Department of Justice for Northern Ireland

Improving Cost Recovery in the Civil Courts

A response by the Association of Personal Injury Lawyers

February 2019

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have around 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.

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Introduction

APIL maintains that full cost recovery should not be the main focus when setting court fees. The courts are a public service from which the whole of society can benefit. 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 tax payers, with users paying a contribution towards the service they receive.

Instead of simply increasing fees year on year, which jeopardises access to justice, the Northern Ireland Courts and Tribunals Service (NICTS) should focus on improving efficiency within the court system. A move towards paperless courts, and the conduct of reviews by telephone or email, would enable the courts to deliver an improved service for court users, at a more efficient cost.

General comments

We do not believe that full cost recovery should simply be accepted as the basis on which to set court fees. The court service benefits the whole of society, and as such should be largely funded by the taxpayer. 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 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. People should not be barred from using the courts because they cannot afford the necessary fees, especially if they have already contributed to the running of the system through the payment of taxes. Just as schools are not paid for by pupils, and hospitals are not maintained by the sick, the civil court should not rely on court users as their sole source of revenue. Justice, just as education or healthcare, cannot be restricted to those able to pay for it.

A very high proportion of costs are already being recouped from court fees – the consultation document states that as a result of fee increases introduced in 2017, the cost recovery position has improved from 73 per cent to 82 per cent of costs being recouped through court fees. There must be a balance struck between cost recovery and ensuring access to justice, and insisting on full cost recovery provides a blanket approval to continue to increase court fees year on year, without regard for whether fees are set at a level to ensure that access to justice can be achieved.

The court service is also in drastic need of reform. Fees should not be increased year on year, with no improvement in the services provided to users. More money is simply being pumped into the court service, without addressing the systemic failings. The consultation states that if fees are not increased as proposed, NICTS will have to implement further cuts to court and tribunal services, to balance its budget. We strongly suggest that rather than simply increasing fees, the focus for the court service should be to implement the long-term transformation project – referred to at paragraph 17 of the consultation document - as a priority. There were numerous recommendations in Lord Justice Gillen's report of civil justice[1], which, if implemented, would go a long way towards improving the efficiency of the court service. There should be greater use of email and a move towards paperless courts. Some review hearings, date fixings and simple interlocutory applications should also be dealt with by email or telephone conference. If these recommendations were implemented, it is highly likely that NICTS would be able to provide an improved service at a reduced cost.

[1] https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf

The court service should not simply be able to put prices up over and over again, without any improvement in services.

Where plaintiffs are represented, solicitors will most likely carry the cost of the increased court fee initially. Increased court fees, coupled with a lack of efficiency means that solicitors who pay the court fee upfront will be out of pocket by more money, for longer and longer periods of time. We suggest that the County Court Rules are amended to permit solicitors to claim interest on disbursements such as court fees to be awarded at the time of the decree. Otherwise, some firms may be deterred from taking on riskier and more complex cases, for fear of having to pay large amounts upfront that may not be recouped back for a long time, if ever. In addition to the improvements recommended in the civil justice review, we also suggest that the ICOS system could be improved, by allowing solicitors to enter their client's name, or the firm's reference, into the court's system. This will make it far easier for solicitors to reconcile which fees have been paid for which cases.

The reference at paragraph 11 of the consultation, to court fees being increased in England and Wales and Scotland, is irrelevant. Northern Ireland is a completely different jurisdiction, with different pressures and volumes of users. There is no justification for increasing fees in Northern Ireland simply because fees have been increased in other jurisdictions.

There appears to be a theme running behind the proposals that litigants in person (LIPs) are a hassle and burden to the court service. The University of Ulster research paper *Litigants in person in Northern Ireland: barriers to legal participation*[2] highlighted that court actors (judges, court staff, legal representatives) felt frustration at the extra time and support litigants in person need in court and at court counters. For some court actors, the presence of LIPs was a source of irritation or frustration: most often for legal representatives on the opposing side, but also for some court staff and judges. The irritation arose both as a result of insufficient accommodation of LIPs' lack of expertise in the system and in response to a few difficult LIPs who presented particular behavioural and procedural challenges. Some of the proposals in the consultation paper appear to be proposed as a deterrent to litigants in person using the court system. For example, there are proposals to make applicants pay a fee for amending errors in forms, indicating that court staff spend a lot of time amending forms that have been completed poorly by those unfamiliar with the system. There is also a suggestion of reducing the scope of the fee remissions scheme due to abuse by those bringing unmeritorious claims. This highlights the importance of having access to legal representation to assist in bringing a claim, and the need for solicitors to act as "gatekeepers" to the court system, to ensure that the court system is not swamped by those who have not received any advice and are bringing a claim without merit. Any moves to reduce access to solicitors will further exacerbate the problems already being experienced by the court service.

