LEGAL COSTS SUBMISSIONS

Index

1. INTRODUCTION

1.1 These submissions are made by the Bar Council to the Legal Costs Working Group ("the Group") established by the Minister for Justice Equality & Law Reform. In these submissions, the Bar Council seeks to provide information and assistance to the Group in relation to the matters identified in the Group's Terms of Reference.

1.2 It is clear from the Group's Terms of Reference that the Minister is concerned to identify ways in which the cost of civil litigation might be reduced and that he wishes to consider how costs are currently assessed and whether changes need to be made to the present system.

1.3 These submissions seek to deal with the following:-

(a) to provide information to the Group about the way in which barristers' fees arise in different areas of practice in civil litigation. This is relevant to the first indent of the Group's Terms of Reference;

(b) these submissions also deal with the current system of taxation and the deficiencies in that system. This is also relevant to the first indent of the Group's Terms of Reference;

(c) the Bar Council does not have information available to it to assist in the review of the historical position contemplated by the second indent of the Group's Terms of Reference. These submissions therefore do not address that issue;

(d) these submissions seek to deal with the fourth indent of the Group's Terms of Reference – namely whether a scale of fees would be useful;

(e) with regard to the fifth indent of the Group's Terms of Reference, these submissions also identify a number of unsatisfactory features of the current court and taxation system which the Bar Council believes have significant implications for the costs of civil litigation. Possible reforms to the system are identified with a view to reducing the cost of civil litigation.

1.4 It should be noted, however, that in the time available, it has not been possible to provide a fully comprehensive submission dealing with all areas of barristers' practice. However, the Bar Council would be happy to amplify what is said in these submissions – either by way of further written submissions, or by way of oral presentation. In this context, the Bar Council wishes to assist the Group in any way it can. In particular, the Bar Council would be happy to provide further assistance to the Group in the event that, for instance, the Group has any particular issues of concern to it in relation to barristers' fees or any other area of legal costs. The Bar Council respectfully requests that the Group might address any further questions which it may have to Jerry Carroll, the Director of the Bar Council.

2. BARRISTERS' FEES

2.1 As of February 2005 there were 1,539 barristers practicing in the Republic of Ireland, 261 of which were senior counsel. Every practicing barrister undertakes at least five years academic training before being admitted to practice at the bar and in a significant number of cases, seven years of training are undertaken prior to admittance. During this time, trainee barristers receive no financial remuneration.

2.2 On being called to the bar, a pupil, being a barrister in their first years of practice, is required by the Code of Conduct to be a pupil to a master, which is referred to as "devilling". It is common place, and indeed recommended, for a barrister to devil for a second year. During this period, a pupil is unlikely through their work to receive sufficient payment to cover their entry expenses of approximately €1,500 per annum. The general experience is that it takes between five to seven years for a newly qualified barrister to make a net income equivalent to the average professional salary of a newly qualified solicitor.

2.3 Barrister's fees in civil litigation will generally be incurred in the following manner. Before a client decides to engage in litigation, a barrister will ordinarily be asked to advise in the first instance as to whether or not there is a good case to be made (in the case of a plaintiff) or a good defence to a claim (in the case of a defendant). Fees will arise for the provision of those advices. If, in the light of those advices, a client decides to proceed with an action or with the defence of an action, barristers' fees will be incurred in drafting the relevant court papers for that purpose (which may or may not be settled by senior counsel). Barristers' fees will also arise in relation to work done by a barrister on any interlocutory applications brought in those proceedings (such as applications for injunctions, judgment in default of defence, delivery of particulars, discovery, interrogatories, motions to join third parties etc.).

2.4 When all of the necessary court documents have been exchanged between the parties and any discovery sought has been made, the action is then ready to be set down for trial. A barrister will be asked to review all of the papers for the purposes of advising on proofs and (in the case of High Court litigation) certifying that the case is ready for trial. A fee will be charged for the advice on proofs.

2.5 There is a common belief among many barristers that the fees marked for advices on proofs, drafting pleadings, and motions are too low. Traditionally, the fees for these items have not been marked at full commercial rates. This is important because a significant number of cases settle at an early stage. In such cases, the fees recovered by barristers do not compensate barristers for the true worth of the work undertaken by them in respect of these items particularly for advices on proofs where very significant time commitment is necessary and yet the cost recoverable is minimal. In this context, it is important to note that although barristers are traditionally associated with advocacy work, a significant amount of their work is paper-based. This paperwork ranges from the drafting of pleadings and affidavits to opinions, advices on proofs (i.e. the necessary evidence for trial) and written legal submissions. This paperwork forms the foundation of the case to be made by the client subsequently in court. The paperwork is therefore of considerable importance and accounts for a significant part of a barrister's practice.

2.6 When the matter comes on for hearing, a brief fee will be marked by counsel engaged for the hearing. Although the brief fee is charged as of the first day of the hearing, it is not designed to remunerate the barristers solely for the work done by them on that day. It is more particularly designed to remunerate barristers for all of their preparation for the hearing (including their legal research, their review of all of the papers, the preparation of their strategy for the examination of witnesses and cross-examination of witnesses, and other work done by them in the preceding months or years in preparation for the trial). In this context, the preparation for a trial (particularly a High Court trial or a Supreme

Court appeal) will involve very extensive work by a barrister. In preparing for a trial, a barrister will have to familiarise himself or herself with all of the documents relevant to the case. In quite routine cases, those documents will comprise:-

(a) the pleadings and particulars in the action (namely the documents setting out the parties' respective cases);

(b) all of the documents discovered by the plaintiff;

(c) all of the documents discovered by the defendant. In this context, it is important to note that although reforms have been made to the Rules of the Superior Courts with the aim of reducing the scope of discovery, the number and range of documents discovered are ordinarily quite voluminous;

(d) all of their own client's documents which are privileged (i.e. which the other side will not see);

(e) all of the statements of the expert witnesses (which may, depending upon the subject matter of the case, range from medical doctors to metallurgists, engineers to economists, accountants/tax advisors to agricultural experts, veterinary surgeons to master mariners – not to mention all of the witnesses as to fact);

(f) all of the relevant case law, statute law, and European law (if applicable).

If a barrister is to be in a position to properly make a case on behalf of a client, it is essential that to have a complete mastery of all of the documents in the case and their respective significance (or insignificance as the case may be). The extent of reading to be done will regularly extend to several bankers' boxes full of documents, all of which will require to be considered and digested. Barristers are required to consider and weigh all of the strengths and weaknesses of their own client's case. Similarly, all of the strengths and weaknesses of the other side's case must be considered and weighed. A strategy must be devised for presenting

the case in the best possible light for the benefit of the client. The relevant principles of law must be mastered. Any cases or statute law in support of the client's case must be identified. Any cases or statute law which undermine the client's case – or undermine the opponent's case – must likewise be identified. This is a painstaking and time consuming process. It involves many hours of work often undertaken after normal working hours – most particularly over the weekends leading up to the trial.

2.7 If the action runs for more than one day, barristers will also mark a daily fee for every day the action continues. This fee is known as a *"refresher"* fee. Despite this somewhat odd name, the purpose of the fee is simply to remunerate the barrister on a daily basis for the work undertaken in court and more particularly for the ongoing (usually very intensive) work involved in preparing for the examination and cross-examination of that day's witnesses or that day's legal submissions). In this context, it is important to bear in mind that although the court hearing day may only run from 10.30 a.m. or 11.00 a.m. to 1 p.m. and from 2 p.m. to 4 p.m., there is very extensive work to be done on the case both before and after court. It would not be unusual for a barrister to work from 7.30 a.m. or 8 a.m. in the morning (or even earlier) until late at night (or into the early hours of the following morning) in preparation for the ongoing hearing.

2.8 In addition, during the course of the proceedings (both before commencement of the proceedings and subsequent to the commencement of the proceedings), there would ordinarily be consultations held from time to time between the barristers retained in the case, the instructing solicitor, and the client or the witnesses to be called on behalf of the client. Fees are charged on an individual basis for each of these consultations. While the fee is marked in respect of the consultation itself, it also covers all of the preparatory work done by the barrister to put himself or herself in the position to understand the issues, research the law, and to conduct the consultation.

2.9 In nominating a fee, a barrister will have regard to the matters identified in clause 11.1(a) of the Code of Conduct for the Bar of Ireland. In so doing, all features of the instructions which bear upon the commitment may be taken into account, including:

- the complexity of the legal issue or subject matter;
- the length and venue of any trial or hearing;
- the amount or value of any claim or subject matter in issue;
- the time within which the work is or was required to be undertaken;
- any other special feature of the case.

It will be seen from this list (which is not intended by the Code to be exhaustive) that time is one of the factors taken into account in proposing a fee. In this context, it is the general experience of barristers that neither clients nor solicitors ask barristers to calculate fees on a time basis such as an hourly rate. An hourly rate might appear to be a more appropriate way to calculate fees. However, if there were a general perception that hourly rates would be a more appropriate or less costly way to charge, then it is surprising that there has not been any perceivable demand from either clients or instructing solicitors that fees should be calculated on that basis. The explanation may well be that clients perceive that an hourly rate would lead to an increase in costs. It has to be said that if an hourly rate were charged by barristers, it is likely that there would be significant increases in costs – particularly at District Court and Circuit Court level (where most civil litigation takes place), and in the drafting of pleadings and the provision of opinions. The adoption of an hourly rate would also be likely to drive up the brief fee in the vast majority of High Court cases. However, it might not make so much difference in very large and complex High Court cases where the brief fee charged is appreciably higher than that proposed in the more routine cases.

2.10 Since much of the work of barristers involves performing in court in front of colleagues, solicitors and clients, the barristers' profession is particularly subject to the benefits of competition. The instructing solicitor is the person who chooses the barrister and works very closely with that barrister and has a unique opportunity to assess every aspect of the barrister's performance from dealing with clients at consultations to the advocacy function performed in court. If barristers fail to perform adequately in court, their reputations suffer in the eyes of the watching market and another barrister will be chosen for the next case. It is difficult to think of any other provider of a professional service which has its skill and competence put to such public scrutiny. This leads in theory, and in practice, to high standards. The legal service consumer is provided with a body of information on the quality of services on offer from individual barristers.

2.11 Every client is free to ask counsel to nominate fees in advance so that the client is in a position to make an informed judgment on the level of fees. The practice of solicitors and clients seeking price indications prior to a barrister being retained is to be encouraged. The legal market place will work more efficiently. The chances of being happy at the end of the case are increased if the client knows what the bill will be.

2.12 Every client is also in a position to instruct their solicitor to ask any number of barristers to quote for the same work. There is no provision in the Code of Conduct (nor is there any practice) which prevents clients from taking this course. Surprisingly, it is not a course which has been frequently adopted to date. However, there is no reason why it could not be adopted and it should be encouraged. It is a sensible and obvious step to take. There are very significant numbers of barristers in practice in the Law Library who practice in similar areas of the law . There is therefore no reason why clients should not seek quotes from a number of barristers before deciding which of them should be retained for the purposes of a particular case.

