

18 November 2005

Mr Andrew Lee
Civil Law & Justice Division – HMCS
Department for Constitutional Affairs (DCA)
1st Floor Southside
105 Victoria Street
London
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Dear Mr Lee

HMCS / DCA consultation paper CP (L) 24/05: Civil and Family Court Fee Increases

The Association of Personal Injury Lawyers (APIL) was set up in 1990 to represent the interests of injured people. We have around 5,000 members, comprising solicitors, barristers, academics and some students. All are committed to ensuring full and proper redress for people injured through negligence.

APIL is disappointed to note that the Department for Constitutional Affairs (DCA) and the newly amalgamated Her Majesty's Court Service (HMCS) are continuing in their attempts to achieve 100 per cent recovery of costs via another increase in civil court fees, the second such increase in only 12 months. Of particular concern, however, is the fact that the increases represent a significant rise in the amount which will need to be paid for various essential services provided by the courts, services which APIL believes should be funded for the public good. Indeed the fee increases – ranging from a five per cent increase to a considerable 25 per cent increase – are all well above the current general rate of inflation (which stands at 2.5 per cent).

APIL has voiced its concern about the Government's decision to raise court fees on several occasions, including in response to the most recent consultation in July 2004. In summary, we believe that the courts represent a vital public service and should therefore be subsidised – either fully or partially – by the Government. We are opposed to the suggestion within the consultation document that the courts should attempt to "*recover 100% of the total cost ... for civil proceedings in the county courts, High Court and Court of Appeal*". In addition, we feel that the vulnerable nature of personal injury

victims should exempt them from paying the full cost of their court case. Under the current structure, personal injury (PI) claimants are not exempted from any part of the cost of going to court so have to pay the full cost price. It should be remembered that PI claimants are often forced into going to court in order to claim much-needed money for their future care from the 'polluter' which injured them.

While in some cases court fees are paid by the losing defendant – often a large insurer – or after-the-event (ATE) insurer the increase in such fees will influence claimants in other ways. For instance, APIL believes that the increase in court fees will have a significant effect on legal funding issues as legal expenses insurers will be more reluctant to offer cover due to the increased financial risk. This will ultimately have a direct impact on injured claimants' access to justice, with many worthy cases unable to gain funding to continue to court.

The civil court system operates for the 'public good'

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 to fund - via fees and cost recovery - a civil court service which is meant to operate for the 'public good'. This fact is especially inequitable for claimants suffering from a personal injury as they do not represent a burden on the public purse in the first place. For example, the Compensation Recovery Unit (CRU) recovers social security benefits paid to the injured claimant, while the NHS is able to recoup the costs of treatment involved in road traffic accident (RTA) cases. Indeed the burden on the NHS is due to lessen further as costs involved in all types of personal injury cases will soon be able to be recouped. These factors, combined with the lack of public funding for virtually all personal injury cases, means that little, if any, public money is spent on funding personal injury cases. The Court Service, on the other hand, 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"¹.

The benefits of the court system are not only appreciated by people actually litigating but are also appreciated 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 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.

¹ Adrian Jack – 'Court fees: the new stealth tax?' New Law Journal (18.06.04) page 909

Full cost recovery

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.

Increase in costs and restriction of access to justice

APIL considers that the proposed new court fees will increase costs and restrict access to justice, effectively undermining the intention of the Woolf reforms. In particular the higher costs involved in taking a case to court will act as a disincentive for many injured claimants 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 he would not receive the correct amount of damages that his injury necessitates.

Service levels

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. For instance, APIL members report that they have constant difficulty with both attempting to get a court date as well as getting details back in a timely fashion concerning interim applications. APIL suggests that courts should have assigned service targets which are set and monitored similar to NHS waiting lists. 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. For instance, if a case is appealed due to an incorrect decision by the original judge the costs of the case should be refunded to the paying party or parties.

Funding difficulties for personal injury cases

As previously mentioned, 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?"² 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.

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. Even with 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.

In conclusion, APIL believes that the court service acts in the public good and should therefore attract Government funding. By proceeding with the concept of full-cost recovery, the courts are failing to appreciate the vulnerable position personal injury claimants are in – both in terms of funding as well as the requirement to pay full court fees.

A copy of APIL's previous responses concerning increases in civil court fees can be found at: <http://www.apil.com/responding-on-behalf-of-injured-people.php>

If you require any further information, or there is anything else I can help you with, please do not hesitate to contact me.

Yours sincerely

Miles Burger
Policy Research Officer

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