

Northern Ireland Courts and Tribunals Service

**County Court Rules Committee Consultative
Document on Scale Costs**



A response by the Association of Personal Injury Lawyers

30 September 2011

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,500 members in the UK and abroad, including around 80 in Northern Ireland, who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Christopher Limb – APIL Treasurer;

Martin Hanna – APIL Northern Ireland Executive Committee Member;

Peter Jack – Co-ordinator APIL Northern Ireland;

Lois Sullivan – Secretary APIL Northern Ireland.

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Introduction

APIL's remit relates only to personal injury law (including medical negligence) and our response is limited to this area of law and practice.

Executive Summary

APIL welcomes the opportunity to put forward its comments on the Northern Ireland Courts and Tribunal Service (NICTS) consultation on the proposed new scale costs. We respond only in the context of personal injury cases.

- The guiding principles should be used as a starting point but further work is required. Procedures in the county court have not been updated for many years but the requirements of the work have changed somewhat since the last scale cost review was conducted in 2001.
- For costs to be fixed fairly, a cost drawer needs to be engaged. In 2006, Paul Kerr was commissioned by the Belfast Solicitors' Association (BSA) to advise whether the scales, as determined by the 2002 survey, provide fair and reasonable remuneration and what impact, if any, the Regulatory Impact Assessment (RIA) may have upon the same¹ when considering the principles which underpin solicitors' remuneration and the documents disclosed by the Committee under the Freedom of Information Act. He concluded that solicitors often incur a shortfall in costs.
- APIL recognise there will be some cost savings associated with having a case heard in the county court rather than the High court; however, the level of work and preparation involved is likely to be similar, if not the same; whichever court the case is heard in. The county court scale should reflect this but the proposed scales in the consultation paper do not.

¹ *Review by County Court Rules Committee of County Courts Scale Fees, Opinion to advise the Belfast Solicitors Association*, 10 October 2006, Paul G. Kerr B.C.L, Legal Costs Consultants.

- A purely inflationary increase in costs for the current bands is not appropriate. There should be a full review of the current cost of processing cases in the county court up to a value of £15,000 undertaken by a costs drawer. Once this has taken place there should be a yearly inflationary increase to represent a fairer system with full reviews conducted every five years.
- There has been an increase in ancillary work in recent years and the scale costs have not been increased for some time and so do not take this into account. As there has been no increase to scale costs in recent years that fact should be considered here and any increase that is agreed should be introduced in full with immediate effect.
- Complex cases require significant amounts of work regardless of the level of damages and, therefore, warrant a guaranteed uplift of one third.
- The NICTS should also recognise other types of additional work that may be required and award costs for these too, such as interlocutory work including telephone hearings.
- The same uplift for additional defendants as used by the high court should be transferred to the county courts.
- APIL remains concerned with the lack of specialisation of county court judges. Data that APIL has acquired through a Freedom of Information request from the NICTS shows that there are a low number of higher level awards made. With an increase in the jurisdictional limit of the county court expected imminently, where awards up to £30,000 can be made, it is essential that judges are able to fully understand the complexities of these types of higher value personal injury cases. There needs to be reassurance that there will be a level of consistency between the county courts in order for the decentralization to work efficiently and provide full and fair access to justice for the injured person.

Consultation Questions

Q. 1. Do you agree that the guiding principles which informed the 2001 fundamental review of scale costs should continue to be applied?

We agree that the guiding principles which informed the 2001 fundamental review of scale costs should be used as a starting point, but suggest that further work should then be applied.

As the jurisdictional limit of the county courts will increase to £30,000, the vast majority of personal injury cases will now be issued there. Procedures in the county court have not been updated for a number of years; but, the requirements of the work have changed somewhat since the last scale cost review was conducted in 2001. For example, plaintiff solicitors are now required to provide three copies of all documents lodged with the court. There are also now expectations for solicitors to attend regular review hearings as part of the fixed cost process. Fixing costs does not fix the amount of work involved in pursuing a claim. In every case there are different issues and complexities to resolve before the injured person can obtain redress. Simply fixing costs is not the answer. More discussion is needed about defendant behaviour, and sufficient safeguards agreed to protect the injured person's right to bring a claim, and to fully pursue it. There is still no requirement for the defendant to fully state their case prior to trial. When the defence is not fully pleaded the plaintiff's solicitor is unaware of the issues to be contested and, therefore, has to prepare for all possible issues, which requires additional work. This is different for cases that take place in the high court in Northern Ireland where a fully pleaded defence is required.

