

Department of Health and Social Care

Fixed recoverable costs in lower damages clinical negligence claims – a supplementary consultation on disbursements

A response by the Association of Personal Injury Lawyers

October 2023



Introduction

APIL welcomes the opportunity to respond to the Department of Health and Social Care (DoHSC) supplementary consultation on disbursements for the Lower Damages Clinical Negligence Claim Fixed Recoverable Costs (LDFRC) scheme.

APIL remains concerned about the speed at which the Government intends to implement these reforms, given the lack of detail available. It remains unclear where a case goes when it exits the protocol, and it also remains unclear whether inquest costs are recoverable separately to the low value clinical negligence scheme.

APIL agrees that after-the-event (ATE) premiums and expert fees should be separately recoverable. As recognised by the DoHSC, these are two necessary pillars for clinical negligence claims, which should continue to be recoverable.

APIL has significant concerns with some proposals in the consultation, including the blanket exclusion of counsel advice fees from the LDFRC scheme, save for in Part 8 claims relating to protected parties and children. The complexity of a claim is not directly linked to its value, and counsel's advice may be required on certain aspects.

We believe that there are other essential disbursements which should be recoverable in all claims, namely professional medical records collation, sorting and pagination fees and stay of proceeding fees. We also argue for capacity assessments to be recoverable where there is a question as to whether a party has capacity or not. Translator and interpreter fees must also be recoverable wherever reasonably required as held by the Court of Appeal in *Santiago v Motor Insurers Bureau*¹. Obtaining evidence to support the claim is a key element given that the burden of proof is on the claimant. If the claimant is successful in their claim, they should be able to recover the reasonable costs of doing so and those costs should be borne by the wrongdoer. If these costs are not recoverable claimants will likely have their damages eroded by having to fund these elements of the claim from their damages. Alternatively, the disbursements will need to be funded by the limited fixed fees in these cases. It is unfair to expect claimants or their firms to subsidise these reasonably incurred disbursements through damages or the grid of costs in the scheme. If the necessary disbursements are not recoverable some firms will not be prepared to undertake this work, which will restrict access to justice for victims of negligence.

APIL is also concerned that this could create an unlevelled playing field between claimants and defendants, with fewer experienced representatives willing to bring lower-value clinical negligence claims on claimants' behalf.

¹ 1 [2023] EWCA Civ 838

While we welcome the Government's acknowledgement that the previous "bolt-on" amount for protected parties and children cases was insufficient to reflect the amount of extra work involved in these cases, the increased amount is still short of the costs incurred in these cases, if all of the necessary disbursements are not recoverable.

With only six months to implementation, the lack of detail in the government response to the 2022 consultation and in this further consultation is extremely worrying. The reforms proposed are a significant change in the way in which lower value clinical negligence claims will be pursued. This is not an issue that only affects legal representatives but also ATE insurers and experts. The CPRC has expressed its concern about the speed at which they will be required to develop the rules in time for April implementation.

The government will be acutely aware of the level of interest in these changes and should recognise the value in further stakeholder comments on the draft rules ahead of implementation. We would call upon the DoHSC to commit to providing the profession with early sight of the rules to avoid a situation where rules have to be amended immediately once published due to inconsistencies and errors.

Question 1: Do you agree with the proposals on disbursements within the FRC scheme for lower damages clinical negligence claims?

- **agree**
- **disagree**
- **not sure**

Please explain your answer (optional) (maximum 1000 words)

APIL agrees with some of the proposals.

Expert fees and ATE premiums

We welcome that expert report fees and ATE insurance premiums will continue to be separately recoverable. As recognised in the consultation document, the ATE insurance market must remain viable, as it is a key mechanism for managing the costs risks of medical expert evidence.

APIL believes that the expert report fee should not be capped, and that the recoverability of expert fee costs should not be limited to the cost of the report. It should encompass the cost of clarifying the expert's opinions, engaging in correspondence, supplementary reports, and opinions, as well as covering the cost of telephone conversations with the expert.

There should be some clarification, however, on the use of agencies to source expert reports and how this will work concerning recoverability. Agencies can provide several benefits, including earlier payment for experts, and aiding cash flow for solicitors' firms, as they are not required to pay the fee until the case is complete. The use of agencies reduces the overall cost of the claim by vetting experts and their reports, and by chasing and expediting reports to allow claims to progress without delay. The law around agency fees is uncertain at the moment – the Department should be aware of the case of *Northampton General Hospital NHS Trust v Hoskin*. We suggest that it would be beneficial to await the Court of Appeal's decision in this case before implementing the fixed costs proposals.

Counsel advice

APIL disagrees with the blanket exclusion of counsel fees from recoverable disbursements other than in relation to Part 8 approval hearings. We have several concerns with this proposal. We believe that it will be detrimental to disincentivise the use of counsel in the

LDFRC scheme. The benefits of the instruction of counsel should not be overlooked. These include the provision of independent advice and helping filter unmeritorious cases.

The use of counsel in clinical negligence claims with a value of less than £25,000 is more common than might be thought. In clinical negligence, the value of the claim is not necessarily linked to its complexity. There are certain circumstances where the instruction of counsel would be entirely reasonable, even in lower-value cases. The risk of unintended consequences and misuse could be managed by specifying that pre-issue council advice is at a limited recoverable cost. In certain claims, counsel's input is required on technical points of law, including when the scope of duty is not clear, fundamental dishonesty, material contribution, cause of action (in addition to traditional tort e.g. contract law, bailments), issues identifying the defendant (particularly in non-NHS claims) and secondary victims of psychiatric injury.

