Department for Health and Social Care

Fixed recoverable costs in lower value clinical negligence claims

April 2022

Introduction

Despite the Government's claims in the consultation that it is continues to strive for excellence in patient safety, the number of patients harmed whilst receiving NHS treatment continues to rise. The NHS data suggests that patient safety has not improved over the past 10 years. APIL recognises that enhancements can be made to improve the process of obtaining compensation when things do go wrong. It is time the Government acknowledged that more should be done to prevent injury in the first place.

APIL has always said that if a predictable process can be created then there is no reason why costs can't be properly calculated to bring benefits to both the claimant and defendant. With any fixed process it is essential that vulnerable groups are adequately protected and that there is sufficient flexibly in the process to ensure that they can be represented. It is fundamentally wrong to include vulnerable claimants in a fixed recoverable cost (FRC) regime. Protected parties are currently excluded from other low value schemes on the basis that there will be more complexity involved.

We are deeply concerned by the Government's approach to adopt the defendant cost figures. As part of the Civil Justice Council's (CJC) working group, key claimant firms were asked to cost the process based on the work required and that it would be carried out by a lawyer with an appropriate level of experience. We are disappointed to note that the Government has disregarded the work of those experienced claimant practitioners who are experts in running these cases. Further, there is significant anxiety amongst those that propose to undertake this work that the fees are not financially viable. We would urge the Government to urgently look at this again.

We also have serious reservations about the practicality of the Light Track (LT). The scope is too wide and the evidential requirements too complex. The theory behind having a track for the simplest of cases, where liability is admitted at the outset, is a sound one but the process outlined in the consultation paper is far too complicated with the possibility of complex evidential requirements that make it cost prohibitive to use.

We have further reservations about the lack of sanctions within the scheme. The process lacks sufficient sanctions to incentivise compliance within the timeframes proposed. It also lacks sufficient sanctions around the evidential requirements. Leaving sanctions for non-adherence to the court process is not satisfactory in a process that is seeking to limit the number of cases that go to court.

Whilst we appreciate that these reforms have been under consideration for a number of years now, there are concerns that the timing for implementing the fixed cost changes could

be impacted by the Court of Appeal's decision in Belsner v Cam[1]. The case is due to be heard later this year and will deal with issues that could fundamentally affect whether a solicitor can make a deduction from a client's damages. Clearly such a ruling would undermine the current fixed recoverable costs regime which is only workable on the basis of lawyers being able to make appropriate deductions from damages. Under these proposals being considered, the costs proposed are prohibitively low (when based on defendant figures) and it is anticipated that significant deductions will be made to claimant's damages to make up any shortfall in costs, reducing damages for injured patients.

Question 1: Do you agree or disagree with the proposed definition for claims falling within the FRC scheme?

APIL has a number of concerns about the proposed definition for claims falling within the FRC scheme.

We do not approve of the proposed value-related bands but we can see the rationale for a £25,000 limit, namely because there are other schemes already in existence which have the same limit. Value bands cause significant disadvantages to those who live in more deprived areas, are low paid and/or have reduced life expectancy. The absence of a claim for care, pension loss or loss of earnings will have a noticeable effect on the final value of a claim. Additionally, for example, if the injured person can afford to pay for care at home after the incident, then this can be claimed back in the litigation, increasing the overall value of the claim. Claimants who cannot afford to pay for care before their claim is settled cannot make a claim for the cost of that care, which is then reflected in the final amount of the compensatory award. Schemes that operate for lower value claims discriminate against those with protected characteristics, disabled people, women who are more likely to be part time workers and the elderly because their income is less.

Defining cases by their final value will be problematic for practitioners as they will not know at the outset the claims full value. Further, in clinical negligence it may be a regular occurrence that a claims is reasonably valued at the outset, only for the claim value to alter at a later stage when an expert opinion in received.

Under the current low value schemes for road traffic collisions, employer liability and public liability claims, the pre-action protocols operate on the basis that the claimant values the claim at the outset on what they 'reasonably believe' the value of the claim to be at the point that it enters the low value protocol[2]. This position is supported by case law, Scott v Ministry of Justice[3]. Clinical negligence claims often have complex causation arguments that mean that at the value of the claim at the outset can reasonably appear a quite different value to what the claim eventually settles for.

Arguments around the re-valuation of a claim part way through are also common. Claims can suffer from a change in valuation, up or down. This could be due to the interplay of a claimant's pre-existing injuries or for example, due to the benefits of rehabilitation.

[1] [2020] EWHC 2755 (QB)
[2] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013, Para 5.9
[3] [2019] EWHC B13 (costs)

It is essential that this new process incorporates a provision to limit arguments about whether or not a case has been properly valued at the outset. We would recommend that the scheme rules set out clearly that it is the reasonable belief or expectation at the outset of the claim that is the trigger for determining whether the claim falls within or outside a FRC regime. This should limit arguments at the conclusion of the claim about whether or not the case was started in the appropriate place.

Question 2: Do you agree or disagree that the proposed scheme should incorporate a twin track approach, following the CJC model, to enable simpler, less contentious cases to process more quickly to resolution?