In order for costs to be fixed at the appropriate level, a cost drawer needs to be engaged as. In 2006, the Belfast Solicitors' Association (BSA) instructed Paul Kerr to advise whether the scales, as determined by the 2002 survey, provide fair and reasonable remuneration and what impact, if any, the Regulatory Impact Assessment (RIA) may have upon the same² when considering the principles which underpin solicitors' remuneration and the documents disclosed by the Committee under the Freedom of Information Act. In his report, Paul Kerr considered the case of *Re C & H Jefferson (a firm)*³ where the court stated,

² *Review by County Court Rules Committee of County Courts Scale Fees, Opinion to advise the Belfast Solicitors Association*, 10 October 2006, Paul G. Kerr B.C.L, Legal Costs Consultants.

³ *Re C & H Jefferson (a firm)* [1996] NI 404

When the scales are applied there is no element of discretion and taxation of costs and fees is not required...If the scales are fixed at a suitable level, proceedings in the county court can be conducted at reasonable cost, while giving a reasonable return to the practitioners who conduct them.

Paul Kerr goes on to state the court held that the scales were to apply as between solicitor and own client as well as inter-partes, except in exceptional cases in which the work done by solicitor or counsel might merit an extra fee.

Paul Kerr concluded that,

The application of the scales to costs between solicitor and own client means that the solicitor must absorb any shortfall which might have arisen had the contractual costs been calculated on the basis of time expended. In effect, as will be seen, this means that in many cases solicitors conduct cases at a loss.

He continues,

In my opinion it is axiomatic that for remuneration to be fair and reasonable from the solicitor's point of view it must be both enable him to cover his overheads and provide him with a living.

In his report, Paul Kerr also provides details on how to calculate the base rate, below which any work carried out by the solicitor would be carried out at a loss.

Q. 2. Are you content with the proposed bands of -

£15,000 - £20,000,

£20,000 - £25,000 and

£25,000 - £30,000?

The bands proposed, in our view, are too wide. We would suggest that a fairer system would be for there to be six additional bands:

15,001 to 17,500

17,501 to 20,000

20,001 to 22,500

22,501 to 25,000

25,001 to 27,500

27,501 to 30,000

By referencing the bands in this way there will be certainty at the top end of the brackets as to which costs apply in any given case, thus giving a sure outcome on costs both for the plaintiff and defendant.

Q. 3. Do you agree with the proposed scales for the new bands?

We do not agree with the proposed scales for the new bands. The BSA's Guide to High Court Costs, included at Annex A, recommends a fee of £7,595 for cases settling between £15,000 and £19,999. The proposed fee in this consultation represents a figure just under half of that at £3,800. We recognise that having these cases heard in the county court represents some decentralisation and that there will be some cost savings associated with that; however, the level of work and preparation involved is likely to be similar, if not the same; whichever court the case is heard in. The county court scale should reflect this and the proposed scales in the consultation paper do not.

Q. 4. Do you agree that present bands should be increased in line with the rate of inflation?

The BSA's Guide to High Court Costs came into existence following the publication of Paul Kerr's report, as detailed in response to Question 1.

Statutory scale of costs ensures that costs in the county court are certain, however; inflationary adjustment is not the most adequate way of dealing with increases. The hours of work and costs involved in conducting county court cases are affected in many ways. The fees should reflect a realistic amount for the work involved. There has been an increase in ancillary work in recent years and the scale costs have not been

increased to take this into account. There are an increasing number of review hearings and direction appointments that solicitors have to attend and prepare for at short notice. There is waiting and travelling time on top of this that is also not accounted for. Scale costs do not incorporate payment for this. In addition to this, the costs of running a practice and the expenses associated with this have increased.

