



## RESEARCH BRIEF

January 2009

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# Analysis of personal injury legal costs

## Introduction

This Research Brief summarises work conducted by Frontier Economics on behalf of the ABI.

## A quantitative analysis of legal fees

The MOJ Consultation Paper finds that:

“The processes and costs involved in making a claim for personal injury are often perceived as being disproportionately high, particularly in the lower value claims. Costs can often exceed compensation, sometimes by a considerable amount”.<sup>1</sup>

This statement is supported by Frontier’s findings which are based on data provided by insurance companies. Frontier collected information on over 18,200 PI claims with an instruction date between March 2005 and April 2007.

The data contains information on:

- the breakdown of the legal costs claimed and paid in each case
- the type of personal injury claim (Motor, EL and PL)
- the amount of damages awarded

Frontier focused on closed cases (where both damages and legal costs have been paid) with the damages falling within the proposed new track limits for PI claims. To do this Frontier removed all cases where the total damages awarded exceed £25,000 or fall under £1,000 as well as all cases where the costs have not yet been settled. Motor claims were also excluded if the accident occurred before October 2003 in order to focus on the effect of predicable fees (the Fixed Recoverable Costs Scheme (FRCS)).

After this “cleaning” Frontier were still left with a large dataset containing more than 15,000 observations. Below we summarise the main findings of the data analysis.

### *Paid versus claimed legal cost*

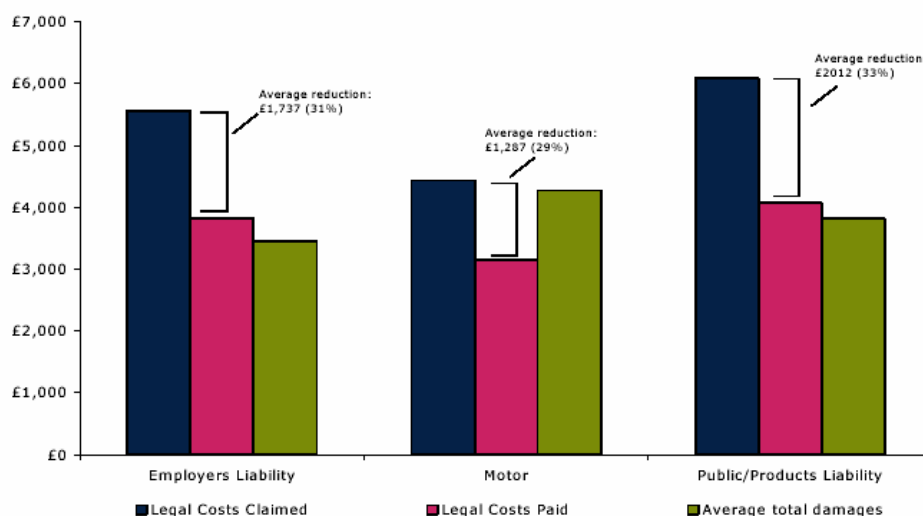
A comparison of legal costs paid and claimed (excluding VAT) shows that the claimed costs are higher than the paid costs by approximately 30% (see figure one). This figure shows average legal costs claimed and paid as well as average damages for each type of claim (EL, PL and Motor). Despite the achieved reductions, the legal costs paid are still higher than the damages awarded in EL and PL cases (£3,821 versus £3,453 for EL claims and £4,069 versus £3,813 for PL claims). This is in line with the MOJ finding cited in the Consultation document.

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<sup>1</sup> MOJ Consultation Paper, page 27, paragraph 51-52.

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**Figure 1 Legal costs (claimed and paid) and damages awarded by claim type**



**Source:** Frontier analysis of insurance companies' claims data.

*Decomposition of legal costs*

The total legal bill presented by a claimant solicitor to an insurance company will include the following components:

- Base costs (legal fees *per se*)
- Disbursements (such as costs of obtaining a medical report, GP's records, etc.)
- Success fees - a success fee is awarded if the claim is funded through a conditional fee agreement (CFA) and the claimant wins
- "After-the-event" (ATE) insurance premium - ATE insurance covers the claimant's liability to pay the defendant's legal costs if the claims fails

The data provides information on all these components.