We agree with the proposal for a twin track approach for these claims. Our members' experience bears out the analysis by Professor Fenn that up to 25% of claims currently fall into the "no dispute on liability category"[4]. Based on this experience, a light track (LT) where the injured person can get the benefits of an early admission of liability is welcome. This change in practice will require a greater level of trust on both sides to ensure that behaviour changes.

Question 3: Do you agree or disagree with the proposed criteria for claims being allocated to the light track?

We have a number of observations regarding the proposed criteria for claims being allocated to the light track. Entry to the LT should only be for those cases where full liability is admitted.

Criteria one states that the parties agree that no evidence on liability is required in respect of breach of duty of care and causation. We would argue that this is fundamental for the light track to work.

In terms of criteria two, which states that claims should be progressed on the light track if there is an admission of breach of duty. An early admission is vital to whether or not a claim proceeds in this track. However, an admission of breach of duty in itself is not enough. It is crucial that this is a full admission of liability. Under the current definition there is no reference to causation. The LT is not the place for arguments over causation.

If the defendant is not able to admit liability in full or if the standard letter of response is amended then the claim should drop out of the low value FRC clinical negligence scheme altogether (see question 11). The admission should be clear, stating that: It is accepted that the defendant had a duty of care towards the claimant. It is admitted that there has been a breach of the defendant practitioners' duty of care and that breach caused injury and loss to the claimant. This should be set out clearly to prevent satellite litigation around the point, something that we are keen to see kept to a minimum within the new process.

There are also some reservations from claimant practitioners around the evidential standing of serious incident (SI) reports in the LT. SI reports provide an overview of the treatment that

[4] Page 26 Department of Health and Social Care, fixed recoverable costs in lower value clinical negligence claims a consultation January 2022.

the claimant has received. They do not provide an indication on whether a breach of duty or causation are admitted. We do not believe that a SI report in itself will be sufficient to determine liability, or be considered to do this.

Question 4: Do you agree or disagree with the proposals for streamline processes in the standard track?

We agree with the proposals for a streamlined process in the Standard Track (ST). This is subject to our comments on appropriate exemptions from the process in question 10.

Question 5: Do you agree or disagree with the proposals for streamlined processes in the light track?

We disagree with the criteria for the LT, see question 3 above. We also have reservations about the scope of the LT. When the CJC working group discussed and costed the LT it was intended to be for the most straightforward of cases, where liability was admitted without significant work being required to discharge the burden of proof.

The current process defined within the consultation process contains significant additional evidential requirements in the 'further evidence' phase. Whilst we acknowledge that this work will not be required in all LT cases, there is still the opportunity for defendants to ask for this information, placing an additional evidential burden upon the claimant.

The low costs currently attached to the LT do not reflect these procedural changes and it is only fair and reasonable that a claimant lawyer is paid for this work if it is mandated within the scheme. There should be additional costs associated with this stage of the LT if the work is required. This could be costed as a bolt-on if the work is required. This would also avoid an unintended consequence, of the claimant being asked to do this in each case.

Question 6: What are your views on the evidentiary requirements applying to both standard and light track claims, that should be set out in the Civil Procedure Rules to support this FRC scheme?

The process should incorporate evidence that complies with the evidential requirements in Part 35 of the Civil Procedure Rules and the need for statements of truth for witness evidence. However, where the parties to the claim agree that a case does not need a condition and prognosis report from an expert, it should be possible for them to rely upon medical records. This would be useful in cases where the claimant has fully recovered, and a report is agreed not to be necessary.

APIL has some concerns about managing behaviours in the new process. When the low value process was implemented for RTA, EL and PL cases under £25,000 in 2013, a behaviours committee was established to provide additional guidance and direction to practitioners. This new process for clinical negligence cases is going to require a significant change in behaviours on both sides of the sector. We would recommend that a behaviours committee is established for low value clinical negligence cases to ensure that there is a

smooth transition into practice. The committee should consist of both senior claimant and NHSR lawyers.

Question 7: Do you agree or disagree in principle that template letters and expert report model elements should be used as part of the streamlined processes in both the standard and light tracks?

We agree that template letters are useful in a streamlined process, see our earlier comments about the importance for the letter of response to replicate the Personal Injury Pre-action protocol[5] in question 3.

We would recommend that a working group be set up to development a template expert report. In a low value process such as this, it is important that the experts focus on the issues they are required to address under the scheme. For example, we do not envisage the need for them to focus in detail upon the claimant's past medical history as a matter of routine, as in most (though not all) of these cases it will not be relevant.

Question 8: Do you agree or disagree with the proposed fixed costs framework based on the CJC Working Group 'defendant group' costs proposals, including the suggested bolt-on cost for protected party claims?

APIL disagrees with the Government using the defendant fixed costs framework. We have significant concerns about the level of fees proposed. It will be attractive to the Department of Health and Social Care (DoHSC) as a defendant in these claims to fix the rates as low as possible. However, the consultation paper does not set out how the Government believes that these rates are commercially viable for claimant firms to continue to offer representation in these cases and what their justification is for choosing these rates.

