Comments on the Department of Health Consultation

"Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims"

Abbreviations

A*v*MA – Action *against* Medical Accidents

CJCC - Civil Justice Council Costs Committee

CPR – Civil Procedure Rules 1998 (as amended)

DH - Department of Health

FRC -Fixed Recoverable Costs

GHR - Guideline Hourly Expense Rates

LASPO - Legal Aid, Sentencing and Punishment of Offenders Act 2012

LVCN claims - Lower Value Clinical Negligence Claims

NHSLA -National Health Service Resolution

SCCO - Senior Courts Costs Office

SRA -Solicitors Regulation Authority

1. I have been asked by *AvMA* to comment on the Department of Health ("DH") consultation entitled "Introducing Fixed Recoverable Costs ("FRC") in Lower Value Clinical Negligence Claims".

2. My personal background is that I was a practising solicitor from 1983 to 1996 : between 1993 and 1996, I sat as a Deputy Costs Judge : from 1996 until

2015 I was a permanent Costs Judge at the Senior Courts Costs Office ("SCCO") at the Royal Courts of Justice where I still sit as a deputy. In these capacities, I have undertaken many assessments, both provisional and detailed, of bills in clinical negligence actions in which costs are payable by the losing party. The level of damages in those cases have fallen within the range £1,000 to £25,000 as well as those where the compensation has been significantly higher. I am familiar with the arguments deployed in support of and in opposition to the level of costs sought in those types of claim. I have also sat as an assessor with Judges of the High Court in a number of costs appeals involving clinical negligence claims and the costs involved, including *McCarthy v Essex Rivers Hospital Authority NHS Trust* (Mackay J), *Blankley v Central Manchester and Manchester Childrens' Hospitals NHS Trust* (Phillips J) and *Manning v King's College Hospital NHS Trust* (Spencer J). Those cases self evidently have covered a wide range of clinical issues which have given rise to the negligence in question and the expense incurred in bringing them.

3. The materials provided for consideration include :-

- Table 5 referred to in the consultation paper (page 22) "Summary of time analysis: minutes required"
- Table 7 referred to in the consultation paper (page24) containing illustrative rates for current market costs relating to pre-issue, post issue, post allocation and post listing stages of clinical negligence litigation
- Confirmation that the costs quotation for each phase of litigation are cumulative by John Culkin Esq., DH
- Annex E consultation document prepared by the Clinical Negligence Policy Team
- NHS LA "Litigation Fact Sheet – basic information"
- CJCC Recommendations on GHR for 2014

4. Specific comments have been sought on the following:-

1. whether the time allowed for non-fatal clinical negligence claims valued at £1,000-£25,000 resonate with my own experience of such claims
2. whether the linking of market costs to the GHR reflects the amount currently allowed on detailed assessment in clinical negligence claims and are based on a sound application of the CPR.

5. Guideline Hourly Rates

5.1 Before addressing the questions, it is appropriate to explain what is meant by GHRs. Their genesis is to be found in the long established practice for payment of legal services under which the lay client is charged by reference to each hour of work undertaken by his or her lawyer.

5.2 Sir Rupert Jackson, the author of "Review of Civil Litigation Costs : Final report " published on 21 December 2009, has said of GHRs that "[it] must now be accepted that the level of GHR is a critical element in the civil justice system, because solicitors' profit costs account for a high percentage of total litigation costs…" and that "… The aim of the GHR should be to reflect market rates for the level of work being undertaken" and that " [these] , would be the rates which an intelligent purchaser with time to shop around for the best deal would negotiate".

5.3 From 2008 – 2012 responsibility for collating evidence and recommending the GHR was undertaken by the Advisory Committee on Civil Costs. The GHR which the committee published contained four grades of fee earner, respectively solicitors of over eight years qualified experience ("A"), solicitors and legal executives with over four years qualified experience ("B"), other qualified solicitors or legal executives ("C") and trainee solicitors, paralegals, or equivalent ("D").

5.4 The GHR were divided into three separate London areas together with other rates for major cities elsewhere and in the country. These have remained static since 2010. A report by the CJCC in 2014 , which gave recommendations for adjustments, was not accepted by the then Master of the Rolls, Lord Dyson and no review is ongoing, which might lead to the first increase in the GHR since 2010.

5.5 The reason for leaving the rates unchanged was that in Lord Dyson's view "….the evidence on which its recommendations …[were] based is not a sufficiently strong foundation in which to adopt the rates proposed" and that

"It is imperative that sound and reliable evidence is obtained". Since rates have remained the same ever since, the inference to be drawn is that no such sound and reliable evidence is yet available in respect of the costs of running clinical negligence cases following the implementation of LASPO on 1 April 2013 ; this altered significantly the way in which claims could be funded under Conditional Fee Agreements from that date.