*Base costs*

Figure two shows average base costs, disbursements, success fees and ATE premium for each type of claim. Base costs are on average:

- £2,069 for EL
- £2,257 for Motor
- £2,330 for PL claims

Base costs represent the largest share of total costs (55% for EL, 72% for Motor and 59% for PL).

The estimate of base costs for Motor appears to be significantly higher than the estimates obtained in other studies, in particular in Fenn and Rickman (2007) "Monitoring the Fixed Recoverable Costs Scheme" (2007).<sup>2</sup> They find that base costs recovered on

<sup>2</sup> Fenn, P., Rickman, N. (2007). *Monitoring the Fixed Recoverable Costs Scheme*.

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low value (less than £10,000) non-litigated Motor claims in the post-FRCS period are on average £1,593. The discrepancy in the estimates is partly explained by the fact that the data also includes higher value claims (with damages between £10,000 and £25,000). These claims are not governed by the FRCS and, in general, tend to be more expensive. Moreover, the data does not allow litigated and non-litigated claims to be separated. The former are, again, significantly more expensive.

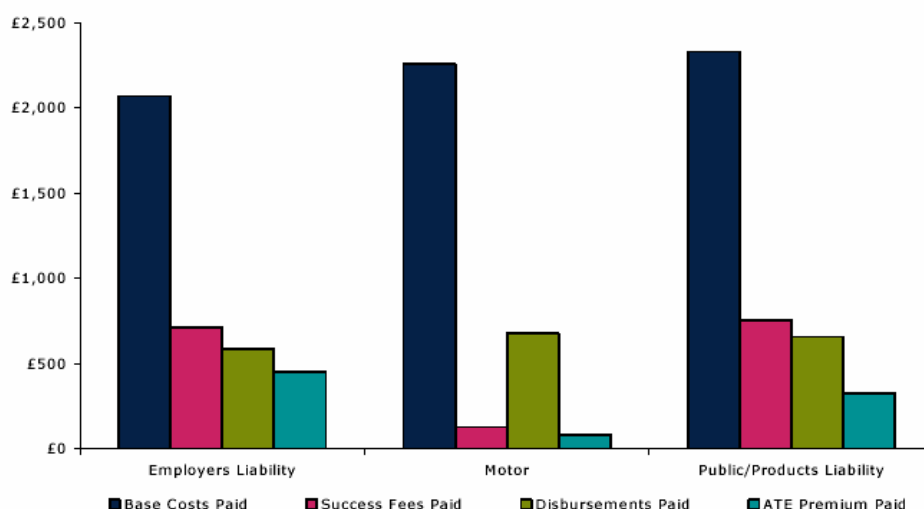
*Other costs*

Of the other three cost components, disbursements appear to be relatively similar across all claims' types, in the range of £600-700 per claim. This represents between 15% and 22% of total legal costs paid.

Success fees and ATE premiums are only paid in CFA-funded cases. Most EL and PL claims are CFA-funded, while Motor claims are mainly funded by "before-the-event" (BTE) insurance. As a consequence of that, success fees and ATE premiums are not paid in 70% of Motor cases. This is reflected in the averages:

- The average success fee and ATE premium across all Motor claims are low (£129 and £86)
- If only CFA-funded cases are included, the average success fee and ATE premium are significantly higher - £422 and £404 respectively - in line with those for EL and PL