There is significant uncertainty amongst experienced clinical negligence claimant firms as to whether these rates are financially viable. Firms we have spoken to, that intend to run these claims going forward, have said that the defendant rates are not viable and that they do not reasonably remunerate the work required to be undertaken. It is disappointing that the Government has failed to take into account the expertise of claimant practitioners involved in conducting these lower value cases, when determining the costs it proposes to impose.

Significant work was undertaken by experienced claimant practitioners on the CJC working group to cost the process for the work required, to be carried out at the appropriate level of experience, and this work appears to have been simply ignored. If the rates are not fair and reasonable then experienced firms will not take on the work and injured people will be significantly disadvantaged.

The defendant rates also provide little incentive for defendants to resolve claims at the earliest stage, i.e. stage 1. This is because the additional costs which can be recovered (i.e., costs the defendant would be responsible for if the claim is successful) at later stages are only marginally higher than those which can be recovered at the first stage. This is likely to have unintended consequences, as the process should provide a greater incentive on the

[5] Pre-Action Protocol for Personal Injury Claims paragraph 6.3.

responsible party to resolve the claims at the earliest point. This is illustrated by the two examples below:

£10,000 claim (standard track)

Stage 1 fixed recoverable costs: £7,500
Stage 2 fixed recoverable costs (including stage 1): £8,000 (an increase of 7% from stage 1)

£20,000 claim (standard track)

Stage 1 fixed recoverable costs: £9,500
Stage 2 fixed recoverable costs (including stage 1): £10,000 (an increase of 5% from stage 1)

The Government should urgently look again at the fees it is proposing. It is important that the costs are fair and economic, but they also need to drive the right behaviours.

The CJC work on FRC in lower value clinical negligence cases took place over a period of between September 2018 and October 2019. The data used to calculate the proposed fees is now over 4 years out of date.

The fees imposed must be properly costed for the work required at the appropriate level and experience of fee earner.

We have made a number of comments throughout this response where we believe the process has been complicated beyond that developed by the CJC working group. Where fixed fees are to be introduced, the work required under the new scheme must be properly evaluated, looking at the time required to complete a task against the appropriate level of fee earner to complete the work. That time must then be costed looking at the current guideline hourly rates. These changed on 1 October 2021, after the CJC work. This is the exercise that the claimant group undertook as part of the CJC work, as it had been tasked. If the Government is not minded to properly cost the work required under the revised process, we would propose that in the very least the claimant figures in the CJC report should be adopted and uprated with the Services Producer Price Inflation (SPPI).

There should also be built into the reform a regular annual review of costs for inflation. We take the view that the correct index to use is the SPPI index for legal services. This is representative of the level of cost inflation being experienced by the legal services sector.

We strenuously oppose including vulnerable claimants within any streamline process. Protected parties are currently excluded from the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013[6] and the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims[7].

Those defined as a protected party in Rule 21.1(2)[8] lack capacity to provide instructions in their claim for so long as they are found to continue to lack it for this purpose. The additional work required in these cases that will vary depending on the individual's particular needs, and whether their lack of capacity is ongoing or fluctuating. It will be difficult to cost the work that will be required in any one case. Despite the varying work, it is essential to facilitate

[6] 4.1A (2)
[7] 4.3 (2)
[8] Civil Procedure Rules Part 21

them to bring a claim. They would be unable to participate in the scheme without the support and extra time required for their capacity to be appropriately assessed for this purpose, and their individual needs to be met. This is why a fixed cost cannot be bolted on in such cases. Adults lacking capacity need to provide instructions by their litigation friend, yet are often also supported to be involved in the decision making, and will need to do so as far as is possible. If costs relating to a claimant's disability are capped, someone with more complex needs, who is able and wishes to have involvement in the claim, whilst at the same time providing instructions via a litigation friend, may struggle to find representation. This is because those individuals will need more time to provide instructions at every stage of the claim.

By contrast we would accept that claims on behalf of children can be fairly costed, as the procedure and work required can be more standardised. However, whether the figure within the consultation of £650 is appropriate is unclear, as the basis for this has not been set out in the paper. We would urge the Government to ensure that the cost of the additional work that will be required on a child's behalf, to appoint a litigation friend to represent them, and to seek the Court's approval of the figure for compensation agreed between the parties, is properly costed looking at the time required and the appropriate level of fee earner. That time must be costed in line with current guideline hourly rates. This is the only fair and economic way in which to fund the work being done, so that firms will be able to continue to offer representation.

Question 9: Do you agree or disagree with the proposed arrangements for mandatory neutral evaluation, including the costs framework for evaluations and how these are funded?

APIL agrees with the premise for mandatory neutral evaluation (MNE). However, we have significant concerns about the lack of detail being consulted upon. There is insufficient detail for those responding to adequately comment on what is actually being proposed and how it will work in practice. What is counsel being asked to do and how will that advice be used? Are barristers being asked to act in a quasi-judicial capacity determining whether or not the claimant succeeds or fails? Or, are they being asked to assess the merits of the case determining a percentage prospect of success? We would be happy to engage further with the DoHSC about the merits of such arrangements and how they would work in practice.

