insurance against future legal costs" that was in place before the event "which gave rise to the claim such as an accident" which caused the injury and the "great majoiry of claimants who suffer personal injury avail this for access to justice". [14]

In the ATE cover the insurance company pays the litigation costs of both sides but if an action fails the claimant may become liable for costs. The insurance companies pay claimants after they have been insured with a policy which will cover their costs in the event of an unsuccessful claim. It has been accepted "that insurance companies are fundamental to tort and the operation

[11] Success Fee Cap under the Regulations 2020

[12] Section 3 of the 2018 Act defines a DBA as follows**:**

(1) A damages-based agreement must not be entered into in connection with a matter which is or may become the subject of family proceedings.

(2) In paragraph (1)—

(a)"damages-based agreement" is a success fee agreement under which the success fee is determined by reference to the amount of financial benefit obtained by the recipient,

(b)"family proceedings" has the same meaning as in section 135 of the Courts Reform (Scotland) Act 2014).

(3) Nothing in paragraph (1) is to be construed as restricting the use of other types of success fee agreement.

[13] M Barendrecht, 'Legal aid, accessible courts or legal information? Three access to justice strategies compared', Global Jurist Vol. 11: Iss. 1 (2011) (Tilburg Institute for Interdisciplinary Studies of Civil Law, and Conflict Resolution Systems) Working paper No 24/2010

[14] Richard Lewis, Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice**?** The Modern Law Review, Vol. 74, No. 2 (2011) pp. 272-286

of the personal injury system". [15] Their conduct impacts on whether "a claim is made, how it is processed and the amount of damages gained. Liability insurance is not merely an ancillary device to protect the insured, but is the "primary medium for the payment of compensation, and tort law [is] a subsidiary part of the process."[16]In general, achieving settlement can be more difficult where ATE insurance is in place because in requiring consent, the insurer will also ensure their interests are protected and may insist on being involved in the settlement process including agreeing on a settlement figure at the outset. The ATE insurance premium not recoverable legal expenses against the unsuccessful party after a civil claim. [17]

Under the instructions issued by the Law Society to solicitors to draft their CFAs they are also under the obligation to provide the client, along with a copy of the Style Success Fee Agreements (SSFA), a copy of the 'Cooling off Notice'. This has to meet the requirements of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This a guidance which is the right to cancel the agreement within a minimum period of 14 days and the solicitor must explain this to the client.[18] The need for the CFAs and the DBAs has been found to be more effective operationally because where "*a claimant is likely to receive significant damages and thus be able to use those funds to reimburse any sums due to their lawyers from them The third pary funding operates effectively only in particularly high value claims, such as to justify a commercia third party funder providing the resources to enable individuals to litigate*".[19]

The road map of the paper is as follows: Part I considers the background of retainers in Scotland and the proportional fees agreements that were historically contingent on the party succeeding in a civil case and the *pacta de quota litis* principle. It also takes into consideration the impact of the Jackson reforms that led to the implementation of the conditional fees in Scotish litigation; Part 2 examines the ATE and the various compuntions used by solicitors in order to arrive to the CFEs with their clients; and Part 3 concerns the Professional Standards and possible breach of the Rules of Conduct for solicitors in entering into agreements in which there has been CFE entered in a claim for damages for personal injury cases.

[15] R. Merkin and J. Steele, Insurance and the Law of Obligations (2013), R. Lewis, 'Insurance and the Tort System' (2005) 25 Legal Studies 85.

[16] P. Cane, Atiyah's Accidents, Compensation and the Law (6th ed 1999) 191.

