

LAW SOCIETY OF SCOTLAND – REMUNERATION COMMITTEE

SHORTFALL IN JUDICIAL EXPENSES

THE COST OF LITIGATION AND ITS IMPACT UPON THE SUCCESSFUL PARTY

In the Society's Civil Justice Committee's Response to the Civil Courts Review Consultation Paper reference is made to the shortfall between judicial expenses and the amount which the Solicitor charges his/her client. Judicial expenses almost always fall short of the actual cost of the work which has to be done in both preparation for litigation and the running of the action itself. The Civil Justice Committee noted that party and party expenses are likely to amount to approximately 60% of the agent and client expenses which the solicitor for the successful party would be entitled to charge the client.

As lawyers who are familiar with the Court system and who know that the judicial expenses will not cover the whole of the costs we are professionally inured to that fact. Clients, however, are not, and perceive an injustice in the winning party having to make good the shortfall. All clients are made aware of the position at the outset of their case but it is, nevertheless, a common experience among solicitors to have to explain the position again at the conclusion of the case. Lay clients have difficulty in reconciling the fact that they have won and been awarded the expenses with the fact that they have to pay a contribution to the costs by reason of the judicial expenses falling short of the actual cost. Often, the shortfall can be significant and dents the principle of restitutio ad integrum.

The principle behind the calculation of judicial expenses is well understood. They are restricted to those costs which are reasonable for the proper conduct of the case. It is therefore a test of reasonableness which is applied when either a judicial account is taxed by the Auditor of Court or adjusted between parties. This paper examines a random sample of 29 judicial accounts which have been taxed or adjusted within the last year or so with a view to examining the extent to which the system serves its stakeholders, whether clients or service providers. The results are to be found in the Table at Appendix 1 to this paper. Thereafter, applying the experience of the Law Accountants involved, the paper examines the relationship between the solicitor and client expense and judicial expense with a view to examining the areas of tension between cost and ability to recover.

The samples were examined by two experienced Law Accountants, James Flett of Alex Quinn & Partners and Stewart Mullan of Mullans. In addition to extrapolating information on gross and net costs they also re-examined the case files with a view to looking at the true cost in relation to the services provided by the law agent and service providers. This information was developed applying data available from the Law Society of Scotland's Cost of Time Survey on average fee rates together with information provided directly by the Law Accountants on typical charge-out rates for the work concerned. These fee rates are grounded in the costs of running a legal practice.

A number of issues can be identified within the data produced:-

- Only law agents fees are charged on a separate judicial rate.
- Outlays (Court fees; experts' fees; witness expenses) are a major element in the cost of litigation. They have to be funded but there is no recognition of the cost of doing so except in exceptional circumstances.
- Fees charged by Counsel are rendered on a solicitor and client basis and any shortfalls requires to be funded either by voluntary reduction or by offset against law agent's fees or principal sum. Approximately 88% of counsel's fees are recovered judicially on average. The samples considered indicate that only 63.17% of the solicitor's fee will be recoverable by way of judicial expenses. The restriction to agent's fees is therefore greater than the restriction to Counsel's fees.
- The notion that judicial expenses recovered are close to solicitor and client cost is not borne out by the figures produced. In most cases there is a substantial shortfall which requires to be funded by either the service provider or the successful litigant.
- The cases examined range from damages of below £10,000 through to a figure of above a quarter of a millions pounds.
- Expenses recovered generally in Scotland equate more closely to standard recovery in England (CPR 44.1 (a)) than fee indemnity basis (CPR 44.1 (b)).

We do recognise that there will inevitably be cases in which a client is particularly difficult or demanding. We should therefore make it clear at the outset that we do not advocate full recovery of all agent and client fees. That result would be unfair on a paying party who happened to have been unlucky enough to lose a case to a "needy" client who has monopolised the time of his solicitor or counsel beyond what was reasonable for the proper conduct of the cause. By the same token, it is inequitable that a client who makes efficient use of the systems available and is not either a difficult or demanding client, should still be expected to suffer a diminution of the sum awarded as an intrinsic part of the procedure. The Court does have the power to make awards of expenses on an agent and client, client paying basis but such awards are few and far between and are usually only made when the paying party has behaved in an irresponsible fashion. The cases with which we are concerned in this paper are, rather, those in which no such criticism can be ventured against the paying party, the receiving party has not been a "needy" client, and a basic award of judicial expenses is made.

