



Forum of Scottish Claims Managers (FSCM) - Response to the Scottish Civil Justice Council's Consultation on the Review of Fees in the Scottish Civil Courts

<http://www.fscm.org.uk>

Section 1 What is the Forum of Scottish Claims Managers and who do we
represent?

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Section 1

About the Forum of Scottish Claims Managers (FSCM)

The Forum exists as a representative organisation on behalf of its members and works to communicate and promote their interests in the handling of insurance claims

1. The Forum aims to promote improvements to the law to enable easier and quicker access to justice for consumers.
2. The Forum's membership covers a number of major insurers, financial institutions together with claims handling companies and local authorities.
3. The individual members of FSCM are all senior professionals, being Claims Managers or equivalent within their respective organisations, and as such bring together a wealth of experience in insurance claims matters.
4. To provide some context of the size and scale of our membership:
 - Our members directly employ approximately 5,550 people in Scotland
 - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums)
 - Solely on claims, we spend £1.257 billion annually in Scotland
 - Our industry is a major economic contributor to Scotland, with Glasgow the largest insurance centre in the UK outside London and is regarded as a core pool of talented resources
5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

It is the Forum's desire to be actively engaged, with all interested parties, in discussions and debate relating to Third Party claims** in Scotland including Pre and Post-litigation.

**** Third Party Claims definition:**

Personal Injury or damage to Property arising out of a party's negligence – be it a personal (Consumer) matter or a Commercial (Business) matter, Road Traffic Accidents and accidents in the Workplace

Our Membership:

AIG Allianz Aviva Direct Aviva AXA Insurance Churchill Chubb DLG Esure ERS First Group Halifax LV Markerstudy More Than	NFU Mutual Privilege Prudential PSV Claims Bureau Ltd QBE RAC Insurance RSA UKI Insurance Zurich Municipal Zurich Insurance Plc Glasgow City Council North Lanarkshire Council Motor Insurers Bureau
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CONSULTATION QUESTIONNAIRE

1. Are amendments required to the Tables of Fees to ensure that fees recoverable are proportionate?

If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

First, we welcome the opportunity to contribute to the consultation and are happy to collect and supply data where we can to assist the Council's consideration.

Our answers will relate to Personal Injury matters (unless otherwise stated) as that constitutes the bulk of our experience.

In our opinion, **Yes**, the current Tables of Fees require amendment to ensure that recoverable fees are proportionate to the level of Damages involved.

Within the current system, there is now a clear mismatch between fees that can be recovered Pre-Litigation and after Litigation, causing a clear impact on the affordability of access to justice, particularly on the low value personal injury claim. (£25,000 Damages or less)

This 'mismatch' being described is because the mandatory [Personal Injury Pre-Action Protocols](#) deals (successfully in our opinion) with proportionality by aligning the fees being paid to the level of damages agreed through the use of a fixed scale fee mechanism, However, on Litigated cases, the current Tables of Fees do not address proportionality (although they can be modified by the Auditor) as the fees are based on a 'work done by the solicitor' proposition.

Lord Justice Jackson¹ said of 'hourly rate' remuneration in England & Wales that:

"Remuneration on a time basis rewards inefficiency. Unrestrained costs shifting drives parties to leave no stone unturned: the more costs mount up, the more determined each party becomes to ensure that the other party pays them. The result is inevitable - a civil justice system which is exorbitantly expensive."

The current Tables of Fees arguably reward inefficiency and unnecessary prolonging of cases to recover higher fees whilst utilising valuable court resources not only through the life of the case, but also when it comes to assessment of fees with parties frequently looking to the Auditor to decide upon recoverability of individual component parts of the fees where agreement cannot be reached.

Additionally, the Tables of Fees offer far less predictability of the cost of litigation to all parties, compared to a fixed scale fee model.

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

We would contend that the current approach does not aid early dispute resolution.

However, early dispute resolution could be aided if the cost of litigation could be easily predicted by the parties from the outset with scale or fixed fees – economics of a case would be in sharp focus.

The Tables of Fees do of course contain a block fee for pre-litigation work, but in our view, this does not go far enough – only a fully scale or fixed fee can remedy the current issues and practical problems.

We have included an **Appendix** to our response that contains the findings of two sets of data collection undertaken by the Forum of Scottish Claim Managers for litigated Personal Injury claims.

The data demonstrates that proportionality of judicial expenses does not presently exist on low value Personal Injury claims:

- **Table 1** contains the data collected up to May 2015 and is derived from the data of 12,304 litigated cases

- **Table 2** contains data collected since the launch of the All Scotland Personal Injury Sheriff Court and is derived from the data of 2,650 litigated cases

Both data sets show that costs exceed damages more often than not and the lower the band of damages, the greater the disproportionality of cost.

Qualified One-way Costs Shifting (QOCS) is currently being considered by the Scottish Parliament as part of the [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Bill](#) which if implemented, will undoubtedly increase access to justice and the affordability for Pursuers since they would only be at risks for an adverse award of expenses in certain circumstances e.g. fraud or misconduct of the litigation.

It is worthy of note that when QOCS was introduced in England & Wales, it was done alongside a system of fixed fees to ensure proportionality and predictability for all parties as well as encourage correct and equitable behaviours and early resolution of disputes.

It is also of note that England & Wales is not the only neighbouring jurisdiction to have fixed fees for lower value litigated cases – Northern Ireland has had fixed or scale fees since the *County Court Rules (Northern Ireland) 1981* came into force.