[17] McGraddie v McGraddie and anon (2015) WLR 560 Lord Neuberger at 21

[18] Style Success Fee Agreements Guidance, Law Society of Scotland I May 2022, https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-f/division-d/guidance/style-success-fee-agreement-guidance/

[19] John Sorabji, Legal Expences Insurance and Future of Effective Litigation Funding, Erasmus Law Review, Issuw 4 (2021) pp 189-197 https://www.bjutijdschriften.nl/tijdschrift/ELR/2021/4/ELR-D-21-00033

1. Conditional fee agreements and Personal injury litigation

In Scotland, civil litigation in tortious claims has traditionally been financed in three ways – "through private funding, civil legal aid, and trade union funding".[20] It has been noted that while the "third party funding by firms of litigation funders is becoming more common in relation to commercial cases, these are unknown in personal injury actions". [21] The existence of no win no fee agreements have an ancient history in Scottish civil litigation and were recognised by an Act of Sederunt of 19 December 1835 and the modern practice is regulated by section 36 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* and section 42 of the *Rules of the Court of Session 1994*.

Traditionally, agreements which do vary in terms of recovery were dependent on what has been recovered under the *pactum de quota litis* in Scotland.[22] That principle covers any situation where there is an attempt by a lawyer to make an arrangement with their client whereby their remuneration is to vary in proportion to the amount recovered in the litigation.. In Scots law it was accepted as "a bargain by an advocate or law agent to receive, in remuneration of his professional services, a share of the subject in contest". [23] It is a similar principle to champerty at common law which, although having very different legal foundations, has the same underlying policy considerations.

These rules did not prevent the recourse to 'speculative fee' agreements under statutory provisions. Section 36 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* allows both solicitors and advocates to avail an incremental sum from their client. [24] Chapter 42 of the *Rules of the Court of Session 1994* also enables the use of speculative fees, which is a format

[20] Success fee agreements in Scotland A Consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, Scottish Government Consultation paper Page 10 (2018) https://www.gov.scot/publications/success-fee-agreements-scotland-consultation-part-1-civil-litigation-expenses-group-proceedings-scotland-act-2018/pages/3/

[21] Ibid

[22] In A & E Investments Inc. and Robert Kidd Pursuers against Levy & McRae Solicitors LLP and Jonathan Brown, [2022] CSOH 14, Lord Doherty ruled that the terms "*pacta de quota litis*" principle aims to prevent the "conflict of interest" which arises if a lawyer has a financial stake in the amount the client may recover in a litigation. Para 21

[23] George JosephBell, Principles of the Law of Scotland Edinburgh Legal Education Trust, (10th ed), 1899 para 36(2))

[24] Section 36 Solicitors' and counsel's fees**.**

(1)An advocate and the person instructing him may agree, in relation to a litigation undertaken on a speculative basis, that, in the event of the litigation being successful, the advocate's fee shall be increased by such percentage as may, subject to subsection (2) below, be agreed.

(2)The percentage increase which may be agreed under subsection (1) above shall not exceed such limit as the court may, after consultation with the Dean of the Faculty of Advocates, prescribe by act of sederunt.

that based on either statutory scale fees or litigation that is being pursued and it can be increased by the court in appropriate cases. [25] The agreements which have varied depending on what has been recovered and the principle covers any situation where there is an attempt by a solicitor to make an arrangement with their client whereby their remuneration is to vary in proportion to the amount recovered in the litigation. This reflects the concept similar to champerty at common law which can be incorporated in an agreement but voided if the funding agreement discloses an element of impropriety so as to constitute "*wanton and officious intermeddling with the disputes of others*". [26]

In *Quantum Claims Compensation Specialists Ltd v Powell* [27] there was a contract for legal expenses insurance and the clamants Quantum were managers of the legal costs of litigation who instructed legal representatives to represent their client and to indemnify the client against an adverse award of expenses. The defendents "Wren" carried on business as indemnity insurers and contracted with Quantum to indemnify it against (i) all awards of expenses awarded against Quantum's client in favour of defenders in an action and (ii) outlays incurred by a solicitor acting for the client.

