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Review of Expenses and Funding of Civil Litigation in Scotland

RESPONSE
BY
THE
ASSOCIATION OF INDEPENDENT LAW ACCOUNTANTS (AILA)

The Association of Independent Law Accountants was formed in 2001 in response to the then review of the Legal Aid Civil Table of Fees for Sheriff Court cases. AILA played an active part, liaising with other interested Parties as diverse as the Family Law Practitioners and Scottish Women's Aid to highlight the potential problems likely to arise from the introduction a Table of Fees based solely on "block fees". A Table which was designed to incentivise early resolution and to financially penalise complicated and long running cases with multiple Proof Hearings or requiring the instruction of Counsel. Representations were made to the Justice 1 Committee while the Parliament considered the impact of the introduction of the new tables. Many of the subsequent amendments, including provision for a detailed account to be rendered where exceptional cases status has been granted by the Scottish Legal Aid Board (SLAB), have come about as a result of continuing dialogue between Law Accountants and SLAB.

The Association has 21 member firms, some of whom have over 30 years experience with some trained by SLAB or it's predecessor the Law Society of Scotland, Legal Aid Central Committee. Not all Law Accountant firms have chosen to become members. AILA have extended associate membership to Law Accountants employed within legal firms. The principal aims of the Association presently, are to provide training to its members and the profession, to keep members abreast of changes to the Tables of Fees and judicial decisions likely to impact on the preparation or adjustment of Judicial Accounts of Expenses. It continues to have good relations with both SLAB and the Law Society of Scotland and is actively engaged with SLAB and the proposed ongoing online accounting system.

Law Accountants are ideally to comment on the management of the case being instructed at the conclusion thereof either to prepare the Judicial Account of Expenses on behalf of the successful Party (for the purposes of these representations referred to as the Pursuer) or to consider and adjust on behalf of the paying Party (again for ease, referred to as the Defender). From a Defender's perspective, the intimation of the Account of Expenses will be the first indication of the costs being sought and often results in expressions of surprise where those expenses might very well exceed the final damages award in favour of the Pursuer. Although the matter of certification should have been part of the

negotiations before issue of a final interlocutor, the Defender will often have had little indication of the costs to be claimed by the Pursuer's Agents by way of fees to their Solicitors, outlays to expert witnesses and to Counsel.

From a Pursuer's perspective, the preparation of the Judicial Account allows the Law Accountant to get a feel for the overall case and comment on any part(s) thereof likely to elicit objection from the "other side", eg, there may have been undue delay in progressing the case, where there may have been a duplication of effort (for example the reallocation of a case to different fee-earners during the course of an action), where there has been non-recoverable work undertaken either as a result of the Client failing to provide timeous instructions or the Agent in implementing same. The file will also disclose advice on the instruction of expert witnesses and employment of Counsel (Junior usually in the Sheriff Court and Senior Counsel in Court of Session cases) and whether those instructed should be revealed to the Opponents Agents by way of disclosure of reports prepared in the case of expert witnesses or intimation of Senior being instructed to attend a Pre-trial meeting or to enter into extra-judicial discussions with their counterpart.

AILA wish to respond to the Review questions as follows:-

Chapter 2: Access to Justice

1 In the view of AILA a significant barrier to access to justice is the cost differential between Judicial and Agent/Client expenses. In its response, AILA propose a radical revision of the Table of Fees which will be based on time engaged and may therefore provide litigants with a more accurate indication of the different rates of fees being charged by their solicitor and those recoverable on a judicial basis.

Chapter 3: The Costs of Litigation

2 In the view of AILA solicitors fees for litigation to be recovered should be on the basis of time expended but regulated by a new revised Judicial Table of Fees as proposed in AILA's response.

3 As referred to in the AILA response, the view of AILA is that LPAC have failed to properly address reviews and a new body under the guidance of the Auditor of the Court of Session should be set up with an independent advisor who can give professional advice on cost of time matters and whether the unit charge proposed by AILA should be subject to increases/decreases.