2.13 Even if clients do not wish to approach more than one barrister, it is always open to them or their solicitor to bargain with counsel as to the level of fees to be paid. They do not have to accept any fee nominated by counsel. They can decide for themselves whether to accept a fee or to suggest that the fee should be lower. It is not uncommon for clients to suggest that they are not prepared to pay more than €X for any particular work.

2.14 It is not advisable for either the client or the barrister to postpone the nomination and agreement of fees until after the case has concluded. However, in cases where that occurs, there is a mechanism for resolving any dispute which may arise. Any such dispute can be resolved on taxation (in a "solicitor and client" taxation).[1] In such cases, the Bar Council believes that barristers should make available all relevant back-up information to the client to enable the client and the Taxing Master to properly assess the extent of the work undertaken by the barrister. The Bar Council believes that a similar practice should also be adopted in party and party taxations –when the fees of counsel are in issue. In such cases, all appropriate back-up information should be made available by barristers to enable the opposing side to form a view as to the appropriateness of the fee paid to counsel.

2.15 Civil litigation encompasses a wide variety of legal work including personal injuries litigation, commercial, chancery and non-jury matters, family law and public and constitutional law areas (which include judicial review, habeas corpus, extradition and cases stated). Each area of practice has distinct features that require individual consideration when examining the issue of costs. In these submissions, information is provided in relation to some of the more significant areas of practice in civil litigation. However, there are many other areas of practice, and if the Group requires information in relation to any other areas of practice, the Bar Council would be happy to supply it.

[1] It is not intended in this memorandum to deal in any detail with a solicitor and client taxation. However, the manner in which such a taxation is conducted is very similar to the manner in which a party and party taxation is dealt with. An outline of party and party taxation is set out in paragraphs ~~16~~ 4.3 to ~~20~~ 4.8 below. While the principle applied on a solicitor/client taxation is slightly different to that which applies on a party and party taxation, the procedure involved is very similar.

2.16 At the end of the day, however, the market for barristers' services, is a free market. Each case should be treated on its own right and the fees should depend upon the complexity of the case, its nature and the experience of the Barrister conducting it. In comparison to professional consultants in other areas, the fees are low [2], especially when one considers the stress of the work, the long hours, the degree of responsibility involved, and its ultimate purpose i.e. the protection of individuals' rights.

2.17 In considering the question of barristers' fees, due account should be taken of the time it takes for barristers to be paid. It is not uncommon for barristers to have to wait several years for payment of their fees. Due account should also be taken of the significant overheads which barristers now carry. The days when barristers could survive in practice by merely keeping a seat in the Law Library are largely over. Most barristers now need to retain their own offices with their own secretaries and with their own collection of text books and case law. Like any other business there are significant overheads. A barrister's turnover is not income. All the usual overheads have to be paid including rent, insurance, technology, bank charges, staff salaries, staff pensions, and personal pensions. In addition there are overheads which are specific to barristers such as the cost of the employment of legal researchers and ongoing investment in legal databases, law reports and text books. Given the rate at which legal databases are put in place and the rate at which legal text books are published and updated nowadays, the cost of acquiring the relevant databases and library and keeping them up-to-date is very significant. Due account should also be taken of the risks involved in running a barristers' practice. In this context, it should be noted that there are no allowances made for personal problems, illnesses or maternity leave as there are in any regular employment. When a barrister is engaged, he or she is engaged on the basis that he or she will carry out the work. There is no facility whereby a barrister can engage an assistant to do so. If a barrister becomes ill or remains out

[2] See the section on personal injuries below from which it is clear that the fees received by barristers represent no more than 14.43% of the overall costs of personal injury litigation. This is in contrast to the costs of expert witnesses who account for 24% of the overall costs incurred in such litigation.

of circulation for a period, there is a very real danger of irreparable damage being done to his or her practice through the loss of contacts with regular solicitors, who have chosen to use other counsel. Where a barrister becomes ill or wishes to retire from practice, that practice comes to an end without any prospect of sale. Unlike other professions there is no goodwill in a barrister's practice that can be sold or transferred. There are very few professions where which the phrase *"working on the hazard"* could be said to be more applicable than the Bar.

3. NO FOAL-NO FEE

3.1 A crucial aspect of work undertaken in civil litigation is that in a significant number of cases, counsel will be prepared to undertake work on the basis of a no foal-no fee arrangement (i.e. without any guarantee of payment). This is particularly so in personal injuries litigation where the vast majority of plaintiff work is undertaken by Barristers on this basis. The no foal no fee principle is generally applied in cases involving persons with a good cause of action who do not have sufficient means to discharge lawyer's fees. In a system where there is no adequate civil legal aid scheme, the availability of this fee structure is of particular importance to ensure that those with legitimate claims may retain the services of leading members of the bar to represent their interests, as was the case in **Hanrahan v. Merck Sharpe and Dohme** [1988] ILRM 629. That case was at hearing before the High Court for several months. The operation of this principle finds barristers at the height of their professional success acting without payment and taking the risk of never being paid if the action fails.

3.2 Illustrations of this principle in operation can be found in many medical malpractice suits, particularly those brought on behalf of minors such as the case of **Dunne v. National Maternity Hospital** [1989] I.R. 91. The no foal-no fee payment structure is also frequently applied in constitutional litigation, actions concerning environmental protection issues, challenges to planning decisions and similar public interest based litigation. Where payment is dependent upon a successful outcome, a barrister's payment will be delayed until the matter is finally determined, which in the case of **Best v. Wellcome** [1993] 3 IR 421, was 14 years after proceedings were commenced. **Best v. Wellcome** was at hearing in the High Court for 34 days spread over a 3 month period. Moreover, given the complexity of the case, the team of counsel involved must have spent many months of work in preparation for the case.

3.3 Indeed the text books and law reports are littered with cases which have changed the face of many different areas of the law (including constitutional law, judicial review, and the law of negligence and breach of duty) in this jurisdiction as a result of the courage of counsel and solicitors to litigate cases over a long period of time and to defend the rights of clients in the face of vested interest with large pockets. Further examples include **Crotty v. An Taoiseach** [1987] IR 713 (concerning the Single European Act), **Synnott v. Minister for Education** [2001] 2 IR 545 (a case concerning the education of an autistic child which was at hearing before the High Court for 7 weeks) and **TD v. Minister for Education** [2001] 4 IR 259 (concerning disadvantaged children in need of accommodation and treatment). This not only benefits the individual litigants, but society in general. In the face of the Government's failure to properly fund free legal aid, it is the acts of such Counsel that have allowed access to the courts system. In cases where the plaintiff is successful, Counsel will ultimately be paid a fee but, in other cases, where the plaintiff fails or (for one reason or another) the case does not proceed, Counsel will be unremunerated for all of the work done by them. This is a significant feature of the current system. It is difficult to identify any other area of work undertaken in the State where professional people provide services where there is no guarantee that payment will ever be made for those services.

3.4 A recent study has been conducted by the Bar Council of voluntary/unpaid work by practising barristers. 98% of questionnaires cited that the barristers undertook some form of voluntary/unpaid work. The results of this survey are contained in a table which forms Appendix I to these submissions.

Recommendations

3.5 The results of the survey clearly demonstrate that members of the Bar are providing their services to litigants to enable them to litigate matters of importance to them without any certainty that they will recover any fee at the end of the day. This is in accordance with a longstanding tradition of public service at the Irish Bar. While the Bar Council believes that barristers will continue to

provide services in this way, it appears to be manifestly inappropriate that impecunious litigants should have to proceed in this way in order to bring their disputes before the courts. The Bar Council believes that a comprehensive system of civil legal aid should be put in place which would enable members of the public to take cases to court without having to rely upon the grace and favour of barristers and solicitors.

4. DISPUTES IN RELATION TO BARRISTERS' FEES AND OTHER LEGAL COSTS – THE TAXATION SYSTEM

4.1 Before turning to the individual areas of barristers' practice, it may be convenient to outline the manner in which disputes in relation to the levels of fee charged by a barrister are currently dealt with. Most disputes in relation to the level of fees charged arise not as between client and counsel but as between party and party – where one party in the case has succeeded against the other party and the court has made an order that the successful party should recover his or her costs from the unsuccessful party. When a case is concluded with an order of that kind, the successful party will ordinarily provide particulars of his or her costs to the unsuccessful party. Those particulars may be delivered informally or in a very formal manner by delivering a bill of costs prepared by a legal costs accountant. The relevant particulars (or bill of costs) will indicate the fees charged by counsel for the successful party. In the majority of cases, those fees will ultimately be agreed (with or without adjustments) by the unsuccessful party. In a minority of cases, where there is a dispute between the unsuccessful party and the successful party, that dispute can be referred for *"taxation"* to be measured by an officer of the High Court known as the *"Taxing Master"*. Where such dispute is referred to the Taxing Master in that way, it is known as a *"party and party taxation"*.

4.2 The existing taxation system seeks to provide a process for dealing with those cases where (inter alia [3]) the fees of counsel (or other legal costs) are believed to be too high or too low (as the case may be). The taxation system has been in place for a long number of years. It is the only system currently in place which provides an independent review in cases where there is a dispute over legal costs. However, there is no system that would not benefit from a critical analysis of its strengths and weaknesses, and for that reason, the Bar Council welcomes the establishment of the Group.

[3] Obviously, the taxation process deals with a great deal of matters other than the fees of counsel.

4.3 The process of taxation is provided for in Order 99 of the Rules of the Superior Courts. Order 99 sets out detailed provisions in relation to the manner in which taxation is to be conducted. In addition, there is a significant body of case law to guide the Taxing Masters in their work.

4.4 The principles applicable to a party and party taxation in the High Court are equally applicable to the taxation of costs in the Circuit Court, where the taxation process is undertaken by the County Registrar. However, the County Registrar has many other duties and functions in addition to the taxation of costs. The Bar Council is very conscious of the extent of the burden on County Registrars, all of whom have a multiplicity of responsibilities.

4.5 It has to be said that the current system of taxation is quite convoluted and often cumbersome. However, that is not to say that it does not serve a useful purpose. The purpose of the taxation process is to resolve **disputes** about the level of costs. It only deals with those cases where there are disputes. As mentioned earlier, the majority of costs are dealt with by agreement between the parties. It is only in the minority of cases that a dispute exists requiring taxation. As in the resolution of any dispute, there have to be clear rules and established procedures to ensure that cases are dealt with fairly and on a consistent basis. It is important that both sides should know what the rules and procedures are so that they know how to approach the dispute in their own best interests. The procedures which apply in the Taxing Master's office serve the same purpose as any rules of procedure in any forum designated to resolve disputes. Such rules should, of course, be kept under review to ensure that they assist rather than undermine the purpose of the process.