Lord Prossner overruled the appeal of the company for reimbursement and held:

"*The rule that a pactum de quota litis is unenforceable is in our opinion limited in its application to solicitors who have undertaken professional obligations, and who must not stipulate for this form of remuneration for fulfilling those obligations. On the whole matter, we are satisfied that the appellant has not made a relevant case of unenforceability, and we will therefore refuse the appeal and sustain the interlocutor of the sheriff principal*".[28]

In *A & E Investments Inc and Robert Kidd v Levy & MacRae Solicitors and Jonathan Brown* [29] the issue was whether the success fee elements of an agreement between the claimants and the solicitors firm and the junior Advocate were *pactum de quota litis*. The Court struck down an agreement between lawyers and their client on the basis that it was the success fee agreements

[25] Chapter 42 Taxation of Party. "*Where expenses are found due to a party in any cause, the court shall- (a) pronounce an interlocutor finding that party entitled to expenses and, subject to rule 42.6(1) (modification of expenses awarded against assisted persons), remitting to the Auditor for taxation; and (b) without prejudice to rule 42.4 (objections to report of the Auditor), unless satisfied that there is special cause shown for not doing so, pronounce an interlocutor decerning against the party found liable in expenses as taxed by the Auditor*".

[26] *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm) the English High Court ordered a claimant, pursuant to CPR 25.14, to reveal the identity of its funder in order to facilitate a security for costs application against the funder with the reasoning being that there were (a) reasonable grounds to believe that funding was in place, and (b) a genuine prospect of security being granted.

[27] 1998 SC 316

[28] Para 37

[29] [2020] CSOH 14

upon which the defendants accepted instructions to have breached the terms of the speculative fee agreement. Lord Docherty stated that the principle of pacta which includes success fee arrangments necessitated a preliminary question to establish their existence. He held :

In my opinion whether the first defender placed itself in a position where its own interests and its duty to its client conflicted, and whether doing what it did was infidelity to the first pursuer for its own benefit and for the benefit of the second defender, are also matters for inquiry".[30]

His Lordship struck down an agreement between the legal representatives and their client on the basis that it was "the success fee agreements upon which the defendants accepted instructions to have breached the terms of the speculative fee agreement". [31] The court upheld the pursuers argument that the success fee arrangements upon which the defenders accepted instructions to act breached the principle of *pacta de quota litis* principle. The scope of champerty and maintenance has receded in recent years and the consequences in litigation are that if the funding agreement is void and unenforceable; the funded party will be unable to recover its costs from an opponent on account of the indemnity principle, because the funding agreement is void and unenforceable, and no liability exists in relation to the funded costs.

It is necessary to consider how the CFEs entered the jurisdiction of Scotland to cover mainly the personal injury claims, which does not traditionally have a compensation culture and their main purpose and objectives. This was impacted by the Jackson Report in England that reformed the civil compensation claims. [32] The Jackson Report which advocated reforms on CFAs, civil litigation and damages awards was a watershed moment for civil justice reform in England, Wales and Scotland. [33] In the section of his report on Scotland Lord Jackson stated that "… it is significant that in Scotland personal injury cases are conducted satisfactorily on CFAs, despite the fact that success fees are not recoverable."[34] The recommendation included the "common law imdemnity principle should be abolished"and that the "legislation to permit the regulation of contingency fee agreements for civil litigation; permission for pre-action applications in respect of breaches of preaction protocols; and pre-action costs management by the court". [35]

The Scottish Government launched a consultation process on the expenses and funding of civil litigation by invested the Sheriff Principal James Taylor to conduct a review of the Expenses and

[30] Para 89

[31] Para 92

[32] Review of Civil litigation Final Report, December 2009, https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

[33] Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations The Government Response, Cm 8041, March 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf

[34] Page 112 (para 5.5)

[35] Ibid. Recoomendation, page 463

Funding of Civil Litigation in Scotland. The remit of the inquiry was: *'to review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review [. . .]'.*[36]

Sheriff Taylor's report stated : "*Jackson LJ observed in his Preliminary Report that in a sample of between 22,000 and 23,000 notified claims obtained from an insurer, costs orders against claimants were obtained in only 0.1% of the sample. While I do not have equivalent statistics for this jurisdiction, all qualitative evidence and my own experience point to the position being broadly the same*."[37] This means that defenders very rarely press for expenses in cases that they win. As a result, their marginal loss owing to these changes would be very limited.

