

## **CJC Costs Consultation Response**

This response is provided by Legal & Risk Services, a division of the NHS Wales Shared Services Partnership, and the in-house legal department of NHS Wales.

Legal and Risk Services represent NHS Wales for all aspects of civil litigation to include clinical negligence, personal injury and commercial disputes.

### **Part 1 – Costs Budgeting**

1.1 Is costs budgeting useful?

1.2 What if any changes should be made to the existing costs budgeting regime?

1.3 Should costs budgeting be abandoned?

1.4 If costs budgeting is retained, should it be on a “default on” or “default off” basis?

1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

### **Response**

Legal and Risk Services’ view is that costs management continues to be an important part of case management. Cases are still seen where costs are many times the damages paid, both pre-action cases and those which have been case managed by the Courts. However Legal and Risk Services questions whether the present costs budgeting process achieves its purpose.

Costs budgets take a considerable time to complete and the accuracy of these is questioned. Costs consultants are often instructed, and this leads to an inflation of costs due to the inclusion of costs to cover every potential situation rather than a focus on the case itself and the steps which are required to bring the case to a conclusion.

An example would be in a low value claim the inclusion of more than one conference with the experts and a pre-trial review, it would be unusual for more than one conference or a pre-trial review to be required in a claim of this nature. In high value claims steps are often duplicated in phases to make sure if they cannot be claimed in one phase, they can be claimed in another.

This has led to an increase in costs over the years since costs budgeting was introduced.

The evidence is that budgeting is dealt with differently by different Courts and by different Judges within the same Court leading to a lottery as to who the case management hearing is to be heard by. Often incurred costs are not considered. In cases where incurred costs are

very high, future costs are allowed even if these lead to the overall costs being disproportionate to the nature value and complexity of the case being case managed.

In light of case law hourly rates are not considered and this leads to a disparity between future and incurred costs and will, in many cases lead to a detailed assessment hearing to deal with the issue of incurred costs and hourly rates in any event.

In addition, in many cases directions for future case management are agreed and the hearing only deals with costs budgeting with the attendance of multiple advocates for each party. The hearings themselves have become very adversarial with Claimant's lawyers determined to allow for every potential cost and Defendants lawyers resisting on the basis that this is their only opportunity to challenge these costs.

The importance of an indication of the level of the parties' costs, early on, is important and if budgeting is abandoned then this should be replaced by a form of costs estimate to help with case and costs management, which should be undertaken by a judge. There should be a requirement to update the estimates at key stages of the litigation and if there are material changes, such as the instruction of an additional expert or prior to trial, with review of these by a Judge looking at costs management and proportionality of the legal spend. Costs estimates allow the parties to assess the costs and risks of a case proceeding to Trial.

As set out above Legal and Risk Services' view is that budgeting should be abandoned in favour of costs estimates provided to assist with case and costs management by the Court.

A simplified, less adversarial process will increase the understanding of litigants who proceed without legal representation and maintain access to justice.

One suggestion is that going forward there is a cap for phases within the costs budget depending on the nature, value and complexity of a claim or the introduction of new/expanded fixed costs schemes to limit costs.

## **Part 2 – Guideline Hourly Rates**

2.1 What is or should be the purpose of GHRs?

2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

2.3 What would be the wider impact of abandoning GHRs?

2.4 Should GHRs be adjusted over time and if so how?

2.5 Are there alternatives to the current GHR methodology?

## Response

Guideline Hourly rates should act as a ready-reckoner and a starting point for Judges at detailed or summary assessment in order to assess the reasonableness and proportionality of the sums claimed.

They also have an important function in allowing parties to advise their clients about their likely overall cost exposure if they were to lose the claim, so allowing the calculation of likely costs. This helps Defendants assess claims on a costs/risks analysis basis, in order to weigh-up whether a case is worth fighting to trial or not, on an economic basis. They also feed into costs budgeting, to provide an overall idea of the likely cost of taking a claim to trial.

Taking the above into account Guideline Hourly Rates do have a broader role than just a starting point in costs assessments. Abandoning these would impact upon the ability of both Claimant and Defendant lawyers to appropriately advise and update their clients about their potential overall costs exposure.

