

GUIDELINES ON REASONABLENESS IN CIVIL LEGAL AID CASES



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REASONABLENESS

Section 14(1)(b) of the Legal Aid (Scotland) Act 1986 (“the Act”) requires us to be satisfied that it is reasonable in the particular circumstances of the case that the applicant should receive civil legal aid. The reasonableness test provides us with a very wide discretion. It is impossible to give an exhaustive list of circumstances in which questions of reasonableness may apply. However, it is possible to identify a number of categories where it would be unreasonable to grant legal aid, which are discussed in more detail below. We hope that these guidelines help to explain our approach to the reasonableness test.

The following categories have been identified.

1. General issues of reasonableness

1.1 The nature of the proceedings appears unreasonable

There may be something about the case itself which is objectively unreasonable.

1.2 Application is premature

It would generally be considered unreasonable to make legal aid available where no or insufficient attempt has been made to resolve a dispute prior to litigation. We would expect to see evidence that negotiations have been attempted and failed, and that the position being adopted by the applicant in relation to those negotiations is a reasonable one.

1.3 The proceedings are frivolous or vexatious

Cases of this nature should certainly not be encouraged at public expense. Privately paying clients would not be reasonably advised to prosecute such actions.

1.4 The issues involved do not appear to be in dispute and the proposed action is unnecessary

It would not be reasonable to expend public funds litigating a matter where there is no active dispute between the parties.

1.5 The order sought is not necessary

The order might be unnecessary if, for example, the existing situation between the parties was unlikely to change and a court order was not needed to prevent it changing.

1.6 A reasonable offer has been made in settlement

It is for us to reach our own view on the reasonableness of an offer or tender. We might wish to consider factors such as

- the likelihood of a finding of contributory negligence;
- the likely cost of the proceedings;
- the prospects of recovery;
- the likelihood of additional sums being clawed back under section 17(2B) of the Act (particularly in consistorial cases); and
- whether the offer appears reasonable having regard to the sum which is likely to be awarded by the court.

1.7 The order sought will not cause significant disadvantage or prejudice

This will most likely arise in defender applications, particularly for interdict. It could also arise where the applicant is a pursuer wishing to oppose a counterclaim. If the applicant is not going to be disadvantaged by an order, it seems unreasonable to expend public funds resisting the order.

1.8 The matter could be resolved in other existing proceedings

It would be unreasonable to make legal aid available for separate proceedings when a claim or dispute could be resolved within an existing action, either as it stands or by way of an additional crave/conclusion/defence/claim in the defence being amended into the existing pleadings. It may be more appropriate for an applicant to seek an extension to an existing grant of civil legal aid.

1.9 Undue delay in seeking a remedy

Where an applicant has failed to avail himself of a remedy at the appropriate time, it may be unreasonable to make legal aid available at, perhaps, some considerably later date. This could arise, for example, where

- an interdict is sought many months or years after the incident complained of
- the applicant seeks to petition for judicial review in respect of a decision taken considerably earlier
- the original decision has been supplanted by a later decision
- legal aid has already been made available to obtain the same remedy at some earlier stage.

1.10 Applicant is not in a position to utilise the remedy sought

If the applicant cannot utilise the remedy sought, the cost of proceedings at public expense seems somewhat pointless. For example, a spouse may demand an order transferring title in the matrimonial home, but not be in a position to meet mortgage payments, or the lender may refuse consent to the transfer from joint names on the mortgage. Whilst the remedy sought might be valid, the applicant could not utilise it.

1.11 Where the state of the evidence may make it unreasonable to make legal aid available

See Handbook at paragraph 6.2. (the Board's approach to the Civil Evidence (Scotland) Act 1988)

1.12 Applications by corporate or unincorporated bodies

Civil legal aid is not available to corporate or unincorporated bodies. Legal aid is not available to partnerships or to the individual partners of a firm to pursue or defend actions brought by or against the partnership. The effect of giving legal aid to a partner would be to give legal aid to the partnership itself.

However, legal aid may be available to an individual partner of a firm if s/he can indicate an interest distinct from that of the partnership (for example, upon dissolution). Where a partnership has been dissolved, we should be satisfied that the dissolution was not a device by the partners to obtain civil legal aid.