We do not believe that it is feasible to ask counsel to act in a quasi-judicial capacity as in our view there is no way to do that on paper. A party's prospects of success will often rest on the view of the experts and it is not uncommon for experts instructed by either side to take different views on breach of duty or causation. If there are opposing views from both experts with no obvious error(s) in one of the reports, there would be a deadlock between the experts, which counsel would not then be in a position to resolve without testing that evidence.

We are also unclear how the interrogation of evidence will work if counsel deems that appropriate. The consultation suggests that this should be limited to complex cases. This is not practical. If exercising a quasi-judicial function is highly likely that evaluators will require clarification from lay witness and from medical experts. It is uncertain what the criteria will be for that. The issue of whether evidence needs to be tested is not universally determined by

complexity. The extent of the dispute is in the hands of the defendant. A need to test the evidence can arise in cases where there are factual disputes, and/or issues around consent, where success or failure depends upon whether a witness is credible.

In our view it would be reasonable to expect counsel to provide an assessment on the merits of the case based on its prospects of success if it were to proceed to trial. Counsel will be familiar with providing a percentage merits-based assessment. Counsel can consider the prospects of success of a case and express that as a percentage allowing the claimant to recover the appropriate percentage of their damages if the parties agree with that analysis. Our view is that a scheme by which counsel identifies the claimant's prospects of success in percentage terms, following by agreement between the parties that damages be awarded on that basis is the only way that MNE can work.

Equally, there are no parallels to be drawn in other low value schemes. The nearest is Stage 3 in the Pre-action Protocol for Low Value Personal Injury Claims[9]. However, there is a significant difference, as this is for liability admitted cases only. In those cases, the fees, and thus the financial risk for the claimant is low. The claimant knows liability is admitted and that they will recover some damages. In the proposed scheme under consultation, both liability and quantum could require a determination and this will put the claimant at significant financial risk on costs. The claimant could be left with a financial liability, and this is at odds with Qualified One-Way Costs shifting (QOCS) a fundament part of the Jackson reforms and a policy adopted by the Government. The proposed scheme appears to ignore those existing rules and protections which operate effectively. Removing QOCS from the scheme, adds an uninsurable risk for the claimant that could create barriers to justice. There is uncertainty around whether the continued availability and use of ATE (After the Event) legal expenses insurance is assumed for claimants using this scheme and on how the market will operate, see our later comments. A significant proportion of claimants will not have the means to pay and therefore will not take the financial risk. We have already pointed out (Q1) that the majority of those whose case falls within this scheme will be on a low income, live in more deprived areas and have limited resources. Producing a scheme that financially prohibits certain groups of people being able to get a determination of their case inhibits access to justice.

It is also unclear how the MNE stage of the process operates to link with what happens next, should the case not settle. We agree that by this point in the process there will only be a small number of claims. Nevertheless, there will still be cases that need to be judicially determined and it is unclear how a case proceeds to this, the evidence that this will require, and (given the lack of clarity on the operation of QOCS) if ATE insurance will be available at that point to protect claimants from financial risk.

We have already said details are scarce. There is no detail around how the dedicated panel of barristers will be administered, who will be responsible for this task and the cost? How will the random selection be monitored and administered fairly? What will the criteria be for those that wish to be on the panel? It is essential that they have sufficient experience of clinical negligence claims to be able to do this work. Would it be an expectation that counsel

[9] Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 stage 3

on the panel would do both claimant and defendant work? We would hope that would be the position, to ensure fairness.

Question 10: Do you agree or disagree with the proposals on claims to be excluded from the FRC scheme and on the approach to protected party claims?

We disagree with the list of exclusions and wish to make a number of recommendations.

We agree that claims involving more than 2 liability experts should be excluded.

Whilst we agree that claims involving multiple defendants should be excluded, we caution against using the wording 'genuine' which is not helpful. Such language could be open to interpretation about what is or is not authentic/reasonable. It is of benefit to all parties to limit the opportunity for disputes to arise. Claims with multiple defendants who are separately represented should be excluded, whether or not the allegations of negligence are the same.

APIL is pleased to see that claims involving stillbirth and neonatal deaths are excluded, but we are extremely disappointed that the Government fails to treat all bereavement cases with the same appropriate sensitivity. In the consultation paper the Government acknowledges that the stillbirth and neonatal deaths are sensitive but concludes that other deaths are not. It is wrong for Government to suggest that some lives are worth more than others. Everyone would agree that death is the most serious outcome that could occur as a result of negligence. Additional compassion and care is required when dealing with these cases and bereaved families. It is our view that all fatal claims should be treated with the same compassion, and should be excluded from this scheme. In cases such as these, the families' motivation for contacting a lawyer is usually the desire to understand what happened and to ensure that it does not happen to others, rather than for compensation.

APIL agrees that claims where limitation is raised as an issue by the defendant should be excluded. We are pleased to see that the CJC suggestion that limitation should be suspended on submitting a claim into this process has been included in the proposals.

We recommend that claims involving an under-insured defendant or uninsured defendant should be excluded from the scheme. In cosmetic surgery claims it is not uncommon for the defendant to either be under-insured or uninsured. In those cases where there is essentially an unrepresented defendant, we would strongly suggest the case is not included in the process due the additional time and cost involved in dealing with these claims.

