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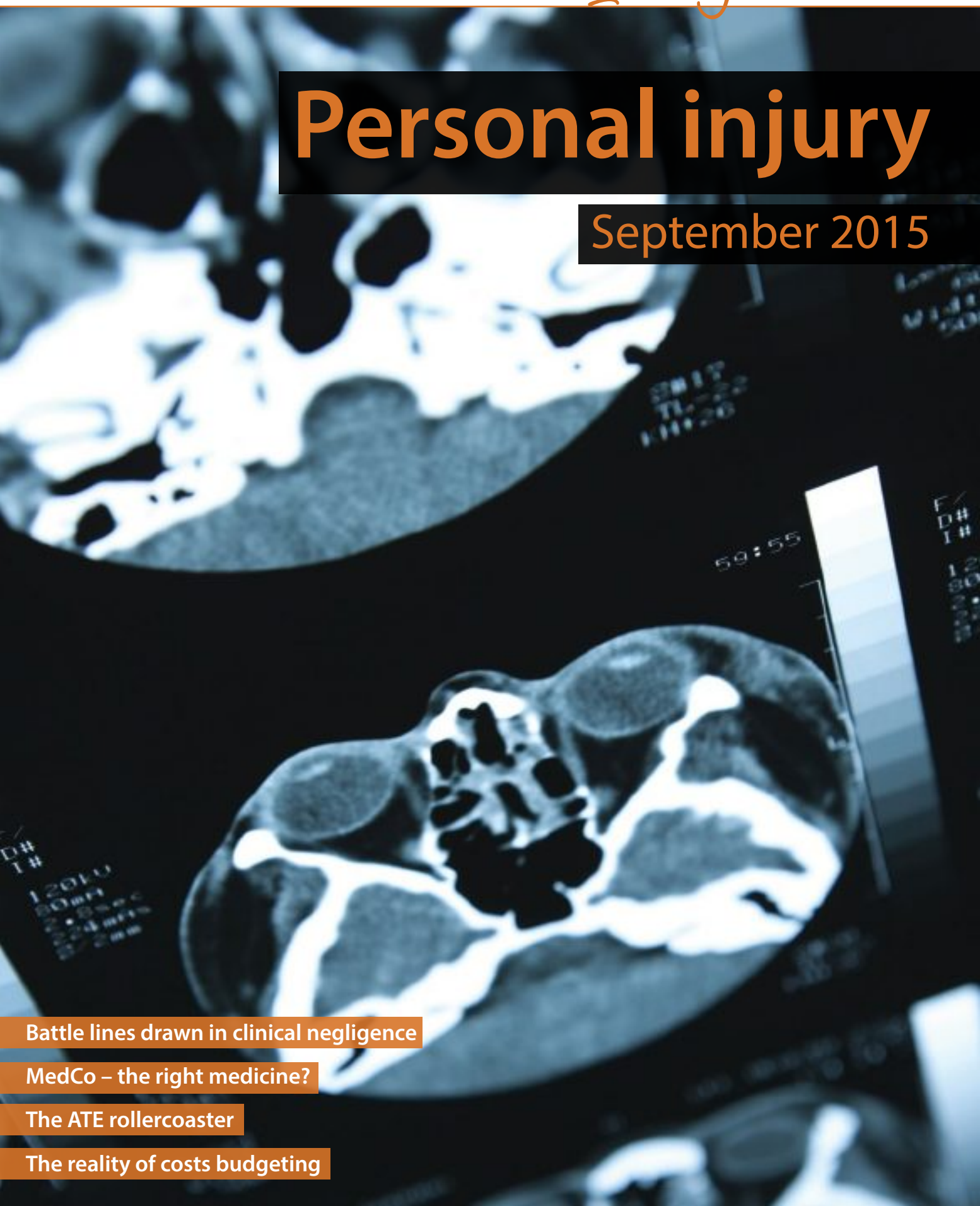
Personal injury

September 2015



Battle lines drawn in clinical negligence

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A turn for the worse

With personal injury firms struggling to make money and claims management companies quaking in their boots after their regulator's first fine, the government has turned its attention to clinical negligence. Once seen as a safe haven from the restrictions on conditional fees in personal injury cases and reduced portal fees, clinical negligence is facing what has been described as a "double-pronged" assault.