The main recommendations were that "Speculative fee arrangements offer access to justice but caps to the level of success fees should be introduced: a cap of 20% (inclusive of VAT) for the first £100,000 of damages; 10% [38] The DBAs could not be enforced by solicitors and remain forbidden for advocates. [39] The damages between £100,001 and £500,000 should incur 2.5% (inclusive of VAT) on all damages over £500,000.[40]The solicitors in Scotland should be able to enter into DBAs (also referred to as 'contingency fees') on the basis that no fee would be charged should the case be lost.[41] The 'One way costs shifting' should operate in most circumstances in personal injury cases (including clinical negligence), meaning that the pursuer (usually an individual) would not be responsible for paying the defender's legal costs should the pursuer lose but that the defender would remain liable for the pursuer's legal costs should the defender lose. [42]

In its objective to lower the higher costs of litigation and to preclude the other party paying the losing party above a reasonable amount the Report recommended the dispensing with an advocate unless necessary.

: "*When deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, amongst other matters, to the resources which are being deployed by the party*

[36] Review of Expenses and Funding of Civil Litigation in Scotland, September 2013, page 1 http://www.gov.scot/About/Review/taylor-review/ReportBack

[37] SP Taylor: Review of Expenses and Funding of Civil Litigation in Scotland, p170, para 50 cf Jackson LJ, Review of Civil Litigation Costs: Preliminary Report, Vol. 1, (2009), Chapter 25, paragraph 2.6.

[38] Page 43

[39] Ibid

[40] Page 158

[41] Ibid

[42] Ibid

opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them."[43]

Taylor also recommended the formal introduction of SFAs, which are markedly similar to CFAs in England & Wales. Under a CFA, the client only pays for the advice if they are successful. CFAs are usually accompanied by an uplift of up to 100% of the normal fee if there is recovery also known as success fee agreements. [44] Lord Jackson who recommended the prevention the escalation of disproportionate costs driven mainly by receivable success fees and 'after the event' (ATE) insurance premiums. He described 'No win, no fee' agreements as "the major contributor to disproportionate costs in civil litigation in England and Wales" and identified the lawyer's success fee and ATE insurance premium as "two key drivers of cost under such agreements". [45]

The English and Scottish authority consist of relevant provisions of the Supreme Court Rules and Practice Direction 13, and the Rules of the Court of Session, that allow expenses which are "reasonably incurred".[46] The conditional fees have never been recoverable in Scotland and while the legal aid is available the level of compensation claims is not as high as in England. The rationale behind the historical prohibition of the CFEs has always been the proper administration of justice, with it being considered to be a potential conflict between the self-interest of the lawyer and their duties to the client and the court in entering into such an agreement. However, there have been exceptions that were permitted under the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* which granted the negotiation of the conditional fee agreements without any formally agreed after the event insurance.

[43] Para 18

[44] Ibid

[45] Review of Civil Litigation Costs: Final Report, page xvi 6 Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations, Consultation Paper CP 13/10, November 2010, Cm 7947 7 Section 58A.

[46]Scottish Statutory Instruments. 2019. No 75. Court of Session (Taxation of Judicial Expences rules) General Principles Section 2.—(1) The Auditor is to allow only such expenses as are reasonable for conducting the proceedings in a proper manner.

(2) The Auditor may in particular refuse to allow—

(a)expenses that the Auditor considers to have been incurred as a result of fault or error on the part of the entitled party or the entitled party's representative; and

(b)expenses relating to a part of the proceedings in which the Auditor considers that the entitled party was unsuccessful.

2. Personal injury claims and recoverable expenses

In pursuing a claim in Scotland based on CFA or a DBA in personal injuries or accidental damages where the burden of proof is based on a balance of probabilities the solicitors firm will act on a retainer that is based on an ATE insurance. It is distinct from pre-purchased before- the-event insurance policies which are commonly purchased with, for example, house insurance. The ATE insurance covers the liability to pay an opponent's legal costs and is "an agreement entered into by the claimant (or the claimant's lawyer operating under some form of *conditional fee agreement*, in short: CFA) after the dispute has already arisen".[47] It is only available where there is no fixed recovery rate and it provides an incentive for the other side to settle, as they will be aware the insurer conducted a separate analysis of the merits of the case or defence.

