KYSEN

FOIL
Prepared by Kysen PR

Date	October 2015
Publication	Legal Futures Personal Injury
Type of publication	Legal

Breaking the dam

As the battle lines are drawn between claimant lawyers and the government for a head-on clash over fees, how have clinical negligence solicitors coped with enhanced court fees and cost budgeting delays and could arbitration come to the rescue? **Nick Hilborne** finds out

Ian Pryer

It was not a good summer for clinical negligence lawyers. Things started badly in June, when the Department of Health announced that it was planning to cap fees for cases worth up to £100,000. They got worse in July, when *Litigation Futures* reported that after-the-event insurers were being summoned to the Ministry of Justice to discuss changing the rules on recoverability of premiums. Finally in August, when nothing usually happens, it emerged that the £100,000 limit was not good enough, and the Department of Health was considering a higher fee cap of £250,000.

The only positive development, if that's the right way of describing it, was the acceptance by the senior judiciary that the courts were grinding to a halt by suspending costs budgeting for High Court clinical negligence cases from October. The move was not formally announced, but confirmed by the Judicial Office in early July.

Ian Pryer, senior partner of York firm Pryers Solicitors, says costs budgeting has been causing "huge delays" in the system. "Budgeting is a valuable concept in allowing management of cases generally, but we haven't got enough judges, with enough time.

"It's taking three to six months to get to a case and costs management conference (CCMC). Costs have been going a bit mad with personal injury firms coming in from outside to do clinical negligence, but not understanding it and spending far too much time putting cases together."

Mr Pryer says the other reason why legal fees are so high is delays caused by defendants refusing to settle cases. "It staggers me still to see the amount of delay on a case which could be settled today," he says. "It often takes two to three years to settle a case. Defendant firms are too slow to react and investigate."

Touch of frost

Mr Pryer says the huge rises in court fees, introduced in March this year, has "sent a shiver" through the world of clinical negligence. "It's a cash-flow issue. We have to pay out a lot more, a lot earlier. It's about taking on winners, not losers, but it's also about being able to fund the case. The majority of cases that litigate succeed – probably nine out of 10."

As a result, Mr Pryer says it is the NHS Litigation Authority (NHSLA) that will ultimately "pay the price" of enhanced court fees.

He says the government's plans to introduce fee caps or fixed fees would "rip the heart out of clinical negligence work". He estimates that around eight out of 10 cases settle for up to £100,000, and 95% for up to £250,000.

He continues: "The future depends on whether fixed fees come in and the level of those fees. If they are too low, it will not be workable and firms will not take on clinical negligence cases. They are not like the basic sort of personal injury cases. You have to put time and money into them. The NHSLA is under-resourced and running far too many cases. With fixed fees, what are the incentives for defendants to settle? Access to justice for clients in many smaller cases would fall away."

Terry Donovan, clinical negligence group co-ordinator for the Association of Personal Injury Lawyers and a partner at City firm Kingsley Napley, says: "Of course the Department of Health would want to limit fees because they are paying for them. It is important that the government

acts impartially. Citizens have a legal right to redress when government departments let them down.

"Why should your right to redress be different because it is a personal injury accident rather than clinical negligence? The defendant, the NHS, is only paying our fees when it loses, when it has been negligent and someone has been injured. We have already have some heavyweight checks and balances with the Jackson reforms. The only costs you get are those which are reasonable and proportionate – we don't have carte blanche."

M Donovan describes the courts as "hideously underfunded", with IT that was "no good" and underpaid staff. "There is a problem with the courts and costs budgeting, but it's not of our making. Our cases take longer than they should and we have to carry the costs of that. Enhanced court fees is yet another drain on our businesses. It's a huge increase and we have to bear it. We are being asked to prop up a public service."

Mike McKenna

Fix budgets, not fees?

However, Mr Donovan says costs budgeting could be replaced with a system of fixed budgets, at least for the more straightforward injuries.

"We've developed IT to do it and a whole science of predicting our costs – it's a huge investment of time and money. We've expanded our department to include a bigger in-house costs team. I'm not against fixed fees in principle, as long as they reflect the real cost."

It is no surprise that Mike McKenna, chair of the clinical negligence sector focus group of the Forum of Insurance Lawyers and a partner at Hill Dickinson, has a different perspective on the Department of Health plans.

"The case for lower-value claims is unanswerable, and the question is up to which level. Defence lawyers have been operating under fixed costs for a while now, and there is certainly scope for claimant lawyers to change their business models."

Mr McKenna says the NHSLA has imposed on defendant lawyers a system of fixed costs for cases worth up to £100,000, and the government has made it clear it did not want 'Rolls Royce' treatment for every case. He believes there is scope for a system of fixed or capped costs up to a limit of £100,000, but £250,000 "could be considered a little high".

However, Mr McKenna is not in favour of enhanced court fees. "The new fees are too high. I agree with the Law Society - I don't think it helps anyone injured to bring a claim." The rises are yet to make an impact on this work, however, perhaps because many cases were issued before they came in, or because people are avoiding issuing proceedings.

