Ministry of Justice
Consultation on further fee proposals

A response by the Association of Personal Injury Lawyers
September 2015

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25-year history of working to help injured people gain access to justice they need and deserve. We have around 3,400 members, committed to supporting the association's aims and all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

The court system is a public service, from which the whole of society can benefit. A person does not choose to be injured through another's negligence; therefore the court service which helps them obtain redress should be primarily funded by taxpayers, with users paying a contribution towards the service that they receive. A modern functioning society must have a fair and efficient system of providing justice and access to it. As APIL has made clear in numerous consultation responses, court fees should not be increased to turn a profit for the Government. Fees should not have been increased to the levels that they are currently at, and to increase them even further will have serious consequences for access to justice.

Whilst we are pleased to note the proposal to exempt personal injury claims from the higher cap, we are extremely disappointed with the decision to press ahead with general application fee increases, and proposals to further increase Court of Appeal and judicial review application fees. We also urge the Government to use this opportunity to revise the entire fee remissions system, not just amend it to cater to the very highest fees. The system has not been properly reviewed since 2013 – before the above cost increases – and it is not providing adequate protection for those who are unable to afford court fees.

General comments on the proposals

Decision to press ahead with general application fee increases

We are extremely disappointed with the Government's decision to increase the fees for general applications.

Many applications are made to draw the court's attention to a party in default of an order to do something positive to advance the case – for example, to file a list of documents, provide disclosure of documents, exchange witness statements or expert evidence. Compliance with directions timetables ensures the efficient administration of the court's function to ultimately have the case ready to be determined at a trial, whilst realising that aim within proportionate cost. The increased cost of application fees may now act as a disincentive to bringing a party's default to the attention of the court. Issues may only be dealt with at the stages the court already becomes involved, thereby causing inefficiencies, leading to delays, and having an adverse effect on the proper administration of justice.

Further, the injured person's right to access justice will be severely impeded, for two main reasons.

The cost of applications will outweigh recoverable costs in fast track cases

In fixed recoverable costs cases, even if the claim is successful the costs recoverable will be less than the cost of making the application. If an interim application costs £255 to make, then it will be higher than the maximum that can be recovered by the successful party on an application in a fast track fixed recoverable costs case. CPR 45.29H(1) sets this out by reference to table 6 or 6A at CPR 45.18. The maximum recoverable in a fixed recoverable cost case of up to £25,000 in value would be £125 for the preparation of the application and £125 for the advocacy. It will not be economically viable for firms, especially smaller firms, to take on these cases, and the claimant's access to justice will, therefore, be severely limited.

Increases in ATE premiums

We are still to find out the true impact of the massive increase in courts fees on the ATE market – especially in more serious, higher value cases. It is inevitable that premiums will increase substantially in line with the higher fees, and following LASPO and the resulting irrecoverable ATE premiums, this now has a major impact on the injured person, not the third party insurer. Yet more court fee increases of any description - and there may be several if a number of applications have to be made during the course of the litigation - will have a disproportionate impact on injured clients. If the claimant is unable to obtain ATE or is unable to pay the premium, they will not be able to access the courts and so will be denied the compensation that they require and deserve.

Comments on Ministerial Foreword

The ministerial foreword states that "in considering the changes, [the Government] has been determined to deliver faster and fairer justice for all". We cannot see how these proposals, or any of the other fee increases, can lead to faster or fairer justice for all. The court system is a public service which should be accessible by all. By continuing to increase fees, people will not be able to access the court and the solicitors taking on cases will no longer be able to afford to do so. These proposals are not about faster or fairer justice. Instead, they are solely designed to increase revenue for the Government.

The focus should be first on ironing out administrative inefficiencies in the court system, not seeking more money. Further, there should be transparency on where any extra income gained from the court system is spent. It should, at the very least, be put back into the court system to deal with the aforementioned inefficiencies.

