AN OVERVIEW OF THE TAYLOR REPORT ON FUNDING OF CIVIL LITIGATION IN SCOTLAND

By Andrew Smith QC
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INTRODUCTION

The Taylor Report represents probably the most important and comprehensive consideration of funding of litigation in Scotland that has ever taken place. Following extensive consultation, a number of recommendations have been made which will change the way in which solicitors, counsel, claims management companies and many others will operate their businesses and litigation.

The aim of the review was to find ways of permitting access to justice. There is no doubt that, if the recommendations are implemented, there will be significant improvement in the accessibility to the justice system for those who are neither very poor nor very rich.

The Taylor Report will form much of the implement of the SCCR (the Gill Review) recommendations when enacted. Although only “recommendations”, it can be presumed that much of what is in the review will become law. Indeed, much of what is said in the review is already capable of being implemented with immediate effect, or by swift changes in rules and practice notes. Other aspects will require further discussion, and perhaps primary legislation. The Rules councils are already meeting to discuss what can be introduced by Rules or Practice notes. Some matters are simply left to the “regulators” – the Faculty of Advocates and the Law Society of Scotland – to remove professional impediments if they choose to do so to allow changes to take place.

This paper is designed to provide an outline of the major changes. It is directed at those who practice in the core areas that Compass Chambers is engaged in – and therefore matters relating to Family Law for example are not considered here. Equally, there are changes that relate to Small Claims, and small damages claims, that are not covered in this paper.

A few comments and caveats are necessary.
First, although I was a member of the advisory committee, I have no particular insight into the thinking behind the report, nor the methods of implement. What is contained in this paper is what can be derived in the report. Where I make recommendations – as I do occasionally in bold type face – I do not make these recommendations in any capacity other than as a suggested plan based upon the content of the report itself. I certainly do not make them on the basis of some inside knowledge of the thinking of Sheriff Principal Taylor.

Second, there is no substitute for actually reading the Report itself. It contains a number of interesting observations on the reason for recommendations. He has tried to learn from experience in other jurisdictions, and avoid some of the problems that have been encountered.

Third, I cannot of course guarantee the accuracy of all that is said below. I have endeavoured to summarise a complex report as best I can, but can fully anticipate that I may have erred in what I have said. The report deals with a number of complex issues that interrelate. The Quantum Physicist, Richard Feynman is said to be the author of the statement “if you think you understand quantum mechanics, you don’t understand quantum mechanics”. The same might easily be said about Expenses and Litigation Funding. Just when you thought you understood how a Speculative Fees Agreement worked and how it interacts with a damages based agreement, you realise that there is a flaw in what you were thinking.

Finally, there will be much in the future that is uncertain. More than once, Taylor acknowledges that there will have to be a fast learning jurisprudence that requires appellate courts to be receptive to arguments to guide us. A reform of any system will undoubtedly raise new issues and new challenges.

The Need for Change: Access to Justice

The need to be addressed in the report is the failure of the current system to allow all to litigate in cases of merit, without fear of losing everything that they have. We are all familiar with situations where cases of considerable merit and occasionally
considerable value cannot be litigated because a party cannot afford to lose. Equally, there are many cases where an offer or a tender is accepted, not because it is particularly valuable, but because the risks of the pursuer losing are unacceptable. With many of the changes outlined in the report, pursuers will have less risk; defenders may have to pay more; and changes in the way of thinking about litigation for both parties will be revolutionary.

In the way that Gill is to Woolf, Taylor is to Jackson. In England, the bonanza that came along with the Woolf reforms was bringing litigation and litigators into disrepute (with massive fees being recovered from defendants, with tales of up to £800 per hour being recovered in some cases against the NHS). A change was bound to happen. And it happened when LJ Jackson was directed to put the brakes on the gravy train.

As of 1st April this year, many of the Jackson recommendations have been implemented under the LASPO 2012 Act. There are teething problems, and counsel are still feeling their way around how the Act will work. I am constantly being looped into “reply to all” discussions from my London chambers, where barristers are facing problems trying to work out interaction between various new rules. There is no doubt that we will have teething problems too, but change will always bring up anomalies, problems that were unforeseen, difficulty in persuading judges as to how the new rules should operate.