Under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 the calculation of the success fee is based on the financial benefit derived by the recipient (reg 2(2)). There are different types of civil claims and caps are applied tangentally. In personal injury claims the caps apply to different types of civil claims.

In a matter that is or could become a claim for damages for personal injuries or the death of a person from personal injuries, the maximum caps are:

- 20% of the first £100,000 of damages;
- 10% of the financial benefit between £100,000 and £500,000, i.e. 10% of up to £400,000; and
- 2.5% of the financial benefit over £500,000 (subject to the conditions mentioned below in relation to future damages).

For example, a personal injury claim settles for £650,000. The maximum success fee chargeable by the provider is £63,750 (£20,000 plus £40,000 plus £3,750), inclusive of VAT and unrecoverable outlays. The Explanatory Notes state that "*Section 6 makes provision for success fee agreements in respect of personal injury claims, including death from personal injuries (subsection (1)). Subsections (2) and (3) provide that the recipient of the relevant services (ie the client) is not required to make any payment other than the success fee, except for any sums in respect of insurance premiums in connection with the claim. The provider of the relevant services (usually a solicitor) will be liable to meet the outlays incurred in providing the services (for example, counsel's fees) from any expenses recovered from the defender and the success fee*".[48]

There is flexibility in the computation because "*there is no requirement for any independent oversight of a decision to pay future damages as a lump sum if the value of the future damages is £1million or less. It is worth emphasising that the £1 million figure is for the future element and*

[47] Willem H. Van, Juxtaposing BTE and ATE: the role of the European Industry in Funding Civil Litigation, Oxford University Comparative Law Forum, (2010) https://ouclf.law.ox.ac.uk/juxtaposing-bte-and-ate-the-role-of-the-european-insurance-industry-in-funding-civil-litigation/

[48] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, Section 6, Explanatory Notes, Commentary on Sections, https://www.legislation.gov.uk/asp/2018/10/notes/division/3

*not the overall value of the compensation award. A success fee on a £2,000,000 settlement could be charged on the full amount of damages if the future element is no more than £1,000,*000". The outcome of this is the "*failure to set out clearly in the agreement how future damages are to be dealt with when calculating the success fee will result in the provider not being able to charge a success fee on the future element*".[49]

In considering the mathematical issue of the recovery of litigation costs, two questions predominate which are (i) a lack of predictability as to the value of any adverse award of costs and (ii) the gap between what a successful litigant spends on litigation and what they can recover from the other side. The Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 (Success Fee Arrangements) Regulations 2020 (the Regulations) provides a remedy in the form of damages-based arrangements (DBAs) to Scottish litigation solicitors. [50]

In both commercial and non commercial disputes in Scotland the Rules of the Court of Session 1994 allows the court to set a directions and procedural timetable. The service can be completed with reference to the CPR 6 and Chapter 16, Rules of the Court of Session 1994). Chapter 33 of the RCS governs orders for caution and security. Under RCS 33.6.-(1) a bond of caution "*shall oblige the cautioner, his heirs and executors to make payment of the sums for which he has become cautioner to the party to whom he is bound, as validly and in the same manner as the party and his heirs and successors, for whom he is cautioner, are obliged*". The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 is an instrument which has created the the CFE legal protection policy, which is covered by the ATE, the no win no fee agreement does not permit the recovery of a premium for ATE legal expenses against the unsuccessful party in litigation. In personal injury cases the CFA will cover their own legal costs, the ATE insurance will cover the other side's costs, and the latter can also reduce any potential liability for costs.