On the one side the Department of Health is leading the charge, and planning to introduce caps on fees for cases worth as much as £250,000; on the other, the Ministry of Justice is discussing with after-the-event (ATE) insurers whether recoverability of premiums for experts' reports should be limited or abolished.

Many claimant lawyers believe there could be a place for fixed or capped fees for the smaller medical negligence cases, for example those valued at less than £25,000, as suggested by the Association of Personal Injury Lawyers. In this issue we discuss whether, amid growing concern over the future of medical negligence, arbitration could play a part. Andrew Ritchie QC, who set up the Personal Injury Claims Arbitration Service in June, believes "the whole industry knows this will happen" and the immediate need is for training.

ATE insurers had some good news from the courts this summer with rulings from the High Court in Nokes and the Supreme Court in *Coventry*. In this issue they give their views about the impact of court fee rises, plans to restrict or abolish recoverability of insurance premiums and MedCo. Are solicitors insuring their cases properly, or leaving it too late and cherry picking?

MedCo is explored in more depth, including whether or not the new system for allocating medical experts in whiplash cases actually works and whether some of the "murky practices" it has highlighted were already there. With the process of weeding out some of the worst offenders now underway, is fragmentation of the market for medical reports is a good thing or will it only lead to more confusion?

Finally, with the suspension of budgeting for negligence claims in the High Court from next month, three leading costs lawyers give their very frank views on what the problems are and what the way forward might be. Matthew Harman argues that suspension "will not fix things" and that "dykes and fingers come to mind". But whatever the challenges for lawyers and judges, some clients seem to like costs budgeting.

Nick Hilborne
Deputy Editor, *Legal Futures*

Government pushes ahead with fixed fees for medical negligence

The government has given no ground this summer to critics of Department of Health (DoH) plans to introduce fixed or capped fees for medical negligence claims.

If anything, things got worse for claimant lawyers when it emerged that the maximum value of cases subject to the scheme could be up to £250,000, rather than up to £100,000.

Claimant lawyers are not completely opposed to fixed fees. The Association of Personal Injury Lawyers (APIL) said it could "see the rationale" for fixing fees for claimants in cases worth up to £25,000, where the NHS Litigation Authority (NHSLA) admitted liability.

APIL said other personal injury claims already had fixed costs for claims up to £25,000 and the limit would cover those injuries "most likely to resolve within 12 months of the incident".

Responding to a DoH pre-consultation letter, the association said: "Even within the cohort of claims up to £25,000 in value, certain cases should be exceptions to the

fixed costs regime – fatal claims, still-births, claimants lacking mental or legal capacity, claims where the claimant has a very short life expectancy.

"APIL has always been prepared to discuss fixed costs for minor claims. Indeed, we worked with the NHSLA in 2013 on a proposed low-value clinical negligence claim scheme until the NHSLA refused to negotiate further."

In its response, the Law Society said that clinical negligence cases were invariably allocated to the multi-track, where there was "very little experience" of fixed fees.

"There has been no analysis of data by independent experts to work out the incidence of costs or what appropriate ratios of costs to damages there might be to enable necessary work to be done," the society said in its response.

"It is hard to escape the conclusion that the proposal is entirely cost driven with no thought as to the consequences for victims of clinical negligence."

Claims Management Regulator fines firm £220,000

The Claims Management Regulator, based at the Ministry of Justice, has used its new disciplinary powers for the first time by fining a claims management company £220,000 for making nuisance calls about claims for noise-induced hearing loss.

A spokesman for the ministry said The Hearing Clinic was responsible for "bombarding people with millions of nuisance calls" even though many of those called had subscribed to the Telephone Preference Service (TPS). He said "hundreds of people" had complained about the calls.

Additional conditions have been imposed on The Hearing Clinic, based in Derby, including restrictions on calling numbers registered with the TPS and using data from third-party companies.

"The Hearing Clinic could face further sanctions including suspension and, where necessary, closure if they break the rules again," he warned.