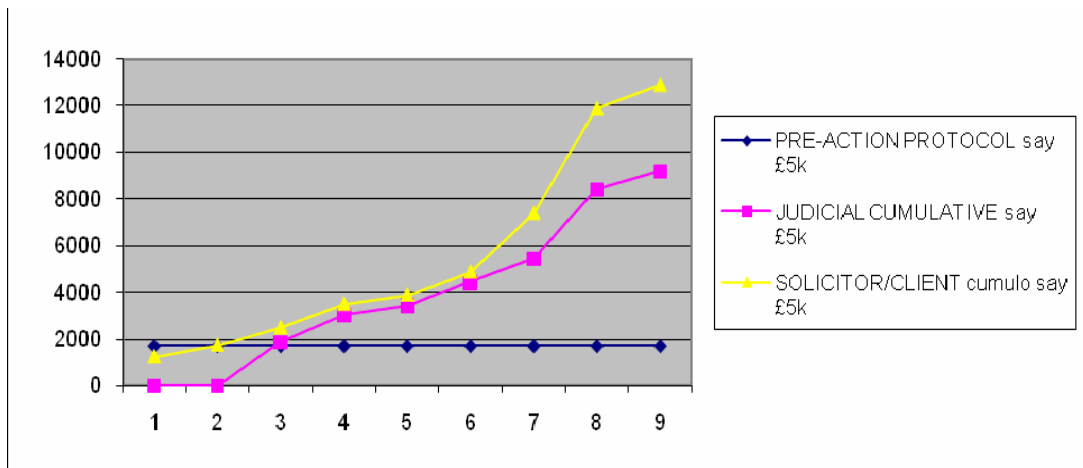
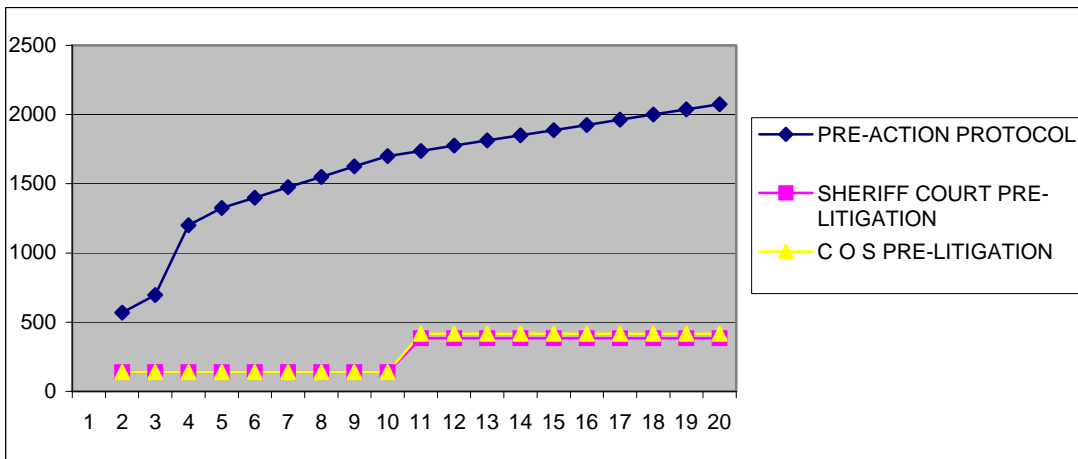
We are therefore examining areas where the "reasonable expenses" are failing to produce a fair result to the extent that a receiving party, who has not been difficult or demanding and thereby added to the work which his lawyers have had to do on his behalf, has nevertheless failed to recover for a substantial part of the basic work which has had to be done.

