



An Alternative to Fixed Recoverable Costs in Medical Negligence Cases: The SCIL Scheme

Society of Clinical Injury Lawyers

October 2024

Introduction

The Society of Clinical Injury Lawyers (SCIL) is a member organisation for specialist claimant solicitor firms. We represent patients and families of those who have been victims of medical negligence.

In 2020 SCIL presented a proposed scheme intended as an alternative to the government's plan for a Fixed Recoverable Costs (FRC) regime for lower-value medical negligence cases¹. This paper provides an updated and amended version of that scheme. It is intended to reflect the changed landscape in the medical negligence arena since our 2020 scheme was drafted and since the original FRC consultation back in 2017.

Significant changes have occurred in the clinical negligence space since 2017 that have impacted the nature of our proposals. However, the underlying principles behind our proposals remain the same: maintaining **access to justice** for those harmed by clinical negligence must be at the heart of any scheme. We believe the following scheme is the best way forward for both **injured patients and the NHS**.

Guiding principles

- **Maintaining access to justice for patients is our primary driver:** Cost-saving for the NHS is a huge driver for reform to FRC proposals, however, we believe this must not come at the cost of justice for patients, many of whom are at their most vulnerable when seeking justice. Our proposed scheme **will** reduce costs for the NHS without restricting the initial investigation that claimant lawyers carry out on behalf of injured patients. This investigation is often the **only independent investigation** that injured patients will ever have into why their medical treatment went wrong. To attempt to limit that or, worse still, remove it as an option for a large proportion of patients, as the previous government's FRC proposal does, is not in their interests nor we would argue in the interests of the NHS.
- **We are committed to supporting and improving the NHS:** As Claimant Lawyers, we are firmly committed to supporting the NHS to improve and learn lessons. However, we do not believe it is our role to set out how the NHS should achieve that aim.
- **We are committed to a collaborative approach:** Since the first FRC consultation was launched in 2017 there has been significant improvement in

¹ 'Low-value' medical negligence cases are defined as those where the maximum award is less than £25,000.

collaborative working between Claimant lawyers (representing victims and families), Defendant lawyers (representing NHS Trusts) and NHS Resolution. This has led to more cases concluding at an earlier stage and without Court proceedings; the volume of settled cases that became litigated **reduced by 13%**, with the total number of claims settled falling by 2,051 between 2019 and 2023. Our proposed scheme embraces all aspects of the collaborative approaches that have been adopted by Claimant lawyers when working with NHS Resolution (NHSR).

- **Striving for earlier conclusion of cases will drive the best outcomes:** There is a misconception that the investigative phase of medical negligence cases is a way for lawyers to make money; this is fundamentally untrue. At the outset of a case, Claimant lawyers do not have any certainty about whether or not a claim will succeed, this is dependent on the opinion of a medical expert. 30% of cases taken on by Claimant lawyers do not proceed beyond the investigation stage and Claimant lawyers receive no fees for these investigations, millions of pounds worth of work is written off annually due to failed cases. Efficiencies are not gained by limiting this crucial phase of the process. Instead, cost savings can be driven by striving for earlier and more efficient conclusion of cases. In tandem, this benefits patients by reducing the stress of the litigation process and allows greater retention of damages.

Impact

Patients

Expert clinical negligence solicitors deal with highly challenging cases – from supporting those harmed by birth trauma, to elderly and vulnerable patients and their families, to those who have experienced mental health issues.

The types of cases we work with impact some of the most vulnerable people. Some examples of the sorts of cases classed as low-value (where the maximum award is under £25,000) that would be affected by the former government's FRC proposals include:

- **Birth trauma**, like RG, a young woman who suffered a delayed diagnosis of an ectopic pregnancy,
- **Mental health**, like RA & WB, two cases of suicide in the same mental health unit within 18 months,
- **Fatalities in older people**, like LN, an 86-year-old woman where failure to assess the risk of falling led to her death,
- **Fatalities in children's treatment**, like CB, a two-year-old girl who died from flu due to clinical negligence.

Without specialist support from SCIL members, individuals harmed by clinical negligence will have limited access to legal advice. We anticipate that much of the caseload currently triaged by our members will shift to MPs' offices and other non-specialist support services.

Costs

Introducing fixed recoverable costs in clinical negligence is likely to prevent solicitors from taking on these types of cases, This would disproportionately impact more complex cases, limiting access to justice for people with literacy issues, translation requirements and learning disabilities where claimants need additional time and support to understand the legal process.

As experts on these types of claims, much of our time is spent triaging cases and advising potential Claimants on the viability of their case, without charge. Each year, our members triage approximately 100,000 clinical negligence cases without charge, with only about 2% of these cases having potential for litigation. If fees are disproportionately capped, firms may be forced to withdraw from this type of work. Loss of this expertise work will not only remove a key triaging element but increase the administrative burden on the NHS, MPs, and local authorities.

These changes are also expected to increase the number of self-represented claimants, further burdening NHS Resolution, the court system and increasing costs to taxpayers.

