

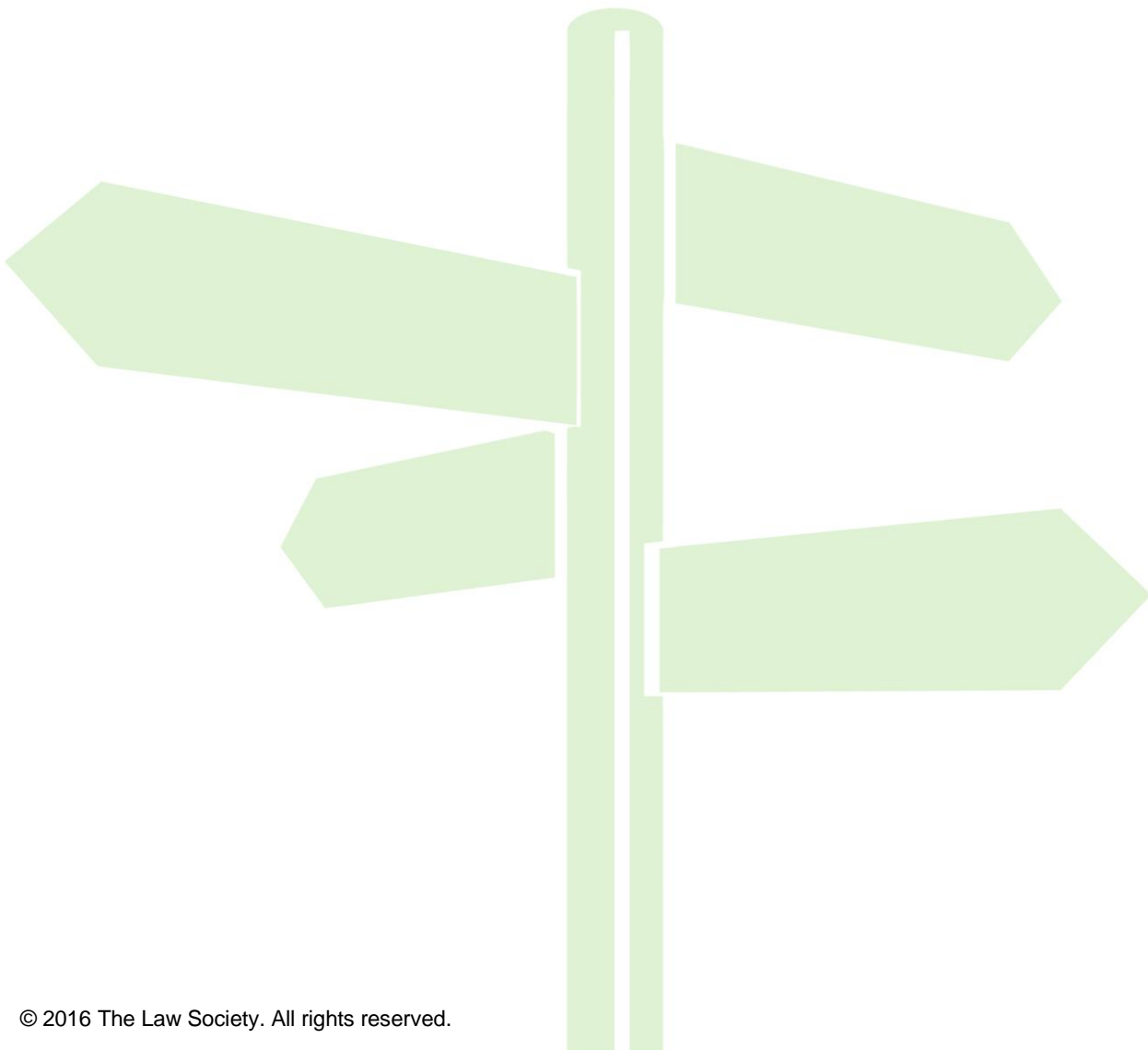


The Law Society

## **Dept of Health consultation: Fixed recoverable costs for clinical negligence claims**

Response of the Junior Lawyers Division

May 2017



# **Fixed recoverable costs for clinical negligence claims**

## **Department of Health consultation**

### **Response of the Junior Lawyers Division**

#### **About the Junior Lawyers Division**

The Junior Lawyers Division (JLD) is a division of the Law Society of England and Wales. The JLD is one of the largest communities within the Law Society with over 70,000 members. Membership of the JLD is free and automatic for those within its membership group including LPC students, LPC graduates, trainee solicitors and solicitors one to five years qualified.

