AvMA

(Action against Medical Accidents)

Response to the Request for written evidence by the Justice Committee on Access to Justice

1. Introduction

1.1. Action against Medical Accidents (AvMA) is the charity for patient safety and justice. AvMA provides specialist advice and support to over 3,000 patients and their families affected by medical accidents each year. Over the years AvMA has also helped bring about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. AvMA accredits solictors for its own specialist clinical negligence panel which is a quality mark recognised by the LSC and others, and works with over 1,000 medical experts on its database.

1.2. The contribution that AvMA makes in its evidence to the Justice Committee is confined to those areas within our knowledge. AvMA has specific expertise in clinical negligence and healthcare law; we have considerable experience in providing assistance to clients who have suffered medical accidents either to help in making a complaint under the NHS complaints scheme or in finding legal representation from one of our panel members to pursue a civil claim.

1.3. We believe that the combined effect of introducing the current proposals for reforming civil litigation funding and costs and taking clinical negligence out of scope for legal aid would have a profoundly detrimental effect on access to justice. For example, we believe the changes would inevitably mean that:

- Many people, including some of the most vulnerable in society, would find it impossible to have their claim investigated or take forward a claim
- Those who are able to claim will lose out by having legal costs deducted from their damages, which are based on actual need,
- The progress that has been made in improving the quality of advice and representation provided by clinical negligence claimant solicitors through

the specialist panels developed by AvMA and the Law Society will be lost if this quality control exercised by the LSC is no longer required and non-specialists will be encouraged to 'have a go' through the CFA route

1.4 AvMA further believes that the current proposals represent a lack of imagination and of joined up working between the Ministry of Justice and the Department of Health. Millions of pounds could have been saved for the Department of Health by increasing access to legal aid for clinical negligence rather than encouraging increasing numbers of claimants to use the much more expensive CFA route. Another unintended consequence of the proposals is that a major driver for improving patient safety would be diluted by making it impossible for many genuine claims to go forward at all.

1.5 However, AvMA does accept the status quo is not an option. Within this paper we flag up some ideas about how the system as it applies to clinical negligence could be made more efficient and actually save more money for the State than the current proposals, but without harming access to justice. We would welcome the opportunity to expand on these ideas in providing further evidence to the committee.

2. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

2.1. AvMA can only respond in relation to the impact on clinical negligence litigation, that is claims brought by patients against healthcare providers for damages for personal injury caused in the course of healthcare treatment.

2.2. A serious unintended consequence of the proposals would be the dilution of the benefits of clinical negligence panel membership (a quality mark for solicitors). Panel membership is awarded to individual solicitors by either the Law Society or AvMA (2 separate panels) after the applicant has demonstrated expertise and experience in clinical negligence work by way of a written application (including details of a number of the applicant's cases) and interview.

2.3. Membership of either AvMA's clinical negligence referral panel or the Law Society's clinical negligence panel has been a requirement for holding a legal aid franchise from the LSC. This requirement has led to a raising of standards in clinical negligence work and made a considerable contribution to the development of clinical negligence as a separate specialty (and not just a sub-speciality of personal injury). The effect of the LSC franchise requirements has been that almost every firm that undertakes clinical negligence work has at least one panel member supervising work; such membership generally being a requirement when firms recruit senior solicitors to their team. Without legal aid in this area of law including the compulsory requirement for panel membership it is inevitable that this externally assessed form of quality control will be lost or lose its impact. A return to non-specialist solicitors 'having a go' at clinical negligence will mean more unmeritorious claims being made and also less success for meritorious claims.

2.4. Without legal aid some firms will find themselves with cash flow difficulties if all their clinical negligence cases have to be run on a CFA and they have to fund disbursements. While this already applies to current cases run on a CFA and those covered by before the event insurance the loss of legal aid with its disbursement funding and payments on account of costs will greatly increase this burden on small firms. The effect of this loss of funding will cause some firms to cease undertaking clinical negligence litigation work all together.

2.5. We have particular concerns over catastrophic injury claims. These cases rely very heavily on expert evidence (for liability, causation and quantum) and take a considerable length of time to reach a conclusion. Thus a solicitor could be expected to fund one or two hundred thousand pounds worth of disbursements and carry as much again in unpaid work in progress for four to six years. The claimants in these cases are the most seriously injured claimants, including children and the least likely to have any personal resources to fund disbursements themselves. Before the event insurance is not even a

partial solution to this problem as the insurers do not provide disbursement funding or pay costs on account, their benefit is that in the event the case is lost the solicitor is reimbursed but it does not benefit cash flow.

2.6. The largest firms in the country may try to channel claims to their offices. This will provide access to justice for some but not all (many will lose out if the same range of cases are not taken on or if firms cherry pick) but at a price. These firms are not as broadly spread out in geographical terms, clients will have to travel long distances or rely on email and telephone to contact their solicitors (or the solicitors will travel, in the case of significantly injured claimants, adding considerably to costs).

