
County Court Scale Costs & Recent Practice and Procedural Changes

Bar Council - Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar Council welcomes the opportunity to contribute to this consultation in respect of the County Court and appreciates the constructive engagement with the legal profession by the County Court Rules Committee. Personal injury barristers take the view that the present system in the County Court provides a forum in which the costs of proceedings and fees are both moderate and ascertainable to the parties involved. The principle of 'swings and roundabouts' as an exercise in balancing out the costs over a number of cases, has proved to be efficient and effective over the course of the last 20 years.
3. The Bar's response to the consultation is structured according to our comments on the proposals outlined in each of the questions contained in the document.

Q1. Do you agree with the proposal to review scale costs on a two year cycle?

4. The Bar is content for the Committee to undertake a regular review of scale costs given the potential for changes to occur across a range of factors which may impact on fair and reasonable remuneration for legal professionals, such as the rate of inflation. However, we do not believe that a fundamental review of all issues is necessary every two years.

Q2. Do you agree with the proposal that there should be a 3% rise in scale costs? If so, should it be done by way of two equal, mutually contingent instalments of 1.5%?

5. The Bar agrees that there should be a phased 3% rise in scale costs over a two year period by way of a 1.5% increase in 2016 and a further 1.5% increase in 2017.

Q3. Do you agree that there should be a new lower scale costs band for awards of £0-£500? If so, at what rate should the Committee set the costs payable?

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6. The Bar notes that following the introduction of three further bands in 2013 to facilitate the increase in the county court jurisdiction from £15,000 to £30,000, there are a total of ten bands. The current bands are logical and manageable and the Bar welcomes the proposals to leave these unchanged at present. However, we have concerns around the proposed introduction of a new lower scale costs band for awards of £0-£500 which are aimed at catering for 'insurance excess' cases which presently usually fall within the £0-£1000 band in the scale costs.
7. At present The County Court (Amendment) Rules (Northern Ireland) 2013 provide remuneration for counsel in the £0-£1000 band at a rate of £180. These cases already typically involve a considerable amount of preparation work by a practitioner. Therefore the Bar considers that it would be difficult to select a figure lower than £180 for a new £0-£500 band which would adequately reflect the work undertaken by counsel. Careful consideration would be required in devising such any new lower band to ensure that it represents fair and reasonable remuneration for the work undertaken. We believe that the costs payable should be no lower than £150 if such a band is to be introduced.

Q4. Do you agree that fees for miscellaneous costs should be increased to the same extent as the substantive scale costs?

8. The Bar suggested in a previous consultation response last year that the procedural changes and the Pre-Action Protocols introduced in 2013 had led to an increase in interlocutory reviews alongside a greater amount of preparatory work for practitioners under Part IX of the Miscellaneous Costs of The County Court (Amendment) Rules (Northern Ireland) 2013. Whilst we believe that a wider review of the interlocutory fees would be appropriate, we are content with the proposal for miscellaneous costs to be increased to the same extent as the substantive scale costs at the current time.

Q5. Do you agree that the fee for drawing up a list of documents under Order 15 should be £60.00?

9. The Bar agrees that the fee for drawing up a list of documents under Order 15 is too low at present (£42.07). The fee for drawing up a list of documents can be uplifted at the judge's discretion. However, we agree with the Committee's assessment that this should be increased to £60 to reflect fair and reasonable remuneration for work completed.

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Q6. Do you agree with the Committee's proposal that it should not introduce a specific fee for attending review hearings?

10. The Bar disagrees with the Committee's proposal that it should not introduce a specific fee for attending review hearings. We believe that a fee should be paid if a review is ordered by a judge as such a review will only be directed if it will be purposeful and is necessary for the efficient administration of justice in a particular case. The Bar takes the view that specific fees should be introduced for review hearings.

Q7. Do you agree with the Committee's proposal that it should not introduce an automatic uplift in scale costs in cases involving multiple defendants?

11. The Bar is content with the status quo in relation to cases involving multiple defendants. We accept that such a case will not necessarily be more complex simply by virtue of the involvement of multiple defendants. The 'swings and roundabouts' principle of the scale costs system adequately caters for such cases at present.

Q8. Do you agree with the Committee's proposal that it should not make any change to current travel entitlements?

12. The Bar disagrees with the Committee's view that it should not make any change to current travel entitlements. The consultation document acknowledges that entitlements for travel have not increased for some time and are currently nothing for the first 20 miles, £23.00 for travel between 20 and 50 miles and £46.00 for travel to Courts in excess of 50 miles. We consider that the current rates payable to counsel are no longer reasonable given that they have not been reviewed for a number of years and are no longer reflective of the cost of travel. Furthermore, the comparable travel rates paid to expert witnesses involved in cases are well in excess of the amount paid to counsel.

