Review of expenses and funding in Civil Litigation in Scotland

A response by the Association of Personal Injury Lawyers

16 March 2012

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has over 150 members in Scotland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured people.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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;
- 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:

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Introduction

APIL welcomes the opportunity to inform the Review of Expenses and Funding in Civil Litigation in Scotland. We agree with the guiding principle informing this Review that the outcome of dispute resolution should be a just one. It is also essential that we maintain individual human rights and prevent injury where possible through social responsibility. Negligent actions will unfortunately happen and when this occurs we must have a system that provides access to care, rehabilitation and redress.

APIL's remit relates only to personal injury law (including clinical negligence) and our response is limited to this area of law and practice. It is important that any debate about reforming our legal system does not lose sign of retaining access to justice for individuals negligently injured through no fault of their own.

APIL believe that the foundations of our civil justice system should be:

- Right to bodily integrity
- Right to full and just compensation
- Access to independent legal advice for all in our society
- Protection of those who have been injured by the negligence of others

We would warn against any reform that simply bolts on processes and practices from other jurisdictions. A one size fits all approach to reform is not the answer. As the consultation paper *Review of expenses and funding in civil litigation in Scotland,* November 2011 (The paper) acknowledges, differences in social structure and culture are also important factors that must be considered.

We agree that the principle of proportionality is highly important, and note that the Review acknowledges the different factors relevant to assessing how best that principle is implemented[1]. We would make the point that the level of expenses in Scotland is significantly below that in England and Wales.

Personal injury law is unlike any other. Most defenders are covered by insurance and claims made against them are dealt with by major multi-national enterprises which are massively resourced. The pursuer is an individual and usually a onetime user of the legal system with little understanding of legal concepts. There is a David and Goliath struggle between the injured person and the commercial enterprises of modern insurers. It is essential that those injured should not be treated as commodities or commercial transactions. The legal system should be about delivering access to justice for injured people.

[1] *Review of expenses and funding in civil litigation in Scotland,* November 2011 paragraphs 1.4 and 1.5.

The current system

We would like to make a general point at this stage about the relationship between expenses and the rules governing procedure in personal injury cases. Personal injury actions raised in the Court of Session and as Ordinary Cause in the Sheriff Court are now subject to a case-flow model of procedure. It is anticipated that this will be extended to Summary Cause actions in the Sheriff Court in the near future. This model has been extremely successful since its introduction in the Court of Session in 2003. Members report that the settlement rate of cases is around 99 per cent. Around 20 cases per year go to proof, from a total of around 2,500-3,000 cases being raised. The vast bulk of cases take up little, if any, judicial time. Parties who abide by the court timetable almost inevitably resolve actions, if not by the stage of the pre-trial meeting then shortly afterwards. The Keeper of the Rolls currently puts out around 90-96 cases per week for proof. The reality is that in most weeks, only one or two reach the stage of the door of the court. The conclusion that must be drawn is that the original intention of the Coulsfield Reforms has indeed been satisfied, namely that the vast majority of personal injury actions can be, and are resolved by negotiation, with no need for judicial intervention. This has led to significant savings in judicial time, not to mention a significant level of income from court fees, where there is little use of judicial resource. Freedom of Information requests[2] have also confirmed that the court fees received in personal injury cases in the Court of Session account for just under 50 per cent of the Court's total income by way of fees. In 2009, personal injury cases generated £1.8m. In the same year, over 3000 personal injury actions were signetted, while only 20 cases went to proof. More recent figures indicate that the Court of Session receives around £180,000 per month in court fees from personal injury actions. This compares favourably with commercial actions.

While it is perhaps a little early to fully assess the impact of the new rules in Ordinary Cause procedure in the Sheriff Court, anecdotally our members' experience is that earlier resolution of cases is increasing, though concerns have been raised in relation to differing practices and interpretations of the rules in different sheriff courts, as well as the true effectiveness of the pre-proof conference which can be carried out by telephone and which is not as successful in settling cases as a pre-trial meeting which involves a face-to-face discussion. Our members also feel that in those cases where counsel is instructed, they often bring added value to the case and can be a significant factor in achieving a settlement.

We take the view that in light of the success of this model, certain principles may also be applied to the issue of expenses. Inevitably, in a number of cases, in addition to the usual disputes on liability and quantum, there are often arguments between the parties about the appropriate level of expenses to be applied, whether particular pieces of work required to be carried out, and whether it was appropriate to instruct an expert witness or counsel in the case. While these aspects may occur in any number of cases, as with disputes relating to the substantive action, almost inevitably, an accommodation is reached whereby parties resolve their differences in relation to expenses by way of negotiation, and without requiring judicial intervention. Of course, there is the occasional case where a judicial decision is necessary. However, it is our members' experience that these are few and far between.

[2] Appendix C

The lesson to be drawn perhaps is that insofar as personal injury cases are concerned, generally disputes are resolved between parties, without any requirement for judicial input, and consequently any proposals to involve additional judicial resource as a matter of course, should be viewed with some careful consideration.

Access to justice

Q1. What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?

Personal injury victims who make court claims do not do so on a whim. They do not use the court voluntarily – they do so because they feel they have no other choice. Transactional costs which are not recovered from the defender must be paid for by the injured person. This reduces the compensation that they recover. The legal profession acting on behalf of those needlessly injured has tried to organise itself in such a way as to limit the impact on an individual's damages but this is not always possible. Often pursuers cannot afford to fund court fees because they are financially insecure as a result of the injuries caused by the defenders' negligence. It is essential that it is not just the rich that can afford to pursue justified claims.

Our members report that there is a limited After the Event (ATE) insurance market in Scotland with policies only being offered to certain firms and with very specific conditions attached to the policies. It is not unusual for cover to be limited to £50,000 and for there to be an agreement between the solicitor and the insurer that the policy will not be claimed against if the case is unsuccessful. The result is a lack of transparency for the pursuer around the policy that is being purchased.