We strenuously oppose including vulnerable claimants within any streamlined process, see question 8. We do not agree that protected parties should be included in this process. Whilst we have been persuaded that the additional work specifically required for a child's settlement to be approved by the Court could be properly costed, we do not believe that the same can be said for the variable extra work required to represent protected parties. These individuals lack capacity. Determining their capacity to specifically litigate in the claim is a pre-requisite task, requiring careful management. The outcome of the assessment can vary widely depending on the individual. The capacity of a claimant must be considered at the earliest possible opportunity, to provide clarity on their ability to provide instructions and engage in litigation without a litigation friend. Some people have fluctuating capacity, for example, where a claimant is able to provide instructions themselves when they are supported to do so, and in the right circumstances. Solicitors are required to make best

efforts to support a person to make decisions for themselves where at all possible, further to the Mental Capacity Act 2005. This does mean extra time may be required, which would also need to be taken into account when it came to meeting deadlines and any potential sanctions. Given the extra time a lawyer would need to spend in supporting such claimants to make their own decisions, we do not believe that their claims would be suitable for a fixed process.

APIL is also concerned that the complexity around secondary victims has not been fully understood. If the primary victim's claim is dealt with under this scheme, then we would expect the secondary victims claim to be dealt with too. However, where there is no primary victim claim, we would expect the secondary victim claim to be out of scope. This is because the law remains extremely complex. This is evidenced by the recent Court of Appeal case of Paul and others v The Royal Wolverhampton NHS Trust[10].

Question 11: Do you agree or disagree with the proposals on sanctions to be considered and implemented by changes to the Civil Procedure Rules?

Sanctions are an important part of any streamlined process. They ensure the timely progression of claims and also ensure that the parties comply with the evidential requirements within the process. The sanctions included must provide a check and balance for both parties. The sanctions in the process currently defined are not adequate and need significant further consideration.

Timely defendant response

We agree that there should be a sanction if the defendant does not respond to the letter of notification or letter of claim in full within the timeframe provided. The current proposal is that the response must be in full within 6 months in the ST and within 8 weeks in the LT. Where the deadlines are not met for the ST, the case falls out of the FRC scheme and into the process applicable for cases above the £25,000 limit. Where deadlines are not met for the LT, it is currently proposed that the claim restarts in the ST. APIL does not agree with this proposal. We propose that should the defendant fail to comply with the timeframe for responding to the letter of notification in the LT the claim should fall out of the process altogether. It is unreasonable to expect a claimant to go to the time and expense of submitting a claim within the LT and then have to resubmit the claim within the ST if the defendant fails to comply. There are no financial incentives for the defendant to comply with the LT deadlines with the proposals as they are. We could see defendants simply fail to respond and wait to see whether the claimant decides to bring the claim again in the standard track. Without knowing whether the defendant admitted liability, this would put the claimant to extra work that they may not be minded to do because of uncertainty. It must be borne in mind that they are vulnerable by virtue of the injury they are claiming compensation for.

In the consultation the sanctions proposed for all other conduct issues, including delay at any other point, are a 50% costs reduction (against the claimant) or a 50% costs uplift (against the defendant) to the relevant stage to which the conduct issue applied. APIL take the view that this is an insufficient penalty for both parties, and will not act as a sufficient

[10] [2022] EWCA Civ 12

incentive for the parties to work constructively in accordance with the rules. The sums proposed are minimal and will not act as a sufficient deterrent. Sanctions need to sufficiently incentivise good behaviour.

We do not see how the proposal to leave non-adherence to deadlines or un-due delay in the scheme to the court process can be satisfactory. The new streamlined process was developed in such a way as to ensure that as few cases as possible progress to court. To therefore have such issues determined by the court will mean that inappropriate behaviour goes un-penalised on both sides. There is also the added barrier to the claimant of being unable to fund these issues – if they alone remain outstanding - to a court determination.

There is the potential for conduct issues to be raised in a number of areas. In the light track, there are some opportunities for the parties to fail to agree, for example where there is disagreement on whether further evidence is required, or the lack of agreement on the identity of a joint expert, or on the letter of instruction to that expert. Where this happens, there is no route in the scheme for the parties to follow - the deadline just isn't met.

We suggest that named individual escalation points should be provided for each organisation involved with the process, and that conduct issues could be escalated to those named contact points to work through and resolve. Escalation points have worked well in the operation of the Serious Injury Guide, providing a named individual point of contact at each signatory law firm and insurer, to act as the point of contact should any issues arise on conduct when operating under the Guide. This has allowed behaviours to be managed positively and collaboratively, effectively self-regulating. A steering group for the Guide also meets from time to time and will consider any issues with wider ramifications, or recommendations. This has worked well, given that both sides wish to see it work well and to demonstrate their best endeavours. If escalation does not resolve the issue, ultimately the claimant could say that there was no agreement and argue that exiting the process was justifiable on this basis. They would then take the risk on presenting this argument in costs recovery in the courts.

