

NORTHERN IRELAND COURT SERVICE

**PARTIAL REGULATORY IMPACT ASSESSMENT – COUNTY
COURT SCALE COSTS**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2006

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 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. 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.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive summary

1. APIL believes there to be a need for a wider review of scale costs, and would have welcomed a full review and broad consultation in line with established best practice to determine the detail of proposed increases.
2. Inflation figures alone do not provide a sufficient basis for a just and reasonable review of scale costs. If inflation adjustments were used in the place of broader reviews, however, these ought to be carried out annually.
3. Both costs and value added by legal professionals have risen significantly for county court cases. Proposed inflation adjustments do not reflect or reward this greater input.
4. There is an unfortunate perception that real term reductions in practitioners' pay are being used to partially offset very high increases in court fees, as well as an understandable dissatisfaction with contradictory messages on litigants' ability to pay. If it is not considered unreasonable for court fees to double, triple or quadruple in some instances, concerns about the effect of single percentage point increases in lawyers' fees seem surprising.
5. Concerns that more equitable increases would adversely affect insurance companies or their customers appear largely unfounded in view of some very real reductions insurers ought to have benefited from in recent years, as a result of static costs and awards, and changing tactics in insurers' approach to potential claimants.
6. Insufficient increases may on the other hand adversely and disproportionately affect claimants, and impede access to justice for injured people.

Introduction

7. APIL welcomes the opportunity to put forward its comments on the Northern Ireland Court Service's Partial Regulatory Impact Assessment – County Court Scale Costs.
8. APIL notes that the consultation document effectively offers consultees only one option to choose from, in the form of an impact assessment which presents a largely finalised proposal with little scope for amendment in response to points that may be raised in this consultation process. We are disappointed that the detail of changes to scale costs appears to have been decided upon prior to the formal consultation process, on the basis of informal consultations with only four agencies¹. APIL would hope, that in future stakeholders are consulted more widely, in processes that ask open question and invite comments from all relevant interested and affected parties on all important decisions and underlying assumptions.
9. APIL fully endorses the concerns of the legal profession summarised in paragraphs 33 to 36 of the document, i.e.
 - (a) proposed uplifts are lower than increases in the hourly rate for high court cases set by the taxing master,
 - (b) scale costs remain lower than rates of pay in England and Wales,
 - (c) the effect of pending increases in court fees must be accounted for, and
 - (d) inflation adjustments should be annual, rather than 4-yearly.

¹ As described in paragraph 29 of the Partial Regulatory Impact Assessment (RIA)

Use of GDP deflator

10. APIL does not consider inflation adjustment the most adequate way of assessing scale costs. Since the hours of work and costs involved in conducting county court cases are affected by many factors other than inflation, the GDP deflator seems a very inaccurate measure. It was presumably for this reason that the Civil Justice Reform Group had recommended regular reviews rather than mere mathematical inflation adjustments.
11. In view of the substantial changes to the environment in which county court action is brought, APIL is disappointed that the “Committee has decided that a further fundamental review is not required at this time”² after more substantial issues appear to have been considered at the level of informal consultations. While the impact assessment gives no indication what might or ought to trigger a fundamental review, APIL would now urge the Committee to carry out such a review following the imminent introduction of higher court fees.
12. While scale costs are simply inflation-adjusted rather than reviewed, however, it would clearly be fairer and more equitable to raise scales annually. The administrative burden of annual inflation increases would be minimal, and in the spirit of the current proposal (adopting inflation as the only context in which to place scale costs) it cannot be just or reasonable for legal professionals to effectively suffer an annual drop in their income in real terms between review years, as cost of living, practice expenses and pay in other sectors rise while scale costs remain static.
13. If no further review is envisaged for another four years, it would be more appropriate to now raise scale costs in line with inflation from 2002 to the

² Partial RIA, paragraph 10

middle of the next term, i.e. 2008 rather than 2006. There is little apparent logic behind the proposal to set according to 2006 costs of living, uplifts expected to come into effect by 2007³ and remain unchanged for a number of years thereafter.

Scale costs in context

14. The current review assumes that, as “scale costs set in 2002 are considered to be fair and reasonable”, raising existing scales in line with inflation would therefore “also be fair and reasonable”.⁴ APIL does not believe that this is necessarily the case. The obvious difficulty that no inflation adjustments have taken place over the last three years aside, this conclusion would be compelling if inflation were the only factor to affect the fairness and reasonability of the scales.

