DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

PROPOSED CHANGES TO CIVIL APPEAL RULES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL18/05)

DECEMBER 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

- APIL supports the proposal that the Court of Appeal should have the right to refuse permission to appeal based on a written application alone in cases that are *"totally without merit"*[1].

- APIL considers that, in order to protect injured claimants, there should be a limit on costs for small claims track cases which are appealed. APIL believes that appeals from the small claims track should therefore operate under the same cost regime as normal small claims track cases - option 3 within the consultation document.

- APIL disagrees with the proposal *"that small claims which are allocated or reallocated to another track should have their costs limited to those available under Part 27 unless the court orders or the parties agree otherwise*[2]*".* We suggest that the current system whereby if a case is re-allocated to another track it adopts the cost regime of that track should be maintained.

[1] Consultation document – page 2 – section 1
[2] Ibid – page 12

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Department for Constitutional Affairs (DCA) consultation on 'proposed changes to civil appeal rules'. Please note, however, that as APIL represents the civil justice interests of people injured through the negligence of others, our response will primarily concentrate on the proposed changes as they relate to personal injury claims.

2. In relation to the small claims court proposals, APIL has campaigned consistently against any increase from the current £1,000 personal injury claims threshold[3]. APIL believes any increase in this threshold will lead to injured people being severely disadvantaged. The following responses are therefore based on the current structure of the small claims scheme. Consequently if the personal injury limit were to be increased, APIL would have to reconsider its position in respect of the following questions and answers.

Consultation Questions

Question 1: Do you agree that the Court of Appeal should have the option to refuse permission to appeal on the papers and order that there be no right to renew to an oral hearing, in addition to the existing options?

3. APIL supports the proposal that the Court of Appeal should have the right to refuse permission to appeal based on a written application alone in cases that are *"totally without merit"*[4]. This option would be in addition to the current powers which the Court holds in respect of oral hearings[5].

4. APIL feels that the proposals are unlikely to disadvantage personal injury litigants. This proposal is an attempt to reduce the number of

[3] See http://www.apil.com/pdf/ConsultationDocuments/130.pdf for APIL's Policy Document relating to the Better Regulation Task Force's recommendation concerning the raising of the £1,000 threshold for personal injury cases.
[4] Consultation document – page 2 – section 1
[5] The Court can grant permission or adjourn directly to an oral hearing and can also refuse permission while preserving the right to an oral hearing.

hopeless (i.e. totally without merit) applications in which the applicant requests an oral hearing. APIL believes that it is unlikely that many, if any, personal injury cases will be 'caught' under these proposals. Due to the complexity of personal injury litigation it is usually necessary for the claimant to be legally represented. The funding for this legal representation, or the legal representation itself, can come from a variety of sources including a trade union, a legal expenses insurer (LEI) or a 'no win, no fee' agreement[6]. As the name of the latter implies, and under the principle of 'loser pays', if the case is lost the solicitor, barrister and/or organisation will not get paid and the claimant may be liable for the other side's costs. There is therefore little incentive for a legally assisted claimant, or the organisation funding the legal representation, to lodge an appeal which is totally without merit.

5. In addition, the research by Professor Hazel Genn indicates that it is unlikely that the majority of applicants, including personal injury applicants, will suffer any type of injustice by the proposed change to the appeal rules[7]. The report concluded that the:

   "level of discrepancy and potential substantive disadvantage to appellants … is both small absolutely and as a proportion of decisions made"[8]*.*

Question 2: Do you agree that appeals from the small claims track should be subject to a limit on costs? If not, why not?

6. APIL considers that there should be a limit on costs for small claims track cases which are appealed, in order to protect injured claimants. Whilst the number of personal injury cases within the small claims

[6] Also known as 'conditional fee agreements' (CFAs).
[7] Of the 112 cases which were analysed, only three would have suffered any disadvantage had the proposed rule change been in force. This represents fewer than three per cent of the 122 cases analysed and in practice only one of these involved a substantive judicial decision.
[8] See www.hmcourts-service.gov.uk/cms/files/PTAFinalReportMarch20051.pdf for a copy of Professor Hazel Genn's research report.

court is relatively minor compared to other types of litigation[9] – such as debt - APIL suggests that the Government's proposals may lead to some injured claimants being disadvantaged and ultimately suffering injustice. For instance, we consider that it would be fundamentally unfair for personal injury claimants who have conducted their case through the small claims court without the aid of legal representation to be faced with unlimited legal costs and fees in the event the decision is appealed.

7. At the moment in the small claims court, costs tend to be borne by each party unless one party has acted unreasonably[10]. A claimant will therefore not have to pay costs win or lose, unless they he has acted unreasonably. The proposed changes would operate on a 'loser pays' principle, meaning that if the claimant lost the appeal he would have to pay all the costs incurred by the defendants. With the majority of personal injury cases being won by the claimant at first instance within the County Court[11], it is suggested that the majority of small claims appeals will be instigated by defendants. In these circumstances it is unlikely that many claimants, if any at all, will want to attempt to defend an appealed decision due to the possible cost implications for them. APIL suggests that by extending the small claims track cost regime to appeals, the claimant is going to have the protection of not being liable for any defendant costs in the event he loses.

[9] The number of small claims for 'negligence – personal injury' in 2004 was 1,560 compared to 46,100 small claims heard overall. This means that only 3.384 per cent of small claims heard concerned personal injury negligence. In contrast the vast majority of cases in the small claims court – 31,710 or over 68 per cent - concerned debt. *Judicial Statistics Annual Report 2004*, page 55, table 4.10 (see http://www.official-documents.co.uk/document/cm65/6565/6565.pdf for a copy of the report).

[10] Unreasonable behaviour in these circumstances refers to one party being openly deceitful and/or dishonest concerning the facts of the case or a party deciding not to attend the court hearing.

[11] Of the 9,340 cases which went to the County Court, three-quarters (75.16%) of them were won solely by the claimant. APIL anticipates that a similar pattern is likely to be reflected in small claims court decisions relating to personal injury. *Judicial Statistics Annual Report 2004*, page 56 – Table 4.13 (see http://www.official-documents.co.uk/document/cm65/6565/6565.pdf for a copy of the report).

Question 2a: If you answered yes to the above question please specify which of the above options you prefer?

8. APIL believes that there are strong arguments (see above) for small claims track appeals to operate under the same cost regime as normal small claims track cases. We therefore recommend the adoption of option 3 within the consultation document.

Question 4: Do you agree that small claims which are allocated or reallocated to another track should have their costs limited to those available under Part 27 unless the court orders or the parties agree otherwise? If you disagree please give reasons.

9. APIL disagrees with this proposal, and suggests that the current system whereby if a case is re-allocated to another track it adopts the cost regime of that track should be maintained. The need to adopt the same cost regime as the new track reflects the additional complexity of both the case and the procedures of the track itself. For instance, the rules governing the fast-track – the most likely track to which small claims cases will be re-allocated – place a heavier burden on the claimant in terms of procedure to which he will have to comply. In addition to this procedural burden, the case itself - particularly if it is a personal injury case - will be more complex. This fact appears to be accepted in the consultation document which states that the primary reason for a case to be re-allocated from the small claims track is because *"the case is considered too complex"* in contrast to the small claims track *"which is designed to provide a simple and informal way of resolving disputes"*[12]. The fast-track procedures reflect this additional complexity by providing fixed costs for legal representation in order to help claimants present their case.

[12] Consultation document – page 3 – section 2