You should note that sole traders are not corporate or unincorporated bodies, and may therefore apply for civil legal aid. There is no prohibition on sole traders seeking legal aid to pursue or defend proceedings relating to 'business matters' (for example, sums not paid under a contract, etc).

1.13 Applications by persons with joint interest

In terms of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, we can only grant legal aid to a person who is jointly concerned with, or has the same interest in the matter as other people if we are satisfied that

- the applicant would be seriously prejudiced in his/her own right if legal aid were not granted or
- it would not be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.

An example of 'serious prejudice' would be

- an owner of a flat in a tenement faced with litigation over a bill for common repairs.

Examples of cases where an applicant will not suffer 'serious prejudice' include

- closure of a school, community centre, swimming pool, or other cultural or leisure institution.

Where a number of people each have a claim for damages, say, arising out of a common calamity and each individual has his or her own distinct claim, this would not be a joint interest situation. Whilst the parties have similar interests, they are not the same.

1.14 Shadow applications

Applications may be received in the name of a child or impecunious relative in cases where other family members, who would not qualify for civil legal aid, have a direct and identical interest in the matter. Indeed, the other family members may be the true client in the case, providing the solicitor with instructions. It would be unreasonable to make civil legal aid available to them, in effect, through the device of granting it to an impecunious relative, thereby allowing them to avoid paying towards the litigation.

1.15 Other rights and facilities

In terms of regulation 16 of the Civil Legal Aid (Scotland) Regulations 2002, we cannot grant legal aid to someone who has other rights and facilities that make it unnecessary for him/her to obtain legal aid or a reasonable expectation of obtaining financial or other help from a body of which s/he is a member. We may, however, grant legal aid if the applicant has not succeeded in enforcing or obtaining such rights, facilities or help after having taken, in our opinion, all reasonable steps to enforce or obtain them (short of taking proceedings by way of declarator).

Other rights or facilities may include rights to indemnity under an insurance policy (legal expenses insurance, home insurance, motor insurance) or membership of a professional association or trade union.

- If an applicant is a member of a trade union or professional body which provides legal assistance to its members, the applicant must explain why s/he is not using its services.
- If the union is refusing to assist, the reason must be ascertained. It may have a bearing on probable cause and/or reasonableness.
- If the applicant has not applied to his/her union or has decided to stop taking their advice, the reason should be ascertained. The applicant might be able to satisfy us that s/he has good reasons to be dissatisfied with the past or present performance of the union-nominated solicitors. However, remember that trade unions nominate specialist firms to deal with personal injury claims.
- It would not be reasonable to make legal aid available because the applicant prefers to instruct his own solicitor, rather than a union-nominated solicitor.

1.16 Applications involving public interest

It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities. Any applications of this nature should be referred to the Legal Services Sub-Committee.

1.17 Matters de minimis

It would be unreasonable to grant legal aid where the amount at stake does not justify the cost of proceedings. This is obviously a variable factor which depends on the circumstances of the individual case, including the strength or otherwise of the merits of the case. You should take into account, in assessing the value of a claim, any deduction likely to be made in respect of contributory negligence.

1.18 Applicant convicted of a criminal offence arising from subject matter of application

If civil litigation arises as a consequence of a criminal offence of which an applicant has been convicted, it would be unreasonable to grant legal aid to oppose the merits of the action.

However, it would not necessarily be unreasonable to oppose the claim on quantum, depending on the whole circumstances of the case. You may also need to consider the prospects of success, where substantial questions may arise bearing upon the reliability and credibility of evidence led at proof.

1.19 Insufficient interest

Every applicant must show that s/he has a right, title and interest to be a party to the proceedings. Even where such an interest is demonstrated, the amount of interest the applicant has may not justify the expenditure of public funds. As a general proposition, litigation which would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle should not be encouraged.

1.20 Cost benefit analysis

Our approach to cost benefit was upheld by the court in the case of *McTear -v- Scottish Legal Aid Board 1997 SLT 108*. Whilst cost alone cannot justify a refusal on reasonableness, the court was satisfied that it could be a very important factor. In balancing up the cost of the litigation, the possible benefit to the applicant, and the prospects of success, Lord Kirkwood saw no reason in principle why, if the case would be likely to involve heavy expenditure of public funds, the cost of the litigation could not effectively be the deciding factor in favour of refusal. The cost benefit analysis applies to any value of financial claim. If the applicant fails to fully recover judicial expenses, property recovered or preserved by the applicant may be subject to clawback, potentially leading to little or no material benefit to the applicant. Where the potential benefit to the applicant is equalled or exceeded by the likely cost of prosecuting the action, the application will fail the cost benefit test. Thus, if the likely benefit to the applicant is £10,000, and the cost of the action is likely to be £12,000, there is no cost benefit.

