NORTHERN IRELAND COURT SERVICE

CONSULTATION PAPER ON FEE CHANGES

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

NOVEMBER 2006

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 members 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 just compensation for all types of personal injury
- To promote and develop expertise in the practice of personal injury law
- To promote wider redress fro 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 communication networks for member

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Robert Martin	APIL executive committee (EC) member for Northern Ireland
Stephen Gray	Coordinator, APIL Northern Ireland
Frank MacElhatton	Member, APIL Northern Ireland
Peter Jack	Member, APIL Northern Ireland

Any enquiries in respect of this response should be addressed, in the first instance, to:

Almut Gadow
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW
Tel: 0115 958 0585
Fax: 0115 958 0885
e-mail: almut.gadow@apil.com

Executive Summary

- Steep increases in court fees will significantly reduce access to justice. This will particularly affect personal injury victims, many of whose cases are likely to become financially unviable as a result, unless the victim can afford to fund litigation.

- This will affect first and foremost the least well-off, whose legal rights and safety will become less enforceable, thus rendering them less protected in everyday life.

- The civil judiciary must retain the character of a public service, serving society as a whole, rather than fee-paying customers, and should be funded accordingly.

- Restricting the use of civil courts to those able to pay for their upkeep is unacceptable, and will create a vicious spiral of rising fees and falling access to justice.

- The cost model on which increases rely appears unsound and intransparent.

- APIL opposes any arrangement under which civil litigants, such as personal injury victims, would be expected to subsidise matrimonial proceedings.

- Current court users cannot reasonably be expected to finance the long-term investment of introducing new, computerised technology into the courts.

- User-financed courts must become user-focused.

- In view of falling case volumes and modernisation, APIL would expect significant reductions in staff and resources, translating into lower fees.

- Financial savings of a self-financing civil judiciary may be more than offset by losses to public funds in other areas: A reduction in personal injury claims reduces opportunities for public bodies to recover the costs of state benefits and care for injured people.

The principle of full cost recovery

1. APIL would like to reiterate its earlier warnings that the principle of full cost recovery is dangerous, contrary to the interests of justice, unjustifiable as a matter of policy, and potentially costly in terms of resultant costs to society as a whole.

2. The existence of an independent judiciary is a hallmark and key pillar of a civilised, democratic society. Government has a duty to provide a civil judiciary, responding not to user demand, but to basic principles of human rights.

3. Just as schools are not paid for by pupils, and hospitals are not maintained by the ill, civil courts cannot 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.

4. The justice system serves the public as a whole, not merely the parties who happen to find themselves before its courts on any given day. In particular those able to settle disputes without court action clearly do so in the shadow of the civil courts, and on the back of decisions actual court users have obtained. The same could be said about many more who receive fair and lawful treatment in everyday interactions. For every litigant in the civil court system, many more harvest the benefits of the fact that courts could and are being used in a particular area of law. It would be grossly unfair to make the minority of citizens who are forced to use the courts pay for the benefits many others thus gain. Courts serve the general public, and should be maintained by the general public.

5. Proposed increases will lead to a vicious circle of higher court fees, fewer cases, higher unit costs per case and the need for further fee increases. The

multiple increases outlined in the consultation document will inevitably place many current cases outside the realm of financial viability, and thus stop them from being brought before a court. As a result, case volumes before each court will drop significantly. The expense of running a civil justice system will, under the principle of full cost recovery, then have to be divided between the much reduced number of cases that still reach the courts.

6. Far from being sustainable, the proposed funding model will therefore undercut the very user base on which it relies. Pricing customers out of the market in this way may be unwise as a business decision in the provision of other services. In the case of the civil justice system, it becomes a fundamental human rights issue, and runs counter to the Government's declared objective of increasing access to justice.

Cost model

7. Whilst reiterating its fundamental objections to the principle of cost recovery, APIL would question the model underlying proposed changes, and suggest that the logic by which fees have been devised is fundamentally flawed in a number of ways.

8. On the information available to us, APIL considers the 'cost model' used for fee reforms to be entirely inadequate, and unacceptable as a basis for a policy and judicial decision of this scope and impact.