Kevin Rousell, head of claims management regulation, said: "The new fines mean we have greater powers to crack down on claims management companies that make nuisance calls. Companies should be in no doubt that if they break the rules, then we won't hesitate to fine them in addition to the tough action we already take."

The fining power has been in place since December 2014.

QOCS protection lost after canoe claim struck out

The widow of a man who died in a canoe accident has lost the protection of qualified one-way costs shifting (QOCS) after her fatal damages claim was struck out.

Judge Lopez, sitting at Birmingham County Court, said Mandy Wall sued the British Canoe Union (BCU) as publisher, in 2003, of a guidebook on English white water covering the stretch of the River Teme in Shropshire where the accident happened.

Mr Wall, who died after his canoe became trapped at the bottom of a weir, was a member of the Wyre Forest Canoe Club, affiliated to the BCU.

However, the judge said there was no "relationship of proximity" between the defendant and Mr Wall to establish a duty of care between publisher and reader.

Ruling in *Wall v British Canoe Union*, Judge Lopez said QOCS applied to claims under the Fatal Accidents Act 1976, or for the benefit of an estate under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

He said that under CPR 44.15(1) costs orders made against the claimant "may be enforced to the full extent" where proceedings had been struck out, including where the claimant had disclosed no reasonable grounds for bringing the proceedings.

Slater & Gordon claims "commanding PI market share"

Slater & Gordon claimed it has reached a "commanding" position in the personal injury market, as it revealed a 27% increase in annual revenue at the end of August.

Its UK operation contributed £121m, including the first contribution from Slater Gordon Solutions (SGS) – the new name for the professional services division it bought from Quindell.

The firm said in a statement that SGS was showing "good early signs" and is operating as expected.

The statement said the personal injury law practice had "capitalised on its emerging brand presence in the UK with a strong increase in new cases opened including in the multi-track area", while the general law practice was "building momentum" to become a leading provider.

S&G said that one in four people in the UK recognised its name and indicated that there would be no further acquisitions in the near future.

Andrew Grech, group managing director, said he was "very pleased" with the firm's financial performance in the latest financial year.

"We have put a lot of effort into business improvement initiatives throughout the year and it is satisfying to see this effort translating into improved client satisfaction, deeper brand awareness and improved financial performance.

"We now have a commanding market share lead in both Australia and the UK. Free from the demands of near-term acquisition activity, we will be able to focus our efforts on continuing to improve operating effectiveness."

The firm's share price rose nearly 6% on the back of the results and announcement of changes to its accounting practices, which are under scrutiny from the Australian Securities and Investments Commission and contributed to a dramatic drop in its share value over recent months.

Fairpoint completes Colemans acquisition

Fairpoint plc's acquisition of well-known personal injury practice Colemans-ctts has formally completed, meaning legal services now accounts for 62% of the company's revenue.

The deal, announced last month, is structured as an acquisition by Simpson Millar, the national law firm Fairpoint bought in June 2014 to enter the legal market.

With niche family practice Foster & Partners also acquired last year, it means that Simpson Millar now has a revenue in excess of £40m. In its financial year ended 30 April 2015, Colemans-ctts generated unaudited revenues of £19m and unaudited pre-tax profits of £2.3m.

Initial consideration was made up of £8m in cash and a further £1m in shares, with up to £7m more payable subject to various performance criteria.

The deal aims to strengthen Simpson Millar's position in personal injury claims, travel law and residential conveyancing, and expand the services Colemans offers clients, particularly in family law, care home claims and private client work.

Peter Watson, managing partner at Simpson Millar, said: "Our strategy of delivering clear, transparent and affordable legal services products to UK consumers, mirrors that of our new partners at Colemans-ctts.

"The acquisition adds their complementary best-of-breed expertise and significant processing capability to our own."

In other alternative business structure (ABS) news, fast-growing Southport firm Fletchers – which specialises in clinical negligence and serious injury work – has become an ABS, mainly to allow the appointment of non-solicitor directors. Chief executive Ed Fletcher said becoming an ABS was "an essential step" to ensure the firm achieves its goal of reaching the top 100. "Being an ABS means we can bring in top talent from other sectors and further our leadership of the medical negligence sector."

