NORTHERN IRELAND COURT SERVICE

REVIEW OF COUNTY COURT SCALE COSTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. We have 112 members in Northern Ireland. The aims of the association are:

   - To promote full and prompt compensation for all types of personal injury;
   - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
   - To promote health and safety;
   - To alert the public to dangers in society such as harmful products and dangerous drugs;
   - To provide a communication network exchanging views formally and informally.

2. APIL welcomes the review of the County Court scale costs, and this opportunity to participate, as our members in Northern Ireland have been extremely concerned about the current level of scale costs for some time. Our response, however, is limited to issues surrounding personal injury litigation.

3. As our letter of 25 June, addressed to the secretariat of the Rules Committee, makes clear, we strongly believe that the provision of the further information identified in that letter would have increased the usefulness of this review, as it would have allowed a more in depth analysis of the issues involved. We would still welcome the provision of the requested information for future reviews of the costs scales system, as recommended by the Civil Justice Reform Group.

4. In summary, we support, in principle, the retention of the County Court scale costs system because of the simplicity and certainty it imports into the litigation system. We strongly believe, however, that the current level of

scales is far too low and that thorough research should be conducted into what, in fact, would be "fair and reasonable" remuneration. Unless the level of the scales is increased we fear that access to justice for the victims of personal injury will be seriously affected. We also believe that the current number of bands in the scale should be reduced, as the present number makes the system unnecessarily complex and is open to abuse by the insurance industry and/or its representatives.

THE LEVEL OF SCALES

5. For the scale costs system to operate fairly for all involved the "swings and roundabouts" principle, described in paragraph 15 of the consultation paper, must operate satisfactorily. We strongly believe that it does not, and cannot, at the moment because the current level of the scales is far too low. Our members do not believe that the costs recovered in cases requiring much effort for little reward are compensated by the costs recovered in cases requiring little effort, as should occur. Much of this problem relates to the fact that:

    - The costs awarded for lower awards of damages are too low in proportion to the amount of work conducted; and

    - It is difficult to absorb the above deficiency through the "swings and roundabouts principle" because few damages, in our members' experienece, are awarded in the County Court at the top end of the scale, which means that few occasions arise for a practitioner to recover the corresponding costs at the top end of the scale.

6. The problem becomes particularly acute in those cases that proceed to trial. The scale costs hardly absorb the costs of pre-trial work, let alone the cost of attending trial. We are informed that if a case goes to trial, it is only once damages of between £3000-£4000 are awarded, that a solicitor will usually be able to break even on the costs awarded on the scale, let alone recover any

profit element. Our members strongly believe that the “swings and roundabouts principle” is not working under the current level of scale costs.

7. APIL is extremely concerned about the implications of the above on access to justice for the victims of personal injury. If practitioners are unable to recover the costs required to continue running their practices (let alone recover a reasonable profit element), practitioners will have no choice but to cease taking on deserving but expensive cases. This effect on access to justice must seriously be considered, especially in view of article 6 of the Human Rights Act 1998, which broadly protects access to justice.

8. We agree with both the Civil Justice Reform Group and the Rules Committee that a balance must be struck between fair remuneration for legal practitioners and economic and efficient litigation. We understand that if legal practitioners can recover inflated costs then there is a serious risk that litigation will not be conducted efficiently and economically. We do not believe, however, that litigation is always conducted efficiently or economically, in any event, under the current scales because the system is open to abuse by the insurance industry and/or its representatives. As the costs of litigation are so low in Northern Ireland wealthy insurance companies have nothing to fear from pursuing unreasonable defences and causing unnecessary delay as a means of putting pressure on a personal injury victim to abandon or under-settle a claim. In England and Wales indemnity costs can be awarded against any party acting unreasonably. No such penalties exist in Northern Ireland. It is hoped that the civil justice reforms, especially the introduction of pre-action protocols will decrease unreasonable behaviour and delay but we believe a disincentive should exist within the costs system. If the scale costs awarded were higher, we strongly believe this would assist in preventing the potential for unreasonable and unfair behaviour by the insurance industry.

