

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

**CIVIL COURT FEES
CONSULTATION PAPER ON FEE CHANGES
*CODE NO CP 10/04***

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL17/04)**

JULY 2004

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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CIVIL COURT FEES

Introduction

1. APIL welcomes the opportunity to put forward its comments to the Department for Constitutional Affairs (DCA) in response to the consultation paper on civil court fees and fee changes. APIL has expressed its views on this issue on several occasions¹ and this response reflects these responses. In summary, APIL believes that the court service operates for the public good and should be fully funded by taxation as opposed to being paid for by its users via fully recoverable fees. Indeed the current system fails to appreciate the vulnerable nature of personal injury victims, who are expected to pay all incurred fees without exception. If civil court fees are to continue, APIL would like to see exemption given to personal injury victims to reflect their status as a vulnerable group.
2. APIL is particularly concerned that the fees which are recovered from injured claimants are being used to fund other areas of the court service. Such a policy represents a stealth tax on personal injury victims, and indicates that increases are not necessary from cases being dealt with in the county court where most personal injury cases are litigated. We believe that the most contentious aspect of the proposed fee increases is the suggestions of £200 per hour trial court fee. APIL believes that this will lead to an increase in costs and considerable restrictions to access to justice. Furthermore APIL predicts that the hourly trial fee will lead to satellite litigation as court users challenge costs bills on the basis of issues involving court conduct and service standards.
3. APIL believes that the increase in court fees will also have a significant effect on legal funding issues as insurers will be more reluctant to offer cover due to the increased financial risk. This will have a direct impact on injured claimants' access to justice, with many worthy cases unable to

gain funding to continue to court. While APIL disagrees with the imposition of fees for users, within the current suggestions, we do provisionally support the charging of a commencement fee per claimant as opposed to per claim. It should be noted, however, that this provision will only be applicable in a small number of cases.

4. Finally, APIL questions whether the increased court fees are an attempt by the Government to drive litigation from the courts into alternative areas of dispute resolution, such as mediation and arbitration. We consider that this may lead to commercial organisations being involved in dispute resolution with unregulated providers offering an alternative to the use of the court system. The fact that these organisations are unregulated means that claimants will have none of the statutory protections which are provided by the courts. This situation can only be detrimental to claimants and to the public interest.

The civil court system operates for the ‘public good’

5. APIL believes that the court service should be a resource provided by the state and should be fully funded by taxation. We consider that it is unjust and unfair to expect litigants, especially those suffering from a personal injury, to fund - via fees and cost recovery - a civil court service which is meant to operate for the ‘public good’. The Court Service is a monopoly supplier, with claimants having no alternative but to use the courts if they are unable to get justice from the negligent party who caused their injury. As one commentator has stated “[c]itizens have a constitutional right of access to the courts”².
6. The benefits of the court system are not only enjoyed by people actually litigating but are also enjoyed by society as a whole. 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

¹ See APIL's response to the Lord Chancellor's Department consultation – ‘Civil Court Fees’ (December 2002)

² Adrian Jack – ‘Court fees: the new stealth tax?’ New Law Journal (18.06.04) page 909

law and the impartial courts which will enforce this law. Furthermore, it is often the threat of court proceedings - and the possible sanctions which can accompany them - which will encourage voluntary payment from negligent defendants. APIL believes that being able to gain access to the courts is a right, not a commodity, and in a civilised society it should be paid for by society as a whole, not just by the unfortunate few which have been forced to use the courts to resolve their dispute.

Full cost recovery

7. APIL does not support the policy of 'full cost recovery', especially for personal injury victims, as the provision of and the ability to gain access to the courts – as detailed above - should be funded by taxation so as to reflect the 'collective benefit' of the civil justice system to society in general. While we are encouraged that the Government recognises that it has a duty to protect the rights of certain vulnerable groups of people – such as children and people with limited means – and so allows exemption and remission from the full cost recovery principle for them, most personal injury victims do not qualify for such exemption. For example most claimants receiving statutory sick pay – approximately £55 per week – will not qualify for an exemption as they will be over the necessary financial threshold. The majority of personal injury claimants therefore currently struggle – even before the proposed increases - to meet the court fees at the outset of a case. This perpetuates the inequality of arms between injured victims and defendants, who are usually well-resourced and experienced insurance companies. APIL proposes that personal injury victims be spared the need for full cost recovery as they represent a significant vulnerable group. Furthermore we suggest that court fees should be levied at the end of the case and paid by the losing party.

Use of county court fees to subsidise other parts of the court service

8. APIL is particularly concerned that personal injury victims' court fees are being used to subsidise other parts of the civil court system. Most personal injury cases are heard in the county court, with the county court recouping approximately 105 per cent of its current cost – i.e. gross income exceeds expenditure. The suggested fee increases will swell this recoupment of monies to approximately 112 per cent. We feel that it is blatantly unfair to expect victims of personal injury to subsidise areas of the court service which are unable to effectively recover the cost of their service. Indeed it appears that cost recovery within probate, which currently recoups 132 per cent of its cost, will be relaxed or lessened so that in future only 100 per cent of its costs will be recovered. APIL feels that this policy acts as a stealth tax on vulnerable individuals, and further perpetrates the inequity of arms between claimants and large insurance-backed defendants.