**Figure 2 Decomposition of legal costs paid (excl VAT)**



**Source:** Frontier analysis of insurance companies claims data.

*Where are the savings being made?*

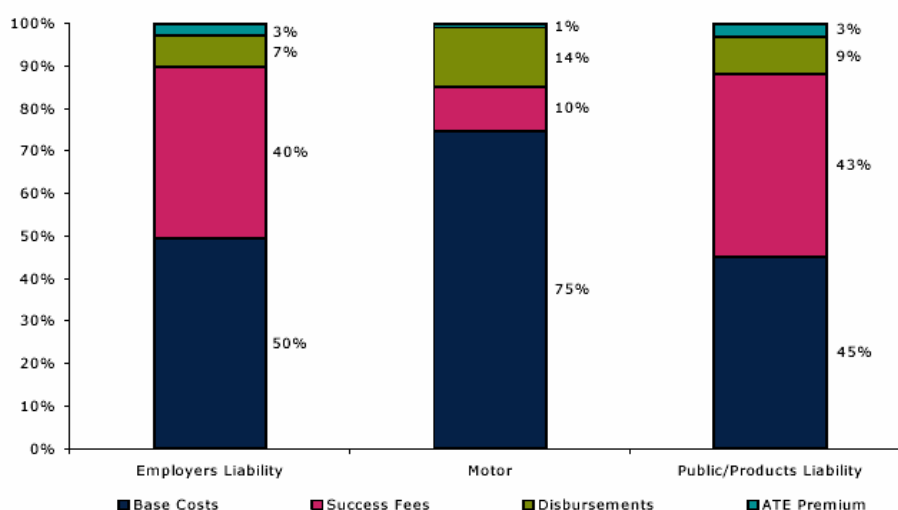
A comparison of the legal costs claimed and paid by component allows an assessment of where the savings have been made. As figure three below demonstrates, most of the savings are made in base costs: 50% for EL, 75% for Motor and 45% for PL.

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Significant savings are also made in EL and PL success fees (40% and 43% of total savings for EL and PL claims respectively). The reasons for that are the following:

- Success fees can only be claimed in CFA-funded cases and most EL and PL cases are CFA-funded
- Success fees are usually proportional to base costs; hence, a reduction in base costs leads to a reduction in success fees

**Figure 3 Savings' decomposition**



**Source:** Frontier analysis of insurance companies claims data.

*Summary*

Overall, the analysis shows that:

- Average legal costs are higher than damages in EL and PL claims
- Significant savings are made in total legal costs. There is a 30% average gap between the legal costs claimed and paid
- These savings are mainly achieved in base costs and in success fees for EL and PL claims

These findings support the view expressed in the MOJ Consultation Paper that the legal costs of making a PI claim can be disproportionately high relative to damages. Moreover, the claims' process appears to be quite ambiguous and open to various interpretations. This is reflected in the significant differences between the legal costs claimed and paid.

**Comparison of legal rates**

Establishing appropriate hourly rates in this market is not an easy task. Three alternatives are assessed:

- HMCS Guideline Rates
- hourly rates charged by defendant lawyers
- civil legal aid rates

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Below is a discussion of these alternatives in detail.

*HMCS Guidelines Rates*

When cost draftsmen assess legal costs claimed, they use the HMCS Guideline rates as the benchmark. These rates were first issued in 1999 due to the requirement of the Woolf reform that there be a summary assessment of the costs at the end of all fast track cases and trials lasting less than one day. These rates were originally based on the actual rates used by County Courts. The rates have been revised every two years (the last two revisions inflated the 2003 rates by RPI). In 2003 geographical banding was introduced: 3 bands for areas outside of London, along with 3 bands for areas within London (see Table 1). The rates also vary by solicitors' grade with Grade A (more than 8 years experience) being the highest and grade D (paralegals and trainee solicitors) being the lowest.

**Table 1 HMCS Guideline rates for summary assessment 2007**

	<b>Grade A – Over 8 years experience with at least 8 years litigation experience</b>	<b>Grade B – More than 4 years experience with at least 4 years litigation experience</b>	<b>Grade C - Other solicitors</b>	<b>Grade D - Trainee solicitors and paralegals</b>
HMCS Band 1 - Areas include Liverpool, Bristol, Oxford, etc.	£195	£173	£145	£106
HMCS Band 2 – Areas include Coventry, York, Plymouth, etc.	£183	£161	£133	£101
HMCS Band 3 – Areas include Devon, Cornwall, South Wales, etc.	£167	£150	£128	£95
Outer London	£210-246	£158-210	£152	£111
Central London	£292	£222	£181	£116
City of London	£380	£274	£210	£129