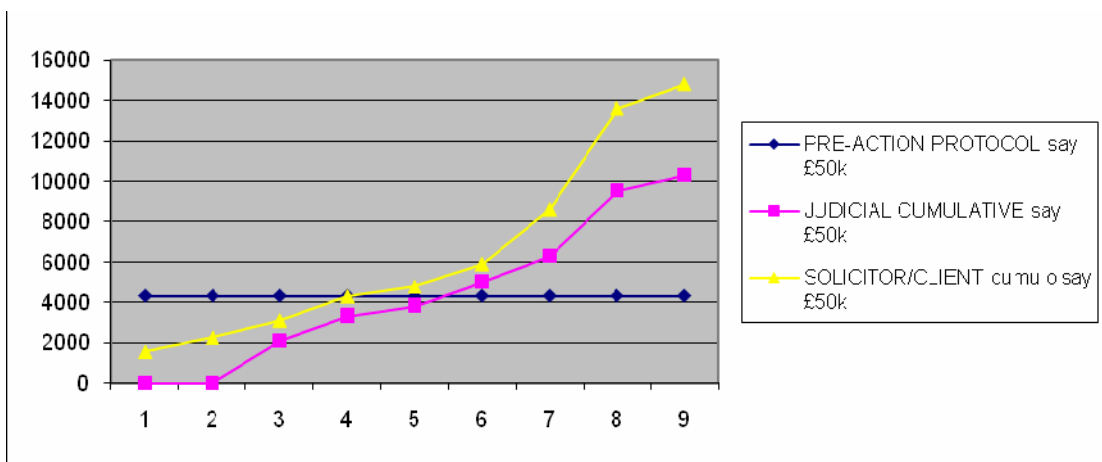
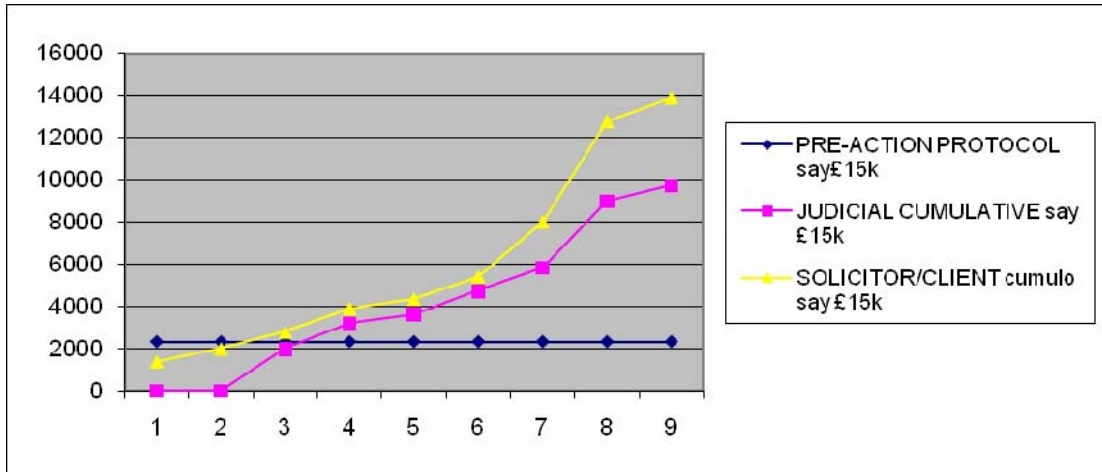
BRIDGING THE GAP – WHERE DOES THE GAP EXIST?

In terms of the work which needs to be done to progress a litigation and the expenses recoverable for that work our research suggests gaps in recoverability exist at the beginning of the litigation and at the preparation for a Proof.

This is clearly seen in the graphs below which illustrate the fees recoverable in cases of about £5,000, £15,000 and £50,000 in value respectively with reference to amounts recoverable under the Pre Action Protocol in personal injury cases; judicially; and on a solicitor/client basis (on the basis of an hourly rate of £175 per hour which our Law Accounts consider to be a reasonable rate).

PRE-LITIGATION





There is provision for the successful party to seek recovery of expenses for work done before the action commences but the fees allowed only cover a small proportion of the cost of the work which must be done to investigate and prepare a case for Court. By way of example, in the Court of Session the block fee stands at £416.50 for this work.

The fee has not been affected in personal injury cases by the introduction of the Pre-Action Protocol which was agreed between the Society and the Forum of Scottish Claims Managers with effect from January 2006.

The Protocol provides for a block Instruction Fee of £320 for cases up to a value of £1,500 and £700 for cases above that value. In addition, there is also a completion fee (which is calculated on a percentage basis with reference to the value of the case).

The Protocol fee, which is considered by both sides to be proportionate to the value of the case is, of course, the result of an agreement between the insurance industry on one hand and the legal profession on the other. Despite the fact that Protocol Fees have been agreed by the two "sides" in personal injury work as fair remuneration for pre-litigation work, their value has not been translated into judicial work. It is an area in which there is an obvious shortfall between the value of the work done on behalf of a successful party and the amount recoverable.

