

**THE CIVIL JUSTICE COUNCIL (CJC)
COSTS COMMITTEE**

PREDICTABILITY AND BUDGETING

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL12/04)**

MAY 2004

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,400 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) 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 enhancement of law reform;
- 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;
- To promote health and safety.

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PREDICTABILITY AND BUDGETING

Introduction

1. APIL welcomes the opportunity to put forward its comments regarding Professor John Peysner's article 'Predictability and Budgeting'¹ and the issue of cost control through budgeting and estimating. In summary, APIL believes that there are already significant and effective controls on legal costs and the introduction of strict budgeting will add to, rather than decrease, these costs. In addition, with respect to budgeting, we believe that without reliable and objective historical data being available it is unlikely that lawyers will be able to accurately budget for the needs of a case. This lack of objective information, and the pre-emptive nature of budgeting, will invariably mean that solicitors may feel the necessity to over-estimate their budgets in order to cover all possible eventualities of a case.
2. APIL is concerned that the wider application of budgeting will be used to control costs predominantly within the personal injury sector, and that legal cost control is being promoted on a self-serving basis by the insurance industry with the intention of reducing the amount they have to pay to claimants. It would be inequitable for defendants, with the endorsement of the court, to dictate the amount of money a claimant can spend making their case. Finally, APIL feels that it is difficult to justify budgeting when there are instances where a solicitor has budgeted for a case, in order to satisfy his paymaster, yet this budget has been disregarded by the court.
3. APIL feels that Professor Peysner's article is a valuable contribution to the ongoing discussion in today's legal profession concerning costs. It is hugely instructive concerning the current status of cost capping and the mechanisms needed for effective budgeting. We are concerned,

¹ Civil Justice Quarterly, Volume 23, January – page 15-37
(See <http://www.costsdebate.civiljusticecouncil.gov.uk/Home.go> for copy of article)

however, by the assumption within the article that “costs have increased”. While the article suggests there is “anecdotal evidence” for such an increase, a recent Datamonitor Report - independent market analysts - stated that:

*“Although initially greeted with some reservation, the [Woolf] reforms have helped boost efficiency to the benefit of all concerned ... Ultimately improved efficiency will result in cost reductions long-term.”*²

In addition, the Department for Constitutional Affairs (DCA) commented:

*“It is still too early to provide a definite view on costs. The picture remains relatively unclear with statistics difficult to obtain and conflicting anecdotal evidence. Where there is evidence of increased costs, the causes are difficult to isolate”*³.

Both of these comments appear to suggest that it may be premature to tackle costs prior to the full realisation of the Woolf reforms⁴.

4. APIL also notes that the issue of budget-setting, and its use for controlling costs, has already been considered, and **rejected**, by Lord Woolf in his “Access to Justice Inquiry”. In considering the subject Lord Woolf referred to an issue paper by Adrian Zuckerman where prospective budgeting was seen as “*unworkable, unfair and likely to be abused by the creation of inflated budgets*”⁵. Lord Woolf’s response was that if budgeting was impossible then costs should be controlled via procedural means. As such APIL believes that the current use of detailed assessment and the Civil Procedure Rules (CPR) – such as Rule 47.19 – provide effective control mechanisms in relation to legal

² Datamonitor Report – ‘UK Personal Injury Litigation 2002’ - September 2002 (See <http://www.datamonitor.com> for corporate details)

³ Department for Constitutional Affairs (DCA) ‘Further Findings – A continuing evaluation of the Civil Justice Reforms’ – August 2002 (See <http://www.dca.gov.uk/civil/reform/ffreform.htm> for copy of report)

⁴ Introduced April 1999

⁵ See paragraphs 16 and 17 – “Controlling Costs”

costs, and that the introduction of budgeting would indeed prove unworkable.

Issues with budgeting

Role of the insurance industry

5. APIL feels that the continuing accusations of legal cost 'problems' are often made in relation to the personal injury sector by defendant lawyers - representing large and profitable insurance companies - in an attempt to reduce the amount of money paid in liabilities. In APIL's experience there does not appear to be great concern, or a drive for mechanisms to control legal costs in other areas of litigation. For example, large corporate clients do not appear to be overly worried about legal costs in commercial litigation. In terms of the insurance industry, however, any reduction in legal costs will be directly beneficial to them as the amount of money which they will have to pay out will be reduced. In contrast, by reducing legal costs for claimants' solicitors there are numerous implications for the injured client's access to justice. For example, a claimant solicitor will budget for the needs of a case, yet may have to restrict the scope of his investigation if this original budget is not endorsed by the court. It is APIL's belief that the insurance industry has the weapons of detailed assessment and the Civil Practice Rules (CPR) to tackle any legal bills which it feels are disproportionate, and the extensive use of strict budgeting may simply allow for the restriction of funding for claimants.

