Scottish Government

Further Consultation on Court Fees

A response by the Association of Personal Injury Lawyers

January 2018

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 3,400 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.

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Introduction

1. APIL's long standing position is that full costs recovery should not be the 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. As highlighted in our response to the Scottish Government in October 2016, we are concerned that increases in court fees will continue on a yearly basis. Year on year increases in court fees will likely lead to access to justice issues, particularly if solicitors' fees remain static, as solicitors tend to pay the court fee upfront. Importantly, however fees are set, the quality of the service within the court system should be reflective of the fees paid. This is not the case currently, with members continuing to report issues with a lack of available judges in the Court of Session.

General comments

Full cost recovery

2. We continue to disagree with the Scottish Government's choice to pursue a full-cost recovery model when setting court fees. The court system is a public service and should be accessible if required, by all. A person does not choose to be injured through another's negligence and therefore the court service which helps them to obtain redress should be primarily funded by the taxpayer, with users paying a contribution towards the service they receive.

3. The whole of society benefits from the functions of the court, not just the direct users. As Lord Reed states in the Supreme Court decision in *R (on the application of UNISON) v Lord Chancellor*[1],

> "the constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings."

4. In his speech, which should be read in full as part of any consideration of court fees policy, Lord Reed goes on to highlight the reasons why the court service is beneficial to the whole of society, not just users:

> 68. …Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

[1] [2017] UKSC 51

5. The courts provide a valuable opportunity to establish matters of general principle, which form precedent, which in turn allows advice to be given to others on how successful their case might be:

> 69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (Donoghue v Stevenson [1932] AC 562), the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be absurd. The same is true of cases before ETs. For example, the case of Dumfries and Galloway Council v North [2013] UKSC 45; [2013] ICR 993, concerned with the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers such as road workers and refuse collectors, had implications well beyond the particular claimants and the respondent local authority. The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.
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> 70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.… The written case lodged on behalf of the Lord Chancellor in this appeal itself cites over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor's own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people.

6. 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. As Lord Reed in the UNISON judgment states:

> "71…. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable."

> "7.2… It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution."

7. 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."

8. We would urge the Scottish Government to rethink the insistence on full-cost recovery as a model to set court fees.

Further increases

9. In our response to the Scottish Government on court fee increases in October 2016, we expressed concern that the Scottish Government will continue to introduce higher increases year on year. This new consultation on further increases a year after the last increases were introduced indicates that this concern was valid.

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

11. 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 reforms. It is clear that the costs of the reforms was not properly considered by the Scottish Government before their introduction.

Level of service reflective of fee levels

12. The more efficient court service that was promised throughout the Court Reform proposals has still yet to materialise. In particular, a lack of judges in the Court of Sesion still persists, causing delays. We also note that the Lord President has recently indicated an

intention to retain the current full complement of Court of Session judges, albeit part of the rationale for the reforms contained within the 2014 Act was that there would be a reduction in the number of Senators. If the Scottish Government is insistent on pursuing full costs recovery, the fees paid must be reflected in the service provided.

13. As suggested in our previous response from October 2016, an analysis of how judges' time and court resources are spent should be carried out. It is clear from the data available that the bulk of judges' time is spent on criminal, rather than civil, business, and that the majority of civil sitting days are not spent on personal injury[2]. It may well be that that those cases that demand a greater use of judicial resources should attract a higher fee, or if fees are the same regardless of the type of business, the money generated should be used to provide the same amount of resources to all. What should not be permitted to happen is court fee increases, with no improvements in service, with money generated from personal injury claims being used to fund other more resource-intensive areas.

14. The latest figures obtained from SCTS confirm that around £4.2 million was received by way of court fees from all personal injury cases in 2015-16. This represents a significant element of the overall court income, and excellent value for money, when one considers the relative lack of court time that personal injury cases utilise, given the case-flow system of procedure. A comparison ought to be drawn with the more intensive case-management model used in, for example, commercial actions.

Qualified One way Costs Shifting (QOCS)

15. Paragraph 21 of the consultation highlights the importance of qualified one way costs shifting in preserving access to justice. We reiterate that QOCS should be introduced as soon as possible, particularly if court fees continue to be subject to yearly increases.

16. 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.

Specific fee proposals

The exemption from fees for the first 30 minutes of the hearing in the Sheriff Appeal Court will be removed. The daily fee of £227 or £568 would be applicable from the start of the hearing, for a bench of one or three respectively.

17. Appeals are extremely important in clarifying the law, and if fees are prohibitive, pursuers may decide not to appeal and therefore areas of difficult law will not be clarified. Overall direction of travel will impede access to justice. If the exemption is removed, there should be

[2] A 2016 Freedom of Information Request to the Scottish Courts and Tribunal 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 nmber of sitting days for criminal business was 2298. A recent Freedom of Informaion Request to the Scottish Courts and Tribunals Service revealed that the leaders in number of civil sitting days for 2014/2015 and 2015/2016 were mostly Commercial Court Judges. 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.

an improvement in the service offered to reflect the increased cost of the service. Instead, at present there is a shortage of judges to hear cases in Appeal Court and Court of Session, which leads to delays and backlogs.

A new fee of £246 (including inflation adjustment proposed by the consultation) for permission to appeal should be introduced so that unmeritorious appeals should be discouraged, to allow the Sheriff Appeal Court more time to deal with meritorious permission applications (i.e. appeals where there is an important point of principle or practice or some other compelling reason for the Court of Session to hear the appeal

18. As above, appeals play an extremely important role in clarifying the law. The fee of £246 may discourage those with meritorious appeals. It is unclear as to the provenance of the implication that there are a large number of unmeritorious appeals, which are currently taking up a disproportionate amount of time of the Sheriff Appeal Court. The number of reported decisions of the Sheriff Appeal Court, since its inception in January 2016, currently sits at 54 for civil cases, and 54 for criminal cases. Given there are currently 16 Appeal Sheriffs, it would seem that this should be sufficient though publication of the number of unsuccessful, as well as successful, applications for permission to appeal would be of assistance.

Fees for substantive appeal hearings to be non-refundable and charged at the time hearing is applied for

19. We draw attention to the suggestion at paragraph 16 of the consultation document that the court fee for a substantive appellate hearing should be paid at the time of application, and be non-refundable in the event that the hearing did not proceed. It is said that this might discourage unmeritorious appeals. It is, of course, accepted elsewhere within the consultation document - para 37 - that to obtain permission to appeal beyond the Sheriff Appeal Court is “exceptional” and “must satisfy the “strict second appeals test””.

20.The potential costs for the appellant are significant. The current fee, per party, for an Inner House hearing, is £500 per half hour. Consequently for a two day Summar Roll Hearing, each party would be obliged to pay around £10,000 at the time of applying for the hearing, which would not be refunded, should the case not go ahead, for whatever reason.

21. While this is likely to discourage even meritorious cases from being taken to appeal, it will also disincentivise settlement in cases where an earlier decision to appeal has been taken. No appeal is ever marked lightly, and there is now even greater disincentive to do so. Appeals marked by lawyers will almost always have an arguable point. But the reality is that final views are frequently taken on prospects at a later date and in particular once parties full Notes of Argument have been lodged, exchanged and digested. Settlement by parties is at the heart of personal injury litigation at every stage of the process. Case flow management depends on it. If parties are to be penalised for late settlement and abandonment of appeals, (with SCTS to receive a windfall benefit), it sets up a perverse incentive for the appeal to proceed. That is unlikely to be a fruitful use of judicial time and court resources. Appeals are extremely important in clarifying law. Lord Rodgers, in his address to the APIL annual conference in 2009 touched on cases that had come before the House of Lords on appeal on issues such as nervous shock, asbestos related illness, and the definition of workplace equipment. He set out the importance of new cases being put before the courts if

the law is to be kept up to date, stating that “what the courts decide can have a considerable effect on the public” and that “those who bring and fight those new cases perform a service from which all members of our society ultimately stand to benefit”. The fee structure should not, however, be such that if parties are in a position to settle after they have lodged an appeal, that an unnecessary appeal then goes ahead simply because the huge fees paid are non-refundable.

22. There should be as efficient use of the court resources as possible, but this provision would impede access to justice and penalise those who seek to settle their claim before an appeal is heard.

23. We agree that there should be provision for a payment, in the event of a late cancellation, as indeed is currently the case, though we feel that the rate of 50 per cent of the anticipated hearing fee, particularly at current rates, is too high.

24. We are aware that currently, Inner House judges are routinely being utilised to deal with Outer House business. This suggests that the real problem to be addressed lies in the amount of criminal business.

Exemptions

25. One member reported issues with attempting to obtain exemption from fees for someone who does not reside in the United Kingdom and is therefore not in receipt of benefits, but who is otherwise on a very low or no income. There is a lack of support in relation to fees if the pursuer resides outside of the UK and does not therefore qualify for UK benefits.

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