Car crash not to blame for failure to secure training contract

A judge has told a litigant-in-person that a road traffic accident she was involved in was not to blame for her failure to secure a training contract.

Susan Berney, representing herself at the High Court, claimed over £800,000 in damages from sole practitioner Thomas Saul for professional negligence over a personal injury claim which settled. Ms Berney had previously taken the case to the Court of Appeal on a limitation issue – and won.

However, Judge Karen Walden-Smith told her that the evidence did not establish that "she would, had it not been for the RTA, have been able to obtain a training contract".

Judge Walden-Smith, sitting as a High Court judge in *Berney v Thomas Saul & Co*, said it was "most significant" that Ms Berney had applied for training contracts before the accident and been rejected.

"The sad fact is that many competent individuals who would undoubtedly make good lawyers, fail to achieve that goal," the judge said.

The judge concluded that, in all the circumstances, Ms Berney would not have been likely to recover "anything more than £10,000" and did not have a "real, rather than fanciful, prospect" of recovering more than £25,000. She dismissed Ms Berney's claim.

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

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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."

The right medicine?

The arrival of MedCo and randomised medical experts for whiplash cases has provoked an angry reaction from many in the industry. But could 'fragmentation' be a good thing? **Dan Bindman** finds out

Jonathan Wheeler

MedCo, the compulsory portal for medical legal evidence in soft tissue injury motor accident cases, is an example of how challenging it is for government to act in haste when disrupting a deeply entrenched marketplace and introducing mechanisms to enforce new behaviours.

As part of a number of whiplash reforms, brought in following the previous coalition government's 2012 'insurance summit' – with the ultimate aim of reducing motor insurance premiums – the not-for-profit MedCo Registration Solutions (MedCo) Portal went live in April 2015.

Although there is goodwill behind the new system, at least rhetorically, privately there is scepticism that it will successfully alter the complex web of relationships that has built up over years between solicitors, intermediaries, and medical experts. Many millions of pounds are involved and the stakes are high.

The first wave of reforms included fixed costs for medical reports under the RTA (road traffic accident) protocol. The second phase included insisting that MedCo is used for sourcing all medical reports in support of low-value RTA-related whiplash cases; if it is not, the cost will not be recoverable. From January 2016, all medical experts who provide such reports through MedCo will also have to be accredited.

Breaking links

The main way that the government has sought to break the links between those who commission and write reports is in how experts are selected under the RTA protocol. It has sought to enforce independence by randomising the pool of medical reporting organisations (MROs) and individual medical experts that can be chosen by those instructing on behalf of claimants. The idea is that "it will no longer be possible for those commissioning reports to appoint an individual or organisation with which they have a financial link".

Alternatively, individual medical experts who pay £150 each to register with MedCo can be instructed directly, and searches can be 'direct medical experts only', with the results excluding MROs altogether.

Perhaps the most controversial element of the new system is the mechanism of including one high-capacity, national MRO (tier 1) and six lower-capacity, regional MROs (tier 2) in MedCo's 'offer' to instructing parties, one of which they can choose. The government's intention was "to maintain consumer choice with sufficient flexibility so as not to prevent MROs from developing their business".

But the system has come under pressure in a number of ways. Firstly, several tier 1 MROs have attempted to increase their chances of receiving instructions by creating multiple tier 2 agencies. They have claimed this was necessary simply to redress the imbalance in the system against them. Secondly, two attempts to bring judicial reviews are in progress: firstly of the way MROs are allocated in the offers made to MedCo users, and, secondly, of the way that the reforms were implemented in the first place.

The behaviour of the MROs in July led the Ministry of Justice to bring forward a formal review of the portal from the planned six months to just 100 days after it started.

Among the reasons for the accelerated timetable given by justice minister Lord Faulks QC was that "it has… become apparent that a number of new business practices have developed in this sector with the potential to undermine both the government's policy objectives and public confidence in MedCo".

While MROs must declare any 'direct financial links' between themselves and those who write reports, there is no obligation to declare links between MROs. Part of the call for evidence is to establish whether the declaration should be extended to include, for instance, MRO to MRO links, in order that results from a MedCo search could be filtered to exclude related businesses.

