ABTA's response to the Scottish Parliament's Justice Committee Call for Evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

About ABTA

This response is submitted on behalf of the membership of ABTA – The Travel Association. ABTA was founded in 1950 and is the largest travel trade association in the UK. In Scotland, ABTA has 42 members and 284 outlets and offices. ABTA Members provide 90% of the package holidays sold in the UK, with Members also selling millions of independent travel arrangements.

Annually, ABTA Members' turnover is in excess of £37 billion. ABTA's focus is ensuring that Members can operate their businesses in a sustainable and successful manner, enabling their customers to travel with confidence.

ABTA welcomes this opportunity to submit views to the Justice Committee. As an introduction, we provided an overview of the main motivating factor for our response, the dramatic rise in holiday sickness claims in recent years. In the main body of the submission, ABTA has demonstrated the direct link between the holiday sickness claims issue and recent legal reforms in England and Wales, which are replicated in a number of provisions within the Civil Litigation (Scotland) Bill (henceforth "the Bill"). We have also drawn attention to the need for reform to other areas of the Scottish civil justice system, including the relevant pre-action protocols.

An overview of the rise in holiday sickness claims

Since 2013, the number of claims for alleged gastric illness has increased by more than 500% on average across the travel industry, with some companies seeing significantly larger increases in claims volumes. However, there has been no corresponding increase in sickness reported through the industry's Customer Satisfaction Questionnaires (CSQ), used for decades to monitor health and safety in resorts globally, and no rise in reported illness levels recorded in resorts.

Since early summer 2016, ABTA, and our Members, have been working to demonstrate to the UK Ministry of Justice the clear link between the rise in holiday sickness claims and civil justice reforms in England and Wales, undertaken in 2012/13 by the then Coalition Government. The reforms tightened rules around personal injury claims, particularly in relation to whiplash claims against motor insurers, in an attempt to reduce fraudulent activity and lessen the incentives for claims management companies (CMCs) to operate in this area. The most notable changes introduced by the 2012/13 reforms, implemented through a combination of new legislation (Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)) and changes to the Civil Procedure Rules and Pre-Action Protocols included:

- Removing the ability for claimants to recover success fees and After the Event (ATE) insurance premiums
- Ban on referral fees
- Extension of the MOJ Claims Portal to Public Liability and Employers' Liability claims valued up to £25,000 (although claims where the incident occurred overseas are explicitly excluded)

- Introduction of cost-management and budgeting rules
- Introduction of Qualified One Way Costs Shifting (QOCS), which prevents defendants from reclaiming certain costs even when a defence case is successful.

ABTA notes that the Civil Litigation (Scotland) Bill shares many of the features within LASPO.

Regulation 15 of the 1992 Package Travel Regulations (PTRs) places liability on package holiday providers for the proper performance of all services sold as part of the package (regardless of the fact that those services are supplied by third parties such as hoteliers and airlines). The travel industry has found, particularly in cases where a claimant alleges illness while on an "all-inclusive" holiday, the Courts have appeared somewhat reluctant to identify potential alternative sources of any infection, despite the absence of any positive evidence of a sickness outbreak in resort.

As a result of the liability obligations of the PTRs, combined with the exclusion of overseas incidents from a fixed costs regime, CMCs and claimant solicitors have focused their attentions on the UK travel industry. These companies are employing aggressive marketing mechanisms, both at home and in resort, to encourage UK holidaymakers to lodge gastric illness claims against UK tour operators. For example, in the summer of 2016, a major UK CMC was seen touting for business in resort in Tenerife, Spain, using a mocked up ambulance to encourage consumers to lodge claims. We have also seen cases of CMCs and legal firms targeting consumers in Scotland, encouraging claims that would be lodged in Courts in England and Wales, as consumer protection is a reserved matter.

The rise in sickness claims has placed significant strain on the relationship between UK tour operators and hoteliers in resort. Due to contractual arrangements, part of the cost of the claim is sometimes met by the hoteliers or their insurers, with the Spanish hotel associations estimating claims to be costing in excess of £50m a year. This has resulted in some hotelier associations and their Members making clear that UK consumers are likely to face price increases, to have the availability of all-inclusive holidays restricted, and potentially to be banned from certain resorts, should the problem not be addressed. To illustrate the UK nature of these claims, a leading tour pan-European operator has noted that in one year it sold 800,000 holidays to German holidaymakers, 375,000 to Scandinavians and 750,000 to people across the UK. These customers will have been sent to the same destinations, and often stayed in shared resorts. However, the respective claims volumes for those countries were telling; the company received 114 holiday sickness claims from German customers and 39 claims from Scandinavian customers. Meanwhile, UK customers submitted a staggering 4,000 claims in the same year.

In addition, the rise in sickness claims has caused a particular problem for SME tour operators, who will be reliant upon public liability insurance policies to meet the cost of claims. As claims levels have increased, the cost of obtaining this insurance cover has also gone up markedly, and higher excess levels mean fewer claims can be passed to insurers. As a result, ABTA is concerned that some smaller tour operators could be placed at risk of insolvency should the problem not be addressed quickly. The problem for SME travel companies will be exacerbated by upcoming changes to the Package Travel Regulations, based on a revised EU Package Travel Directive, which will extend significantly the definition of what constitutes a package holiday from 1 July 2018. These reforms will bring into scope many companies currently outside of the Regulation.