4 In the view of AILA the test to be applied prior to the instruction of Counsel in the Sheriff Court or Senior Counsel in the Court of Session should be one related to the complexity of the case, the value of the claim, equality of arms and the potential recovery from opponents agents. As referred to in the response, AILA are firmly of the view that Counsels fees should be regulated by a Judicial Table of Fees and therefore when sanction is applied for and granted there would be openness and transparency as to the potential costs for Counsels involvement both for the litigant instructing Counsel and for the opponent who potentially may be liable for those costs.

5 As referred to in its response, AILA is of the view that applications for the employment of expert witnesses should be made to the Court in advance of the expert being instructed and as part of that application there should be an indication of the potential costs as well as a statement setting out the reasonableness and necessity of those instructions. It would also be open to the opponents agents to request the Court that those instructions be undertaken on a joint basis and further the Order would be one from the Court and the expert witness's duties would be to the Court rather than to the instructing litigant.

6 As referred to in its response, AILA is of the view that the recovery of Counsels fees should be based on a Judicial Table and should only apply from the date an Interlocutor certifies the case as suitable for the employment of Counsel.

7 AILA's above response also applies to certification of the case as suitable for the employment of Senior Counsel in a Court of Session Action.

8 In the view of AILA the presiding Judicial Office holder should not be responsible for assessing Counsels fees. AILA's response agrees that there should be a Judicial Table of Fees for Counsel and therefore the appropriate person to assess/tax Counsels fees should be the Auditor of Court when taxing the final Account of Expenses.

9 In AILA's view, fees of an expert witness should only be a competent outlay to reflect work undertaken following approval of that witness by the Court. After the certification of a witness to prepare an initial report, further certification would require to be applied for in the event that supplementary reports were required and AILA envisage that if a consultation were to be held with an expert witness it would also be an open and transparent exercise for the Court to be requested to grant sanction to cover those additional costs. Alternatively, when granting sanction for the report together with associated costs, the question of

additional costs for a consultation could be applied for at that initial stage and the determination as to whether the consultation is a reasonable charge to be recovered on a party/party basis would be left to the determination of the Auditor of Court at Taxation.

10 AILA has proposed in its response that the Judicial Table of Fees for both solicitors and Counsel should be banded. With regard to fees to expert witnesses AILA would take a similar view and therefore where an application is made to the presiding judicial office holder for sanction to employ an expert witness to prepare a report, potentially attend a consultation the costs involved would be part of that application and the opposing party would be aware at that stage of their client's possible liability. AILA's response also raises the possibility that the report maybe instructed on a joint basis which may limit each party's initial costs. While the initial approval to instruct the expert witness will be made by the presiding judicial office holder in the view of AILA the final determination of the costs recoverable on a party/party basis should be left to the Auditor of the Court of Session at the formal Diet of Taxation of the Account of Expenses.

11 As indicated in its response, AILA is firmly of the view that commitment fees for Counsel should no longer apply in Judicial Accounts of Expenses. There is however some confusion over the term "commitment fees". It is the understanding of AILA that a "commitment fee" is a fee paid by the client to Counsel simply committing Counsel to that client's case. Judicial determinations are that such a fee is not recoverable on a party/party basis. It may well be that the reference in this question to a "commitment fee" should properly be referred to as a "cancellation fee" where Counsel is instructed for a lengthy Diet of Proof and the case settles in advance of the Proof and the instructed Counsel seeks to charge his client a cancellation fee for days lost as a result of his diary having been booked out for the duration of the Proof. While such charges are presently, in principle, allowed by the Auditor of Court it remains a bone of contention at Taxation as to the level of those charges recoverable from the paying party. As AILA has referred to in its response, it considers such a system to be outdated and such payment for not undertaking work should not form part of the Judicial Table of Fees for Counsel which AILA considers should be introduced.

12 AILA has proposed in its response a radical revision of the Solicitors Table of Fees based upon minimum and maximum bands. If there were justification in those circumstances ie if the time expended by the solicitor in a commercial action could be justified as longer than say a personal injuries action then within a banded Table of Fees there would be scope to

seek a higher fee.

13 In its response, AILA proposes that an element of a tariff based system should apply but both on a positive and negative basis; for the Pursuer based upon the final award in their favour and for the Defender based upon what might be considered the successful element of the defence ie the difference between the final claim against the Defender and the final award made against him.