If there is one criticism of the report over all, it could well be that it is overtly favourable to pursuers as opposed to defenders. In particular, the QOCS¹, mentioned below, is a dramatic change which leads to what may be perceived as asymmetry between parties. Is it right that only a defender has to pay expenses in litigation if he loses? Surprisingly, this proposal was not vigorously opposed by defenders’ insurers: largely because its introduction was seen as better than the existing system in England and Wales. In short, insurers in the Southern UK jurisdiction were being subjected to “creative” and extensive costs awards. The gravy train did not stop with Jackson, but

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¹ Qualified One Way Costs Shifting
certainly slowed down for claimants’ solicitors and thus the opposition to QOCS was muted.

The challenges for all members of the profession in implementing and advising are manifold. This paper is designed not to answer the questions that may arise, but to provide a guide to the main themes of change.

The paper will cover topics to be discussed at the seminar. It is not of course a verbatim note of what as been said at the seminar, and in many ways provides a summary of the recommendations in a hopefully easy to read format.

I don’t agree with all of what is said in the report about what the proposals will do; I don’t agree that it will be fair to all – in particular I think that it is grossly unfair on insurance companies that they should be deprived of the right to seek expenses against a pursuer in many cases. But it will happen and when it does, not only the expenses regime will change but the business models for a large number of organisations will change. For example, at present there are several organisations that will, for a percentage of the damages, carry the risk of an adverse finding of expenses. Under QOCS, however, there is no such risk. How then can there be justification for taking a percentage of damages, when the risk is non existent? Organisations such as Quantum Claims will no doubt have to think carefully about their business model and consider what it is that they are giving for the cost that they charge.

Although I do not spend long considering referral fees, these are not abolished; but the recommendations are for heavy regulation. It may be that organisations such as Trade Unions who refer their members to particular firms of solicitors, will be subjected to the proposed regime. The details will have to be decided upon in the future, but as they say, the devil is in the detail.

This paper will consider various chapters in the report and do so broadly in the order that they appear in the report itself.
RECOVERABILITY OF EXPENSES

This section discusses the amount of fees that can be recovered from an opposing party (essentially what is to be recovered under a judicial account). It must be emphasised that nothing discussed below affects the rights of solicitors to charge their clients any sum that will be a solicitor and client arrangement. There are of course many cases where solicitors will not charge clients the shortfall. The desire is to maximise the recovered element.

The Extra Judicial Shortfall

One great difficulty that was identified by Taylor is known to all litigators – the often huge gulf between the expenses recovered under a judicial account compared to the account charged to the client. This difference (between party/party expenses and agent/client expenses) can on occasions be as much as 50%.

One flippant response may be that the solicitor charges his client too much, and the gap can be narrowed by reducing the fees charged. This problem is familiar to those acting for pursuers in personal injury cases, but perhaps less so to those who practice for large corporations in commercial litigation. It is unclear why it is thought that commercial litigation should attract higher fees than other types of litigation, but it would seem arguable that the shortfall is no longer as much as might be expected.

Marshall v Fife HB, which will be discussed in this seminar, appears to mean that for both solicitors and counsel, the gap between the two scales is narrowed. One questions whether there is much difference between judicial and extra judicial accounts now, if the test is whether it was reasonable for the solicitor to incur the charge.

As Taylor points out, obtaining an additional fee is often the only means by which the gap can be bridged. And that, of course, is not the purpose of additional fees.
“Proportionality” of the costs to the litigation

In England, the Civil Procedure Rules (CPR) govern most aspects of costs assessment. There is some supplementing of the rules by “Practice Directions”, which of course are equivalent to Practice Notes in Scotland. I can highly recommend Blackstone’s Civil Practice (published annually) as an excellent text book at modest cost. It can be thought of as similar to the Parliament House Book – with the rules of course, but with excellent annotations. The annotations deal with substantive law and on two occasions (Hamilton v Merck, and Martin and Co Petitioners) the reference to authority has been the source of rich pickings and ultimately success for my clients. It is also clear that as we move more towards an English model of funding, it may be useful to actually look at what the English experience has been.

The coming together of Scottish and English principles of judicial expense recovery

Costs assessment in England can either be on a “standard” basis or an “indemnity” basis, being roughly the equivalent of party/party and agent/client respectively. On taxing an account, the first question that is asked is “is the fee reasonable?” If the answer is “yes” it is allowed. If it is “no” it is disallowed. If it is doubtful, then on a standard basis the question is answered by reference to the viewpoint of the paying party; and if it is on an indemnity basis, it is viewed from the standpoint of the receiving party.

