Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims

Ministry of Health Consultation

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Introduction

The Birmingham Law Society ("BLS") is the largest local law society and represents approximately 4200 lawyers through individual and corporate membership including both solicitors and barristers. The BLS responds to a variety of consultations on issues of importance to its members through its 11 specialist committees. This response to the consultation of the Department of Health has been prepared by the BLS Personal injury committee which has specialist medical negligence lawyers within its ranks.

Question 1
Do you agree that Fixed Recoverable Costs for lower value clinical negligence claims should be introduced on a mandatory basis?

If not, what are your objections?

Birmingham Law Society do not agree that FRC for lower value clinical negligence claims should be introduced on a mandatory basis for a number of reasons:

i. The premise behind (FRC) in "lower value" is to save £45M in costs. However, BLS argue that the saving can be made and exceeded by (a) learning from claims and improving the conduct of claims; (b)waiting for the effects of LASPO to take hold; and (c) learning from other reviews which are ongoing. BLS contend that any proposal to fix costs is premature and risks patient safety and access to justice.

ii. If FRC are introduced they will not reflect the costs that that would currently be incurred and recovered in some cases. This would mean that the majority of Claimant solicitors would not take the case on a CFA, due to the high levels of work that would be required. In addition, FRC will put costs in the hands of solicitors which means that they might be reluctant to go to barristers for specialist advice on procedural matters and/or advocacy.

iii. FRC will continue to maintain an uneven playing field between Claimants and Defendants because whilst Claimant solicitors will, in certain cases, be required to limit the work they do on each case, the Defendant remains at liberty to incur as much (or little) as it wishes. The quality of investigation, preparation, advice and advocacy is skewed in favour of the Defendant.

iv. FRC will open and encourage Claimant solicitors to charge Claimants more for their services than can be recovered inter partes. On that basis, Claimants, who have through no fault of their own, complicated claims will have to partially fund them out of their damages beyond the level currently set by LASPO. Where is the justice in this? This is patently unfair to those claimants, thereby compromising access to justice

v. BLS believe that access to justice is achieved under the current regime for all claimants. Defendants also have access to justice under the current systems under the regime of QOCS that struck a new balance welcomed by the insurance industry by way of recovery of costs when successful and the quantum of costs payable when unsuccessful.

vi. Unfortunately, where Claimant solicitors are unwilling to take on cases, this will create a vacuum that will be filled by unregulated claims management companies or the Claimants will be forced to become litigants in person.

vii. Work available to the junior bar will also inevitably be reduced, thereby impacting upon progress made towards building a socially diverse profession. BLS wholeheartedly supports the view that Barristers add value to litigation, in terms of weeding out weak cases, promoting settlement by accurate assessment, together with presenting cases effectively.

viii. In 2009, Lord Justice Jackson carried out a Review of Civil Litigation Costs. Clinical negligence litigation was treated as a special case in respect of costs. BLS therefore invites Lord Justice Jackson to continue to treat this area as a special case, in what is already an extension to the review that he has already conducted.

ix. BLS are concerned that the NHSLA is not a learning organisation. Nor has it taken adequate measures to learn from previous claims in order to avoid repetition of clinical errors. This failure to learn clinical lessons has contributed to preventable harm to many patients, thereby increasing costs to the public purse. In addition, it has defended the same errors time and again. It has not committed adequate resources to paying for a thorough investigation by experienced doctors and lawyers.

x. As a result, this has forced many claimants with meritorious claims into litigation, thereby increasing costs. From a freedom of information request, the Society of Clinical Injury Lawyers (SCIL) have obtained data showing that the NHSLA paid compensation in 2,514 of the 3311 cases in which the Claimant issued Court proceedings in 2015/2016. This means that the Claimant succeeded in almost 76% of cases in which Court proceedings were issued. This is in addition to the 3,281 cases in which compensation was paid pre-issue.

xi. This failure rate of 76% in cases where court proceedings were issued would not be sustainable in the private sector, yet the NHSLA sets its lawyers a target of winning just 25% of cases.