15. In reality, a range of other factors have affected the remuneration solicitors receive for county court work, and have arguably had a greater impact on practitioners’ pay in real terms than inflation. Any review that seeks to maintain fairness and appropriateness of scale costs must therefore, in our view, account for these developments, including the increasing complexity of typical county court cases, and increases in court fees and outlays.

16. APIL believes that the taxing master’s review of hourly rates for high court cases was more appropriate not because it arrived at higher rates but because it based its conclusion on an assessment of the environment in which legal professionals operate.

³ See Partial RIA, paragraph 58

⁴ Partial RIA, paragraph 32

17. The paper's suggestion that increases in solicitor's fees by more than 10.47 per cent would place an unjustifiable burden on litigants⁵ appears difficult to justify at a time when the court service proposes to more than double courts' own fees for many cases.⁶
18. Proposals to raise court fees are driven by a new "requirement to recover the full cost of civil court business" from litigants; a policy which, the court service states, is not open for discussion.⁷ APIL objects to this manner of fundamentally changing the operation of the justice system without debate as a matter of principle. In relation to scale costs, however, this inflexibility means that the balance between practitioners' costs and pay will have to be redressed through adjustments in pay.
19. The impact assessment suggests it "arguable" that these increases in court fees are "not directly relevant to an assessment of impacts of an increase in scale costs".⁸ Arguable though it may be, APIL believes the statement to be inaccurate. Unless increases in practitioners' expenses are offset by increases in their pay, proposed increases may change the judicial environment so significantly as to affect the bringing and outcome of cases for solicitors and clients alike.
20. Steep increases in the costs of conducting a case will have a particular impact on practitioners in areas such as personal injury law, where it is not customary for clients to make any payments while their cases are ongoing. As many clients are not in a position to afford the costs of ongoing proceedings, practitioners effectively loan this money to a client's case for the duration of legal action, which the paper estimates to be an average of 18-24 months.⁹

⁵ Partial RIA, paragraphs 37 ff

⁶ As set out in Northern Ireland Court Service, Consultation Paper on Fee Changes, currently open for consultation

⁷ Consultation Paper on Fee Changes, p. 3

⁸ Partial RIA, paragraph 35

⁹ Partial RIA, footnote 13

Even where a case ultimately succeeds and the defendant is ordered to pay the cost of the proceedings, the claimant's legal representatives therefore carry the cost of a two-year loan to finance proceedings.

21. Proposed rises affecting the costs of typical county court cases include the fee for a certificate of readiness rising from £29 to £250, the introduction of a £115 fee for each adjournment, and the cost of an interlocutory application rising from £33 to £115.¹⁰ Following these increases, we would expect a solicitor's total outlays to be in the realms of £1,000 to £1,200 for a typical, uncomplicated personal injury case (i.e. involving the usual costs of court fees and copies of medical and police reports, but not requiring experts such as engineers). The overall outlay exposure for such cases is likely to double. With cases typically settling for an amount between £2,500 and £5,000, outlays are thus roughly equivalent to the scale costs payable on successful conclusion.

22. As this illustrates, cash flow and the funding of personal injury cases will be gravely affected. Paragraph 35 goes on to state that "there would appear to be other options open to the profession to reduce adverse impacts on cash flow". It is unfortunate that these options are not explained, and consultees not given the opportunity to comment on either the viability of these proposals or the impact they might have on access to justice and overall costs of county court action. In any event, this statement seems to acknowledge that cash flows are set to suffer to the point where practitioners may need to find alternative ways of funding cases in order to ensure the liquidity of their businesses.

23. Secondly the appropriateness of scale costs is affected by the increasing complexity of court cases. According to the impact assessment, the number of cases which are brought before the county courts in Northern Ireland has

¹⁰ Northern Ireland Court Service, Consultation Paper on Fee Changes, pp. 17 – 22

dropped by over a third between 2002 and 2005.¹¹ This is so largely because solicitors increasingly work to resolve cases without litigation wherever possible. Conversely, this effort to avoid litigation in civil claims capable of resolution reduces the case load of the courts to the more difficult, complex and serious matters. The original design of scale costs had assumed the logic of ‘swings and roundabouts’ – low fees for the more complex cases would be counterbalanced by simpler and less labour-intensive cases attracting the same rates of pay. As the latter cases are no longer routinely settled in court, scale costs therefore continue to reward solicitors on the assumption of an average case, for cases that are now typically above-average in their complexity or labour-intensity. Clearly, uplifts in line with inflation fail to account for the different nature of typical county court cases, and are therefore less fair and appropriate than they might be.