9. We accept that the views expressed about the level of scales in our response are based upon anecdotal evidence obtained from our members who feel very strongly about these issues. We would have liked to have conducted research into the appropriate level of scales but were unable to do so in the short time

available as, of course, practitioners do not conduct detailed assessment of their costs as they do in England and Wales. We sincerely hope, however, that this lack of hard evidence will not be used as a reason to ignore our call for an increase in the level of costs. This is because there appears to be no substantive evidence either to establish that the "swings and roundabouts" principle is working satisfactorily (as stated in paragraph 15 of the consultation paper) and/or that the current level of costs is sufficient.

10. In view of the above we strongly urge the Rules Committee to initiate further research into the appropriate level of costs. We are not suggesting that costs should merely be increased by either plucking a figure from the air or by applying a percentage increase to current figures. Applying percentage increases, equal to those applied in England and Wales, to a base figure that is out of date will not solve the problems currently being experienced by practitioners. We are calling for a new base rate to be devised following detailed research into the costs of running legal practices in Northern Ireland. Unless this is done, practitioners will be unable (and are probably unable now) to run their practices as a business and will instead either end up funding personal injury litigation or cease to assist in providing access to justice. Once the base rate has been devised on the basis of the actual costs of running a legal practice, decisions can then be made about a "fair and reasonable" profit uplift on that base cost. We believe that this was the kind of costs review envisaged by the Civil Justice Reform Group when it recommended that regular reviews should be conducted. Research into the costs of running legal practices in various regions is regularly conducted, on a local basis, in England and Wales with the co-operation of local law societies and local County Courts. For this reason we do not believe our suggested research would be too onerous.

11. In conducting this research and devising new levels of costs we strongly believe it is vital that the following factors are taken into account. Firstly, the use of information technology greatly improves the efficiency of litigation and so leads to more economic litigation. For this reason, its use should be encouraged and practitioners should be able to recover costs that sufficiently

allow them to absorb the costs of implementing and using an IT infrastructure within their practices. Secondly, procedural reforms can have a significant impact upon the costs of litigation. It appears, however, from the information provided in the consultation paper that such reforms are not currently taken into account. For example, the Consolidated County Court Practice Direction No. 1 of 1997 significantly increased costs incurred by practitioners by requiring cases to be presented in a manner similar to those falling within the jurisdiction of the High Court. No extra costs were awarded, however, as should have occurred, to account for the extra work. In addition, the Government have now accepted the principal recommendations of the Civil Justice Reform Group and have commenced a rolling programme of implementation of procedural reforms. We seek reassurance from the Rules Committee that, at the appropriate time, the effect of such changes will be taken into account on the level of costs.

12. Thirdly, we agree that regard should be given to costs awarded in England and Wales and that parity should be maintained. As is clear from our letter of 25 June, we are extremely unclear as to how parity is maintained between the costs awarded in each jurisdiction in view of the significant differences between the costs systems in each. As far as we can understand it is achieved by merely applying the same percentage increases. As noted above, we do not believe that this is sufficient because the application of percentage increases to a base figure cannot solve problems that are inherent within that base figure itself. The base figure must be devised with reference to the jurisdiction in which it is awarded. It is with reference to the profit up-lifts and the percentage increases to account for, for example, inflation, that regard should be given to costs awarded in England and Wales.

13. In conclusion on this issue, APIL would like to offer its assistance in gathering information on costs in both Northern Ireland and England and Wales and would invite the Rules Committee to enter into dialogue with our organisation on this issue.