14 In the view of AILA the Table of Fees should not prescribe different rates of recovery for the experience of the solicitor conducting the case. If a banded Table of Fees were introduced it may well be appropriate that a more experienced solicitor would be entitled to a fee towards the higher level of the band but only if undertaking additional work would result in lesser work being undertaken by Counsel. For example, if an experienced solicitor undertook the preparation of the Summons/Adjustments/Statement of Valuation of Claim without the requirement for Counsel being instructed then a higher fee may therefore be justified.

15 In its response AILA have proposed a banded Table of Fees with the suggestion that each particular fee could be assessed for complexity and other issues which would normally justify an application for an Additional Fee. It is the view of AILA that it is more appropriate that particular aspects of work undertaken should attract an Additional Fee enhancement rather than the Additional Fee applying to the Account overall.

16 If the concept of an Additional Fee is retained:-

a. AILA are of the view that the present rules regulating an application for an Additional Fee are appropriate and that the application if not made at the conclusion of the Proof or the Hearing on Expenses can be made at any time up to the Diet of Taxation provided that sufficient intimation is given to the paying parties agents of the intention to make such an application.
b. Provided sufficient time is given to the paying parties solicitors to take instructions on the application it appears to AILA that the present rules in the Court of Session whereby the application is dealt with by a member of the Judiciary and when granted the fee assessment is undertaken by the Auditor of Court is satisfactory and does not require to be interfered with. AILA's view is that a similar procedure should apply in the Sheriff Court and the Judiciary should be asked simply to grant the application and the Auditor of Court

should be the person who determines the percentage uplift at the Taxation itself.

17 The question of interest applying on an Award of Judicial Expenses is not one on which AILA has a view.

Chapter 4: Further enhancing the predictability of the costs of litigation

18 AILA does not have a view with regard to this question.

19 AILA does not have a view with regard to this question.

20 In its response AILA consider that in family cases there is no reason why the usual Rule that expenses follow success should not apply in defended actions where the defence is not related to the breakdown of the marriage. Accordingly, AILA are not in agreement that in family actions each party to the litigation should require to bear their own expenses, particularly given the view expressed in the response by AILA that in a proposed SLAS all litigants are likely to pay a substantial contribution towards the costs of their representation.

21 In its response, AILA has taken the view that summary assessment of expenses should not be introduced in Civil Courts in Scotland. While summary assessments may operate in other jurisdictions, the recovery of expenses in Scotland is based upon the Judicial Table of Fees. While there may be an argument that a costs Judge be appointed in the Court of Session to deal specifically with issues regarding expenses that position would appear to duplicate the Office of the Auditor of the Court of Session and AILA's view is that the present system allowing the Auditor to be the Judicial Officer determining expenses is a satisfactory one.

22 AILA's view on this question is responded to above.

23 In its response, AILA has made reference to the pilot scheme of submitting Schedules of Expenditure in the Birmingham Mercantile Court and agrees that provided the clients are also in attendance at the case management conferences and are made aware of both potential recoveries on a Judicial basis and the costs being claimed by their solicitors on an agent/client basis then there may be merit in the scheme. AILA has in its report proposed that interim accounting be undertaken at various stages of the proceedings (a) all charges prior to the raising of proceedings should be considered as part of the claim itself and not part of the recoverable expenses and (b) interim accounting be undertaken throughout the conduct of the case eg. following

the closing of the Record prior to and post any pre trial meeting and before substantial preparation for the Proof is undertaken. Such interim accounting would not be taxed but would provide openness and transparency as well as predictability of potential costs to both parties.

24 As per its response, AILA is firmly of the view that to promote predictability and certainty of judicial expenses limiting powers should be introduced in respect of precognition and report charges. In its suggestion of a revised Judicial Table of Fees AILA propose that the precognition and revisal of report charges be based on the actual time undertaken and not on the length of the document produced. The present system rewards over-lengthy reports and precognitions.

Chapter 5: Protective Expenses Orders

25/26 AILA does not have a view with regard to these questions.

Chapter 6: Referral Fees

27/31 AILA does not have a view with regard to these questions.