4.6 There are advantages to the current system which include the following:-

(a) the taxation process is governed by well established and well tried principles;

(b) it operates in an open manner. The entire process is open not only to the parties concerned but to the public. Sittings of the Taxing Master take place in public;

(c) the process is operated by skilled professionals (legal costs accountants) who are in a position to make all necessary points and submissions on behalf of their client;

(d) there are inbuilt safeguards in the system. If either party is unhappy with the initial decision of the Taxing Master, they are given the opportunity to criticise that decision by means of filing objections. However, it is anomalous that these objections are heard by the same Taxing Master whose decision is contested in the objections;

(e) if the ultimate decision of the Taxing Master is considered unjust by either party, the party aggrieved has a statutory right of appeal to the High Court under section 27(3) of the Courts & Court Officers Act, 1995 [4]. The relevant test for the purposes of such appeals is whether the decision of the Taxing Master is unjust. This was recently confirmed by the Supreme Court in **Cronin v. Astra Business Systems Limited** [5]. Thus, if in any particular case, the paying party believes that the fee allowed by the Taxing Master to counsel is unjustly high, they have the ability to take that matter to the High Court. [6] The test applicable under section 27(3) of the 1995 Act is commendable for its simplicity and ease of application. It represents a considerable improvement on the

[4] A similar right exists to appeal to the Circuit Court from decisions of the County Registrar.
[5] Supreme Court, unreported, 14 May, 2004.
[6] Examples of cases where the courts have significantly reduced the fees proposed by counsel includes **Smyth v. Tunney** [1993] 1 IR 451; **Superquinn Limited v. Bray UDC (No. 2)** [2001] 1 IR 459 and (in the case of a solicitor and client taxation) **Commissioners of Irish Lights v. Maxwell Weldon & Darley** [1997] 3 IR 474.

old test applied under the pre-existing law which was unnecessarily complicated.

4.7 However, there are also significant deficiencies in the present system. The present system can be costly. There is a significant disincentive to remit cases to taxation in circumstances where court fees of 6% must be paid. This represents a very significant additional burden on a party who wishes to have an independent review carried out of costs. Furthermore, there are cases where perhaps only one item is in dispute and no simple procedure exists to enable that item to be dealt with speedily. Consideration might be given to adopting a simple exclusively written procedure for such items. An oral hearing is hardly required in every case. In addition, several features of the present system are quite antiquated. Some of the provisions of order 99 are outdated (in particular, the scale of costs provided for in Appendix W which is rooted in antiquity). There is also a need to review the provisions of order 99 to bring them into line with the provisions of section 27 of the Court & Court Officers Act, 1995. No amendments have been made to the rules notwithstanding the enactment of the 1995 Act. Furthermore, the procedures employed in the Taxing Master's office and under order 99 require careful review. For instance, the procedure under which the objections of a party dissatisfied with a decision of the Taxing Master are dealt with by the very same Taxing Master appears to be inherently wrong. There is also the fact that the process of taxation can be quite lengthy and time consuming. Notwithstanding the rise in litigation, there have been no increases in the number of Taxing Masters in the High Court for a long number of years. Insofar as the Circuit Court is concerned, the County Registrar is expected to fulfil the role of Taxing Master notwithstanding the many other responsibilities of the County Registrar, and notwithstanding the increase in case loads in the various Circuit Courts. The appointment of additional Taxing Masters in the High Court and Taxing Officers in the Circuit Court would speed up the process. It would also mean that those assessing the level of costs would have more time to spend on individual cases in carrying out the type of assessments contemplated by section 27(1) of the Courts & Court Officers Act, 1995.

4.8 There have been improvements in the system. As mentioned already, section 27 of the 1995 Act represents a significant advance on the previous position. In this context, one of the most common complaints **in the past** about the level of fees allowed by the Taxing Master to counsel arose from the practice that a Taxing Master could not reduce the amount of counsel's fee unless satisfied that no solicitor acting reasonably carefully and reasonably prudently based upon experience acquired in the course of a solicitor's practice would have agreed such a fee. [7] While that practice did not prevent Taxing Masters and courts from reducing the level of brief fees proposed by counsel [8], it effectively prevented the Taxing Master from embarking on a personal review of the work done by counsel with a view to measuring an appropriate fee for that work. However, that restriction on the powers of the Taxing Master was abolished and set aside by the provisions of section 27(1) of the Courts & Court Officers Act, 1995 which provides that on any taxation of costs, the Taxing Master has power *"to examine the nature and extent of any work done or services rendered or provided by counsel….."*. Thus, the Taxing Master is now freed from the restrictions previously imposed and can look in any individual case at the actual work undertaken by counsel and decide whether or not the fee proposed by counsel is appropriate having regard to the level of that work. Similarly, a paying party on any taxation of costs can also now make submissions to the Taxing Master on the same basis. Thus, if the paying party believes that the level of work undertaken by counsel (or the attention given by counsel to a particular item of work) does not justify the level of fee proposed in that particular case, the paying party is entitled to examine the work undertaken and to test whether or not the fee proposed by counsel is commensurate with the level of work actually done. If it is not, then it would clearly be unjust to force the paying party to pay such a fee to counsel on a party and party taxation and the fee will inevitably be reduced.

[7] See, for example, **The State (Richard F. Gallagher Shatter & Co.) v. De Valera** [1987] IR 57.
[8] as exemplified by the approach adopted by Murphy J. in **Smyth v. Tunney** [1993] 1 IR 451.

Recommendations

4.9 The Bar Council makes the following recommendations in the context of taxation:-

(a) the Bar Council would welcome a careful review of the current system by the Legal Costs Group;

(b) obsolete or out-of-date provisions in order 99 should be dropped;

(c) the process of taxation should be speeded up;

(d) additional Taxing Masters should be appointed to deal with the level of work and to allow proper assessments to be carried out in accordance with the requirements of section 27 of the 1995 Act.

(e) it is important that the taxation process should look at both the value or worth of the work done and the necessity to carry out that work. Unnecessary costs should not be for the account of the paying party;

(f) in view of the significant burden already imposed upon County Registrars around the country, it would make sense (and would lead to greater consistency in decision-making) if all taxations of costs were centralised in one agency in the State. However, provision would obviously have to be made to allow Taxing Officers to travel around the country to facilitate country practitioners who would not have the opportunity to travel to Dublin;

(g) in particular, the objections process needs to be examined. It is hardly right that the objections should be dealt with by the same Taxing Master who heard the original taxation. If there were sufficient numbers of Taxing Officers, it would be possible to have the objections dealt with by a different person (or perhaps by a panel of different officers) to the officer who dealt with the initial taxation;

(h) it would make sense if appeals to the court were dealt with by judges specifically assigned to reviews of taxation so that such judges would develop expertise in the area. This would shorten the length of hearings under section 27(3) of the 1995 Act and would, in itself, lead to a saving in costs;

(i) a simple taxation process should be introduced to deal with cases where only a single item is in dispute or only a very small number of items are in dispute. A simple written process might well be appropriate in such cases.

5. ALTERNATIVES TO TAXATION?

5.1 An obvious alternative to the taxation process would be to introduce a tariff system which effectively placed a cap on the level of costs recoverable by a successful party in civil litigation. Consideration should be given by the Group to the possibility of devising a system whereby, irrespective of the level of costs actually incurred by a litigant, the most which that litigant could recover from the paying party would be limited to a specified figure in accordance with the terms of a pre-existing published tariff.

5.2 Such a system would undoubtedly have some advantages. Parties to litigation would be in a position to know and measure the maximum extent of their liability to pay costs to the other side in the event that they are unsuccessful.

5.3 On the other hand, such a system would also have disadvantages:-

(a) Having regard to the multiplicity of different types of claims in proceedings which can arise in civil litigation, the formulation of such a tariff is likely to be an extremely complex and difficult task.

(b) Moreover, while such a system would have certain advantages for a paying party, what impact would it have upon the successful party? In this context, it is important to bear in mind that the successful party is the party whose case has successfully been established, after a hearing before a judge appointed under the Constitution, and who has demonstrated that the case sought to be made by the opposing side is wrong or unfounded. Should the successful party, in those circumstances, be limited to recovering a sum calculated in accordance with a tariff even where (as may well be the case) the costs actually incurred by that party substantially exceed the amount available under the tariff?

(c) The difficulty with a tariff is that it does not measure the extent of the necessary work actually done in a case, and it therefore cannot accurately value the work which may arise in any particular case in order to attain justice for the successful party.

(d) A tariff based on the value of a case may not be capable of dealing with such a situation. A tariff based on the value of the case would not take account of the fact that in some cases of significant value, the issues are relatively straightforward, and the amount of work involved is proportionately less. On the other hand, a case of lesser value may well involve a multiplicity of difficult issues (both of law and of fact) requiring extensive investigation and intensive consideration.

5.4 Very obvious difficulties arise in the context of the Constitution and the European Convention on Human Rights & Fundamental Freedoms ("the Convention"). The right of a litigant to take a case to court has been recognised as a personal and property right of an individual protected under the Constitution. [9] The right of access to the courts is also one of the rights recognised under Article 6 of the Convention. [10] How will a tariff affect the right of a litigant to pursue a claim? Will it operate as an impediment to the right of access to the courts? What will happen in a case where the amount available under the tariff is considerably less than the estimated cost of taking a particular action? If a prospective litigant is not a person of significant means, it is likely that the case will proceed unless the legal advisors can be persuaded to undertake the additional work (i.e. the work which would not be remunerated under the tariff) for no fee. If there is no prospect that the lawyers will be in a position to recover those fees from the unsuccessful party, it is likely that in many cases, the proceedings will not be taken.

[9] See, for example, **Murphy v. Greene** [1990] 2 IR 556 per Griffin J. at p 578. See also **R.B. v. A.S.** [2002] 2 IR 428 per Keane C.J. at p 446.
[10] See, for example, **Golder v. United Kingdom** (1979-1980) 1 EHRR 524.

5.5 Another difficulty with a tariff of this kind is that it could actually lead to significant increases in costs. There are bound to be cases where the level of costs allowed under the tariff will be greater than the value of the work actually done. Yet, if the tariff applies, the successful party will be entitled to recover the full amount allowed by the tariff. In that way, considerable injustice will be done to the paying party. This appears to be an inevitable consequence of any system which does not actually seek to measure the worth or value of the work actually done.

5.6 Such a system may also motivate parties to take steps in proceedings which they would not otherwise do – solely with a view to ensuring that they can earn the level of fees available under the tariff. Rather than settling proceedings at an early stage, parties may be motivated to take the proceedings to court where they are confident that they will succeed on liability and will thereby secure for themselves the amount available under the tariff. It may therefore act as a disincentive to the early settlement of proceedings. Regrettably, if there is no independent third party available to review and assess the actual level, necessity and value of the work done, there is an incentive to parties to proceed in this way.

5.7 A tariff of this kind is open to further abuse in that parties with significant resources available to them may use the tariff as an instrument of oppression by taking steps or bringing applications in proceedings which force the opposing party to incur very considerable costs (well in excess of the amount available under the tariff) with the aim of forcing that party either to abandon the litigation or to agree to an unfavourable settlement.