It may be argued in some quarters that fixed or scale fees introduced for cases under £25,000 is too radical a step, however, Simple Procedure is on the horizon for Personal Injury claims as is the Scottish Civil Justice Council's own work by the Rules Rewrite Committee laying a basis for a future which could include online dispute resolution and our opinion is that fixed or scale fees could assist much of this work to succeed.

If action is not taken to revise the method of rewarding Solicitors, we could be attracting undesirable practices to become more prevalent in Scotland such as cold calling, as there would be a layer of reward and referral fees which would encourage the same practices the Scottish Government is attempting to tackle as being detrimental to society.

We would propose a scale or fixed fee method of calculating Fees on cases where the damages are £25,000 or less – this could build on the basis of the existing Protocol fee structure with an added component or components to take account of the stages of litigation as the case progresses.

2. Are amendments required to the Tables of Fees to ensure that they better reflect the work being undertaken?

If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

Yes, as we now have Compulsory Pre-Action Protocols in place for Personal Injury, therefore much of the work in narrowing the areas of dispute should already have been carried out Pre-Litigation.

Additionally, we now have greater use of technology in obtaining and drafting precognitions, statements, motions and even Statements of Valuation where much of the time consuming manual elements have been removed, streamlined or simply made into a more cost efficient process.

As outlined in our answer to Question 1., our opinion is that amending entries in the Tables of Fees will not go far enough to address these changes or the mismatch between Pre-Litigation and Litigated fees. We must ensure the system is fit for purpose in the changing landscape.

As evidenced by the tables included in the **Appendix** there is not currently proportionality of the judicial expenses being paid relative to the damages agreed and we would advocate a change to a scale fee based system where there is a direct correlation between the damages being paid and the judicial expenses.

We accept that there may be criticism from some quarters that such a system would not properly reflect the work done on an individual case, but we believe that not only would proper recovery of costs be achieved via 'swings and roundabouts' in that some cases would mean higher cost recovery compared to work expended to balance out with cases where lower cost recovery takes place.

In our view, the clear advantages would outweigh the disadvantages:

- Promote early pro-active dispute resolution
- greater certainty of the cost of litigation for all
- a system that is fit for purpose through future changes to the Civil Justice system

We believe this is even more important when QOCS, DBAs and Success fees will be changing the landscape as part of the [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Bill](#).

There could be stages to the proposed scale fee , so if a case reaches a certain stage or milestone in litigation before it settles, then an added element of fee could be recovered – this is in successful operation in England and Wales at the moment.

In addition to all the other highlighted benefits, such a system also promotes narrowing of the issues between parties to the extent that court hearings are shorter saving valuable court time and resources.

3. Are amendments required to the Tables of Fees to reflect changes in practice and/or procedure?

If yes, please detail the amendments proposed.

Yes – previous answers refer.

There is now a clear mismatch between Pre-litigation fees which work on a fixed scale basis and the way litigated fees work with the Tables of Fees.

As previously discussed in earlier answers, Simple Procedure for Personal Injury claims alongside QOCS, DBAs and Success fees will be changing the civil litigation landscape and it is vital that the approach to litigated fees is amended to encourage settlement, affordability and proportionality that the increased access to justice will bring.

4. Is there a requirement for a general modification of the level of fees provided for in the Tables of Fees?

If yes, please specify the modification proposed and the circumstances justifying the modification and provide any evidence you may have to support your proposal.

Yes, please see our earlier answers. In our view, there is a need for wholesale change.

5. Is it necessary to consider any additional fees that are not currently included in the Tables of Fees?

If yes, please detail the additions proposed and provide any evidence you may have to support your proposal.

No. We believe the focus should be on altering the dynamics of how litigated fees work in practice in Scotland rather than adding in additional components – this would only serve to compound the proportionality problems as highlighted in the **Appendix**.

Appendix

Table 1

FSCM Data up to May 2015 (the older data)

	No. of Cases	Costs exceed Damages	Ratio	Average Damages	Average Costs	£X Legal costs for every £1 Damages
<i>Sample size = 12,304 cases</i>						
Damages under £5,000	7,522	5,074	67.46%	£2,874.50	£3,858.64	£1.34
Damages under £10,000	10,028	6,095	60.78%	£3,966.53	£4,666.80	£1.18
Damages under £15,000	10,694	6,197	57.95%	£4,517.79	£4,944.06	£1.09
Damages under £20,000	11,037	6,230	56.45%	£4,943.83	£5,138.01	£1.04
Damages under £25,000	11,232	6,232	55.48%	£5,273.52	£5,227.83	£0.99

Table 2

FSCM new data, since September 2015 - ASPIC launched on 22 Sept 2015

	No. of Cases	Costs exceed Damages	Ratio	Average Damages	Average Costs	£X Legal costs for every £1 Damages
<i>Sample size = 2,650 cases</i>						
Damages under £5,000	1,731	1,079	62.33%	£2,348.10	£4,064.11	£1.73
Damages under £10,000	2,253	1,271	56.41%	£3,566.57	£4,152.69	£1.16
Damages under £15,000	2,388	1,282	53.69%	£4,011.03	£4,355.44	£1.09
Damages under £20,000	2,467	1,283	52.01%	£4,403.04	£4,492.52	£1.02
Damages under £25,000	2,507	1,282	51.14%	£4,668.52	£4,557.56	£0.98

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