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**Lord Justice Jackson’s Proposed Review for Extending Fixed Recoverable Costs (Clinical Negligence)**

Law Society discussion paper

January 2017

1. **Introduction**
   1. Lord Justice Jackson has been commissioned to undertake a review of fixed recoverable costs.
   2. The review was commissioned by Lord Thomas, the Lord Chief Justice, and Sir Terence Etherton, the Master of the Rolls. The review’s recommendations will help to inform a Government public consultation on reforms to extend fixed recoverable costs to further areas of civil litigation.
   3. The terms of reference for the Review are:
2. To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants;

(ii) To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply;

(iii) To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017.

(iv) Lord Jackson has invited submissions from practitioner, users of the civil courts and any other interested parties on the above points, prior to commencing his Review.

1. **Birmingham Law Society’s Position**
   1. This Response is submitted on behalf of the Birmingham Law Society (BLS) Personal Injury/Clinical Negligence Committee. BLS represents a number of law firms who have specialist clinical negligence teams and Lord Jackson’s decision following his Review of fixed recoverable costs is going to have a significant impact on these firms.
2. **Why should clinical negligence fall outside the scope of this Review?** 
   1. Clinical Negligence should fall outside the scope of this review as it can be distinguished from other fields of litigation for the following reasons:
3. The burden of proof is set high;
4. Unlike most areas of litigation, the Defendant’s position and progress with claims is impossible to predict. Ideally, litigants should know in advance what they are “in for” but this is simply not possible for clinical negligence;
5. Cases are decided on medical expert evidence and the role of experts is almost more important in clinical negligence than any other field of litigation because as multiple liability issues often raise their heads more than one expert’s opinion is required before any preliminary assessment on liability can be made. Even then, invariably a causation expert will be required which is far more significant in clinical negligence that most other fields of litigation. Having jumped through the first two hurdles of breach and causation you then move on to instructing a condition and prognosis expert. This is clearly a minefield where a knowledgeable solicitor can cut a swathe through what, on the face of it, is a complicated claim (and such claims are not always the large ones). Specialist clinical negligence solicitors identify:
6. the liability issues; chooses the appropriate experts;
7. will be alert to the causation issues raised and will be able to advise clients on prospects throughout from an informed position.

A non-specialist counterpart is less likely to be able to deal with the claim anywhere near as efficiently and get hopelessly lost/bogged down.

1. In relation to clinical negligence litigation within the High Court (QBD) and County Court Jurisdictions (Civil) it is important that the courts and the parties involved in a clinical dispute have access to:
2. accredited expert lawyers (Solicitors, Barristers and Legal Executives) and
3. independent evidence from medical expert witnesses to ensure that litigants can discharge their burden of proof and the courts can properly determine complex medical issues.

1. Extending the fixed recoverable costs regime for, say, straightforward commercial disputes where tested expert evidence may be unnecessary needs to be distinguished from complex injury disputes arising from medical negligence.

1. It is highly likely that by extending the fixed recoverable costs regime without giving due consideration to these issues will have the unintended consequences of denying access to justice in Claimants being able to rely on specialist medical experts and specialist lawyers.
2. **Misguided impressions in relation to “Proportionality”**
   1. When considering the issue of “proportionality” there is an ever increasing trend by the Courts and Government to measure the same as equating to the “value” of the claim.
   2. Experienced practitioners are more than aware that “value” need not be purely a monetary comparison. The decisions made in clinical negligence actions are not always purely financial. The principles established may be of significant public interest; assist in the development of legal principles increasing the overall benefit to society and ensure an equality for all within the legal processes.
   3. Common law, upon which we all base our everyday working lives has developed not because of cases which are financially “proportionate” but by cases which are often disproportionate.
   4. Whilst BLS, acknowledges the need to try and ensure that cases are dealt with efficiently and proportionately it is imperative that it is appreciated that one size does not fit all.
   5. The Legal sector is encouraged to be proportionate. Economically, in order to make fixed fees profitable and ensure the survival of access to legal services, anecdotally Grade D fee earners will be allocated claims worth less than £25,000 and Grade A fee earners will be acting on the £250,000 plus claim. However, this takes no account of where the actual need for that skill and expertise lies.
   6. If the level of experience that a Claimant is allowed to pursue their case is dictated upon by virtue of the value of a claim, which is purely based upon pre-existing socio-economic factors this is in itself discriminatory. This seeks to endorse that the injury to a mother who gives birth to a ‘still born’ child, as a result of receiving substandard treatment, is not as “important” or as valuable to her as to the blue collar worker irrespective of the complexities of the liability dispute involved.
   7. Any worthwhile clinical negligence practitioner will have come across very easy £200,000 cases, but very complicated and difficult £30,000 cases.
   8. Furthermore, a large proportion of defended cases which settle post-issue or immediately prior to trial cannot be dealt with cost effectively and are often run at a loss by legal practitioners.
   9. The most common methods to avoid such a pitfall are:
3. Give the work to unqualified / untrained practitioners at a reduced cost. This will have a knock on effect on opposing parties in that cases are pursued or defended when they should not be. It is for this very reason why matters that come before the court they are not correctly pleaded and / or are in breach of CPR guidelines.
4. Stack the claims high to make the most of volume. This causes delay together with an inefficiency dealing with the matters. In addition, there is no appropriate investment of time and there is a danger that the Claimant’s case will be undervalued and under settled, which prejudices the Claimant.
5. To offset any loss by charging the Claimant wherever possible irrespective of the intended protection of the Conditional Fee Agreement Guidelines. This brings the reputation of the profession and in particular clinical negligence solicitors into disrepute with members of the public.
6. Many high volume clinical negligence practitioners operate with loss leaders; i.e. the lower value cases promotes the firm to attract higher value work. The higher value claims, currently chargeable by the hour, offsets the losses incurred on the low value claims. If fixed fees are extended to clinical negligence these firms will close or could alter their working patterns to the detriment of the public.