5.8 Such a system will inevitably lead to an inequality of arms between parties. Well resourced parties would be able to engage teams of lawyers while less well resourced parties might have to confine their representation to a smaller team. This would have immediate and obvious implications for litigants' constitutional rights and for the rights protected by Article 6 of the Convention.

5.9 It might be possible to devise a different type of tariff – one which is not based on the value of the case – but upon the time actually spent by lawyers in dealing with the case. Again, this would have the advantage that parties might be in a position to gauge the likely level of costs being incurred by the opposing party. But it would be a very inexact science because one could never gauge precisely how many hours were being spent by the other side on the litigation. Such a system has a number of disadvantages. If the system is based upon time, it incentivises lawyers to take very considerable time not only in preparing for a case, but also in running cases before the courts. This would not be in the interests either of the efficient disposal of business in the courts, or in the interests of the paying parties.

5.10 Any attempt to devise a tariff therefore faces very considerable difficulties. Quite apart from the difficulties identified above, there is also the very real practical difficulty (dealt with in part 12 below – dealing with scale fees) that there is a vast and ever expanding range of civil litigation and anyone seeking to devise a tariff faces an unenviable task in trying to formulate a tariff which will deal with each aspect of the system.

5.11 Most fundamentally, a tariff lacks the ability to independently review the level, the necessity, the value and the worth of the work actually undertaken by lawyers. The Bar Council believes that an independent review of the work done is the only way in which a just and fair computation can be made of the amount which the paying party should be obliged to pay to the successful party in litigation. Such a process of independent review should strike a balance between the interests of the paying party on the one hand and the successful party on the other. It should be capable of ensuring that the paying party is not required to pay unjustly high costs to the successful party, while at the same time it should also be capable of ensuring that the successful party should be entitled to recover such costs as were **necessary** to enable that party to attain justice in the proceedings in which he or she has been found to be in the right. The Bar Council believes that a system of independent review is the only system capable of balancing the competing

interests of the parties and which can properly test the value and the necessity of the work actually done in any case.

5.12 The Bar Council believes that, ideally, there should be a single costs assessment body appointed to deal with all disputes in relation to costs which arise in the context of civil litigation governing the Supreme Court, High Court, Circuit Court and District Court. Such a system would enable a coherent and consistent approach to be taken to costs on a countrywide basis. Such a system could also include provision for ongoing review. The Bar Council believes that such a system would require periodic review. Any body established for this purpose should have the power to revise its rules to deal with new situations which may arise (and new forms of litigation which may arise). Whether that body should be formed by expanding and reforming the present Taxing Master's office, or whether it should be a newly appointed body, is a matter which obviously requires careful consideration by the Group. The Bar Council believes that the present taxing system is capable of being reorganised and reformed, but it has no difficulty in principle with an entirely new body being set up for the purposes of dealing with any disputes that may arise in relation to the necessity or level of costs to be paid in civil litigation.

6. THE DIFFERENT AREAS OF CIVIL LITIGATION

6.1 As mentioned earlier, it is now proposed to consider a number of significant areas of practice in civil litigation. The Bar Council reiterates, however, that this is not an exhaustive list, and there are many other areas of practice.

6.2 The areas which account for the majority of Civil Litigation can be broken down as follows:

(a) personal injury litigation;

(b) non-jury/chancery and commercial work;

(c) public and constitutional law;

(d) family law;

(e) civil jury actions.

7. PERSONAL INJURIES LITIGATION

7.1 A distinguishing feature of personal injuries litigation is that the vast majority of such cases which come before the District Court, the Circuit Court the High Court and the Supreme Court involve the presence of an insurance company. At least 80% of personal injury cases coming before the courts arise out of *"tortious wrongdoing"* and are cases in which the Defendant is insured.

7.2 Since the insurance market in this jurisdiction is controlled by no more then 10 major insurance companies, they have an inordinate influence over the level of fees which can be marked. To avoid the delays involved in sending a matter forward to taxation, parties tend to attempt to negotiate their fees with the insurance company directly after the case is concluded. It is for the 'winner' to assess whether they wish to accept the fees offered or proceed to taxation, with the consequential delays and without any guarantee that a higher level of fees will be achieved. In the vast majority of cases (at least 90%) legal costs are agreed directly with the insurance company.

7.3 What is agreed in settlement with the insurance companies has a direct impact on the level of fees that will tax, as what is achieved in settlement is frequently quoted by cost accountants to the relevant taxing authority in an attempt to dictate what the appropriate level of fees should be. Accordingly, the level of fees marked by counsel in personal injury work is in fact regulated by the insurance industry and does not reflect either the level of work involved or a barristers overhead expenses which include the cost of insurance, office rental, telephone expenses, secretary support, text books etc.

7.4 Recent analysis undertaken in the MIAB report in relation to *"costs of claims incurred"* suggests that solicitors receive 80% of total lawyers fees and barristers received 20%. If one adds the cost of doctors, engineers, quantity surveyors etc., to the equation, barristers receive 14.43% of the overall costs while doctors, engineers and other experts receive 24% with solicitors accounting for the balance.

7.5 Over the last 5 years, the level of fees marked by Counsel has remained static and even declined with the introduction of the Euro. A direct IR£1 or €1 exchange rate has been observed in many court awards and legal fees and in some areas there has been an even greater reduction. For example, prior to the introduction of the Euro, a typical fee for a consultation with Senior Counsel in relation to a High Court case would be IR£200. At present, however, a consultation in a High Court personal injury action is now taxed at €160 which equates to approximately IR£130.

7.6 With the introduction of the new Rules of Court, S.I. 391/98, which compel the exchange of expert reports prior to the commencement of a High Court personal injury action, the preparatory work in such cases has practically doubled without any increases in the level of fees charged. The introduction of S.I. 391 has significantly increased the work load of counsel. In the past, counsel were obliged to read, understand and analyse their own expert's reports including medical reports, engineering reports, vocational assessor reports, actuary reports, and accountant reports. Counsel must now not only read, understand and analyse those reports, but must also understand and analyse the opposition reports and compare the two prior to the trial of the action. However, while undoubtedly the preparatory work in High Court personal injury cases has effectively doubled in recent years, the fees on taxation have either remained the same or reduced.

Unsatisfactory Features of the Current personal injury System

7.7 A significant feature of any counsel's work is the listing and calling on of cases. While the listing of personal injury matters is not significantly time consuming, waiting for a case to get called on is. As a result of the continual under funding of the Court Service and the failure to appoint the appropriate number of judges, personal injury cases throughout the country are listed for hearing in circumstances where it is not anticipated that they will ever be reached.

7.8 It is a regular feature of the Dublin High Court Personal Injury List that cases listed for hearing on a Tuesday do not get assigned to a judge until the end of the

week or, on occasion, the following week. This means that counsel, solicitor, experts and witnesses are obliged to wait in the hope, rather then expectation, that their case will be taken up by a judge. Counsel cannot recover any fees for waiting time. In one case, where a plaintiff had lost the sight of her eye and suffered horrendous other personal injuries, the matter was originally Specially Fixed in November 2003, was re-listed on three separate occasions until finally, in June 2004, the matter was called on for hearing before a Judge. Nine court days were wasted waiting for the case to be heard and in the circumstances of that case, counsel for the plaintiff were unable to accept any other work.

Recent reforms

7.9 Recent legislative reform is anticipated to have the effect of streamlining procedural requirements and reducing the costs of personal injury litigation as a result. Delays in the exchange of pleadings and the inevitable motions that follow significantly increase costs. The introduction of the Civil Liability and Courts Act, 2004, which is based primarily upon the submissions of the Bar Council to the Denham Committee on Court Practice and Procedure, will fundamentally change the nature of pleadings and have the effect of reducing procedural requirements and thus expediting litigation and as a result reducing the costs involved. However, while this will certainly expedite litigation and has a result of a beneficial reduction in costs involved, the new statutory requirements by themselves will increase the extent to which recourse is made to counsel and will thereby also increase the work of counsel. Such increased work should be appropriately remunerated.

8. NON-JURY, CHANCERY AND COMMERCIAL WORK

8.1 Work undertaken by barristers in these areas cover a whole range of different types of dispute including the following:-

(a) building construction and engineering disputes;

(b) banking;

(c) sale of goods;

(d) carriage of goods (by air, road and sea);

(e) shipping cases (involving claims against ships) [11];

(f) intellectual property claims including passing off disputes, trade mark disputes, copyright disputes, industrial design disputes and also appeals from decisions of the Controller of Patents Designs & Trade Marks;

(g) insurance and re-insurance disputes;

(h) trust claims;

(i) disputes relating to the estates of deceased persons;

(j) probate (including disputes about the validity of wills);

(k) land disputes including boundary disputes and actions relating to trespass and nuisance;

(l) landlord and tenant disputes;

[11] which are dealt with by the Admiralty Judge of the High Court.

(m) product liability cases (where damage is done to property rather than to persons);

(n) competition law;

(o) tax planning cases and other revenue disputes;

(p) pension disputes;

(q) disputes between agents and principals, franchisees and franchisors etc.;

(r) actions for professional negligence against solicitors, accountants, bankers, auditors, financial advisors etc.;

(s) civil actions for deceit, fraudulent or negligent misrepresentation or negligent mis-statement;

(t) disputes arising in relation to the operation of markets or exchanges;

(u) disputes relating to the purchase or sale of commodities;

(v) actions for breach of contract of all kinds;

(w) actions in which assistance is sought from the court to interpret documents;

(x) actions on foot of cheques and bills of exchange;

(y) applications for injunctions;

(z) actions in relation to charities;

(aa) actions to enforce or rescind contracts;

(bb) company law matters;

(cc) bankruptcy and insolvency;

(dd) European law disputes;

(ee) partnership disputes;

(ff) general business disputes which do not fall into any of the other categories identified above.

8.2 For largely historical reasons, the listing of actions of the type described in paragraph 6.1 above [12] are divided into three different lists in the High Court, namely:-

(a) the Chancery List comprising actions (which historically fell within the *"equity"* jurisdiction of the courts);

(b) non-jury actions (which historically were dealt with by the common law courts); and the Commercial List (which comprises actions which are specifically admitted into the Commercial List by the Commercial Court judge pursuant to the provisions of Order 63A of the Rules of the Superior Courts). Almost any of the actions identified in paragraph 8.1 above are capable of constituting commercial proceedings where the amount in dispute is not less than €1 million. The Commercial List came into operation for the first time in January 2004.

