

Scottish Government

Consultation on Scottish Court Fees



A response by the Association of Personal Injury Lawyers

October 2016

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which 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:

Alice Warren, Legal Policy Officer

APIL

Unit 3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.warren@apil.org.uk

Introduction

APIL's long standing position is that full costs recovery should not be a main focus when setting court fees. The court service is for the benefit of the whole of society, and should be mainly funded through taxation. While we do not agree with the rationale behind the increases, our preferred option would be option 2, a targeted increase of certain fees. As full cost recovery is the principle that the Scottish Government wishes to base fees on, we suggest that a more detailed analysis of the costs and judicial time involved in each type of court proceedings (e.g. commercial, personal injury) should be carried out. Certain court proceedings, for example commercial, are more costly and resource heavy than other areas, and it may well be that the charge for initiating and use of judicial time and resources in these proceedings ought to reflect that.

APIL raised concerns on numerous occasions before the Courts Reform (Scotland) Act was introduced, about how the reformed court service would be funded. Due to this uncertainty, we are concerned that not only will there be a move towards full costs recovery as set out in this paper, but that there will be further year on year increases, which will restrict access to justice.

Executive Summary

- Full costs recovery should not be the main focus when setting court fees. The court system is a public service and should be accessible by all
- The level of service within the court system should be reflective of the fees paid.
- APIL suggests that if full costs recovery is the principle upon which fees are set, there should be a full analysis of how court resources are spent on each type of case. Some types of case are more resource heavy than others and it may be that the fees in those cases should reflect that.
- The cost of court reforms was not fully calculated by the Scottish Government and APIL is concerned that this uncertainty will lead to further year on year increases in fees.
- Qualified One Way Costs Shifting should be introduced as soon as possible, and definitely before any fee increases take place.

General comments

Full cost recovery

We believe that full costs recovery should not be a main focus when setting court fees. The court system is a public service and should be accessible if required, by all. The system should be primarily funded by taxation, with a contribution from the user. It should not be funded by expensive fees set at full cost levels, which could potentially be a bar to someone bringing a claim.

The whole of society benefits from the functions of the court, not just the direct users. For example, most people go to work safe in the knowledge that if they are negligently injured in the course of their employment they are protected by both the law and the impartiality of the

court system which enforces the law. Furthermore, it is often the threat of court proceedings – and the possible sanctions which can accompany them – which will encourage observance of the law, and if necessary, voluntary payment from negligent defenders.

In his Preliminary Report on the Review of Civil Litigation Costs in England and Wales, Lord Justice Jackson spoke out against full costs recovery, seeing considerable force in the strongly held view that it is the function of the state to provide and fund the machinery for dispute resolution. Jackson LJ added that the civil courts play a vital role in maintaining social order and the functioning of the economy. He concluded: “I would suggest it is wrong in principle that the entire cost or most of the cost of the civil justice system should be shifted from taxpayers to litigants. This is now particularly pertinent, given that court fees have increased in the last ten years substantially in excess of inflation.”¹

Level of service reflective of fee levels

At the same time as increasing fees to fund the “improved” court service, members have reported that the efficient and cost effective court service that was promised has yet to materialise². Members have reported that in the Court of Session in the summer of 2016, three complex cases in as many months were not heard because of a lack of available judges. Each of these cases had been set down for a twelve day hearing, and had been allocated a proof diet well over a year earlier.

Fees reflective of court resources spent

If, as is clearly the Scottish Government’s intention, full costs recovery is the basis on which the Scottish Government wishes to set court fees, we suggest that an analysis of how judges’ time and court resources are spent should be carried out. It is clear from the data available on judges’ sitting days that the vast bulk of judges’ time is spent on criminal business³ rather than civil business. With regard to civil business, a look at the Court of Session sitting figures for the years 2014/2015 and 2015/16 reveals that the majority of civil sitting days were not spent on personal injury.⁴ The case management model used in commercial cases involves a far more intensive use of judicial resource and it may well be that the charge for initiating and use of judicial time in these proceedings ought to reflect that usage.

Further increases

¹ <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>
page 70

² The vision of the “Making Justice Work” programme was that “the Scottish Justice system will be fair, accessible, cost effective and efficient” <http://www.gov.scot/Resource/0041/00415373.pdf>

³ A recent Freedom of Information Request to the Scottish Courts and Tribunals Service revealed that in the year 2015/2016, the sitting days apportioned to civil and criminal business in the Sheriff Courts were 29% civil, and 71% criminal. In the Court of Session, in 2015/2016, the total number of sitting days for civil business was 1665, and the total number of sitting days for criminal business was 2298.

⁴ A recent Freedom of Information Request to the Scottish Courts and Tribunals Service revealed that the leaders in number of civil sitting days for 2014/2015 and 2015/16 were mostly Commercial Court Judges, namely Lords Woolman, Tyre, Doherty and the late Lord Jones, along with Lord Brailsford, the Family Judge. This indicates that a large proportion of civil cases requiring sitting days in the Court of Session in those years were commercial, family or other non-PI matters. Further, we know from previous Freedom of Information Requests that only 20 to 30 personal injury cases per year went to proof in the Court of Session before the introduction of the Sheriff Personal Injury Court. Only a very small proportion of cases would, therefore, have been PI.