2.7. Batch processing of claims, already seen in road traffic accident cases and other personal injury claims will lead to the reduction in the quality of advice and a lack of contact between solicitor and client. There is also increased reliance on 'paralegals' with large groups of unqualified staff supervised by a single solicitor. There is evidence that the pressure on the paralegals to complete cases and bill means that there is a tendency for the client to be encouraged to accept the first offer to get the case settled and billed. This inevitably leads to under settlement of cases in terms of value.

2.8. Further, in the field of clinical negligence it is vital given the issues involved that a client meets his or her solicitor at key points in the investigation and litigation of a claim, to give instructions and provide statements. However, if firms become larger and more process driven the personal contact with clients may be lost. This change has already been seen in personal injury work since the changes of the late 1990s.

2.9. The effects of these changes may also lead to a reduction in consumer choice as small firms merge with larger (or the fee earners transfer) and the work is transferred to the larger urban centres. This effect may also be exacerbated by the effect of insurers (chiefly Before the Event insurers) insistence on their insured being represented by

solicitors on their panel. Before the Event insurers may sell claims to solicitors and/or use firms which will not claim against the insurer if the claim is unsuccessful (on the understanding more referrals will be forthcoming). This arrangement can work well especially for low value claims, however, it is a commercial arrangement between the insurance company and the firm of solicitors that does not always guarantee the best quality advice and representation to the injured party.

2.10. Membership of an insurance company solicitor panel is all about economics and economies of scale, not expertise. While some of the firms on an insurer's panel may have solicitors who are members of the AvMA or Law Society clinical negligence panel they are more likely to be personal injury specialists only (i.e. where injuries are caused in the workplace or road traffic accidents). Expertise in personal injury does not necessarily qualify a solicitor to act in clinical negligence cases where the issues of causation are much more complex and often require a detailed knowledge of medical procedures, disease and the structure and policy of healthcare provision. This situation is only likely to be made worse by the effects of the loss of legal aid and the changes that are likely to ensue

3. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

3.1. It is important to note that the effect of the current proposals would indeed mean that savings would be made by stopping many clinical negligence claims, many of them meritorious, from being made. We believe there are better ways of making the system more efficient and realising savings without denying access to justice.

3.2. It might be easier to state which cases will not be so affected. At present claims with a value roughly between £50,000 and £1m are

very often funded by conditional fee agreements While the changes will affect these cases too, it is likely that solicitors will continue to take on most of these cases and act for their clients under the new proposed CFA costs regime (although claimants will still suffer a reduction in their damages by the deduction of success fees). It is our view that clients with cases of this size will probably continue to find legal representation to pursue their claims.

3.3. Our main concern is for lower value claims (ie up to £50,000) and catastrophic injury claims (ie where damages are estimated to be in excess of £1m). The issues differ between the two ends of the damages spectrum. For lower value claims, solicitors may feel that without recovery of the success fee a case is not financially viable on a costs benefit basis. For catastrophic injury claims, a solicitor may not be able to carry the disbursements or take the risk of an unsuccessful claim. We are also concerned about funding for disbursements in all cases formerly legally aided. Most solicitors' firms do not fund all disbursements, expecting instead their clients to pay at least the cost of initial expert opinion. Such costs are likely to be beyond the means of most claimants formerly eligible for legal aid.

3.4. At present there is no formal mechanism for settling claims without litigation, however, it is our opinion that serious consideration should be given to implementing a scheme that enables settlement of lower value claims. Such a scheme would address the issue of access to justice for the claimants in this category, many of which have claims arising out of a fatality and ensure the claims are expedited in a reasonable time at a reasonable cost. The NHS Redress Act was an attempt to provide for such a scheme. Whilst we do not suggest that the NHS Redress Act comes into force in its present form, we do believe that with some adaptations (for example more independence and the availability of independent advice) an NHS Redress Scheme could provide a suitable, low cost way of resolving many lower value claims. We would welcome involvement in any discussions about alternatives to litigation for clinical negligence..

3.5. The issues for claimants with injuries of the utmost severity whose cases attract damages in excess of £1m are in relation to the cost of disbursements and the length of time a case takes to settlement. The burden of disbursements in these cases and the number of years (commonly between 4 and 6) before either barristers of solicitors receive any fees, if at all, will mean that for many lawyers the cash flow difficulties will prevent them taking on these cases at all.