24. The impact assessment assumes that scale costs must not rise more than modestly as litigants, and insurance companies in particular, would otherwise be faced with excessive rises in legal expenses. This, the assessment assumes, is likely to increase insurance premiums in the longer term.¹²

25. As indicated above, it is unfortunate that this reasoning coincides with sometimes multiple increases in court fees not prohibited by any potentially detrimental effect on litigants or the insurance sector.

26. Changes in the handling of personal injury claims undermine this logic further. Evidence presented in the impact assessment suggests that insurers’ legal costs ought to have fallen quite significantly: Since 2002, the number of court cases has dropped by 34 per cent¹³, and levels of damages¹⁴, and scale costs have remained static. Yet despite market pressures referred to in

¹¹ Partial RIA, paragraph 42

¹² Partial RIA, paragraph 37 to 41

¹³ Partial RIA, paragraph 42

¹⁴ Partial RIA, paragraph 44

paragraph 41, there is no indication that these reductions have been passed on to customers in the form of lower insurance premiums.

27. The total number of cases is, in any event, likely to be too low for rises in scale costs to have any significant impact. The document indicates that some seven thousand civil bill cases were heard in Northern Irish county courts last year, leading to awards of compensation in only some 4500 cases.¹⁵ Clearly insurers would not have been involved in all cases; and would not have been liable to pay legal costs in all cases to which they were a party. The additional cost of a moderate increase in claimant legal costs is therefore likely to be negligible if divided over all liability insurance policies in Northern Ireland.

28. APIL would expect insurance spending on claimant legal costs to have been reduced even further by practices designed to discourage personal injury victims from seeking legal representation. APIL members in Northern Ireland report increasing anecdotal evidence that insurers have adopted a policy of approaching personal injury victims promptly after the event, with the offer of a lump sum by way of full and final settlement in a bid to settle claims before the injured individual receives any independent legal advice. Questions of ethical practice and justice for vulnerable, injured individuals aside, this approach clearly has the potential to further reduce the amount of legal costs insurance companies are liable to pay.

29. The link between scale costs and insurance premiums would thus appear to be less immediate than suggested; and in light of likely recent reductions in insurers' legal expenses, their opposition should not in itself deter the Committee from increasing scale costs by reasonable and fair amounts.

¹⁵ Partial RIA, paragraph 42

Access to Justice

30. APIL is surprised that the impact assessment discusses the effects excessive rises could have on fee paying litigants, without considering the possibility that insufficient rises might also affect them. While the review was cautious to avoid adversely affecting defendants and their insurers through any real increases in scales, less careful consideration was given to the effect insufficient rises might have on claimants and injured people as users of the court system.
31. The impact assessment states that the “‘do nothing’ option would ... eliminate any concerns over impact on access to justice and increases in legal expenditure”.¹⁶ APIL believes this conclusion to be inaccurate in two respects. Firstly, with imminent steep rises in court fees, legal expenditure in Northern Irish county courts is set to increase substantially irrespective of any increases or freezes of scale costs. The ‘do nothing’ option could therefore not eliminate these concerns.
32. Secondly, the question whether real term drops in scale costs year on year will lead practitioners to withdraw from county court work should have been addressed. This outcome would impact very directly on access to justice. Claimants might find themselves unable to find legal representation, while respondents continue to be able to rely on the legal expertise of insurance companies to defend claims. It is therefore far from self-evident that the ‘do nothing’ option would eliminate access to justice concerns. No, or inadequate, increases in scale costs might place more obstacles in the way of access to justice than they remove.
33. Even under the current proposal of a 10.47 per cent uplift, combining modest rises in scale costs with exponential increases in court fees may prevent

¹⁶ Partial RIA, paragraph 13

some current court users from accessing county court justice in future. On the figures quoted above, it should be evident that even a relatively small number of unsuccessful cases could have a fatal impact on a solicitor's business. As solicitors' outlays and expenses increase disproportionately, the costs and financial risks associated with bringing cases in a county court will become prohibitive for more cases. This, in turn, will force practitioners to avoid legal action even in cases of relatively strong legal merit, and at the risk of under-settling claims for clients. Experienced defendants, including insurers, might seek to exploit this by treating claimants less reasonably where capped scale costs and soaring expenses make court action unlikely.

34. Outcomes for personal injury victims may therefore be directly affected by this review. Injured individuals may have less opportunity to be represented in the county courts, and find themselves in a weaker bargaining position outside court as a result of the inadequate uplifts of scale costs proposed.