9. APIL has requested sight of the underlying calculations, but was provided with only "a high level summary of the cost model", comprising of one page and very limited content. The summary suggests that the cost model is essentially derived from "discussion with a group of experienced operational staff", and unspecified forecasts of income and outgoings. APIL therefore

cannot comment on the strength of the model, but would question its transparency.

10. APIL was particularly concerned to find that personal injury victims are apparently expected to subsidise matrimonial disputes through their court fees. The paper proposes "a subsidy of 50%" for children cases "for the first full year of implementation" as well as taking domestic violence proceedings "out of the charging regime altogether*."* While the consultation paper asserts that "the loss of revenue from subsidies and remittals would not be recovered from other litigants,"[1] the cost model we have received would suggest the opposite. We were advised that the 'cost model' excluded the cost of criminal business and certain administrative expenses. No mention was made of a reduction to reflect matrimonial civil business which attracts a discount.

11. Furthermore, the paper explicitly states that "the level of this subsidy (for family cases) would reduce in subsequent years." [2] Thus even if public funds are made available to support family cases in the first year of operation, there is a clear expectation that these will, in the near future, be replaced with court revenue obtained from civil litigants.

12. It would thus appear that the envisaged discount for children and domestic violence actions will effectively consist of a cross-subsidy from non-matrimonial civil business. That is to say, personal injury claimants will not only have to pay 100% of their own judicial costs. They will be charged an additional amount beyond the full cost of their court use, to cross-subsidise cases which attract reduced rates. There can be no justification for making one court user pay another's judge, for forcing the personal injury victim who lost limbs or was left disabled for life, to part-finance the hearing of another court user's custody battle.

[1] Consultation paper, page 8
[2] Ibid.

13. Thirdly, the consultation paper refers to the potential benefits of ongoing modernisation and the introduction of new technologies. The use of modern technology is undoubtedly to be welcomed, where it improves efficiency and reduces costs. It is not, however, appropriate to make current court users pay for the one-off, long-term investment of the introduction of a new computer system.

14. Years of underinvestment in modern administration systems cannot be compensated for at the expense of today's court users. It cannot be fair to expect current users to pay for a technology which is said to be beneficial, or even reduce costs and fees for future litigants and others who regularly deal with the courts (e.g. police, CPS, local authorities).

15. Conversely, the principle of cost recovery, or users paying for the services they receive, would command that the purchase of new technologies can only be justified, and justifiably be charged to users, if it benefits them. A wide overhaul of court technology may well not benefit those before the courts today, and the court service cannot unilaterally impose these investments and associated costs on court users. The new computer system would have to justify itself through efficiency gains palpable to them. The court service may therefore need to reconsider this investment in light of its new, user-financed funding policy.

16. APIL would further suggest that not every element of the total cost can rightly be relayed to court users. The consultation paper proposes that the court service should charge users the full cost of its infrastructure, in the form of charging for services by the unit. This can only be logically justified if the court service offers services that meet paying users' demand and needs, and nothing but their requirements. It cannot be justifiable for 'cost recovery' to charge users for parts of the system which reflect spare capacities,

inefficiencies or services not requested by the paying users, or for services which fail to meet user needs.

17. APIL would therefore expect a user-financed court service to be fundamentally redesigned to best meet the requirements of its paying customers. By way of example, it cannot be appropriate for a court to fix an inconvenient or unsuitable hearing date without consulting the parties, and then charge the paying user the full cost of a hearing as well as an additional fee for the adjournment. Clearly, if judge and court room are paid for entirely by users, these must be provided according to the user's convenience and availability.

18. In view of suggestions that IT investments will pay off, as well as declining volumes of court business, we note with surprise that no expected future savings appear to have been factored into the calculations. According to court service figures, the total number of civil cases before county courts has dropped by over a third between 2002 and 2005.[3] Equally, the introduction of electronic systems should lead to large efficiency gains. One would therefore expect ongoing cuts and substantial reductions in administrative costs and staffing to be factored into any cost model. There is, however, no indication of any past or envisaged savings or staff reductions. In spite of the marked and ongoing decline in civil court business, the 'experienced operational staff' on whose 'considerations' cost models were based do not appear to have proposed that judicial or support staff could be reduced accordingly.

