RESPONSE TO CIVIL JUSTICE COUNCIL'S CONSULTATION ON COSTS: Implications of Belsner

Submitted 14th December 2022

1. About AvMA

1.1 Action against Medical Accidents (AvMA) is the national patients' charity for patient safety and justice. We provide free independent specialist advice and support to patients and families who have been affected by avoidable harm in any kind of healthcare. This provides us with a unique and extensive insight into the experience of patients and families following such patient safety incidents. We use this experience and our knowledge of the healthcare system to work with others to develop policies, systems and practice to improve patient safety and the way that patients and families are treated following avoidable harm.

1.2 AvMA gives advice and information through its public facing services, it does not issue proceedings or act on behalf of patients or would be claimants. As such AvMA does not hold itself out as having an particular expertise on costs.

1.3 In responding to this consultation and the implications of Belsner we have looked to the type of concerns raised by the public on costs related issues whether on our Helpline and/or Written Advice and Information services.

1.4 For full details of what AvMA does and our experience please see the information provided at paragraphs 1 and 2, in our response dated 13th October 2022.

1.5 Currently there is no fixed recoverable costs (FRC) regime applicable to clinical negligence claims. The government has consulted on a FRC regime for clinical negligence claims and consulted on the Civil Justice Council (CJC) proposals for Fixed Recoverable Costs in low value clinical negligence claims.

1.6 AvMA is not opposed to the concept of FRC per se but has significant concerns about the potential impact and unintended consequences of introducing such a regime into clinical negligence litigation. Clinical negligence claims, even those which are low value are complex. Clinical negligence actions enable patients and/or their families to hold the NHS and private healthcare providers to account, to this end there is public interest in ensuring there is access to justice so claims which should be brought, can be brought.

1.7 For details of AvMA's concerns around fixed costs in clinical negligence claims, please see our detailed consultation responses as follows:

1.6.1. Pre action protocol (PAP) – Submitted 27.01.22
1.6.2. Fixed recoverable costs in lower value clinical negligence claims – Submitted April 2022
1.6.3. Extending FRC: How vulnerability is addressed – Submitted 20.06.22
1.6.4. CJC working party on costs: consequences of extending FRC; digitisation of court process; use of IT in court system generally; portal systems; vulnerability; costs under PAPs – Submitted 13.10.22

AvMA's comment on the implications of Court Appeal decision in Belsner:

2. Contentious and non-contentious costs

2.1 AvMA considers that litigation should be considered a last resort. In our response on pre action protocol, we make clear our view that greater emphasis should be placed on compliance with the Pre Action-Protocol (PAP) for Resolution of Clinical Disputes.

2.2 We also consider it important that parties should be encouraged to consider all forms of redress, even before the protocol stage. We refer to our response to the consultation on pre action protocol, we have drawn attention to the fact that several opportunities exist even before the PAP stage to resolve most substantive issues in most cases, certainly in low value claims. Those opportunities proper application of the statutory duty of candour The potential to expand those pre PAP opportunities exists with the introduction of the Patient Safety Incident Response Framework (PSIRF)

2.3 It is clear from the Court of Appeal judgment in Belsner, that lodging a claim in the portal system does not make it a contentious claim. The court noted that there was artificiality in the distinction between non-contentious and contentious claims.

2.4 A claim is non contentious unless and until proceedings are issued in the County Court. Once proceedings are issued, it has the effect of turning non-contentious work done into contentious work.

2.5 It is important to note that currently, there is neither a FRC regime in place for any clinical negligence claims, neither is there a portal system. Should such a regime and/or a portal be introduced for clinical negligence work, clarification is required as to whether work done through the portal is contentious or non-contentious.

2.6 A clear definition of what amounts to non-contentious work is required.

2.7 Consideration needs to be given to the status of other steps available that can help to achieve resolution even before the pre action protocol stage. For example, using the Healthcare providers complaints process or providing support to would be claimants going through the PSIRF process. Mediation might also

be considered and clearly identified as being contentious or non-contentious business.

2.8 AvMA suggests that work done in the pre action protocol stage should be given proper consideration and gravitas, many of the pre action processes offer an opportunity to stave off proceedings. Failing that, the information gleaned from those processes may be helpful in identifying and formulating any subsequent claim, including the Letter of Claim.

2.9 There is evidence that if the healthcare providers complaints process is used by a patient/would-be-claimant, seeking explanation, answers and information and that process does not deliver satisfactory responses then this can drive patients to litigation. To that end, arguably modes of redress available in the pre action stage may be work done in anticipation of court proceedings and therefore potentially non contentious.

