

LEGAL CULTURE AND LEGAL FEES: A COMPARISON OF ENGLAND AND IRELAND

by Brian Greenford*

Introduction

Ireland experiences the highest motor and liability insurance premiums in the European Union. Because of the political implications attempts have been made by government to reduce these expenses by attacking the main constituent of these insurance premiums, litigation costs. Examples being capping damages, disposing of jury trials in personal injury claims and changing the rules relating to the use of counsel. This seems to have had little effect. The high cost of insurance premiums has been attributed to level of damages being awarded by the Irish courts¹. Insurers are normally involved in handling personal injury claims and meet all the costs incurred. The premiums charged to the public are intended to cover these expenses plus administrative costs and profit. The major cost experienced by liability and motor insurers is claims made by third parties against one of their policyholders. This expense can represent over 100% of premiums paid to insurers and makes a major contribution towards the cost of insurance to the policyholder². Claims are normally settled by negotiation between insurers and representatives of the injured party rather than the courts. These negotiations not only include compensation but also costs payable to solicitors acting for the injured party as well as those representing the insurer. Consequently it is this interaction which directly affects the costs involved.

Reports commissioned by government have made recommendations to reduce these costs based on structural factors. This is despite the fact that a number of studies have argued that differences in awards and costs in separate jurisdictions cannot be attributed solely to external factors such as judicial structures, case loads or local rules (see Church et. al., 1978; Sherwood and Clarke, 1981, Schiller & Manikas, 1987; Eisenstein, et. al., 1988)³ These writers advance the idea that the local legal culture affects costs incurred in legal actions.

The cost of litigation can be divided into two main areas. These are compensation payable to the injured party, and legal fees of the lawyers representing plaintiff and defendant. If it can be shown that the legal culture has an effect on costs then changing the structure of the courts by, for example, instituting special tribunals, will have little effect. In this paper it is intended to compare legal fees incurred in personal injury claims by an insurer operating in England and Ireland, and explore whether any differences can

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be explained by different legal cultures. This will be achieved by obtaining data from closed claim files of an insurer. From an analysis of these files it is expected to be able to discern differences in the method of settlement which could affect payment to lawyers, but cannot be explained purely by structural factors.

The Legal System

On Ireland gaining independence from the UK the Irish Constitution prescribed that the law of Ireland would be the same as the law of England at the time of independence. This has led to the Irish legal system being similar to the one in England. In order to obtain damages following an injury the third party may instruct a solicitor who then writes a letter of demand to the injurer. If the latter is insured the letter is passed on to the insurer who deals with the claim in its entirety. If the claim is not settled the injured party commences formal proceedings through the courts. The plaintiff sets out a case by preparing a Statement of Claim. This is followed by the formal preparation of the defendant's response by means of the Defence. Once the allegations of both sides have been stipulated, evidence is obtained by the formal procedure of Discovery of documents relating to the case. This is followed by the Setting Down of the case for trial in the relevant court. Eventually the case is heard and a judgement handed down. The final judgement includes an award of damages if the case is found in favour of the plaintiff. Throughout the procedure either side may negotiate an acceptable agreement for payment of both legal fees and damages in order to settle the case. If the case is not settled amicably, and the defendant is of the view that damages are payable, s/he may pay into court a sum of money representing the amount of damages which the defendant considers may be awarded if the case goes to court. This puts the plaintiff at risk for costs. This means that if the judge makes a final award that is greater than the lodgement the plaintiff meets all the fees from the date of the payment. During the course of this procedure a barrister may be appointed to draft the relevant documentation and advise solicitors and their clients.

The legal fees payable to lawyers acting on behalf of both the plaintiff and defendant will be payable by the defendant if a settlement is achieved. If the plaintiff withdraws or is unable to prove his or her case in court he or she may be required to pay their own fees as well as those of the defendant. The loser pays all is the rule applicable in both England and Ireland.

Legal Culture

The concept of legal culture was developed by Church (1972)¹ to explain that factors such as court size or caseload did not affect the rate at which criminal cases were disposed of by the courts. He suggested that speed and backlog, factors that affected legal fees, were functions of the established expectations, practices and informal rules of behaviour of judges and attorneys. This conclusion was supported by a number of

other research projects carried out within the criminal justice courts in various districts within the USA. Eisenstein, Flemming and Nardulli (1988)⁵ described different types of court communities which have locally defined expectations as how to handle criminal cases and Levin (1972, 1977)⁶ reports differences in perspectives heard by judges in the two court districts they reviewed. Kritzer (1991)⁷ extended this work to a consideration of civil cases. Kritzer and Zemans (1993)⁸ considered the concept further by examining the application of a particular rule of court in different districts courts in America and came to the conclusion that the variations in procedure can be explained by factors other than legal culture defined in the second sense. However, they do not rule out the effect of this phenomena.