8.3 Ordinarily, actions are commenced by summons and, if the plaintiff's claim is disputed, the action will go through a process of exchange of documents following which it will ultimately be listed for hearing by a process which involves the matter being listed in a list known as the *"list to fix dates"*. Lists to fix dates are held each term when the court calls over all of the cases which had been certified as ready for trial for the purposes of assigning hearing dates to them. Ordinarily, cases are listed for hearing in the order in which they were

[12] Please note that this is not an exhaustive list.

certified as ready for trial. As many as three or four cases may be listed for hearing each day although it is the common experience of practitioners that there will not be sufficient judges to hear all of the cases assigned to any particular day. If so, those cases will be put back to the next list to fix dates when they will be allocated new hearing dates. No extra fee is allowable to counsel when this happens. Occasionally, cases which are put back to the next list to fix dates in this way will be given priority in the next list to fix dates (i.e. they will be placed at a relatively high point in the list, thus increasing their prospects of being listed first on a day for hearing in the following term). Cases listed first on any hearing day will obviously have a better chance of securing a judge than cases which are listed lower down in the list.

8.4 In cases of this kind, fees will ordinarily be agreed in advance of the hearing with a client. In most cases, it will be impossible to tell at the date of commencement of the proceedings whether or not the client will ultimately be successful. While counsel may have advised that the client has a good prospect of succeeding in the case (either as plaintiff or defendant) it will ordinarily be impossible to predict at this stage which party will win. In those circumstances, a client will be fully aware that ultimately, fees due to counsel may have to be discharged out of their own resources. In cases of this kind (unlike in personal injury cases) clients will ordinarily be very concerned to ensure that they know the level of fees involved so that they can make their own decision as to whether or not it is worthwhile bringing or defending proceedings. In most cases, clients will have no expectation that they will definitely be in a position to recover their costs from the other side after the conclusion of the case. Whether such recovery will occur will depend upon success in the case. Even in cases where an order for costs is made against the unsuccessful party, the client may have discharged the barrister's fee in the first instance. The client may well have paid those fees as they arose during the course of the proceedings. In such cases, there is a considerable burden on a client if they have to await the outcome of the taxation process.

Unsatisfactory Features of the Current System which lead to wasted costs

8.5 The lists to fix dates are an inherently unsatisfactory way of assigning hearing dates to cases. They involve large numbers of counsel and solicitors attending before a High Court judge when each of the cases on the list is laboriously called out one after the other and a debate takes place in respect of each case as to when it should be listed for hearing in the following term. Anyone who has attended such a list to fix dates will see that it is an inefficient and time consuming way to allocate hearing dates. These inefficiencies must, inevitably, increase the overall cost of litigation. The current system represents a considerable waste of practitioners' time and judicial time – particularly in circumstances where the allocation of a date at that list is no guarantee that a case will secure a hearing when it is subsequently listed for trial.

8.6 Similarly, the manner of listing more cases than can conceivably be heard on any particular day is inefficient and costly. It involves parties attending with all of their lawyers and witnesses in the hope that their case will secure a judge. If no judge is available, all of these persons have to re-assemble again after a significant interval of time, i.e. after a new date is fixed for the hearing of the case following its inclusion in the next list to fix dates. It is not unusual for cases to fail to secure a judge on more than one occasion.

8.7 Another unsatisfactory feature of the system is that there appears to be insufficient thought given to the allocation of judges to the individual daily lists. For instance, the parties in a three day case (which has been flagged as a three day case since the preceding list to fix dates in the previous term) may attend before the judge in (for the sake of argument) the Chancery list on a Thursday to be told that the judge assigned is unavailable to deal with a three day case because of existing commitments that judge has for the following week. With more planning and fore-thought, a different judge with adequate availability might have been assigned to ensure that the three day case could be taken up.

8.8 The difficulties identified above in relation to listing do not apply in relation to those cases which have been admitted to the Commercial List. That list is run on

an altogether different basis. While only a small number of cases qualify for admission to that list (namely cases with a value of more than €1 million), those cases are effectively *"fast tracked"* through the system. Every case is *"managed"* by the judge to ensure that all of the relevant court documents are delivered within a relatively short period of time. The judge will also be in a position to allocate hearing dates which are real in the sense that a judge will be available to deal with the case on the day allocated for the hearing.

Recommendations

8.9 The Bar Council recommends that significant changes should be made to ensure that wasted costs of the type discussed above can be eradicated from the system:-

(a) in the first place, it is clearly essential that additional judges should be appointed. The State of Ontario in Canada has a population similar to Ireland. It has a similar legal system (a common law system). However, in that State, there are 64 High Court judges. That is approximately double the number of High Court judges in Ireland. The Bar Council believes that the number of High Court judges should be doubled. An increase in the number of judges is the only way in which wasted costs of the type discussed above can be eradicated. There need to be enough judges available to hear cases [13];

(b) the Bar Council makes a similar recommendation in relation to Circuit Court judges. There are significant delays in country circuits. In country areas, circuit judges often have to sit very late at night to get through their lists. In such circumstances, judges are understandably driven to urging parties and their counsel to confine the evidence as much as possible. However, this can lead

[13] It might be thought that judges might be left idle in such circumstances where cases due to be heard by them settle. However, nothing could be further from the truth. All judges tend to have significant numbers of reserved judgments to prepare. All judges deserve free time from sittings so that they can prepare their reserved judgments.

to a perception by clients that they have not got a full and fair hearing. In order to provide a fully comprehensive Circuit Court system, the Bar Council believes that the number of Circuit judges should be doubled;

(c) the listing system needs to be substantially overhauled. There is no reason why the allocation of dates should require the attendance of large numbers of solicitor and counsel or why it should occupy so much court time. The listing of cases could surely be undertaken in the relevant court offices;

(d) furthermore, not more than one case should be listed before any judge for hearing on any day (unless it is known in advance that the cases are sufficiently short to enable all cases listed before a practitioner judge can be dealt with by that judge). However, this system would only work in the even that there are sufficient numbers of judges to deal with the number of cases requiring hearings. That is why it is so essential to appoint a significant number of additional judges.

9. PUBLIC and CONSTITUTIONAL LAW

9.1 This area includes:

i) Judicial Review
ii) Habeas Corpus
iii) Extradition
iv) Cases Stated

i) Judicial Review

9.2 Quite frequently the parties to a judicial review are mismatched in terms of financial resources. A typical judicial review involves a person of little means taking on a Government Department, the Gardaí, a District Judge, a Disciplinary Body or the State itself. One of the virtues of an independent referral bar operating the cab rank rule is that a 'David' wishing to take on a Government 'Goliath' can retain the barrister of his or her choice and gain access to the courts. Notwithstanding the absence of a properly funded legal aid system, private citizens still manage to litigate the issues concerning them. Important issues of principle and justice are litigated because of the existence of an independent referral bar, and because barristers continue to take cases on, often without any guarantee of being paid.

9.3 In judicial review cases the stakes are often very high. An immigrant seeking to restrain a wrongful deportation deserves a proper hearing. The prisoner who has not received a fair trial is entitled to a quashed conviction. If a prisoner is beaten up in Garda custody, both the prisoner and the community deserve to have that highlighted. In all of these examples, the stakes are high and the objective is usually the pursuit of justice. The public good is best served if a barrister who

takes on such cases is properly remunerated. That applies to the applicant's counsel as much as it does to the respondent's.

ii) Habeas Corpus – applications under Article 40 of the Constitution

9.4 A habeas corpus application is an application made to a High Court Judge for an Order directing the release of the applicant prisoner. Habeas corpus applications may be directed at a Prison Governor, a member of the Gardai, a Military Detention Centre or any person or body whom it is alleged is unlawfully detaining the applicant. Involving as it does the liberty of the individual, a habeas corpus application enjoys a special priority in court listings. Habeas corpus applications are taken first, ahead of the other business of the day. As with judicial review cases generally, habeas corpus applications can involve a lot of law. A barrister practising in this area must have knowledge of a significant body of case law, legal principles and practice. All habeas corpus applications must be made to the High Court. They frequently arise as emergency applications, requiring speedy paperwork and efficient case presentation.

9.5 Inevitably, much of this work is pro bono. Applications frequently get refused, or are turned into bail applications or judicial review applications. This frequently results in barristers going unremunerated. Whether acting for applicant or respondent, a barrister is entitled to a proper fee for this type of work.

iii) Extradition

9.6 As with the two areas just mentioned, modest fees are charged in extradition cases. They are often taken on as an adjunct to purely criminal work. Extradition applications (brought by the Attorney General) usually succeed. Accordingly, more often than not the "punter pays". Where that happens a barrister will either get nothing or will get a very modest fee on the Attorney General's Scheme. The

Attorney General's Scheme is considered below under the heading of "Recommendations".

9.7 Extradition applications are considered to be civil applications, though plainly involving a criminal subject matter. They are not covered by legal aid. Since the 2001 Extradition Act all extradition cases are now dealt with in the High court.

9.8 In recent times the extradition area has become more and more complex. A large number of statutes govern the area, including the most recent European Arrest Warrant Act. A barrister practising in this field must have detailed knowledge of a significant body of statute and case law, and a detailed knowledge of a significant number of International Extradition Treaties and Agreements.

9.9 Fees on both the applicant and State side are modest and do not reflect the relative complexity of the cases. Routinely, in such cases, a barrister will recover a brief fee of no more than €1,000.00. On occasions, larger fees may be recovered. However, such cases are unusual. Occasionally, the brief fees paid are less than €1,000. In a relatively straightforward extradition, a brief fee of approximately €800 will be paid.

iv) Cases Stated

9.10 Again, this is a relatively discrete field of the law and is considered somewhat of a speciality. Cases can be stated from lower courts in both criminal and civil matters. Many of the observations made above concerning judicial review, habeas corpus and extradition cases apply equally to this particular area. The forum for such cases is once again either the High Court or the Supreme Court. In cases stated, difficult issues of law arise. Considerable expertise is required and the emphasis upon procedural questions is quite marked. As with the other areas, this area of practice is quite heavily regulated by statute and secondary legislation. That entails a barrister developing a knowledge of the area over time.

9.11 Relative to the question of costs, the following features may be said to be common to the four areas of practice identified above:

- The cases are heard in either the High or Supreme Court.
- The cases often involve difficult issues of law.
- The cases require and involve significant knowledge of specific court procedures and the rules of evidence.
- The areas are heavily regulated by statute and secondary legislation.
- For the parties involved, the stakes are usually quite high.
- The subject matter of such cases can occasionally be quite "weighty". Issues of constitutional justice and fundamental principles tend to be a feature.
- As with non Stateside areas of practice, barrister's fees are set in accordance with the rules of the legal market place.
- Costs in such cases are usually agreed and do not have to go to taxation. In other words, the system is working.
- A lot of these cases involve a large number of "for mentions" requiring a barrister to attend in court on each and every occasion. For example, a typical judicial review case will involve five or six court appearances prior to the case getting a hearing date. A barrister is rarely paid for such appearances.
- The DPP's office will pay a barrister in the region of €80.00 for appearing in court to extend time for the service of opposition papers in a judicial review. That is not an excessive fee.
- With the surge in the number of stateside/judicial review judgements being delivered, the entire area has become more complex. Apart from the increase in case law, statutory regulation of the area continues apace, be it domestic or European. European Court of Human Rights jurisprudence now features routinely. Since the

complexity of such briefs has risen, that should be reflected in the level of fee marked by the barrister.