2.10 As matters currently stand, if this work is included in the definition of non-contentious then it would retrospectively convert to contentious work in the event that proceedings are issued.

2.11 The pre action protocol advocates the use of alternative dispute resolution, including mediation, as a means of settling issues early. Mediation may also be open to the parties before the pre action protocol stage – this approach is being promoted by NHS Resolution through their preferred mediation providers. If this achieves resolution of the potential claim and heads off litigation, then arguably this step should be at the very least, non-contentious business.

2.12 There is a lack of advice, information, and support for would be claimants in the pre action protocol stage. If the value of utilising these preliminary stages were recognised by considering them to be non-contentious business which attracts remuneration, lawyers may be more encouraged to assist in these processes. In turn, this may help to create a more level playing field for would-be-claimants accessing these processes as lawyers will assist in the knowledge that if they achieve resolution they will be paid.

2.13 If patients feel supported in the pre-PAP stage, have proper advice, information, and guidance there is a better chance that they will receive the answers they are looking for. This leaves the door open to early resolution, ironically this is likely to head off the need for reverting to litigation. However, this does need careful consideration as we do not suggest that these pre-PAP opportunities to resolve cases should be “legalised” and incorporated as part of the litigation process. Rather, that these processes should be recognised and valued for the opportunities they present to resolve matters pre litigation.

2.14 There are also some inherent anomalies with the current system that allows non contentious costs to become contentious costs simply because proceedings have been issued. Does this mean that cases requiring court approval of an

agreed settlement, for example, infant settlement cases, that all the costs retrospectively become contentious costs because Part 8 proceedings were issued? Would this be the case, even if the case was resolved in the pre action stage?

2.15 Some judges giving approval of clinical negligence settlements will not allow costs to be deducted from the award. If clinical negligence claims were to become subject to a FRC regime, under the terms proposed by the CJC this means that solicitors would not be able to recover any shortfall in their costs from client damages. The effect of this, solicitors will simply not take these cases.

2.16 The effects of the above paragraph are not a direct consequence of the Court of Appeal's decision in Belsner. However, it demonstrates that there is a clearly a need for a balance to be struck between protecting a client's damages and ensuring there are adequate financial incentives for clinical negligence specialists to represent claimants with low value claims. Part of that balance is likely to be found by ensuring that the fixed rates of remuneration offered under a FRC regime, properly reflect the market rate of remuneration.

2.17 The problem is potentially compounded if determination of whether a client is vulnerable or not, is delayed until the conclusion of the case. This is a recent CJC proposal. Acting for a client where court approval is required is more time consuming as more care is required.

2.18 In the case of a child, it is the additional time to take instructions from a next friend and to be sure that they are acting in the minor's best interests. Another example might be solicitors acting for elderly people, or those with certain types of learning disabilities, client capacity can fluctuate.

2.19 It can be very difficult for lawyers to know if a client has capacity to give instructions or whether they should revert to a next friend. These are vulnerable clients who are just as entitled to representation when something has gone wrong, as someone who is not a minor or for whom capacity is not an issue.

2.20 There is a very real risk if clinical negligence claims do become subject to a FRC regime, and the assessment of vulnerability is delayed until the conclusion of the case solicitors will not take vulnerable clients on as the risk of not being able to recover their costs is too great.

2.21 Injured patients find the basic concept of costs recovery difficult to grasp. Many feel overwhelmed not just by their injury, but by having to seek out a lawyer in the first instance. The message around what constitutes contentious and non-contentious costs, needs to be clear, consistent, and easy to understand. Currently, this is not the case. It would also be very difficult, if not impossible for lawyers to advise clients on this issue, especially if they are vulnerable and/or under a disability.

3. **Does a solicitor need to ensure that a would-be-client is in a position to give informed consent to enter into a CFA?**

3.1 The recent judgment in Belsner made clear that solicitors do not owe would be clients/claimants a fiduciary duty when it comes to negotiating the terms of their retainer and Conditional Fee Agreement (CFA). This means that when a would-be-client comes to a lawyer, the lawyer is not expected to explain to the would-be-client that they might want to shop around for a more competitive hourly rate.