There is also the added issue of increases to costs not being made yearly. The additional increases of annual inflation increases would be minimal, by not increasing the costs yearly by inflation once a full scale review has taken place effectively means that the professionals suffer a drop in their income in real terms between the review years. This may very well lead to a reduction in solicitors prepared to do county court work, and in particular personal injury work.

For this reason, a purely inflationary increase in costs for the current bands is not appropriate. There should be a full review of the current cost of processing cases in the county court up to a value of £15,000 undertaken by a costs drawer. Once this has taken place there should be a yearly inflationary increase to represent a fairer system with full reviews conducted every five years.

Q. 5. Do you agree with the phased implementation of the inflationary increase?

We do not agree with the proposed phased implementation of the inflationary increase. As mentioned in response to Question 1 there has been an increase in ancillary work in recent years and the scale costs have not been increased for some time and so do not take this into account. As there has been no increase to scale costs in recent years that fact should be considered here and any increase that is agreed should be introduced in full with immediate effect.

Q. 6. Do you agree that the discretionary uplift of one-third for complex cases should apply to awards up to the new jurisdictional limit of £30,000?

There is an agreed assumption that complex cases, such as clinical negligence cases, will be more difficult to run than the typical claim. Complex cases require significant amounts of work regardless of the level of damages and, therefore, warrant a guaranteed uplift of one third. However, the base cost or scale has to be set at the right

amount in the first instance and, as stated above, we do not agree that the proposed new scales represent the correct base costs to be used.

Q. 7. Do you agree with the proposed costs for additional day hearings?

The NICTS recognise here that additional work is required for additional day hearings. We agree that 50 per cent of the base scale costs is accurate, providing the base level is set correctly in the first instance. However, there should be no ceiling point of £600, as proposed in the paper, for complex cases.

The NICTS should also recognise other types of additional work that may be required and award costs for these too, such as interlocutory work including telephone hearings.

Q. 8. Do you agree with the proposed costs for cases in which there is more than one defendant?

The paper proposes that there is an uplift of 5 per cent for cases where there is more than one defendant. This does not satisfactorily represent the additional level of work that will be required. The BSA's Guide to High Court Costs recommends an uplift of 20 per cent for the first additional defendant, and then 10 per cent for each further additional defendant thereafter⁴. The percentage increase reflects the issue of proportionality when there is more than one defendant and is justified by the amount of additional time spent working on a case. The same uplift as used by the high court should be transferred to the county courts. The uplift will then still reflect proportionality as the uplift is a set percentage and the new scale costs in the county court are expected to be slightly lower than those currently in the high court for cases of the same value.

Q. 9. Do you have any additional comments?

APIL remains concerned with the increase of the jurisdictional limit and the lack of specialization of county court judges. Personal injury cases, even those of a lower value, are not necessarily legally straightforward as they often involve complex

⁴ Belfast Solicitors' Association Guide to High Court Costs as revised (applicable to actions settled after 1 May 2009), Page 3 Paragraph 3.

arguments on apportionment or causation, and medical evidence can often involve exacerbation injuries or pre-existing conditions.

Using the Judicial Studies Board for Northern Ireland's *Guideline for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*⁵ personal injury cases up to a value of £30,000 can include:

Level of Damages £	Injury suffered
18,000 – 30,000	Serious fracture of jaw with permanent consequences
15,000 – 36,000	Continuing bilateral disability with surgery and loss of employment (work related upper limb disorders)
24,000 – 42,000	Knee injuries
24,000 – 50,000	Very serious fracture of the jaw followed by prolonged treatment
24,000 – 65,000	Female less significant scarring where the worst effects have been or will be reduced by plastic surgery
24,000 – 50,000	Total loss of smell and significant loss of taste
18,000 – 36,000	Pleural thickening with functional impairment (lung disease)
27,000 – 42,000	Loss of kidney with no damage
15,000 – 36,000	Less severe wrist injury still resulting in permanent disability