Voluntary protocols have now not only been agreed for personal injury cases but also for professional negligence and industrial disease cases and pre action communication between parties to a commercial action has been formalised to a considerable extent in commercial cases until Practice Note No 6 of 2004. It is noteworthy that even in the smallest value cases the Protocol fees are higher than the block fee allowed in the Sheriff Court and Court of Session for work done before an action commences. (See Table of Pre-Litigation Fees - below.)

The Personal Injury Pre Action Protocol is targeted at cases with a value of £10,000 or less but with the abolition of the old Chapter 10 scale it is the only available point of reference for the valuation of extra judicial fees in such cases and is therefore used as a point of reference for larger settlements.

There is evidence to show that the Personal Injury Pre Action Protocol is not as effective in settling cases extra judicially as had been hoped (see "A Breach of Protocol" by Graeme Garrett – Journal of the Law Society of Scotland, February 2008) and that litigation is often necessary to secure fair compensation for an injured client.

It can be cheaper for an insurer/defender to keep their best offer until an action calls and lodge it as a Tender with Defences.

Should that happen, there will have been work done to litigate the case which is part of the litigation and as such is recoverable. However, only a fraction of the pre action litigation work (meetings, correspondence, telephone attendances, research, advice, investigation and so on) is actually recoverable on a party and party basis and the judicial fees are significantly less than the fees which the insurance industry has agreed is reasonable for that work (see table below). It is therefore, in many cases, the client who has to pay for that work.

PRINCIPAL SUM	PRE ACTION PROTOCOL	SHERIFF COURT PRE-LITIGATION	C O S PRE-LITIGATION
£1,000	£570.00	£138.90	£138.90
£1,500	£695.00	£138.90	£138.90
£2,000	£1,200.00	£138.90	£138.90
£2,500	£1,325.00	£138.90	£138.90
£3,000	£1,400.00	£138.90	£138.90
£3,500	£1,475.00	£138.90	£138.90
£4,000	£1,550.00	£138.90	£138.90
£4,500	£1,625.00	£138.90	£138.90
£5,000	£1,700.00	£138.90	£138.90
£5,500	£1,737.50	£383.80	£416.50
£6,000	£1,775.00	£383.80	£416.50
£6,500	£1,812.50	£383.80	£416.50
£7,000	£1,850.00	£383.80	£416.50
£7,500	£1,887.50	£383.80	£416.50
£8,000	£1,925.00	£383.80	£416.50
£8,500	£1,962.50	£383.80	£416.50
£9,000	£2,000.00	£383.80	£416.50
£9,500	£2,037.50	£383.80	£416.50
£10,000	£2,075.00	£383.80	£416.50

In his above article, Mr Garrett produces evidence to show that poor offers are the norm in pre litigation personal injury claims and one of the reasons suggested for this is to be found in another article by Ronnie Conway entitled "A Colossus in the Room" – Journal of the Law Society of Scotland – January 2008, page 14.

There is an obvious shortfall in reasonable recovery of expenses at this stage which needs to be addressed as a matter of equity. In any event, while it is not part of this paper to address the question of whether or not Pre Action Protocols should become compulsory that is something which has been raised in the Review's Consultation Paper and if that route is followed then it would be essential to link the fees agreed for the work done under Protocols to be recoverable as part of any subsequent litigation in order that the Protocol is effective and that the tactic of waiting until just after litigation has been commenced before making a reasonable offer is discouraged.

There would need to be a review procedure in place to see that Protocol fees did not atrophy by reason of inflation but if Protocols become a compulsory route to litigation then their fees could be reviewed by the Lord President's Advisory Committee in the same way as the Court Table now is.

Irrespective of whether or not Protocols become compulsory in advance of litigation, our research reveals a significant shortfall in the cost of work which is done in advance of the litigation and the judicial expenses allowed for it and it is an area which needs to be addressed to reduce the gap between judicial expenses and actual cost.

PROOF PREPARATION

As can be seen from the above graph, once a case has reached the start of Adjustment Procedure the differences between actual cost and judicial expenses diminishes but the gap begins to grow again as the case approaches the Proof Preparation stage.

The block fee for Proof Preparation work in a Court of Session personal injury action is £940.40 and in an Ordinary Cause is £942.35. That fee is intended to cover all work carried out in preparation for a Diet of Proof or Jury Trial, including arranging the Consultation on the sufficiency of evidence, citing witnesses and all work involved in checking and writing up the process.

Our Law Accountants advise that the work involved in arranging and preparing a Consultation on the sufficiency of evidence amounts to approximately £150 (with no allowance for attendance at the Consultation itself).