Despite this previous research the concept of legal culture has proved difficult to operationalise. Friedman has defined culture as 'bodies of custom organically related to the culture as a whole' (1975:14)⁹ or 'those parts of general culture – customs, opinion, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways' (1975:15)¹⁰. Church (1982)¹¹ refers to the concept as "the common practitioner norms governing case handling and particular behaviour in court" Kritzer & Zemans (1993:538)¹² conclude that the concept of legal culture has taken on two different meanings in the research that they reviewed. Firstly, it reflects the complete set of norms and attitudes that govern the operation of a court system and include the formal rules as well as the informal ones. The second meaning is limited to "the way we do things around here". This latter definition provides for residualisation of factors which are affecting the legal system but cannot easily be operationalised into variables. Yet this aspect of legal culture seems to have the most effect on the cost of running the system (Kritzer and Zemans: 1993:540)¹³.

Few attempts have been made to classify legal culture as opposed to legal systems. Wildavsky (1989)¹⁴ has developed a means of measuring culturing using the concept of grid/group which provide two axis to a matrix. Group refers to the degree of social incorporation of the individual in a social unit, whilst grid is a measure of the constraining classifications that bear on any members of social grouping (Rayner, 1992:87)¹⁵. Thus group describes the extent of social interaction grid describes their nature. Bierbrauer's classification includes the aspect of group but excludes the concept of grid. Rayner developed this classification of society into four groups (Rayner, 1992 89): stratified individuals, hierarchies, competitive individuals and egalitarians. Bierbrauer (1994)¹⁶ classified legal cultures in terms of individualism and collectivism. This classification includes the concept of group but excludes grid. It is intended to use Rayner's classification as a guide to considering the English and Irish legal cultures in order to ascertain where they differ, although no attempt will be made in this article to measure the differences formally but only to ascertain whether the concept could be used.

Lawyer's Fees – The Irish Context

The most recent report dealing with fees was completed by Deloitte and Touche (1996:51). Legal fees were found to range from 8% to 50% of the total outlay paid by insurers. This is supported by the Fair Trade Commission Report 1990, which showed that legal fees averaged 24.6% of total expenses incurred in settling claims, including damages. In the case of smaller claims this was nearly 40% (1996:50). Deloitte and Touche report that fees are highest in claims below IR£20,000 and decrease proportionately as the amount of compensation increases. There was a strong correlation ($r=0.97$) between fees and damages achieved showing that lawyers based their costs on their success in obtaining compensation for their clients. Deloitte & Touche conclude that fees are a significant overhead in personal injury claims and are excessive for smaller claims. One of the reasons given for the high cost is the length of time it takes to settle a claim. According to the report, a case which takes 3–4 years to settle at trial can cost twice as much as an action which settles in the defence stage.

In comparing fees payable to lawyers acting for the defendant and plaintiff, Deloitte & Touche (1996:50) discovered that defendant's fees are half those charged by the plaintiff's lawyers. This is because the insurer places a large volume of business with certain solicitors who are therefore able to reduce their fees.

The English Context

The Oxford Socio-Legal Studies Centre report (1984)¹⁷ ascertained that there was little relationship between the legal fees charged and the damages recovered. This is because lawyers charge on the basis of work done (84:128). Insurers pay nearly all the fees; in only three out of 51 cases were a proportion of the fees paid from other sources. Fees as a proportion of compensation in both England and Ireland are depicted in Figure 1.

Figure 1 Fees as a Percentage of Damages in England and Ireland

Damages	England	Ireland
Total	18%	13%
<£1,000	29%	
>£1,000	15%	
>£4,500	8–12%	
>£10,000		32%
>£10,000		
>£50,000		25%
>£50,000		12%

Source: DeLoitte & Touche, 1996; Harris et al., 1984

It is difficult to compare the two reports because damages are some four times higher in Ireland than in England. Despite this the pattern is similar in that fees paid reduce as a percentage of damages as compensation increases.

Genn¹⁸ (1988) carried out a study of personal Injury claims in England, including legal costs. There were three different payment systems: private funding, unions and legal aid. The latter is no longer used for personal injury cases and many lawyers are working on a contingent fee basis. Genn (1988:132) found that solicitors could be divided into two categories, either co-operative or uncooperative. The former did not make such good settlements as the latter. Privately funded solicitors appeared to fall into the co-operative bracket. One of the reasons for this is that if a claim is not settled the defendant's fees may have to be paid by the plaintiff. He or she may not have funds to meet these expenses and also pay his or her own lawyer's fees. This could lead to the risk that the plaintiff's lawyer might not receive their fees if a settlement is not attained. In view of this an attempt is made to settle with insurers. Lawyers indicated that they would prefer to deal with insurers than legal aid as they would normally be able to obtain their fees from these companies. Similarly unions guaranteed the payment of plaintiff's fees. If privately funded lawyers do lose the case they tend to write off their own fees but this leaves them with the possibility that their client would have to pay defendant's fees (1988:88). Since Genn's work a system of insurance has been inaugurated in Britain to protect plaintiff's lawyers should they not be able to obtain their fees from the defendant.

Methodology

In order to compare the legal fees payable in Ireland and England 205 English third party claims files and 243 Irish cases belonging to an insurer operating in both countries were examined. These claims were selected randomly from those settled between 1994 and 1997. Details of the fees paid to both defendant and plaintiff's lawyers were obtained together with the level of damages paid in each case. The length of time it took to settle the claim and the state of the proceedings were also considered to try to ascertain whether there were differences in legal fees in the two countries and, if so, what contributed to this. The files did not reveal how the plaintiffs funded their actions, so the effect of this has not been considered.

The Data

Average legal fees per claim payable to the plaintiff in Ireland were found to be some 3.8 times higher than in England, and defendant's fees 4.4 times higher. The actual average fees, without adjustment for exchange rate or time value, are depicted in Figure 2. At the lower level of damages Irish fees paid to the plaintiff are less than in England. This is due to the higher number of cases where no damages were paid (14% in Ireland as opposed to 10% in England). If the claims where no compensation was paid are

Figure 2 Average Legal Fees Per Claim

Damages £/IR£	England		Ireland	
	Defendant £	Plaintiff£	Defendant IR£	Plaintiff IR£
All	588	1168	2579	4407
=<5,000	585	1143	1500	795
>5,000	651	2070	1227	2406
=<10,000				

* There were no claims in the English sample where awards above €70000 were experienced.

Figure 3 A comparison of legal fees to total expenses

	England			Ireland		
	Plaintiff	Defendant	Total	Plaintiff	Defendant	Total
	%	%	%	%	%	%
All	49	25	39	18	11	26
<=1000	86	40	53	9	93	93
>1000 / <=3000	43	23	39	23	26	42
>3000 / <=5000	26	15	30	25	23	44
>5000 / <=7500	26	8	24	24	9	31

This represents the mean of each costs divided by the mean of the total expenses.

deleted the average plaintiff's fees are IR€1286 in Ireland and €1137 in England. In Ireland the average fees payable to plaintiff's lawyers where no compensation was paid are lower than in England (IR€50 as opposed to €2165), indicating a greater willingness on the part of English insurers to settle claims by payment of third party fees only. If fees as a percentage of total expenses are considered the Irish results are lower than experienced in England, as is shown in Figure 3. Despite this latter relationship it can be seen that, overall, Irish lawyer's fees are higher than those experienced in England. This is accentuated if the total percentage of fees for different levels of damages are examined. In all cases legal fees are a higher percentage of total expenses in Ireland than in England. This comparison also reflects the low level of damages payable in England as no case exceeded €7000.

There are a number of reasons for this. Firstly, in Ireland, there is a strong correlation between legal fees and compensation paid to third parties. Average damages

Figure 4 General Damages and Lawyer's Fees per claim

England		Ireland	
General Damages Per Claim	Legal Fees Per Claim	Damages Per Claim	Legal Fees Per Claim
£1445	£931	IRE17916	IRE6441

Figure 5 Correlation between Damages and Legal Fees

	England		Ireland	
	Defendant's "r"	Plaintiff's "r"	Defendant's "r"	Plaintiff's "r"
Total Damages	0.32	0.46	0.73	0.90
General Damages	0.42	0.47	0.80	0.92

Figure 6 Representation by Lawyers

	England		Ireland	
	Plaintiff %	Defendant %	Plaintiff %	Defendant %
No representation	Nil	87	Nil	46
Solicitors 100	13	100	54	
Barristers 3	11	78	41	
Senior Counsel	0	0	19	11