Comments on the introduction to further proposals for court fees

We also query the costs of the court service which are referred to in the consultation paper and used as a justification for why further increases are needed. At paragraph 53, the document states that "whilst the combination of fee increases puts HMCTS above full cost recovery across the civil courts, the net operating cost of HMCTS to the taxpayer remained around £1 billion in 2014/2015". The new enhanced fees designed to address the operating costs did not come into force until March 2015. As stated, the HMCTS is already operating above full cost recovery. The cost to the taxpayer will now be lower than the figure for 2014/2015. The Government is trying to justify further increases by quoting costings which were calculated before the earlier increases were introduced. This is disingenuous, and cannot be used as a justification for these further increases.

Throughout the numerous consultations, the Government has continued to maintain that increased court fees would not be a barrier to accessing justice. We maintain that the increased fees do have dangerous implications for access to justice - there is a real risk that charging people more for access to the court system will simply drive people away from using the courts. Whilst it is too soon to gather any substantial evidence, it is very likely that the increases that went ahead in March, and also the further proposals set out below, will mean that injured claimants are put off bringing their case to court. They will be unable to fund the very high upfront fee and will find it much more difficult to obtain ATE insurance even if they are willing to pay the higher fee. Defendants will take advantage of this reluctance and offer low settlements knowing that the claimant will not take the matter to court. As above, we are still yet to find out the true impact of the massive increase in court

fees in all, but especially complex, high value serious injury claims on the ATE market. It is inevitable, though, that as court fees increase, ATE premiums will increase substantially in line with this. Since LASPO, the injured person will no longer be reimbursed their ATE premium if they win their case, which means that the cost of funding this insurance falls solely on the injured person. At the very least, the effects of the existing increases should be permitted to bed down and be properly analysed before further increases take place.

The Government has also maintained throughout consultation that fees are not a major consideration when deciding whether to litigate. We remain unclear as to where the evidence to support this assumption was gathered and do not believe it is accurate. Indeed, the Law Society has recently released comments on the Ministry of Justice's employment tribunal figures. Since employment tribunal fees were introduced two years ago, the number of employment tribunal cases has decreased by over 60 per cent. Increased fees clearly do have an impact on access to justice and the decision to litigate, and this impact will not only be felt in employment tribunal cases but all civil claims, including those involving personal injury. Again, the effects of the existing increases should be examined and analysed before further increases are allowed to go ahead.

Q3 Do you agree with the proposal to exempt personal injury claims from the higher cap and that the maximum fee of £10,000 should continue to apply in these cases?

We welcome the decision to exempt personal injury claims from the higher cap. If, however, the Government can now (correctly) acknowledge that personal injury claimants are a special and particularly vulnerable category of court users[1], we question how the Government can allow the existing fees to remain as high as they are, to go ahead with increase to fees for general applications, and to propose further increases to Court of Appeal and judicial review application fees – both of which will at some point affect injured people and their ability to access the courts.

We also question whether people bringing a professional negligence claim against their original solicitor in relation to how their personal injury claim was dealt with would be included in the personal injury exemption. If not, this will create a highly unfair situation whereby a person is penalised for bringing a claim where their original solicitor failed to act properly and as such the claim failed completely or they did not receive the amount of compensation they were entitled to. In order to prevent this situation arising, personal injury claims must be defined to include any action arising out of a personal injury.

Q4 Do you agree that if the maximum fee for money claims is increased as proposed, the disposable capital test for a fee remission should also be amended so that the disposable capital threshold for a fee of £10,000 is increased to £20,000 and to £25,000 for a fee of £20,000? Please give reasons.

The entire fee remission system should be reviewed in light of the increases in court fees which have taken place over the past year. It is, anecdotally, extremely difficult to get fee remissions at present and the courts do not uniformly apply the guidelines. As the court fees

[1] In the Ministerial Foreword, Shailesh Vara states that "in order to protect the most vulnerable, personal injury and clinical negligence claims will be excluded from this higher cap and fee remissions for those of limited means will continue to apply."

have increased, it is important that the fee remissions scheme reflects this and the thresholds are set at an appropriate level to ensure access to justice.

When the 2013 proposals were brought in, it was already predicted by the Government that there would be a 20 per cent reduction in the number of people who could qualify for a fee remission compared to the previous system. The inadequate coverage of the system will have been exacerbated further by the increases in fees brought in earlier this year.