Unsatisfactory Features of the Current System

9.12 Many of the problems identified in this area apply with equal force to the other areas of practice under scrutiny. Most glaringly of all is the shortage of judges which gives rise to considerable injustice at a number of levels:

a) Custody cases, that is to say cases in which a person is held in custody, are routinely held up and postponed by reason of the non availability of judges.

b) Litigants with genuinely urgent cases get no remedy.

c) Issues can become moot and a wrongdoer can escape without stricture.

d) Non urgent cases become hopelessly bogged down in court lists. Quite frequently on the judicial review side, hearing dates given out in a list to fix dates will all be taken up by "priority" matters, leaving non priority cases to wander from list to list and from term to term.

9.13 In the context of barristers' fees, the problems wrought by a shortage of judges include the high probability that a barrister, where a case fails to get on, will go unremunerated.

10. FAMILY LAW PROCEEDINGS

10.1 Family Law proceedings can be broken down into the following categories:

(1) Applications under the Guardianship of Infants Act 1964 as amended i.e. custody and access

(2) Applications for Maintenance Orders under the Family Law (Maintenance of Spouses and Children) Act 1976 as amended.

(3) Applications under the Domestic Violence Act 1996 for Barring Orders, Safety Orders and Protection Orders.

(4) Applications for a Decree of Judicial Separation and Ancillary Relief pursuant to the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act, 1995.

(5) Applications for a Decree of Divorce and ancillary relief pursuant to the Family Law (Divorce) Act 1996.

(6) Applications for a Decree of Nullity.

(7) Applications for a Declaration of Parentage pursuant to s.35 of the Status of Children Act 1987.

(8) Applications for a Declaration of Marital Status pursuant to s. 28 of the Family Law Act, 1995.

(9) Applications for an Order dispensing with the parents' consent to adoption pursuant to s.3 of the Adoption Act 1974.

(10) Applications declaring that a child can be adopted pursuant to s.3 of the Adoption Act 1988.

(11) Applications to dispense with the consent of a spouse to the sale of a family home pursuant to s.5 of the Family Home Protection Act 1976.

(12) Applications to prevent the disposal of household chattels pursuant to s.9 of the Family Home Protection Act 1976.

(13) Stand alone applications for Ancillary Orders such as Property Adjustment Orders, Lump Sum Orders, Periodic Payments Orders, Financial Compensation Orders, or Pension Adjustment Orders following judicial separation or divorce pursuant to the Family Law Act 1995 or the Family Law (Divorce) Act 1996.

(14) Applications for variation or discharge of prior Ancillary Relief Orders pursuant to s.18 of the Family Law Act 1995 or s.22 of the Family Law (Divorce) Act 1996.

(15) Applications for Ancillary Relief following a foreign decree of divorce pursuant to Part IV of the Family Law Act, 1995.

10.2 It should be borne in mind that these applications are often not brought separately but together for example a maintenance order, a barring order and an order in respect of custody of children would be brought and determined together at the one hearing. In the majority of judicial separation and divorce applications there would also be an application for orders by way of ancillary relief typically a selection of the following:-

- An order dealing with custody and access of children.
- A periodic payments order
- A lump sum order
- A property adjustment order
- A financial compensation order
- A pension adjustment order
- An order ending Succession Act rights
- An order blocking any applications for provision out of the estate of the other spouse
- An order preserving pension rights following a decree of judicial separation.

The Courts

10.3 These family law proceedings are dealt with at different levels of the Court system. For ease of reference we set out hereunder the Courts which have power to deal with the above mentioned applications using the same number for each category.

(1) Custody and Access applications – District and Circuit Court
(2) Maintenance applications – District and Circuit Court
(3) Domestic Violence applications – District and Circuit Court
(4) Judicial Separation applications – Circuit and High Court
(5) Divorce applications – Circuit and High Court
(6) Nullity applications – Circuit and High Court
(7) Declaration of Status – Circuit Court
(8) Declaration of Marital Status – Circuit and High Court
(9) Adoption application pursuant to s.3 of 1974 Act – High Court
(10) Adoption application pursuant to s.3 of the 1988 Act – High Court
(11) Application pursuant to s.5 of Family Home Protection Act 1976 – Circuit and High Court
(12) Application to prevent disposal of household chattels under s.9 of 1976 Act – District and Circuit Court

<u>STAND ALONE APPLICATIONS FOR ANCILLARY RELIEF:
CIRCUIT AND HIGH COURT</u>

(13) Applications to vary or discharge previous Ancillary Orders – Circuit and High Court
(14) Applications for relief following foreign divorce – Circuit and High Court

10.4 Jurisdiction of the District Court is limited in regard to the amount which can be awarded or in regard to the length of an order. The Circuit Court has an unlimited jurisdiction save that it cannot deal with properties with a poor law valuation of €260.00, while the High Court has a completely unlimited jurisdiction. If a case is heard at first instance in the District Court there is a right of appeal to the Circuit Court, where a full re-hearing will take place. If a case is heard at first instance in the Circuit Court there is a right of appeal to the High Court where again a full re-hearing takes place. If the hearing at first instance is in the High Court there is a right of appeal to the Supreme Court but this appeal is based on a transcript of the evidence in the High Court and save for very limited exceptions the Supreme Court is bound by the findings of fact of the High Court Judge.

10.5 Hearings are in camera which means that members of the public and of the media are excluded from the Court. Section 40 of the Civil Proceedings and Court Officers Act 2004 amends the legal position in regard to in camera hearings to allow limited reporting of such hearings in accordance with regulations to be made under the section. This provision comes into effect in March 2005 but since the necessary regulations have not as yet been published it is unclear exactly how it will operate.

10.6 In general the main family law work in the courts system can be broken down into three principal classifications.

(a) District Court applications for maintenance orders, custody and access orders and applications for safety or barring orders.

(b) Circuit Court applications for judicial separation or divorce together with orders by way of ancillary relief.

(c) High Court applications for judicial separation or divorce together with orders by way of ancillary relief in cases where there are considerable assets.

Matters to be determined in Family Law proceedings

10.7 As can be seen from the considerable array of different orders which can be obtained in Family Law proceedings the matters at issue can vary hugely from case to case. One can be dealing with a relatively straight forward application for divorce in the Circuit Court where both parties are agreed and where neither is seeking any form of ancillary relief against the other save for an order that no provision will be sought out of each other's estate. At the other end of the spectrum is an application for a divorce in the High Court where there are very large resources and where there are extremely complex legal issues of fact and law, for example in valuing properties and companies and/or for the variation of trusts in which assets are held.

10.8 However it can sometimes be the case that a matter where there is relatively small assets may also be extremely complex, due to some specific aspect of the case, for example where there is an application for custody and access in the context of an allegation of child sexual abuse made by one spouse against the other. Paradoxically sometimes cases with quite limited resources can be the most difficult and hardest fought simply because the two spouses can maintain a reasonable standard of living while living together but a separation means an inevitable drop in the standard of living of one or both. However the fact that there are very considerable resources does not necessarily mean that a judicial separation or divorce can be simply resolved. In some cases the very extent and nature of the resources will bring its own complexity, for example the valuation of multiple properties and companies; the examination of the commercial and taxation effects of extracting money from such companies; the transfer of pension entitlements and the re-organisation of the ownership of many different types of assets as between spouses.

10.9 In reality as the case law in regard to proper provision in divorce and judicial separation cases has stressed[14], each case must turn on its own facts. While in general in cases with considerable resources it will be more difficult and complex to resolve the value of assets, in cases with much more limited assets it may be more difficult and complex to divide those scarce resources between the spouses. However it can be said with some confidence as a general principle no other form of litigation so profoundly affects those involved. Not only are all the financial resources of the parties at issue, but also extremely sensitive and far reaching questions can arise in regard to the upbringing of children and the right to reside in the family home. Because of this it is understandable that family law proceedings can be more hard fought and more demanding on the litigants and their lawyers than any other type of litigation. Just as each case turns on its own facts so the fees charged in each case must reflect those facts and must attempt to reflect the particular unique facts and circumstances of each individual case. Before proceeding to look in some more detail at how lawyers charge fees in family cases it is useful to consider the makeup of the legal profession insofar as it deals with such cases.

The lawyers

10.10 The changes in family law legislation and the rise in the number of such cases in the last twenty years has been reflected in the profile and number of lawyers available to deal with such cases. Twenty years ago there were at most five or six Junior Counsel in the Law Library and no Senior Counsel, whose work consisted mainly of family law cases. Now the position has radically altered; there are at least 50 to 60 specialist family law practitioners at the Junior Bar. There are also 7 or 8 Senior Counsel who specialize in family law work. Quite apart from these specialist practitioners many other Barristers, particularly on circuit, would deal with occasional family law matters. Clients therefore can choose from a wide range of available Counsel, from the very experienced to those in their early years

[14] T .V. T [2002] 3 IR 334

in practice. There has been a transformation from a situation where family law constituted a very small proportion of the work at the Bar to one where it is now a significant and growing portion of the overall work load.

10.11 The position in regard to solicitors is similar. There are a number of specialist firms in Dublin who deal mainly with family law work. Further the vast majority of solicitors' firms would do some family law work on behalf of their clients. This is in contrast with the situation in the past where many firms, and in particular larger firms, were very reluctant to do such work. Again clients have a considerable choice in picking a solicitor to deal with a family law case. If they already have a solicitor, their solicitor will probably deal with the matter or if they wish they can employ a firm which specializes in the area or which has a department which does so.

10.12 A final matter worth noting in regard to family law is that solicitors tend to exercise their right of audience to a somewhat greater extent than in other types of litigation. It is not unusual to see solicitors acting as advocates in fairly uncomplicated matrimonial cases and indeed some solicitors are happy to do so even in complex High Court and Supreme Court litigation.

Legislative developments

10.13 There have been huge changes in the past fifteen years in the legislation governing family law disputes. Obviously the most radical and fundamental change has been the amendment of Article 41.3.2 of the Constitution to allow courts to grant decrees of divorce in certain defined circumstances. However this central constitutional change was accompanied by a great deal of legislative change. The Family Law Act 1995 and the Family Law (Divorce) Act 1996 ensured that there was a modern legislative background for dealing with all aspects of matrimonial disputes. The thrust of the legislation was to move away from the concept of fault in such cases and to concentrate on irretrievable

breakdown and separation for set periods of time. More importantly the legislation ensured that a judge had available adequate remedies to respond properly and fairly to all the various problems and difficulties which arise in the context of the breakdown of a marriage.