6. The insurance industry currently uses the aforementioned mechanisms of detailed assessment and the CPR to effectively challenge legal cost bills in successful claimant litigation. Professor Peysner's article does not detail whether once a proposed budget, submitted by a claimant solicitor, can be challenged or disputed by the opposing defendant solicitor. Currently there tends to be a certain amount of satellite

litigation concerning legal costs post-litigation. By allowing the defendants to view either a full budget, or even a generalised figure, it is anticipated that substantially more disputes of a similar variety will materialise pre-litigation; more disputes will mean additional court time and legal costs.

7. If defendant scrutiny of budgets is permitted, APIL feels that it could lead to the insurers - potentially endorsed by the court itself - 'setting the budget' by them challenging any legal bill which is deemed high. In addition we are further concerned that by allowing the defendant sight of the claimant's budget you are allowing the insurer intimate access to strategies on which the claimant's case will be run. Both these factors are incompatible with the equality of standing which is a necessity within the English adversarial legal system.

Lack of historical data

8. APIL believes that there is a lack of objective historical data concerning the legal costs in claims which prevents, and will continue to prevent, effective prospective case budgeting. Budgeting can only work if you have accurate knowledge of what it cost in the past to conduct similar litigation. The differing needs of each case means that while experience may give the solicitor some insight, this insight is unlikely to be sufficient to construct an effective or appropriate budget. APIL is concerned that, in the absence of data, district or circuit judges will be tasked to adjudicate on the majority of case budgets based on their own limited experience. Most district and circuit judges tend to have little to no experience of litigation, especially personal injury litigation, and scant objective data on which to base decisions. Even cost judges will tend to base their decisions on experience rather than actual data. This means that it is vital that research and data are used for budgeting so as to make the figures produced as real and meaningful as possible, and not just based on 'gut reaction'. While there has previously been discussion about the possibility, as part of the settlement, to have the

legal costs figure inserted into the costs assessment order there has been no larger attempt to roll-out such a scheme. Indeed it is questionable whether the legal profession would be willing to provide such figures due to their sensitive and confidential nature.

Additional costs

9. APIL considers that the vast majority of cases, whether in personal injury or not, are not prohibitively expensive or time-consuming, and the article offers little evidence to dispute this claim. We are therefore concerned about the presumption within the article that there is currently a problem with legal costs. The vast majority of cases are settled without the need for the involvement of the courts or detailed assessment, with costs being agreed between the two solicitors. Indeed less than half-a-percent of possible personal injury cases in the calendar year 2002 went to detailed assessment⁶. This suggests that the current control mechanisms which are in place are working effectively.

10. The use of a detailed assessment by the courts, for example, acts as an effective control mechanism by ensuring that the solicitors involved have to justify the costs of the case. The courts use the concept of proportionality to assess if the costs incurred are necessary and reasonable⁷. If a firm's legal costs are deemed disproportionate, the court can reduce the amount which the solicitor will be paid. Naturally, following such a cost sanction, it is highly unlikely that a profitable law firm will want to make the same mistake again. A firm is unlikely to financially survive if its bills are reduced by ten per cent upon each

⁶ Actual figure is 0.4% (Figures taken from the Judicial Statistics Annual Report 2002)

Court	Total No. of Supreme Court Costs Office (SCCO) cases	Total No. of cases
Court of Appeal	592	2 434 (Civil Division)
Court of Protection	1 650	5 706
Queen's Bench	1 948	18 624
County Court	2 365	1 571 060 (excluding small claims)
TOTAL	6 555	1 597 824

⁷ See Lord Woolf's judgment in *Home Office v Lownds* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450

detailed assessment. The need for stringent cost control, and need for all costs incurred to be necessary and reasonable, is thus essential throughout the litigation process.

11. Moreover, APIL stresses that the definition of “proportionality” in the CPR is more than just a costs figure but reflects other important features. CPR rule 1.1. (2) (c) states a requirement that a court should deal with a case justly and this means, so far as is practicable:

“Dealing with the case in ways which are proportionate

- i. to the amount of money involved;*
- ii. to the importance of the case*
- iii. to the complexity of the issues; and*
- iv. to the financial position of each party.”*

12. APIL firmly believes that the use of budgeting will increase legal costs rather than reduce them. With the introduction of prospective cost budgeting it is conceivable that for every case a detailed ‘bill’ will need to be drawn-up and submitted prior to the commencement of proceedings. This will further add to the front-loading of costs within legal cases. It is also probable that the detailed ‘bill’ will need to be drawn up by a budget specialist, much in the same way that the drawing-up of detailed legal cost bills is currently handled by a law cost draughtsman. A draughtsman tends only to be involved, however, when a case is due to go to detailed assessment – which, as detailed above, is seldom. The need to have detailed budget figures prior to the commencement of a case would involve a legal cost draughtsman being involved in all cases, rather than a select few, or by a further sub-industry being formed where legal cost ‘budgeters’ would draft the initial bill. Both of these possibilities would add a further layer of staff and costs.