Chapter 7: Before the Event Insurance

32/35 AILA does not have a view with regard to these questions.

Chapter 8: Speculative Fee Agreements

36/41 AILA does not have a view with regard to these questions.

AILA has however commented upon the existing Act of Sederunt regulating speculative actions and consider there to be a conflict between the Act and the present practice. AILA's view is that it would be more protective to litigants if all speculative actions were prescribed by the Act of Sederunt.

Chapter 9: Damages Based Agreements (Contingency Funding)

42/46 AILA does not have a view with regard to these questions.

Chapter 10: Third Party Funding

47/49 AILA does not have a view with regard to these questions.

Chapter 11: Alternative Sources of Funding

50 AILA does not have a view with regard to this question.

51 In its response AILA proposes a SLAS should be introduced.

52 AILA do not see the need for there to be any restriction as to the type of litigation which might be covered provided applicants are aware that they will be required to meet a minimum contribution of 60% of the costs but at rates considerably less than present commercial rates.

53 In its response AILA has suggested that any litigant should be eligible irrespective of their disposable income to apply to a SLAS scheme.

54 In its response AILA has suggested that the modification of an assisted person's liability for expenses presently applicable under the Legal Aid Regulations should no longer apply and accordingly the view of AILA is that if a litigant is unsuccessful there is no reason why they should not meet the successful parties judicial expenses in the normal manner. Clearly in those circumstances there would be an obligation on agents to ensure that SLAS litigants were aware not only of their potential contribution towards their own agents costs but a potential liability for their opponents costs as is the position in any non-assisted litigation.

55 AILA does not have a view with regard to this question.

56 AILA does not have a view with regard to this question.

Chapter 12: Scotland's Litigation Market

57/60 AILA does not have a view with regard to these questions.

Chapter 13: Special Cases and Concluding Remarks

61/68 AILA does not have a view with regard to these questions.

Transparency & Predictability

It is therefore the view of AILA that there requires to be more transparency in the legal costs being incurred during the conduct of the proceedings. It should be

possible to predict Solicitors fees based upon the Block Fee table where those charges reflect recoverable fees for particular aspects of work. Areas of unpredictability arise in connection with the fees claimed for witnesses' precognitions and revisals of reports where the table allows fees which may not reflect the actual time spent in the obtaining/instruction of those precognitions and reports and greatly enhance the recoverable fees being sought. If those charges were to more aligned to the actual time spent in obtaining them and maximum recoverable charges introduced, it would allow for both Parties and particularly the Paying Party, a better indication of their potential liability.

Increased Litigation Costs

AILA consider that any significant increase in litigation costs recoverable on a judicial basis over the last, say, 5 year period, is not as a result of increased Solicitors charges. Since April 2007, there have only been 3 increases to Solicitors fees totalling approximately 11% in Judicial fees. The experience of AILA members involved in the preparation and adjustment of Court of Session Judicial Accounts is that fees to both Counsel and expert witnesses during that period have increased well above the rate of inflation. AILA, as other organisations have proposed, are in favour of a Judicial Table of Fees for Counsel which should in principal set out bands of fees recoverable to Counsel for various aspects of work undertaken and possibly to reflect the complexity of the proceedings and other related matters, including the experience of Counsel. Cancellation fees (Counsel) should not be recoverable on a Judicial basis and consideration should be given as to whether such charges should continue to be paid on an Agent/Client basis. Similar consideration should be given as to whether the cancellation fees charged by expert witnesses should be recoverable against the losing Party.

Greater Court Management by the Presiding Judicial Office Holder

It is the view of AILA that there should be more control by the Courts during the conduct of the proceedings in a manner similar to Case Management Conferences now being standard procedure in Commercial cases in both the Court of Session and the Sheriff Court. The concept of a presiding judicial office holder is one with which AILA would concur and consider would allow the Court to have far greater control over costs to be incurred by both Parties.