xii. BLS argues that the NHSLA's failure to settle enough cases, prior to proceedings being issued has driven up the costs of clinical negligence litigation.

xiii. There is no 'equality of arms' between Claimant and Defendants. Claimants incur differing amounts of costs on different cases as each case is tailored to the individual claim. Those costs are currently only recoverable if they are reasonable and proportionate to the claim. Whereas, Defendant lawyers are entitled to incur as high a level of fees as they wish. There is no bar in place. They will self-regulate in the knowledge that, pursuant to QOCS, they are unlikely to recover their costs.

xiv. Furthermore, if the claims are issued and allocated under the current system, costs budgeting provides a bespoke fixed costs regime where costs are payable on the standard basis, subject to one or other party contending on assessment that the budget should not be followed.

xv. BLS argues that as the pre-LASPO CFA cases tail off and disappear, the sums paid in success fees will disappear and the sums paid in ATE premiums will reduce. There will therefore be significant savings, as outlined above.

xvi. SCIL have carried out research that found that:

- In cases closed in 2014/2015 success fees accounted for 21.88% of the costs paid to Claimants in 2014/2015 i.e. £63.67M
- In cases closed in 2015/2016 success fees accounted for 18.77% of the total costs paid to Claimants i.e. £52.18M.
- In 2014/2015 the amount of ATE premiums paid by the NHSLA that will in future not be recoverable amounted to 6.12% of the total costs paid to Claimants, i.e. £17.81M.
- In 2015/2016 the NHSLA paid an average of £61,663 per case funded by a pre-LASPO Conditional Fee Agreement; the average figure where the case was funded by other means was £27,470.
- In claims valued at £25,000 and under, the focus of this consultation, the Data Pack at Annex E of the consultation paper, at table 5 shows that in 2015/2016 the average costs paid in a case funded by a pre-LASPO CFA were £31,120 (1,949 cases) but in a case funded by a post-LASPO CFA the costs were £10,227 (845 cases).
- The recoverable ATE insurance premium increases upon the issue of proceedings. It is noted that the average pre-LASPO ATE premium recovered in cases resolved at the pre-issue stage was £5,091 whilst the average pre-LASPO ATE premium recovered in a case resolved after the issue of Court proceedings was £18,276.
- If one applies the post-LASPO average costs to the 1,949 pre LASPO cases the result is a reduction in costs paid of £41.1M. This demonstrates that almost the entire £45M, that the introduction of FRC is intended to save would be achieved by doing nothing whatsoever and risking none of the unintended consequences of FRC.
- In cases funded by pre-LASPO Conditional Fee Agreements, the losing Defendant pays a success fee, a percentage uplift on the solicitor's costs to reflect the risk of losing the case, and the full After the Event (ATE) insurance premium.
- In a case funded by a pre-LASPO Conditional Fee Agreement, the very fact that a Claimant was forced to issue proceedings, whether that be as a result of a denial of liability, refusal to make or accept reasonable offers of settlement or a refusal to extend the limitation period, resulted in an immediate increased cost to the losing Defendant.
- The average **additional** costs paid to the Claimant in all cases, however funded, in which damages are paid after the issue of proceedings are

£64,700, across the 2,514 such cases that is a total of an additional £162.6M. That is money that could, in the majority of cases, have been saved.

xvii. Any attempt by the DOH to change the way in which justice is administered to reduce the sum that it pays in Claimants' legal costs, is bound to be tainted by the suspicion of bias. A better course would be to await the outcome of the above reviews and to allow LASPO to take its course.

xviii. The failings of the NHSLA seem to have been recognised by the Secretary of State, who has rebranded the NHSLA as NHS Resolution. It is said that the organisation will focus on the early resolution of claims; if it does, it will save the NHS significant sums and it will do so without affecting negatively patient safety or access to justice.

xix. This consultation is taking place at the same time as a National Audit Office investigation into the cost of Clinical Negligence Litigation, a review of LASPO and an independent judicial review by Lord Justice Jackson into the application of FRC to the multi-track in all cases with a value of up to £250,000. Therefore, it would be premature to arrive at any decision before the outcome of the findings of the National Audit Office in order to arrive at a better informed decision.

