

**Scottish Civil Justice Council
Consultation on the Review of Fees in the Scottish Civil Courts
Fees of solicitors**



A response by the Association of Personal Injury Lawyers

November 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25year history of working to help injured people gain access to justice they need and deserve. We have around 3,400 members across the UK and abroad, committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the Scottish Civil Justice Council's consultation on a Review of the Solicitors Fees in Scottish Civil Courts. The Table of Fees as it currently stands is not reflective of the work carried out by solicitors, with more work now being carried out pre-litigation. At the very least, solicitors fees should be increased in line with inflation.

General comments

In 2011, Sheriff Principal Taylor's consultation on his Review of Expenses and Funding in Civil Litigation in Scotland indicated that the level of recovery of judicial expenses is between 50 – 80 per cent of the cost that is actually incurred. There remains a shortfall between what is recoverable from the defender in a successful case and what it has cost for the case to be pursued, and this gap is widening. We believe that the current level of recovery is around 55 – 60 per cent of the actual costs incurred. The shortfall can be a barrier to pursuers bringing claims.

There has been no increase in fees for four years, and at the very least, there should be an inflationary increase to the Table of Fees. We note that the Scottish Government is looking to increase court fees each year for the next 3 years, due to "inflationary pressures in the wider economy". We see no reason why the fees paid to solicitors should not also have an uplift in line with inflation. Court fees are usually paid upfront by the solicitor. If court fees are increased but the amount paid to solicitors in judicial expenses does not keep pace with these increases, solicitors may not be able to take on cases because they will not be able to afford the risk of not recovering the cost of the court fee from the defender.

Q1) Are amendments required to the Table of Fees to ensure that fees recoverable are proportionate?

It is important to remember that there is an inherent amount of cost involved in investigating and dealing with the basic elements of the claim, regardless of value.

Sheriff Principal Taylor's vision of proportionality was that higher value cases should be subject to increased judicial expenses to reflect the amount of work involved. The independent auditor does have discretion to increase these fees, if the successful party can demonstrate that they have complied with the appropriate rules of court. There must, however, be consistency in the application of increases to judicial expenses. At present, whether increases are awarded depends on where the case is being heard. There are inconsistencies in the application of increases throughout Scotland.

Q2) Are amendments required to the Table of Fees to ensure that they better reflect the work being undertaken?

It is imperative that the Table of Fees reflects the work carried out, and at present this is not the case. There is a significant amount of background work that solicitors carry out that does not feature within the Table of Fees, and which is therefore not being factored in when judicial expenses are awarded.

One area where amendments are necessary is in relation to motion fees. Currently, motion fees in the Court of Session and Sheriff Court do not properly reflect the amount of work involved. In the Court of Session, for example, an opposed motion fee is calculated on the

basis that 45 minutes of work will be involved. This includes the first 30 minutes of court time, so only allows for 15 minutes for considering the motion, collating papers, instructing counsel, advising the client, preparing and attending court, uplifting and considering the interlocutor and reporting on the outcome.

In order to accurately reflect the time spent on motions, we recommend that the fee should allow for one and a half hours for consideration, instruction, preparation and reporting. Time spent in attending court should be charged as a separate item. This should apply to each Table of Fees, at the applicable rates.

Q3) Are amendments required to the Table of Fees to reflect changes in practice and/or procedure?

We believe that the current Table of Fees is not entirely fit for purpose. There is much more front-loading of work now than there was previously. The process fee, which is meant to cover all consultations between the solicitor and client during the progress of the cause, and all written and oral communications passing between them, is currently set at a further 10 per cent on top of the total fees and copyings allowed on taxation. Where previously, communications with the client would have largely been over the phone and through letters, it is now largely carried out by e-mail. This changes the nature of communication between the solicitor and client, which can be far more demanding - solicitors can be reached far more easily out of hours, and email often demands a much quicker response than traditional "snail mail". There has been a significant increase in the volume of communication between solicitor and client. An additional ten percent on top of other fees is therefore no longer reflective of the amount of work and time spent on communicating with clients.

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. If pre-litigation work was more accurately reflected in the Table of Fees, there would be a greater incentive on all parties to settle a case without the need for litigation.

Q4) Is there a requirement for a general modification of the level of fees provided for in the Table of Fees?

See above. The Table of Fees should be modified to more accurately reflect the work carried out by solicitors, particularly in the pre-litigation stage. At the very least, solicitors fees should be increased in line with inflation.

Fixed fees

In his 2013 response to the consultation on his Review of Expenses and Funding of Civil Litigation in Scotland, Sheriff Principal Taylor indicated that consideration should be given to widening the scope of fixed fees in Scotland beyond simple procedure. 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.

Precognition charges

In 2013, the Taylor Report indicated that precognition sheetage charges may be open to consideration in any review of fees¹. We suggest that the rate currently set for precognitions is not unreasonable, accurately reflects the amount of work carried out, and should not be changed.

For example, in the Sheriff Court, the table of fees allows a precognition charge of £78 per sheet to be recovered. The work involved in a 3 sheet precognition would generally include two phone calls/arrangements to note precognitions; consideration of papers in advance to prepare for questioning the client or witness (15 minutes); attendance on the witness to discuss and note details (30 minutes); framing the precognition; writing out to the client/witness with draft precognition; considering any revisals required to the precognition and finalising the same; writing out with the finalised precognition. On an itemised basis, this would be costed at around £250 - £275. The table of fees would allow £234 to be recovered. This is not unreasonable, and on the basis of the work involved, there should not be a restriction on the rates recoverable for precognition.

The paying party also has the protection of taxation before the auditor if it is considered the length of a precognition is excessive in the particular circumstances of a case.

Q5) Is it necessary to consider any additional fees that are not currently included in the Table of Fees?

We suggest that the following should be included in the Table of Fees:

Specification of Matters or Specification of Property

Whilst a fee exists in the tables for a Specification of Documents, on occasion there is a requirement to move a Specification of Matters or a Specification of Property. The procedure for both Specification of Documents and Specification of Property is largely similar. We suggest that the Table of Fees should be updated to, accurately, allow for a Specification of Documents, Matters or Property.

Provision for attendances at Site/Locus Inspections

In certain instances, solicitors are sometimes required to attend at a locus/site inspection, in order to properly understand how the accident occurred. Currently, there is no provision within the Tables of Fees for such an attendance. Provision should therefore be made for solicitor attendance at a locus/site inspection where such an attendance can be justified before the auditor.

¹ Paragraph 77, Review of Expenses and Funding of Civil Litigation in Scotland 2013