**Source:** HMCS.

*Defendant solicitors' rates*

An alternative source of information on Personal Injury solicitor rates is insurance companies themselves, which enter into agreements with defendant solicitor firms. The type of work performed by defendant lawyers is not dissimilar to claimant work. A lot of work is in fact done in parallel, as has been acknowledged in the MOJ consultation document. If anything, defendant solicitor work tends to be more difficult, because insurance companies usually employ solicitors only in complex/contentious cases, undertaking all straightforward work in-house.

Obtaining information on defendant hourly rates is not straightforward as they are bilaterally negotiated between insurance companies and solicitors' firms and are not in the public domain. However, in the course of Frontier's interviews with insurance companies, some of them disclosed their agreed rates. The rates usually vary by the value of claim as more expensive claims require more experience in the current system. For example, the rates are typically lower for claims with damages below £4,999 than those for claims with damages between £5,000 and £9,999. In principle, rates based on damages can be translated into rates based on grades or years of experience. From the discussions with insurers, Frontier have estimated a set of defendant solicitors' rates for each grade (see Table 2 below).

**Table 2 Defendant solicitors’ average hourly rates**

	<b>Grade A</b>	<b>Grade B</b>	<b>Grade C</b>	<b>Grade D</b>
Defendant solicitors’ rates	£155	£137	£115	£84

**Source:** Frontier calculations based on insurance companies’ data.

These rates are consistently lower than the HMCS Guidelines rates. However, one should bear in mind that in exchange for lower rates, defendant lawyers are guaranteed large volumes of work. So, in theory at least, they might still be better off even if they charge lower rates.

That does not appear to be the case in practice. A comparison of profits per partner (PPP) of a sub-sample of Top 100 solicitor firms, split into those doing predominantly (i) claimant work and (ii) defendant work, suggests that claimant firms on average tend to be more profitable (PPP up to 45% higher). Clearly, this analysis has its limitations. Indeed:

- it focuses only on larger firms and ignores a fringe of firms with lower ranking (due to lack of data)
- some key players (notably Thompson) have not responded to the Lawyer 100 questionnaire and, therefore, are not part of the analysis

Given these limitations, Frontier cannot make a definitive conclusion that the results hold for all firms, but they do provide some evidence that claimant firms tend to be more profitable.

Hence, if the purpose of the reform is to encourage the industry to become more competitive, lower rates, in line with those currently paid to defendant solicitors, may be appropriate.

### *Legal aid hourly rates*

Personal Injury solicitors’ rates can also be compared to civil legal aid rates. Legal aid is provided by the Legal Services Commission (LSC). LSC pays for legal services for people on low income who cannot afford private rates. Civil legal aid can fund:

- initial advice and assistance with any legal problem
- a solicitor who can speak on someone’s behalf at court hearings without formally representing them
- legal representation in court proceedings

A wide range of civil legal work (for example, family proceedings, inheritance, adoption, clinical negligence, etc.) is not dissimilar in its nature to privately funded personal injury work. Moreover, prior to 2000, PI work was also funded by legal aid.

Table 3 below shows the legal aid rates currently paid in care and family proceedings in County courts or magistrates’ court for preparation work, for attending at the trial or hearing with and without counsel and for preparing the bill and completing the detailed assessment.