Evidence quality

We agree that parties should be able to raise concerns where the evidence provided or the response is insufficiently detailed to enable to claim to progress. We are concerned as highlighted above about the need for a full response to the letter of claim or letter of notification. There is generally a lack of detail in the proposed process about how defendant non-compliance will be sanctioned. The current process does nothing to sanction the defendant if they do not provide adequate detail in their response. Namely if they:

- fail to either admit or deny liability,
- deny liability, but fail to set out their case,
- reject the claimant's offer where they admit liability, but fail to make a counter-offer,
- deny liability, and fail to provide a CPR compliant expert report on breach of duty and/or causation to support their denial,
- deny liability, but fail to provide witness statements with a signed statement of truth,
- deny liability, but fail to provide a counter schedule with a signed statement of truth

The consultation paper suggests that where the letter of claim and accompanying evidence is not sufficient the defendant should be able to include a statement in their letter of response to the effect that there is a deficiency in the claimant bundle of evidence, but that the defendant must still respond in time. This is incredibly subjective and likely to lead to unintended consequences. There must be included in the scheme a provision to sanction the parties for raising invalid points about deficiencies in evidence. Case law is clear that requests for evidence should be proportionate.

In the case of Edwards v Hugh James Ford Simey (a firm)[11] Lord Justice Irwin said the "The purpose of the Scheme was to provide a rough-and-ready resolution of a very large number of standardised small claims at low cost. That was a proportionate approach. It appears to me particularly inappropriate to lose sight of what would have been the outcome of such a Scheme, by reference to after-coming evidence which would not have been brought into being at the time."[12] It is important therefore that a proportionate approach is taken to the extent that such points are only raised in circumstances where it was reasonable to do so, taking into account the overall evidence and explanation provided by the claimant.

Mandatory neutral evaluation

Further, in the mandatory neutral evaluation section, the consultation paper suggested that there needs to be additional sanctions for claimants but not for defendants. It suggested that this is because there are already sufficient sanctions to prevent defendants from taking cases to court unnecessarily, we do not agree. The proposed scheme provides no incentives on the defendant to admit and make concessions. Taking the scenarios set out in the consultation paper in turn,

- A. Presentation of evidence

Evidence presented in the course of the claim needs to be CPR compliant and consistent when later filed in court. There should be appropriate costs attached to allow the claimant to be able to do this.

- B. Claimant liability non-acceptance

In this scenario if the claim is found not to succeed at an evaluation, the only way to enable a claimant to pay adverse costs would be where ATE insurance is available (see our concerns about the ATE insurance market below). The claimant is unlikely to have their own funds. Qualified One-Way Cost Shifting was put in place by Lord Justice Jackson for this very reason.

- C. Claimant quantum non-acceptance (i)

We are unclear from the consultation paper about the status and operation of CPR Part 36 within the process. (See later comments). We assume that it applies, as Part 36 applies to other low value schemes[13]. So, for example upon the MNE closing, the defendant would make a P36 offer of the amount they are prepared to pay to settle the claim, and the usual rules would apply. Whichever disincentive operates, it only has an effect if the claimant

[11] [2018] EWCA Civ 1299

[12]

[13] Civil Procedure Rules, Part 36. 1 (3).

chooses to go on and issue court proceedings. Again, they are likely to need to have the protection of ATE insurance to cover the Part 36 risk, so behaviours would be guided by whether this was available or not.

- D. Claimant quantum non-acceptance (ii)

We question why this new system is required given that we have Part 36, which is an established part of the Civil Procedure Rules.

Additional areas for consideration

There is currently no sanction on either party for failure to comply with the mandatory stocktake. We would suggest that a sanction should apply if either party unreasonably fails to participate in a mandatory stocktake process. We are also of the view that a sanction should apply where either party's legal representative enters into the mandatory stocktake without authority to take the necessary steps, as set out in the consultation. It is important this section has teeth in order to drive the parties to settlement.

Question 12: Do you agree or disagree that the proposals on FRC should apply to claims where the FRC letter of claim (or FRC claim notification letter) was submitted on or after the implementation date of the scheme?

We agree the implementation date for the scheme should be letter of claim. This is on the understanding that it is essential for lawyers to have a firm commencement date to work towards, and that there is at least a period of 18 months' notice after announcement of any change. Traditionally Government has been poor at providing the legal profession with sufficient detail of reforms and adequate lead in time. Providing firms with an 18-month lead in time will allow them to plan workstreams and manage costs appropriately at the outset of the claims.

Question 13: Do you agree or disagree that the £25,000 upper limit for scheme claims should be reviewed post-implementation, and at regular intervals thereafter, specifically to take account of the effects of claims inflation?

We disagree that the upper limit should be regularly reviewed. The process being adopted by the Government is largely based on that developed by a group of experienced cross industry representatives. That CJC working group agree that this twin track approach would not be suitable for claims over £25,000. The chair of the clinical negligence working group and CJC member Andrew Parker said in his report "It is worth emphasising in any event that the support for these proposals on all sides is strictly on the basis that they are suitable for claims valued up to £25,000 and no higher. Such streamlining of the claims process is proportionate when the sums at stake are modest, but should in no way be taken as a feasible option for larger value claims."[14] If a formal review is to take place, we suggest that this would require a further body of work with experienced cross industry representatives, and should not take place until 5 years post implementation.