If you prefer a voluntary scheme instead, please explain how this would fulfil the same policy objectives as a mandatory scheme.

Question 2	Yes	No
Do you agree that Fixed Recoverable Costs should apply in all clinical negligence claims:		NO
Option A: above £1,000 and below £25,000 (preferred)		NO
Option B: Another proposal		NO

i. Claimants with clinical negligence claims worth £25,000 and below are bound to be under physical, financial or psychological distress. In addition, they would have sustained a personal injury that has affected their daily lives. Even in low value claims more than two experts may need to be involved if they considered to be complicated cases.

ii. FRC is not currently applied in any multi-track litigation. It is only applied to Fast-Track litigation. The limits of the fast track are that the trial should last no more than 1 day; there should be no more than 2 experts; and the value of the claim is no more than £25,000; it is a system for simple claims. We are aware of very few clinical negligence claims where liability is in issue that have been allocated to the Fast Track. The fact that Courts do not allocate clinical negligence claims to the Fast Track is acknowledged within the consultation.

iii. Clinical negligence benefits from skilled expert lawyers. Significantly, Lord Justice Briggs recognised this when considering whether low value personal injury litigation should fall within his proposed Online Court.

iv. The only way in which any form of FRC might be workable is in genuine Fast Track cases, which in the context of clinical negligence litigation, would mean an admission of liability would need to be made in the Letter of Response, such that the only matter to be determined is the level of compensation to be paid.

v. The current regime works. Claimants enjoy access to a solicitor in every case with merit. Claimants pay a proportion of their damages, if successful, to their solicitor by way of a success fee which means that they have an interest in reasonable costs being incurred. However, Claimants are prepared to allow solicitors to run the litigation in the knowledge that the recoverable success fee element has been capped.

vi. Claimants also enjoy access to the junior Bar. BLS believe that provided the costs of counsel are reasonable and proportionate they should be recoverable. Furthermore, they will be fixed along with all other costs at the CCMC.

vii. BLS agree with SCIL that a working party of interested stakeholders should be created to look at any additional savings that can be made in addition to those that will be delivered by LASPO and changing defendant behaviour.

Question 3 Implementation	Yes	No
Which option for implementation do you agree with:		
Option 1: all cases in which the letter of claim is sent on or after the proposed implementation date.		NO
Option 2: all adverse incidents after the date of implementation.		NO
Another proposal		
Please Explain Why Option 1 would be unconscionable because it has retrospective consequences as well as not being economically sensible. Claimants and their lawyers will have entered into contracts and commenced investigations of claims based on the costs regime that is in place at the moment. Currently a judge assesses the reasonable and proportionate costs that the Defendant should pay upon conclusion of the case. If the regime is changed, it is possible that Claimants will be left out of pocket having to pay legal costs which had been reasonably incurred at the time, but were not recoverable because the Defendant. The result will be a rush to send letters of claim in cases that have not been fully investigated and satellite litigation into whether the Letter of Claim was valid, which has the potential to increase costs and the number of unmeritorious claims that the NHS must investigate. Option 2 is too generous. Should any scheme be introduced, our preferred option for implementation is the date of the retainer. This is a mid-point between options 1 and 2 and allows for certainty as to whether the case falls in or out of the scheme, avoids the injustice of claims having been investigated under one regime now falling within another and has a shorter tail than Option 2.		