There are also issues with the disposable capital test, which disproportionately affects certain groups. The elderly, for example, are likely to have more capital than other groups, but will not be in a position to use it to pay for court fees, as they rely on their savings for day to day costs. A wholesale review is necessary to ensure that fee remissions properly assist those who require financial support to access the courts.

Q5 Are there any other benefits or payments that should be excluded from the assessment of a person's disposable capital for the purposes of a fee remission?

As well as a full review of the fee remissions system to ensure that those who require assistance can obtain it, any interim payments should be discarded from the assessment of disposable capital. A situation may arise whereby voluntary interim payments have been made, but the proceedings have hit a barrier and proceedings are issued. It is important that interim payments already received are not taken into account for the purposes of fee remissions – these payments are made to help the injured person with the costs associated with their injuries whilst their case is on-going, to access vital medical treatment, rehabilitation, to provide for adapted accommodation etc. This money is not meant to pay for court fees. Payments from the Criminal Injuries Compensation Scheme should also be excluded from the calculation.

Additionally, an injured person may well be unable to earn replacement income. Whilst the decision to spend savings on higher court fees is not one that any person would take lightly, an injured person's income and capital is much more precious and valuable to them than an average person who is still able to work and replenish any savings spent on court fees. The injured person who is relying on such savings to survive whilst taking time off due to their accident can far less afford to spend or lose it than other groups and so their assets are more worthy of protection and ring fencing.

Q6 Do you agree with the proposal to uplift all civil fees not yet affected by one of the other specific proposals by 10%? Please give reasons for your answer

We reiterate the general points above in relation to increasing fees above full cost.

Judicial review

Judicial review is an important tool in bringing the Government to account, ensuring that the decision making process is carried out fairly and justly. Increased fees for judicial review applications, coupled with the reform of judicial review that has already gone ahead and is currently underway, will be another way to make challenging Government decisions even more difficult.

Court of Appeal

There is a public interest in the Court of Appeal clarifying the law. The increases which are already set to go ahead - £480 for permission to appeal and £1,090 for a hearing are double the current amounts, and will most likely act as a deterrent to people pursuing a claim to this level. We also disagree with the introduction of additional fee-charging points, as these will again act as a barrier to access to justice.

We reiterate our point from the previous consultation that there is no actual evidence present to demonstrate that the fee levels in the Court of Appeal need to change. We believe that the courts should not be operated on a full costs recovery system because they are a public service for the good of the whole of society and should therefore be largely funded by taxes, and not expensive fees that could potentially be a bar to someone bringing a claim.

It is also currently unclear what the impact of the court fee increases will be on ATE premiums. It is already quite difficult (notwithstanding QOCS) for injured people to secure insurance to pursue their claim. The increase in court fees will not make it any easier and further increases are likely to make it more difficult still. The effects of this will be particularly dangerous in the Court of Appeal, if a person has a potentially meritorious claim that has been wrongly decided but they are unable to obtain insurance to bring the case because the appeal fees are so high. This will not only damage that person's access to justice, but may lead to bad law being created as cases are not pursued to the Court of Appeal and clarified.

Q18 We would welcome views on our assessment of the impacts of the proposals for further fee increases set out in chapters 3 and 4 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

Many claimants who pursue claims for injury or harm done to them are vulnerable, and disabled. They may not be in receipt of welfare benefits but will still lack the means to pay enhanced fees. These people should not be deterred from bringing their claim and seeking justice because of higher fees, and the defendant should not be put in a position where they can take advantage of the claimant and offer a low settlement, in the knowledge that the claimant will be extremely reluctant to take the case to litigation because of the costs involved. Anything that is going to adversely affect their access to justice needs to be looked at under the Equalities Act.

The Equalities Statement accompanying this consultation suggests that whilst there may be some indirect discrimination to disabled people following the proposed increases, these effects will be mitigated by the availability of fee remissions (paragraph 4.5). We reiterate that at present the fee remissions scheme is not suitable to provide the assistance required to ensure that those who cannot afford court fees still have access to the courts. There must be a wholesale review of the fee remissions system to ensure that vulnerable injured people are able to access the courts to obtain the compensation that they need and deserve.

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