10.14 We have already set out in some detail the exact nature of these remedies. Suffice it to say that they vary from the relatively straight forward to the extremely complex. For example the remedy of a pension adjustment order was first introduced in the Family Law Act 1995. The basic legislative provision providing for such orders, s.12 of the 1995 Act runs to some 26 sub-sections while the Regulations dealing with pension adjustment orders are nearly 100 pages in length. The operation of the section and the Regulations is sufficiently complex that in many cases where the pension of one of the spouses is a significant asset, a pension consultant is employed to advise in regard to the best type of order and its method of implementation. This is just one aspect of a considerably more complex and sophisticated legislative web with which family lawyers must now be familiar.

10.15 After the passing of the divorce referendum, contrary to expectations, there was not a great flood of divorce applications, rather it took some years before there was a large flow of such applications. The extent of the legislative change in the last ten to fifteen years has been such that the practice of family law has been completely transformed rendering it quite different from what went before. In reality family lawyers are still dealing with a new and emerging jurisdiction, the exact parameters of which are still being determined by the High Court and Supreme Court.

Developments in Case Law

10.16 As well as legislative changes there has been considerable developments in the area of divorce law by reason of judicial decisions. The Irish legislation in regard

to divorce is similar but not identical to its English counterpart. In 2001 there was a very significant change in the way in which the English Courts interpreted their legislation in regard to divorce. Until then the English Courts had applied a test of *"reasonable requirements"* when an applicant applied for a decree of divorce; in that an applicant would only be awarded their reasonable requirements for support into the future. In the case of **White .v. White** [15], the House of Lords said for the first time that there was no logical reason in a case where there were *"ample resources"* why an applicant's award should be limited to *"reasonable requirements"*. The House of Lords also made clear that Courts should be careful not to discriminate against the spouse who does not work outside the home and should use a test of a 50% division of the assets to each party as a check list against fairness.

10.17 Within a year of the White judgement the Irish Supreme Court was asked to consider its implications for Irish law. In the case of **T .v. T** [16] the Court for the first time set out parameters for assessing proper provision in the context of divorce in this jurisdiction. The Court approved some aspects of the approach set down by the House of Lords in **White .v. White** but equally pointed out that English legislation was different in crucial respects to the equivalent Irish provisions. The Court stressed that fairness in each case must depend on the particular facts of that case. Some of the judges indicated that in a longstanding marriage where there were ample resources a reasonable starting point in assessing proper provision might be a third to a half of the assets. The Court upheld the High Court award which gave the wife 38% of the overall assets.

10.18 After **T .v. T**, Applicants' expectations have increased and in practice more cases are being fought to a conclusion in the High Court. This is reflected in the fact that there are now three appeals pending to the Supreme Court in regard to the application of the **T .v. T** principles in particular situations; one concerning a

[15] White .v. White [2001] 1 AER 1
[16] T .V. T [2002] 3 IR 334

family farm, another concerning a trading company and the third where there is a subsisting but old Deed of separation. Again this increase in litigation at High Court and Supreme Court level is indicative of the fact that family law is in a phase where the relevant principles are still emerging and being refined by decisions of the Courts.

The fees charged

10.19 Counsel in general tend to charge fees in family law cases following the completion of the case. However it is becoming increasingly common for Counsel to be asked to give an estimate of such fees well prior to the hearing of the case. Completion can be difficult to achieve in that family law cases are notorious for their propensity to go on forever, being adjourned to subsequent dates to see how certain matters proceed. Fees are marked having regard to the overall circumstances of the case and in particular having regard to the following matters:-

(a) The complexity of the case.

(b) The length of the case.

(c) The assets involved in the litigation.

(d) The amount of work involved in the case and the timescale in which it is to be done; and

(e) The circumstances of the client following the disposal of the case.

10.20 Obviously in many instances these matters will be interlinked but we will deal with each one separately:-

(a) Complexity – as discussed above the complexity of a case may be a reflection of either the legal issues; the factual issues or a combination of both. While the amount of assets is not necessarily an indication of the complexity of the matter, in some cases the very number and nature of assets will cause the matter to be more complex. Equally, however some aspect of the case other than a financial one can cause considerable complexity for example a bitterly contested dispute in regard to custody and access.

(b) Length – In general the more complex the case the longer it will take but some relatively straight forward cases can still be lengthy due to the fact that the parties are determined to go into the history of the marriage in great detail. On the other hand sometimes a case involving very complex legal issues will not take very long at hearing, in particular if the parties have prepared detailed written submissions in regard to the legal principles applicable.

(c) The amount of Assets – The fees charged will to some degree also reflect the amount of assets in issue, particularly if the dispute is in regard to the proper division of those assets. The practice of the fees charged reflecting the amount of assets can work both ways. While in some cases the fees may be greater having regard to the high level of assets involved, in other cases the fees may be less because it is obvious to the lawyer that the client does not have sufficient resources to discharge what would be the normal fee in such a case. An example of the latter situation would be the case of a couple of modest means who really do not have sufficient assets to separate and as a result have a highly contentious and bitterly fought court case.

(d) The work involved – Normally the work carried out by the barrister will reflect to a considerable degree the complexity and length of the

case. Occasionally even a relatively straight forward case may make extra demands on the time of the barrister, for example because the client expects an unusually large number of consultations and meetings in regard to the case. On the other hand even though a very complex legal issue may be involved in the case the amount of work may be lessened by the fact that the barrister has been involved in a previous case involving the same issue. The reduction in work is likely to bring about a reduction in the fees charged.

(e) The circumstances of the client following the litigation – It may be that one side or other in the case has done particularly well and the other done particularly badly. Nonetheless the level of difficulty and work involved for the barrister on each side may well be more or less the same. In such circumstances it is likely that the individual circumstance of the client following the litigation will be reflected to some degree in the fee charged.

Protection measures against excessive costs

10.21 There are a number of special features in regard to family law litigation which are designed to ensure that excessive costs are not run up in such litigation. Sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 require solicitors to discuss with clients the possibility of resolving their matrimonial difficulties by way of mediation and/or by entering into a Deed of Separation. The solicitor must lodge a certificate that this has been done before the litigation can continue. Further the court has a discretion to adjourn proceedings, if both parties wish, to allow time for them to reach agreement in regard to terms of separation. (s7 of the 1989 Act). There are similar provisions contained at sections 6, 7 and 8 of the Family Law (Divorce) Act 1996. For the past year a Practice Direction has been in force in the Dublin Circuit Court which requires parties in family law cases to exchange valuations and to attempt to agree certain

other matters. It also requires practitioners to lodge with the Court an estimate of their fees in the case prior to the hearing of the matter. Also there is no stamp duty payable in regard to the taxation of costs in family cases which makes it considerably cheaper for someone to exercise their right to have a Bill of Costs referred to taxation.

10.22 Over the past number of months family law practitioners have been in discussions with the Judges in the High Court at present dealing with family law cases, Mr Justice O'Higgins and Mr Justice McKechnie, with a view to streamlining the procedure in that Court. This will mean that cases can be dealt with more efficiently and expeditiously with a resulting saving of costs to both sides. It is hoped to formalize arrangements for disclosure of assets and for the exchange of reports between professional witnesses, such as valuers and accountants so that the amount of matters in dispute can be reduced to a minimum. These discussions have progressed to a level where it is expected that a Practice Direction which will set out the new procedures for dealing with family cases will issue within the next few weeks. These procedures will be designed to considerably reduce the time between issue of proceedings and the ultimate hearing of the case and also to ensure that discovery of documents and exchange of financial information is carried out in a much more efficient and structured way. This will ensure a considerable reduction in the amount of court time which will required to determine a case, thus ensuring a reduction in costs.

Legal Aid

10.23 The vast majority of cases dealt with under the Civil Legal Aid Act 1995, probably in excess of 90%, concern family law matters. These cases are dealt with mainly through law centres operated by the Legal Aid Board. A person who is unable to afford the cost of a private solicitor or barrister will be able to apply for and obtain legal aid under the provisions of the 1995 Act, subject to being able to satisfy the relevant statutory conditions and the means test applicable for such

legal aid. There is an agreement between the Bar Council and the Legal Aid Board governing the retention of Counsel in cases under the Legal Aid Act. A solicitor in a law centre is able to retain on behalf of his client the same barristers as are retained by private solicitors in family law cases. The fees payable to Counsel under the terms of the agreement are set at a level which represent a social contribution by the Bar and this is expressly acknowledged in the Agreement. The members of the Bar are therefore providing services in family law cases for persons with limited means at fee levels less than those generally charged if they were retained by a private solicitor.

11. CIVIL JURY ACTIONS

11.1 By virtue of the Court's Act, 1988 parties in civil proceedings are only entitled as of right to have their action tried with a jury in a very limited number of cases. The Principal civil actions in respect of this entitlement to a jury are:-

(a) defamation;

(b) civil assault;

(c) false imprisonment;

(d) malicious prosecution.

11.2 As with most civil proceedings, these actions are commenced by way of a plenary summons and the procedural rules concerning the delivery of pleadings and pre-trial motions concerning discovery, particulars and interrogatories are similar to the rules applicable in non jury civil actions.

11.3 However because of the need to empanel a jury these actions when ready for trial enter a High Court list called the jury list.

11.4 There are typically four jury terms during the year consisting usually of three weeks during the particular law term.

11.5 When a case enters the jury list, it will appear at a call over of all of the civil jury cases awaiting a hearing. Typically this call over will take place three to four weeks in advance of the three week jury term. Similar problems and inefficiencies as pertain and have been described in relation to the judicial review, non jury and chancery list to fix dates also apply in the case of the jury list to fix

dates. In addition it should be noted that there is no requirement on the party serving the Notice of Trial to certify that the case is ready. Accordingly a call over of the jury list can involve reasonably detailed argument on a case by case basis in circumstances where one party, typically the Plaintiff who has set the case down, is seeking a trial date whereas the other party, typically the Defendant, is objecting on the basis that some outstanding issue requires to be dealt with.

11.6 In addition, as has been alluded to in relation to the other lists, it is not at all uncommon to have several cases listed for the same date and for the parties to turn up fully prepared for trial to find that there is no Judge available to hear their case. In addition, in circumstances where a case which may take a full week commences the jury panel has occasionally been discharged on the basis that the Court will be occupied for the full week with the first case and if that case subsequently settles or collapses then, due to the full discharge of the jury panel, no further jury action can be heard that week.

11.7 These features of the current system certainly lead to wasted costs on the part of the parties although typically counsel will not charge the client for preparing and turning up at court in circumstances where the case does not get on due to the lack of a judge.

11.8 The perception is that counsel's fees in these cases will often be higher than in typical common law actions. However, this is not always so.

11.9 There are a number of reasons why civil jury actions will attract higher fees for counsel. In the first instance, the presence of the jury adds to the importance of the counsel's advocacy skills not just in dealing with witnesses and arguing legal points before the judge but also in terms of presenting the case and persuading a jury of 12 lay people. In addition, the consequences of leading inadmissible evidence can be more significant as it may lead to the jury being discharged and the case having to be adjourned to the next list which is far less likely, if ever, to

occur in a civil non jury action where the professionalism and training of the judge is considered sufficient to deal with any inadmissible evidence that may inadvertently be adduced before the court.