Premiums can often be high for certain types of case. ATE providers are often reluctant to quote for a policy for a clinical negligence case and when they do, will quote a premium which is rarely affordable. There is also the added problem that NHS Scotland Central Legal Office (CLO) run most cases to proof. Pursuers are often forced to raise proceedings because the CLO does not make reasonable offers to settle cases. This makes cases expensive. The cost of litigation to society should not include consideration of defenders' expenses when it is the defenders who have effectively been negligent, caused injury and failed to narrow the issues which would, in turn, prevent litigation.

Legal aid contributions are another concern for pursuers. Our members report cases where the cost of the tapered legal aid contribution payable by the pursuer can be as much as £10,000 which is a significant sum of money to someone who has already been assessed as having limited means and who is likely to be suffering financial hardship as a result of the negligence of another. It is our understanding that the Legal Aid Board is considering a change to the eligibility rules in personal injury actions whereby an applicant must demonstrate that they have exhausted all other potential methods of funding, including speculative agreements, before applying for legal aid. This is likely to significantly affect the number of legally-aided pursuers.

Prior to 2011, children would be assessed on the basis of their own resources: parental resources would be disregarded. This meant that virtually every catastrophically injured infant in Scotland would qualify for free legal advice and assistance to cover an investigation where

clinical negligence was suspected, and then for free legal aid to pursue a claim where there was expert evidence to prove clinical negligence. However, now that the Scottish Legal Aid Board assess the parents' resources when determining eligibility, many such infants do not qualify for legal advice and assistance or legal aid, thus forcing parents to choose between (a) spending money on the direct needs of disabled children and (b) on legal expenses. This not only discourages, but in reality prevents, access to the courts or any form of justice for these seriously injured children.

The cost of litigation

Q2. Should solicitors' fees for litigation be recovered as expenses on the basis of time expended, value of the claim or some other basis?

It is acknowledged within the consultation document that there is a view that regardless of the value of a claim, there is a certain level of basic cost involved in investigating and dealing with the basic elements of the claim. We would concur with that view. Once a case is litigated, and generally this is due to liability being denied, or the defenders' insurers not making an adequate offer, the solicitors' fees for litigation should be assessed on the basis of the work carried out in the case. The paying party's position is protected to the extent that there is a mechanism to challenge the level of fees through the taxation process.

Increasing the level of judicial fees may be of benefit. As is recognised by the Review team, the level of judicial recovery can be between 50 and 80%[3] of the cost involved in dealing with the case. Higher levels of judicial recovery may assist in focusing parties' minds at an earlier stage, leading to earlier resolution.

Q3. Is LPAC, as currently constituted, an appropriate body to review the level of fees for litigation which may be recovered as expenses?

APIL supports the creation of a Civil Justice Council (CJC) and suggests that part of the remit of this body would be suited to annually review solicitors' fees for litigation in both the Court of Session and Sheriff Court. One body responsible for the creation of rules, policy and the review of fees will ensure consistency.

Q4. Is the test currently applied by the sheriff court in sanctioning the instruction of counsel appropriate? If the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied?

Defenders and insurers are uniformly represented by "repeat player" firms with specialist solicitors and in-house solicitor advocates. Whilst there are some specialist firms in Scotland virtually none could run existing case loads without the assistance of the Bar. The Bar brings the benefits of years of experience in case preparation, case pleading and presentation, and case

[3] Review of expenses and funding in civil litigation in Scotland, consultation paper, November 2011 page 30 paragraph 3.38

advocacy, which levels the playing field with defenders. We have no doubt that the availability of the specialist Bar to pursuers significantly improves the prospects of success. It would be extremely disappointing if one of the unintended consequences of any reform would be to remove access to the Bar for pursuers and their solicitors.

It is clear from our members' experience of the Chapter 43 procedure in the Court of Session and the high settlement rate, that the use of counsel brings added value to many cases. It should be borne in mind that the case flow system applied to personal injury cases was designed to reduce to a minimum the number of occasions that a case would require to call in court. Introducing motions to approve the sanction of counsel in every case would increase cost and add a further procedural layer to settling cases. There is also the added concern that some defenders will decide that as a matter of policy they will challenge every request as a matter of routine.

Anecdotally our members report that cases currently in the Sheriff Court are more likely to run to proof. In the event that the privative limit is increased, as proposed by Lord Gill[4], the availability of counsel would be an important asset in facilitating early settlement of cases in the Sheriff Court. APIL's position is that, provided appropriate safeguards are introduced, the privative limit should be increased to £30,000. Clearly there would be no need for counsel in more straightforward, low value cases, but in cases where damages may be expected to exceed £10,000, or there was particular complexity, there should be automatic sanction for counsel or solicitor advocate.

We do not believe that a party wishing to instruct senior counsel should be required to make a formal application to the court for the sanction of counsel. Again this will be costly and will create a further procedural layer to the litigation process. In our view it should be for the solicitor and/or junior counsel to determine whether the use of senior counsel is reasonable for the proper conduct of the case. Ultimately, any party wishing to take objection to the instruction of counsel or a solicitor advocate, can bring the matter before the court for a ruling, as well as arguing the point before the Auditor.

Q5. What test should the court apply when considering a motion for certification of an expert witness- should it be necessity, reasonableness or some other test?

The test of reasonableness should be applied by the court when confirming the involvement of an expert in a case. The same test should be applied to cases in the Sheriff Court and in the Court of Session to ensure consistency in approach.

Q6. In the sheriff court, should counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the cases as suitable for the employment of counsel?