#### **Question 1: Introducing Fixed Recoverable Costs**

**Do you agree that Fixed Recoverable Costs for lower value clinical negligence claims should be introduced on a mandatory basis?**

No

**If not, what are your objections? If you prefer a voluntary scheme instead, please explain how this would fulfil the same policy objectives as a mandatory scheme.**

#### ***Introduction and concerns about access to justice.***

The JLD does not support the introduction of Fixed Recoverable Costs for lower value clinical negligence claims ('the Proposal') on a mandatory basis. Although the objective of lowering litigation costs for the NHS is laudable, the proposed mechanism has a questionable logical basis and there is a very real risk (as anticipated in the consultation document itself) that access to justice for some claimants will be negatively affected. Clinical negligence claims are complex in nature; many cases require a lengthy investigation process before the prospects of success can be established. Unlike many personal injury cases, prospects of success cannot be ascertained at the initial consultation. Access to justice will no doubt be affected by these proposals, as practitioners will be unable to fully investigate allegations of medical negligence simply because of the cost. For example, the fact (as reported in The Telegraph 02.05.17) that the hundreds of women that Dr Ian Paterson has been negligently operating on may be affected by the proposal (and potentially unable to bring claims as a result) demonstrates the potential for victims' access to justice to be impinged by the proposed reforms, and how iniquitous this would be.

#### ***Alternatives should be explored first***

The JLD acknowledges the need for reform in this area as clinical negligence cases negatively impact NHS resources. As such, the JLD welcomes current initiatives to reduce the number of claims in the first place (such as enhanced organisational learning). The JLD would further suggest that rigorous costs budgeting be considered rather than the broad-brush approach of fixed costs. If the court manages cost

budgets effectively and applies the new tests on proportionality at assessment the need for fixed fees may be redundant. This would also enable a costs judge to take into consideration the complexities of the case.

These efforts have the potential to achieve the same stated objective of reducing the cost to the NHS of litigation as this proposal, but in contrast will not have a concomitant deleterious impact on access to justice.

The JLD accordingly believes that these initiatives should be pursued and evaluated before the more drastic approach of this proposal is considered. In short, it may well not be necessary. Please also see the answer to Q9 in relation to this point.

### ***Impact on junior lawyers and consequential increase in NHS costs***

The JLD is concerned that any introduction of Fixed Recoverable Costs for lower value clinical negligence claims will result in junior lawyers being overloaded with work to make any affected claims which are taken on (as opposed to rejected) cost-effective for firms. Junior lawyers will in turn face the increased pressure of managing a large caseload of complex contentious cases. This has already happened in the personal injury sector as fast-track cases are now generally managed by the junior end of the spectrum due to limited profit margins. Junior lawyers are already facing considerable pressure; recent JLD-commissioned research demonstrated that the stress and adverse pressures facing junior lawyers are huge at the present time. The research showed that the current high levels of stress are causing junior lawyers to make mistakes, and the JLD believes that these changes would only cause this problem to get worse. Mistakes can not only affect the service that clients receive but also cause delays to litigation, which increase costs and may therefore be contrary to the proposal's objective.

### ***Increase in litigants in person and consequential increase in NHS costs***

The introduction of fixed fees in personal injury cases has seen a number of firms close, restrict their intake to cases worth in excess of 25k or be forced to change practice to include other areas of law. This has resulted in an increase of litigants-in-person. Experience from this (and the reduction of legal aid available in the Family Courts) suggests that there will be a significant increase in the number of litigants in person if these proposals are put into effect. This tends to cause delays and increase costs, which is contrary to the proposal's stated objective.