There is, however, an overarching principle: proportionality. A fee, individually, may be reasonable, but when looking at the entire account, it may be thought that it is disproportionate to the litigation. Tales abound of litigation in England where the damages were £7,000 and the fees and outlays are ten times that sum.

Taylor recommends that there be rules that the fees must be “proportionate” to the case as an overarching concept. He declines to define what “proportionate” means. And what is going to be clear is that there will be significant argument on this point and determinations by judges no doubt, to establish a body of case law.
Tables of Fees

Taylor proposes that there be a table of fees published, which will allow transparency and predictability to all parties. It should be noted that counsel’s fees are not now and will not be part of a table of fees. They are and will remain (especially in the light of comments in Marshall) an outlay and not subjected to scales or tables.

Although it will have to be discussed further, it is recommended that levels of fees for different seniority of the solicitors working on the case should be published. The rates will be set by and reviewed by a new body, being similar to but bigger than LPAC (the Lord President’s Advisory Committee\(^2\)). Whether a particular level of solicitor ought to have been doing the work will be assessed by the Auditor. This is designed to stop a very senior solicitor doing a job such as photocopying to maximise fees.

In summary, further work will be needed to set up a committee; set the level of fees for blocks; but the auditor will still decide – if necessary – whether a particular level of fee earner was reasonable.

Additional Fees under the Rules of Court

As noted above, the power of the court to award an additional fee on account of the complexity of a case has often been used to bridge the gap of an extra judicial account. On occasions, the additional fee has been up to 140% of the actual fee, thus providing a total fee of nearly 250%.

The problem with additional fees is that it is not known to the parties how much it will be, until it is determined in an essentially arbitrary way at the end of the case, what the uplift will be. As noted above, this can be considerable. Both sides would like to know what it will be sooner rather than later. A solution is proposed by Taylor.

\(^2\) Currently chaired by Lord Burns, and also has the Auditor; one advocate nominated by the Faculty; and three solicitors nominated by the Law Society.
Commercial cases: agree/set the additional fee at the outset

He therefore proposes that it should be up to the parties to agree at the outset what the additional fee should be in commercial cases, subject to “judicial control”. For example if the parties cannot agree, then the court can – at the outset – determine what that percentage should be. He also proposes certain new criteria for commercial actions justifying an additional fee (see page 47, para 66) to include for example whether there is any legal precedent for the claim; and commercial status of the parties (whatever that may mean).

Taylor recommends that the part of the current rule, applicable to commercial and non commercial cases, relating to the “Importance to the Client” is abolished.

I suggest that it is open to parties at the present time to enter into an agreement on the level of uplift at the end of the case. It may be that a judge could be persuaded (in the light of Taylor), that the matter could be determined near to the outset of the case where agreement is not possible, [perhaps arguing that 47.11 [speedy determination] covers such an order]. But what is clear is that if both parties are willing to discuss it, for budgeting purposes, there is no reason why they should not do so. Any such agreement could be minuted by the parties on the minute of proceedings.

Equally in non commercial cases, it may well be that parties are prepared to enter into such an agreement. That said, the unusual nature of personal injury claims, may make this difficult in practical terms.

Block fees: to be set by a committee at some date in the future – not applicable to PI cases

Taylor also recommends that there be block fees introduced for more situations than are catered for at present: the theory is that block fees encourage efficiency, but time and line encourages tardiness. If block fees are introduced in commercial cases for more types of work, it can allow for speedy preparation of accounts. When this is
coupled with what is said below regarding summary assessments of expenses, there will be substantial increases in cash flow to solicitors and counsel.

One example he gives is for block fees for preparation for preliminary hearings. At present there is no block fee that covers that matter. Accordingly, the recommendation is that there be further discussion and work to create more comprehensive block fee tables.

The use of block fees will not apply to Personal Injury cases. Traditional rules will continue for them.

**Maximum Uplift**

One difficulty with the current additional fee arrangement is that the percentage uplift is arbitrary, unknown for most of the litigation and can be extensive. In commercial actions, the advance determination of what it might be will cure part of the problem; in PI cases, it is proposed that these be set at a maximum of 100%. Although this seems a little unfair, it not only introduces some predictability for the paying party, it is also part of the overall review of PI case funding which might be thought to be generous in many other ways.