Mixed reports

Already under pressure from the Ministry of Justice to clamp down on MROs suspected of making dubious claims in their applications to join the portal MedCo acted at the beginning of September by suspending a number of the agencies and issuing warning notices to others, after carrying out audits. One MRO has since been thrown out of the system.

Reports on how MedCo is working in practice are mixed, depending on who you talk to. Most acknowledge that, from a public policy perspective, there are positive aspects to the whiplash reforms and that the situation as it was should not have been allowed to continue unchanged.

Smaller MROs have so far had to endure a significant drop in income from low value RTA work under MedCo, with fees for GP-level reports capped at £180. There are also complaints that the software involved in randomising searches does not work. "Everything seems rushed. It's been very badly organised. Even the software doesn't work properly. They've got lots of problems to sort out," says Susan Broadley, the owner of tier 2 MRO Prestige Medical Legal Services.

Since the multiple tier 2 agencies were registered, MedCo has not delivered the required number of instructions, she added: "I think we've had 80 in the last month. So we're not getting the volume. We were hoping to get at least 100 a week."

Jonathan Wheeler, the president of the Association of Personal Injury Lawyers, welcomes the government bringing forward its review as "helpful" and "a step in the right direction". But he draws attention to what he says are failings in the IT underpinning MedCo. "At the moment it's not really fit for purpose, we would say… The whole idea is that you put in roughly where your client is, but it spits out a doctor at the other side of the country. It just doesn't work."

On a more positive note, Mr Wheeler says the best feature of MedCo is the accreditation of all medical experts from next year, which he says will help raise quality standards and benefit his members' clients. However, launching the scheme without accreditation has been "rather putting the cart before the horse".

Valuable fragmentation

One venture that has attracted disapproval from the MoJ is an attempt by Qualitas Medical Assurance to provide an IT-based platform and accreditation scheme to help smaller MROs compete within MedCo. But co-founder Dr David Pearce has fiercely defended Qualitas as "an ethical organisation", which bans the payment of any commissions and pays doctors properly.

Dr Pearce condemns the government's commitment to preserving an industry which has very large MROs. A valuable "fragmentation" was imposed on the industry when MedCo started, he says, which has since come to a halt since multiple tier 2 companies were created.

Fragmentation, he argues, is the best protection for medical experts from undue influence being exerted on them by dominant instructing parties. "Randomisation, independence, many providers, both MROs and doctors, will empower those experts to stand up [if attempts are made to influence the content of their reports] and say 'no, enough is enough, I'm a professional'."

Despite the problems faced by MedCo in its first months, its supporters say its successes should not be overlooked. Nigel Teasdale, a DWF partner and head of its motor, fraud, costs and claimant teams, sits on the national committee of the Forum of Insurance Lawyers. He says that although it is currently being "sidetracked [by] a lot of business behaviours around MROs and their business models", there are "positives" that must be acknowledged.

The fact the portal is already up and running and producing searches is one, he says, adding: "The other thing… is that murky practices that were probably always going on are really being brought to light… Some people will say 'well, we are not engaging in that kind of behaviour, but others are and here's some of the details', which in the past perhaps you'd never find out… Hopefully in time it is then something that can be remedied."

He concludes that MedCo should be given a chance to prove itself. "You need to let it bed in and develop. No-one likes change, do they?"

The ATE rollercoaster

The after-the-event insurance market seemed to be recovering this year until the court fee rises and clinical negligence curbs, as **Nick Hilborne** reports

David Marshall

Two important decisions from the courts gave the after-the-event (ATE) market for personal injury a boost this summer.

In the High Court, Master Leonard resisted an attempt by the NHS Litigation Authority (NHSLA) to reduce a clinical negligence ATE premium, making it clear that "suspicion and speculation" were not enough. The Temple Litigation Advantage premium was divided into two parts: The first, which required a premium of £5,680 for £10,000 cover, insured against the risk of liability to pay for expert reports. The second, which was non-recoverable, required the payment of 3% of damages for an indemnity of up to £100,000 for the opponent's costs and disbursements.