Proposal: an increase in the fees charged by NICTS for the delivery of civil and family court business, from the planned 5% uplift to a 10% uplift; to be applied to all fees, effective from 1 April 2019

We are against increases to court fees above inflation. As above, the answer is not simply to continue increasing fees and putting more money into a broken system. Court fees were increased and agreed upon in 2017, and to already be looking to increase fees further – even though court business has increased, so revenue should have also increased - is a sign that the court system is not running efficiently.

[2] https://www.ulster.ac.uk/__data/assets/pdf_file/0004/309892/179367_NIHRC-Litigants-in-Person_EXECUTIVE-SUMMARY__6_LOW.pdf

Proposal: a fee for a review hearing in the High Court

Again, as above, we do not believe that charging a fee is the correct way to address the problems in the court service. Instead, the focus should be on reforming the way review hearings are used. At present, there is no control on review hearings being used more often than is necessary, or that parties have to attend in person rather than being able to conduct business over the telephone or via email. The court can request a review hearing, even when the parties themselves are of the view that everything has been agreed. There is nothing in place to prevent the courts from requesting unnecessary review hearings, simply as a way to generate income for the court service. The focus should instead be on how cases can be resolved in the most efficient way possible.

There are also issues with judge's review hearings needing to take place because the defendant refuses to agree a date for the full hearing. There should not be a situation, should this fee be introduced, whereby defendants can drag their heels and force a review hearing, that the plaintiff will be responsible for paying the fee for. Similarly, Masters' reviews take place because defendants have not complied with interlocutory issues. The plaintiff should not be responsible for paying a fee for a Masters' review because the defendant has not done something that they should have. There must be an incentive for the parties to resolve cases as efficiently as possible.

Review of NICTS Exemption and Remissions Policy

We do not believe that changes should be made to the exemptions and remissions policy purely on the basis of anecdotal evidence. If changes are to be considered which would restrict access to the scheme, there must be clear evidence to highlight exactly what the problems with the current scheme are. Further, the consultation itself states that the fee income lost as a result of the policy is a mere 0.3 per cent of the total fee income – this impact should certainly not be a justification for reducing or removing the fee remissions scheme. A system of remissions is vital to ensure that those who cannot afford to pay the full cost of court fees to be able to access the system.

It is also clear that the fee remissions system is not being used to its full potential by solicitors at present. Administratively, it is time consuming for both applicants and court staff. There should be a review of the way the scheme is administered, and how fee remissions are applied for, so that applications can be more easily dealt with online.

Proposal: The policy would not apply to appeals without the leave of the Court. This would effectively remove any financial assistance for Appeals unless granted by the Court.

The court deciding whether the appeal has merit, and thus whether the person can apply for a fee remission, must be independent from the determining court.

Proposal: At present, there is no "cap" or financial ceiling on the number of fees or "cases" that can be supported by the policy, at any one time. There is evidence to show possible abuse of the policy. The introduction of a "cap" could help prevent this.

We do not agree that there should be a cap on the number of fees that can be supported by the policy at any one time. Firstly, there is no evidence included within the DoJ's consultation to illustrate that there is an abuse of the policy. Secondly, simply because people are using the policy for a number of fees does not automatically mean that this is misuse. Needing to use the remissions system for several cases does not mean that cases were not meritorious,

or that the applicant should not have brought the claim in the first place. If the DoJ is concerned about abuse, in place of an arbitrary cap, there could be the introduction of a test to determine whether the claim is frivolous or vexatious.

Proposal: NICTS propose to introduce a nominal fee, in the region of £25, for any person availing of assistance from the policy.

It is nonsensical to charge people who already cannot afford to pay. The process should be moved online, to reduce administration costs.

Proposal: the applicant's gross monthly income (rather than their net or disposable income, as is the case currently)

The consultation states that the government has chosen to consider an applicant's monthly gross income as this best reflects an applicant's current financial situation and therefore their ability to pay a fee. There is a danger that gross monthly income will not adequately reflect a person's ability to pay for court fees.