We are concerned that the Scottish Government will continue to introduce higher increases year on year. The Scottish Government has already changed its proposals since 2015 – at that stage it intended to increase fees by 2 per cent per year until 2017/2018 to assist with the costs of modernising the court's IT system. The majority of the proposed increases in this paper go far beyond this two per cent increase, and the Scottish Government still intends to carry out a full review in 2017/2018.

APIL expressed concern on numerous occasions before the Courts Reform (Scotland) Act 2014 was introduced as to how the personal injury court would be funded, and suggested that it would be met with a hike in fees elsewhere to counter the £2 million loss in fee income as a result of removing most personal injury claims from the Court of Session.

Eric McQueen, Chief Executive of Scottish Court Service, in evidence to the Justice Committee on 1 April 2014, said the Scottish Government was working to ensure that they could put in place the most cost effective and efficient court service, as Parliament had asked. Mr McQueen stated that this would come at a cost but the Court Service did not expect that cost to be more than the cost of running the service as it was before the reforms⁵. It is clear that the costs of the reforms and the associated drop in fee income were not properly considered by the Scottish Government before their introduction.

In light of this, and with the concern that further fee increases are in the pipeline, we feel it necessary to state that an increase in civil court fees over and above cost recovery would not be acceptable.

A demonstration of the impact of increased fees on access to justice can be found through examination of the level of Employment Tribunal cases since fees were introduced in 2013. UK wide, according to Ministry of Justice tribunal quarterly statistics between the period of April – June 2013 (before fees were introduced in employment tribunals) and the period April – June 2016, there was a 64% decrease in the number of Employment Tribunal claims received⁶. We acknowledge that the Scottish Government has pledged to remove Employment Tribunal fees in Scotland, and is therefore alive to the damaging effects of prohibitive fee increases on access to justice.

Qualified One way Costs Shifting (QOCS)

Particularly if court fees are to increase over the coming few years, it is extremely important that QOCS is introduced as soon as possible. Otherwise, coupled with increased court fees this will provide a huge disincentive for pursuers and will deter those seeking the compensation they are entitled to, through fear that they will have to pay the other sides' costs if they are unsuccessful.

Typical outlay fees alone for pursuers in the All Scotland Personal Injury Court for defended cases can already run up to almost £1,500.00. This is typically made up of:

1. Warrant Dues: £214.00

⁵<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9088&mode=pdf>

⁶In Employment Tribunals, the number of claims received in April to June 2013 was 44,335 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239257/tribunal-stats-quarterly-april-june-2013.pdf. The number of claims received in April to June 2016 was 15, 837 (11,637 multiple claims and 4,200 single claims)

2. Proof Fee: £59.00
3. Record Fee: £107.00
4. Four Day Proof Fee: £908.00
5. Motion Fee: £54.00
6. Hearing on Motion Fee (1 hour): £154.00.

This is a total of £1,496.00. Added to this is the cost of expert, medical and health and safety witnesses, running at around £800.00 each per day.

A pursuer who is seeking to fund an action, or a law firm seeking to support a claimant, will be required to budget for an outlay of at least £3,000 per standard case.

Without QOCS in place, borderline and more difficult cases will not be taken on for fear that the pursuer will be made to pay the defenders' costs, in addition to their own, if they are unsuccessful. This will consist of all of the above in addition to defender lawyer costs.

We comment below on the additional costs any appeal would involve.

Questions

Q1 Should simple procedure fees be set at the same level as the fees for small claims and summary cause proceedings?

As a group representing injured pursuers, we await the Simple Procedure (Special Claims) Rules consultation and accompanying statutory instrument for comment.

Q2 Which option to achieve full cost recovery, as set out in this paper, should be implemented

We do not agree that full costs recovery should be the basis on which to set fees, but in the event a choice has to be made, option 2, targeted increases, is our preferred option. While we appreciate that this would mean that certain fees would be more expensive than the flat rise option, looking at the fees in the round and from the point of view of an injured pursuer, the targeted increase would be least prohibitive.

If a flat rise was implemented in the Sheriff Appeal Court, the fee for a hearing in front of a bench of three would be £707 per day. Appeals are extremely important in clarifying the law, and if fees are prohibitive, pursuers may decide not to appeal and therefore difficult law will not be clarified.

Q5 Are there any alternative options to achieve full cost recovery that should be considered?

Again, we do not agree that full costs recovery should be the basis on which to set fees.

Given the relatively little use of judicial time in personal injury cases, consideration should be given to a more detailed analysis of the costs involved in particular proceedings, for example the Commercial Court in the Court of Session, commercial proceedings in the Sheriff Court, as well as judicial review cases.

Q6) Are any of the proposals likely to have a disproportionate effect on a particular group? If so, please specify the possible impact?

As above, appellants will be disadvantaged if there is a flat rise because the cost of an appeal may become prohibitive.

- Ends -

Association of Personal Injury Lawyers

- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
 - T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk