

# **CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1 – Success Fee Agreements**

##### ***Section 6 – Personal injury claims***

15. **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.
16. Subsections (4) and (5) make provision about damages obtained (whether by settlement or by award of the court or tribunal) in respect of future loss. Such damages are not to be included in the amount of damages used to calculate the success fee if they are to be paid by way of periodical payments, but may be included if the damages are paid as a lump sum and the criteria set out in subsection (5) are met.
17. Subsection (5) sets out two circumstances in which a success fee agreement can include a future element of lump sum damages. These are if the lump sum:
  - does not exceed £1 million; or
  - exceeds £1 million and, first, the services provider has not advised the recipient to accept that the future element be paid in periodical instalments but, second, the condition in subsection (6) is satisfied.

Otherwise, the success fee agreement must provide that any future element will not be included in the relevant amount of damages used for the calculation of the success fee.

18. Subsection (6) sets out the condition referred to in subsection (5)(b)(ii). This is that either the damages are awarded by a court or tribunal which has stated that it is satisfied that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical instalments or, where the damages are agreed, it is certified by an independent actuary that it is the actuary's view that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical payments. The actuary must have consulted the recipient personally without the provider being present. As the solicitor has a financial interest in whether damages are awarded as a lump sum or a periodical payment, and, as periodical payments can only be ordered with the agreement of the pursuer, the solicitor must not have advised the client to accept a periodical payment and must not be present in any interview with the actuary.

*These notes relate to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp 10) which received Royal Assent on 5th June 2018*

19. Subsection (7) provides that a success fee agreement is unenforceable to the extent that it makes provision contrary to subsections (2) or (4).
20. Subsection (8) confers a power on the Scottish Ministers who may, through regulations subject to the affirmative procedure (see section 24(2)), adjust the sums specified in subsection (5)(a) and (b).
21. Subsection (9) explains what is meant by “personal injuries” in this section. That term includes diseases as well as physical or mental impairment.
22. Subsection (10) defines an “actuary” for the purposes of section 6.

Example
A child has suffered cerebral palsy as a result of clinical negligence. The child will require lifelong care. The damages awarded by the court, or agreed in a settlement by the parties, will be intended to provide for the lifetime care of the child. If it is agreed that the future element of the damages (covering the lifelong care) will be paid by periodical payments, these sums will not be included in the calculation of the solicitor’s success fee.
It is, however, apparently rare for periodical payments to be agreed. Sheriff Principal Taylor indicated that periodical payments will only be in contemplation if the level of damages is expected to exceed £2 million. Such cases happen rarely in Scotland.
It is therefore more likely that the future element of damages will be paid as part of a lump sum. This will therefore be liable to be included in the calculation of the solicitor’s success fee. The question of whether the future loss is compensated by means of a lump sum or by periodical payments presents a potential conflict of interest as the solicitor will be significantly better remunerated if the pursuer receives a lump sum.
The solution in section 6(4) to (6) is that there should be some form of independent scrutiny of the settlement where the lump sum exceeds £1,000,000 and the solicitor <b>has not advised</b> the family of the child suffering from cerebral palsy that the future element of the damages be paid in periodical instalments (in which case it would not be included in the calculation of the success fee).
In terms of the independent scrutiny required, if the child’s damages are awarded by a court or tribunal, the court or tribunal must state that it is satisfied that it is in the child’s best interests that the future element of the damages should be paid as a lump sum rather than in periodical instalments.
If, however, the child’s damages are agreed by settlement of the case, an independent actuary must certify – after consulting the family without the solicitor being present – that, in the actuary’s view, it is in the best interests of the child that the future element of the damages covering the lifelong care be paid as a lump sum and not in periodical instalments.