

Lord Gill's Scottish Civil Courts Review

Association of Independent Law Accountants

Response to
Chapter 3: The Cost and Funding of Litigation

3.1 The Association of Independent Law Accountants (AILA) wishes to participate in the ongoing review chaired by Lord Gill insofar as it relates to the questions of costs and funding of litigation. AILA is an association representing the majority of independent Law Accountants in Scotland. A sub-group was formed to represent the views of AILA and the following reflects the considered views of the sub-group. Individual members may have differing views on certain matters and may wish to make their own representations.

AILA's representations are restricted to Chapter 3: The cost and Funding of Litigation. The authors of this report were impressed by the terms of the Chapter on costs and funding of litigation. The work had been well researched and included all the important issues facing a) funding for litigation including the availability or lack thereof of Legal Aid and the need to consider other forms of funding and b) the perceived problems over the increasing costs of litigation particularly the relationship between the value of the claim and the costs of the litigation both costs recoverable from the opponent and the costs incurred by the client to their solicitors.

3.2 AILA is in a unique position to provide details of the costs of litigating and comparing the cost of cases with the value of the claim. AILA members are responsible for the preparation or adjustment of a large number of Accounts of Expenses and have access to both Pursuer's and Defender's Agents files to establish the value of the claim, either the sums sued for or the ultimate settlement or award. Statistics could be provided for the full range of litigation in the Scottish Courts including Sheriff Court Ordinary Actions, Summary Cause actions for Personal Injuries, and Court of Session cases, involving the employment of either both Senior and Junior Counsel or just Junior Counsel in proceedings brought both under the fast-track Coulsfield procedure or the standard procedure. While data would not be available on the value of the action, historical records could be accessed, certainly for the period from the introduction of the fast-

track procedure in 2003, to provided comparative figures for the costs of litigation, broken down into fees to solicitors, fees to Counsel, outlays incurred including Court dues, fees to experts for reports, consultations and court attendances and Vat where recoverable. The question of Vat is often overlooked when considering comparative figures for litigation. If both parties are themselves registered for Vat, then Vat does not become a recoverable judicial expense. This would immediately reduce the recoverable expenses by 17.5% and would clearly require to be taken into account when undertaking a comparative study.

3.3 The statistics from the SLAB report do not disclose whether the average cost of PI cases include expenses recovered judicially because in those cases the expenses paid to Solicitors will be on the judicial scale and not the more restricted legal aid table. Counsel's fees will also be charged on the judicial table i.e. in accordance with the Scheme for accounting and recovery of Counsel's fees, and therefore, on a commercial basis rather than the more restricted levels set out in the Legal Aid table of fees for Counsel

3.4 Statistics available to AILA members mirror the findings referred to in Lord Woolf's interim report comparing the costs as taxed or adjusted with the agreed settlement valuation, assuming the "value of the claim" to refer to the settlement figure rather than the Pursuer's assessment as reflected in the Summons or under the new PI procedure as detailed in the Statement of Valuation of Claim.

Recovery of Expenses

3.14 Previous paragraphs rightly point out that charges due by an unsuccessful party comprise 3 main elements – a) court fees, b) fees due to Solicitors and Counsel and c) other liabilities such as expert fees for reports and Court attendances. Experts' fees can only be recovered where the Court pronounce an interlocutor certifying the witness as an expert and entitling them to fees higher than those for other witnesses set out in the appropriate relevant section of the Table of Fees. The exact level of allowable charges to be recovered from the Paying Party is determined by the Auditor of Court.