3.2 It is important to appreciate that many would-be clinical negligence claimants often feel let down by the healthcare profession, many find it difficult to know who to trust or how to challenge other professionals. If would-be-clients do not know they can shop around, they are unlikely to do so. To this end, there is already an inequality of bargaining power when it comes to negotiating the terms of the retainer and/or CFA which is essentially a contract between solicitor and client. This is to the would-be-claimant's disadvantage.

3.3 Solicitors are obliged to provide the would-be-client with the best information about overall costs of the case. This includes providing information to the would-be-client on their liability for any shortfall in solicitors costs; likely disbursement costs; costs estimate to settlement; estimated value of damages. The judgment in Belsner, makes clear that the solicitor should also advise the would-be-client on the fixed sums that are allowable under any FRC regime.

3.4 In clinical negligence claims, clients should also be advised of the cost of After-the-Event (ATE) insurance and that ATE premiums are recoverable in successful cases. ATE insurance is not straight forward, it is usually split into two parts. Part A, represents the cost of liability and causation expert reports – this element is recoverable in the event the claim is successful. Part B, covers other factors such as the would-be-claimants failure to beat a Part 36 offer and/or adverse costs award, Part B is payable by the client out of their damages.

3.5 Giving the client the best information about overall costs is about providing clients with clear and simple messaging that they can understand. For example, an effective simple message might be advising the client that they will receive as a minimum say three-quarters of the damages awarded to them.

3.6 Providing a simple message is difficult for solicitors to deliver on where they are unable to say whether proceedings will have to be issued. It can be difficult to predict the stage at which a clinical negligence case will settle and therefore difficult to advise on this with any accuracy. The majority of clinical negligence claims do settle as opposed to go to trial, however, it is often the case that settlement only occurs once proceedings have been issued. It will also be difficult for solicitors to advise on whether the costs are contentious or non-contentious and what the effect, if any, of proceeding through any portal might be.

3.7 If FRC are introduced for clinical negligence claims, the solicitor will have to anticipate what stage of the proceedings the case settles. If it is the solicitor's view that the case will settle at the pre issue stage and that the costs will therefore be considered non contentious costs the client will need to be advised of this and the cost implications.

3.8 There is a risk that if solicitors advise that a case will settle in the pre issue stage and explain the cost consequences that flow from that, but in fact the case needs to be issued that this will create a solicitor/client conflict. Solicitors, having advised on the implications of non-contentious costs will then have explain that their original cost predictions must be revised to contentious costs and explain the cost ramifications associated with issuing. This will cost the client more money by way of increased deductions from damages.

3.9 Not only is the move from non-contentious to contentious costs ill-defined and difficult for clients to understand, it may also disincentives solicitors from progressing the client's case as they ought to. For example, it is likely to put pressure on solicitors to recommend accepting a low or inadequate offer of settlement, simply to avoid issuing proceedings and explaining the cost implications of doing so.

3.10 The solicitor may be mindful that the additional costs and time involved in explaining to the client that issuing proceedings, will mean costs will become contentious are not likely to be recoverable. In those circumstances, the solicitor may take the view that they are better off to cut their losses and those of the clients and accept the low offer, rather than fight the claim and risk the increase in costs, the shortfall of which will be paid by the client out of their damages.

3.11 As matters stand, there is neither certainty or clarity for the would-be-claimant or the lawyer advising them. The situation heightens the risk of a conflict situation arising between solicitor and client and this is to be avoided.

4. Can the solicitor charge more than the costs recoverable from the other side?

4.1 If a FRC regime were introduced in clinical negligence claims, this would be problematic. Many low value clinical negligence claims are complex, unlike low value personal injury claims which do not tend to rely on expert opinion to identify negligence, rather the application of statute to the facts of the case. Low value clinical negligence claims and low value personal injury claims cannot be treated in the same way, Many would-be clinical negligence claimants are not motivated by money, but by seeking the truth of their or their loved ones injury or death. They want lessons to be learned, money is often considered a blunt tool especially where the sums awarded are low.

4.2 AvMA is not against the concept of Fixed Recoverable Costs in clinical negligence claims per se. However, the rates suggested by Civil Justice Council

(CJC) in their proposals for fixing costs in low value clinical negligence claims are so low as to commercially unviable for many clinical negligence firms.

4.3 FRC in low value clinical negligence claims are intended to sit with a CFA. The Law Society, model CFA is drafted to cover contentious costs although it is described as not being a Contentious Business Agreement. Does the model CFA cover non contentious work? This situation is unclear and confusing for lawyers, it is impossible for clients to understand their position properly and this needs to be resolved.

