

## POLICY NOTE

### THE CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018 (COMMENCEMENT NO. 4 AND TRANSITIONAL PROVISION) REGULATIONS 2021

#### SSI 2021/125 (C. 9)

The above instrument (the “Regulations”) is made in exercise of the powers conferred by section 27(3) and (4) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”).

#### Background

The 2018 Act received Royal Assent on 5 June 2018. It provides a framework for the implementation of the recommendations of the Review of the Expenses and Funding of Civil Litigation<sup>1</sup> carried out by Sheriff Principal James Taylor which required primary legislation. The overarching aim of the 2018 Act is to increase access to justice by creating a more accessible, affordable and equitable civil justice system for Scotland that:

- makes the costs of civil action more predictable;
- increases the funding options for pursuers of civil actions; and
- introduces a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

#### Policy Objectives

The Regulations provide for commencement and transitional arrangements.

Regulation 2 commences certain provisions of the 2018 Act on 30 June 2021. The main policy objective for the Regulations is to commence section 8 of the Act which concerns qualified one way costs shifting. Section 13 is also commenced, which provides a definition of “legal representative”, and section 12(2) which relates to minor and consequential modifications of the Courts Reform (Scotland) Act 2014.

Regulation 3 makes different provision for claims and proceedings which commence on or after the coming into force date. It applies the provisions in regulation 2 to claims commenced on or after 30 June 2021 and to proceedings arising from those claims. It also applies the provisions in regulation 2 to proceedings commenced on or after 30 June 2021, but not to any claim activity undertaken before that date. This avoids section 8 of the 2018 Act applying to pre-litigation activity which occurred before the section was brought into force. This approach is intended to achieve the policy aim of applying section 8 to as many proceedings as possible after it comes into effect.

#### *Qualified one way costs shifting (QOCS) for personal injury actions*

Even in a relatively modest claim, legal expenses can mount up. In many cases, the legal costs will exceed the amount at issue in the proceedings. If a pursuer’s expenses would exceed the likely benefit of the litigation, then it is likely that the case will not be pursued.

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<sup>1</sup> <https://www.gov.scot/Publications/2013/10/8023>

Concern about the cost of losing a case (and having to pay the other side's expenses) can deter members of the public from bringing a genuine claim. Liability for expenses is a crucial component of access to justice, but can act as a barrier to access to justice.

The general rule in litigation is that "expenses follow success" – the unsuccessful party bears the successful party's expenses. In other words, the costs are shifted.

In personal injury litigation, most pursuers are private individuals without the financial means to fund the loss of a litigation, while the vast majority of defenders have the strength of an insurance company behind them.

The proposals in sections 3 and 4 of the Bill on success fee agreements limit the potential liability of a pursuer in such personal injury cases to his or her own agents, but they do nothing to limit the potential liability of the unsuccessful pursuer to pay the expenses of the defender, if the defender is successful.

Pursuers may therefore still be deterred from making use of the courts even if they have the benefit of a success fee agreement.

Section 8 provides that the court must not make an award of expenses against the pursuer of a claim or appeal in civil proceedings for personal injuries, which includes clinical negligence, where they have conducted proceedings in an appropriate manner. This means that defenders will generally not recover their own expenses from the pursuer even if they successfully defend the claim. The purpose of this is to provide "equality of arms" between the pursuer who might have limited resources and defenders who will mainly have the backing of large well-funded insurance companies.

Parties who have a meritorious case will therefore be able to bring a personal injury claim, but at proportionate cost, and without having to worry about paying the expenses of the defender if they lose.

The costs shifting is "one way" because it would only be the pursuer who would be awarded expenses if successful and "qualified" because there are circumstances in which the pursuer might lose the benefit of the rule. The general rule that expenses follow success will continue to apply in all other cases so QOCS will be an exception to the general rule. QOCS will apply to all levels of the courts, the Court of Session, the Sheriff Personal Injury Court and the other sheriff courts.