Court dues and Solicitors fees are strictly regulated by Tables of Fees in Statutory Instruments made by the Scottish Parliament, although Solicitors have a choice as to which Table of Fees might be more appropriate in particular circumstances. It is also open to Solicitors to apply to the Court for an Additional uplift on the standard fees in cases of complexity, novelty, importance and other relevant factors. Additional fee cases are not uncommon particularly in the Court of Session where the larger value and complex cases are raised. The Auditor of Court again, determines the fee uplift. In Sheriff Court cases, the Court grants the additional fee on a percentage basis. In Court of Session cases increases in fees can often be over 100% of the statutory fees and sometimes in excess of 250%

3.15 The restructuring of the Table of Fees referred to under this paragraph was an attempt to bring the judicial rates close to average commercial rates and in line with those recommended by the Law Society of Scotland. The recent abolition of the Law Society's recommended table removed that base line and the difference between the judicial rates and Agent/Client expenses can in some instances be substantial depending on the seniority and experience of the fee-earner undertaking the work. While judicial rates in both Courts are in the order of £128 - £135 per hour, information available to AILA members is that there can be a huge variation in the rates charged by different firms. At the higher end, some firm's charge-out rates for their associates and partners can be in the region of £175 - £250 and sometimes even higher. At the lower end of the scale, other practices fees, through special charging arrangements, are restricted to rates less than the judicial rate.

In those cases where letters of engagement allow for all the work to be charged on a time basis, the time of supporting ancillary staff e.g. court runners, paralegals might also be charged to the client, and while such work is more strictly regulated by the judicial table, the charges to a client, if based on the time engaged, may substantially increase the difference between expenses recovered by a successful party and the expenses to be paid to their solicitor on an Agent/Client basis. For example the judicial table sets out one restricted fee for lodging a document in Court presently a fee of £6.70 whereas on a private basis the client might require to pay for the actual time spent for an assistant travelling to Court, waiting the availability of the Court

staff and returning to offices, charges for which might well be closer to £40 - £50.

As the judicial table is subject to regular annual reviews, it cannot be said that it is that table which is now out of line with previous recoveries, but that any increasing differential between one's own expenses and expenses recoverable judicially is due to the increased agent/client fees charged against their own clients mainly by large to middle sized firms.

If the concept of Agent/Client expenses were to be recovered on behalf of a successful party, it would be essential that any formal Letter of Engagement regulating those expense were lodged in the court process in order that a) the opposing party would have some reasonable notice of their potential exposure for expenses and b) if the terms of engagement appear unreasonable, to question these during the conduct of the case and seek the direction of the court rather than leave the determination to the Auditor after the Court had made it's findings as sometimes arises in unusual circumstances where the Court, as an indication of it's displeasure at the actings of party in the proceedings, grants expenses on an Agent/Client basis.

There appears to be no good reason why taxation of Solicitors and Counsel fees are undertaken on a different basis. If Counsels' fees are recoverable on an "open market" basis, solicitors' fees should similarly be so recoverable – i.e. on the basis of the Letter of Engagement between the Agent and the Client. If however, it is the intention of the Court and the Scottish Parliament to "rein in" recoverable costs under a Statutory table of fees, then alongside a table of solicitors recoverable fees should be similar table of recoverable Counsel's fees along the lines of the legal aid table in criminal cases but always allowing the Court to uplift standard fees should it consider the case merits one.

Sources of Funding for Litigation

Legal Aid

AILA have previously made representations to various Justice committees on Legal Aid reforms and feel their predictions have been shown to be accurate over time. AILA predicted the failure of the reforms to provide suitable remuneration for Solicitors would result in a downfall of civil legal aid applications and more importantly a drop in the number of large to medium-sized firms willing to take on legal aid cases. Many of these firms who built up their reputation on legal aid cases in the mid 1970s to 1990s are no longer prepared to take on legal aid clients, enforced in part by the failure of the 2003 reforms to produce anything like the increases forecasted. In particular, firms are now experiencing considerable losses in complicated Sheriff Court cases now coming to a conclusion after many years litigation and negotiation where the present restrictive table fails to properly remunerate them for the considerable work undertaken.