Increase in costs and restriction of access to justice

9. APIL considers that the increased fees, in particular the newly introduced hourly trial rate, will increase costs and restrict access to justice, effectively undermining the intention of the Woolf reforms. In fact hourly fees will have a *“disproportionately harsh effect on the few litigants whose cases go to trial”*³. For example, the aforementioned hourly trial fee of £200 that is charged to court users – regardless of whether it is capped at a maximum amount⁴ – will act as a disincentive for many litigating parties to issue court proceedings. Instead, as neither side will want to pay the newly-introduced exorbitant court fees, negotiation will lead to defendants offering derisory damages in the knowledge that the claimant is unlikely to issue court proceedings due to the cost burden they may incur. While this series of events would prevent cases reaching court, the claimant's access to justice would be significantly infringed as

³ Adrian Jack – *Court fees: the new stealth tax?* New Law Journal (18.06.04) page 909

⁴ Consultation Document – Paragraphs 6.4.-6.12, pages 18-20

he would not receive the correct amount of damages that his injury deserved.

10. The burden of an hourly trial fee is further exacerbated by the fact that the claimant has *“little control over the speed of the judge, or of the other side”*⁵. If either the judge or defendants are slow this will inevitably mean that the costs involved in the case will increase. For example, judges may prolong a case because they have not fully read the trial bundle, the skeleton argument or the legal authorities. Without the help which is contained in this material, it will be difficult for the judge to effectively navigate the subsequent proceedings, and this in turn is likely to slow down proceedings.

11. APIL is further concerned about judges assigned to personal injury cases when they have little or no experience within this particular area of law, and we recommend that specialist judges should be appointed to try such cases. For example, if a judge does not know about personal injury (PI) law, proceedings will naturally be slower as the advocates involved in the case will have to guide him through the intricacies of the specific PI law involved. APIL has continually called for the training of specialist personal injury judges to hear personal injury cases. We believe that, due to the unique nature of this particular area of law, it is only with specialist knowledge and experience that a judge can make a fully informed decision on a personal injury case, and do so quickly enough so that the proposed hourly trial fee does not unfairly cost those who litigate PI cases.

12. APIL believes that the introduction of the hourly fee rate for cases will adversely affect the standard and level of case law in this country. The newly proposed fees will make pursuing or appealing a case above the county court level simply not financially viable. It should be remembered that the High Court and the Court of Appeal - the two venues to which the new hourly fee rate of £200 applies – set *“precedents of great value*

*in developing English law*⁶. Indeed “*an individual should not have to carry this cost. An additional £1,000 a day in court fees for those whose case does not settle is a serious burden*”⁷.

13. APIL questions how long it will be viable to restrict the hourly trial fee only to high court cases and above in the light of moves towards a unified civil court service⁸. Hourly trial fees will also inevitably lead to venue shopping⁹ by claimants. The additional, and unjustified, costs involved in taking a case to the high court will mean that most claimants will be forced to take cases to the county courts. At the moment, however, the county courts are in the middle of a crisis in terms of being hugely under-resourced. The increased number of cases which will inevitably be driven towards county courts will mean further strain on their already limited resources. APIL believes that this over-demand will lead to cases not being heard promptly, leaving injured claimants in limbo awaiting their day in court.

Satellite litigation

14. APIL believes that the increase in civil court fees will also increase satellite litigation as higher costs bills will be challenged on the basis of the conduct and the service of the court, as well as the actions of the opposing side. For example, if a case was heard in the high court and the defendants advocates were perceived to be unduly slow during the proceedings, it is only right that the eventual costs of the case – in particular the hourly court fee – should be open to challenge. As previously mentioned there are also instances where the judge may be ill-prepared, insufficiently experienced or lacking the required legal knowledge. In these instances, if the claimant loses the case, he is forced to bear the burden of costs due to the conduct of the court. This possibility can be reduced by the imposition of service standards where

⁵ Adrian Jack – ‘*Court fees: the new stealth tax?*’ New Law Journal (18.06.04) page 909

⁶ Ibid

⁷ Ibid

⁸ See ‘*Philips and Woolf: scrap the High Court*’ Law Society Gazette 101/26 – 01.07.04, page 1 & 3

PI litigation is conducted by specialist judges given adequate time to read all the lodged papers in advance of the trial.

15. Another illustration of a potential judicial problem may be where a case is appealed due to an incorrect decision by the original judge. Due to the high costs involved, APIL proposes that the costs of the case should be refunded to the paying party or parties.
16. In addition, while APIL fundamentally disagrees with the funding of the court service through the levying of fees on users, we believe that if claimants are expected to pay the higher court fees they should be able to expect a minimum level of service. In the event that these minimum standards are not met, APIL contends that the offending court should refund part, if not all, of the fees charged.