The recovery of expences from the other party also covered by the Qualified One-way Costs Shifting (QOCS), which has been in force in personal injury claims in England & Wales since 2013 and serves to restrict the circumstances in which a claimant can be found liable for their opponent's costs. In Scotland this implies that an unsuccessful claimant will only be liable for their opponent's costs (or "judicial expenses") where he or she has made a fraudulent representation or has otherwise acted fraudulently in connection with the claim or proceedings; behaved in a manner which is manifestly unreasonable in connection with the claim or proceedings; or conducted the proceedings in a manner that the court considers amounts to an abuse of process.[51]

[49] Iain Nicol, An Access to Justice success story, Journal of the Law Society of Society. 18/5/20 https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-05/an-access-to-justice-success-story/

[50]Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 (Success Fee Arrangements) Regulations 2020. SI 10 https://www.legislation.gov.uk/sdsi/2020/9780111044186/contents

[51] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 Section 3

Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 provides that, "*where a person brings a claim for personal injuries, or a death resulting from personal injuries, and has conducted the proceedings in an 'appropriate manner', the court must not make an award of expenses against the person in respect of any expenses relating to the claim*".

The principle of QOCS is that the losing pursuer will not be liable to pay the costs of the successful defender providing that the pursuer 'conducts the proceedings in an appropriate manner' and it only applies in relation to a claim for damages for personal injuries, or the death of a person from personal injuries. The Qualified One Way Cost Shifting (QOCS) includes a bond of Caution in Scottish litigation and in personal injury cases where the ATE is likely to arise an appraisal of the circumstances when the courts will award damages against un insured parties.[52] The QOCS operates so as to greatly reduce the risk of paying the defendant's costs if the case is lost. In litigation post Jackson, the ATE insurance premium is generally unrecoverable from the losing defendant, however, unlike in personal injury actions, part of the ATE premium may be recoverable in clinical negligence actions. [53]

The personal injury cases in Scotland have a staged cap, at 20% of the first £100,000 damages recovered; 10% of the next £400,000; and 2.5% of damages recovered over £500,000. These are less in figurative terms than in England and Wales, where at present a flat 25% applies, although again there are proposals to reduce that to a flat 20%.[54] The provisions cap the success fees payable to Scottish solicitors at 50% of damages in Commercial cases and 35% of damages in Employment Tribunal claims. These mirror the current caps in England & Wales, though there are current proposals to reduce the commercial claims cap south of the border to 40% of damages.

This create more flexibility in the litigation that is being financed and allow solicitors to operate success fees on a flexible basis. These new rules allow partial damages-based agreements. Unlike the current all-or-nothing approach in England and Wales, a hybrid "no win, lower fee" damages-based model will be allowed in Scottish commercial courts. The "no win, no fee" DBA is where the whole legal fee is calculated as a percentage of the damages awarded, or, more attractively, a "no win, lower fee" hybrid DBA where only the additional success element of the fee is determined by reference to the amount of compensation awarded. It is this hybrid DBA

[52] Section 8(4) of the 2018 Act provides for three exceptions to the rule where the pursuer may not benefit from the costs protection which QOCS affords and would therefore be liable for the defender's expenses. This will be the case where the pursuer or the pursuer's legal representative;

a. makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,
b. behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
c. otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process'

[53] Review of Civil Litigation Costs: Final Report supra 26, At paragraph 286

[54] Section 6

which has the most potential to transform the funding of Scottish litigation, as well as add a distinct attraction (in addition to the relatively modest costs) for litigants with a choice of jurisdictional forum for resolving disputes.

The regulations have introduced a cap on the proportion of any successful award handed down by the Courts that a solicitor can claim. The cap means a solicitor can receive a maximum of 50% of the damages awarded in commercial cases and 35% of the damages awarded in Employment Tribunal claims. In personal injury matters the cap is incremental, with the percentage reducing as the award increases. The key element in enacting the 2018 Act and in these regulations is that success fee funding arrangements are more transparent in order for them to be adequately and fairly regulated. Therefore, in order for any success fee arrangement to be enforceable, it must be in writing; specify the value of the success fee and detail how the fee will be calculated (including whether or not the fee agreed is inclusive of legal expenses); and clearly state how each party can terminate the agreement.