### ***Further practical considerations and consequential increase in NHS costs***

The JLD does not agree with the proposal. However, if it is adopted, the implementation date should be set in advance and not include those claims already in progress as this could chaotically effect case management plans already in place. This could potentially cause delays and therefore increase costs.

## **Question 2: Fixed Recoverable Costs Ranges**

**Do you agree that Fixed Recoverable Costs should apply in clinical negligence claims:**

No

**Option A: above £1,000 and below £25,000 (preferred)**

**Option B: another proposal**

**Please explain why**

For the reasons stipulated in the response to Question 1, the JLD is not supportive of the proposal.

## **Question 3: Implementation**

**Which option for implementation do you agree with:**

**Option 1: All cases in which the letter of claim is sent on or after the proposed implementation date.**

No

**Option 2: All adverse incidents after the date of implementation.**

No

**Another proposal**

**Please explain why**

Pursuant to the response to Question 1, the JLD does not agree with the proposal. In the event that the proposal is adopted then the implementation date should be set in advance and not include those claims already in progress as this could chaotically effect case management plans already in place. This could result in delays and therefore increase costs.

## **Question 4: Fixed Recoverable Costs Rates**

**Looking at the approach (not the level of fixed recoverable costs), do you prefer:**

**Option 1: Staged Flat Fee Arrangement**

No

**Option 2: Staged Flat Fee Arrangement plus % of damages awarded: do you agree with the percentage of damages?**

No

**Option 3: Early Admission of Liability Arrangement: do you agree with the percentage of damages for early resolution?**

No

**Option 4: Cost Analysis Approach: do you agree with the percentage of damages and/or the percentage for early resolution?**

No

**Option 5: Another proposal**

No

**Please explain why**

For the reasons stipulated in the response to Question 1, the JLD is not supportive of the proposal.

In addition, the JLD notes that the value of a case does not necessarily reflect the complexity and in particular the work involved in order to prove the claimant's case.

It is also notable that the only time deemed recoverable by Grade D fee earners under 'Option 1' would be confined to 60 minutes on 'liability investigations'. This would likely mean that trainees (and paralegals, junior Cilex, etc.) would not be able to gain the valuable experience of working on full clinical negligence matters.

**Question 5: Do you agree that there should be a maximum cap of £1,200 applied to recoverable expert fees for both defendant and claimant lawyers?**

No

The JLD does not believe that there should be a maximum cap of £1,200 applied to recoverable expert fees for both defendant and claimant lawyers. Clinical negligence cases of all values can be extremely complex, and implementing an arbitrary cap will risk claimants and defendants being unable to adequately put forward their case through an inability to access the requisite expert knowledge.

**Question 6: Expert fees could be reduced and the parties assisted in establishing an agreed position on liability by the instruction of single joint experts on breach of duty, causation, condition and prognosis or all. Should there be a presumption of a single joint expert and, if so, how would this operate?**

No

In extremely limited circumstances the instruction of a single joint expert ('SJE') is appropriate. However, the JLD believes that this is infrequent and that it would be inappropriate for there to be a presumption to this effect. Two issues in particular should be considered. Firstly, in complex clinical negligence cases it is often rare to find the requisite expertise in one expert. Secondly, where one particular discipline may be identified as relevant, it would be highly unlikely that the SJE in question would hold the necessary level of clinical expertise in breach of duty, causation, condition and prognosis to report accurately on all of these aspects.

It would be a false economy to limit the instruction of experts to one at the start of a claim without considering the potential future impact on additional experts required, as this may lead to a duplication of work and invariably a later increase in expert fees. Instead of a presumption of an SJE, this should continue to be negotiated by experienced solicitors between the parties to ascertain the most appropriate course of action on a case by case basis. This sort of decision lies at the root of clinical negligence case theory and should be undertaken at a senior level and appropriate costs should be allowed. This could be managed by rigorous case management and costs budgeting.

In any event, instructions may not be agreed between the parties which would inevitably lead to an increased workload for the SJE where two separate sets of instructions would need to be pursued. The JLD believes that this would reduce or negate altogether the proposed benefits of instructing an SJE in the first place.