1.21 Prospects of success

McTear re-affirmed that it is perfectly appropriate for us to assess the prospects of success when considering the reasonableness of granting legal aid. It is for us to assess prospects of success having regard to all the information before us including, where appropriate, the solicitor's own opinion as to the prospects of success. Regard must obviously be had to comments by the solicitor and counsel, but we carry out our own independent assessment. Experience shows that assertions of good prospects of success may be overoptimistic.

In looking at the prospects of success, factors to be considered include, for example

- volenti and contributory negligence
- evidential difficulties arising from the fading memories of witnesses
- unsuccessful litigation of a similar nature in Scotland or elsewhere in the UK
- evidential discrepancies
- unsupportive opinions of the applicant's own legal advisers.

There may be some classes of case where less emphasis would be placed on the prospects of success, but a greater emphasis placed on other factors. In looking at prospects of success, we are not looking at a guaranteed successful outcome, but rather – all things being equal – a reasonable prospect of success.

1.22 Private client reality

Legal aid does not exist to place assisted persons in any better position than privately paying clients. We should have regard to whether a privately paying client would reasonably be advised to litigate in the same circumstances. In *Venter -v- Scottish Legal Aid Board 1993 SLT 147*, the Inner House agreed that we were perfectly entitled to have regard to what a private client would do when being advised on steps likely to involve unusually large expenditure.

1.23 Claim likely to be within the small claims limit

Assertions of a particular value of quantum must not be taken at face value. It is for us to assess whether, in our view, the claim lies above the small claims limit. Civil legal aid is not available for small claims actions. If the claim really lies below £750, it should be raised as a small claim. Take care to note contemporary levels of quantum and check the current edition of the Judicial Studies Board Guidelines for personal injuries cases (in particular, for psychiatric injury).

1.24 The prospects of recovery do not justify the use of public funds

Where there are insufficient prospects of recovering both the principal sum and expenses, it would be unreasonable to waste public money obtaining an unenforceable decree. The solicitor's comments on the CIV/APP form as to the prospects of recovery should be noted, but we must reach our own view, having regard to all the circumstances. Experience indicates that forms invariably suggest there are good prospects of recovery. We should consider whether the opponent

- is insured
- has substantial capital assets or income to satisfy a decree
- has been sequestrated or is in liquidation
- is not indemnified by the insurer for the particular risk or claim
- is furth of Scotland with no employer or capital in Scotland
- has unreachable assets (for example, individual placing property behind the corporate veil) or
- is in receipt of civil legal aid.

1.25 Proceedings in a court outwith Scotland are more appropriate

This factor interacts with an examination of jurisdiction when assessing probable cause. There may be cases where both the Scottish and foreign courts have jurisdiction. Factors which might be relevant in assessing which country is more appropriate include, for example, place of accident, place of business/residence of opponent, location of witnesses, whether there are existing related proceedings in the other jurisdiction, existence of a statutory remedy in Scotland although incident occurred abroad (for example, under domestic legislation implementing an EU Directive).

2. Reasonableness in Reparation cases

In addition to the factors in (1) above, the following issues arise in applications for civil legal aid in respect of reparation.

2.1 Court of Session – reparation etc

Whilst the Court of Session continues to have concurrent jurisdiction with the sheriff court in respect of cases valued at more than £1,500, the additional cost of instructing Edinburgh agents and counsel will have to be justified for an application to raise proceedings in the Court of Session. It would not normally be reasonable to grant legal aid for proceedings in the Court of Session where the case has a financial value of less than £20,000. The solicitor should be in a position to justify the figure claimed for quantum on the application.

You should also note whether proceedings have already been raised in the Court of Session under regulation 18. If legal aid is refused for Court of Session proceedings, the case will need to be remitted to the sheriff court. However, the Court of Session may not necessarily be a more expensive forum for litigation than the sheriff court. If you are minded to refuse for Court of Session proceedings, the application may be part admitted for sheriff court only.