Therefore, ABTA welcomes the announcement by the UK Secretary of State for Justice, David Lidington, on 9 July 2017 that he has asked the Civil Procedure Rules Committee to consider amendments to the Pre-Action Protocol relating to low-value personal injury claims. If adopted, these amendments will be an important first step in addressing fraudulent and exaggerated claims, bringing holiday sickness claims made through Courts in England and Wales within the scope of the fixed costs regime, and placing them on equal footing with other low value personal injury claims within other sectors. The Government announcement recognised that the existing system in England and Wales is flawed, and that the system has enabled the travel industry to be targeted. ABTA urges the Scottish Government not to make the mistake of replicating these features in this Bill, and the associated regulatory reforms (please see response to 3a, below, for more information).

ABTA acknowledges the detailed considerations of the Taylor Review, and appreciate there are important differences in the legal systems between Scotland and England and Wales. However, ABTA is deeply concerned that the Scottish Government might unintentionally recreate in Scotland many of the regulatory features that have left the travel industry vulnerable to spurious and exaggerated compensation claims in England and Wales. The travel industry already receives claims from Scottish customers, as consumer protection is a reserved competence of the UK Government. Should these regulatory reforms proceed in a way that opens up the Scottish Courts system to such claims, as the loophole is closed in England and Wales, we would be seriously concerned that these cases would simply migrate to the Scotland.

More information on ABTA's work in this area can be seen at www.abta.com/stopsicknessscams.

1. Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system

1. We are concerned that the Bill will not meet the objectives in relation to the creation of an equitable civil justice system. We have particular concerns that the Bill might unintentionally recreate features of the existing regime in England and Wales, which has led to the targeting of travel companies, and their customers, by unscrupulous CMCs and legal firms.

2. Collectively, the proposals overall will significantly minimise the risk to pursuers, leaving defenders to bear the financial risk of litigation, even where claims are unmeritorious. We note that the Taylor Review concluded that fraud was not an issue in Scotland, on the basis that solicitors would be unlikely to take forward unmeritorious claims. We would recommend that the Scottish Government speak to the Law Society of Scotland and UK Solicitors Regulatory Authority to examine their own evidence and views relating to unmeritorious claims.

2. The specific provisions in the Bill which:

i. regulate success fee agreements (sometimes called 'no win, no fee' agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements;

3. From a consumer protection perspective, ABTA supports the principle of capping the fee payable under such agreements.

4. Success fees are not recoverable from the unsuccessful opponent and in practice are therefore often taken out of funds recovered in the litigation. There is potential for inflation of compensation awards, as the impact of the measures on the final payment received by consumers is likely to be considered when awards are made.

ii. allow solicitors to enforce damages based agreements (a form of 'no win, no fee' agreement, where the fee is calculated as a percentage of the damages recovered);

5. From a consumer protection perspective, ABTA supports the principle of capping the fee payable under such agreements.

6. When operating under a DBA, the pursuer's lawyer has a direct financial interest in the value of the damages awarded. Such an agreement may not always be in the best interests of the client. As with success fee agreements, there is potential for inflation of compensation awards, as the impact of the measures on the final payment received by consumers is likely to be considered when awards are made.

iii. introduce 'qualified one way costs shifting', which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender's legal expenses even if the action is unsuccessful;

7. Under the proposed QOCS regime, defenders will generally be ordered to pay the expenses of successful pursuers but, subject to very limited exceptions, they will not recover their own expenses even if they successfully defend the claim.

8. As the pursuer will face no potential liability for the defender's costs, there is potential for an increase in speculative or unmeritorious claims. Since the introduction of QOCS in England and Wales we have seen an exponential rise in the number of claims being brought and a corresponding increase in at best unmeritorious and at worst fraudulent claims, the cost risk of litigation having been removed for the Claimant. We ask the Scottish Government to recognise that the expense of litigating is an issue for both sides. Therefore, it is a disproportionate response to remove all costs risks from one side only.

9. As the defender will be aware they will be liable for their own costs, regardless of the outcome of the claim, they may be forced into making commercial settlements rather than on the basis of the legal merits of the case. This is what we have seen in the holiday sickness market, where claims were settled rather than taken to trial, which we believe ultimately contributed to the increase in false claims.

10. It should be noted that the defender is not always an insurer. In holiday sickness claims, many low value claims are handled by tour operators (or travel organisers) as they fall within the defender's insurance policy excess.

