FIXED RECOVERABLE COSTS IN CLINICAL NEGLIGENCE – PRE CONSULTATION RESPONSE BY

Action against Medical Accidents

Questionnaire

The Government proposes to introduce fixed recoverable costs for all cases where the letter of claim is sent on, or after, the proposed implementation date of 1st October 2016. Although this could affect cases where solicitors are already instructed but a letter of claim has not been sent, it leaves at least 12 months for such claimants to submit a letter of claim and so avoid the application of the proposed fixed recoverable costs regime.

1. Do you agree with this proposed approach to the transitional provisions? **No**

If your answer is no, please explain how you consider the transitional provision should be set, having regard to the need for the effect of fixed recoverable costs to apply as soon as practicable.

As discussed in the meeting we had with Julie Badon, we believe the current proposals to introduce fixed recoverable costs are ill conceived and premature. The figures being quoted appear to be largely based on the costs recovery system that was in place prior to the introduction of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO). We have yet to see the full effects of LASPO, with no success fee recoverable from the losing party and the removal of recovery of ATE premiums other than experts' fees – substantive data is unlikely to be available until at least Summer 2016. We are extremely disappointed that prior to announcing the firm intention to go ahead with these proposals, no consideration of their impact on access to justice for injured patients or their families has been given. We are already seeing the withdrawal of Legal Aid impacting on the ability of many would be claimants with lower value claims being unable to secure legal representation in order to be able to pursue their claim. Our own data confirms this. We believe that these proposals would have a disastrous effect on many more vulnerable and deserving would-be claimants' ability to pursue claims. However, as the DoH has chosen not to provide any real detail on how a Fixed Fee regime might work, it is difficult for anyone to make any sensible comment or give a real view on how fixed fees and or the transitional provisions might be introduced. This lack of information and the rush to introduce these reforms makes it impossible for solicitors to advise new clients what their liability to costs may be in the near future, this is a wholly unsatisfactory situation which leaves clients, who are already vulnerable from their injuries left feeling even more vulnerable and anxious by not knowing what their exposure to costs will be. For example, there is no indication whether a fixed fee regime is intended to catch claims which fall under the Human Rights Act (HRA) or whether the scheme will allow any recovery for work done at the inquest which then results in a civil claim. There is a real risk that this hiatus will only serve to put people who have legitimate claims off from claiming at this time, deferring their claims until more concrete information is available. This in turn may lead to a spike in claims once the fixed fee regime is announced, the NHS LA has previously identified that the rush to introduce LASPO resulted in a spike of claims which was difficult for them to manage.

We were also extremely disappointed to learn that no detailed consideration has been given to the question of why the costs recovered in some cases have been so high, and in particular how the behaviour of defence solicitors acting for the NHS has impacted on this. Had you done so, we believe you would have found that most of these costs could have been avoided had the NHS recognised the original treatment as negligent and admitted liability earlier. We have not seen any evidence from the Department of Health to demonstrate that inappropriate claiming of costs by claimant solicitors is widespread. Where the NHS Litigation Authority believes it has identified excessive costs it is more than able to challenge these and the Courts have shown that they are prepared to use the powers they already have to strike out inappropriate or excessive cost claims. Furthermore, we were surprised that there does not appear to be a recognition within the Department of Health that costs in some very serious but low value clinical negligence claims will perfectly reasonably incur recoverable costs that may be substantially more than the damages paid (for example in fatal cases where there are no dependants, when more than one expert report is needed and/or liability is denied for a long period of time. There has also been a lack of assessment on the effect that reduction of legal aid has had on the market since April 2013, in particular the fact that this has opened the door to more non specialist clinical negligence solicitors taking on these claims. The NHS LA has noted that this fact alone has led to an increase in claims being made, many of which have not been properly risk assessed and cannot be substantiated.

We therefore suggest that these proposals are put on hold to allow for proper consideration of all of these issues in partnership with stakeholders such as ourselves. We would be delighted to work constructively with the Department of Health and Ministry of Justice to find ways of significantly reducing costs whilst preserving access to justice for all people harmed through clinical negligence.

If the proposals do go ahead we believe that a longer transition period will be needed. Your consultation will run until the end of 2015 at the earliest. The responses to the consultation will need to be analysed and decisions made, meaning that 1st October 2016 would only allow a few months from the time of the decision post consultation. 1st April 2017 may be a more realistic implementation date (if the proposals do go ahead as envisaged).

The Government considers that the Fixed Recoverable Costs (FRC) scheme could be applied in clinical negligence to cases up to a value of £250,000 in damages and will apply both to pre-issue costs and post-issue, pre-trial costs.

2. Up to what value of damages do you think should be applied to the FRC regime?

a. Up to £25,000

b. £25,0001 - £50,000

c. £50,000 - £100,000

d. £100,000 to £250,000

Why do you believe this to be the right threshold?

If a FRC scheme does go ahead as envisaged, we strongly believe that it should be limited to damages claims under £25,000 and also that some such claims should be exempt from FRC. For example complex claims and fatal claims where the damages are necessarily low..