6. Comments on Question One

6.1 The issue for consideration is whether the time allowed in the tables at 4D -4L at Annex E of part B of Chapter 4 (pages 3-22) of the consultation document reflect the time required to assess claims properly. Put another way, it is to express a view about the time it should reasonably take to complete tasks in LVCN claims and about the hourly expense rates that it is reasonable for solicitors to charge.

6.2 In this context reference should be made to Annex E in full, but the following will suffice as a précis of the figures suggested.

- Tables 4D -4L inclusive (pages 13 – 21 Annex E) contain a "time analysis" for Non-fatal claims with damages above £1,000 and up to £25,000 written by a group of three solicitors excluding trial costs.
- The consultation paper states that the information provided is, or has been used to calculate, the FRC rates in Chapter 5 of the consultation document entitled "Claimant Funding"
- The time analysis was "…. Both bottom-up i.e. an assessment of what work was reasonable and proportionate for each step, and top-down using the data from costs lawyers who deal with many claims against the NHSLA referred to in relation to Tables 4A (litigated claims 2012/13 and 2013/14 and Profit costs of litigated claims by stage 2012/13 and 2013/14 respectively)".
- The claim use as an example, is said to be a "case of average complexity" (see consultation paper, paragraph 4.4 page 21).

6.3 The reference to the FRC rates in Chapter 5 is to the "Summary of Time Analysis : minutes required at Table 5" . This uses the GHRs to summarise the time spent by lawyers and advances £4,470 as being the total FRC payable for the work undertaken in Tables 4 C to 4 N in a lost case. (This material also appears as Table 4O).

6.4 The consultation paper then advances four options under consideration for setting FRC rates

- option one - staged, flat fee arrangement under which the recoverable amount would be fixed irrespective of settlement value, and would depend upon the stage at which the claim was settled
- option two - staged flat fee arrangement plus a percentage of damages under which there would be a lower fixed sum than under option one, but an additional amount would be calculated and paid as a percentage of the final damages awarded
- option three - a flat fee arrangement using the same rates as for option one, but reduced where liability is accepted within a defined period and settlement proposed
- option four - a cost analysis approach under which the same methodology for calculating FRC is used, but based upon the mean relationship between current costs and damages using data from costs lawyers who deal with many claims against the NHSLA.

Options 1,2 and 3 are based upon an estimation of legal time required to undertake LVCN claims under a streamlined proposal.

6.5 Option 4 would be based upon current market costs.

6.6 The time analysis presupposes that various grades of staff will undertake work on the case in question.

6.7 In levels of seniority downwards, these include Grade A,B,C and D staff, together with Administrative Support staff ("AC") not being legally trained or qualified. That work is subdivided into nine categories , with the time allowed for each task appearing below :-

- Preliminary Investigations — AC 15 mins, C 103 mins
- Formal complaint to trust — C 45 mins
- Liability investigations — A 10 mins, C 245 mins, D 60 mins
- Liability negotiations (in event of denial) — C 145 Mins
- Quantum investigations — A 10 mins, C 229 mins
- Issue of proceedings — A 5 mins, A 10 mins, C 269 mins
- Litigation tasks — A 20 mins, C 512 mins, AC 10 mins
- Claim finalisation tasks — C 19 mins
- Contingency – Additional Expert required — C 181 mins

6.8 The totals for each fee earner, including contingencies is thus as follows :-

- AC 30 mins
- A 50 mins
- C 29 hours 8 mins
- D 60 mins
- **TOTAL Fee Earner time** 31 hours 28 minutes at a value of £4,470 plus VAT

6.9 These figures are stated to be the amount of time it would be reasonable and proportionate to take for each step in relation to the nine categories of work set out above.

6.10 In my opinion, the figures are seriously flawed. Before explaining why I consider this to be the case, it is important to make some preliminary points.

6.11 The FRC appears to presuppose that a "*One Hat Fits All"* approach is appropriate in LVCN claims. If that be so, it is one that is susceptible to many valid challenges.

6.12 In assessing reasonable, necessary and proportionate costs in such claims, there are a multitude of variables which bear upon the amount justly payable by the NHS LA in a lost case. In a non-exhaustive list, these will include:-

- whether the claimant is a protected party,
- whether there are problems with limitation,
- whether breach of duty and causation are in issue,
- whether there are part admissions, e.g. negligence is admitted, but causation is denied,
- whether the quantum of damages is straightforward or complex,
- whether medical evidence can be agreed
- whether realistic negotiations have taken place and Part 36 offers have been put forward which might affect the overall costs
- whether the conduct of any party has been such as to increase the level of costs reasonably incurred : defendant conduct where there have been late admissions of liability or settlements immediately before trial are significant issues in this context .