3.28 This paragraph requires some comment. Of the 84% recovered in reparation cases almost 100% of that recovery is undertaken by the Agents and passed to the Board. Almost the full costs of Board's recovery and treasury departments are engaged to recover only 13% of the amount spent in family and matrimonial cases and a high percentage of that figure, it is suggested, reflects money or property recovered or preserved rather than the recovery of court expense from an unsuccessful party. Because of SLAB's interpretation of recovered monies, Assisted Persons in matrimonial cases often have to meet their own legal costs from sums due to them in terms of an agreement or award of court. Expenses in matrimonial cases are few and far between. Payments, which require to be made to the Legal Aid Fund, are often than not circumstances where the sums awarded/agreed are less than $\frac{1}{2}$ of the joint matrimonial assets. By ignoring the principals of the Divorce (Scotland) Act and other subsequent legislation, the Board disregards the calculation of the joint assets where the Assisted Person recovers as part of the settlement a proportion of the opponent's assets whether it be Pension entitlement, business interests or other assets in the sole name of the opponent.

The discrepancy between the fair and reasonable approach taken by the court in dividing the net joint assets and SLAB's narrow interpretation requires to be urgently addressed and only in a

situation where an Assisted Person is awarded more than 50% of the net assets should they be construed as having recovered monies or property. The principle that one cannot recover what one already owns – i.e. ½ of the assets should apply in those circumstances – a principle the Board adopts in actions of Division and Sale

Speculative or conditional fee arrangements

3.33 The statement in the penultimate sentence of this paragraph properly describes the current arrangements. It does not however take account of the Rule of Court 42.17, which is, one assumes, intended to regulate fees, which can be charged against one's client in speculative cases. In particular, while the uplift can indeed be up to 100% of fees, those fees should be based on an account as prepared between party and party. It appears that advice given to its members by the Law Society that any uplift would apply to Agent/Client charges, seems to be contrary to the terms of the Statute.

3.34 After the event insurance is rare in Scottish cases. In a small percentage of actions, legal insurance indemnity covers the costs of litigation for individuals engaged in litigation. This contrasts greatly with the number of businesses or organisations who can depend on insurance cover to meet their costs as well as any award made against them. Attempts to redress this inequality by setting up a scheme in Scotland of an after the event insurance failed after a relative short period of time and AILA agree that some further consideration into insurance cover is required.

Following discussions between Insurers and members of AILA, one proposal being mooted was that premiums and thus insurance cover might be on an incremental basis. The payment of one substantial payment before the action is raised, is often too daunting for individuals. The concept of a lesser initial payment with reviews and other payments becoming due during the conduct of the case may be worth considering.

A more radical approach might be to consider "privatising or outsourcing" legal aid for certain actions. If all personal injury actions were to be dealt with by a legal insurance firm, they would be entitled to a proportion of the legal aid spend to cover administrative costs. Solicitors and where applicable Counsel would be entitled to payment

at rates considerably higher than the legal aid table, but slightly less than the judicial table. Where actions were successful, unlike the recent amendment to the legal aid regulations allowing agents to claim the recovered judicial expenses (an amendment that the Board required to implement given that there had been no statutory authority for the practice that had been adopted since 1987), fees would be paid on the agreed rates and not the judicial table. The difference would go some way to cover the costs of unsuccessful actions. Clients would still be considered in receipt of legal aid and therefore entitled to the benefits such as modification of liability for an opponents expense in the event of an action failing. As with the present legislation, any modification would be at the discretion of the Court subject the financial circumstances of the Assisted Person at the time modification is being considered. Financial eligibility would not apply and the costs involved in assessments and collections of contributions and expenses would be passed to the insurers. With no financial barrier to obtaining “legal aid insurance”, the number of current litigants now eligible would be substantially increased, but more importantly, those potential litigants put off access to justice because of the costs, might then be persuaded to proceed. Such innovative measures may also tempt back into the “legal aid insurance” fold the substantial number of solicitors who have given up on the present legal aid system.

3.35 AILA is aware of the contentious issue over recovery of any insurance premium in the context of judicial expenses. It has been suggested that rather than extend the present rules regulating recovery of reasonable expenses against an opponent, the insurance premium should be considered part of the Pursuer’s loss and therefore recoverable as part of the claim and not expenses of the court process. The premium is, it is understood, assessed and paid before proceedings are raised and could easily in those circumstances be incorporated into the claim, when the writ was prepared.