Funding difficulties for personal injury cases

17. APIL believes that the suggested increases in court fees will further restrict injured claimants' access to justice due to difficulties in securing appropriate legal funding for their case. In particular conditional fee agreements will be at risk because "[w]ho will fund a £5,000 fee for a five-day High Court action?"¹⁰ While the provision of legal funding is dependent on the particular type of policy – either before-the-event (BTE) or after-the-event (ATE) legal insurance – and the specific policy itself, the increase in court fees and the subsequent increase in the amount of money which the insurance industry will have to pay out will inevitably lead to higher premiums across the board. In addition, numerous policies either do not pay disbursements - so the claimant or the solicitor will have to pay - or will reimburse the disbursement amount only after the conclusion of the trial.

⁹ Choosing a venue based on monetary considerations – i.e. the court that is the cheapest.

¹⁰ Adrian Jack – 'Court fees: the new stealth tax?' New Law Journal (18.06.04) page 909

18. In relation to policies which do not pay for disbursements, higher court fees will simply mean that many injured claimants will not be able to afford to continue with their case, and solicitors will be even more reluctant to take on cases due to the potential financial risk. Furthermore, while disbursement loans are available, these tend to charge interest on the loan amount, so further increasing the costs involved. In relation to disbursement reimbursement policies, there is still the issue that the court fees need to be paid in advance. While this money will be returned after the conclusion of the trial, initial funds are still necessary. It is unlikely that claimants will be able to gain access to the kind of funds which allow them to initially pay for the disbursement themselves. The same can be seen to be true for solicitors.

Commencement fee per claimant as opposed to per claim

19. APIL provisionally supports the charging of a commencement fee per claimant rather than per claim on the understanding that there will be appropriate exemptions for members of a single household. This support is also based on the fact that, in APIL members' experience, this change in provision will affect only a small minority of claimants and will not be overly detrimental. In case provision is shown to affect a larger number of claimants than originally anticipated, APIL suggests monitoring and review of this decision in the light of experience.

20. APIL believes that members of a single household should be exempted from the proposed commencement provision due to the fact that it is often this category of claimant which will appear in a single claim due to the fact that the injuries sustained may have happened when the household members were together. For example, a family going on holiday may be involved in a car crash. It would be illogical and unfair to charge individual commencement fees to each member of the family, as this would significantly burden the family before any determination of liability or award of damages has taken place.

Mediation and arbitration

21. APIL considers that the high percentage increase in court fees will not only increase costs and reduce access to justice, but may well drive a considerable amount of litigation from the courts into private and unregulated arbitrators and mediators. Indeed APIL members have suggested that the increase in court fees is an attempt by the judiciary and Government to drive more litigation into mediation and arbitration. A recent commentator suggested that “[t]here are now clear signs that mediation will become the norm rather than the exception in PI [personal injury] and clinical negligence work”¹¹. APIL is concerned that by pushing litigation from the courts the Government has given little thought to what kind of dispute resolution will take its place, and that while going to trial “will remain a party’s right ... it is likely to become an increasingly high-risk option”¹².

22. APIL is concerned that increasing the need, due to the financial burdens of litigating through the courts, for mediation may lead to the establishment of non-regulated providers of dispute resolution. To give a parallel example of the potential problems, it should be remembered that one of the initial attractions about claims management companies was that they appeared to offer a low-cost avenue into the personal injury litigation process. This perception was facilitated by a huge amount of money spent on advertising. While this perception proved incorrect, with many people being left with bills higher than the sum of their eventual damages, APIL is concerned that mediation services will appear to offer a similar ‘cheaper’ alternative, this time to the court system. Yet mediation can also be seen as a high-risk option to a claimant as the costs involved usually have to be met by the parties themselves and therefore out of their damages, if awarded, or out of their pocket, if no award is made. APIL believes that the rise of private non-regulated mediation services can only be to detriment of personal injury claimants -

¹¹ Ralph Lewis ‘Ways of making you talk’ The Lawyer 21.06.04, page 27

¹² Ibid

as were the claims management companies - and that the increased costs to the claimant, whether it be from court litigation or mediation, significantly restricts access to justice, and will inevitably lead to worthy cases either being settled cheaply or not being brought at all. Furthermore, APIL believes that a claimant's right to be able to gain access to the court system should be sacrosanct, and not be hindered by the imposition of higher court fees and full cost recovery.

23. It is APIL's belief that it is in the public interest that dispute resolution is undertaken by, or at least regulated by, the state, and that the courts offer the best way of achieving that result. APIL considers that the civil court system should be promoted, and that by removing dispute resolution from the courts it is being taken out of the hands of those designated to protect and enforce it, leaving people to take the law into their own hands.