[4] Scottish Civil Courts Review

We take the view that on the basis sanction in the Sheriff Court should be automatic in cases of a value of £10,000 or above, then in those cases where counsel requires certification, outlays should only be competent from the date of certification subject to retrospective pieces of work being sanctioned on cause shown.

Q7. In the Court of Session, should senior counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the cases as suitable for the employment of senior counsel?

We do not think that certification of senior counsel should be required. If, however, that were introduced, then it would depend on the stage at which certification was sought.

Q8. Should the presiding judicial office holder assess what would be a reasonable fee for counsel in any account of expenses? If so, at what point in the proceedings should that assessment be made?

The current system where an auditor of court assesses an account of expenses works, in our view. It provides consistency and predictability in decision making. We would warn against reforming a process that is currently effective.

In England and Wales there can be a lack of costs knowledge amongst the judiciary at the level of district and circuit judge. They often do not have the experience to determine what a reasonable fee is. Judges predominantly come from the Bar and, unless specialists in costs, can have limited knowledge of costs issues. This problem is only resolved if a case goes before an experienced senior court cost office judge.

We believe that it would be more appropriate for auditors of court to be salaried employees recruited from practitioners who have a real background in costs rather than for them for be paid a percentage of taxed expenses. We also see an advantage in establishing a system where there is a cohesive body of auditors of court across Scotland, headed by the Auditor of the Court of Session, which would ensure consistency of decision-making.

Q9. From when should the fees of an expert witness be a competent outlay in a judicial account of expenses?

The fees of an expert witness should be allowable from the date of instruction of the expert. If a party wishes to object to the instruction of an expert on the basis that such instruction was not reasonable or necessary, recourse can be had to the court for a decision. As pointed out in our opening remarks, while it is not uncommon for objection to be taken to the instruction of an expert at the point of initial analysis of the account of expenses by the paying party, almost inevitably, a compromise agreement is reached between parties without the need for a court hearing. If the decision relating to the instruction of an expert witness were to be made at the outset of a case, there would be a significant increase in the number of opposed motions coming before the court, resulting in additional expenses and time.

Q10. Should the presiding judicial office holder assess what would be a reasonable fee for an expert witness in any account of expenses? If so, at what point in the proceedings should that assessment be made?

The current system where an auditor of court assesses whether the expert witness fee is reasonable works, in our view works. It provides consistency and predictability in decision making. We would warn against reforming a process that is currently effective.

Q11. Is it reasonable for counsel to be entitled to charge a commitment fee and, if so, should that be prescribed or left to the discretion of the Auditor?

Counsel is entitled to charge a commitment fee when booked to appear in a case. In practice however, counsel tend not to charge a commitment fee unless a case settles close to the proof date. The case flow procedure has been successfully developed in personal injury which allows for little use of judicial resources but allows for early settlement of cases. Data from our members/FOI request shows that less than 1 per cent of cases go to proof[5]. The majority of PI cases settle at or shortly before the pre-trial meeting, if they have not already settled at an earlier point in the case. Therefore the number of cases where counsel ends up charging a commitment fee is minimal.

If in one of the small number of cases where a commitment fee might be charged there is a dispute then the fee would be subject to taxation by the auditor in any event to determine if reasonable.

Q12. Should the level of fees recoverable by the successful party in a commercial action be greater than in other types of action and, if so, what is the justification?

No. This matter has been considered and there is no justification to differentiate between different types of action in principle. Where some change may be appropriate, is in the particular elements of specialised procedures, and calculating the appropriate block fee accordingly.

Q13. Should a tariff-based system for assessing the level of recoverability of judicial expenses be introduced? If so, how might such a system be structured?

We believe that the current judicial block or time and line basis of judicial expenses works, albeit that recoverability of judicial expenses is deemed to be around 50-80 per cent. As previously stated, we believe that the current judicial expenses should be increased to accurately reflect the amount of work done in litigation, especially in the pre- litigation stages.

If a tariff-based system for assessing the level of recoverability of judicial expenses were to be explored further then we would recommend that the work should be carried out by the Civil Justice Council once implemented, with proper costing and input from the profession.

[5] Scottish Government response to the report of the Scottish Civil Court Review- A response by APIL July 2011

In addition there would also be merit in examining whether the current table of fees is set at the right level. Pursuers' costs shape defenders behaviour and recalculating the fees to accurately reflect the work involved in successfully pursuing a claim would allow greater recoverability of expenses and therefore greater access to justice for the client. Certainly if there were greater recoverability of expenses within the pre-litigation stage then there is a greater incentive on all parties to settle a case without the need for litigation. Furthermore, the level of the pre- litigation fee should reflect the amount of work that has to be carried out prior a court action being raised.

Q14. Should any table of fees provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor and/or for an accredited specialist to recover at a higher rate than a solicitor without accreditation?

A table of fees should not in our view provide different rates for different levels of expertise. Certain types of case such as clinical negligence cases, multi party actions or disease cases inevitably warrant the experience of a specialist solicitor as do cases where the pursuer has been catastrophically injured. A review of the block fees applicable to each type of action would allow for expertise to be reflected.

Q15. Is the ability to request an additional fee a reasonable procedure for regulating the recoverability of judicial expenses?

We believe that the additional fee should be retained. There is often a gap between what is recoverable from the defender in a successful case and what it has cost for the case to be pursued. Lord Gill also acknowledged this as a problem for pursuers.

Whilst lawyers acting on behalf of injured people have worked hard to make the system work, the gap in costs recoverable can be a barrier to access to justice for injured people. People who are at their most vulnerable should have access to justice and if the additional fee can assist with the cost of justice then this should be retained.

Q16. If the concept of an additional fee is retained:

a. **at what stage in the proceedings should a motion for an additional fee be made?**

b. **should motions for an additional fee, and the percentage increase, be determined by an auditor of court or by the member of the judiciary hearing the motion?**

The motion for an additional fee should be made at the conclusion of the case as this is when it would be easily assessed as to the reasonableness of asking for the additional fee.