11.10 In addition, in one of the principal jury civil actions, namely claims based on defamation, significant specialist expertise is required in relation to both preparing the pleadings and dealing with legal issues at the trial of the action. Preparing the statement of claim in a defamation action requires specialist attention to ensure that the appropriate and tactically astute meanings are well pleaded and set out. In addition, framing the defence requires significant specialist expertise and there are particular obligations on counsel settling any defence which includes a claim of justification or partial justification. Accordingly, libel actions tend to involve extensive work in the preparation of both the pleadings and the action and even a publication which on its face appears readily straight forward can raise complex issues of law and strategy not unusually of a unique nature. In addition to the drafting skill required and specialist knowledge of the area of law to deal with legal issues, significant additional preparation can be required to ensure that the case is thoroughly prepared for both presentation to a judge and to a jury which is invariably a different and additional challenge to presenting a case to a judge alone.

11.11 In addition, libel actions concern the complex balance between reputation and the right to a good name on the one hand and freedom of expression and matters of public interest on the other hand. Accordingly, for both plaintiff and defendant usually important issues will be at stake in the trial and this is a factor in the costs equation.

11.12 While particular reference has been made to libel actions, many of the foregoing comments apply equally to the other, albeit less typical, civil jury actions.

Recommendations

11.13 The Bar Council repeats the recommendations already made in paragraph 7.9 above.

12. SCALE FEES

12.1 Scale fees carry with them advantages and disadvantages. Many of the advantages and disadvantages have already been discussed in section 4 above in connection with the suggestion that there might be an overall cap on fees recoverable by a successful party in civil litigation. However, scale fees also raise very serious issues of Competition law. Many years ago, scale fees were regularly operated. However, all of these scales were abandoned following the enactment of the Competition Act, 1991 (now replaced by the Competition Act, 2002). The Bar Council has a real concern that any adoption of a scale of fees would be in breach of the provisions of the Competition Act, 2002.

12.2 Scale fees may lead to inadequate resources being devoted to cases which will ultimately affect the standards of justice. Fixing a scale fee cannot take account of the different characteristics which each case has. Scales fail to take account of the experience and expertise of practitioners with the result that no reward will be given for these attributes notwithstanding that such attributes often have an influence on the outcome of proceedings. Scale fees may also have the result that the better legal professionals would gravitate to unregulated areas of the law.

12.3 Quite apart from the considerations outlined above, it is difficult to see how a scale of fees could be devised which could appropriately deal with the myriad types of work which a barrister may undertake. As can be seen from section 10 (above), even within one area – the family law area – there is a vast range of different types of work in which a barrister might be retained. How could a scale be devised to cover all those different areas? Even if a scale could be devised, how could it deal with situations where a single case or a single application involved a myriad of different issues? To take a hypothetical example, actions for divorce run the gamut from relatively straightforward actions to hugely complicated actions involving difficult issues of tax law, pensions law, company

or partnership law, family law, and the law of trusts. How could one devise a scale which would appropriately deal with the different levels of work involved in two cases? Both of them are divorce actions – yet the extent of the work undertaken in each of them will be hugely different. The advantage of having an independent umpire such as a Taxing Master examine the work actually done (as contemplated by section 27 of the Court & Court Officers Act, 1995) is that appropriate recognition can be given to the different levels of work involved in those two cases.

13. RECOMMENDATIONS

13.1 A number of recommendations have already been identified in Parts 1-12 above. In summary, the Bar Council makes the following suggestions with a view to reducing the level of legal costs incurred in civil litigation:-

(a) before retaining counsel, clients and solicitors should be encouraged to approach a number of barristers to provide a quotation before deciding which barrister to retain for any particular purpose;

(b) more judges need to be appointed to deal with the growing case loads in the various areas of civil litigation. The Bar Council believes that the number of judges in the High Court should be doubled. The Bar Council refers again to the fact that in Ontario (which has a similar population and legal system to Ireland), there are 64 High Court judges. The Bar Council also believes that the number of Circuit Court judges should be doubled to increase the number of judges available to hear cases. The number of District Court judges should be trebled. Their workload is intolerable;

(c) one of the significant advantages of appointing more judges is that cases would then have a much better prospect of getting on for hearing on the day they are listed. This would lead to a significant saving in costs – as the costs incurred in assembling all the papers, witnesses and lawyers for the hearing would not be wasted (as frequently occurs at present). It would also ensure that judges were in a position to read all of the papers for a case prior to the hearing. This would significantly reduce the length of hearing. Under the current system, cases have to be fully opened to judges prior to the commencement of the evidence. This entails reading all of the relevant papers in open

court to the judge. This is obviously hugely time consuming and wasteful in terms of costs. The opening of cases can often last a day or more. If judges had the time to read papers in advance, there would be a very real saving in costs;

(d) in the High Court, considerable time and costs could be saved if High Court judges adopted the practice currently operated in the Supreme Court whereby judgments are handed down rather than read out laboriously in court. It is not uncommon for the reading of a judgment to take in excess of an hour. That represents a quarter of the court day. If a case is listed for hearing before that judge, it means that by the time it starts, one quarter of the day is already gone. A case which perhaps was capable of being dealt with in one day may therefore spill over into a second day with the result that significant additional costs are incurred. Alternatively, the judgment could simply be made available electronically to the parties and published on the Courts Service website. While the Constitution requires that justice should be administered in public, that constitutional requirement could surely be met by immediate publication of the judgment on the Courts Service website where it would be accessible to a much wider range of the public than those who could make their way down to the Four Courts to hear the judgment delivered in open court;

(e) greater use should be made of Registrars from the point of view of managing lists and hearing dates. Far too much judges' time is devoted to managing the listing system;

(f) the current listing system should be reformed to remove judges and counsel from what is effectively an administrative function. It should be possible to list cases effectively using e-mail communications between solicitors and personnel in the Courts Service;

(g) a greater degree of advance planning should be applied to the listing system to ensure that cases are listed appropriately and assigned to judges who have sufficient availability to deal with them;

(h) more Taxing Masters should be appointed in the High Court and Taxing officers in the Circuit Court to speed up the process of taxation and in particular, to enable Taxing officers to fully exercise their powers under section 27 of the Court & Court Officers Act, 1995. To assist the assessment of costs (in any case in which counsel's fees are in issue), barristers should make available all relevant back-up information to assist the Taxing Master (or other Taxing officer) and the paying party to form an assessment as to the appropriateness of the fees proposed by counsel or paid to counsel [17];

(i) consideration might be given to establishing a single costs assessment office or body where officers would be responsible for assessing all disputed court costs. This would enable a coherent and consistent approach to be taken to costs on a countrywide basis. Whether the present taxation system is continued or a single costs assessment office is established, it is essential that the system be kept under periodic review. In particular, the rules of the system should be capable of being amended and revised as necessary to deal with any new situations which arise or new forms of litigation which emerge;

(j) order 99 of the Rules of the Superior Courts should be carefully reviewed and any antiquated or obsolete provisions should be removed. The process of taxation should be simplified. In particular, the anachronistic system whereby the same Taxing Masters, on the

[17] Obviously, if litigation is still ongoing between the parties, it may be necessary to include appropriate safeguards to ensure that no privileged information is disclosed to the opposing side.

hearing of objections, review their own decisions, should be changed. If there were sufficient numbers of Taxing officers, the hearing of objections could be taken by a different Taxing officer (or perhaps by a panel of Taxing officers) to the officer who dealt with the original taxation;

(k) consideration should be given to providing a simplified taxation procedure in cases where only one item or a small number of items are in dispute. A simple written procedure might be considered in such cases. Oral hearings are not necessary in every case;

(l) appeals to the court should be dealt with by judges who are specifically assigned to deal with cases of that kind. In that way, such appeals will be dealt with by judges with expertise, and therefore the duration of the hearing of such appeals should be reduced;

(m) training should be available to the judiciary in relation to costs issues. Such training would make judges aware of the full implications of the orders for costs made by them;

(n) consideration should be given to allow solicitors and/or counsel to make representations to a trial judge as to how costs should ultimately be awarded;

(o) where parties have chosen to argue matters which were not relevant to a case, or introduce evidence which is ultimately irrelevant, the court should be encouraged to exercise its jurisdiction to exclude costs of these matters;

(p) the rate of interest applicable to costs (i.e. 8%) is excessive and should be reduced. However, an incentive in the form of some interest

payment should be retained for the purposes of ensuring that parties responsible for payment of costs readily and speedily settle their bills. The successful party should not be kept out-of-pocket for long periods of time;

(q) the rate of court duty imposed on the taxation of costs (namely 6% of the total bill) is excessive. It should be reduced. It effectively acts as a form of taxation on litigation;

(r) another form of taxation on litigation is the imposition of VAT on legal fees. At its present rate (21%), this adds very significantly to the overall costs bill. The abolition of VAT on legal fees would lead to a very substantial reduction in the overall level of costs;

(s) parties to all litigation (not just personal injury lists) – and particularly so in commercial cases – should be encouraged either through case management or otherwise to narrow the issues, and if necessary, present legal submissions on the issues for the purposes of reducing court time;

(t) the Rules of the Superior Court should be significantly reviewed for the purposes of bringing them in to line with the Rules applicable to the new Commercial Court. There is no logical reason why a *"big case"* should be dealt with any more expediently than a perceived small case. Such a step would significantly reduce costs by bringing the parties very quickly to identify what the issues are;

(u) settlement of proceedings should be encouraged and mediation should be considered in appropriate cases. However, mediation is probably only appropriate where both of the parties are receptive to it. Enforced mediation will simply add another layer of costs to the legal process.

Enforced mediation would also be contrary to the spirit and underlying rationale of mediation;

(v) with regard to the Supreme Court, parties should be limited to a specific time period in making oral submissions and greater emphasis should be placed on written submissions thereby avoiding legal argument being prolonged over days;

(w) costs orders at interlocutory or notion stage should not be reserved but should be awarded and payable by the party in default;

(x) the Legal Aid System should be expanded properly and comprehensively. As an interim measure pending that development, the Attorney General's Scheme should be revamped and should be properly resourced. While there have been improvements in terms of the backlog and size of barristers' fees, it remains a fact that fees recoverable under the Attorney General Scheme are inadequate and take too long to arrive;

(y) given the necessity to fully read and comprehend any papers prior to drafting proceedings or offering advice or dealing with any consultation or application to court, appropriate fees should be allowed to counsel in respect of matters to reflect the level of work involved;

(z) one of the factors which should be taken into account in the course of taxation is the particular experience or expertise of counsel.

14. CONCLUSION

14.1 In conclusion, the Bar Council reiterates its willingness to assist the Legal Costs Group in any way that it can. The Bar Council is conscious of the enormity and difficulty of the task facing the Group. If the Group have any questions arising from or any response to this submission, the Bar Council would be very happy to deal with them.

THE BAR COUNCIL

2 February 2005

APPENDIX I

Bar Council Study of Voluntary Work by Practising Barristers