3. Speculative agreements in claims and fiduciary obligations

The Scottish courts have enforced the rule that the CFA and the DFAs must comply with the proper administration of justice, and the need to act within the framework of the Standard Rules of Conduct of the Solicitors profession. Where an speculative fee agreement as drafted is contrary to either or both the provisions of the 2020 Regulations and the 2018 Act, it is therefore unenforceable in whole or part, then this may be grounds for a complaint of unsatisfactory professional conduct. In order to ensure the compliance in personal injury cases the Style Success Fee Agreements (SSFA) have been drafted which reflect the statutory requirements of the 2018 Act and the 2020 Regulations and is specifically designed for claims relating to damages resulting from personal injury or death of a person from personal injuries. [55]

The Law Society has stipulated that when taking instructions under a speculative fee agreement the solicistors has to issue a 'Cooling Off period notice' to the client and this has to be complaint with the requirements of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The Cooling off Notice must provide the client with the right to cancel the agreement within a minimum period of 14 days and the solicitor must explain this to the client. The solicitor should also ensure that they provide to the client the information required under Practice Rule B4 (Client Communication). [56]

The SSFA sets out the terms of the agreement with the cliens as follows:

[55] New guidance on Law Society Style Success Fee Agreement, Professional Support Regulation, 7/4/22 https://www.lawscot.org.uk/news-and-events/law-society-news/new-guidance-on-law-society-style-success-fee-agreement/

[56] B4 Client Communication, Law Society of Scotland, https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b4/rules/b4-client-communication/

Clause 1 *requires all details of the client's personal injury claim to be clearly stated within the SSFA. This should include work associated with the claim, that to be covered by the SSFA and the remedy sought by the client. The remedy sought must be because of personal injury or relating to the death of a person from personal injuries.*

Clause 2 *sets out the client's obligations which are required to ensure that full co-operation is given to the solicitor by the client. These obligations will help and support the solicitor to do their work properly and ensure that they act in the best interests of the of the client in pursuance of the claim.*

The solicitor should explain to the client their (the clients) obligations and the potential consequences should the client fail meet those obligations. The Law Society of Scotland which is responsible for setting down the codes of professional conduct for solicitors which are assessed under the CFAs and need to be affirmed when these contracts are framed to give them effect. Rule 1 states:

"*Trust and personal integrity that Solicitors must act with honesty and integrity at all times*". This includes the requirement that "*they must behave in a way which shows that they have personal integrity and are fit to carry out the duties of a solicitor*". This is particularly important when they are dealing with the finances of the client and have been instructed to carry out their task or to act in litigation.

Rule 4 which relates to Professional fees and it stipulates that "*fees charged by solicitors must be fair and reasonable*". This takes into consideration "*the place where and the circumstances in which the work is done*" and the "urgency of the case". This is complimented by Rule 6 which is on Competence, diligence and appropriate skills. It advises that solicitors "*must have the relevant legal knowledge and skill to provide a competent and professional service*". This is in accordance with the "thoroughness" and "preparedness" and to work within a "reasonable time frame".

In order to remain within the Professional Conduct rules framed by the Law Society the Faculty of Advocates have raised the prospect for the temptation to commit fraud by solicitors not acting in accordance with the rules of professional conduct.[57] This is because the CFA could encourage litigation that is disengenous and that "a party should be disqualified on account of fraud".[58] The Faculty is also concerned "at the lack of protection for defenders who are uninsured and of limited means – the "David v David" (rather than "David v Goliath") scenario". [59] This could arise from "*persons being held to ransom if they have no prospect of recovering the cost of a*

[57] Faculty of Advocates, Response of Faculty of Advocates to Request for Evidence in Civil litigation (Expences and Group proceedings) 5/2/14. https://www.advocates.org.uk/media/2495/final-faculty-response-15-aug-17-civil-litigation.pdf accessed on 10 November 2023

[58] Ibid Para 13

[59] Para 14

successful defence. It is again suggested that QOCS should only be available in claims against public bodies and insured defenders. Third party funding of civil litigation" . [60]

The apprehension in accepting an ATE is that the insurers "tend to apply to commercial third party funders" who should not "have a financial interest in the outcome of the proceedings. That could, for example, be interpreted to include solicitors who act on a speculative basis, and who do not recover all of their fees". These are the disadvantages of the DBAs agreements which may not all satisfy the test of the professional rules of conduct and need to be strictly monitored. The issue turns on whether the terms of the ATE policy are adequate to satisfy the court that the claimant would be able to pay the costs order in case they lose the case. The policy will be annulled if there was a fraudulent non-disclosure or misrepresentation. However , the courts have dismissed the defendant's argument and focussed on the key distinction between a rejection of evidence on factual grounds and a finding that evidence is mala fides. [61]The breach of the ATE policy would not necessarily lead to avoidance of insurance cover given the lack of commercial interest in breaching the conditions.