The motion for additional fee should be dealt with by the auditor of court with the possibility of a note or direction being made available to the auditor from the member of judiciary, who heard

the case, if deemed to be appropriate, about the reasonableness of the request for an additional fee.

Q17. Should a litigant be entitled to claim interest on an award of judicial expenses and, if so, from what date and at what rate?

Lord Gill[6] made the recommendation that a litigant should be entitled to interest at the judicial rate on outlays. We support this recommendation. There can often be substantial costs (judicial expenses and disbursements) unpaid on a file from the date they were incurred. This can be years in personal injury cases because they can take considerable time to resolve. Allowing interest from the date of the order for expenses would greatly assist any litigant who has to pay his disbursements and it will assist those firms of solicitors who are incurring overdraft charges for to incur these substantial disbursements on their clients behalf.

Further enhancing the predictability of the cost of litigation

Q18. Should the court have discretion to restrict recoverable expenses in a small claim even in cases where a defender, having stated a defence, has decided not to proceed with it?

PI cases do not fall within the jurisdiction of the small claims court therefore we are not in a position to respond.

Q19. Should more cases in Scotland come under the scope of a fixed expenses regime? If so, what types of case should be included?

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. It is also widely acknowledged that there is an irreducible minimum amount of work that must be done to bring a successful claim. These costs are unavoidable if cases are to be prepared properly. Simply fixing costs is not the answer as it does not drive the correct behaviours and fails to encourage settlement of cases.

It is important that the current pre-action protocol is made mandatory and that the costs of pre-litigation settlement are increased to reflect the amount of work carried out by pursuer solicitors and that full costs recovery is there to incentivise PI cases to settle without the need for litigation.

There already exists an inequality of arms between a corporate insurer and an injured person. This will only deepen with the introduction of fixed costs if the process is not fixed at the same time to ensure that defenders stop routinely making low pre-litigation offer and refuse to narrow the issues.

[6] Scottish Civil Courts Review recommendation 187

There is reference in the paper[7] to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents which deals with cases under £10,000. It is important to note that the process was developed as a result of the insurance industry persistently lobbying the Government to address the cost associated with RTA claims in England and Wales. The process was fixed and strict time limits are imposed on the defendant insurer. If you do not comply with the time limits then the case falls out of the fixed costs regime and the claimant is free to raise proceedings and recover enhanced costs. The process was specifically developed to drive cases to settlement. Once the process was arrived at each element of the work required to be done by the claimant's solicitor was costed to reflect the appropriate level of fee earner and the time taken to complete it[8]. There are still ongoing problems with this process and the electronic portal that accompanies it which has yet to be resolved[9].

Q20. Should each party to litigation in Scotland bear their own expenses? If so, in what types of litigation? Should the rule be qualified and, if so, in what circumstances? In particular, is the general rule in family cases appropriate?

We do not believe that a personal injury pursuer should bear his own expenses for bringing a claim. A person injured through no fault of his own should not have to pay for the privilege of pursuing a claim.

One way cost shifting is also mooted in the paper. The object of one way cost shifting is to negate the need for ATE insurance. True one way cost shifting where a successful defender is never able to recover their costs from the unsuccessful pursuer could work. Lord Justice Jackson proposed one way cost shifting to be qualified by reference to the financial means and by the conduct of the pursuers. In our view there are inherent difficulties with defining and applying financial qualifications to one way cost shifting. How do you define sufficiently wealthy? How do you draft a test that does not penalise those who have been prudent and saved for their retirement or have equity in their property, against those that spend what they earn? It simply cannot be right that individuals might be forced to sell their homes to fund claims when they have been catastrophically injured through no fault of their own.

There should not in our view be any minimum payment applied to QOCS either. This is a suggestion made by the MoJ. Pitching any minimum payment at the right level to ensure genuine pursuers are not deterred is proving impossible in current discussions. If the contribution is too high it might lead to the need for an ATE policy to insure against the risk of incurring this risk.

There does seem to be some agreement over what type of conduct can remove the protection offered by QOCS. Those at a CJC led event to discuss the matter were largely agreed that only fraud should remove the costs protection. Any allegation of fraud must be properly pleaded and proven to a criminal standard to ensure that defendants do not simply raise the issues of fraud on a whim to put pursuers at risk of paying costs.

One of our major concerns with QOCS, which remains to be addressed, is whether QOCS should take precedence over the rules governing offers to settle, and, in particular tenders.

[7] Review of expenses and funding in civil litigation in Scotland, consultation paper, November 2011
[8] Further details of how the process was developed can be found in appendix A
[9] Appendix B

Essentially if the rules governing offers to settle take precedence the pursuer will lose the entire cost protection afforded by QOCS thus undermining the principle behind it, which is to remove the need for ATE. To suggest that two-way cost shifting is partially restored when there is an offer to settle further undermines QOCS as a replacement for ATE.

One further concern is the impact on the injured person's damages. There could quite easily be the scenario where a defender makes an offer to settle which the pursuer fails to beat. The claimant will be liable to the defender for his costs from the date of the offer. The impact of the offer taking precedence over QOCS is twofold. Firstly it will encourage poor defender behaviour. They will increasingly make early low offers on quantum to under settle claims and deter pursuers from pursuing cases to court. Secondly the risk to the pursuers is such that they could lose 100 per cent of their damages by paying the defenders' costs and their own disbursements, which is unequal when compared to the defenders having to pay only 10 per cent increase in damages or costs (see later) where the pursuer beats the defenders offer at trial.

If an ATE market were to be retained to supplement QOCS the premium for insuring against the aforementioned risk would make it uneconomic to purchase.

Q21. Should a procedure for the summary assessment of expenses be introduced into the civil courts in Scotland?