COMPLEX CASES

14. Complex cases, more often than not, require significant amounts of work regardless of the level of damages awarded. The costs incurred in running such a case, therefore, often bear no relation to the damages awarded at the end of the day. A scales system relating to damages awarded seems to cause particular prejudice in such cases. For this reason, we believe that complex cases should be taxed at the end of the case to ensure that sufficient costs are awarded. We believe that complex cases should be identified by category and should include the following personal injury claims:

    - medical negligence claims
    - occupational disease claims
    - claims against the police.

    Another solution to the problem of high costs in complex cases would be to automatically include all such cases, as identified above, in the top band of costs.

REMOVAL OF BANDS

15. The number of bands in the current scale costs system, in our view, makes the system unnecessarily complex. The current system is also open to abuse by the insurance industry and/or its representatives. Our members' experiences suggest that insurers, in negotiating damages settlements, often do so with a view to the costs scale. This cannot be in the interests of personal injury victims. APIL believes, therefore, that the number of bands should be reduced. At this stage, however, we reserve judgment on the appropriate number of bands as we believe it is essential to consider information relating to the number of cases falling within each band before reaching a decision.

INTERLOCUTORY APPLICATIONS

16. APIL believes it is essential that practitioners are properly paid for work done in relation to interlocutory applications. In paragraph 8 we mentioned the potential for the current County Court costs system to be abused by the insurance industry and/or its representatives to the plaintiff's and his representative's detriment. This point is clearly demonstrated in relation to this issue. Extremely low costs are awarded in respect of interlocutory applications, which can take on average about 2 hours (including preparation, drafting, service and court attendance). For this work a practitioner can expect to recover only £58.14, less than £30 an hour. We believe that such a rate is ridiculously low for professional services, as many employed skilled workers with no overheads earn the same, if not more, than that rate. Our initial view is that a rate of £150 for an interlocutory application would represent "fair and reasonable" remuneration, but this is subject to further research as called for above.

17. The current low recoverable cost means that the insurance industry and/or its representatives have nothing to fear from refusing to provide essential documents. In refusing to provide documents without fear of penalty it means that claims can be unnecessarily delayed for tactical purposes as, again, noted in paragraph 8. In effect, because the costs awarded for interlocutory applications are so low, plaintiff lawyers are penalised for the insurance industry's failure to provide documents that should be provided. As can be seen, therefore, whilst both parties should have "equality of arms", the current costs system prevents this equality from being achieved. Whilst it is hoped that the civil justice reforms will help to prevent unnecessary delay, we strongly believe that incentives should exist within the costs system for all parties to conduct litigation expeditiously.

REFRESHER FEES

18. In paragraph 21 of the consultation paper, it is stated “there is little merit in increasing refresher fees given that few county court hearings exceed one day in duration”. In response to views that the current refresher fee (one third of the scale fee) is insufficient it is noted that “scale fees include pre-trial work and therefore any further increase is likely to create anomalies at the higher end of the scale”. We do not agree and strongly believe that the refresher fee for counsel is too low. Further we believe that the argument, in relation to solicitors, is misleading. Solicitors are also awarded one third of the scale fee applying to counsel. As well as bearing, therefore, no relation to the actual costs incurred by solicitors in attending court for an extra day, we believe it is far too low. For a case with a value of £5000, a solicitor would be awarded only £90 for an extra day in court. As we have noted before, this is more the pay rate of an employed skilled worker (with no overheads) rather than a professional (with overheads). We strongly believe that the refresher fee should be increased and should also be awarded for those days spent in court but on which the case is not heard. If, as is noted in the consultation paper, few cases exceed one day, increasing the refresher fee should not cause any prejudice.

CONCLUSION

19. Funding issues are directly connected to issues of access to justice. For this reason we hope that this review of the County Court scale costs, following submissions from interested parties, will develop into an in-depth analysis of the system. As is clear from our response, we believe this is an area that requires much further research before any decisions are taken and the review is concluded. With members in both Northern Ireland and England and Wales we hope that we can be useful in providing further information on the

operation of the costs systems in each jurisdiction and we invite the Rules committee to enter into further dialogue with us on these issues.