In *Monarch Energy Ltd against Powergen Retail Ltd* [62] there was an allegation that was fraud in the terms of the ATE by the non disclosure of facts under the section 726 (2) of the Companies Act 1985. The Claimant had costs awarded against them. The Outer Sessions Court stated that there were a number of restrictions on the insurer's liability to pay under the policy which included unreasonable conduct on the part of the pursuer or a failure to comply with a court order.

The Court accepted the point that these restrictions might seriously limit or even avoid the insurer's liability if not complied with. There was also concern that ATE policies can be obtained through misrepresentation or non-disclosure of all material facts. Lord Drummond Young held that "non-disclosure was *"a particularly significant risk"* and there was an allegations of fraud and such risks placed a *"substantial limitation on the extent to which an ATE policy can be used to provide security for expenses". [63]*The difference was in the "scale of the expences" provided by either party and only in which "major discrepencies in the estimated provided" need to be reconciled in any ATE policy that is enforceable. [64]

The defender's motion was therefore successful and the pursuer was ordered to find "caution or alternative security" in the sum of £75,000 for the defender's expenses.[65] The terms of the ATE

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[60] Para 15

[61] *Geophysical Service Centre Company Ltd v Dowell Schlumberger (Middle East) Inc.* ([2013] EWHC147 (TCC))

[62] ([2006] CSOH 102)

[63] Para 35

[64] Ibid

[65] Para 36

policy were drafted in order to exclude liability in the event of misrepresentation or non-disclosure. This case can be distinguished in the approach towards ATE policies in security for costs applications in Scotland and England where in the latter case it is accepted that an ATE policy will rarely afford the same level of security as payment of money into court (ie consignation) or a guarantee. This provides a more elastic form of an ATE policy that meets with the parties intentions and civil litigation costs can be recovered and it is construed as a deed of indemnity from the same or another insurer.

Conclusion

In Scotland the civil litigation has adopted the CFA and the DBAs in the aftermath of the 2011 Jackson report that successfully advocated speculative fee agreements that could be viable within the framework of the personal injury litigation. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 Act and the Civil Litigation (Success Fee Agreements) Regulations 2020 increases the options to fund civil litigation which is by incremental premiums in personal injury cases which have their own gradient as far as costs are concerned and mitigation can be set into the equation with the solicitor. Unlike commercial litigation it can transfer some of the risk to the retainer and there is more certainty over its cost and the premium based insurance costs will also be covered.

The civil procedural reforms have been superimposed by the risk-sharing approach between client and solicitor, allowing solicitors to maintain the client account to flow and mitigate their exposure to risk rather than taking on all of the risk inherent in a traditional no win no fee arrangement. The ATE will transfer the risk to the insurer and it offers more transparency and certainty on costs, allowing a client to budget effectively from the outset of the litigation. Both these forms of agreements are success based agreements and both CFA and DBA in civil litigation are in harmony with English civil litigation.

The Style Success Fee Agreements (SSFA), a copy of the 'Cooling off Notice' is another reform that is intended for the solicitors to act in accordance with the Professional Rules of Conduct that enable to act as the fiduciary of the client. The reason for that is the calculation of risk which involved in computing the the ATE in the agreement for the instuctions to act as representative in the case. The Law Society has made the SSFA complaint with the professional ethics rules and the professional misconduct, or an inadequate professional services complaint against the solicitor if admitted by the SLCC it will be investigated by the relevant body (either the Law Society of Scotland or the Scottish Legal Complaints Commission). The English and Scottish jurisdiction have different rules except in Scotland rules are more stringent and an ATE is considered less of a deed of indemnity and the guarantor will succeed if there is a caution or an alternative remedy available.