Q22. If a procedure for summary assessment was introduced, in what circumstances should the summary assessment of expenses take place and should it be restricted to any particular types of action?

The experience of our members in England and Wales is that summary assessment on interim hearings is working adequately but in terms of fast track trials, summary assessment is unsatisfactory.

Summary assessment was developed with speed and cost in mind. We do not accept, however, that the current system in England and Wales works in all cases where it is used. As Lord Justice Jackson himself pointed out there is a lack of costs knowledge both by counsel and the hearing judge post trial which can be a disadvantage to both claimants and defendants. It is an awkward process at the end of a trial when the judge is often rushed, there is little desire to do a proper job, counsel is unfamiliar with the file and therefore unable to deal with discrete issues on the case that may need explanation. In our view it is not sensible to adopt a process from another jurisdiction that is not working well.

Cost issues are best dealt with by auditors. They have the experience to deal with these matters. In the experience of our Scottish members, the vast majority of cases settle in terms of principal sum and expenses without the need for judicial intervention and therefore to add layers of judicial intervention would not be cost effective. If the aim is to promote predictability and certainty, on the basis summary assessment would be applicable at preliminary stages of a case and not at the proof or trial, most solicitors working in the personal injury area are able to estimate with reasonable accuracy the likely cost of an unsuccessful hearing.

Q23. Would there be any benefit in introducing a procedure of submitting schedules of expenditure similar to the pilot scheme operating in the Birmingham Mercantile Court and TCC?

Adopting a procedure that heavily relies on judicial management of expenditure would be counterproductive for PI cases in Scotland. This is because the case flow procedure successfully developed for personal injury cases allows for little use of judicial resources but delivers early settlement of cases without the need for judicial intervention in relation to expenses. Statistics shows that over 99 per cent of cases settle without the need for proof in the Court of Session.

Q24. Apart from imposing sanctions, what other powers, if any, should be made available to the courts to promote predictability and certainty of judicial expenses?

The current case-flow process ensures that in the majority of personal injury cases limited judicial time is taken up narrowing issues between the parties. We take the view therefore that implementing case management involving proactive judicial time would be inappropriate in PI cases.

Protective expenses orders

Q25. Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?

Q26. Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?

This is outside APIL's remit.

Referral fees

Q27. Should lawyers be permitted to pay a sum of money to a third party in return for referrals or instructions for other business?

Q28. Should lawyers be permitted to provide legal or other services to a third party at no cost to the third party in return for referrals or instructions for other business?

Q29. Should lawyers be permitted to make payment to a company, or some other body, either in money or by some other consideration, in order to have their name placed on a panel for the purpose of securing a flow of instructions in litigation?

Q30. Should the answers to questions 27, 28 and 29 be different, please explain why the situations should be distinguished.

Q31. In the event that payment for referrals, whether by money or provision of services, is permitted, should there be a limit upon the value of the referral fee or services provided?

We recognise that these arrangements already exist in Scotland and are subject to Law Society rules. Most solicitors have reservations about referral fees, including those who pay them, but there are also serious concerns about banning them, could this be achieved? Who will police it? Will there be joined up regulation? APIL's concern in relation to referral fees has always been the protection of the injured person: this cannot be achieved by driving referral fees underground, where we know from previous experience in England and Wales that arrangements would be subject to no transparency or control at all. The injured person should always have the freedom to choose a solicitor of their choice. A referral arrangement can often be hidden to the extent that the injured person does not know the full extent of the arrangement under which the claim has been referred.

Referral arrangements continue to be a contentious area of business amongst our members. Concerns voiced to us express worries about high referral fee payments, the lack of transparency and potential conflicts of interest. There is also concern over the likely impact of the introduction of alternative business structures. Most solicitors have reservations about referral fees, including those who currently pay them in England and Wales. We were never in favour of the ban on referral fees in England and Wales being lifted.

There is also the added complication of defining a referral arrangement. There is a lot more to referral fees than the straightforward payment of a fee in return for a case. The area is very complex and this highlights one of our concerns, namely lack of transparency for injured people. Some firms agree other arrangements in return for obtaining personal injury work, for example providing non contentious legal advice for free, such as will writing and conveyancing. Other agreements tie a firm, receiving work on a referral basis, to a particular ATE product, medical agency, rehabilitation provider or counsel's chambers– all of which may in turn provide a commission stream to the referrer. Some firms agree to handle minor legal work such as "bent metal" cases (car accidents where there is no injury) in return for receiving personal injury claims from insurers. Others have complicated referral arrangements with "before the event" insurers where the reality of the position is that cases are not run with the benefit of a real indemnity but on what is effectively a "no win no fee no cost" basis for the insurer.

Referral arrangements have operated in England and Wales without proper transparency and without robust and joined-up regulation. Solicitors have been left to police the activities of introducers and this is simply impractical. There is the additional problem of spam texting that must be stopped.

Before the event insurance

Q32. Do BTE insurers adversely influence the conduct of the litigation which they are funding?

Q33. Is it appropriate for a lawyer in the direct employment of an insurance company to assess whether a policy holder's claim falls within the terms of the policy?

Q34. Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage?

Q35. Should BTE insurance be encouraged and, if so, what suggestions would you make to address some of the criticisms levelled against it?

APIL supports the provision and use of legal expenses insurance provided accident victims are not denied access to a solicitor of their choice or are not penalised for choosing their own solicitor. BTE insurance can benefit individuals if the cover provided is sufficient for them to get the advice they need from the solicitor they choose. There is also often a lack of transparency around the passing of these cases to solicitors. Unfortunately the policy wording often means that the policyholder's choice will be limited thus giving the insurer control over the proceedings by regulating expenditure on the work to be done.