In previous discussions with the NHSLA there has been consensus that seriousness of injury and complexity need to be taken into consideration.

If a FRC scheme does go ahead at all, we recommend that rather than the crude proposals set out in the pre-consultation, the notion of some form of lower value claims scheme (as we have previously discussed with NHSLA) or of an NHS Redress Scheme (as was provided for by the NHS Redress Act) is re-explored in partnership with stakeholders such as AvMA and specialist claimant solicitors.

The Government is also concerned with the number and cost of expert reports obtained in lower value cases, which can add to the disproportionate costs incurred. The Government is therefore considering a proposal to cap experts' fees at a maximum recoverable sum which fairly reflects the likely number and cost of experts' reports needed in such cases. Under this proposal, the cap would apply to all reports both on liability/causation and on quantum/diagnosis.

3. Do you agree that capping experts' fees in this way would be a useful way forward?

No

If your answer is no, how would you propose that the use of experts and the cost of their reports might best be managed, particularly before the first case management conference?

Any cap on experts' fees must apply equally to the expert fees paid either by the claimant or by the defendant. Otherwise, a clear inequality of arms is created and access to justice is compromised. The proposal appears to be that only the experts fees that are recoverable by the successful claimant are capped rather than the fees paid by either side, which would be grossly unfair. We are already seeing the adverse effects of an unequal playing field in the payment of expert fees in legal aid funded cases.

Our provisional thinking is that the fixed recoverable costs and ancillary rules would be sufficient to control behaviour on both sides and that no further sanctions would be required than currently appear in the rules for fixed recoverable costs generally. We consider that to this extent, the behaviour issues likely to be encountered in introducing fixed recoverable costs for clinical negligence will be no different from those encountered in other personal injury claims.

4. Do you agree that no special provisions will be required to control behaviour in clinical neg-ligence claims?

No

If no, what sort of Rules do you feel would assist in controlling behaviour alongside Fixed Recoverable Costs?

We believe that strong measures are required to control the behaviour of defendant lawyers. The cost savings being sought by the Department of Health could most easily be achieved, without affecting access to justice, if the NHS was better at recognising when it had negligently caused harm and admitted liability early. Millions of pounds are wasted because of unreasonable denials and delays in settling claims.

One way of doing this might be to put greater emphasis and increased scrutiny on whether parties comply with the pre action protocol for Clinical Disputes, in particular the effect any non-compliance has on the litigation. The introduction of costs penalties could be employed for clear breaches, particularly in relation to failing to disclose documents at an early stage with a view to resolving disputes or where there is evidence of a lack of prompt investigation into the issues of concern by the healthcare provider and prolonged defence of meritorious claims.

We agree with the Department of Health and the NHSLA's conclusion that the increase in non-specialist solicitors attempting clinical negligence claims is in itself both a major factor in causing unnecessary costs as well as being to the disadvantage of claimants. We would be keen to explore opportunities to try to ensure that clinical negligence claims are dealt with by accredited specialist clinical negligence solicitors.

For pre-issue costs, the Government is proposing a sliding scale for the fixed recoverable costs, calculated by reference to the level of damages agreed. This type of approach has been used successfully with other fixed recoverable costs regimes; it has obvious benefits in terms of applying proportionality and it is also acknowledged that it should encourage the solicitor to ensure that damages are recovered at the appropriate level. (The proposal for post-issue, pre-trial costs is likely to be for fixed costs in various stages according to when the case is settled.)

5. Do you agree with a sliding scale pre-issue?

Yes or No

If no, please explain what you would consider to be a more appropriate fixed costs structure for pre-issue cases.

We are not clear about how the sliding scale being proposed by the DoH will work and are therefore unable to comment in any meaningful way. In particular we are unable to identify how the sliding scale acts as an assurance that damages will be recovered at the appropriate level. It does occur to us that a scheme that is referable only to the damages recovered by the claimant and does not take into account the complexity of the case is fundamentally flawed. A fixed fee scheme

which is based on this premise will only serve to ensure that meritorious, but low value and complex claims will not be brought. These would most likely include elderly care cases (complicated by the fact that elderly people tend to often have a number of pre-existing co morbidities which complicates the outcome), mental health and fatal accident cases and as such these claimants may have no access to justice at all.

We do not think it is fair or reasonable for FRC's to be a proportion of the damages. In some complex and serious claims, for example fatal claims where there are no dependants, and multiple expert reports are required, and/or when there are denials of liability, then it is not unreasonable for legal costs to significantly exceed the damages.

More generally, we do not consider it appropriate to have a sliding scale pre issue. The burden of proof lies on the claimant, every effort should be made to ensure cases are properly investigated prior to being issued, restricting the recoverability of fees at this stage would risk compromising the investigative aspect of the case, In turn, this may result in letters of claim being sent based on claims that do not have sufficient merits. If parties are committed to resolving claims as soon as possible then it will be in both the defendant and the claimant's interests to settle cases as soon as possible, preferably in the pre issue stage.

Action against Medical Accidents (AvMA), August 2015