



The Bar Council

The Remuneration Committee of the Bar Council response to the Fixed recoverable costs in lower damages clinical negligence claims – a supplementary consultation on disbursements

1. This is the response of the Remuneration Committee of the Bar Council of England and Wales to the supplementary consultation on disbursements for Fixed recoverable costs in clinical negligence claims.¹

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Background

4. This Consultation concerns the Lower Damages Clinical Negligence Claim Fixed Recoverable Costs scheme ['LDFRC']. LDFRC applies to case with a value at settlement or judgment from £1,501 to £25,000 inclusive. The consultation is only concerned with disbursements within the scheme, in particular:

¹ <https://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-damages-clinical-negligence-claims-a-supplementary-consultation-on-disbursements>

- For all LDFRC scheme claims all expert report fees and ATE [After the Event Insurance] premiums covering the cost of expert reports will be separately recoverable
- For all LDFRC scheme claims involving protected parties and children counsel's fees and court fees in relation to Part 8 approval hearings will be separately recoverable
- For LDFRC scheme claims which do not involve children counsel's fees and court fees will not be separately recoverable

Consultation Questions

5. The Consultation questions are:

- Do you agree with the proposals on disbursements within the FRC scheme for lower damages clinical negligence claims?
- Do you have any alternative proposal?

Answers

6. The Bar Council Remuneration Committee answers these questions as follows:

Q.) Do you agree with the proposals on disbursements within the FRC scheme for lower damages clinical negligence claims?

Disagree

Explanation:

The Bar Council restricts its comments to the issue of Counsel's fees.

The Bar Council

- acknowledges that during the CJC mediation process in 2017-19 Counsel's fees were included in proposals for costs put forward by both the Claimant's and Defendant's representatives;
- rejected the fees put forward by the Defendant's representatives in that process as insufficient;

- supported the fees advocated by the Claimant's representatives as sufficient to allow for instruction of Counsel where appropriate.

However, the fees proposed for LDFRC are significantly too low. First, they are markedly lower than those that the Bar Council supported In 2019. Secondly, their value has been eroded further by inflation since 2019. Adopting the general SPPI (the 'Services Producer Price Index') as recommended by the CJC in its Costs Review Final Report (May 2023), the figures proposed for the LDFRC are at least 15% lower than they were when the CJC submitted its report.

No system of Fixed Recoverable Costs ['FRC'] can operate successfully if costs are fixed at an inappropriate level. The failure to ensure that rates are fair and reasonable will significantly restrict access to justice. FRC in clinical negligence cases is particularly difficult as the lawyers involved, both Counsel and solicitors, are highly specialised. An FRC scheme which seeks to reduce legal fees but does not allow for adequate remuneration for appropriate legal representation will not command the support of the professions and will inevitably restrict access to justice.

In particular, in relation to the Bar, as we understood the position during the CJC process, neither the claimants nor the defendants wanted to introduce a scheme that disincentivised the use of counsel.

We suggest that it would not be wise to do so. The benefits which specialist counsel can bring to a case include: (1) independent advice - the 'fresh pair of specialist eyes'; (2) acting as 'quality control', helping weed out weak cases and identifying those with merit; (3) focused analysis and formulating and/or pleading the case; (4) testing the evidence with the forensic skill and experience of a trial advocate; (5) a cost-effective service.

In his Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs, Lord Justice Jackson recognised the merit of using counsel: see e.g. (§5.2-5.3)

"The involvement of counsel at an early stage, both in advising and drafting, brings substantial benefits. Independent counsel bringing a fresh eye to the case can focus the litigation and sometimes bring about settlement."

A scheme which does not properly provide for the involvement of counsel (a) risks more cases being poorly prepared and analysed, more cases under-settling and more cases being pursued when they should not be; (b) would have a substantial negative impact on the junior Bar and imperil the pool of advocates for both claimants and defendants in higher value claims in the future.

The use of counsel in clinical negligence claims with a value of £25,000 or less is more common than might be thought. The only data of which we are aware is that submitted by SCIL (The Society of Clinical Injury Lawyers) to Professor Fenn during the CJC process. Professor Fenn's analysis of that data showed that Counsel was instructed in 142 out of 283 cases (50.2%). Of those 142 cases, 73 settled pre-issue. Professor Fenn was able to identify the mean cost for Counsel at each stage of the litigation. Where counsel was involved, the mean Counsel's fee per case was £3,382. Averaged out across all 283 cases in the dataset, that equated to just under £1,700 for counsel per case.

Plainly, those figures should be updated by the SPPI to give a real current value.

Against that background the Bar Council considers that it is reasonable to consider the issue of Counsel's fees in LDFRC cases afresh.

Our view is that in circumstances when restrictions on costs recovery will inevitably impose significant restrictions on the ability of legal representatives to pursue meritorious clinical negligence claims, provision for specialist legal advice is a valuable independent check, allowing for a second opinion which is helpful to lay and professional client alike.

