



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 20 March 2020  
SP Paper 709  
6th Report, 2020 (Session 5)

## **Justice Committee Comataidh a' Cheartais**

# **Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft]**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

---

All documents are available on the Scottish  
Parliament website at:  
[http://www.parliament.scot/abouttheparliament/  
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact  
Public Information on:  
Telephone: 0131 348 5000  
Textphone: 0800 092 7100  
Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

# Contents

<b>Introduction</b>	<b>1</b>
<b>About the instrument</b>	<b>2</b>
<b>Consideration by parliamentary committees</b>	<b>6</b>
Delegated Powers and Law Reform Committee	6
Justice Committee	6
<b>Conclusion and recommendation</b>	<b>7</b>

# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



[justicecommittee@parliament.scot](mailto:justicecommittee@parliament.scot)



0131 348 5047

# Committee Membership



**Convener**  
**Margaret Mitchell**  
Scottish Conservative  
and Unionist Party



**Deputy Convener**  
**Rona Mackay**  
Scottish National Party



**Alasdair Allan**  
Scottish National Party



**John Finnie**  
Scottish Green Party



**James Kelly**  
Scottish Labour



**Liam Kerr**  
Scottish Conservative  
and Unionist Party



**Liam McArthur**  
Scottish Liberal  
Democrats



**Fulton MacGregor**  
Scottish National Party



**Shona Robison**  
Scottish National Party

# Introduction

1. At its meeting on 17 March 2020, the Justice Committee ("the Committee") considered the following draft Statutory Instrument:
  - Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft]
2. The draft instrument was laid before the Parliament and referred to the Committee. The Committee is required to report to Parliament on the instrument by 29 March 2020. The instrument is subject to the affirmative procedure.
3. The main objective of the instrument is to regulate success fee agreements in Scotland, cap success fees under those agreements and provide that some kinds of success fee agreements will not be available for family proceedings. Success fee agreements are "no win, no fee" agreements which enable potential litigants to raise a legal claim which they may not otherwise be able to pursue due to the potential cost, particularly if they are not eligible for legal aid.

# About the instrument

## Success fee agreements

4. The Regulations provide for the regulation of success fee agreements in Scotland. The term “success fee agreements” covers both speculative fee agreements and damages based agreements. A speculative fee agreement is a type of 'no win no fee' funding arrangement in terms of which an enhanced fee will normally be charged in the event of success and is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. This contrasts with damages based agreements whereby the success fee is calculated as a percentage of the client's damages or recovered funds. In both types of agreements there is to be paid, in the event of success, a 'success fee', but no fee (or a lower one) if the action is lost. In other words, both speculative fee agreements and damages based agreements are types of 'no win, no fee' agreements, entered into in connection with actual or contemplated civil proceedings. Success fee agreements concern “relevant services” which are defined to be one of either “legal services” or “claims management services”.
5. The 2018 Act treats both speculative fee agreements and damages based agreements as “success fee agreements” and the success fee will be a percentage of the damages awarded or agreed. In Scotland success fee agreements offered by solicitors have until now been in the form of speculative fee agreements, but following implementation of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, solicitors will also be able to offer damages based agreements. Claims management companies will also continue to offer damages based agreements. Except in the case of personal injury cases, success fee agreements may also be entered into on a 'no win, lower fee' basis.
6. Solicitors have indicated that potential litigants appear to like the simplicity and predictability of success fee agreements based on a set percentage of the damages achieved since they pay nothing up front (the provider of the relevant services will bear the costs of the outputs of raising the action and will seek to recover those costs from the other party). Litigants rarely, if ever, retain 100% of damages achieved since, even if they are in a position to finance the action themselves, they will have to pay the cost of their legal representation and set that off against the damages received. The recipient of relevant services under a success fee agreement is therefore, in the event of success, in the same position as a self-financing litigant. Without success fee agreements, if litigants are not in a financial position to raise proceedings by any other means (for example, if they are ineligible for legal aid), they would receive 100% of nothing, since they may be unable to litigate at all. Increasing the availability of success fee agreements will therefore increase access to justice.

## Success fee cap

7. The objective of capping success fees is to increase options and provide a greater level of certainty for claimants entering into success fee agreements so that they are able to find the best value representation to meet their needs. It will, in

particular, increase access to justice for those who are unable to fund an action themselves yet do not qualify for legal aid (the “excluded middle”).

8. The 2018 Act defines “success fee” as the payment which is – in the event of success – to be made to the “provider” (the solicitor or claims management company) by the “recipient”, namely the person who receives legal services or claims management services under the success fee agreement.
9. In considering whether there should be a cap on the success fee which can be charged by solicitors or claims management companies, Sheriff Principal Taylor believed that a “proper balance must be struck between sufficient remuneration for solicitors and justice for clients awarded damages”.
10. A member of the advisory panel to Sheriff Principal Taylor’s Review, which contained representatives of both pursuer and defender/insurer interests, indicated that the success fee caps recommended “were the outcome of long and detailed debates leading to a fully considered compromise”.
11. Regulation 2 sets the following caps on success fees as recommended by Sheriff Principal Taylor.