Question 4 Fixed Recoverable Costs Rates	Yes	No
Looking at the approach (not the level of fixed recoverable costs), do you prefer:		
Option 1: Staged Flat Fee Arrangement	YES	
Option 2: Staged Flat Fee Arrangement plus % of damages awarded: do you agree with the percentage of damages?		NO
Option 3: Early Admission of Liability Arrangement: do you agree with the percentage of damages for early resolution?		NO

Option 4: Cost Analysis Approach: do you agree with the percentage of damages and/or the percentage for early resolution?		NO
Option 5: Another Proposal	YES	

Please explain why

There is an irreducible cost in investigating a clinical negligence claim. Medical records must be obtained and read by a lawyer of sufficient skill and experience to obtain witness statements, select and instruct the right experts who must then consider the statements and records, and examine the Claimant before preparing reports on liability and the Claimant's condition and prognosis. The reports prepared have to be read, the client must be properly advised and the case must be prepared to be submitted to the Defendant and put before a judge.

Claimant lawyers generally work under Conditional Fee Agreements, which means that they are not paid in cases that they lose because the success fees recovered in the winners are supposed to pay for the losers. For the Conditional Fee Agreement business model to work, the winning cases have to make a profit. If a scheme were implemented that meant that a case would not make a profit even if it succeeded, it would make no economic sense to take on that case – it would not pay for itself, let alone subsidise losses incurred in losing cases.

A scheme which relies upon a percentage of damages risks denying access to justice in lower value, but meritorious claims. Such a claim might, for example, be made by a retired patient sustaining a fractured femur in hospital. That claim would require the same work to investigate liability as an identical injury to a self- employed builder with a substantial loss of earnings claim although the value would be substantially less.

Darryl Allen QC gave a speech on FRC in Manchester on 7th February 2017. He stated that: "*FRC requires the adoption of a commercial model to achieve maximum profitability operating within the prescribed fixed costs limits. Further it is simple economics that people will not act in a particular way unless there is an incentive for them to do so*". If access to justice is impeded, a further market will open up for unregulated claims management firms. This will be an unintended but very damaging consequence of the proposed reform. In addition, the number of litigants in person will increase with all of the concomitant expense to Court system that it brings with it.

We believe that a working party of interested stakeholders should be formed to identify costs savings that can be made and to avoid any unintended consequences.

Question 5: Expert Witness Costs	Yes	No
Do you believe that there should be a maximum cap of £1,200 applied to recoverable expert fees for both defendant and claimant lawyers		NO

Please explain why

This would not work in clinical negligence claims because Claimant lawyers are usually required to obtain up to 3 reports: one on breach of duty, one on causation and a third on condition and prognosis. AVMA have commissioned research and found that most experts would not work for Claimants on a fixed fee basis.

It is noteworthy that the NHSLA have historically used screening reports for which they pay a flat fee of £450. However, this is only for a screening report to answer a focused and defined case prepared by the Claimant. It is not a report prepared by reference to witness statements prepared by either side, nor is it a report which is intended to be disclosed to the Claimant. Furthermore, it does not comply with the Civil Procedure Rules.

The NHSLA will, in a defended case, pay a further fee to the expert to consider the full records and witness statements before preparing a report for disclosure to the Claimant and the Court. It is often only after this stage that the NHSLA decide to settle claims. It is possible that the reliance on cheap reports is a significant factor in the NHSLA losing 76% of cases after the issue of proceedings and thus increasing the costs paid by the NHS.

We propose that a working party of interested stakeholders, including medical experts, examines expert fees in clinical negligence.

Question 6 : Single Joint Experts	Yes	No
Expert fees could be reduced and the parties assisted in establishing an agreed position on liability by the instruction of single joint experts on breach of duty, causation, condition and prognosis or all three. Should there be a presumption of a single joint expert and, if so, how would this operate?		NO

Single joint experts are not appropriate in clinical negligence claims and would be unworkable.

Experts are not lawyers and so their initial reports usually require clarification and discussion to fully address the relevant legal tests and burden of proof. Single joint experts are not allowed to meet or speak with one party alone.

A single expert would supplant the role of a judge, rather than assisting the Court.