2.2 The injury is a criminal injury within the meaning of the CICA scheme and separate civil proceedings are not justified at public expense

Where the applicant has the option of pursuing a claim through the Criminal Injuries Compensation Agency (CICA), involving simpler procedure and minimal cost, it would be unreasonable for civil legal aid to be granted to raise civil proceedings. Claims for damages arising from criminal injuries are also likely to involve substantial questions as to the prospects of recovery, the applicant's own conduct, etc, and thus interact with other reasonableness factors.

2.3 Uninsured drivers

Our approach, over a number of years, has been to refuse civil legal aid to defend a reparation action arising from a road traffic accident where the defender was an uninsured driver. The defender was under a legal obligation to carry, at the very least, third party, fire and theft insurance. We considered it unreasonable to support a defence at public expense when the applicant deliberately failed to avail him/herself of an insurance policy which could have supported him or her.

However, the fact that the driver is uninsured does not mean that the defence is invalid. The pursuer may well lose at proof and, if legally aided, expose us to a finding of expenses under section 19. Indeed, this happened a few years ago at Glasgow Sheriff Court.

- The defender's application may act as a trigger to re-examine the reasonableness of continuing to support the pursuer at public expense. Without an insurer, there is little prospect of recovery from the defender unless s/he has substantial assets or income.
- We would also wish to be addressed on the involvement of the Motor Insurers' Bureau (MIB) in the claim. If the MIB are fully dealing with the matter, it would not appear reasonable to fund a separate defence by the uninsured driver. If the uninsured driver has withheld consent to the claim being dealt with by the MIB, we may consider it unreasonable to fund a defence.
- Where the claim against the uninsured driver relates to matters outwith the MIB scheme (for example, recovery of the insured driver's excess), the uninsured driver would need to demonstrate at least a valid defence on quantum. The value of those heads of claim may not justify the cost of a defence.

3. Reasonableness in Consistorial cases

In addition to the factors in (1) above, the following issues arise in applications for civil legal aid in respect of consistorial matters.

3.1 Court of Session consistorial cases

It will only rarely be demonstrated that it would be reasonable to grant civil legal aid for consistorial proceedings in the Court of Session. These cases can generally be prosecuted perfectly efficiently and cost effectively in the sheriff court. Given the volume of case law that has developed under the Family Law (Scotland) Act 1985, cases presenting such legal complexity as to be suitable for the Court of Session should be few and far between.

- The fact that the case presents a large financial claim does not necessarily mean that there is sufficient complexity for the Court of Session.
- The Court of Session will not necessarily be a more expensive forum for litigation than the sheriff court.
- The Court of Session may present itself as a more reasonable venue because of factors such as the effect of local publicity on the parties, local court policy or jurisdictional issues.

Particular care will need to be taken with jurisdiction in cross-border divorce cases within the E.U as a result of the jurisdictional changes introduced by Council Regulation (EC) No 1347/2000, which was directly effective from 1 March 2001. Arguments as to the reasonableness of raising proceedings in Scotland will no longer arise if the Scottish courts do not have jurisdiction under community law. In such cases, reasonableness will not arise if there is simply no probable cause to litigate in Scotland.

3.2 Cross actions of divorce, residence, etc

Where the parties to a marriage are plainly in agreement that the marriage has irretrievably broken down, but are only disputing the cause, defences on the merits and/or cross actions should not be encouraged. You should not grant legal aid for a cross action of divorce where the applicant is not defending the other party's action on the merits. There may be cases where a cross action might be considered reasonable, if the outcome of ancillary matters is affected. Jurisdiction will need to be examined closely, as a result of Council Regulation (EC) 1347/2000.

4. House of Lords and Judicial Committee of the Privy Council

In what will invariably be extremely expensive proceedings, where the Fund is at considerable risk of bearing the high costs of both sides, the standard that is applied to the application is relatively high. Although accounts have typically been claimed at around £50,000 (inclusive of counsel), the total bill claimed by both parties in one recent case was in the region of £200,000.

- The sum involved, after making appropriate allowances for any element of contributory negligence, or the importance of the point at issue, must justify the cost of proceedings.
- An applicant who has been successful in the court at first instance but not before the Inner House is on relatively stronger ground than one who has failed both at first instance and on appeal.
- In any application for proceedings before the House of Lords, or JCPC, we should be satisfied that there are not only significant prospects of success, but also significant points of law to be argued.