**Judges to Determine the percentage**

One aspect of the percentage that is going to be a vast improvement is having a judge determine the level of the additional fee by deciding the percentage to be applied. It is anticipated that at first there will be a number of appeals against decisions, but this is the pain that we must all feel until a body of law is built up.

**INTEREST ON JUDICIAL EXPENSES**

As is no doubt known, the question of interest on expenses is a topic that can excite enthusiasm. The obligation to pay interest on debt is now covered substantially by the
relevant EU Directive\textsuperscript{3}. Domestic legislation (Late Payment of Commercial Debts (Interest) Act 1998, and associated regulations) implement the Directive. There has been occasional litigation\textsuperscript{4}.

But the right to interest on accounts of expenses has fallen into disuse in substantial measure.

The second part of this seminar will be discussing the question of interest on accounts at common law; but suffice it to say that the Taylor recommendation is that interest should accrue on accounts of expenses as ultimately assessed; the interest rate should be at 8%; and it should apply as from 28 days after the account is lodged.

One slight anomaly that is to be fixed is that the “four month” rule, in the Court of Session, which requires the account to be lodged in that time scale or it is lost, be introduced in the Sheriff Court.


\textsuperscript{4} For example Andrew Smith QC v SLAB http://www.scotcourts.gov.uk/opinions/2012CSIH14.html
OUTLAYS

Counsel’s Fees

One great criticism of expenses relates to counsel’s fees and the “lack of transparency” on what counsel can and do charge in individual cases. These are of course “outlays” in the same way as expert witness fees are outlays – but the paying party will have little idea what counsel instructed for his opponent is charging.

There is a further problem in the Sheriff Court. Currently, certification (or “sanction”) for counsel is usually dealt with at the end of a case. Thus the paying party only discovers the horrible truth that he is paying for counsel when the case is finished; or the payee discovers that he has to pay counsel if the motion fails. The worst result of the lot (as far as counsel are concerned) is for counsel to discover that he is not to be paid for the work he has done when he has enthusiastically taken on a “fees recovered” speculative action.

There is a relatively simple solution. The motion for sanction should be made at the start of the case so all parties know the position early on.

I am happy to claim the credit for this idea – mentioned some years ago to the newly appointed Sheriff Principal Taylor when I bumped in to him in Glasgow. His response was that he could do this by Practice Note, but did not get around to doing it for reasons he has never disclosed.

The good news is, though, that as of the beginning of last year, it has been competent to do so. A Scottish SI was introduced with the title “Statutory Instrument (Sanction for the Employment of Counsel in the Sheriff Court) 2011\(^5\)”, it seems to have escaped the notice of practitioners. In fairness, as is pointed out in the report, the wording is not exactly as punchy as it could have been and has been overlooked for perhaps good reason. But, as we can see from the Report, that SSI is designed to do precisely what

was cooked up in Glasgow all those years ago. Taylor recommends a much more detailed provision to be introduced than is in the SSI, such as allowing retrospective sanction in limited circumstances – such as pre litigation instruction of counsel – and withdrawal or grant upon changes of circumstances. But we have the rules now to allow progress.

**I recommend therefore that solicitors who wish to use counsel in the Sheriff Court, make the motion under reference to the SSI as soon as possible, no doubt waving the observations of SP Taylor recorded in the Report as justification.**

I am aware from one Compass member that he in fact persuaded a Glasgow Sheriff (he could not remember which) to sanction counsel in advance despite the Sheriff being rather unclear if he could do so or not.

It may be thought that it would be sensible to instruct counsel for the motions to be heard.

**The Consequences for legal aid cases?**

It is clear that the cases in which legal aid will be applied for are now rather limited. That is so on account of the attraction (mentioned below) to the benefits that can accrue in non legal aid situations. That said, there will still be cases where legal aid will be necessary or desirable (e.g. cases involving children).

If a Sheriff is of the opinion that sanction is appropriate, it seems to me that it will be virtually impossible for SLAB to refuse sanction. Although Taylor says that the tests are different between sanction allowed by the court and allowed by SLAB, as the latter has the public purse to think of, I disagree that that is a relevant consideration. In my opinion, if SLAB does not follow a Sheriff’s view, that decision is open to Judicial Review on the basis of Wednesbury unreasonableness – failing to take into account a relevant factor. Legal aid is demand led; and budgeting should not feature in the decision to follow the Sheriff’s decision.

