

Scottish Court Service

Consultation paper on review of fees charged by the Court of Session, Sheriff Courts, Office of the Public Guardian, Accountant of Court and High Court



A response by the Association of Personal Injury Lawyers

May 2008

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has over 170 members in Scotland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured pursuers.

The aims of the association 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 David Short – Secretary, APIL Scotland, in preparing this response:

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Introduction

APIL welcomes the Scottish Court Service consultation on civil court fees as an opportunity to voice our concerns on behalf of injured people. We have consistently campaigned against the principle of full-cost pricing in England and Wales, and in Northern Ireland. We are naturally disappointed that the Scottish Court Service has therefore decided to follow suit, proposing to increase civil court fees to reduce the public subsidy in the first instance to 22 per cent by 2010-11, and later removing it all together. We understand the court service plans to increase fees in 2008 with immediate effect.

In 2007-08 personal injury actions accounted for 76 per cent of all summonses lodged in the Court of Session.¹ This shows that it will be injured victims who will be hardest hit by the court fee increases and many individuals will not be able to afford access to the courts to seek redress if these proposals are implemented. Any reform of the court service must maintain access to justice as a priority and must be made in court users' best interests.

The courts provide a public service

The civil courts provide a fundamental public service. Just as schools are not paid for by pupils, and hospitals are not maintained directly by the ill, civil courts cannot rely on court users as their sole source of revenue. Justice, like education or healthcare, cannot be restricted to those able to pay for it.

APIL's long standing position has been that the court service should primarily be a resource of the state and funded by taxation. The state is under a duty to provide its citizens with recourse to redress when wronged and the civil judiciary represents the

¹ The Proof, quarterly newsletter of the Offices of the Court of Session, March 2008.

cornerstone of social justice. The civil judiciary must retain the character of a public service, serving society as a whole, rather than only those with the ability to pay for it.

It must be remembered that the court service is not something that an injured person uses because he wants to. It is a necessary legal mechanism which enables the pursuer to enforce his legal rights. The civil justice system should be designed to encourage early resolution of disputes, preferably without resort to the courts. This does not always happen, however, because of the way in which some insurers handle claims. At the moment systemic attempts by insurers to under-settle claims leave personal injury pursuers little choice but to raise proceedings. It is only right and proper that the pursuer proceeds with his case until full and just compensation for his injury is obtained.

It is not only the court user who benefits from the court service. Court decisions affect other pursuers in the early stages of their claim who, because of a decision in a previous case, may achieve adequate settlement pre-trial. It is unfair to make the minority of individual citizens who are forced to use the courts pay for the benefits gained by the collective.

Improvements to the court service

We currently have a number of concerns about the Scottish civil courts and we submit that the Scottish Court Service, if it intends to proceed with its full-cost pricing policy, should also introduce proposals for the improvement of the service.

In our response to the Scottish Civil Courts Review we made a number of comments concerning the efficiency and appropriateness of the sheriff court for personal injury actions which are also relevant to this paper.

We feel the sheriff court is unsuitable for higher value or complex cases because of the lack of specialist judges, a system for setting dates for proofs which can be unreliable, and the fact that decisions can be inconsistent in different sheriff courts. In addition to these concerns, the recent Scottish Court User Satisfaction Survey, prepared on the behalf of the Scottish Court Service, reveals the satisfaction of court users in the Sherriffdom of Lothian and Borders was just 43 per cent.² The survey also reveals that the number of respondents who indicated they had to wait to be served at the counter or to take part in court proceedings rose from 39 per cent in 2006 to 49 per cent in 2007. As our concerns indicate, there is room for improvement which should be addressed by the court service prior to any consideration of proposals for costs reform.

It is therefore disappointing that the Scottish Court Service has not included provisions in its proposals to dedicate more funds to the courts to improve the service it delivers. There needs to be some direct benefit to the pursuer if fee changes are to be introduced, and this is not currently evident. APIL expects a user-financed court service to be fundamentally redesigned to best meet the requirements of its paying customers.

Access to justice

APIL believes that steep increases in court fees will significantly reduce access to justice for pursuers. It is common in practice for solicitors to initially fund clients' court fees prior to issuing proceedings. If fees are increased, pursuers may find their solicitor unable to pay their court fees because of the recent increase, leaving the individual to either pay the fees himself or refrain from taking his case to trial.

² Scottish Court Service, Court User Satisfaction Survey 2007. Prepared by MVA consultancy for Scottish Court Service, December 2007.

We emphasise that the court fee increase will affect the ability of private individuals to issue proceedings rather than corporations, for example. Furthermore, if a pursuer is deterred from taking his case to trial, it is likely his claim will be at risk of under settling if the defender is aware of the pursuer's inability to pay the court fees.. It is entirely unfair if pursuers are pushed towards settlement because of the deterrent effect of increasing civil court fees.

We contend that the impact on claimants will be especially severe for those on low incomes just above the threshold for legal aid. The number of civil legal aid grants for personal injury actions has sharply declined from 618 in 2006-07 to 465 in 2007-08.³ As fewer personal injury pursuers are granted legal aid, an increasing number of the least well off will be forced to pay court fees and will be hit hard by the proposed increase in fees.

We refer to the Scottish Legal Aid Board's Annual Report of 2006 – 07 in which the Chairman, Iain A Robertson, expresses the following concern:

The number of applications for civil legal aid and civil advice and assistance also continues to decline. Whilst some potential applicants will undoubtedly have been able to access legal services under no win no fee arrangements or other funding mechanisms, the Board remains concerned that there may be underlying access to justice issues which remain to be addressed.

APIL believes it is very unwise to consider introducing an increase in court fees when there remains access to justice concerns with civil legal aid.

We also take issue with the more substantial fee increases in the Court of Session where fee increases will be more substantial. In light of our concerns about the sheriff court, raised above, we feel that the Court of Session is a more appropriate place to

³ March 2007 – March 2008, March 2006 – March 2007.

hear personal injury actions. It is more beneficial for pursuers to issue personal injury actions in the Court of Session because we believe its decisions are consistent, well reasoned and delivered efficiently. The centralised system also means that resources can be used cost-effectively and access to specialist counsel means that cases are more likely to be pursued or defended only when there are reasonable prospects of success.

Paying court fees at a later stage

APIL opposes increases in civil court fees in principle, but if after the consultative process the Scottish Court Service remains committed to introducing its proposals, we wish put forward some suggestions about how to try to minimise the adverse effect it will have on access to justice.

As disbursements are usually recovered by successful pursuers, it is the initial funding of these costs rather than the ultimate responsibility for them which may act as a disincentive to pursuing a claim. We ask the Scottish Court Service to allow solicitors to pay civil court fees at a later stage. This will prevent a situation arising where the solicitor finds himself unable to fund his client's court fee because of the increases, leaving the pursuer to pick up the tab. If he is unable to do so then he will be prevented from seeking full and just compensation in the courts. Many outlays are already paid under a deferral fee arrangement at a later stage in the claims process and we do not see why court fees should be any different.