Delivering judgment in *Nokes v Heart of England Foundation NHS Trust* [2015] EWHC B6 (Costs), Master Leonard says: "I need more than suspicion or speculation to reduce an ATE premium. In implementing the 2013 reforms, Parliament intended that that certain kinds of ATE premium should continue to be recoverable under orders for costs. For that intention to be achieved, insurers must be able to offer a compliant product which is realistic and competitive." Master Leonard added that it was not "credible" to reduce the premium by up to 95%.

The other case, which has become something of a household name in the litigation world, was *Coventry v Lawrence*. The original Supreme Court judgment threatened to unpick the entire pre-Jackson conditional fee regime, but in July, by a 5:2 majority, the court accepted that it was compatible with the European Convention on Human Rights.

In his lead ruling, Lord Neuberger accepted that the case in question "would not have been viable" under the system put in place by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The president of the Supreme Court says it was not his intention to criticise the Jackson reforms, but "to show that there are restrictions on access to justice inherent in the LASPO scheme" and demonstrate that, "at least in the absence of a widely accessible civil legal aid system (which has ceased to exist by 1999), it is impossible to devise a fair scheme which promotes access to justice for all litigants".

Now the bad news

Despite the good news from the courts, storm clouds were already gathering with an announcement from the Department of Health.

Health minister Ben Gummer unveiled plans at the end of June to cap the fees charged by lawyers on clinical negligence claims worth less than £100,000, saving the NHS up to £80m a year. The department is now considering extending this limit to £250,000, to save a further £25m per year.

Meanwhile, ATE insurers were sent invitations at the end of July by the Ministry of Justice, asking them to discuss changes to the rules on the recoverability of insurance premiums in clinical negligence cases. It has since emerged that recoverability could be restricted or abolished completely.

David Marshall, managing partner of Anthony Gold and chairman of the Law Society's civil justice committee, says experts' reports are essential in clinical negligence, and if clients or solicitors have to fund them, it would be "much more difficult" to bring claims. The reason why LASPO was amended to ensure that recoverability was preserved for experts' reports was so victims could bring claims, he explains, and to that extent it has worked.

"Parliament wanted people with meritorious cases to have access to justice. Most people cannot afford to pay for two experts' reports – one on the breach, one on causation. It's not the same as

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Phil Bellamy

whiplash – it is complicated work and you've got to have senior people."

Mr Marshall says the cost of two reports can be £6,000 and abolishing recoverability of ATE premiums will reduce the number of people whose claims are investigated.

Phil Bellamy, underwriting director at Temple Legal Protection, says there has been "quite a big log jam of cases that were won or settled", but the NHSLA has not been paying the premiums due. Some of them were held pending the decision in *Nokes*. Now that decision has been made and not appealed, the NHSLA has started paying them. That is really good news." He adds that the *Coventry* ruling is also leading to more premiums being paid.

He says the increases in court fees can be seen as good for ATE insurers, but are bad for claimant lawyers, and the recent increase in insurance premium tax will make things harder.

Mr Bellamy predicts that if the Ministry of Justice changes the rules on recoverability in clinical negligence cases, commercial cases are likely to become the "driving force" of the ATE market.

Changing focus

In contrast to the worries over ATE for clinical negligence, Russell Smart, group chief operating officer of Elite Insurance, says there has been an upturn in ATE for mainstream personal injury fast-track cases. Although LASPO had a "significant impact" on his firm's business, Mr Smart says there has been some "green shoots of recovery" since. His concern now is over the new system for obtaining experts' reports in whiplash cases, MedCo, which has "created uncertainty" and concerns over independence. "There is a general, overriding fear that doctors will become fearful of removal from the panel if they don't provide defendant-friendly reports," he says.

"There is a feeling that MedCo is for the defendants. The Ministry of Justice insisted on it, but nobody knows how it is going to be policed."

Mr Smart says his company has not concentrated on ATE for clinical negligence because there was "so much uncertainty". Instead Elite has focused on higher-value mainstream personal injury cases, where the ratio of damages to costs is three or four to one. He adds: "Some solicitors still believe that ATE is only available if there is a conditional fee agreement. That is a myth."