**The test for engaging counsel in the Sheriff Court**
The Gill Review proposed that the test be “exceptional” circumstances. However, Taylor is of the opinion that the test should remain the same as it currently is and Gill is now in line with Taylor.

So what is the test?

The test at common law is rather elusive. In litigation against SLAB\(^6\), Lady Stacey indicated that the test under the Act for sanction in a criminal case was the same as the common law for civil cases: whether it was “appropriate” to do so. This was to be distinguished from “necessary” and is thus a lower standard. Although she does not refer to any guidance on when sanction is usually granted in the Sheriff Court, MacPhail’s Sheriff Court Practice (3rd Edition) at 12.25 states that

“the test appears to be whether the employment of counsel is appropriate by reason of the circumstances of difficulty or complexity or the importance or value of the claim. A claim of small value may involve imputations on the personal or professional character of a party of such seriousness that representation by counsel is appropriate. It has been said that where the case is one of serious difficulty….the employment of counsel may generally be sanctioned and the onus is thrown on the other side to show why it should not be.”

I recommend that where a solicitor considers that counsel may be appropriate, that consideration be given to instructing counsel to appear to argue that that is so. The test will remain the same as it currently is. This could have a dramatic effect on the grant of sanction from SLAB if there is a legal aid certificate already issued. Should SLAB refuse to follow the lead of the Sheriff, active consideration should be given to taking judicial review proceedings against SLAB in respect of that refusal.

\(^6\) McAllister v SLAB http://www.scotcourts.gov.uk/opinions/2010CSOH112.html
It is anticipated by Taylor that there will a number of appeals against the grant or refusal of sanction: but he says that leave should be given readily at first to establish sufficient jurisprudence on the matter.

**Commitment Fees**

He recommends a table for the charging of commitment fees as an outlay. This will be essentially fixed as a table for recovery from an opponent. But once again, this will not affect what counsel can charge his own client.

**Sanction for Experts in Sheriff Court**

This is no longer a test of “necessity” but is now “reasonableness” - as it is in the Court of Session. The threshold is not so difficult to cross.
SUMMARY ASSESSMENT OF EXPENSES AND COSTS BUDGETING

The report adopts two very important practices from the English courts. Summary assessment of costs has been around since Woolf and works well – about which more to follow. Costs budgeting is new in England (having been piloted in Birmingham in the TCC) and is being “rolled out” to all litigation. There have been a number of teething problems which will be mentioned below.

It is intended that in the Sheriff Court (commercial courts) and the Court of Session, Commercial Roll, a pilot will be introduced of summary assessment of expenses.

Immediately after a decision is made on matters – largely incidental motions, debates etc – the Sheriff or judge will assess the amount of expenses due. The precise method of assessment will be catered for in the rules, but this will also require judicial training.

In England, at least 24 hours prior to a hearing parties must exchange a summary of costs that they will seek if successful. This encourages honesty as, because a party does not know if they will be paying or being paid, it lies ill in the mouth of a paying party to complain about the size of his opponent’s account when he proposed charging more than that if he won.

The summary is a summary; little more in length of an A4 sheet and often less. It takes a few minutes; and an order is pronounced there and then.

This can only be a good thing. It is not anticipated that law accountants will be involved in the compilation of such accounts and, if block fees are introduced, there will be no need. This will increase cash flow, and sends a message out to parties that litigation costs money. Hopefully summary assessment will be introduced to all types of litigation soon.

Costs budgeting is a far more volatile and complex matter. Having been piloted in England, there have been some surprising results. In Henry v News Group, under the
Pilot scheme, the estimate was £23,737; ultimately the costs were claimed at £316,447. The judge at first instance held them to the estimate, but the Appeal Court allowed the full costs on the basis that there was no real prejudice to the paying party. That said, it was made clear that in future there would be little cutting of slack.

Many firms have complex computer systems to budget. And there is an intention to introduce a pilot scheme in the commercial courts in the Court of Session and in the Sheriff Courts with commercial procedures.
MINOR MATTERS

The Report recommends that where someone has BTE insurance, they must be given the right to instruct a solicitor of their choosing. But, if there is a shortfall between the fees that the panel solicitor would charge and the insured’s solicitor of choice, the insured must meet the shortfall.

PEOs

Protective Expenses Orders will be extended to all cases where there is public interest and not limited to environmental cases.

