

Opinion: Ben Christman, Malcolm Combe

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Since devolution, Scottish Governments have pursued a policy of full cost recovery through civil court fees, but our newly published research study casts doubt on the justifications given

Courts don't pay for themselves; that much is obvious. How should the costs associated with the administration of civil justice be met? The Scottish Government's answer is that the users of the court system should meet those costs through court fees (with certain exemptions): the policy of "full cost recovery" (FCR).

Before the last round of fee increases, a Scottish Government consultation proceeded on the basis that this overall approach would continue. Various consultees – including the Access to Justice Committee of the Law Society of Scotland – nevertheless took the opportunity to critique full cost recovery. In its response to the submissions, the Government offered some explanation of the "very substantial support" for (some) users of the court system through legal aid and court fee exemptions, then proceeded to implement an increase in fees in line with inflation for the three years to 2021.

In our newly published paper "Funding Civil Justice in Scotland: Full Cost Recovery, at What Cost to Justice?" EdinLR (2020) 24(1) 49, we critique FCR in, we hope, a suitably rigorous way on a number of grounds. This article offers a condensed version.

The Scottish Government's published position comprises three key tenets. First, litigants receive the majority of the benefits of litigation. On this view, the civil justice system is a private dispute resolution service and it is unreasonable for the state to provide funding. Secondly, any tension between access to justice and the imposition of court fees can be minimised by providing a fee exemption regime. And in any case, thirdly, court fees constitute a small proportion of litigation costs, so cannot be prohibitive of themselves.

Dealing with these in turn, clearly litigants can gain excludable private benefits from going to court, such as an award of damages for personal injury. However, litigation provides many social benefits. It plays a key role in enforcement of the law, clarifies the law for the community, keeps the executive in check, maintains social order by peacefully resolving disputes, and is said to lessen alienation and strengthen community cohesion. One needs only to think of *Donoghue v Stevenson* to consider the social effects of litigation.

The Scottish Government places considerable reliance on a 2007 Ministry of Justice commissioned study, *What's cost got to do with it?*, for the proposition that court fees are a minor factor for individuals in going to court. Without going into much detail here (we do this in our article), its findings do not support this conclusion, and in fact suggest that increasing court fees can deter a significant proportion of court users from litigation.

In any event, the study's methodology is such that it is questionable whether its findings are useful in respect of this proposition. It surveyed the views of individuals whose cases were already in court in England & Wales and who had already paid court fees, not those who were considering going to court (who may have been deterred by court fees).

The introduction of fees in UK employment tribunals serves as a warning. In the view of the House of Commons Justice Committee, this had a “significant adverse impact on access to justice for meritorious claims” (HC 167(2016), para 69).

There is reason for scepticism regarding the Scottish Government’s claim.

Our article discusses that the jurisprudence on ECHR, article 6(1) recognises a “right to a court” to assert civil rights. The right must be practical and effective. States can impose limitations, but must not impair the essence of the right.

The European Court of Human Rights has declared court fees to violate the right of access to a court in several decisions. This jurisprudence, coupled with that of the UK Supreme Court in *UNISON* [2017] UKSC 51, provides the legal tools for entrepreneurial lawyers seeking to challenge full cost recovery through the courts.

Full cost recovery commoditises access to a critical public service. Civil justice is not a product for an informed consumer to choose at will; it is a constitutional fundamental and a human right. For the policy to be properly challenged, Scottish parliamentarians will be required to focus on an issue which has thus far generated little debate in Holyrood.

Full cost recovery is part of the inheritance of devolution, and it has been enthusiastically embraced by all Scottish Governments so far. Its entrenchment is such that a concerted political and legal effort will be required for it to be unseated.

A useful starting point will occur later this year when the Scottish Government consults on court fees for 2021-2024.