13. There would be further cost increases by virtue of the need for budget variation. The suggested prospective nature of budgeting would require

that there be a review process for possible increases of the budget as the facts and needs of the case became more apparent. This necessity is accepted by Gage J. in relation to costs capping⁸, and can also be seen to be applicable to budgeting. Requesting a variation of the original budget would invariably involve an application to the court. This would mean there would be additional costs in preparing and filing an application, as well as the cost of additional court time. The increased workload on the district judges would probably mean there would be a further requirement for more qualified individuals in those positions; extra staff would again mean extra costs.

14. Finally, APIL is concerned that the use of costs budgeting, while adding expense, will make little difference to the conduct of the substantive issues in the case. At present the courts are provided with costs estimates at the Allocation Questionnaire and Listing Questionnaire stage of the litigation in the vast majority of cases. The provision of these estimates already adds to the time and cost incurred at these stages. It is the experience of APIL members, however, that the estimates provided make little if any difference to directions relating to the future conduct of the case. Consequently we feel that cost budgeting, a more elaborate and expensive process, will also have little effect on how a case is run.

Solicitor-client relationship

15. APIL is concerned about the role that the court will play in monitoring costs. The article suggests that prospective cost budgeting will help resolve the costs 'problem'. It would appear, however, from the summary of recent cost capping cases that even in instances where a lawyer has prepared a budget which has subsequently been agreed by his paymaster prior to the commencement of a case, the court still feels

⁸ Gage J. ordered that the cap should be varied "in the event of some future and exceptional factor which affects costs. Such a factor will include the trial lasting longer than the estimated four weeks" – Paragraph 63 - *A & B v Leeds Teaching Hospital NHS Trust and In re. Nationwide Group Litigation* [2003] EWHC 1034 (QB)

justified in capping the costs⁹. APIL questions whether it is appropriate, within the duties of the court, to intervene in cost matters between a solicitor and his paymaster, where the paymaster is satisfied with the costs of the budgeted legal work.

Inflated budgets

16. APIL believes that the need to prepare a budget prior to a case may lead to the creation of inflated costs. This concern reflects Adrian Zuckerman's finding in his previously mentioned investigation into mechanisms for controlling costs in advance. Without the availability of objective historical data, combined with what APIL envisages will be a restrictive procedure for varying the budget¹⁰, there will be a tendency to inflate the needs of the case so as to cater for any eventuality. In addition there is the possibility that once a budget has been agreed the lawyer will make no attempt to restrict the amount he spends; he has a 'green-light' to spend within the budgeted limit. In contrast, with post-trial assessment, the lawyer is often in a position where he might not receive any costs (a conditional fee agreement – 'no win, no fee'). This fact may ensure that the lawyer spends what is necessary rather than trying to justify a pre-set amount.

Consultation Questions

Question 1: How practical is budgeting?

17. APIL has serious concerns over the use of budgeting, and while Professor Peysner's article puts forward a persuasive argument in theory, we feel that in practice it will not succeed in reducing costs. In particular we would dispute Professor Peysner's assertion that

⁹ See *A & B v Leeds Teaching Hospital NHS Trust and In re. Nationwide Group Litigation* [2003] EWHC 1034 (QB) – Even though the claimant solicitor had provided two case plans to the Legal Services Commission prior to the commencement of the case, Gage J. stated that “*the basis upon which the claimants have agreed costs with the Legal Services Commission is only a guide but not a determinative factor when making [the cost capping] order.*” (paragraph 30)

¹⁰ APIL's members' experience in relation to providing budgets for the LSC indicates that the courts do not like the parties returning to increase the amount of the budget. It is not unreasonable to assume that a similar attitude will pervade budgeting in *all* cases.

anecdotal evidence suggests that costs have increased; reports by Datamonitor and the Department for Constitutional Affairs (DCA) seem to indicate that the situation is unclear at best. Furthermore, the case has not yet been made that the vast majority of cases, whether in personal injury or not, are prohibitively expensive and time-consuming. As already mentioned, less than half-a-percent of cases appear to go to detailed assessment, with the remainder of cases being settled or decided without an extensive review of costs. These figures do not seem to provide evidence that there is a legal cost issue with the majority of cases.