Application to the presiding judicial office holder should be made for matters which would substantially increase costs, including the use of Counsel, Junior in Sheriff Court cases and Senior in Court of Session cases either with or without Junior. Such sanction should be obtained before the work is undertaken. It is envisaged that along with an application for employment of an expert witness, the costs to be incurred would be provided in support of the application/motion and

there would be the opportunity of the opposing Party agreeing the appointment on a joint basis. The report would be instructed in terms of an order of the Court which would find one or both parties liable for the costs of the report in the first instance. Because the report is at the order of the Court, it would be issued to the Court in the first instance rather than to the parties and fees for instruction and consideration would be those for "Reports obtained under order of the Court" (Paragraphs 6 and 8 of the respective Court of Session tables) rather than one half of the precognition fees for revisal of reports.

Similarly the opposing party would be able to object at the time of the application/motion for authority to employ Counsel either Senior in a Court of Session case or Counsel generally in a Sheriff Court case. Clearly, the reference to Senior and Junior Counsel would apply in a similar manner to the employment of a Solicitor-Advocate in Sheriff Court cases and a Senior Solicitor Advocate in a Court of Session action. Provision within the Rules of Court for such applications would not preclude parties from instructing as many expert witnesses as they wish or to instruct their choice of Counsel, but the costs recoverable from the paying party would be limited to those authorised by the Court.

Consultation with LPAC to Revise & Review the Table of Fees Annually

Reference has been made to the restricted increases in Solicitors fees since 2007. Modification, of the various tables, has been undertaken in recent years but, all too often, on a fairly haphazard basis, attempting to add fees to the block fee table to try and reflect new procedures or where the existing table had no provision for work that required to be undertaken in new court procedures. For example rather than introduce a specific table to account for the different procedures in Commercial actions, those responsible for revising the tables sought to make use of the existing table, cloning on at different times additional fees which were more than often not fit for purpose and unlikely to be used in non-commercial causes. Even then, some work necessarily ordered in commercial causes still do not have relevant charges within the present table. In other instances, changes to the fees included clear mistakes and omissions which only become apparent when accounts are being prepared some time after the introduction of the amendments and the work had been undertaken.

It is the view of AILA that those advising The Lord President's Advisory Committee on Solicitors' Fees (LPAC) have a specific agenda to increase and add fees which would be recoverable by a successful Pursuer. AILA take the view that any proposed revisals to the various table of fees to be adopted by LPAC should be published well in advance of their introduction and comment invited from those who principally make use of the fees tables including AILA, SOLAS, Auditors of Court and any other parties.

Differential between Judicial and Agent/Client Rates

The last major attempt to correlate recoverable fees with Agent/Client expense took place in 1998. At that time the judicial rate was substantially increased – over 43% to introduce a rate of £86 per hour, the same rate as that recommended by the Law Society of Scotland for private work. Since that time and with the abolition of the Law Society recommended General Table of Fees, the differential between the two rates has again increased. AILA are of view that it would be appropriate for a substantial increase to be applied to the judicial hourly rate and would recommend an increase in the region of 25% to introduce a rate of around £175 per hour. AILA are conscious of the increasing costs of litigation and would therefore propose that now would be an appropriate time for a radical revision of the Judicial Table of Fees.

AILA's Proposal for Revised Table of Fees

AILA's proposal is for certain fees to be banded to take into consideration the type of action and the procedures involved, the complexity of the proceedings and the time engaged for particular aspects of work. A unit charge would be applied based on the hourly rate applicable at the time work was undertaken. Time would be split into 6 minute units. For an hourly rate of £175, the unit charge would £17.50. As long as no major revision was required to the table, LPAC would only require to review the unit charge and avoid the present situation where each and every fee is reviewed on an annual basis often leading to confusing discrepancies in fees for the same work being set in the different tables of fees. The banding would allow the Auditor discretion in cases of complexity or other factors for which an additional fee may apply, to assess the fee towards the higher level of the allowable banding to reflect such complexity etc. It would dispense with the present practice where the additional fee is applied overall to the account rather than to particular aspects, such as preparation which might warrant an additional responsibility element to the fee whereas other straight forward matters would not justify any uplift.