How will the SCIL Scheme work?

With these guiding principles in mind, SCIL has drafted the following scheme as an alternative to the current FRC proposals. The following scheme will deliver cost savings while maintaining access to justice for patients (*please see glossary below for clarification of terminology*):

1. The **Pre-Action Protocol (PAP)** for Clinical Disputes should continue to govern these claims but with some added requirements (see below) to facilitate earlier conclusion.
 - a. It may be advisable for those additional requirements to be incorporated into a lower-value Pre-Action Protocol (LV PAP) which would have the benefit of creating a lower-value framework and achieving consistency of approach.
 - b. All cases falling within the lower-value scheme to be subject to a Limitation moratorium, the terms of which should be agreed as part of any LV PAP.
 - c. If the case falls out of the lower-value scheme then a Limitation extension of 6 months will automatically apply.
2. The Claimant issues a **Letter of Notification (LON)** to notify a defendant as soon as they know a claim is likely to be made, but before they are able to send a detailed Letter of Claim (LOC). The LON should indicate that the Claimant believes the value of the claim to be at or below £25,000 and should reference the claim therefore falling into the low-value scheme.
3. After sending a LON the Claimant and Defendant lawyers should hold a 'road map' discussion on a 'without prejudice' basis to agree on how the case will proceed.
 - a. This should be by telephone or video call.



- b. The purpose of a 'road map' discussion is to allow the lawyers to agree the future plan for resolving liability and then quantum with dates for actions.
 - c. If the Claimant solicitor believes there is any need to instruct more than one expert or to involve counsel in any way during the investigative stage this should be discussed but the presumption will be that this is by exception.
 - d. There should also at this stage be a discussion about a 'without prejudice' exchange of expert evidence particularly if there is any reason that the Claimant will not be able or is not willing to serve their expert evidence with their Letter of Claim (LOC).
 - e. There may for example be no expert evidence if there is a SUI report or Inquest outcome which removes the need for.
4. The Claimant to serve their expert evidence with their LOC if required (even if that is just in the form of a letter from an expert). The Defendant then to serve their expert evidence with any denial of liability.
 - a. Where possible the Claimant will also make an offer to settle at the same time as serving their LOC with supporting evidence.
 - b. If this is not possible the Claimant to explain why and when they will be in a position to quantify the claim.
5. If the matter is not settled post Letter of Response (LOR) the lawyers for both parties to arrange a telephone call to attempt settlement.
 - a. Alternative means of settling the case also to be considered if appropriate. These to include settlement handled by the parties senior solicitors rather than counsel and other forms of settlement considered by both parties to be appropriate.

Exclusions

We do not believe there is any need to 'exclude' certain categories of cases from this scheme. However, we have already raised with NHR whether an alternative way of managing stillbirth and neonatal death cases can be considered, simply because the needs of bereaved parents are quite different from other claimants.

About the Society of Clinical Injury Lawyers (SCIL)

SCIL is a member organisation for specialist claimant solicitor firms dedicated to the field of clinical negligence. We have existed since 2010-11 and are now made up of over 80 member firms across the country.

SCIL members are professional experts in clinical injury law who act for claimants. Our objective is to ensure that those harmed by clinical negligence receive the support that they deserve to access justice and that organisations learn lessons from incidents of clinical negligence to improve practice in future.

More information can be found at www.scil.org.uk. If you have any questions or would like further information, please contact SCIL@crestviewstrategy.com.

Glossary

Claimant – a person bringing a claim against a Defendant (NHS or private provider).

Defendant – person / organisation defending the claim, who injured the patient.

FRC – fixed recoverable costs – a statutory scheme fixing the costs a Defendant (NHS or private providers) pay to the solicitor if a claim is successful and compensation is less than £25,000. It is likely that if FRC is introduced any shortfall in costs would be deducted from the Claimant’s damages by the solicitors.

Liability – elements of breach of duty and causation that must be established for a claim to succeed.

Limitation – a date upon which the claim must be issued at Court or it will be statute barred because it has been brought too late, this is usually three years from the negligent act.

LOC – Letter of Claim - a letter issued by the Claimant to a Defendant setting out the allegations of breach of duty and causation.

LON – Letter of Notification - a letter issued by the Claimant to a Defendant informing it of the result of a Prequalification Invitation.

LOR – Letter of Response – an open letter issued by the Defendant outlining the response; if the claim is admitted, part-admitted or denied.

NHS Resolution – the organisation that manages clinical claims on behalf of NHS Defendants.

Pre Action Protocol for Clinical Disputes – a series of steps taken by the parties to consider allegations before a claim is ‘issued’ at Court.

Quantum – the value of the compensation/ damages to be paid to the injured person.

SCIL – Society of Clinical Injury Lawyers – an organisation of legal firms who represent those harmed by clinical negligence.

SUI – report or investigation undertaken by the NHS to consider if the circumstances of the injury and if lessons could be learned.