The work involved in the preparation and lodging of a List of Witnesses and the citation of those witnesses is estimated at a cost of about £375.

Accordingly, in carrying out only two of the necessary areas of Proof preparation, over 50% of the block fee is exhausted. The further basic work which requires to be done includes scheduling the timing of witnesses' attendance and dealing with all follow-up work in that regard, especially liaising with expert witnesses; considering the other side's List of Witnesses and productions and identifying any further investigations which may be required in light thereof; discussions and correspondence with clients which may include meetings; consideration of developments arising from the Pre Proof Consultation such as updated expert reports, precognitions and further productions; general communications with Counsel including updating Counsel's papers and any other areas of preparation which might have to be addressed, such as considering whether or not a Commission to take evidence from particular witnesses is required.

All of that work is part and parcel of the routine preparation for Proof in straightforward cases and in those which are more complicated or difficult the element of preparation will be greater.

In short, the fees allowable simply do not reflect the amount of basic work which needs to be done.

At present it is not open to a Solicitor to draft a judicial account on a mixed basis, ie partly time and line and partly block fee. It was once open to Solicitors to do so but our view is that a return to any mixed fee basis would create more problems than it would solve. However, the judicial fee structure for this part of the case does not recognise the amount of work which has to be done and should be addressed.

In order to reduce the shortfall the work which is routinely required over and above that for which the block fee allows needs to be taken into account in judicial expenses. This can be achieved by treating the basic fee for Proof preparation as a starting point and allowing the receiving party to claim an open ended uplift on the basis of what has had to be done to prepare a particular case for Proof. A detailed breakdown which refers to the number of letters written, attendances on the telephone and at meetings, and other chamber work would be required in order to justify the uplift without going to the extent of preparing a detailed time and line entry. The purpose of the breakdown would be to give the paying party and the Auditor the necessary information to establish the reasonableness of the uplift and leaving it open ended would allow the receiving party the necessary flexibility with reference to the difficulty or complexity of the case. The extent of any uplift would be a matter for the Auditor's discretion and it would be open to him to provide guidance in Practice Notes and through his decisions. (In the Court of Session the Auditor has an overriding discretion to increase fees if he considers it appropriate but such discretionary uplifts are not the norm.)

COUNSEL'S FEES

Counsel's fees will make up a significant part of any judicial account in the Court of Session and in many Sheriff Court accounts.

Unlike solicitors, counsel's fees in Scotland are not the subject of any judicial table.

Counsel's fees are issued on an agent and client basis and are frequently the subject of dispute in negotiations and Taxations. This, in part, is because the Proposed Fee Notes issued on behalf of counsel tend to be brief and uninformative and no detailed reference to the amount or nature of the work which has had to be done for a particular item is given. (Some counsel have recognised that it is very helpful to have reference to that type of information in their fee notes and have adopted a practice of doing so but they are in the minority.)

The lack of any certainty about how much will be recoverable in respect of counsel's fees means that there is a greater scope for dispute about them and in our Law Accountants' experience many accounts require to be taxed because of this lack of certainty, especially in cases which are settling at or near Proof or which have been the subject of Proof.

Obviously, from the client's point of view, the longer it takes for an account to settle then the longer it is before any final accounting can be done. This is one of the hidden costs of litigation in that while counsel may be acting on a speculative basis, experts and lay witnesses are not and their fees will have been paid at an earlier stage in the case, as will Court fees. Court fees, of course, have now become a very significant outlay because of the increases introduced in July 2007 and August 2008.

Interest on expenses is only recoverable in exceptional circumstances. In the vast majority of cases interest on the outlays is not recoverable and the client ends up paying that interest whether directly by means of a funding account or indirectly by reason of the cost of interest or outlays being taken into account by the funding Solicitor.

Delays in recovery of expenses adds to this hidden cost and the subsequent shortfall between recoverable expenses and actual cost. Depending on the size of an account it can take anything up to nine months to a year after the final Interlocutor to recover expenses.

If there were some certainty about the level of Counsel's fees recoverable judicially then the effect would be to reduce the scope for argument over this element of the judicial account and speed up the process of recovery. This could be achieved by way of a table of counsel's fees. Given that the sanction for employment of counsel is needed in the Sheriff Court there is no obvious reason for one table not applying to both the Sheriff Court and Court of Session actions. The Lord President's Advisory Committee could determine appropriate fee levels (in the same way as they do for solicitors' fees). There is already precedent for guideline tables for counsel's fees in the House of Lords and taxing officers have a general discretion to decide whether higher or lower fees are appropriate. The fees set out in those guidelines are treated as being "going rates" and if counsel seeks higher fees then they must explain their reasons for doing so in a note. Introduction of similar guideline tables in Scotland for general work by counsel would go a long way to introducing some certainty on recoverable fees and reducing the length of time it takes for accounts to be adjusted and settled.