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**Table 3 Hourly rates paid for civil legal aid work**

<b>Item</b>	<b>County court rate</b>
Care proceedings - Preparation work including any work arising out of or incidental to the proceedings, interviews with client, witnesses and other parties; obtaining evidence; preparation and consideration of, and dealing with, documents, negotiations and notices; dealing with letters and telephone calls which are not routine	£64.90 per hour (£68.20 in London)
Care proceedings – Attending without counsel at the trial or hearing	£71.50 per hour
Care proceedings – Preparing the bill and completing the detailed assessment	£35.75 - £56.95 per hour
Family proceedings – Preparation work	£64.80 per hour (£68.50 in London)
Family proceedings – Attending without counsel at the trial or hearing	£64.80 per hour (£68.50 in London)
Family proceedings – Preparing the bill and completing the detailed assessment	£35.70 - £56.95 per hour

**Source:** The LSC Manual, Volume 1, Part B.

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**Authors:** Justin Jacobs and David O’Neill, ABI

Any queries about this report should be directed to the authors at [justin.jacobs@abi.org.uk](mailto:justin.jacobs@abi.org.uk) and [david.oneill@abi.org.uk](mailto:david.oneill@abi.org.uk). Alternatively, queries about this report or other information available from the ABI can be directed to the Research Helpdesk at [research@abi.org.uk](mailto:research@abi.org.uk), telephone +44 (0)20 7216 7390.

## REFERENCES

- Fenn, P. and Rickman, N., 2003, "Calculating "Reasonable" Success Fees for RTA Claims", in *Report for the Civil Justice Council*.
- Fenn, P. and Rickman, N, 2003, "Costs of Low Value RTA Claims 1997 - 2002", in *Report for the Civil Justice Council*.
- Fenn, P. and Rickman, N, 2007, "Monitoring the Fixed Recoverable Costs Scheme. Part I: The effects of the scheme on the outcome of claims".
- Lord Carter’s Review of Legal Aid Procurement, "Legal Aid: A market based approach to reform".
- Otterburn Legal Consulting, "The impact on the supplier case of reductions in criminal fees from April 2007".



## APIL's response to the ABI's research briefing- Analysis of personal injury legal costs.



We are disappointed that the ABI refused to share the full Frontier research. The lack of data in this extract means that we are unable to comment fully on the validity of the statistics presented and this renders the ABI's conclusions unreliable. Despite this we have sought to provide as much comment as possible on the limited information made available. Our comments are as follows:

### Data set

We require further information about the data set used to provide a more detailed response:

- Which insurance companies the data came from? Knowing this would help us comment further. Some companies are more efficient and this can have a direct impact of the costs incurred.
- How many cases were within each type of cover?
- Further details about that type of cover e.g where it was a motor policy was it an underwriter's book which contained mainly fleet vehicles or private comprehensively insured, was it a non comprehensive policy or a motorcycle policy. We know that each have different profiles from the IUA bodily injury awards study<sup>1</sup>.
- How many cases were litigated or settled without proceedings?

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<sup>1</sup> Fourth UK bodily injury awards study October 2007 page 18

- If the research included disease cases?

We believe that the data set is far too small to be statistically significant. Our reasons for this are as follows. The Datamonitor report<sup>2</sup> states that 98 percent of all personal injury claims are motor, public liability or employer's liability<sup>3</sup>. The Ministry of Justice in their response to consultation on the claims process stated that 70 to 75 percent<sup>4</sup> of all motor claims will be included in the streamlining process for personal injury claims up to £10,000. The current compensation recovery unit figures for 2007 to 2008 show that 551,899 motor claims were registered during that period. 70 to 75 percent of this figure is 386,329 to 413,928 claims. Professor Nickell in the hourly rates survey<sup>5</sup> response was happy to work to a response rate of around 8 percent. 10 percent of motor claims within the claims process would mean a data set of around 38,633 to 41,393 for any meaningful analysis.

### **Paid versus claimed legal costs**

We question the statement in the ABI's report that costs claimed are 30 percent higher than costs paid. This data is not broken down for predictable costs and non predictable costs.

APIL have already provided detailed comments on proportionality in our phase one document. We do not therefore intend to replicate the details here other than to say that we believe that the costs paid should be proportionate to the issues in the claim and not the level of damages. The cause of the difficulty therefore lies firmly with the insurers for failing to properly manage the case early on. This criticism should be addressed by the fixed fees in the new claims process.