Proposal: The income test could be similar to that in England and Wales. This would result in a greater contribution from those who pay part of the fee and would also improve the transparency of the assessment for the court user. There would be an income cap (above which the applicant would be ineligible for remission), and a lower income threshold (under which the applicant receives full remission). The "cap" and "threshold" would need to be maintained in line with Social Security Benefits.

The income threshold whereby someone no longer qualifies for a full fee remission is set too low in England and Wales, and the Department for Justice should not simply replicate the threshold in Northern Ireland. In England and Wales, a single person's income threshold is set at £1,085 (equating to around £13,000 per annum) for entitlement to a full remission, and a couple's threshold is £1,245 gross monthly income, which equates to £15,000 per annum – a mere £2,000 per annum above that of a single person. A 23 year old working 40 hours a week on minimum wage earns around £15,000 per annum. According to the gross monthly income test, they will be wealthy enough to contribute to the payment of court fees. In reality, this will not be the case. Setting the threshold too low means that people will be put off pursuing claims for fear of being unable to afford to pay court fees. The remissions system should also cater to those who fall above the threshold for legal aid, but who otherwise do not have the disposable income to pay for court fees.

Proposal: NICTS may consider reducing the time period for a retrospective fee remission to three months.

There is no administrative basis for seeking a shorter time period for retrospective remission.

APIL is strongly against the time limit for retrospective fee remission being reduced from six months to three months. Commonly, defendants will refuse to pay for court fees if a remission could have been granted to the plaintiff, but the plaintiff did not apply. The defendant will class these costs as an unnecessary disbursement. Insurers argue that they are not liable for court fees even if they lose a case, as the plaintiff would have been entitled to remission and so failed to mitigate by not applying for it.

The six month time limit for retrospective claims allows plaintiffs with borderline cases who may not be sure whether or not they should have applied for a fee remission, to apply after the case has gone to court, and get a remission to avoid being out of pocket when the defendant will not pay. We are concerned that three months is an unrealistic time limit, failing to allow sufficient time for the client to gather the required evidence and apply for remission.

The form requesting fee remission is very time consuming and difficult to complete. The form must be completed perfectly, or it will be sent back. Supporting evidence must also be gathered and sent off.

Proposal: Consideration could be given to NICTS recovering fees that have been waived if the applicant is successful in their case and some form of financial award results.

It is sensible that where the plaintiff is successful, and the defendant is responsible for reimbursing the court fee, that the NICTS should recover the fees that have been waived from the defendant.

Proposal: Consideration be given to abolishing the policy and recognising that it has led to poor behaviours and evidence of abuse. Instead, allow the Pro Bono system to provide support to meritorious cases.

The fee remissions scheme should not be abolished – it ensures that access to justice can be achieved. The scheme costs a mere 0.3 per cent of the overall legal aid budget.

Impact assessments

Solicitors fund court fees upfront in Northern Ireland. Solicitors' scale cost have increased by only 7 per cent in the past nine years[3]. This is completely out of step with the continued increases to court fees in the same period, with court fees increasing by 10 per cent in April 2017, another 7.5 per cent in 2018, and a further increase now due. If solicitors are not properly reimbursed for the work that they carry out, and court fees are set at higher and higher levels, some firms will struggle to pay costs such as court fees upfront, and with the risk that they will not get reimbursed for those costs. This will lead to some firms simply being unable to take more complex and borderline cases on.

As above, a lack of efficiencies in the court system also mean that solicitors are paying costs upfront and the time taken to resolve the case (and get those costs reimbursed) is getting longer and longer. If there is not an improvement in the efficiency, again, this may lead to some firms struggling to take cases on.

NICTS should also consider other ways to increase the revenue they, instead of continually targeting plaintiff solicitors. We suggest that defendants should be required to pay a fee to enter a defence in a case. Defendants should also be asked to lodge a fee with their paper objection, if they are objecting to an interlocutory application. This would avoid meaningless objections by the defendant. There should also be an additional penalty fee for a defendant lodging a late notice to defend in the county court.

We also understand that those issuing in the commercial and chancery courts do not have to pay to get their case listed. We suggest that the NICTS could obtain a further revenue stream by introducing fees here. Cases heard in the commercial court tend to be business cases of high value, and it seems far more sensible to require a higher fee from businesses than injured individuals who are trying to seek compensation to put them back, as closely as possible, to the position they were in before the accident.

[3] Costs for cases between £10,000 - £12,500 increased from £2529 in 2007 to just £2709 in 2018