Q9. Do you agree with the proposal that there should not be a separate fee for drafting an affidavit?

13. The Bar accepts the Committee's suggestion that the present fee for "Instructions and drawing notice of motion [etc.]" will be amended to reflect that it includes any affidavit filed. However, the Bar would suggest that where an

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affidavit is drafted which is not in connection with drafting a notice of motion then there should be a separate scale fee for the drafting of that affidavit of £50.

Q10. Do you agree with the proposal that the range of cases in which the discretionary uplift is currently available should not be widened?

14. The Bar notes that Order 55 Rule 11 currently provides discretion to the judge to give a one third uplift in particular types of cases. We are content to accept the Committee's current proposal that the range of cases which qualify for the discretionary uplift should not be widened at present. However, this is an area which the Committee may wish to consider further following completion of the Review of Civil and Family Justice.

Q11. Do you agree with the proposal that there should not be provision for the uplift to apply in certain cases unless the court orders otherwise?

15. The Bar considers that there are a range of complex cases in which it would be appropriate for an automatic uplift to be applied unless the Court directs otherwise. We highlighted in last year's initial consultation that the Committee should consider making a further adjustment to reflect the presumption that complex cases, such as medical negligence in the case of a child, should qualify for an uplift on costs.
16. The Bar believes that this is an area which could warrant further consideration if the practices and procedures in the County Court are reviewed more fully on completion of the Review of Civil and Family Justice. However, we are content to accept the Committee's proposal that no changes will be made in this area at present.

Q12. Do you agree with the proposal to provide for a fee for preparation of a Court-directed skeleton argument with the fee payable to be at the judge's discretion up to a maximum of £100?

17. The Bar welcomes the Committee's proposal to provide a separate fee for a court-directed skeleton argument. We previously highlighted that it is unsatisfactory that at present there is no fee structure under which counsel may be paid for the development of a skeleton argument. These skeleton arguments can be lengthy and detailed and can ultimately save a significant amount of Court time.

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18. However, we are concerned that the Committee is proposing that the fee payable should be at the “judge’s discretion up to a maximum of £100”. The Bar believes that the decision to direct counsel to prepare a skeleton argument should rest with the judge but the £100 should be a fixed fee. Does the Committee instead envisage that the judge could make an award of £30, £50 or £100, for example, depending on the length and complexity of the skeleton argument? We consider that this would place an unnecessary administrative burden on the judiciary to decide on the appropriate remuneration for a skeleton argument. Elsewhere the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 provides for a flat fee of £125 for a skeleton argument in the High Court. One of the advantages of scale costs is that they provide a straightforward and predictable system of costs. Consequently, we would call on the Committee to clarify how this payment for skeleton fees will operate in practice.

Q13. Do you agree with the proposal that, in remitted actions, the defendant’s fee should be equal to a case in which the civil bill claims £30,000 (i.e. the present maximum jurisdiction of the County Court)?

19. The Bar agrees with the Committee’s proposal in relation to remitted actions and accepts that this will rectify the gap created by the increase in the County Court jurisdiction from £15,000 to £30,000.

Q14. Do you agree with the Committee’s proposals in relation to practice and procedural issues?

20. The Bar agrees with the Committee’s proposals in relation to practice and procedural issues. We understand that these will be examined as part of the Review of Civil and Family Justice which is looking at procedures generally and will be considered further by the Committee upon the Review’s completion.

Q15. What, if any, other matters should be taken into account when assessing the impact of the proposals in this paper?

21. The Bar would highlight that the County Court scale costs system offers both access to justice and value for money, particularly when compared to the system in England and Wales. The Bar of Northern Ireland would urge the Committee

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to protect the fundamental structure of this efficient and successful system. This is particularly important in light of a number of overlapping reform initiatives which are currently underway. This includes the forthcoming Review of Civil and Family Justice, alongside the outworkings of the Report of the Access to Justice 2 Review which recommends the introduction of conditional fee agreements and proposes making the County Court the compulsory entry point for a much greater range of cases. The Bar is very concerned around the potential impact of the Access to Justice 2 policy proposals on the County Court given that they are largely dictated by short sighted budgetary considerations. Furthermore, the Committee should be mindful that the views expounded in Access to Justice 2 may conflict with the recommendations of the Gillen Review when it is published in 2017.

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