Offset Increase in hourly Judicial Rate by revision of certain Block Fees

To offset the potential increase in costs proposed by a substantial increase in the hourly rate, AILA propose that the block fees should reflect actual time spent. For example, the time preparing for a pre-trial meeting should be narrated in the account entry and vouched at taxation, if called upon by the Auditor, with appropriate file notes. The banding would prescribe minimum and maximum fees and a draft of a table, in part, for Court of Session Personal Injury cases is attached to these representations. That principal would apply throughout the case and precognitions of witnesses would have a minimum and a maximum recovery.

Similarly, recoverable fees for perusal of reports from witnesses, both expert and others, would be based on the time spent in their instruction and consideration of the report. Presently, precognitions and report charges are the two factors which account for the non-predictability of solicitors fees and on occasion can account for more than 50% of the fees being sought by way of judicial expenses. Where an expert report might be lengthy, the fee for its revisal can often be more than the full preparation for proof fee and in one case recently adjusted was the equivalent of over 23 hours work. The successful Pursuers Agents were also seeking an increase in fees throughout the action in the region of 80%, which would have brought the recoverable fee for perusing a report to over £5600 and a time of over 40 hours. Such charges are in the view of AILA not reasonable on a party/party basis in accordance with the *Jarvie* decision.

Interim Accounting

AILA are supportive of the suggestion that interim accounting be undertaken during various stages of the proceedings to improve the transparency and predictability of final costs. Such accounting would require to be produced by both parties in the event the Pursuer was unsuccessful. The Accounts would be lodged in process and could be referred to in the taxation of the final Account of expenses. No taxation would be required at the interim stage given that there would be no remit to the Auditor to tax the Account.

One particular difficulty for Defenders' Agents advising their clients on potential costs of defending an action, including sums sued for plus judicial expenses when proceedings are raised is the level of expenses incurred by the Pursuer prior to the raising of proceedings. While Instruction and pre litigation fees can be estimated, the non-predictability of precognition and report charges make that exercise almost impossible. One suggestion is that as part of the Pursuer's craves within the initiating Writ would be a specific and separate claim for expenses incurred up to the date of raising the action and in the same manner as documents need to be exhibited with the lodging of a Statement of Valuation of Claim in PI cases, reports and possible summaries of witnesses statements (as is required in Commercial cases) would also be lodged in support of the claim. Indeed, there may well be an argument that those costs should not form part of the ultimate award of expenses but part of the losses incurred by the party in investigating the claim or entering into constructive discussions with the opponents agents or representatives and should be payable on an Agent/Client basis in the same manner as the party would be seeking to recover costs of medical treatment, claim for services or other losses arising from the event.

Costs Schedules

The intimation of interim accounting throughout the action is to provide both parties with a degree of transparency in ongoing costs. There is reference in the review to the comments of Judge Brown (page 45) that costs schedules are helpful "when the cost paying customers are present at the case management conferences". The suggestion is that only at that time are clients aware of their potential exposure and intimation of both interim accounts recoverable on a judicial basis together with an updated solicitor and client fee would ensure that both parties were being properly informed of costs associated with the litigation and the likely shortfall in expenses not to be recovered. The interim accounting would be used as a guide both to the client and the opponent of potential liabilities, but would not be used by the court to make summary assessment of costs. The present taxation process by the Auditors of Court is robust with proper procedures for objections to the account itself and if necessary to the report by the Auditor following his taxation of the account. Summary assessments would in the view of AILA deny litigants the opportunity for a fair hearing on the question of expenses. It is assumed but not clear from the Review paper that if summary assessments were to be introduced, any decision made thereunder would still be subject to the usual Appeal procedures.

Attendance of the Presiding Judicial Office Holder at Hearings on Statements of Valuations of Claim and Pre Trial Meetings

It is the experience of AILA members that proceedings are regularly extended due to the failure of the parties to reasonably quantify the value of the claim. Statements of Valuation in personal injury cases are often inadequately supported by documentation. For example: Valuations are lodged with notes that pension details and loss of employability is to follow. Parties representatives are sometimes not properly prepared for the pre-Trial meetings. AILA would recommend that in place of or additional to, there should be a Hearing before the presiding judicial office holder when both parties address the office holder with regard to their formal Statements of Valuation of the claim and possibly just after the closing of the Record and before the Court allow a Proof. If the Hearing is in addition to the Pre-Trial meeting, then AILA consider that the presiding judicial office holder should also be present at the Pre-trial meeting, if not to actively take part, at least to monitor the preparedness and willingness of both parties to resolve matters without recourse to continuing litigation. In cases where liability is to remain in dispute or there is little likelihood of agreement on the financial craves, the judicial office holder's attendance may still have input to the final question of expenses and the reasonableness of same is to be determined.