BTE will be encouraged, but will not be compulsory.
SPECULATIVE FEES AGREEMENTS (in PI cases)

We have a new acronym: SFAs. SFAs old style have been rather ad hoc, but both solicitors and counsel have had the right to seek up to 100% uplift in their fees, payable of course by the client and not the other side.

The deal is: no win, no fee; but win and I can take up to 100% uplift in my fees.

Although there was heavy pressure for Regulation of SFAs, this has been rejected. They are not always in the best interests of the client: a passenger in a road traffic accident will not lose, but why should he be losing from his damages? Especially so if he is also paying a percentage of the damages through an intermediary company?

Although SFAs do not deal with cutting into the damages (about more below under reference to DBAs), the fees can be considerable. Taylor has recommended maxima for the obligations of the clients as follows:

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<th>Personal Injury Cases</th>
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<td>£1-£100k</td>
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<td>£100k - £500k</td>
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<td>£500k plus</td>
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In Employment Tribunal cases, the maximum is 35% of the amount awarded; and in commercial cases, it is 50% of the amount of the decree.

The table above and other figures will be again used when we deal with DBAs below.

Thus a £1m PI claim gives £72,500 success fee on top of judicial expenses – with or without an additional fee.
It is also to be the case that where counsel has a fees agreement, this bonus comes from the same pot of cash. There are not to “hits” to the client, and all is wrapped up in the one success fee.
QOCS

This is, in my opinion, the single most important change that will happen. The acronym stands for Qualified One-way Costs Shifting – adopting the English terminology. QOES doesn’t quite have the ring to it, so perhaps QOCS are here to stay.

In England, the system was being frankly abused by some claimants’ solicitors. Fees were being racked up in an aggressive way and lawyers were being tarred with a very nasty brush. The system had to change and, as is said in the introduction, QOCS, whilst asymmetric and palpably unfair on insurers, was a far better system than what it replaced.

What is a QOC? How will it operate in Scotland?

The systems in Scotland and England will not be identical. Frankly, in Scotland the use of QOCS is far more attractive than even in England from a pursuer’s perspective.

It will initially apply only in PI cases including clinical negligence; in England it will be extended – first to defamation cases; Jackson recommended Judicial Review cases too. It may of course eventually apply to all types of cases. Taylor recommends that it will specifically apply to appeals in PI and clinical negligence cases.

In most circumstances where a pursuer loses he will not pay the defenders’ expenses; but if he wins, he will get his expenses. The exceptions are where there has been dishonesty, or abuse of process, or a claim is dismissed summarily (as proposed by Gill) – a bit like summary decree in reverse.

The other major exception is where a tender is not beaten – but even then the amount of costs recoverable by the defender will be limited to 75% of the amount awarded.

Taylor notes that it is likely that this will be the death of ATE insurers. There will become little risk and thus little point in a system of insurance with no clients.
The Tricky exceptions: hard to work in practice

But there are difficult exceptions: it will apply only to the PI element of a claim. So a hybrid case – say one that also covers say damage to property or excess recovery, with have to suffer from an analysis of proportions. That, it is suggested, will be a logistical nightmare.

Another rather strange proposal is that in assessing whether a tender was beaten, the court should be allowed to exercise a bit of discretion. The red line that is a tender is no longer well defined. As tenders are often “carefully pitched” as Taylor says, it is too harsh on a pursuer to be expected to always get it right. This too, is a rather pursuer minded approach that has much to commend it but much that is also capable of criticism.

In summary therefore: a defender will face expenses in PI cases unless a tender is not beaten; but the threat of an award against a pursuer is no longer going to be there. Even tenders that are not beaten will not give rise to awards against pursuers – unless the margin of failure is more than unreasonable. If ever there was an area for satellite litigation, it is this……
DAMAGES BASED AGREEMENTS

Another idea; another acronym that we should become familiar with: DBAs.

Again this is being road tested in England as of 1st April. The Rules are, though, different in material respects to those proposed in Scotland.

A DBA is an agreement which allows solicitors and counsel to share in the damages. They must do so from the same “pot”, as with SFAs. Taylor proposes that this should be in addition to the judicial fees and also in addition to an arrangement for a success fee – per SFAs.