He says claimant lawyers are also concerned that restricting recoverability for after-the-event premiums will mean they process fewer claims, but this could trigger a move to larger firms "with the systems to cope".

Mr McKenna doubts whether all the changes to clinical negligence litigation will eventually result in a smaller number of claims, though some could be brought by litigants in person.

"I am always amazed by the ingenuity of solicitors," he says. "They will find a way round things and adjust their business models, and ensure that if someone is injured, there is good-quality representation."

Ed Fletcher, chief executive of Southport claimant firm Fletchers, says huge rises in court fees are putting an "unbearable strain" on the cash flow of smaller law firms.

"They won't be able to sustain the vast and unnecessary increases in court fees and it will have an impact on access to justice. It could be part of a grand plan by the government to get complex personal injury cases out of the court system. Or it could be an attempt to flush out the more spurious cases.

"Some of our clients have already has to pay £10,000. Who has that kind of money in their back pocket? We are assisting them because we have faith in these cases and only issue when we have a realistic prospect of success."

The case for ADR

Mr Fletcher says arbitration and other forms of alternative dispute resolution (ADR) could be the way forward. "I am very keen for the parties in clinical negligence cases to embrace ADR

continued on page 6

Ed Fletcher

because the court process is creaking at the coalface, and you can tell it is under strain.

"Clinical negligence and ADR were not historically seen as good bedfellows, because of the complexity of cases, the number of experts and the number of issues – which are far greater than in an ordinary PI case. That is nonsense. Even if ADR could be used to narrow down the issues, that would be useful. We know that our customers want us to embrace ADR because they want their claims settled as quickly, consistently and fairly as possible – this is central to our plans."

Mr Fletcher says there has been "a very clear edict" from the upper echelons of the NHSLA that ADR is the way forward and mediation should be encouraged by them in every available case.

"We just need to make sure that this percolates down through the lawyers and into the defence panel law firms. I genuinely believe that there is a desire on behalf of the NHSLA to see it being embraced.

"With a number of things happening at the same time, the political will and an appetite by claimants and law firms, there is only one sensible destination – the full embracing of ADR."

Alan Mendham, partner at clinical negligence specialist Gadsby Wicks in Chelmsford, Essex, says his firm would keen to use the Personal Injury claims Arbitration Service (PIcARBS) launched by Andrew Ritchie QC in June and designed for claims worth over £50,000.

"Arbitration would reduce fees and time spent on the case. If I have a claim in the High Court, it comes back with a hearing date three or more months away. Nothing happens and the parties dig into their positions. You could e-mail an arbitrator immediately. You would not have to wait three to four months for a hearing and you could get a decision within a day or so.

"Another huge saving would be trials. One of my colleagues has a trial in the High Court earlier this year. You get a four-month window, but what you don't get is a guaranteed start date. You don't find out until the Friday if a trial is going to start on the Monday. In this case we were told every day for a week that the hearing would start the following day. Finally, on Friday, a deputy High Court judge was brought in to do the trial.

"Unlike an arbitrator, you don't know which judge you will get. He or she may never have seen a clinical negligence case, or know what the tests are. You can explain it, but that takes time. With arbitration you know the arbitrator is an expert."

"Amazing" budgets

Mr Mendham says that before the introduction of costs budgeting, there were not many contested case management hearings, with the parties agreeing many of the directions and emailing the master.

"Now, you're waiting nine months for a CCMC and everything is being argued. The NHSLA is taking a completely different approach to the one it took before. It's delaying valuation of the claim and any attempts to settle it. Instead of agreeing on the experts you might require, now they are saying you should not have an expert in that particular field.

"Some of the defendants' budgets are just amazing. They are so low it is quite staggering how the work could be done for that amount. There have been some suggestions from the masters that defendants are putting in unsustainably low budgets."

Mr Mendham adds that arbitration would only catch on if the NHSLA agreed. "I'm hopeful, but it remains to be seen."

PIcARBS aims to "break the dam" that has led the sector to fall behind others in its use of arbitration. Mr Ritchie is clear about the challenges facing clinical negligence lawyers. "You've got civil court fees, the prospect of fixed fees for clinical negligence cases, delays and *Mitchell* strike-outs. With arbitration you've got none of this. It's about breaking down the inertia. Firms will not want to send lawyers to arbitrations unless they've has training. The reality is that the cases will come through next year, once the firms have trained themselves."

Mr Ritchie says he is waiting for a reply from the NHSLA on whether it is prepared for 50-100 clinical negligence cases to be put through the system. He also says that one leading firm of defendant lawyers is considering recommending the use of arbitration to its insurance clients.

"It's all pushing personal injury towards arbitration and the whole industry knows this will happen in a certain percentage of cases. You can feel it in the wind. Now it's a matter of the industry tooling up, grasping it and doing it."