Tariff based systems – positive & negative

Unrealistic, overstated claims by Pursuers and Defenders' failures to make reasonable offers both protract litigation and therefore increase costs associated with same. For those reasons AILA are of the view that an element of a tariff based system should be applied to expenses. AILA do not consider the overall expenses should be tariff based but an enhancement on the agreed or taxed expenses should be made in favour of the successful party. Similarly a tariff based reduction should apply in favour of a Defender based upon the final claim being made against them and the final award itself. Such deductions might also be applied in favour of a Defender where the Court has determined there to be an element of contributory negligence. The imposition of a tariff system in favour of Pursuers and a negative tariff in favour of Defenders would encourageencourage both parties to address their minds at an early stage to produce full vouched and accurate assessments of the claim. As an incentive to reaching early resolutions, the tariff may apply at different rates where settlement is achieved at different stages in the litigation eg. a higher rate for early resolution and perhaps none for a case which proceeds to Proof.

Responsibility of Courts not to increase litigation costs

The Courts also have a responsibility to avoid incurring additional costs and where lengthy waiting for cases to call or Proofs are discharged due to double booking or lack of Court time, the Court should accept responsibility for those costs rather than these be considered expenses of the Court process and sought from the unsuccessful party at the end of the case. The Court's liability would be assessed on a judicial basis as being the "Party" responsible for the abortive work. With today's technology, there should be no need for all cases to be allocated to start at the same time and each case could be given specific times for calling. Where cases do not proceed for whatever reason, motions dropped, actions settled, the Court would be entitled to charge for the times allocated. For example court dues for a Proof set down for three days would still require to be met if the case were to settle in advance shortly prior to Diet, say 14 days. Such costs might not be recoverable from the opponent had they intimated to the Court that a lesser duration would be sufficient. If the Pursuer were insistent on a 3 day Hearing and the Defender 1 day and matters were dealt with in one day, then the Pursuer would require to meet the Court's full costs, but only one day would be recoverable from the Defender. Such costs implications would hopefully once again concentrate both parties minds at an early stage on the potential length required for the Proof and cost implications of overbooking for a Proof diet. In the event, Counsel's fees continue to be recovered as at present (and not according to a

newly established judicial table of fees), a similar argument would apply to the level of Counsel's fees recoverable judicially.

Speculative Fee Agreements

On the matter of Speculative Fee Agreements, AILA acknowledge the reference in the review to the existence of the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 and the accompanying Rules. The experience of Association members is, that, since the number of speculative actions have increased over the years, Agents have entered into Fee Charging Arrangements usually at their standard charge-out rates with a percentage uplift to reflect the speculative nature of those instructions. AILA believe greater clarification regarding these Fee Charging Arrangements is required. Specifically, in the event there is nothing to preclude Agents entering into such Fee Charging Arrangements, are Agents obliged to advise clients of the existence of the Act and the clients entitlement to reject the Fee Charging Arrangement and elect to meet Agents costs in accordance with the Act regulating Fees in Speculative Cases.