19. This would suggest that 'full cost recovery' recovers not only the costs reasonably incurred in the maintenance of a judicial infrastructure, but also expects to charge users for potentially substantial and growing spare capacity within the judiciary.

[3] Northern Ireland Court Service, Partial Regulatory Impact Assessment – County Court Scale Costs, July 2006, p. 9.

20. APIL therefore hopes to receive confirmation of the measures by which the court service intends to cut unnecessary and unused capacities (judges, administrative staff, premises etc.), to the necessary.

Effects of proposed increases

21. APIL would remind the court service of its own recent warnings about the impact excessive increases in the cost of court action could have. As the court service rightly pointed out this summer, "there is a danger of overpricing the market", which "is not in the long term interests of … the public".[4]

22. Any increase in the cost of legal action will, as the court service rightly recognised, have to be assessed in terms of the "impact on fee paying litigants"[5] in relation to "the proportionality of the increase relative to income and outgoings for the fee payer" [6].

    If the latter is excessive (and APIL would suggest multiple overnight increases of fees will be), "the unintended consequence of prohibiting access to justice could potentially arise".[7] In relation to claimants, this will in many instances mean that they can no longer afford to bring potentially very valid cases. Where defendants are concerned, the court service has warned that steep increases will affect insurers, who regularly defend compensation claims. This, in turn, would lead to the "filtration of higher legal costs through to higher insurance premiums" [8] for the general public in the long run.

[4] Ibid,, p. 8.
[5] Ibid.
[6] Ibid,
[7] Ibid.
[8] Ibid, p. 9.

23. The impact will obviously vary between different areas of law. APIL would suggest that it is likely to be most severe in areas where (a) at least one side of the litigation is a private individual rather than a business (in the case of personal injury usually facing a well-resourced and experienced opponent), and (b) claimants do not own sufficient capital to fund the case.

24. Since many injured people cannot afford the costs of legal action, it is not customary for personal injury clients to make any payments while their cases are ongoing. Instead, personal injury practitioners finance clients' cases by borrowing the necessary funds at commercial rates for the duration of the case, which the court service estimates to be an average of 18-24 months.[9].

25. Following the proposed increases, we would expect a solicitor's total outlays to be in the realms of £1,000 to £1,200 for a typical, uncomplicated personal injury case (i.e. involving the usual costs of court fees and copies of medical and police reports, but not requiring experts such as engineers); roughly twice the previous figure. With cases typically settling for amounts between £2,500 and £5,000, outlays will be comparable to the fees payable to solicitors on successful conclusion.

26. This represents a ratio of risk and outlays to potential gains which few entrepreneurs in other sectors would consider worthwhile. The margins of financial viability are narrow at present, and many presently successful cases are set to become loss-making if proposed fee increases are implemented.

27. The impact on solicitors' cash flows is further exacerbated by recent changes in Inland Revenue regulations, under which firms will now be required to pay tax on ongoing cases. In the case of personal injury litigation, this represents a further outlay for solicitors to pay before they receive any fee income.

[9] Northern Ireland Court Service, Partial Regulatory Impact Assessment – County Court Scale Costs, July 2006, footnote 13.

28. The court service has effectively acknowledged that proposed increases will affect solicitors' cash flows to the point where current arrangements for funding personal injury litigation cease to be viable. While the court service has not specified possible solutions, some practitioners understood its response ("there would appear to be other options open to the profession to reduce adverse impacts on cash flow"[10]) to imply that solicitors should ask clients to fund their own litigation, as this seems the only viable alternative at present.

29. This would clearly be unacceptable. Current arrangements were devised precisely because many injured people could not afford the cost of proceedings in the past. They will be even less able to fund litigation now, following the multiplication of court fees. There can be no justification for excluding from civil justice all those who cannot pay hundreds or thousands of pounds upfront.

30. At present, some legally meritorious but unprofitable cases are able to proceed because many practitioners are willing to conduct occasional loss-making cases and support these through other, profitable work. This will, however, become increasingly difficult if not impossible after the proposed fee rises.