There must be complete transparency about the policy so consumers are fully aware of conditions attached to their legal expenses insurance when they acquire it. The policy often places restrictions on the solicitor that can be used before issue, the instruction of expert witnesses and counsel. The terms of the policy mean that the client's freedom of choice cannot be exercised. We are equally concerned that the terms of the policy do not compromise the independence of the solicitor handling the case.

It is also important that the level of indemnity provided in these policies really is sufficient to cover the costs of investigating and pursuing any claim and that, if necessary, it extends to the beginning of proceedings and taking the case to proof. These polices often only have low indemnity cover, meaning that it does not offer policy holders sufficient protection in the event of pursuing a claim. Often policies can exclude cover on clinical negligence and disease cases where funding due to unavailability of ATE policy and public funding is problematic.

Often the arrangements between the legal expenses insurer and the solicitor can be restrictive to the extent that they might prevent the solicitor from properly pursuing the claim on behalf of the accident victim.

Speculative fee agreements

Q36. Are there any aspects of speculative fee agreements that require regulation?

Q37. What should be the maximum uplift for success fees in Scotland?

Q38. Should there be a cap on success fees as a percentage of damages? If so, at what percentage and at what level and heads of damages?

Q39. Should success fees be recoverable in Scotland? If so, under what circumstances?

Q40. Should ATE insurance premiums be recoverable in Scotland? If so, under what circumstances?

Q41. If success fees and ATE insurance premiums remain irrecoverable in Scotland, is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees and insurance premiums? If not, what are the alternatives?

As a matter of principle APIL opposes damages being used to pay for legal fees. We recognise however, that this has been the case for sometime in Scotland and the Government seems committed to a similar system in England and Wales.

A speculative fee agreement, backed up by ATE insurance to ensure that the client has funds to pay the other side's costs if the claim is unsuccessful, can facilitate access to justice. This type of funding allows those not eligible for legal aid and those that cannot afford to pay privately for access to advice and representation. This is particularly important in personal injury cases where the pursuer may be out of work due to no fault of his own and/or had to incur additional expenses as a result of the injury.

We understand that there is currently no standard speculative fee agreement and that the current maximum uplift for success fees in Scotland is 100 per cent[10] of solicitors' fees but capped at 25 per cent of the client's damages. One of the main reasons for lawyers charging an uplift to clients is because the client solicitor costs are never fully recovered from the negligent party. The report itself points out that recovery of expenses can often be as low as 50 per cent of the sum expended in pursuing the case. If judicial expenses were to be up-rated so that the negligent party contributed to a greater extent towards the cost of bringing a claim, the injured party would have to contribute less towards legal costs which would increase access to justice.

Unfortunately the ATE insurance market in Scotland is currently limited to very few firms. Agreements are often reached between firms and ATE insurance providers to ensure that policies are not claimed against if the case is unsuccessful. We believe that the ATE market should be open to all pursuers and that the cost of the policy should reflect the risk being underwritten. In the main, ATE insurance is unaffordable in clinical negligence cases due to the risk and high premiums that are quoted for such cases. ATE providers are often reluctant to quote for a policy for a clinical negligence case because of the levels of risk and because many cases run to proof. There is no incentive to pre- litigation settlement in medical negligence cases and the Central Legal Office (CLO) is well known for not making pre- litigation offers despite where negligence and causation are straightforward. Pursuers are often forced to raise proceedings because defenders or their insurers do not make reasonable offers to settle cases.

[10] Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992/1879

We do not believe that ATE insurance should become recoverable in Scotland. The introduction of recoverable ATE premiums would be likely to lead to an undesirable increase in 'satellite litigation' in relation to expenses, similar to that experienced in England and Wales during early 2000[11]. Our concern with that is that it increases overall costs and prolongs already stressful cases for the client.

Damages based agreements (contingency funding)

42. Should the law be changed to allow solicitors and counsel to enter into DBAs?

43. Should claims management companies continue to be entitled to enter into DBAs?

44. If DBAs are permitted in Scotland:

a. **is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees?**

b. **should there be a cap on the percentage of the damages that lawyers are entitled to charge?**

c. **should the percentage recoverable under a DBA be applicable to all heads of loss?**

d. **should there be an increase in the level of damages awarded? If so, by what percentage and how is this to be achieved?**

e. **what forms of protection may be required for clients entering into such an agreement?**

45. If the current prohibition on solicitors and counsel entering into DBAs is retained, should steps be taken to prevent its circumvention by the formation of a claims management company in which solicitors are directors or shareholders?

46. Should there be regulation of claims management companies operating in Scotland? If so, what are the mischiefs to be addressed and how should regulation be achieved?

We recognise that there is political will in England and Wales to introduce DBAs and that allowing DBAs in England and Wales whilst not introducing them in Scotland may not satisfy the review team given the given the concerns of forum shopping. We also recognise that there may be merit in allowing DBAs for multi-party actions. There is however, a risk of large reductions being made from damages and the client paying more under a DBA than under a speculative fee agreement. If DBAs are to be introduced we urge for the need for transparency and consistency. Where the maximum deduction from the client's damages is capped at 25 per cent for speculative fees the same should be said for DBAs.

[11] See APIL's response to Scottish Civil Courts Review March 2008 page 17

There is also the concern amongst our membership that DBAs are currently open to abuse by claims management companies because of the lack of regulation this will need to be addressed to ensure a level playing field.

Third party funding

47. What are the risks/potential abuses involved in third party funding and how might these be addressed?

48. If regulation is desirable, what form(s) should it take?

49. Should a party to a litigation who has entered into a funding arrangement be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances?

Access to justice is currently largely served by the funding options that are available to pursuers in Scotland. However, we accept that there are problems with funding options for certain claims, in particular multi party actions.