Question 7: Early Exchange of Evidence	Yes	No
Do you agree with the concept of early exchange of evidence		NO
If no, do you have any other ideas to encourage parties to come to an early conclusion about breach of duty and causation?	YES	

Please explain why

The consultation proposes sequential exchange of expert evidence during the pre-action protocol phase. This is flawed and will not lead to costs savings. The parties' experts will not have seen the factual witness statements and so, inevitably, their reports will need to be amended and positions may change based upon the subsequent exchange of factual evidence. Therefore exchanging reports before witness evidence is likely to increase costs.

There is also concern that witnesses will be contaminated, consciously or sub-consciously, by seeing the case that they must meet in their opponent's expert evidence.

BLS propose that a working party is established, made up of interested stakeholders, to examine how the claims process can be streamlined without adding additional costly steps.

Question 8: Draft Protocol and Rules	Yes	No
Do you agree with the proposals in relation to:		
Trial Costs		NO
Multiple Claimants		NO
Exit Points		NO
Technical Exemptions		NO
Where the number of experts reasonably required by both sides on breach of duty and causation exceeds two per party	YES	
Child fatalities	YES	
Interim Applications		NO
London Weighting		NO

Please explain why

The Fast Track is currently the only litigation track in which there are Fixed Recoverable Costs. The Fast Track is limited to simple claims where the trial will not last more than one day, there will be no more than 2 experts and the sum in dispute does not exceed £25,000. Our independent judiciary recognise that clinical negligence claims are not suited to the Fast Track and allocate them to the multi-track, where more complex matters are dealt with. This is acknowledged within the consultation paper. Lord Justice Jackson is carrying out an independent review of the case for fixed costs in the multi-track and it would be unfortunate to have a position where an independent judicial review might reach a different conclusion to that reached by the Department of Health.

The draft rules and protocol will not significantly alter the work required to be carried out and, in some areas such as exchange of expert evidence, will increase that work. There is no change to the work to be carried out post-issue of proceedings.

BLS propose that the way in which the work required in the costs matrix has been compiled is flawed and demonstrates a misunderstanding of how a case needs to be prepared by a Claimant lawyer. For example, in the proposal, the work to quantify the compensation to be

claimed is only carried out after the issue of Court Proceedings. This will prevent pre-issue settlements.

It is also notable that the NHSLA Framework Agreement under which it remunerates its panel lawyers for defending claims, does not provide for fixed costs to be paid to its lawyers for preparing for or attending trial.

BLS argue that all fatalities, including still births, should be excluded from the scheme. These cases concern allegations of death at the hands of the State and so the State should not restrict the ability of families to find expert representation.

In addition, BLS propose that a working party is established, made up of interested stakeholders, to examine how the claims process can be streamlined without adding additional costly steps.

Question 9 : Behavioural Change	Yes	No
Are there any further incentives or mechanisms that could be included in the Civil Procedure Rules or Pre-Action Protocol to encourage less adversarial behaviours on the part of all parties involved in lower value clinical negligence claims, for example the use of an alternative resolution dispute process (ADR)? This would include both Defendant and Claimant lawyers, defence organisations including the NHSLA, the professionals and/or the organisations involved.	YES	

In 2015/2016 the NHSLA paid £213M in legal costs in the 2,514 cases where damages were paid post issue of court proceedings, compared to £74.3M paid in legal costs in the 3,281 cases that were settled pre-issue of court proceedings.

The pre-action protocol currently states that parties should consider ADR prior to the issue of proceedings. NHS Resolution has set a target of mediating 50 claims over the course of the next financial year. This target has been set in respect of all claims and is a low ambition in our opinion.

In order to encourage pre-issue settlement, the pre-action protocol could be amended to be consistent with the High Court Model directions, as follows;

"Before the issue of proceedings, the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including round table conferences, early neutral evaluation, mediation and arbitration); any party not engaging in any such means proposed by another is to serve a witness statement giving reasons within **21 days** of receipt of that proposal."

A successful Claimant who refused to enter into ADR could be penalised by not receiving costs after the date of their refusal.

An unsuccessful Defendant who refused to enter into ADR could be penalised by payment of indemnity costs from the date of their refusal.