Paul Hurley, director and head of ATE at ARAG, says the personal injury market has continued to improve this year. "The market is fairly buoyant across all areas of personal injury. We hope that this will continue throughout the year. It does not mean to say that there aren't challenges, because there are. The pre-LASPO days are not coming back and I don't foresee that they will. At least there is a market we can work with and plenty of solicitors see the benefits of ATE insurance."

Mr Hurley says it is "a bit early" to say what the impact of the court fee rises will be, but, as an additional cost, it will increase the need for ATE. "It is absolutely vital that ATE insurance is taken out at the outset of a claim to provide a spread of risk to the insurer. If it is taken out later, insurance premiums are more expensive and more is deducted from damages. Hopefully the *Nokes* case will help the ATE industry recover appropriate premiums, but there's a backlog in recovery due to defendants' attitudes. I hope it will free up cases to come to a conclusion more swiftly. Mr Hurley adds that although it is not common, defendants can take out ATE as well as claimants, as pointed out by the Supreme Court in *Coventry*.

Next piece of the jigsaw

Martin Doyle, director of insurance brokers Amberis, says most of the firm's work is in providing delegated volume personal injury schemes to solicitors. "The main issue we're finding is that people are not insuring all their cases, but cherry-picking the ones that tend to be the most problematic. They are looking for an insurer to take the risk for them."

He describes increased court fees as an "undercurrent" rather than leading to a situation that is "noticeably different" at the moment.

"Pre-LASPO cases are coming to a conclusion and profits are being reduced on new cases being won. High-volume solicitors are realising that some of their business models might not be as profitable as they thought. If defendants are squeezing them on cash flow by making them issue, they may have to reduce the number of cases they can take on."

Mr Doyle says Amberis did "very little clinical negligence" work. However, he adds: "Clinical negligence is the next piece of the jigsaw in putting the squeeze on what is seen as exorbitant charges by claimant lawyers.

"Both sides are playing the game. If the defendants were playing ball and acting in the spirit of the Jackson reforms, costs would not be so high."

Whatever the cost?

Three leading costs specialists give different views on the joys and horrors of cost budgeting in personal injury cases

Matthew Harman, founding partner of Harmans

Matthew Harman

I spend a good deal of time dealing with budget hearings in the Queen's Bench Division corridor. From my perspective they waste an awful lot of time by being listed at times like 11.30am, which leads to a complete morning and early afternoon out of the office. However, my slight inconvenience is of nothing compared to the desperation that must be felt by the Masters. I actually feel slightly sorry for them – there, I have said it.

They signed up for something completely different and have found themselves, with little training, thrown into the fascinating and magical world of costs, having to cope with these strange costs lawyer types who were previously restricted to the nether regions of the Thomas More Building.

It is fair to say that our appearance on the QBD corridor has not met with universal approval, although I don't know why that should be as I suggest that we know a great deal more about costs issues than most advocates.

The decision to suspend costs budgeting was the inevitable outcome of ill thought-out changes in procedure. It really was pretty obvious that, if you increase the time of a case management conference to include dealing with a costs budget and increase the time estimate from 30 to 90 minutes, it will not be long before the wait for hearing extends over the horizon.

Further, previously directions could often be agreed – obviating the need for a hearing. That has been rare to date on budget hearings. The best one can expect generally is to agree some of the more straightforward phases ahead of time.

The problem with the suspension is that it will not fix things. It will allow the Masters to catch up for now, but unless something is done, the same situation will arise and a further suspension will be required. Dykes and fingers come to mind.

An unexpected consequence of the suspension has been three months' worth of old-fashioned estimates being ordered in 14 days, causing mayhem in our offices and, no doubt, in many others.

I am a fan of budgets as a concept and think that they can be made to work. There is no question that they are being dealt with more quickly and, dare I say it, Masters are becoming more comfortable with the process.

What does concern me is that there will be some around the country who will adopt a tariff approach to budgets, as in 'I always allow X for this phase in this type of action'. I am already starting to see evidence of this and do find myself when preparing budgets thinking things like 'Master so and so usually allows X hours per day for attending trial' and preparing the budget accordingly.