Figure 7 Legal Proceedings

Stage of Proceedings	England %	Ireland %
No proceedings	85	16
Commenced	10	31
Defence	3	11
Set Down	Nil	5
Trial	2	37

paid per claim in the sample were 12 times higher in Ireland than in England (see Figure 4); this affects the actual fees paid to lawyers as Irish fees are based on awards. In England fees are based on work done although in both countries the actual amount paid is negotiated between insurer and lawyer. Figure 5 shows that plaintiffs' fees in Ireland can be correlated with total damages. In England there is little correlation between damages and fees. Thus the higher the awards achieved in Ireland the larger the fees. Figure 3 shows that payments made in respect of damages in Ireland are far higher than in England, which leads to higher legal fees. In the English sample there were no awards over £7000, the mode was £1500. In Ireland the general damages mode was IR£5,000 clearly showing the higher compensation payable in the Irish system. Figure 3 compares fees with the different level of damages, showing that as compensation increases the percentage of legal expenses to overall payments decreases in both countries – although the actual percentage is higher in Ireland than England.

Secondly, the use of lawyers is greater in Ireland than in England and this is shown in Figure 7. In both countries there is a two-tier profession of solicitors and barristers, with the former instructing the latter where necessary. In addition barristers are divided into two classes, Junior and Senior Counsel, with the latter always appearing with the former. It was found that in both countries a solicitor always represented the third party when instituting an action for a personal injury claim. Insurers do not normally appoint lawyers until proceedings have been issued by the third party, and sometimes they are not appointed at all, even though formal proceedings have been commenced.

Figure 8 shows the relative use of the court procedure in both countries. From this it can be seen that Irish plaintiffs are more prepared to use the courts than is the case in England. This has an effect on legal expenses as the amount of work carried out by lawyers increases as the proceedings develop. Although this is true in general, the length of time taken to settle a claim seems to have little effect on the total costs in either country. The correlation between time taken to settle and fees is 0.41 in the case of Ireland and 0.48 for England. Despite this the fees as a percentage of the total increases as the case proceeds towards trial. Figure 9 shows this as an overall trend in both countries, although the increase is greater in England than in Ireland. This underlines the different basis for calculation of fees.

The delay in settlement may be a factor that affects the greater propensity to use the courts in Ireland than in England. Settlement delays are shown in Figure 10. From this it can be seen that delays are endemic in Ireland. Insurers take longer to make an initial approach in Ireland than in England and solicitors take longer to issue proceedings.

A factor that may affect delay is the procedure used to settle claims. Figure 10 shows the proportion of cases settled at various venues. Settlement in England is, in the majority of cases, carried out by correspondence or on the phone between solicitor and insurer. This seldom occurs in Ireland. Cases are normally settled in the law courts between plaintiff's counsel and insurers; very few settlements are made outside of the

court room buildings. In Dublin for example it is the practice of insurers and lawyers to meet in the law library or the Four Courts when the courts are in session. In England cases are settled mainly by correspondence.

The negotiation strategy used to settle claims could also affect fees as it could prolong the settlement of the case. In order to review the negotiating strategy between insurer and the plaintiff the patterns of offers were considered. Figure 12 shows that the English opening offer was found to be closer to the plaintiff's expectations than is the case in Ireland. On comparing both sides opening position with the damages actually obtained in both countries it was found that the first offer made in England was closer than in Ireland, although the plaintiff's expectations of the final offer were higher in England. This indicates that the English insurers seem to be able to achieve a better settlement than in Ireland where the final amounts paid are closer to the defendant's initial demands.

An interesting comparison is the delay between the first offer and final settlement. This is shown in Figure 10 where the delay in settlement in Ireland following a first offer is lower than in England. Despite this a greater number of claims are settled on first offer in England than in Ireland.

Conclusions

On reviewing the data there seems to be a clear indication that the way things are done in Ireland is different from England despite the similar procedural structures. On the whole, legal fees are higher in Ireland than in England. The different methods of calculating these fees could contribute towards this. Although solicitors in England have been allowed since 1991 to charge on a percentage of fees basis this method does not seem to have taken root as it has in Ireland. This indicates a difference in the legal cultures in the two countries.

The increased fees are compounded by delays in settlement. This is as a result of Irish solicitors being unwilling to negotiate directly with insurers, as well as delays by insurers. The system whereby Counsel settles claims in court can lead to delays in arriving at settlement figures and this increases fees as a percentage of total costs. Counsel are more often used in Ireland than in the England, which also increases the fees payable to lawyers. These factors again indicate a clear difference in procedure outside the formal rules. One explanation provided by insurers for these practices is that solicitors wish to avoid the risk of being sued for professional negligence if their client is not satisfied with the results. The use of counsel is protection against this risk.