Third party funding could provide an option to pursuers wishing to pursue a claim where there is no other funding available. In our view it would act like a fund of last resort in the personal injury market. We would not however want to see abuse within the system with financial backers who are solely profit driver and have not ethical code to abide by. There would need to be regulation of third party funders to ensure that there are enforcement powers and built in safeguards.

Alternative sources of funding

50. Is a disproportionate amount of the civil legal aid budget allocated to family actions and, on any view, are there ways in which this might be reduced?

APIL has no comments to make.

51. Should a CLAF or SLAS be introduced in Scotland? If so, which is preferable?

52. If such schemes were to be introduced, what types of litigation should be covered?

53. If such schemes were to be introduced, what should be the minimum and maximum disposable income of successful applicants?

54. Should such schemes be liable for payment of the expenses of successful opponents?

APIL is not opposed to contingent legal aid funds in principle. A CLAF could in theory produce funding on a level playing field for those wishing to pursue a claim. It would mean that those with meritorious cases could pursue them against well resourced defenders. It would provide a system of funding based on merits and not means.

However there are a number of serious practical barriers to establishing a CLAF or SLAS. Firstly, it would cost a significant amount of money to set up a CLAF or SLAS. Whilst we have not costed the size of the seed fund required for a model on Scotland, in 1998 APIL calculated that it would cost £34 million to set up a CLAF for personal injury claims only[12] for England and Wales. More than ten years later, this figure is likely to have increased and whilst the market in Scotland in smaller we anticipate that the seed fund would need to be substantial to set up such a scheme. Where would this funding come from?

Secondly, any mutual fund will rely on enough strong cases entering the scheme if it is to be successful. Such a fund can only operate if enough successful cases are operating under the scheme and generate enough money to fund unsuccessful cases. The concern has always been the issue of 'adverse selection'. If the fund is financed by contributions from successful pursuers then injured people with strong cases are likely to be less willing to join the scheme if it means parting with more of their damages than they would have if they had instructed a solicitor on a speculative agreement. Those with weak cases who are unable to find other forms of funding, however, will be very keen to join the scheme.

55. What further steps, if any, should be taken to promote *pro bono* funding of litigation and by whom?

56. Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a *pro bono* basis and, if so, to whom should such a payment be made?

The range of funding options currently available to the injured person to enable him to pursue a claim means that solicitors do not have to fully represent clients on a pro bono basis as a law centre might. We do not therefore propose to respond to this section.

[12] *Access to Justice with Conditional Fees, APIL response to the Lord Chancellor's consultation, 30 April 1998*

Scotland's litigation market

57. What steps could be taken to make Scotland the forum of choice for litigation?

58. Apart from the introduction of a tariff-based system as described in Chapter 3, what measures might be introduced to reduce the difference between the actual cost of litigation and the amount recoverable as judicial expenses?

The level of judicial expenses should be increased. The expenses rule is an important apsect in levelling the playing field between parties and in controlling behaviours.

59. If a one way costs shifting regime is introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

The number of personal injury cases which could be raised in either jurisdiction is relatively small, and consequently we do not see this as a major issue. See our earlier comments at question 20.

60. If damages based agreements are introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

See our earlier comments at questions 42 to 46.

Special cases and concluding remarks

61. Do clinical negligence claimants face particular difficulties in the funding of claims? If so, what measures might be taken to address these difficulties?

Clinical Negligence claimants face particular difficulties in the funding of claims. There is a significant lack of access to justice for clinical negligence claimants. Few solicitors now deal with this work and even fewer solicitors undertake this work on the basis of Legal Aid. Solicitors need to be more adequately rewarded for the work they carry out in such cases.

Most Legal Aid practitioners are not prepared to do complex clinical negligence cases. Legal Aid remuneration is inadequate to cover the work involved in complex clinical negligence cases.

Claimants can rarely afford to pursue claims on a privately paying basis. It is only in the most exceptional clinical negligence case that it is possible to establish if there are grounds to pursue a claim without expensive expert reports. Even in non- infant cases, the cost of an investigation to establish if there are grounds to pursue a claim involves costs beyond the means of most claimants. The direct costs and the potential liability for the Defenders' costs of running a clinical negligence litigation are such that none but the most wealthy can afford to litigate without Legal Aid or without insurance cover.

Insurance cover is rarely adequate or available. ATE insurance is virtually non-existent, and BTE insurance is rarely sufficient (in the rare cases that it is available in the first place) involves

It is not possible to establish if there is a case without expensive investigation but the existing funding models are not adequate to cover these cases. Only a handful of firms have a business model that enables clinical negligence cases to be undertaken on a speculative fee basis. The high costs and high risks associated with such cases can lead to “cherry picking”.

A review of block fees for clinical negligence cases, would allow for expertise to be reflected and more fairly reflect the working being carried out.

62. In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?

63. If DBAs are not recommended for multi-party actions, how else may lawyers be remunerated for the additional responsibility involved in such actions?

64. Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?

65. Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?

See earlier comment in our paper.

66. In addition to the cases identified in Chapter 13, are there any other cases that may require special consideration? If so, what are they and why?

67. Can you suggest any means, other than those raised in this consultation paper, which would enable litigation to be more affordable?

68. What other recommendations might this Review make to enable individuals to fund a litigation when they are not eligible for legal aid, have no BTE insurance cover or their cover is inadequate, cannot afford the ATE insurance premium and are not members of an organisation that meets its members’ legal fees?

We have no additional comments to make.

Appendices

Appendix A – Background to the claims process

Appendix B - Ongoing problems with the low value RTA claims process in England and Wales.

Appendix C- Freedom of Information Requests.

Appendix A – Background to the claims process.