1. Extending the fixed cost regime to clinical negligence is only likely to extenuate the difficulties in firms having little alternative but to continue to employ unqualified staff, thereby providing little training and/or support by qualified members of staff. This will result in far more claims being presented to the Court in an unacceptable manner, wasting judicial time.
   * 1. BLS acknowledge and understand the need to ensure that costs are proportionate. However the proposal to extend fixed fees to clinical negligence will provide an inadequate method of dealing with claims and will in turn create additional problems for the Judiciary and Court process.
     2. Any fixed costs regime needs to take into account value but should also take into consideration that there is a differentiation between cases liability is admitted within/after the Pre-action Protocol Period and post issue. Currently no discount is given to Claimant solicitors, irrespective of the amount of work that is undertaken prior to issue and irrespective of any attempt to adhere to ADR. The Claimant is penalised and recovers the same costs as if Defendants admit liability fully. This is neither equitable nor encourages the parties to work together to bring the matter to a conclusion pre-issue.
2. **Access to Justice / Conditional Fee Agreements** 
   1. The majority of personal injury actions are funded by way of Conditional Fee Agreements (with or without BTE and/or ATE insurance policies behind them). There is restriction on the total maximum success fee that can be charged to the Claimant of 25% of the past losses and general damages.
   2. Due to the perceived shortfall in fixed fees that are recoverable from opponents, it is clear that some Claimant solicitors are passing this shortfall directly onto Claimants which BLS argues was never the intention behind the Conditional Fee Agreement. This is regularly depriving Claimants of their appropriate level of damages and if it continues is likely to further bring the profession into disrepute.
3. **LASPO Reforms**

6.1 The LASPO reforms are achieving their intended objectives for clinical negligence costs however, the level of success of the LASPO reforms has not been fully measured yet. The 2013 reforms are expected to have an impact on the income generated by specialist clinical negligence practitioners and many will not be viable under the post LASPO funding regime.

1. **The National Audit Office**

7.1 The National Audit Office (NAO) is scheduled to prepare a report into the NHSLA spending in June 2016. Any review of costs saving reforms should take into account the findings of the NAO.

**8. Department of Health**

8.1 Any proposals for the reform of costs in clinical negligence litigation should take into account the costs reforms proposed by the Department of Health and their wider considerations.

1. **Department of Justice**

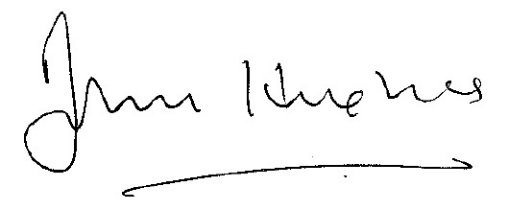
9.1 The Department of Justice continues to increase Court fees. Furthermore, there seems to be no joined up thinking in the what the Department of Justice considers to be a high value claims (i.e. a £10,000 court fee for claim that are likely to obtain an award of £200,000 or more); to the proposed fixed costs regime that a low value claim is between £25,000 - £250,000! BLS practitioners continue to express concerns that £50,000 can be a ‘life changing’ amount to members of the public.

**10. Patient Safety**

10.1 All clinical negligence practitioners are committed to patient safety and access to justice for patients. BLS would therefore propose that a working party, drawn from across the broad spectrum of interested parties (which extends beyond lawyers) is charged with the task of reviewing the whole area of litigation in this field. This would ensure the following:

1. Improvement in the investigation of clinical negligence by hospitals learning from mistakes during the litigation process thereby improving clinical governance and;
2. Create certainty, transparency and proportionality in terms of the costs of claims in this field.
3. **Conclusion**
   1. For the reasons set out above Birmingham Law Society take the view that any proposals for fixed recoverable costs in clinical negligence should be evidence based and that it should not be introduced for all cases valued up to £250,000.
   2. It is accepted that if fixed fees are set at a reasonable and realistic level it could work. Furthermore, any fixed fee structure would need to ensure that parties are able to litigate on a level playing field with financial penalties being introduced where there are delays or there is evidence of litigation bullying as this only drives up costs.
   3. Consideration needs to be given for parties being able to exit the fixed fee structure (with agreement of the Court if the issues in the case change or liability is denied.
   4. Finally a full consultation process should be undertaken with the legal professions prior to setting any fixed fees and a comprehensive study and research should be undertaken in this area of law to ensure that fees are set at a reasonable level so as to make the work commercially viable for law firms.

Dated 23rd January 2017



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President of Birmingham Law Society