[14] Fixed recoverable costs in lower value clinical negligence claims, Report of the Civil Justice Council working group October 2019.

We would, however, urge the DoHSC to review the effectiveness of the new scheme, and not just in terms of the financial savings. Any review should take into account the intended and unintended behaviours of parties in the scheme, both positive and negative. We suggest that this could be done through the behavioural committee that we have suggested. This committee would be a stakeholder group of industry representatives which could meet to address behavioural issues within the sector and to report on trends that need wider consideration.

Question 14: What are your views on how the proposals in this consultation might impact businesses involved in handling and processing lower value clinical negligence claims?

Question 15: What are your views on how the proposals in this consultation might differentially or disproportionately impact small and micro businesses such as:

• law firms

• other small or micro businesses involved in supporting the handling or processing of lower value clinical negligence claims?

As mentioned above, there is significant anxiety amongst those who wish to undertake this work that the fees proposed by the Government are not financially viable. Significant work was undertaken by experienced claimant practitioners on the CJC working group to cost the process for the work required, to be carried out at the appropriate level of expertise. This work appears to have been simply ignored. If the rates are not fair and reasonable, then experienced firms will not take on the work, and injured people will be significantly disadvantaged.

It is also vital, as set out above, that lawyers have a firm commencement date for the changes, and there is at least a period of 18 months' notice after the announcement of changes is made. This is essential, to allow planning for workstreams, and appropriate management of costs at the outset of claims.

Question 16: What are your views on how the proposals in this consultation might impact:

• people with protected characteristics as defined under the Equality Act 2010

• health disparities or

• vulnerable groups?

As it stands, a tiny fraction - roughly 2% - of patient safety incidents which cause harm result in a clinical negligence claim against the NHS[15].

[15] In 2020/21, 647,542 reported patient safety incidents resulting in any degree of harm occurred, according to NHS data. In contrast, NHS Resolution received 12,629 clinical negligence claims in 2020/21. See page 40 of NHSR's 2020/21 annual report.

The Government's assessment of the impact of the fixed cost proposals assumes no change in the likelihood of negligently injured people to bring claims i.e., the Government assumes there will be no reduction in access to justice[16]. In reality, similar reforms aimed at reducing legal costs, e.g., Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), have resulted in a significant reduction in both claims and damages. This indicates that the fixed costs proposals could have a similar impact, and potentially undermine patient safety.

For example, a comparison of pre-LASPO and post-LASPO clinical negligence claims valued at £1,000- £250,000 found that damages were 22% lower in post-LASPO claims. Fenn and Rickman's research also found that the reforms were associated with a reduction in the volume of claims:

"*LASPO appears to have had an effect on settlement behaviour and on the overall costs of litigation. There are fewer claims, and their base costs, damages and legal proceedings have all diminished*"[17].

This conclusion is corroborated by the Government's Compensation Recovery Unit (CRU) data, which shows a substantial reduction in claims following the introduction of LASPO in April 2013. Between 2012/13 and 2019/20, the number of personal injury claims registered with the CRU fell by 21%[18].YouGov research from 2017 also found that the percentage of adults who did not make a claim following an injury or accident was growing year-on-year[19].

Fenn's evaluation of previous fixed cost proposals for clinical negligence claims recognised that the impact of these proposals on the number of claims *"would be unpredictable*"[20]. The lower level of recoverable costs proposed by the defendant group increases the risk that there is a reduction in claims.

If cases are allocated purely by value, this will discriminate against people based on earnings, with those on benefits or lower pay less likely to have a case over £25,000. This is more likely to discriminate against protected groups such as those with a disability or the elderly. It will also adversely affect part time workers, who are predominantly women. Further there is evidence of workers from a minority ethnic background being paid less than their white counterparts and again they will be adversely impacted. If cases are not economically viable to run then it will have an inevitable impact on people being able to access justice – people with meritorious cases will be unable to access representation. Those whose are better paid will have access to specialist lawyers while those lesser paid will not, and that cannot be right. We have already said that those adults who are protected parties, such as those who have learning difficulties or other cognitive needs, will require extra time and care to pursue their claim, and in a fixed fee system, they may be unable to receive this necessary additional help.

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[16] Department of Health and Social Care, *Impact assessment: extending fixed recoverable costs to lower value clinical negligence claims,* January 2022
[17] Fenn, P., Rickman, N., *THE IMPACT OF LEGISLATION ON THE OUTCOMES OF CIVIL LITIGATION: AN EMPIRICAL ANALYSIS OF THE LEGAL AID SENTENCING AND PUNISHMENT OF OFFENDES ACT 2012*, February 2019
[18] https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data
[19] YouGov, *Personal Injury 2017,* 2017
[20] Fenn, P., *Evaluating the proposed fixed costs for clinical negligence claims: An Independent Review*, January 2017, p21

Any reduction in claims caused as a result of the fixed cost proposals would not only reduce access to justice, but could also have an impact on patient safety, as recognised by Professor Fenn:

"*Any major reduction in the propensity of patients to identify negligence could of course have wider implications for patient safety*"[21].