**Personal Injury Cases**

<table>
<thead>
<tr>
<th>(£1-£100k)</th>
<th>20%</th>
<th>All heads of claim</th>
<th>20000</th>
</tr>
</thead>
<tbody>
<tr>
<td>(£100k - £500k)</td>
<td>10%</td>
<td>All heads of claim</td>
<td>40000</td>
</tr>
<tr>
<td>(£500k plus)</td>
<td>2.5%</td>
<td>All Heads</td>
<td>£25k per Million</td>
</tr>
</tbody>
</table>

**Employment Cases: 35% maximum**

**Commercial cases: 50% maximum**

There are many checks and balances. Implement will require alteration of the rules of the professional bodies (it is forbidden by the Faculty; with solicitors it is unenforceable, making it therefore sterile). But Taylor wishes to change all that.

He recommends maximum amounts that can be taken – precisely the same levels as are detailed in SFAs above. It will apply of course to employment and to commercial cases.

One might have assumed that this is intended to be an alternative to an SFA otherwise in theory all of the damages could be swallowed up in commercial cases by the 50%
uplift from each of the two systems. However, surprisingly this is not the case. At page 230, Taylor says that the success fee in an SFA can be claimed as well as a DBA. This will allow solicitors and counsel to obtain very extensive fees indeed from litigation. Frankly, and personally, this appears wholly unfair and unreasonable.

Any recovered expenses from the opponent are set off against the 50% thereby reducing the amount to be taken from one’s own client. Again, counsel’s share comes from the one pot.

Unlike in England, the DBA will attach to all heads of claim, past and future. The only exception will be where a PPO is agreed. This of course means that there is a conflict of interest – a solicitor will be better off to agree a lump sum rather than a PPO. Thus there will be required court approval for lump sums over £1m, with an independent actuary paid for by the solicitor having to report to the court that a lump sum is in the client’s best interests. I wonder about marginal cases where the damages are say £1.025m. The solicitor may be well advised to accept less than £1m to save difficulty.

The structure of DBAs will be carefully controlled, with letters of engagement and cooling off periods introduced. Serious sanctions will be introduced for solicitors failing to follow the new rules.

A number of problems may arise: most settlements are on a global basis without the parties actually deciding what proportion of the lump sum is attributable to each head in a PI case. The future care element will be included (the theory being that in catastrophic cases the future care will fail to be within the margin of error of 2.5% that is allowed). But what this does not do is consider the non catastrophic cases or cases involving the elderly that will take a larger slice from the damages that are lower, which may be a significant element of the care costs.

It should be noted that according to the recommendations, only solicitors, counsel and regulated claims management companies should be allowed to enter into a DBA. That said, there appears to be unregulated “third party funding” that is permitted, referred
to below. It is difficult to see how such a market could be regulated, but that is discussed in following sections of this paper.
REFERRAL FEES

Significant concern has been expressed by the public and government over referral fees. As anyone who has received texts and emails advising that “we can claim up to £3756 for the accident you recently suffered” can attest, the aggressive attempts to find clients is at least irritating to those who have not suffered an accident, and arguably harassment of those who do not wish to be pestered.

Worse than that, any person actually suffering an accident is immediately an asset that can be bought and sold again and again. The claimant’s insurance company may sell the information to claims companies, who sell to others, who then sell to solicitors who contact the claimant and offer all kinds of incentives to go with them.

This system is seen as being morally repulsive to some and Taylor seeks to tackle it.

There is no attempt to define what will be considered to be a referral fee, or how regulation will be implemented in its finality. But the report makes it clear that where a client is referred to a solicitor by a third party, certain obligations will then flow from that referral.

The Taylor Recommendation is this:

“I therefore recommend that solicitors should be under an obligation to provide clients who have been referred to them by a third party agency with a written statement which should

a) list all potential factors which a responsible referring agency might consider relevant when making a referral and

b) indicate whether such factors played a part in the selection of the particular solicitor for the referral. Relevant factors would include, but not necessarily be limited to
i) the particular skill possessed by the solicitor,

ii) whether there has been any quality control audit of the solicitor or the firm of solicitors,

iii) whether the result of such an audit is available for inspection by the client, and

iv) the basis upon which the solicitor is to be remunerated if legal costs are to be met by the referring agency, for example, a Before the Event insurer. The statement should also indicate that the services provided may be available elsewhere, for example, from a firm that does not have an arrangement with the referring party.”

As far as I can see it, if for example an insurer that provides BTE insurance, or a trade union that instructs a firm of solicitors by referring members may fall within this provision. The detail will no doubt become clear with the Regulations that are enacted.