The sooner an account is settled then the sooner funding is reimbursed and the less interest the client has to pay. However, until interest becomes recoverable on all outlays from date of payment, it will continue to quietly contribute to the shortfall between judicial expenses and actual cost of litigation.

CONCLUSIONS

It is only a relatively small proportion of clients who have to resort to litigation in order to vindicate their rights but when they do there is an expectation that having taken the risk they will, if successful, recover the cost of having done so. The present system for recovery of judicial expenses is not meeting that legitimate expectation.

There must be controls in place to protect the paying party from the profligate client and the test of reasonableness works well in this regard. However, the work which needs to be done at the start of a case and in preparation for a Proof, all of which is necessary for that case's proper conduct, is largely overlooked in our judicial expenses and if "Access to Justice" is to be achieved then it is important that the winning party recover as much of their reasonable costs as they can.

The hidden cost of funding outlays adds to the shortfall and this particular burden will now increase with the large rises we have recently seen in Court fees. Interest on outlays would assist clients in recovering the actual cost of going to Court and a guideline table of judicially recoverable fees for Counsel would help speed up the process of agreeing accounts without the need for Taxation.

The first two points could be addressed by way of making an appropriate recommendation to the Lord President's Advisory Committee and the second two, we believe, would require appropriate legislation.

One of the Review's concerns is that litigation is far too expensive and something must be done to make it cheaper. If a successful party can make full recovery of his reasonable costs then the litigation will be cheaper for him but that, of course, is not what the insurance industry and others mean when they call for cheaper litigation. The information provided with this paper points to the areas where a shortfall exists between actual costs and judicial recovery but it cannot tell the whole story. Many cases are run by Solicitors who restrict their fees to the judicial expenses or who absorb unrecovered items in their own fees. This happens more often in lower value cases. It has been suggested in the Review that judicial costs in lower value cases are disproportionate. To an extent that perceived problem has now been addressed by increasing the privative jurisdiction to £5,000. Cases of relative complexity will now have to be litigated in the Summary Cause Court (which is an inappropriate forum for them) and the winning party will be unable to recover a greater proportion of the actual cost than if the case has been run as an Ordinary action or in the Court of Session. In such cases, a greater proportion of the cost will not be recoverable judicially and solicitors will be forced to decide between making a larger, proportionate charge to their clients or reducing their own income. In many lower value cases the client will be better off if he does not litigate at all and instead accepts a principal sum even if it is far less than a fair value for his losses.

We fail to see any justice in that situation but it is where our system is headed if the calls for cheap litigation are heeded. Litigation, if it is to be done properly, has basic costs to it and it is a risky business. Those factors have been part of the landscape against which the majority of cases and claims settle without litigation or prolonged litigation.

We already have the example of small personal injury claims to draw upon as a danger warning of what happens when the reasonable costs of litigation are not recoverable. Solicitors stopped doing that work because it did not pay – even if the client's damages went towards fees and outlays. The field was abandoned to insurers and corporate defenders, save for a rump of party litigants who were outgunned and took up disproportionate amounts of Shrieval time. (See – "In the shadow of the Small Claims Court. The impact of small claims procedure on personal injury litigants and litigation" – Elaine Samuel – Scottish Government Publications – 27th January 1999.) Personal injury cases have been saved to some extent now from that scenario but clients will continue to struggle to find representation in other areas where the value of the claim is less than £3,000.

The paying party in an action has a lot of checks and balances to protect him. Some of these are mentioned above but there are others such as contra awards of expenses for unnecessary procedure or the protection which Tenders can afford.

Lawyers and litigation may be perceived by some as an evil but in civil society they are, at the very least, a necessary evil if clients are to have a realistic chance of fully vindicating their legal rights. The Review should heed the words of Cicero when considering these issues – "Nervos belli, pecuniam infinitiam" – ("the sinews of war is unlimited funding"). Litigation takes the place of self help in our civil society which is why it is so important. Perhaps it would therefore be fairer to Cicero to paraphrase him by concluding that the sinews of litigation is reasonable funding.

SS/SDL