NORTHERN IRELAND COURT SERVICE

COUNTY COURT RULES COMMITTEE

REVIEW OF COUNTY COURT SCALE COSTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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

Annette Morris
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: Annette@apil.com

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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 110 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. 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 open to abuse by the insurance industry and/or its representatives.

THE LEVEL OF THE SCALES

4. APIL supports, in principle, the scale costs system in the county courts. It provides a simple and efficient mechanism for awarding costs in relatively low value cases. We strongly believe that the current level of scales is too low, however, and that as a result:

   - the insurance industry has a tactical advantage in all personal injury litigation;
   - there is a serious risk that access to justice for the victims of personal injury will be impeded.

5. For the scales system to operate satisfactorily, the "swings and roundabouts" principle underpinning it must also operate satisfactorily. This means that the costs recovered in cases requiring "little effort for much reward" must compensate for those cases in which there is "much effort for little reward". The evidence suggests that this cannot happen, and is not happening, in practice.

6. The costs recovered in cases towards the lower end of the scale are so low that there are few, if any, cases in which you can recover "much reward" for "little effort". It is only once you get to the higher end of the scale that there is any chance of compensating for the fact that the costs recovered in cases towards the lower end of the scale did not cover, in most, if not all cases, the amount of work actually undertaken. This chance rarely arises in practice, however, as there are so few awards made towards the higher end of the scale and we would refer you to the annexed table (annex one) outlining this. On average, between 1996-2000, only 10% of all awards made in the county court were between £5001-£9999 and only 2% of all awards made were between £10,000-£15,000. We do not know how many of the awards between £10,000-£15,000 included claims for personal injury, possibly none.

7. This means that between 1996–2000, on average, 88% of all awards made in the county courts were between £0 - £5,000. The majority of claims fell, therefore, into the category in which there is rarely an opportunity to recover "much reward" for "little effort". Taking complex cases out of the scales system, as suggested later in this response, would not solve this problem as it is not only in complex cases that recoverable costs are disproportionately low to the amount of work undertaken. The statistics outlined above also cause concern about the low level of damages awarded to the victims of personal injury. It is important to note the decline in levels of awards in recent years. For example, in 1994, 24%[1] of all awards made in the county court were over £5,000, whereas in 2000 only 11%[2] were over £5,000. One would have expected to see an increase in awards between these dates given the increased cost of living and the decline is, therefore, of particular concern.

8. The above problems are likely to have worsened since September 2001. Before September solicitors were penalised on costs through the "half costs rule" if they issued a civil bill for more than £3,000, but the plaintiff was awarded less. Judges were reluctant to use their discretion to award full costs despite the fact that the solicitor may not have acted unreasonably in issuing the civil bill for a larger amount than actually awarded. The scope for the "half costs rule" to penalise solicitors significantly increased in September when the district judges' jurisdiction increased to £5,000, as the majority of awards made in the county court are below £5,000. The half costs rule is contrary to the overriding objective that the parties are on an equal footing since there is no equivalent penalty imposed upon defendants.

9. In view of the above we strongly urge the Rules Committee to initiate further research into 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

[1] Out of a total of 9217 awards made in the county court in 1994, 2,252 were over £5000.
[2] Out of a total of 12,023 awards made in the county courts in 2000, 1289 were over £5,000.

practitioners or their clients. We are calling for a new base rate to be devised following detailed research into the costs of running legal practices in Northern Ireland. 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.

10. 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.

11. Thirdly, we agree that regard should be given to costs awarded in England and Wales and that parity should be maintained. We have attached the 2001 guideline hourly rates for solicitors in England and Wales at annex two for your information. As far as we can understand, 'parity' is achieved by merely applying the same percentage increases in each jurisdiction. 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 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.

12. Research into the costs of running a legal practice is conducted regularly in England and Wales on a regional basis and we do not believe such research would be too onerous. APIL would be more than willing to provide assistance in this research, as we are sure would other organisations. Whilst the Civil Justice Reform Group endorsed the "swings and roundabouts" principle, it admitted that "it [was] neither practicable, nor appropriate, for the Group to indicate what the particular level of fees should be for County Court litigation."

13. We fear that unless this research is conducted, the scales will continue to be based on fiction rather than reality. To say that legal costs or overheads in Northern Ireland are lower than in England and Wales because the hourly rates are lower is not a strong argument because the hourly rates in England and Wales are based on the research into the cost of living and overheads, whereas those in Northern Ireland are not. Applying a percentage increase to the current level of the scales will not remedy the problems outlined above as any such increase cannot compensate for inherent deficiencies within the scale costs themselves.

14. We believe it is important to stress that we are not seeking inflated costs for solicitors that would make litigation inefficient and uneconomical. We seek only "fair and reasonable" remuneration for professional legal services. Due to increases in the jurisdiction of the county court in the last 20 years, a high proportion of a solicitors' income is derived from civil bills issued in that court. Comparison of the old Belfast Solicitor's Association Guide with the current county court scale costs illustrates that remuneration for solicitors has declined dramatically in real terms over the past 20 years.

15. It is vital to remember that all costs liabilities are incurred by the parties in the action and if plaintiffs are unable to recover costs which meet, either individually or collectively, the actual cost of their solicitors' work, there is a severe risk that access to justice will be impeded as follows:

    - Solicitors, with a view to the costs recoverable on the scale, may be encouraged to work less hours on a claim and under-settle it;
    - Solicitors may cease to take on cases in which it is believed the recoverable costs will not be proportionate to the amount of work undertaken on the case;
    - Solicitors may begin to charge their clients fees to compensate for the fact that the current level of scales is far too low.

    In view of the Human Rights Act 1999 such risks cannot be ignored.

16. The established rule of costs is that the loser should pay, but as demonstrated above, in the current system, it is the victims of personal injury and / or their legal representatives that have to pay, even if they are successful. In addition, the scales system, at the current level, provides an in-built tactical advantage to the insurance industry. With no fear of adverse costs consequences the insurance industry can unreasonably delay and defend cases so as to put pressure on plaintiffs to settle. In England and Wales indemnity costs can be awarded against any party who has acted 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 that a disincentive should also exist within the costs system. If the scale costs awarded were higher, we strongly believe that this would assist in preventing the potential for unreasonable and unfair behaviour by the insurance industry.

COMPLEX CASES

17. 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

18. 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. We initially submitted that the number of bands should be reduced to three. Following further analysis of the number of awards falling into each band, however, we believe that the number of bands should be reduced to four with two falling within the district judges' jurisdiction and two falling within the county court and divided as follows: £0-£2,499, £2,500-£4,999, £5,000-£9,999, £10,000-£14,999.

INTERLOCUTORY APPLICATIONS

19. APIL believes it is essential that practitioners are properly paid for work done in relation to interlocutory applications. In paragraph 13 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.

20. 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 13. 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

21. 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, "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

22. 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.

ANNEX ONE

ANALYSIS OF AWARDS MADE IN COUNTY COURT (1996 – 2000)

Award	**1996**	**1997**	**1998**	**1999**	**2000**
£0 - £5000	8,012 (88%)	8,724 (87%)	9192 (87%)	9677 (88%)	10,734 (89%)
£5001 - £9999	959 (10%)	1082 (11%)	1193 (11%)	1207 (11%)	1148 (10%)
£10,000 - £15,000	145 (2%)	194 (2%)	152 (2%)	147 (1%)	141 (1%)
Total	9116	10,000	10,537	11,031	12,023