“Cold Calling” will be illegal and a solicitor will be under an obligation to ensure that any business he takes on is not tainted by being the product of a cold call.
ALTERNATIVE SOURCES OF FUNDING

I recommend reading this chapter in detail to appreciate the change in the approach of third party funding.

There is clear evidence that (quite apart from insurance companies or companies such as Quantum Claims) there is a growing market out there of companies that will fund litigation in return for, on occasions, a significant slice of the damages. Venture Capitalist funds are engaging enthusiastically with such cases and this is of great importance in high value commercial cases. Anecdotally, there is evidence of one such organisation that will fund litigation even with a chance of success as low as 65%. It is not clear how much of a “cut” they will take, but no doubt this is open to discussion.

Information is in the report of VCs that are prepared to fund divorce cases too: and it is no longer only the very high value divorces that they will consider. Equally, there is a growing market for engagement in commercial actions.

In the current climate, there are plainly significant opportunities for litigation to commence with funding of both sides by such organisations. The main target areas are where QOCS are not available, PEOs are not available and obviously where legal aid is not available. This will therefore include insolvency litigation, and other debt recovery type litigation including contract breach, professional negligence, intellectual property cases, international arbitration and mediation.

In addition to the creation of a market that allows cases to proceed – usually funding the claimant’s case as it goes along – there is a parasitic market that must be hard on its heels in provision of opinions to funders on the strength of claims. This is probably a niche market to Scotland as the vagaries of Scottish proceedings and Scots law are probably not well know to those in southern jurisdictions.
Transparency about funding arrangements is going to be required. This is thought to send a message out to the other side: we are serious, we have resources, and we will fight you.

Concerns exist about ensuring that the funder has sufficient capital to run the case and will remain solvent to enforce awards against them. Taylor recommends a voluntary code of conduct, but the detail is missing of course.

Reference is made to Arkin v Borchard Lines Ltd in the Court of Appeal, which held that a third party investor could be liable jointly and severally with the party, but only to the extent of his investment. The recommendation of Taylor is that this rule be followed in Scotland. ⁷

I recommend that even now, solicitors consider contacting one of the many third party funders – especially if clients are beginning to get “cold feet” about the down side risk on expenses. The claim is an asset that can be sold and rather than abandon a relatively good case because of a high risk of a significant award of expenses, efforts can be made to ensure you get paid and the claim continues. It is of course worth disclosing now the funding arrangements, although not the details.

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⁷ Hamilton v Merck may be of interest here. It was held that only a dominus litis could have that liability and being a DL requires control over the litigation to a high degree. That rule is clearly set for change.
CLAF AND SLAS

These are non identical twins.

What is suggested is that there ought to be funds operating known as Contingent Legal Aid Fund and Supplementary Legal Aid Scheme. For a share of the damages, funding will be provided as a case progresses. The difference is that the former should be an organisation that is private, and the latter is added on to the existing organisation that is SLAB.

Taylor recommends (wait for it) a “boutique” CLAF in Clinical Negligence cases for a percentage of the damages. Again, devil is in the detail yet to be published.

PRO BONO FUNDING

Payment should be to a charity of the Lord President’s choosing should there be success.

MULTI PARTY ACTIONS

In England, the CPR has provision for Group Litigation Orders (GLOs). This allows common issues to be resolved, but there is no obligation on a claimant to join the Group as there is, for example, in the USA in some states.

In Scotland, there is little by way of precedent on how to handle MPAs – and where liability is at issue this tends to be limited to product liability claims.

As far as I am aware, the only time such matters have been considered and liability and causation have been discussed across all cases is in the cases in respect of Vioxx (Merck) and Celebrex (Pfizer). There are other large scale MPAs about to be raised, but we are struggling to make the system work.
QOCS will be recommended in MPAs; and PEOs can be used in public interest cases. Otherwise, there is no recommendation.

REGULATION OF CLAIMS MANAGEMENT COMPANIES

This is recommended, but there is a deliberate avoiding of saying how they should be managed and who they should apply to.
CONCLUSION

As is stated at the outset, there are some very significant changes in the Report and if a few should be singled out as of immense importance it is the following:

DBAs
SFAs
QOCs

It would be open, as far as I can see it, to have a case where all three can be utilised. But the use of third party funders who are and will remain unregulated is an important factor for, in particular, commercial litigation.

The changes in the report appear to me to achieve the purpose of greater access to the courts. One hopes that this leads to greater justice for all.

Andrew Smith QC