The JLD believes that a central expert database could fetter a claimant's choice of expert, which, like the fettering of a claimant's choice of solicitor, would be fundamentally opposed to the operation of the rule of law.

**Question 7: Do you agree with the concept of an early exchange of evidence?**

Yes

**If no, do you have any other ideas to encourage parties to come to an early conclusion about breach of duty and causation?**

N/A

Where the Duty of Candour is engaged with effectively from the outset and defendant parties engage constructively with a claimant's letter before action, then exchange of expert or other evidence at an early stage may lead to reduced future costs.

**Question 8: Do you agree with the proposals in relation to:**

**a) Trial Costs (para 5.7):**

No. The JLD believes the proposed costs are implausibly low. They also do not clearly set out if they include preparatory work or only advocacy in court. Fees should include all preparatory work.

**b) Multiple Claimants**

Yes

**c) Exit points**

Yes

**d) Technical exemptions (para 6.9)**

Yes

**e) Where the number of experts reasonably required by both sides on issues of breach and causation exceeds a total of two per party. (para 6.11)**

Yes

**f) Child fatalities (para 6.12)**

Yes

**g) Interim Applications**

Yes

**h) London Weighting**

Yes

**Question 9: Are there any further incentives or mechanisms that could be included in the Civil Procedure Rules or PreAction Protocol to encourage less adversarial behaviours on the part of all parties involved in lower value clinical negligence claims, for example use of an Alternative Dispute Resolution process (ADR)? This would include both defendant and the claimant lawyers, defence organisations including NHS LA, the professionals and/or the organisation involved.**

The JLD strongly encourages the use of alternative measures to achieve the same objective as this proposal (lower litigation costs for the NHS) but without the anticipated side effect of reduced access to justice for many claimants. Amending the current Pre-Action Protocol for Clinical Negligence provides an excellent opportunity to do so. The Department of Health may wish to consult further on this point, but one avenue to explore could be to make Part 36 offers a compulsory element of the protocol, either for one or both parties. This would encourage a party/the parties to consider their position and to make reasonable offers at an early stage. This is effectively implemented in matrimonial finance matters where both parties are required to put forward without prejudice offers in advance of a financial dispute resolution hearing. As a result, fewer cases reach final hearings. The JLD believes that this approach (or similar ones) should be pursued and evaluated before the more drastic approach of this proposal is implemented.

**Question 10: Please provide any further data or evidence that you think would assist consideration of the proposal, particularly for other than NHS provision. In particular, we are interested to gather data from private, not for profit and mutual organisations delivering healthcare. Please identify your organisation in your response. We would be interested in hearing views on: The scale of expected savings if Fixed Recoverable Costs outlined is introduced, the expected growth in the number of claims received and settled over the next 10 years to help in modelling the impact of the proposals, any details on the number and size of legal firms involved in clinical negligence (primarily as claimant lawyers), and any information on the likely administrative savings and set up costs due to introduction of Fixed Recoverable Costs. Please indicate whether your organisation would be willing to work with DH in providing more details on the impact for future IA analysis. This would be provided in confidence and anonymised in any future analysis.**

The JLD is not aware of further data or evidence which would aid consideration of the proposal. The JLD does not support the proposal, but calls for a comprehensive impact assessment including these aspects (and others, such as the effect on access to justice) to be completed and published within 18 months as part of its implementation if it does go ahead.

**Question 11: The Government has prepared an initial assessment of the impact of Fixed Recoverable Costs on equalities, health inequalities and families. This assessment will be updated as a result of the consultation. Please give your view on the impact of these proposals on: Age; Gender; Disability; Race; Religion or belief; Sexual orientation; Pregnancy and maternity; Carers, Health Inequalities and Families.**

The JLD notes with significant concern that the initial impact assessment suggests that various groups with protected characteristics will be disproportionately adversely affected by the proposal. It does not have further data or evidence which would aid consideration of the proposal. The JLD does not support the proposal, but calls for a comprehensive impact assessment on these aspects to be completed and published within 18 months as part of its implementation if it does go ahead.

**The Junior Lawyers Division  
May 2017**