It can clearly be seen from the table above that there can be a wide variation in the level of damages that may be awarded. For this reason, specialist judges are far better placed to manage personal injury cases. Currently, it is possible to come before a judge who has never conducted a personal injury case while practising law, having spent their entire career specialising in a different area. This is because of the way the legal

⁵ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, The Judicial Studies Board for Northern Ireland, Third Edition, 2008.

profession has developed over recent decades, with solicitors and barristers increasingly specialising in a particular area of law from an early stage in their career. This same trend means, however, that it should be easier than ever to recruit experienced specialist lawyers in to the judiciary. Introducing specialist judges to deal with personal injury claims where possible would be a sensible and cost effective measure. Training and performance monitoring should then be conducted on a continuing basis during service to ensure the specialist's skills, and experience, remain relevant. There should be initial and ongoing training for judges and that this should be endorsed by the introduction of a "ticketing" system, whereby judges who have undertaken such specialised training are allocated cases which reflect their specialism through certification. This system is already in place within family law and criminal law in England and Wales and it should be extended to personal injury in Northern Ireland. A further benefit of such a system is that having specialist, or ticketed judges' means that there will be specialist court lists, and so the courts' time will be used more effectively and efficiently.

APIL recently made a Freedom of Information request to the NICTS. We requested information on the total number of ordinary civil bills for personal injury cases by amount awarded between 2005 and 2010. On page 19 of the consultation paper⁶, a table is included which shows the percentage of ordinary civil bills cases by amounts awarded in 2004-2009. The table shows awards made in £2,000 increments up to £5,000 and then has one bracket for all awards between £5,000 and £15,000. Using the information provided by the NICTS we are able to show the number of awards made in £2,000 increments between no value and £15,000. The results are shown in the table below:

	No award	Under £1,000	£1,001 - £3,000	£3,001 - £5,000	£5,000 - £7,000	£7,000 - £9,000	£9,000 - £11,000	£11,000 - £13,000	£13,000 - £15,000
2005	859	218	555	439	142	73	16	8	5
2006	634	164	407	321	110	41	23	9	4
2007	535	158	435	298	108	56	9	7	2
2008	420	103	320	209	77	43	10	2	4

⁶ Northern Ireland Courts and Tribunals Service County Court Rules Committee Consultative Document on Scale Costs

	No award	Under £1,000	£1,001 - £3,000	£3,001 - £5,000	£5,000 - £7,000	£7,000 - £9,000	£9,000 - £11,000	£11,000 - £13,000	£13,000 - £15,000
2009	284	43	188	97	63	40	8	5	2
2010	313	57	222	168	56	38	10	4	2

To show this information alongside that data which is presented in the table at page 19, these figures have been converted to a percentage of the total number of civil bills by amount awarded. The civil bill awards shown as a percentage can be seen in the following table:

	No award	Under £1,000	£1,001 - £3,000	£3,001 - £5,000	£5,001 - £7,000	£7,001 - £9,000	£9,001 - £11,000	£11,001 - £13,000	£13,001 - £15,000
2004	31%	8%	27%	21%					
2005	36%	7%	23%	20%	6.1%	3.1%	0.7%	0.3%	0.2%
2006	34%	8%	23%	20%	6.4%	2.3%	1.34%	0.52%	0.23%
2007	27%	9%	26%	22%	6.71%	3.48%	0.55%	0.43%	0.12%
2008	28%	9%	26%	20%	6.47%	3.61%	0.84%	0.16%	0.33%
2009	27%	10%	24%	21%	8.2%	5.2%	1.04%	0.65%	0.26%
2010	36%	7%	25%	19%	6.42%	4.35%	1.14%	0.45%	0.22%

The data in this table shows that there are a low number of higher level awards made. With an increase in the jurisdictional limit of the county court expected imminently, where awards up to £30,000 can be made, it is essential that judges are able to fully understand the complexities of these types of higher value personal injury cases. There needs to be reassurance that there will be a level of consistency between the county courts in order for the decentralization to work efficiently and provide full and fair access to justice for the injured person.

- Ends -

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