On the other hand there is a delay in starting negotiations that could lead to the issue of formal proceedings. The delay between commencement of the claim and issue of proceedings is over twice as long in Ireland than England and settlement negotiations take twice as long to start. This indicates that lawyers are prepared to await settlement offers for a longer period than in England but, because of the long delays, have to issue

Figure 8 Legal Fees as a Percentage of Total Expenses at Different Stages of the Legal Proceedings

Stage of Proceedings	England			Ireland		
	Total %	Plaintiff %	Defendant %	Total %	Plaintiff %	Defendant %
None	37	51	25	19	16	4
Summons	41	40	16	20	14	7
Defence	56	42	14	26	20	9
Set Down	n/a	n/a	n/a*	28	17	10
Hearing	46	45	24	32	21	14

* No cases in England were set down without going to trial.

Figure 9 Delays

Periods	England (days)	Ireland (days)
To Settlement	260	1012
Claim made to initiating settlement	332	774
Claim made to issue of proceedings	192	397
Commencement of proceedings to settlement	130	751
First offer to settlement	81	236

Figure 10 Place of Settlement

Place	England %	Ireland %
Not settled	2	7
Court Buildings	0	55
Between Solicitors	18	11
At Insurer's Office	2	0
At Solicitor's Office	6	1
By Telephone	19	2
At Trial	1	12
On Court Steps	0	8
By Judge	0	2
By Correspondence	52	2
Total	100	100

Figure 11 Negotiating Strategy

Strategy	England	Ireland
Percentage opening offer to defendant's expectations	60%	47%
First offer to final settlement	88%	75%

Figure 12 Time of Settlement

Time	England	Ireland
On First Offer	67	3

proceedings to force commencement of negotiations. This leads to an increased propensity to issue proceedings in Ireland as compared with England. Once negotiations are commenced in Ireland they are, in the main, completed on the same day. If a settlement figure cannot be reached there are further delays in the system whilst arranging another meeting with Counsel. The fact that the first offer as a percentage the final settlement is lower in Ireland than in England indicates that the latter have a more realistic view of the amount the third party will accept. This could be due to the availability of text books on damages, which have not been available in Ireland until recently. The lower offer could also be an indication that insurers are trying to reduce their costs. It is also interesting to note that in Ireland insurers offer less than half of the third party's expectation as compared to England where the offer is more than half. This could also delay settlement.

Co-operation between insurers and lawyers is higher in England than in Ireland, as is indicated by the reduced reliance on the issue of proceedings and the faster settlement times. According to Germ (1987)¹⁹ co-operation between solicitors and insurers leads to more reasonable settlements than if the lawyer is uncooperative. The different levels of co-operation are governed by the culture of the system in the failure to negotiate settlement, as well as the reluctance of insurers to enter negotiations despite the pressure on claims inspectors to settle quickly. This is underlined by management of the insurer as well as evident from the files.

Most claims in both countries are settled between the parties, although the number of cases dealt with by the courts in Ireland compares unfavourably with both UK and America. Genn (1987:2) reports that 99% of claims are settled out of court in the UK and Ross (1980:4)²⁰ advises that in the USA 95% of bodily injury cases reach a

negotiated settlement. In Ireland this figure is 86%. This reflects the lack of co-operation between the two sides in Ireland.

This research indicates that in addition to the formal rules of procedure operating in both England and Ireland there is evidence of a difference in “the way we do things around here”, which affects the cost of insurance claims. The methods of settlement used differ in both countries and this is reflected in the cost of claims. The greater use of lawyers in Ireland and the longer settlement periods as well as the compensation awarded to plaintiff’s all affect costs. These are aspects of legal culture as opposed to structural factors affecting litigation costs. This indicates that further research should be carried out into the aspects of culture that affect costs rather than concentrating on changing structural factors.

To ascertain differences in legal cultures a means of measurement needs to be used. Litigation involves risk-taking in that the final result is always uncertain; consequently the participants in the negotiation do not know whether they would have fared better by going to court or by the settlement. Wildavsky’s scales of grid and group are aimed at measuring risk-taking in different cultures. This research indicates that there are differences on the scale that can be explained by interaction within the system as well as the nature of the groups involved. The application of the grid/group scale needs to be considered further in applying it to the difference between the Irish and English systems.

Notes

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19. *Ibid.*
20. Ross, H.L. 1980. *Settled out of court: the social process of insurance claims adjustment*. New York: Aldine Publishing Co.