6.13 If any one (or more) of these factors is present in a potential claim, it will have an upwards influence on the level of costs which are likely to be incurred by both sides. However none of them appear to have been given any weight or consideration in Part B of chapter 4 of Annex E of the consultation document. On the contrary, the figures suggested bear no resemblance to the amount of legal time required at each stage "for a case of average complexity " : there is only one witness statement of one-page, one expert witness and one conference with counsel, with work on the pleadings all having been undertaken by the solicitors. This suggests that the claim appears to be a case with little , if any, complexity. If it was, in truth, a case of average complexity, the figures need to be significantly higher.

6.14 The fallacy of the "*One Hat Fits All*" approach can be illustrated by a simple example : suppose claimant A and claimant B suffer injuries arising from similar but separate instances of clinical negligence, in respect of which the general damages will not exceed £20,000. Breach of duty and causation are denied, and both claims succeed. Claimant A is elderly and lives on a state pension : claimant B has a substantial income as a career sports player and is compelled to retire prematurely as a result of the injury. It is a statement of the obvious that the lawyers' task to establish breach of duty and causation will be the same in each case. However, because claimant A, has no earning capacity, special damages will be under £5,000 , whereas for claimant B, compensation will be very significant. If FRC were to apply, the solicitor for claimant A would receive far less in costs than the solicitor for claimant B solely because Claimant B was a high earner and claimant A was not, even though the amount of work needed to prove breach of duty and causation in each claim would be identical. A costs regime which can permit such an outcome (as FRC would), will deny justice to deserving claimants for whom solicitors will no longer be willing to act because the FRC will mean that the work can only be undertaken at a financial loss to the firm.

6.15 These preliminary points having been made, I turn to the specifics of the analysis. The first point to make is that for some items, less than six minutes has been allowed. Under paragraph 5.22(1) of the Practice Direction to CPR 47.5 , routine items will in general be allowed on a unit basis of six minutes each . It follows that by allocating as little as three minutes to each item, the Tables appearing in Part B have undercharged the amount which would be recoverable on assessment as a minimum. Another example of short-changing includes charging six minutes for a letter of substance of two pages written to

the defendant enclosing damages proposals. In short, the analysis has not been prepared in a way which complies with the Rules of Court.

6.16 So far as fee earning work is concerned , as set out above, 50 minutes has been allowed for a grade A fee earner. This is unrealistic and inadequate, even in a claim at the bottom end of a LVCN claim, which this case appears to be, and all the more so in a case of average complexity, as the consultation has suggested that it is.

6.17 In any sort of case, however big or small, some grade A input is required because the case needs to be vetted for suitability at the outset, thereafter for purposes of delegation to an appropriate fee earner and following that, at strategic stages in the litigation : for example, it cannot be reasonably expected that a grade C should advise on a Part 36 settlement offer without reference to a grade A. It would be professionally irresponsible and potentially a matter a dissatisfied client might refer to the SRA were the grade A to be involved in such a case for just the 50 minutes suggested.

6.18 So far as other fee earners are concerned, the analysis has proceeded on the basis that virtually all work will be done at grade C, with nothing at grade B, and under three hours for all other fee earners.

6.19 Whether or not the work is suitable to be undertaken at grade C is likely to be fact specific. In a claim in which breach of duty, causation and quantum are all in dispute, it is to be expected that the day-to-day case handler would be grade B or above, rather than grade C and below. The analysis makes no provision for this, even though it alludes to liability negotiations "in the event of denial". Plainly, if the work needs to be done undertaken at above grade C, the FRC should be significantly higher.

6.20 With regard to time allowed for specific items, the figures advanced are risibly low, *a fortiori* , when matters such as funding and "obtain cheque for issue fee " are not recoverable between the parties but have been included as if they were.

6.21 Whilst the tasks in question are broadly all those which are justifiably included in bills, the amount of time for undertaking them is unrealistic and inadequate. A few examples will suffice :-

- discussing claim with client - 30 minutes. It would be rare for the initial taking of instructions in a clinical negligence case to take under 2 to 3

hours. In other cases it would be more if, as often is the case, the client is under a disability, elderly, distressed or whose first language is not English.