NHS Resolution research found that concerns for patient safety are key to explaining why people bring a claim for clinical negligence. 87% of past claimants surveyed as part of the research said they had brought a claim "to prevent similar incidents happening again to others". 79% of past claimants said they had brought a claim "To get a detailed investigation and explanation of the incident"[22].

The wider potential patient safety costs of the proposals are not recognised in the Government's impact assessment[23]. Any increase in patient safety incidents will result in costs to both individuals and the NHS.

Clinical negligence claims, and the data associated with them, is an important resource to help improve patient safety[24] [25]. If patients who are harmed as a result of clinical negligence are less likely to make a clinical negligence claim, the opportunity for this learning will be reduced.

Currently the learning opportunities arising from clinical negligence claims are under-utilised in efforts to improve patient safety, with clinicians and healthcare managers often unaware of the claims against their department[26].

Other issues of concern

After the event insurance

Any proposals must be within the environment of a viable ATE legal expenses insurance market. Currently in clinical negligence cases, part of the ATE premium is recoverable from the losing party. APIL is of the view that this position should be unchanged. We are concerned about the potential for unrecoverable disbursements such as experts' fees. There is considerable front loading of work in the new process, as expert evidence must be served with the letter of claim. This puts the claimant at considerable financial risk at the outset of the claim, a risk that they will want to be able to insure against. The current consultation is silent on ATE cover; we strongly recommend that the Government discusses the viability of ATE with the underwriters to determine its feasibility in this new process.

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[21] Ibid.
[22] https://resolution.nhs.uk/wp-content/uploads/2018/10/Behavioural-insights-into-patient-motivation-to-make-a-claim-for-clinical-negligence.pdf
[23] Department of Health and Social Care, *Impact assessment: extending fixed recoverable costs to lower value clinical negligence claims*, January 2022
[24] https://www.bmj.com/content/368/bmj.m552/rr
[25] NHS Resolution, *Learning from Litigation Claims: The Getting It Right First Time and NHS Resolution best practice guide for clinicians and managers*, May 2021, p4
[26] https://resolution.nhs.uk/2021/05/07/new-guide-helps-nhs-trusts-improve-patient-safety-by-learning-from-clinical-negligence-claims/

The status of offers within the scheme

The current proposals are also silent on the status of offers made within the scheme. Are these Part 36 offers? It is important that this is known at the outset. The parties should be clear what additional liabilities/ uplifts are attached to offers that might have an impact on the grid of costs proposed. The cost sanctions attached to any offer will have an impact on the behaviours of the parties, and this should be fully explored.

Patient safety

It is very disappointing that the new process does not have a greater emphasis on patient safety and learning. The Minister says in her foreword to the consultation that the NHS has continued to strive for excellence in patient safety and in its response to harm; and that it is committed to learning and being frank with patients. This is not our members' experience. They are contacted time and time again by families who have been affected by negligence. Rob Behrens, Parliamentary and Health Service Ombudsman said at the Westminster Health Forum policy conference on 22 February 2022 that "…despite a whole catalogue of policy changes, framed within the context of the NHS patient safety strategy, it's actually hard to say that patient safety is significantly better now than it was in 2013"[27] NHS data also suggests that patient safety has not improved over the past 10 years.

Since 2010 NHS organisations have been mandated to report all patient safety incidents resulting in severe harm or death. Between 2010/11 and 2019/20, the number of these incidents increased by 2%[28]. The latest Ockenden report[29] exposes ongoing failings in maternity services. Some of the cases identified would fall into this scheme. The common problems namely failure to follow clinical guideline, failure to learn and improve, and failures to listen to patients are a key theme of this review. The report shows ongoing failings in NHS care.

Furthermore, even pre-Covid, the percentage of patients treated within waiting time standards for both elective (non-urgent care) and cancer treatment was falling. Longer waiting times are likely to increase the risk of patient harm and, therefore, negligence claims[30].

Above there is reference to NHS Resolution research which found that concerns for patient safety are key to explaining why people bring a claim for clinical negligence.

Any changes which limit people's access to compensation would not have public support. YouGov research has found that two-thirds (67 per cent) of UK adults think that the NHS

[27] Westminster Health Forum Conference. Next steps for patient safety in the NHS 22.02.22
[28] APIL analysis of NHS patient safety data accessed at https://www.england.nhs.uk/patient-safety/national-patient-safety-incident-reports/national-patient-safety-incident-reports-29-september-2021/
[29] Independent review of maternity services at Shrewsbury and Telford Hospital NHS Trust. March 2022
[30] National Audit Office, *NHS waiting times for elective and cancer treatment*, March 2019

should provide monetary compensation to a person who is injured because the NHS failed to take proper care of them[31].

Move forward to 2021 and research conducted by Opinium[32] shows that this is still an issue, all many claimants want is an apology.

It is extremely disappointing that more has not been done to address these ongoing issues.

APIL would be willing to engage further with the DoHSC regarding the practical steps of implementing this scheme.

-ends-

Any queries about this response should be, in the first instance, directed to:

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[31] All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 2,061 adults. Fieldwork was undertaken between 19th - 20th November 2019. The survey was carried out online. The figures have been weighted and are representative of all UK adults (aged 18+).
[32] The Value of Compensation, 12 July 2021. Page 25