31. An independent analysis commissioned by the Belfast Solicitors' Association recently found that the Northern Irish scale fee regime is designed in such a way that, already, solicitors do not recover their full overheads on personal injury cases. It pointed out the inequity of this situation, highlighting

[10] Ibid, para 35.

observations the House of Lord has made, to the effect that solicitors should not have to fund their clients' litigations.[11]

32. In our response to the recent consultation on scale costs, APIL pointed out that previous assumptions of 'swings and roundabouts' no longer stand. With declining numbers of civil court actions, only the more complex cases are now commonly settled in court. As a result, the complex, labour and cost intensive court cases are no longer offset by less demanding cases attracting the same rates. Personal injury solicitors are therefore increasingly less able to subsidise difficult and costly meritorious cases through their work on other cases. Law firms will increasingly have to turn away injured people with valid, but financially unviable cases.

33. In short, injured people with valid claims will increasingly be unable to access justice through the courts. As the cost of bringing personal injury cases in Northern Irish courts becomes prohibitive in many more instances, injured people will be forced to settle out of court, at whatever terms are offered to them, and at the risk of substantially under-settling claims. Experienced defendants may exploit this, by treating claimants less fairly, offering derisory levels of damages and denying liability altogether far more often, confident in the knowledge that the injured person is highly unlikely to issue proceedings and obtain their due in court.

34. As a result of the proposed unreasonable, and in our view unjustifiable fee increases, injured people may therefore go uncompensated or under-compensated more often, or be left without secure arrangements for their future care or livelihoods.

[11] Independent analysis of County Court Scale Costs conducted by Legal Costs Consultant Paul Kerr, October 2006.

Underlying Policy

35. Putting the effect on individual injured people into a wider policy context, APIL would point out that this will disproportionately affect the less affluent sectors in society. It stands to reason that manual labourers are far more likely to suffer disabling accidents, loss of limb or death at work than well-to-do professionals. In addition, the relatively low levels of compensation awarded in Northern Irish courts (85 per cent of county court cases settle for less than £5000; 65 per cent for less than £3000[12]) often make the trauma and effort of bringing personal injury cases worthwhile only for those on lower incomes.

36. Savings in the court system will therefore be made at the expense of the least affluent sectors of society, and potentially result in more hardship for families on low incomes who have already suffered personal tragedies. It seems almost offensive to expect some of the most disadvantaged in society (such as shipyard workers suffering from asbestos related diseases) to pay for the maintenance of the judiciary as well as its modernisation, new technology, and the retention of excess staff in the court system.

37. In this context, APIL would also like to remind the court service that Northern Ireland's accident rate remains higher than that of other parts of the UK. The prospect of personal injury claims remains a powerful way of forcing people to take health and safety seriously. Pricing injured workers and citizens out of the court system will therefore send out a dangerous message that employers and authorities have little to fear if they fail to protect others from avoidable injuries.

[12] Northern Ireland Court Service, Partial Regulatory Impact Assessment – County Court Scale Costs, July 2006, p.9.

38. In policy terms, rises to the point of pricing litigants out of the court system therefore seem most counter-productive since they are likely to result in a reduction of health and safety, and an increase in avoidable injuries.

39. Where fee rises price injured people out of the court system, the effects may not even be restricted to individual personal injury victims. The public in general may be affected, as tortfeasors' liabilities may fall onto the public purse where court action to establish liability is no longer conducted.

40. Successful personal injury litigation allows the public purse to recover the cost of public services the victim receives (incl. welfare benefits, care and health services) from the tortfeasor. Only where liability is identified and personal injury compensation obtained by the claimant, is the state able to recover these costs. If, as is likely, the cost of civil court action becomes prohibitive for many injured people, public funds will be forced to pay for state services that would otherwise be the guilty party's liability.

41. APIL would warn that consequent losses to the public purse in terms of unrecoverable public expenses may more than offset expected savings in the judiciary. Implementing fee rises without considering this cost seems extremely short-sighted. We would urge the court service to carry out a full assessment of the impact on public resources overall, setting likely losses to health and care services and the benefits system against the estimated increase in court revenues.