4.4 If introduced, the low FRC rates currently proposed would mean that inevitably the claimant will have to pay the shortfall in costs from their damages.

4.5 There are no safeguards to protect the shortfall in the commercial rate charged in the CFA and the low rates offered under the proposed FRC scheme. Inevitably this will result in large sums being deducted from the claimant's award of damages.

4.6 The issue of whether a solicitor can charge more than they are likely to recover is potentially a very real one if FRC is introduced to clinical negligence work.

4.7 In the case of non-contentious work, solicitors may charge a rate which is considered to be fair and reasonable. With contentious work, the rate need only be reasonable. Solicitors need to explain to their clients what "reasonable" means in practice. This is not an easy message, particularly when considering that reasonably incurred costs may not be allowed if the overall bill is considered unreasonably high at assessment.

4.8 Solicitors may need to warn would-be-clients that in some cases, the deductions for the shortfall in solicitor's costs may result in the claimant receiving little or nothing by way of actual damages.

4.9 It is important that clients understand that they will be responsible for the shortfall in costs. It is unsatisfactory to expect a solicitor to explain to a client that for the solicitor prepared to act on their behalf, the client has to agree in advance to the solicitor charging them significantly more than the claim is known to be worth.

4.10 It is an unsatisfactory situation to have solicitors signing up clients to a costs regime that allows them to claim significantly more than the claim is worth. It is equally unsatisfactory to offer fixed rates which do not reflect a commercial market rate of remuneration that requires such deductions from damages to be made.

4.11 As matters currently stand, if a FRC is introduced for clinical negligence claims on the rates proposed then the only way solicitors can act for the client is if deductions are made from damages to cover the shortfall. To prevent solicitors

from doing this will simply render the would-be-claimant without recourse to litigation and redress. This is an access to justice issue.

4.12 The situation creates at the very least a potential conflict between the ongoing solicitor and client relationship. The message is confusing for the client. This situation does not offer any clarity or certainty for the client, on the contrary, it will only cause them to ask what are they are signing up to? And, how much of their damages will they receive in the event their claim is successful?

4.13 If the FRC proposed regime for clinical negligence claims is introduced, it will create a situation where the FRC regime prevents access to justice. Currently, the terms of the FRC proposals are such that because the costs of bringing the proceedings will invariably exceed the maximum sums allowed under the FRC that the shortfall will be made from client damages. It is unrealistic to expect a client to be able to give informed consent to such a process.

4.14 The situation illustrates how a FRC regime in clinical negligence claims thwarts access to justice. It will prevent claims being brought. It will create a situation where claimant's damages could be wiped out or significantly reduced such that it won't be worth their while bringing the claim. In turn, this will create a situation where there is a loss of information re matters giving rise to patient safety issues, it also risks a loss of accountability against one of the government's largest bodies, NHS.

4.15 It is in the public interest that these claims be brought and not lost through the economics of the claims process.

5. Recourse for the client dissatisfied with the solicitor's bill

5.1 The Court of Appeal criticised the fact that the case of Belsner had come before them at all, given that the sums in issue were only a few hundred pounds. The court suggested that the Financial Ombudsman would provide a more suitable and appropriate way to challenge a solicitor's bill of costs.

5.2 The Legal Ombudsman is experiencing a backlog of cases. It is quite likely that by the time the client has had their case considered by the Legal Ombudsman more than a year would have passed. The Legal Ombudsman has recently announced a time limit of one year for bringing complaints.

5.3 By the time the Legal Ombudsman has assessed the complaint, the client is likely to be out of time to enforce their statutory right to assessment of their fees by a judge. It is also the case that a complaint to the Legal Ombudsman is unlikely to be handled by a legally qualified person and costs is a complex area of law so there may be no confidence in the decisions made by the Ombudsman. Referring a bill of costs to the Legal Ombudsman is therefore unlikely to provide the claimant with resolution.

6. Submissions

6.1 The current situation is unsatisfactory and needs to be dealt with, it is overly complicated and the ordinary man in the street is unlikely to understand their position on costs, let alone be able to give informed consent to any retainer/CFA .

6.2 There needs to be a clear definition of what amounts to non-contentious and contentious business.

6.3 There needs to be clarity around what status pre-PAP stages hold.

6.4 There also needs to be clarity about how deductions from damages can be made if a FRC regime is introduced for clinical negligence claims.

6.5 If solicitors are not able to be clear about these things, it is not reasonable to expect a non lawyer to understand their position on costs.

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