Supplementary Legal Aid Scheme

AILA believe there is scope either for a Contingency Legal aid Fund (CLAF) or a Supplementary Legal Aid Scheme (SLAS) to be introduced in Scotland. If a SLAS was to be introduced, it would require to be predicated on various changes to the present Legal Aid arrangements. Eligibility for SLAS scheme would be open to any potential litigant and contribution towards the costs would be based not only on means, but on costs incurred. Litigants would require to contribute to their costs with a minimum contribution of 60% and a maximum of 120%. To encourage experienced court Firms who no longer undertake legal aid work, the fees payable in such cases would require to be substantially higher than the present legal aid table, presently about 40% - 45% of the Judicial table for civil court work. AILA consider that rates equivalent to 80% of the judicial table may persuade firms to return to a SLAS scheme. Litigants would enter into the scheme in the knowledge that they can no longer expect legal services to be provided without some form of contribution. There would require to be more emphasis on the recovery of expenses which would include Family Law cases where, the present convention not to seek expenses would require to be reviewed. Given that the majority of defended cases relate to matters other than the merits, ie financial matters or issues concerning children including contact and residence, It is difficult to understand why the successful party should not be awarded expenses from their opponent. The prospect of being found liable for costs would focus litigants' minds at an early stage of proceedings. It would also be proposed that the right of an Assisted Person to seek modification of liability for expenses should cease. A party who instructs the raising of or a defence to proceedings

should be aware of the cost implications of those instructions. In the event that judicial expenses are awarded to a party under a SLAS scheme, those expenses would be retained by the Fund with the solicitor being paid in accordance with the SLAS regulated fees.

Fee Exemption Certificates

AILA also consider that the Fee Exemption Certificate regulations introduced at the instigation of SLAB should be repealed. There is no benefit to the public purse, it causes additional work to Agents which SLAB refuse to reimburse and has resulted in the loss of substantial court dues including Auditors' fees from unsuccessful parties where an award of expenses has been granted in favour of an Assisted Person.

AILA have reservations regarding the competency of the Review's recommendation that that legislation be amended to "ensure court fees and auditor's fees can be recovered from the losing party...". Given that these costs have not been incurred by the successful party, it would not be appropriate to seek recovery of them from an opponent. Only expenses/costs that had been incurred during the conduct of an action could be recoverable judicially. What the proposed amendment to the legislation seeks to do is recover within the context of a court order, expenses incurred by a third party - in this instance, the Scottish Government/Executive.

Other Issues

AILA do not wish to express any particular views on Protective Expenses Orders (Chapter 5), Referral Fees (Chapter 6), Before the Event Insurance (Chapter 7), Third Party \funding (Chapter 10) and Chapter 13 dealing with Special Cases and Concluding remarks.

Specimen Table of Fees for Personal Injuries Actions

Based upon a Unit charge	**£17.50 per 6 minutes**
Letters up to 175 words	**1 Unit per page**
Framing documents up to 175 words per sheet	**1 Unit per sheet**

Precognitions	**3 Units per sheet up to 4 sheets 1 Unit per sheet thereafter Maximum 30 Units per witness per case**
Report Fees	**2 Units per sheet up to 4 sheets 1 Unit per sheet thereafter Maximum 30 Units per report**
Instruction Fee – to cover all work including meetings, correspondence instructions to Counsel , correspondence instructions to Counsel up to the lodging of Defences	**10 Units - 30 Units**
Where Summons prepared without the assistance of Counsel or Solicitor-Advocate	**10 Units**
Record Fee to cover all work up to the lodging of the Record	**10 Units - 25 Units**
Arrange Consultation on Pleadings	**3 Units**
Travel to and attend Consultation	**1 Unit per 6 minutes**
Incidental Procedure Fee – to cover all work from allowance of Proof prior to Consultation on the sufficiency of evidence	**10 Units - 20 Units**

Lodging productions – where no previous charge for perusal **Where charge claimed for perusal of documents lodged**	**4 Units** **2 Units**
Considering Opponents productions per Inventory	**2 Units**
Fixing Pre-trial Meeting	**4 Units**
Preparing for Pre-Trial Meeting	**10 Units - 20 Units**
Travel to and attending Pre-Trial Meeting	**1 Unit per 6 minutes**
Joint Minute of Pre-Trial Meeting	**3 Units**
Preparation for Proof Fee – to include fixing consultation on sufficiency of evidence, all instructions to Counsel meetings and correspondence with witnesses, citations and all preparation – where case proceeds and evidence lead	**50 Units - 100 Units**
Preparation for Proof Fee – as above where case settles within 14 days of Proof diet	**30 Units - 50 Units**
Preparation for Proof – as above where case settles more than 14 days prior to Proof diet	**10 Units - 30 Units**

Other fees to be transcribed accordingly