The table produced at figure 1 requires further clarification before detailed comment can be made. The table provided details of an average reduction for employer's liability, motor and public/product liability claims. There is no explanation in the paper as to how these figures are calculated. Firstly we do not know how the reduction is achieved, e.g reduction in success fee or ATE premium. Secondly there is no definition of 'average' e.g mean median or mode, this will also affect the outcome.

Finally the figures compared in each section of the table are not comparable. Damages have been calculated as an average total whereas costs claimed and costs paid have not. In the IUA study on page 199 the report states that legal costs are a proportion of the total paid costs which suggests that VAT is included in the overall

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<sup>2</sup> Datamonitor, UK personal injury litigation 2008

<sup>3</sup> Datamonitor, UK personal injury litigation 2008 . Table2 page 18

<sup>4</sup> Ministry of Justice, case track limits and the claims process for personal injury claims. July 2008

<sup>5</sup> The derivation of new guideline hourly rates 2008

figures. We are not, however, clear from the figures stated in ABI report whether the figures are all inclusive or not.

## **Decomposition of legal costs**

### **Base costs**

Clarification is also needed on this section of the report. This section specifically refers to 'estimate of base costs' whereas reference in the rest of the report refers to actual costs. This would seem to indicate that the insurers may have decomposed global settlement offers for the purposes of these statistics and then presented base costs as actual whereas in fact they are estimates.

The ABI report suggests that higher value claims (with damages between £10,000 to £25,000) tend to be more expensive. This is contrary to the fourth bodily injury awards study<sup>6</sup> which shows clearly that the higher the value of the claim the less the cost to damages ratio.

Reference is made to most motor claims being funded by BTE insurance. Claimant representatives at the MoJ claims process meeting have suggested that out of the claims falling within the £0 to £10,000 market, 50% of those with BTE cover have inadequate cover. Therefore the ABI's assertion on BTE coverage should be treated with caution

### **Where are savings being made?**

The figures expressed in this section of the ABI report should be read with caution.

It is not clear from the report what claimants and insurers have agreed in negotiation with regard to reductions on success fees, ATE etc. Our members have reported that it is not unusual for global offers on costs to be made.

### **Comparison of legal rates**

APIL produced a detailed submission to the advisory council on civil costs, which we will not reproduce here, but which addresses hourly rates, defendant business models, legal aid work in clinical negligence claims and provides evidence of defendants hourly charge rates.

There are a number of points specific to the frontier report that we would wish to make. Firstly we are surprised by the assertion that defendant solicitors work tends to be more difficult. Defendant insurance work is often done in volume and therefore

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<sup>6</sup> Fourth UK bodily injury awards study October 200. Page 200

they are able to specialise in repetitive tasks. Further it is widely accepted that building a claim is much harder and more time consuming than defending a claim. Defendant insurance work does not involve taking instructions from individual clients who can be more demanding.

We question whether there is sufficient information on the lawyer 100 questionnaire to provide any meaning full analysis. We have not seen a copy of the questionnaire or the final report to know if the questionnaire/ results breakdown the practice areas. Nor do we have information for lower ranking firms, there is no information available on the types of management systems the top 100 ranking firms use, or on their IT systems etc.

With regard to legal aid rates, this is misleading. The comparison between personal injury work and family work is meaningless. The work is very different, care and family proceedings are probably the worst hit in terms of lack of review and lack of increase in rates for many years. What we do know is that when legal aid was available for personal injury, recoverable costs were adjudicated at guideline rates. In addition in clinical negligence cases where legal aid is still available, enhancements claimed from the basic legal aid rate on successful cases can be up to 100 percent in County Court cases and up to 200 percent in High Court.

## References

Reference is made in this section to Otterburn legal consulting “The impact on the supplier case of reductions in criminal fees from April 2007”, however no indication is given in the report as to how the ABI have tried to use it and therefore we are unable to comment on it further.

9 April 2009

## Association of Personal Injury Lawyers

- ▶ 11 Castle Quay, Nottingham, NG7 1FW • T: 0115 958 0585
- W: [www.apil.org.uk](http://www.apil.org.uk)