18. APIL considers that the introduction of prospective budgeting may well increase the cost burden on claimants, defendants and the courts. The increased costs would come from the need to involve a law costs draughtsman or a budgeting specialist to prepare the budget, and the possible fees attached to preparing an application for variation of a budget.

Question 2: Will budgeting increase the workload of courts pre-trial/settlement, save it by reducing post settlement/trial detailed assessment or be neutral?

19. APIL believes that the workload of the courts will increase substantially with the introduction of detailed budgeting. The number of cases which progress to detailed assessment is very low, with over ninety-nine per cent of cases not progressing to detailed assessment. It is anticipated with the proposed use of budgets that the costs of each case would need to be approved by the court prior to commencement of the case. If the majority of cases needed to come before a court to have their budgets approved, there would need to be a dramatic increase in the number of district judges in order to deal with the increased court time involved.

20. In addition, as the case developed, it may be necessary to increase the original budgeted amount. This would require an application to the court for adjustment. With all cases needing to be budgeted, it is anticipated that there will be a significant number of applications to vary budgets. The processing of these applications will invariably take up considerable court time and resources, increasing costs.

Question 3: Should all cases in the Multi Track and/or all or part of the Fast Track be subject to a budgeting process?

21. APIL reiterates its belief that the case has not been appropriately made for the use of budgeting within *any* sphere of legal costs, regardless of whether they are multi track or fast track. Indeed, outside of budgeting, APIL is actively involved in cost negotiations in relation to the fast track and a considerable amount of progress has been made in relation to predictable costs.

22. In relation to multi track cases, APIL considers there to be adequate cost controls in the guise of detailed assessment. For example, if a firm's legal costs are deemed disproportionate they are likely to be reduced by the court in a detailed assessment. Following such a cost sanction, it is unlikely that a profitable law firm will proceed with a large scale case without a full consideration of whether the costs incurred are reasonable and necessary.

23. The fact that detailed assessments are deemed necessary, and are used by the courts, illustrates that disputes occur between claimant solicitors and defendant solicitors regarding costs. If such disagreement occurs after the litigation, where the true costs of the case can be objectively calculated and assessed, it is highly likely that such disputes are going to occur with pre-emptive assessments. The difficulty with pre-emptive assessments is that it is very difficult to predict what the costs of a case are going to be. In summary, if it is difficult to decide what the costs should be at the end of a case, where

all the necessary information is available, how difficult is it going to be to assess costs before a case has begun where there is no information available?

Question 4: Will budgeting deflate or inflate costs?

24. APIL firmly believes that budgeting will inflate costs significantly. It is envisaged that the need to prepare pre-emptive budgets will require the employment of specialist 'budgeters' and that the need for variation of budgets will incur extra court time, both of these measures ultimately increasing costs.

25. There is also the possibility of costs being inflated within the actual budget itself. Law firms, both claimant and defendant, may inflate the submitted budget in order to make sure all eventualities which could occur in the case are financially covered. In addition, once this budget is agreed, the solicitors involved may feel justified in spending up to the limit of the budget, regardless of whether this is strictly necessary. This last scenario is made more probable if the law firm in question does not receive the budget surplus which occurs with completing a pre-budgeted action prior to the allotted time / financial threshold. For example, the firm budgets for 20 hours to read necessary documentation, but manages to read all the documentation in 10 hours; rather than lose the remaining hours of cost, the firm might request and read non-essential documentation to make-up the time.

26. APIL concurs that there may be a case for budgeting reducing costs if the majority of cases went to detailed assessment. As mentioned previously, however, very few cases go to detailed assessment, thus there is unlikely to be any genuine cost saving.

27. In addition, we feel that any attempt to artificially deflate costs will be to the detriment of providing the injured client access to justice. For

example, a reduction in a claimant solicitor's budget may mean that a less thorough investigation into the injured client's case is undertaken.

Question 5: Should there be a pilot of budgeting and if so what type of cases should it cover?

28. APIL feels that if budgeting was to be introduced there would need to be a well thought out pilot scheme. Any pilot scheme, however, would have to follow a necessary, and well researched, collection of objective case data. This data is essential as the parties concerned would rely on it in order to set realistic and meaningful budgets. In relation to what type of cases should be covered by the scheme, we believe that it should be piloted on a small number of cases within a very small sample. Attempting to introduce such a scheme across the board, particularly without full regard to the reservations detailed in this response, would prove foolhardy and reckless.

29. APIL would like to offer its help and experience in the area of costs if any such pilot scheme was introduced.