### Success Fee Caps

Type of case	Cap (all caps include VAT)
<b>Personal injury cases</b>	Up to 20% of the first £100,000 of damages  Up to 10% for the next £400,000  Up to 2.5% of damages over £500,000
<b>Employment Tribunal cases</b>	Up to 35% of the monetary award recovered
<b>Commercial and all other actions</b>	Up to 50% of the monetary award recovered

Source: Scottish Government

12. Sheriff Principal Taylor stressed that these percentage caps should be maxima. There is clearly a danger that, in time, these caps may be viewed as the going rate, and not maxima. He argued, however, that from the evidence before him, that it was likely that with members of the public becoming increasingly aware of different funding mechanisms, that competition will determine the actual rates used.
13. It should be noted that since the cap is inclusive of VAT, no more than 20% is deducted from the client’s first £100,000 of damages in a personal injury case, but



the solicitor receives a success fee of considerably less. So, for example, if a client is awarded £100,000, the success fee is set at 20% and VAT remains at 20%, then the client receives £80,000 in damages, the solicitor receives £16,667 and VAT is paid at £3,333. Counsel's success fee (plus VAT) and any outlays not recovered from the other side in the judicial account of expenses must be met out of the £16,667 received by the solicitor.

14. Regulation 2(4) and (5) provide the success fee caps recommended by Sheriff Principal Taylor for, respectively, employment tribunals and other cases.
15. Regulation 2(6) makes it clear that only one success fee can be paid even if there is more than one provider of relevant services (for example, both a claims management company and a solicitor) and the success fee cap applies to the total amount payable by the recipient of those services, regardless of whether such services are provided under one or more success fee agreements.

### Family proceedings

16. Sheriff Principal Taylor, when considering success fee agreements, concluded that damages based agreements in particular were not suited to all types of litigation. Sheriff Principal Taylor noted in his Review that damages based agreements were not available for family proceedings in England and Wales and recommended that they should also not be available for family actions in Scotland. He argued that it was much more difficult to define success in family proceedings since the court may require to make a range of different orders dealing with various aspects of, for example, matrimonial breakdown aside from purely financial matters and 'success' may therefore be divided. It does not therefore seem appropriate that damages based agreements, which are predicated on the provider of the relevant services taking a percentage of damages awarded or agreed, should be used in such cases.
17. The Faculty of Advocates submitted evidence to the Justice Committee during the Bill's Parliamentary stages that speculative fee agreements were sometimes used in family proceedings and argued that this funding option should not become unavailable to litigants.
18. The Scottish Government fully agreed with Sheriff Principal Taylor's recommendation that damages based agreements should not be used in family proceedings. The 2018 Act therefore gave Scottish Ministers' power to make regulations so as to specify what kinds of litigation should be capable of being dealt with by certain kinds of such agreements. This was intended to permit consultation on what should be included in regulations to ensure the correct result is reached for family proceedings. In the event, very few responses were received in relation to these questions and so the regulations simply exclude the use of damages based agreements from family proceedings. The power will allow for future proofing since the regulations can change as practice changes.
19. The policy objective is therefore to prohibit the use of damages based agreements in family proceedings and this is achieved by Regulation 3.

### Terms of a success fee agreement

20. Regulation 4 seeks to ensure that success fee agreements are offered on a relatively standard basis and can readily be compared by potential recipients of relevant services. The aim to make the costs of litigation more transparent and

predictable, thereby increasing the confidence of recipients of relevant services. To this end, Regulation 4 sets out a number of requirements to do with the content of success fee agreements. It remains open to the provider and recipient of relevant services to agree further terms.

21. The Scottish Government is mindful that a degree of regulation will be provided by the professional rules of the Law Society of Scotland (for solicitors) and of the Financial Conduct Authority (for claims management companies) and general consumer protection legislation will also apply, for example a “cooling off period” may apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
22. The proposed requirements in the draft regulations are therefore relatively light touch, but if it emerges over time that the initial affirmative regulations are not sufficiently robust, then it will open to Ministers to make more prescriptive affirmative regulations.

# Consideration by parliamentary committees

## Delegated Powers and Law Reform Committee

23. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 25 February 2020 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

## Justice Committee

24. The Justice Committee considered the instrument at its meeting on 17 March 2020. A number of questions and concerns were raised by a variety of members. These included:
- the suggestion that the instrument enables a portion of any success fee that forms part of any compensation for future loss to be awarded to the solicitor as a bonus;
  - the evidence base for a financial incentive being required to get solicitors to take on cases, especially those involving figures of more than £500,000;
  - the Justice Committee's previous comments that damages for future loss should be protected;
  - the engagement between the Scottish Government and the Scottish Civil Justice Commission to take alternative measures which would mean that this instrument is not necessary;
  - whether this instrument relates to the pursuit of a criminal injuries compensation claim; and
  - whether periodic payments are commonly used in out of court settlements.
25. The full transcript of the discussions is available in the [Official Report](#) of the Committee's meeting.

## Conclusion and recommendation

26. After debate, the Minister for Community Safety moved motion S5M-21029:

That the Justice Committee recommends that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] be approved.

27. The motion was agreed to, by division<sup>i</sup>, and the Justice Committee therefore recommends that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] be approved.

---

<sup>i</sup> For 6 (Alasdair Allan, John Finnie, James Kelly, Bill Kidd, Fulton MacGregor, Shona Robison), Against 2 (Liam Kerr, Margaret Mitchell), Abstentions 0.