Claims involving protected parties or children

APIL agrees with the proposals that counsel fees and court fees should be recoverable in relation to Part 8 approval hearings. However, it is not clear whether the counsels' advice on quantum will be a recoverable disbursement in those claims. If this is not separately recoverable, a large proportion of the £1,800 bolt-on for these claims would be used here. Our members reported that most courts will not accept advice on quantum unless it has been provided by a barrister.

We believe that capacity assessments should also be recoverable in protected party claims. The cost of capacity assessment should be recoverable whether or not it is found that the claimant lacks capacity. If there were valid reasons to suspect the claimant's capacity to litigate and/or manage the award of damages, the cost of the report should be recoverable.

The increase to a £1,800 bolt-on is welcome. However, where the claimant lacks capacity, the cost of the necessary additional support required varies and can easily be in excess of this throughout the life of the claim. The claimant is required to be involved in decision-making if possible, making each communication and step more time-consuming. Any reference to a basket of cases balancing out the costs is unlikely to reflect reality, where a case of this type may not be commonplace in a firm's caseload.

Other disbursements

The system does not support the costs of other necessary disbursements required in lower value clinical negligence claims.

Some claims will require translators and/or interpreter fees, which are essential for the claimant. Should they not be recoverable, this would be an extra barrier to access to justice where the claimant could not take legal advice in English. It is also discriminatory and not reflective of the needs of the population. In the case of *Santiago v Motor Insurers Bureau*², the Court of Appeal confirmed that interpreter fees are recoverable under the Civil Procedure Rules Part 45(f) "(f)any other disbursement reasonably incurred due to a particular feature of the dispute or any requirement of these Rules." It was held that these fees are an additional expense that falls upon the vulnerable party or their solicitor. If these fees are unrecoverable, they provide a financial disincentive to bringing legal proceedings or representing a vulnerable prospective party. The Court of Appeal did not overrule the case of *Aldred v*

² 2 [2023] EWCA Civ 838

*Cham*³, therefore it must be very clearly spelt out in the rules that there must be payment of costs addressing vulnerability.

Travel expenses should also be recoverable in circumstances where that is justified. For example, claimants who are not able to understand technological advancements and cannot attend an online meeting; disabled elderly claimants in care homes who are unable to access video conferencing or other technological solutions; claimants detained in prison or in a hospital under the Mental Health Act 1983. Travel expenses for face-to-face meetings with the claimant should be recoverable in the scheme. The inability to recover travel expenses will impact vulnerable claimants and those on the lowest incomes.

Further, the costs of asset tracing/tracing agents' fees should also be recoverable in cases where the defendant is a business owner. This is required, for example, in cosmetic surgery cases where the defendants will often be litigants in person. These reports are required to assert whether the defendant can meet the cost of the claim, whether he has insurance/indemnity cover, and trace the address for service. The DoHSC proposals fail to acknowledge the consequences of implementing the scheme across all healthcare providers including private providers, where other considerations will apply, uncommon to NHS claims.

We believe that the costs of pre-action disclosure applications should be separately recoverable when defendants do not disclose medical records or other relevant documents.

Whilst APIL agrees that court fees should be separately recoverable in circumstances where proceedings are started as a result of a limitation period that is about to expire, this does not go far enough. The claimant may have to apply for a stay of proceedings for the period to allow time for the parties to undertake the steps envisaged to take place within the Pre-Action Protocol. The fee for a stay of proceedings should also be separately recoverable.

APIL believes that professional medical records collation, sorting and pagination fees should also be recoverable in the LDFRC scheme. To achieve the cost efficiencies envisaged by these reforms, claimant representatives will likely need to outsource medical records collation. There is no allowance to cover that fee. Alternatively, the time taken by the fee earner to prepare properly ordered and paginated records (with chronology documents) will consume a large proportion of the grid of fixed costs awarded for stage 1 in both the light and standard tracks. If this falls into the fixed costs, the quality of the bundles will be compromised to increase costs on both sides in terms of presenting and defending a claim as well as increasing the overall costs incurred by experts in considering the case and producing their reports. It is a false economy to fail to allow the costs of recovering professional medical records collation fees.

Fatal cases

While APIL is pleased that claims involving stillbirth and neonatal deaths are excluded from the fixed costs scheme, we remain extremely disappointed that the Government fails to treat all bereavement cases with the same appropriate sensitivity. It is wrong for the Government to suggest that some lives are worth more than others. Death is the most serious outcome that could occur as a result of negligence. Additional compassion and care are required when dealing with these cases and bereaved families. This scheme will cover claims relating

³ [2019] EWCA Civ 1780. The Court of Appeal held that work done on advising about quantum in a case involving a child was not recoverable, as the fact that the claimant was a child was not a "particular feature of the dispute" as per CPR 45.29I(2)(h))

to the scandal in Mid Staffordshire NHS Foundation⁴ which resulted in hundreds of avoidable or unnecessary deaths at the trust or the victims of Lucy Letby who died in the neonatal unit following her crimes⁵. It is APIL's 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. If fatal cases aside from those involving stillbirth and neonatal deaths are included within the scheme, the particular disbursements that relate to fatal cases should be recoverable. For example, the costs associated with the grant of probate, including the application fee, and the costs of letters of administration which are required to prove the legal right to manage and represent the deceased's estate must also be recoverable. If this cost is not recoverable, it would be a barrier to access to justice for estate representatives.

Question 2: Do you have an alternative proposal? (optional) (maximum 1000 words)

Please see Question 1.

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

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⁴ leading to the Francis Inquiry:

<https://assets.publishing.service.gov.uk/media/5a7ba0faed915d13110607c8/0947.pdf>

⁵ now subject to the ongoing Thirlwall Inquiry: <https://www.gov.uk/government/publications/thirlwall-inquiry-terms-of-reference>