The Bar Council does not consider that the provision of a rule that would allow for specialist legal advice would give rise to the problems suggested in the Consultation. We note that provision for specialist legal advice on merits and quantum in cases to which FRC apply is now an established feature of the CPR, see, in particular CPR 45.34 (Pre Action Protocol claims), CPR 45.46 (Fast Track Claims), complexity Band 4), and S2 and S7 Table 14 CPR 45. 50 (Intermediate Track Claims). In these instances it has been accepted there are adequate control mechanisms in place; it is necessary to show: (1) that a Specialist Legal Representative had been instructed; and (2) that such instruction was justified.

These provisions provide an established mechanism that can also be used in LDFRC cases.

The Bar Council does not accept that there is evidence or reason to believe that Counsel will be used inappropriately if LDFRC allowed separate recovery of Counsel's fees. That has never been the result of allowing the use of Counsel. To the extent there is any reason for protection, the focus should be on the control mechanisms to ensure that Counsel's fees are only separately recovered when they are justified.

There can be no 'in principle' objection to the separate recovery of Counsel's fees. The recovery of such fees is entirely consistent with existing provisions of the CPR as set

out above. In particular, the Bar Council observes that Sir Rupert Jackson did not consider clinical negligence cases were appropriate for FRC, save in very particular circumstances. In the context of the FRC consultation, both Sir Rupert Jackson and the Ministry of Justice agreed that clinical negligence cases were complex and appropriate for allocation to the multi-track, save in very particular circumstances: when liability and causation are admitted, expert evidence is limited, and any trial will not last more than 3 days.

Patients injured by negligent medical care are amongst the most vulnerable in society. Clinical negligence claims, even low value claims, are often detailed, complex and difficult. They require specialist and experienced legal advice and expert evidence. The facts upon which such claims are based, the injuries involved, and patients' individual circumstances are all highly variable; more so than in other areas of litigation where FRC schemes exist. The value of damages recovered is a poor predictor of the extent of the legal and expert input required to establish liability and ensure that such patients receive proper compensation for their injuries.

Clinical negligence cases clearly fall within the category of cases in which provision for separate recovery of Counsel's fee is justified. These cases are more serious than those on Band 4 of the Intermediate Track in which the costs of specialist legal advice are justified under CPR 45.46 and are certainly more serious than those cases where a fixed fee for advice on quantum is allowed under CPR 45.34.

The Bar Council does not agree that Counsel is rarely used in lower value clinical negligence and disputes the inference in the consultation that Counsel's advice in such cases would be of limited benefit. Clinical negligence claims worth up to £25,000 represent a substantial proportion of successful clinical negligence claims. LDFRC will affect a high proportion of clinical negligence claims. Denying access to Counsel's advice in such a large volume of claims would be seriously detrimental to access to justice, and is unjustified, particularly when such access is permitted in other claims worth up to £25,000 and intermediate track claims which are less complex.

In LDFRC claims which do not settle, the working assumption is that such cases will proceed on the intermediate or multi track. Our concern is that the failure to make provision for Counsel's fees to be recovered as a separate expense will give rise to an anomaly. If a claim should settle at the pre-action stage, Counsel's fees will not be recoverable; however, if it should continue, the costs of such advice will be recoverable in multi-track cases and will probably fall to be recovered within S2 Table 14 for intermediate track cases. In our view, making provision for Counsel's advice to be separately recoverable within the LDFRC scheme will provide consistency and a valuable resource for claimants in these difficult cases

Q.) Do you have any alternative proposal?

The Bar Council submits that the CPR provides several examples of how an appropriate rule could allow for the separate recovery of specialist advice in cases to which LDFRC applies, such as CPR 45.34 and CPR 45.46. The language used in the CPR provides the appropriate control mechanism.

The Bar Council proposes the following draft rule in a claim to which LDFREC applies, namely that that the costs:

may include an additional amount for the advice of a specialist legal representative where (a) that advice is within the legal representative's specialist expertise; and (b) the use of that person to provide such advice is justified.

We repeat the point made above that, if such a rule is appropriate for band 4 intermediate cases, it is also suitable in LDFRC and justified for the policy reasons set out above.

We note that, in the example of CPR 45.34 and CPR 45.46, the costs of additional advice are fixed. We consider it will be impossible to identify a figure for fixed costs for such an advice. As we have noted above, clinical negligence cases cover a very wide range of different factual and legal issues, making it difficult to estimate a range of fixed costs for advice. In so far as provision for fixed costs may be possible, consideration may have to be given to a banding scheme similar to that for Intermediate Track cases. However, we doubt that such a banding scheme is appropriate for LDFRC, as any banding scheme also involves an exercise of judicial discretion.

In the circumstances, the Bar Council considers that any fee recoverable under the rule we suggest should be subject to assessment.

Bar Council Remuneration Committee

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