To abandon hourly rates could deter Claimants from pursuing litigation due to unknown costs, which would impact on access to justice.

In addition, abandoning guideline rates is likely to lead to more cases proceeding to assessment. Hearings will be longer and more extensive as there would be no starting point to work from.

Legal and Risk Services view is that Guideline Hourly rates could be tailored to case complexity and value with sliding scale rates, to incorporate features such as value, locality, complexity to include, issues in dispute, number of witnesses, experts, trial length. This would tie in with the principles of Fixed recoverable Costs. This would also allow a review of working practices which have changed over the last two years and are likely to have an impact on business models moving forward.

As previously expressed, the expansion of the current Fixed Recoverable Costs regimes and the introduction of Fixed Recoverable Costs for Clinical Negligence claims and other areas of law would be welcomed as providing certainty for both parties by giving a clear indication of what costs will be recovered inter-partes as well as limiting the legal spend.

Since the introduction of the Fixed Recoverable Costs scheme for Personal Injury cases there has been a marked reduction in the amount of costs paid by the NHS in Wales. The scheme, however, not only reduces costs but also focusses the parties' minds on the case before them, leading to a change in practice and earlier claim resolution, as a fixed costs regime rewards efficiency.

Guideline Hourly Rates should be periodically reviewed to consider adjustments which could lead to hourly rates decreasing as well as increasing and Legal and Risk Services view is that this should take place 3 yearly with an adjustment in line with inflation. This review should be carried out by a working group assessing the rate based on data analysis, which in our view is the best methodology

### **Part 3 – Costs under pre-action protocols/portals and the digital justice system**

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

3.2 What is the impact on costs of pre-action protocols and portals?

3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

3.4 What purpose(s) does the current distinction between contentious business and non contentious business serve? Should it be retained?

#### **Response**

The introduction of digital processes is welcomed by Legal and Risk Services. Digitalisation reduces not just costs, for example in the production of digital rather than paper bundles but also the time spent. The systems introduced for virtual Court hearings, and notices sent by the Court giving clear joining instructions has reduced not only the time spent by parties but also the time spent liaising with the Courts. Legal and Risk Services view is that the use of digital systems and Court portals should be encouraged with a focus on the extension/introduction of pre-action Fixed Recoverable Costs schemes with strict criteria to retain as many cases as possible within these schemes. This will lead to more effective case management and earlier resolution of claims.

The development of APIs to link with the Courts case management systems is also a feature which would be helpful and should be prioritised going forward. Such a development will allow for more efficient and effective case management and once more lead to speedier resolution of claims.

Online forms will also increase access to justice as with support these will be easier for parties who are not legally represented to access and complete.

Online portals will also encourage speedier resolution of claims by ensuring effective and efficient case management.

### **Part 4 – Consequences of the extension of Fixed Recoverable Costs**

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

## **Response**

Please see comments elsewhere in this document.

Please also note that lessons can be learned from the Putting Things Right arrangements which NHS Wales introduced in April 2011. This represented a significant culture change for the NHS in Wales in the way in which it dealt with things that went wrong at an early stage.

As part of the Putting Things Right arrangements, if Health Bodies in Wales identify, following an investigation, a Qualifying Liability (a liability in tort), then consideration must be given to offering a form of Redress. This can include an offer of financial compensation, the giving of an explanation, a written apology and a report on actions taken. At the stage that a Health Body accepts that there is, or may be, a Qualifying Liability, the patient is entitled to “free” legal advice, funded by NHS Wales. Appendix O to the Putting Things Right Guidance sets out the applicable levels of fixed fees.

Ownership of both the cost of the payment of damages to the person harmed, and the concomitant costs, is crucial if the Health Bodies are to use incidents to learn from their mistakes to reduce the risk of further harm. Putting Things Right was designed to ensure that the patient and their actual experience remained at the heart of the investigation throughout. The investigation, incorporating as it does a prospect of financial redress in the course of the process, which is time limited to prevent unnecessary delays, common in the past, is comprehensive. That being said, the scheme at present is a voluntary one.

The introduction of this scheme illustrates the commitment of NHS Wales not only to cost savings in terms of clinical negligence claims but also to ensuring appropriate and adequate redress for any person harmed.