11. We believe the Scottish Government must act to create a balanced civil justice regime, which the current Bill drafting fails to deliver.

iv. give the courts the power to order that a payment be made to a charity where expenses are awarded to a party represented for free;

12.ABTA has no specific comment on this element of the Bill.

v. require a party to disclose the identity of any third party funder and provide the courts with the power to award expenses against that third party;

13. ABTA would support this provision within the Bill.

vi. make legal representatives personally liable for any costs caused by a serious breach of their duty to the court;

14. ABTA would support this provision within the Bill.

vii. enable auditors (who are responsible for determining the amount of expenses due by one party in litigation to another) to become salaried posts within the Scottish Courts and Tribunals Service; and

15. ABTA has no specific comment on this element of the Bill.

viii. allow for the introduction of a group procedure in Scotland, which would enable people with similar claims to bring a joint action.

16. ABTA has no specific comments on this element of the Bill. We would note that group claims are relatively common in travel, especially in relation to sickness outbreaks in resorts or on cruise ships.

3. Any other matters relating to the Bill, such as any financial impacts or whether there are other provisions which should be included.

a) Fixed recoverable costs and the travel industry

17. As outlined in the introduction, ABTA, and our Members, have been working with the MOJ to explain how the 2012/13 civil justice reforms have led to an increase in sickness claims for travel companies. The situation results from the exclusion from the fixed recoverable costs regime of any claim relating to an incident occurring overseas. As a result, claims brought against a UK travel organiser, under Regulation 15 of the Package Travel Regulations or the Athens Convention (for cruise claims), fall outside of the fixed recoverable costs regime, which covers other sectors of personal injury claims. This is despite the fact that under the PTRs or Athens Convention, the consumer will be suing their UK travel company in the UK. We believe the situation is a loophole in the law, enabling claims management companies and law firms to target the travel industry, and travel consumers, encouraging spurious or exaggerated holiday sickness claims.

18. To address our concerns, and bring holiday sickness claims within the scope of fixed costs, ABTA has asked the MOJ to make changes to civil procedure rules, amending the relevant Pre-Action Protocol for Low Value Personal Injury Claims. The MOJ announced on 9 July that they have asked the Civil Rules Procedure Committee to make the necessary amendments to bring these claims into scope, and the process is expected to complete by early in 2018. A Call for Evidence is to be published by the MOJ in September to collate more data and evidence. Any changes made would likely come into force in 2018.

19. ABTA is aware that the Pre-Action Protocol for the fixed costs regime operating in Scotland, The Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016, also include a loophole that excludes holiday sickness claims from scope. This is related to an exemption covering disease claims, which takes all illness claims out of scope, rather than any specific overseas exemption. We would therefore ask the Scottish Government to consider the need to make amendments to the Pre-Action Protocol, to ensure that the problems seen with fraudulent activity in this area in England and Wales do not migrate to Scotland. We have already had cases of Scottish consumers being encouraged to make claims, with cases currently taken through the courts of England & Wales, and ABTA is keen to work closely with officials to deliver the necessary regulatory changes that can ensure Scottish companies are not targeted by this scam in the future.

20. As part of our work to make a robust case for regulatory change, ABTA has also highlighted to the MOJ that there are a number of similarities between whiplash injuries, which were the intended mischief addressed by the 2012/13 reforms, and holiday sickness claims. In both cases, it is very difficult from a medical standpoint to provide, especially retrospectively, evidence to refute the occurrence of the claimed event. Medical assessment is subjective and based upon an acceptance of the Claimant's narrative. This has made these types of claims an attractive avenue for companies and individuals that wish to encourage fraudulent activity. We urge the Scottish Government to be cognisant of these factors, and the historical context of work undertaken by the UK Government, within the Bill and in broader civil justice reforms.

21. It is important to reiterate the industry's support for consumer redress in genuine cases. In addition to the direct legal remedies available through the Package Travel Regulations, explained in the introduction to this submission, ABTA has established a conciliation scheme, enabling consumers to settle valid claims with their travel organisers through an independently delivered ADR scheme, and to retain 100% of any compensation awarded.

b) Regulation of claims management companies

22. The final element that ABTA wishes to bring to the attention of the Scottish Government through this submission is the need for effective regulation of claims management bodies, including a ban on the payment of referral fees. ABTA is aware that there is an ongoing review, the review of the Regulation of Legal Services, conducted by Esther Roberton, which will report in 2018.

23. ABTA would encourage the Scottish Government to also consider developments with the Financial Guidance and Claims Bill, currently passing through the UK Parliament, which introduces oversight by the Financial Conduct Authority (FCA) of claims management companies conducting activities in England and Wales, and any rules introduced as a result. The Financial Guidance and Claims Bill does not extend to Scotland, but it will be important for the two regulatory systems to be broadly equivalent, avoiding any potential for migration of CMCs and their activity in promoting exaggerated or fraudulent claims to Scotland.

24. ABTA is also concerned that any delay in bringing forward equivalent regulations, following the Regulation of Legal Services review, will lead to a period where CMCs are significantly more lightly

regulated in Scotland than in England or Wales. If CMCs are not sufficiently and effectively regulated in Scotland, and the other challenges addressed in this response are also not addressed, then there is a serious risk of an explosion in holiday sickness claims. ABTA believes it is imperative such a situation is not allowed to come to fruition, as it will cause serious financial problems for Scottish travel companies, especially SMEs and damage the reputation of Scottish holidaymakers overseas.

More information

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