3.6. The risks of taking such a case on are so high for solicitors and barristers that there will be a tendency for only a small number of firms with sufficient resources to take on these cases and only when the likelihood of a case succeeding is very high. Proposals have been made by the government in the legal aid consultation to retain exceptional funding for cases where the ECHR is engaged. This may cover some cases involving brain damaged children and some fatal cases but would not be enough to ensure access to justice for all of the members of this group. Some mechanism must be adopted whereby all these cases (an adult brain damaged in the course of surgery is as needful of litigation funding and compensation for his injuries as is a child with cerebral palsy) receive funding from some form of self funding legal aid scheme, or at the very least, legal aid disbursement funding

3.7. Finally we envisage that a significant number of potential claimants who are unable to find a solicitor to take on their cases will become litigants in person. At present few claimants act in their own cases in clinical negligence claims but it is inevitable that these numbers will increase when individuals fail to find a solicitor to represent them. We cannot predict whether these claimants will be successful or not in bringing a claim but we believe it is inevitable that they will encounter difficulties. Experts generally do not accept instructions from litigants in person, the courts will have to provide more advice and support on the litigation process. Litigants in person may not fully understand what is expected of them or what they can expect from disclosure and all these issues can cause delays and an increase in interlocutory

applications. The increase in litigants in person and the resultant strain on the courts is another unintended consequence which we do not believe has been fully considered.

4. What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

4.1. On very high cost cases, in order to maintain access to justice and address the issues outlined above the government should consider keeping all cases with an estimated value of £1m or above within scope, not just children's cases. Further all fatal cases should also be included, not withstanding their low value on the grounds that they are of utmost importance to the clients and the issues are often as complicated as cases where the patient survives.

4.2. We do not believe exceptional funding is sufficient to ensure access to justice for these patients. Exceptional funding will always be discretionary and subject to available funding (i.e. no funding if the year's budget is exhausted) and is no substitute for keeping this category within scope.

4.3. With regard to the lower value claims, these are often very serious, for example involving the death of a child or older person. These are unlikely to be able to be taken on under a CFA and we suggest that it must be in the public interest to keep such cases within scope for legal aid.

4.4. Within the legal aid arrangements, consideration could be given to the potential role of non profit organisations to provide telephone helpline advice or even run a self funding legal aid scheme. AvMA would be happy to discuss how such a scheme could be implemented

5. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

5.1. In one significant area, no. The recommendations were made on the understanding legal aid would remain for clinical negligence. It is not entirely clear exactly what figures Sir Rupert based his views on (we understand he had difficulty in obtaining costs figures from a large enough group of solicitors to draw a conclusion) but in that he did, he made his recommendations in relation to funding and access to justice on the grounds that clinical negligence remained in scope of legal aid. It is the combined effect of both sets of proposals which makes them unjust.

6. What are the implications of the Government's proposals?

6.1. As the number of cases that solicitors are willing to take on declines (by the government's own estimate) there will be particular groups who experience reduced access to justice. Those who previously would have been in receipt of legal aid are likely to be the biggest group affected. Thus children, the poor, elderly and chronically sick will be more affected than those in work and who are more financially affluent.

6.2. Solicitors will not be prepared to take on the same range of cases. The quality of advice and representation provided will be lower.

6.3. Claimants with clinical negligence claims will struggle to find suitably qualified solicitors in their area to act for them. Either they will have to travel long distances (or give instructions by email or telephone) to see specialist panel solicitors or they will instruct local solicitors whose expertise is in personal injury only. This will be increasingly the case in rural communities away from the main metropolitan areas.

6.4. With fewer solicitors firms undertaking this specialised work there will be less consumer choice for the clients.

6.5. Of those who do succeed in their claims solicitors will be able to deduct up to 25% of their general damages and past losses by way of a success fee. These damages are not punitive but compensatory, thus claimants in clinical negligence claims face the possibility of being under compensated for their injuries.

6.6. Deducting solicitors' costs from their client's damages causes a conflict of interest between the solicitor and their clients. A solicitor may encourage a claimant to settle too early or continue to pursue a claim when it should have settled. Solicitors will have an interest in whether a claimant makes, accepts or rejects a P36 offer.

7. Our alternative suggestions

7.1 We accept that savings need to be found and believe that adoption of some or all of the following suggestions could deliver the same or even more savings in the field of clinical negligence than the proposals themselves. We suggest:

- Reduction of success fees in CFAs but on a tiered increasing basis according to when liability is admitted and the claim settled. This would provide a much needed incentive for the defence to speed up the assessment of and settling of meritorious claims and reduce costs
- Consideration of a genuine one-way cost shifting arrangement
- Making legal aid more efficient, for example by introducing a small levy on costs or damages to help fund the work (fully or partially).
- Retain legal aid, at the very least for cases involving severe disability or death. Consider even widening the scope of legal aid to include all clinical negligence cases, and possibly even personal injury cases. The use of a small statutory charge could make legal aid self funding.
- Alternatively, widen access to legal aid to any clinical negligence claim, but for the investigation and initial disbursements stage only
- Make panel accreditation a requirement for running a clinical negligence either under legal aid or on a CFA

- Introduce an alternative to litigation for smaller value claims (an amended version of the NHS Redress Scheme concept).

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