The Defendant Trust should also comply with the 'duty of candour', which means that admissions would be made and cases would be settled more quickly.

This amendment could be carried out immediately by the Civil Procedure Rule Committee. It would focus the minds of all parties to a claim on avoiding litigation, which would reduce the costs paid.

Question 10: Evidence
Please provide any further data or evidence that you think would assist consideration of the proposal, particularly for other than NHS provision. In particular, we are interested to gather data from private, not for profit and mutual organisations delivering healthcare. Please identify your organisation in your response. We would be interested in hearing views on: the scale of expected savings if Fixed Recoverable Costs outlined is introduced; the expected growth in the number of claims received and settled over the next 10 years to help in modelling the impact of the proposals; any details on the number and size of legal firms involved in clinical negligence (primarily as claimant lawyers), any information on the likely administrative savings and set up costs due to introduction of Fixed Recoverable Costs. Please indicate whether your organisation would be willing to work with DH in providing more details on the impact for future IA analysis. This would be provided in confidence and anonymised in any future analysis.

BLS understand that SCIL has provided Professor Fenn with data setting out a breakdown of the costs paid in individual cases with a total costs value of in excess of £30M. We are in agreement with SCIL that this is evidence of the savings that will be made as a result of LASPO.

Question 11: Equalities, Health Equalities and Families
The Government has prepared an initial assessment of the impact of Fixed Recoverable Costs on equalities, health inequalities and families. This assessment will be updated as a result of the consultation. Please give your view on the impact of these proposals on: Age; Gender; Disability; Race; Religion or belief; Sexual orientation; Pregnancy and maternity; Carers; Health Inequalities and Families
A scheme aimed at claims with a value of £25,000 will impact disproportionately on lower income groups or those with no income. If costs are set by reference to damages then the likelihood is that this will impair the ability of children, the elderly and those on low incomes successfully to pursue claims – or to find solicitors willing to take their claims. It will affect disproportionately women, as women are three times more likely than men to work part time[1], those of non-white ethnicity[2] and the disabled[3]. By way of illustration, if a person earning the minimum wage and another earning a million pounds a year suffer identical injuries that prevent each from working for 3 months, the same expert evidence will be required and the cost of proving the Claimant's case on liability and quantum for each will be the same. The only difference would be the figure for the lost earnings. In terms of the importance to the Claimant, the amount at stake would be broadly

[1] The Equality and Human Rights Commission findings that in 2011-2012 13-14% of men worked part-time compared to 43-44% of women.

[2] Equality and Human Rights Commission found 20% of white households to be low income, compared to 37.9% of non-white households.

[3] 60.1% of disabled are in employment, compared to 80.7% of non-disabled, source Equality & Human Rights Commission, Review of Equality Statistics 2008

similar – three months' pay. It would be regressive to introduce a system that made it harder for those on a low income to obtain compensation when injured by the state.

In conclusion, BLS are in total agreement with Daryl Allen QC, who said: *"……. if you are contemplating a radical overhaul of costs recovery in Multi Track claims,* ***surely you need an evidence based understanding of how the current regime is working, or, in order to support an argument for reform not working.*** *We are not aware that any such evidence has been made available or analysed. A sensible starting point, we suggest, would be a review of a large sample of costs budgets to see what costs are being agreed by the parties or allowed by experienced Masters and District Judges who bring a wealth of experience of costs management hearings and details assessments.*

Those that argue for the extension of FRC to the Multi Track do so by reference to historic and outdated data, which does not fairly or accurately reflect costs liabilities under the current regime. Such an approach is artificial as it fails to recognize any of the following savings:

(i) Abolition of ATE insurance recovery;
(ii) Abolition of success fee recovery;
(iii) The introduction and impact of costs budgeting and costs management;
(iv) The introduction and impact of the stand-alone proportionality test under CPR 44.3".

Dated 02 May 2017

Andrew Beedham

President

Birmingham Law Society