QOCS will prevent an award against a pursuer only in relation to personal injury – but if the pursuer loses in relation to a non-personal injury element of the case, QOCS will not prevent an award of expenses being made in relation to that.

Under section 8(4), the pursuer will lose the protection of QOCS if they or their legal representative:

- makes a fraudulent representation or acts fraudulently during claim activity or court proceedings;
- behaves in a manner which is manifestly unreasonable during claim activity or court proceedings; or
- otherwise conducts the proceedings in a manner which the court considers to be an abuse of process.

### *Other commencements*

The remaining un-commenced provisions in Parts 2 of the 2018 Act (sections 9, 10 and 11) will require to be supplemented by rules of court before they can be commenced.

The Scottish Civil Justice Council (SCJC), which will be responsible for recommending appropriate rules of court to the Court of Session, has indicated that rules requests received under the 2018 Act will be one of its work priorities.<sup>2</sup> The SCJC's implementation timetable has, however, been significantly disrupted due to 'lockdown' restrictions and these continue to have significant impact on its capacity to deliver the outstanding rules instruments.

The following provisions of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 have been brought into force by commencement regulations made before the date of these Regulations.

<i>Provision</i>	<i>Date of Commencement</i>	<i>Instrument No.</i>
Section 1	27 April 2020	S.S.I. 2020/23
Section 2	27 April 2020	S.S.I. 2020/23
Section 3	27 April 2020	S.S.I. 2020/23
Section 4(1) and (2)	30 January 2019	S.S.I. 2018/368
Section 4(3) to (5)	27 April 2020	S.S.I. 2020/23
Section 5	30 January 2019	S.S.I. 2018/368
Section 6(1) to (7), (9) and (10)	27 April 2020	S.S.I. 2020/23
Section 6(8)	30 January 2019	S.S.I. 2018/368
Section 7(1) and (2)	27 April 2020	S.S.I. 2020/23
Section 7(3) and (4)	30 January 2019	S.S.I. 2018/368
Section 12(1), (3) and (4)	30 January 2019	S.S.I. 2018/368
Section 14	30 January 2019	S.S.I. 2018/368
Section 15	30 January 2019	S.S.I. 2018/368
Section 16	30 January 2019	S.S.I. 2018/368
Section 17	30 January 2019	S.S.I. 2018/368
Section 18	30 January 2019	S.S.I. 2018/368
Section 19	30 January 2019	S.S.I. 2018/368
Section 20(1) to (6), (9) and (10)	31 July 2020	S.S.I. 2020/167
Section 20(7) and (8)	30 January 2019	S.S.I. 2018/368
Section 21	30 January 2019	S.S.I. 2018/368
Section 22	30 January 2019	S.S.I. 2018/368
The schedule	30 January 2019	S.S.I. 2018/368

### **Commencement**

The Regulations come into force on 30 June 2021.

### **Consultation**

No public consultation has taken place on the Regulations as they are being made as a consequence of the 2018 Act.

The Government consulted on the legislative proposals in 2015. The consultation can be viewed on the Scottish Government website at:

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<sup>2</sup> <https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/pdf-scjc-annual-report-and-programme-2019-2020>

<https://www.gov.scot/Publications/2013/10/8023/5>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<https://www.gov.scot/Publications/2015/08/6159/3>

### **Impact assessments**

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <https://www.gov.scot/Publications/2017/06/9266/1> and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

### **Financial effects**

The financial effects of the 2108 Act were set out in the Financial Memorandum for the Bill:

[http://www.parliament.scot/Civil%20Litigation%20\(Expenses%20and%20Group%20Proceedings\)%20\(Scotland\)%20Bill/SPBill14FMS052017.pdf](http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14FMS052017.pdf)

A Business and Regulatory Impact Assessment (BRIA) for the Bill was published on the Scottish Government website at:

<https://www.gov.scot/Publications/2017/06/7388>

Scottish Government Justice Directorate  
Civil Law and Legal System Division

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