The RTA claims process was developed by fixing the process for dealing with liability admitted RTA cases. Once the process had been fixed it was costed from the bottom up: namely the average amount of time reasonably taken to deal with each element of the fixed process was costed according to the appropriate level of fee earner needed to conduct the work. The hourly rates for the appropriate level of fee earner was then averaged out and applied to the amount of work involved. The rates applicable at the time of the exercise were applied, namely the rates for 2009. Additional time was then built in for supervision by an appropriate level of fee earner, and this was costed in the same way according to the applicable hourly rate.

The claimant figures were then cross referenced by a full and detailed manual examination of 50 detailed bills of costs in RTA matters, where the general damages were under £10,000 and where liability was admitted or agreed on a contributory basis but damages could not be agreed, meaning that the matters were ultimately outside the provisions of CPR45 Section II. None of the cases examined proceeded to a final hearing and all litigation costs (the issuing of proceedings, attendance at court, with counsel and with the client in respect of the same) were discounted from the calculations. Bills were selected from large/medium sized solicitor firms which operated systemised processes but which did not record time generically. The claimant representatives' figures and those submitted by the defendant insurers were then mediated and the figures in CPR 45.29 were announced by the MoJ, including fixed success fees. In hindsight, to fix the costs at this stage was too premature. When the process was drafted and costed it was envisaged that a notification form, the level of detail of which would be akin to a letter of claim, would be submitted to insurers to intimate the claim. This developed into a lengthy claim notification form which was not fully costed.

Following this work the MoJ announced an implementation date of April 2010, which meant that the task of developing the IT portal and writing the protocol and the amendments and additions to the Civil Procedure Rules had to be run in tandem.

The tender for the IT solution went to a company that already had a solution capable of being adapted for the RTA claims process within a short period. In hindsight a bespoke IT solution would have been more sensible and delivered a system that would not have required substantial changes within the first two years post implementation. All changes to the IT solution to reflect the CPR will incur additional costs.

Post implementation, a behavioural committee has been set up to police claimant and defendant practices. The committee can only issue guidance and lacks teeth, as decisions of the committee are not binding.

Lessons have been learned on both sides of the industry about the difficulties in doing this work in this manner.

Appendix B - Ongoing problems with the low value RTA claims process in England and Wales.

The RTA claims process is still very much in its infancy. Huge changes were brought about by the implementation of this new process and because of the timeframes imposed by the Ministry of Justice the problems have been many. Claimant and insurer representatives are still working collectively to make the portal reflect the rules. The first update at the end of March 2011 brought some improvements to the portal, but there are further changes planned to improve the portal and bring it further into line with the pre-action protocol and Civil Procedure Rules. We are currently expecting at least two further updates in 2012 to achieve this. Before the changes have been made and the process monitored post improvement, it is far too soon to be extending the process to higher value RTA claims or other types of claim.

To provide a clear indication of the extent of the changes required, the second wave of IT changes (change request two) will deal with eleven further changes to the portal to bring it into line with the rules. This is in addition to the thirteen changes in request one. 'Release two' includes modifications to stage one payment of costs, the interim settlement pack, stage two settlement pack, child claims, and court proceedings pack. Despite these changes the portal will still not be user friendly. The portal is inflexible, solicitors are unable to transfer claims to another firm of solicitors when they cease acting for a claimant, and the portal does not allow for errors to be corrected. There have been occasions when the website has been 'down' and inaccessible to both parties. Practitioners are constantly suggesting ways of improving the portal to make it more user friendly; such change requests have not yet been actioned and will not be considered until all mandatory changes have been made. It is expected that these will not be completed until the end of 2012.

The portal is managed by Portal Co. Portal Co consists of an independent chair and equal representation from the defendant and claimant side of the industry. The claimant representatives form Claimant Co. APIL sit on Portal Co and Claimant Co. The representatives on Portal Co are actively engaged in resolving the problems with the portal to ensure that it reflects the rules and that it becomes more user friendly.

The portal is currently funded by the insurers and managed on a daily basis by MIB Management Services (MMS). Claimant Co has raised concerns about this clearly conflicted role since early 2010. The MIB is carrying out this role at the behest of its members on a non-profit making basis. If the portal is to be extended to other areas of litigation, then we question whether the MoJ can impose something that the industry must pay for. Additionally it must not be assumed that the running cost of a portal of EL and PL claims will be the same as for RTA claims. The cost per claim is likely to increase substantially for EL and PL cases, as there are fewer claims being made in these areas of personal injury.

There is also the additional issue of ownership of the portal. Portal Co owns the intellectual property rights to the system, but CRIF, the IT company responsible for the IT development, owns the actual IT programme. If the portal is going to be extended then ownership is another issue that will need to be resolved. It may be that the only solution is to start again with a bespoke system.

Although claimants and insurers are equally represented on the board, the absence of contracts and clear governance arrangements must be addressed before the process is extended further,

either horizontally into other areas of personal injury law or vertically, meaning more RTA cases will be started through the portal.

Appendix C- Freedom of Information Requests.

Court of Session - Personal Injury cases registered

	2007	2008	2009	1 Jan - 30 Jun 2010
Signetted	2,487	2,427	3,025	1,727
Proceeded to proof	25	21	20	16

Court of Session- Fee amount totals from Jan 2010 Jun 2010

Type of action	Caveat	Commercial actions	Family	Inner house appeals	Miscellaneous	Ordinary	Personal injury damages	Petitions	Grand total
Court of Session fee charged	146970	161840	29770	90865	27470	331207	1094435	269415	2151972

Court of Session- Fee amount totals from Jan 2009 Oct 2009

	PERSONAL DAMAGES	Grand Total
Court of Session Exemptions	17731	17731
Court of Session Fees Charged	1456364	1456364
Grand Total	**1474095**	**1474095**

Court of Session- Fee amount totals from Nov 2009 Jun 2010

	PERSONAL DAMAGES	Grand Total
Court of Session Fees Charged	1440730	1440730
Grand Total	**1440730**	**1440730**