- drafting letter of claim (6 pages) - 40 minutes. An examination of the Pre-action Protocol for the Resolution of Clinical Disputes sets out the extensive details which must be provided in the Letter of Claim. It could not be done professionally and nor would it serve the client's best interests if this was to be undertaken in just 40 minutes
- instructing medical expert -30 minutes. The same point is made.
- Review expert's report (10 pages) - 10 minutes. One minute per page has been allowed : it is a statement of the obvious that a solicitor could not discharge his or her duty to his client without risking a claim in negligence were only 10 minutes to be spent on such an important task.

6.22 The analysis is also striking in what it leaves out.

- Although the consultation paper recognises that cases will be allocated to the multitrack, there is no provision for costs budgeting, either in the preparation of the budget or for attending before the judge at case or costs management conferences. Indeed, the figures presuppose that there are no interlocutory hearings of any nature. This is unrealistic and does not happen in practice.
- No allowance has been made for Advice on Evidence, inspection, mediation and advice on settlement under Part 36 save for 15 minutes in a letter to the client headed "explain quantum : explain the effect of CPR P36". The latter is particularly significant. The workings of Part 36 are complicated and have led to numerous appeals to the Court of Appeal. A claimant who fails to beat a Part 36 offer will be ordered to pay the NHS LA's costs from the last date on which the offer should have been accepted. In some cases this could result in the costs order wiping out the damages awarded. No basis has been advanced to support the view that such advice could be imparted in sufficient depth within 15 minutes : quite simply, it cannot.

6.23 So far as the options are concerned, the DH recognises that lawyers will be deterred from taking on low value clinical negligence cases if remuneration is inadequate and that accordingly, patients may not have the option of taking legal action where something has gone wrong with their care (see paragraph 4.3 of the consultation document (page 21)).

6.24 For the reasons given above, it is my view that any implementation of option 1 will do just that.

6.25 Would option 2 make a difference? I do not consider that it would. If a claim settled for £20,000, the additional amount would be £2,000 which would be inadequate recompense where, as here, the base figure is too low as the starting point. Of course, if the damages were £1,000, the extra amount would be just £100, less than one hour of the most junior fee earner's time.

6.26 An outcome that pays a solicitor's firm less rather than more for its services, as envisaged in option 3 would not have any attraction either. In short any of these options will deter lawyers from providing their services in LVCN claims and access to justice to needy patients will thereby be denied.

6.27 There is insufficient material in the consultation paper to permit reasoned comment to be passed on option 4.

7. Comments on Question Two

7.1 The analysis has been undertaken using the GHR without any uplift. No explanation has been provided why the factors set out in CPR 44.4 (3) have not been taken into account.

7.2 It is trite law that an enhancement to hourly rates is justified to reflect the factors set out in rule 44.4(5) , including the importance of the matter to the parties, the time spent on the case and any particular complexity (see *Kelly v Hayes PLC* [2015] 5 Costs LO 595 and *Group Seven v Nasir* [2016] 2 Costs LO 303 , in which rates significantly higher than the GHR were allowed). Whilst it is right that the GHR is taken as a starting point on an assessment of costs, they are just that, guidelines which are not binding. In clinical negligence, higher rates are *always* allowed, having regard to the CPR 44.4(3) factors which are applicable in varying degrees in every clinical negligence case. In addition, the court will consider other factors such as the extent to which breach of duty, causation and quantum are in issue. The straitjacket of FRC as set out in the analysis gives inadequate allowances for these considerations.

7.3 As I have mentioned above, the DH recognises that the level at which FRC rates are set will be key in ensuring that claimant lawyers can recover reasonable costs and are not deterred from taking on low value clinical

negligence cases. Fixing rates at no more than GHR will do just that, all the more so when the rates in question have not been increased since 2010, even to adjust for inflation. Where solicitors remain willing to undertake LVCN claims, their emphasis will be on accepting only cases that are likely to succeed, with claims that have merit, but are less straightforward, being rejected, leaving the prospective claimant without a remedy or compensation. It follows that if any of the options are adopted using the rates proposed in the consultation paper, firms of solicitors will cease to undertake LVCN claims. That will lead either to injured parties being unable to recover compensation where something has gone wrong with their care or to an increase in the number of litigants in person who lack legal training to bring claims at proportionate expense, leading to a climate that is even more adversarial than it is now.

8. Conclusions

8.1 FRC in LVCN claims will deny patients who have suffered personal injuries arising out of their care, access to justice save in the most straightforward cases because at the allowances proposed, it will be uneconomic for lawyers to take on their claims.

8.2 The GHR proposed are inadequate, do not reflect current practice at detailed assessment and fail to take into account or indeed, to apply CPR 44 .4(5) and relevant case law.

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2 May 2017