Matthew Hoe, partner at Taylor Rose Law

I've not had much to do with costs budgeting, and that, without intending to sound conceited, is indicative of a problem. Budgeting has gripped PI practitioners because it has exposed them to costs in a new way. It is ironic, then, that budgeting has been so isolated from detailed assessment. My work is predominantly in detailed assessments in PI claims. I helped establish a budgeting team in my (mainly defendant) costs firm two years ago. Budgets are prepared, discussed, negotiated, agreed or reviewed by the court. The files get handed over to a different team at the detailed assessment stage. The budgets don't help much.

Frankly, I suspect that there are a great many bills of costs in which the costs for an individual phase exceed the approved budget, but it's impossible to tell with the present bill format. Only in

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Matthew Hoe

the rare case where there is an obvious mismatch between the bill and budget, such as the bill exceeding the budget or the total of costs in completed phases plus the costs incurred in other phases, does it ever become an issue. I can count those few claims on my fingers.

The last two years have been a dry run for the next 'phase' in budgeting. There will be greater integration in the costs assessment process. First, there is the incoming amendment to CPR 47, which will require a breakdown of the bill by budget phase to accompany a notice of commencement. That transparency will lead to far greater reference to budgets. Perhaps there will be some interesting 'sleights of hand' so that bills do not exceed budgets by phase, and that in turn may lead to some interesting arguments.

Second, there is the new format for bills of costs, which will adopt the budget phases. The budget will become more important for costs than for case management.

There will also be more rational application – which is necessary. For a moment there was a tantalising prospect of some significant exemption from budgeting in PI, temporarily or permanently, but that moment has passed. The Civil Procedure Rule Committee's deliberations have resulted in the exclusion of children's claims, but there may also be guidance on when budgeting may not be suitable more generally.

The vast majority of PI claims are low value. Budgeting seems disproportionate at the bottom of the multi-track. An expansion of fixed costs is inevitable, and therein lies large-scale relief from budgeting.

Alex Bagnall, costs lawyer at Just Costs

Since the advent of costs management, lawyers have, in general, been averse to it. During the pilot schemes, there was said to be a drop in the number of cases issued in the courts where costs management applied and a rise in cases issued elsewhere.

Avoiding costs management is no longer an option. As a result, it seems that every litigator has a costs management horror story, whether it be case and costs management conferences which go on for days or adverse decisions because local (and unpublished) practices have not been complied with.

But are the myriad difficulties which are facing lawyers determinative of whether costs management has been a success? I would suggest not. Instead, one should look towards the experience of parties to litigation for the answer to this question.

Lord Justice Jackson indicated in his final report that clients were keener on costs management than lawyers. With the notable exception of the Law Society, groups which represented lawyers' interests were hostile to the idea of costs management. By contrast, his report quoted a survey by a firm of City solicitors which showed that 75% of their clients felt that courts should be given greater costs management powers.

There is, as yet, no research on the perception of the parties themselves. However, my experience is that most commercial clients have reacted positively to the changes. Businesses welcome the certainty which costs management brings.

Alex Bagnall

Approved budgets mean that litigation no longer comes with a potentially open-ended costs liability, and this obviously helps to inform litigation strategy. Financial directors view litigation as a business risk. They accept that they cannot affect the outcome of the case, but they value the ability to budget the cost of it.

The move towards awarding significant payments on account of costs at the end of budgeted cases provides corporate litigants with much-needed cash injections at the end of what can be financially punishing cases.

Historically, claimants in PI cases often had no interest in the level of costs incurred. This is no longer the case. Most solicitors are recovering a success fee from claimants and an exposure to adverse costs exists, notwithstanding qualified one-way costs shifting. It is therefore more important than ever for such claimants to be aware of their own and their opponents' costs, and costs management is an effective way to facilitate this. A moratorium is being placed on costs management in clinical negligence cases in London, so clearly the scheme isn't quite going according to plan. Few will deny that the costs management process could do with some tweaks or that better judicial training is absolutely essential if the scheme is to survive. However, if the ultimate touchstone of whether costs management has been a success is the experience of clients, the only conclusion which can be drawn is that it has.

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