Questions for discussions

1. AILA’s position on this is set out in detail under paragraph 3.2. In summary AILA members are in position to provide current

and historical data on costs and comparisons with the value of claim.

2. AILA is not in a position to provide data on this point other than the apocryphal comment that the number of cases members are dealing with does not appear to be diminishing and not withstanding the reduction in legal aid cases, most members appear to be as busy as ever.
3. AILA do not consider the levying of court fees to be a major factor affecting access to justice. Court fees are in the main only a small proportion of the overall costs. The only exception may be where the Court order the extension of the notes of evidence, and the Shorthand Writers costs can, in those cases, be considerable.

A rather peculiar situation has arisen in legal aid cases with regard to court dues. The Executive introduced it is assumed following representations from SLAB, the fee exemption regulations which in brief meant no court dues are payable in legal aid cases. This exemption applied to all legal aid cases including those where judicial expenses were recoverable from an unsuccessful party and included the Auditor of Court's fee for taxing the account. The surprising benefactors of this piece of legislation are more often than not, the insurance company indemnifying the opponent. As the court dues and Auditor's fees still require to be met from the Judiciary budget but not now recoverable from the opponent it is estimated that the loss to the public purse by this piece of legislation is now a substantial amount.

4. AILA is of the view that the current rules for recovery of expenses are satisfactory. Review of the tables of fees are undertaken on a regular basis and amendment to the recoverable fees to reflect changes in practice and legislation are also implemented regularly. AILA's preliminary view is that the increasing costs between recoverable judicial expenses and Agent/Client costs are not a reflection of the poor recovery judicially but because agent/client costs have increased at rates far higher than the judicial increases and certainly higher than increases in the cost of living.

AILA consider that the process for fee review and amendment should be more open and transparent. It is not known how many organisations have any input into recommendations for

changes to the fees etc, but as those changes have impact not only on solicitors fees, but those that require to pay them, both clients and paying parties, other organisations such as CAB, Consumer groups, representatives from Insurance bodies should all have some say in those changes.

5. AILA consider the present arrangements for taxation of judicial accounts to be satisfactory in those cases where the remit is to a professional Auditor of Court. AILA agree that some reform is required to address the issues of inconsistency of Auditors' decisions. In some instances a more detailed report explaining the reasoning behind some decisions might be helpful, but cannot be construed as affecting access to justice. Some observers have commented that a tender-like procedure should be introduced into the taxation process whereby if an offer to settle the expenses is made prior to the taxation in an effort to reduce costs and that offer is not beaten at taxation, the full costs of the taxation should be borne by those lodging the account rather than by the paying party.
6. AILA consider that the statistics within this review demonstrate that the availability of legal aid has a considerable affect to access to justice. The decrease over the last ten years in the number of applications for civil legal aid and the low percentage of households now financially eligible both reflect that legal aid could well be said to be failing many prospective litigants. Further, it is the view of some AILA members that the third criteria for receiving or continuing legal aid, that of reasonableness, over recent years and certainly since the introduction of the amended regulations in 2003, has had a greater impact on the continuation or more practically, the withdrawal of grants of legal aid than was the case in previous years.
7. AILA do not consider they are qualified to respond to this particular question.
8. AILA is of the view that speculative fee arrangements have improved access to justice in limited cases and usually in cases where during pre-litigation discussions liability is admitted but quantum is still to be determined. In such cases the prospects of failure and therefore the risks involved, would appear to be quite low. These arrangements have been of particular value in cases where the applicants would not be eligible for legal aid.

9. AILA, within this paper, has expressed the view that insurers should have a much greater input into funding of litigation in Scotland and consider that this might apply to all forms of personal injury actions in both the Sheriff Court and the Court of Session.
10. AILA have, within this paper, proposed that insurance premiums payable in such circumstances should be considered a legitimate part of the claim to be adjusted or determined by the Court in the same manner as any other loss incurred by the Pursuer. They are of the view therefore that the costs of such premiums should not form part of the recoverable judicial expenses.