## Fixed costs for clinical negligence claims: a cost analysis approach



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## Fixed costs for clinical negligence claims: a cost analysis approach

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### 1. Introduction

In my earlier report [Evaluating the proposed fixed costs for clinical negligence claims: an independent review] I made several recommendations in relation to possible ways forward for the Department of Health's consultation Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims (January 2017). These were:

- Consideration should be given to a two-stage introduction of fixed costs for clinical negligence claims: first, an extension of the current FRCS fixed costs for fast track claims up to £25,000, along the lines of tables 6C and 6D in part 45 of the CPR; second, an extension to multitrack claims over £25,000 in value to be considered for introduction alongside a similar extension to other civil claims up to £250,000 as recently proposed by Jackson LJ.
- 2. The proposed fixed costs ... should be replaced with an alternative matrix obtained using the same methodology that was used to calibrate the costs in part 45 of the CPR namely, a matrix derived from estimated average levels of observed base costs recovered for varying claim values and differing stages of litigation. The proportional relationship observed between base costs and damages could be estimated statistically from observed data on current clinical negligence claims. These fixed cost formulae could then be calibrated downwards according to assumptions about the efficiency gains that might be expected from improved cash flow and also any predicted changes to the structure of the legal services market. Further reductions could be made if changes in the claimant risk profile were anticipated.
- 3. The fixed costs obtained as above could be reduced for claims where an admission of liability was made within the protocol stage. This reduction could be varied depending on stage of settlement and value of claim, using evidence from realised claim outcomes. It could also be varied in order to increase the incentives for early settlement.
- 4. The impact of any proposed fixed costs should be estimated and made transparent. The fixed costs that are ultimately put in place will need to be monitored over time by an appropriate body.

Recommendation 1 was accepted alongside the views of other stakeholders, and the consultation is now restricted to claims up to a value of £25,000. Lord Justice Jackson is currently conducting his review into the extension of fixed costs to higher value claims, and he is due to report in July 2017. As far as recommendation 4 is concerned, the consultation document states that: "A post-implementation review will be carried out five years after implementation of FRC. The review will consider, based on the available evidence, whether: the overall aims of the policy have been met; the policy has been implemented effectively; and any unintended consequences have been identified".

For the purpose of this, my second report, I have been asked "to take forward the work on recommendations 2 and 3 around using a matrix derived from average base costs to calculate the rates of FRC, and options to reduce the fixed cost where there is an early admission of liability. This further work will be carried out during the consultation period so that it can be considered alongside the consultation responses and feed into decision-making following the consultation".

I have structured the report into three sections. Section 2 summarises the data made available to me by both defendant and claimant organisations. Section 3 uses the data to capture the typical pattern of costs recovered on low value clinical negligence claims settled at different stages of the litigation process under current protocols. Section 4 attempts to review evidence on the likely impact of a fixed recoverable cost regime on the efficiency of the claims settlement process, taking into account the proposal for a simplified protocol as well as the potential for exemptions for more complex claims. I will conclude with some recommendations for a possible set of fixed recoverable costs taking into account the evidence and reasoning presented here.

### 2. Data

### 2.1 Data requirements

My earlier report drew on data that was made available to me then by the DH, which included only data supplied by NHS Resolution during the pre-consultation period. As NHS Resolution is not the only defendant in clinical negligence cases, and as data from claimant solicitors were not available, my first concern was to explore the extent to which alternative sources of data were available, and at the same time to update NHS Resolution data to cover the time that had elapsed since my first report.

The core data requirements needed in order to pursue the alternative approach recommended in my first report were, for each claim settled for less than £25,000 since LASPO (This was chosen in order to obtain a sufficiently large sample of recently settled claims, which was representative in terms of complexity and value. It was not chosen to capture the effects of the LASPO rule changes, as recently settled claims would inevitably contain a mixture of claims run under pre- and post-LASPO CFAs. Any attempt to isolate only claims with post-LASPO CFAs would mean that the sample would not be representative):

- 1. The date the claim was initiated typically the date of the letter of claim
- 2. Damages agreed, and date these were paid in settlement of the claim (For staged payments, the lump sum equivalent)

3. Profit costs recovered, and the stage of litigation at which these were agreed and paid.

Note that these core requirements did not include the amount of success fees or ATE premiums recovered from the defendant or client, nor the amounts of other disbursements including the fees paid to counsel or experts, as they were outside the remit given to me. Nevertheless, it should be recognised that the most common scenario on closure of a claim is for the parties to agree a global sum in settlement of the sum of profit costs, additional liabilities, and disbursements. Consequently, the amount of profit costs recovered, as reported by the data providers, is often a simple residual after these extra elements are removed from the global total. As such it may be sensitive to the information available to the data providers, with defendants in particular needing to make assumptions about the amounts of disbursements paid out.

### 2.2 Defendant data: NHS Resolution

NHS Resolution is the main defendant in clinical negligence claims in the UK, as the agency responsible for NHS Hospital Trusts' liabilities. NHS Resolution has a panel of solicitors' firms who specialise in the defence of clinical negligence claims, and in addition it arranges for the costs of some of these claims to be negotiated by the legal costs firm Acumension, who have established a database recording the outcomes of these negotiations. The data provided to me by NHS Resolution are drawn exclusively from that database - that is, claims where costs were negotiated by NHS Resolution defence panel solicitors or directly by NHS Resolution are excluded (without access to data on these excluded claims, it is not possible to be certain about how representative the Acumension dataset is of the overall population of clinical negligence claims against NHS Resolution. Nevertheless, it does represent around a third of all NHS Resolution clinical claims in any one year, and it is clearly an important source of information on that part of NHS Resolution's activity). For the purpose of this report, NHS Resolution asked Acumension to update the database extract to include claims settled in the financial year 2015/6. Consequently I now have access to case-level data on claims settled by Acumension in the financial years 2012/3, 2013/4, 2014/5 and 2015/6.

Table 2.1 below shows the breakdown of the number of settled claims (excluding part 8 (costs only) claims) with damages less than or equal to £25,000 in the Acumension dataset by financial year and stage of settlement.

Table 2.1 Breakdown of the number of settled claims (excluding Part 8 (costs only) claims) with damages less than or equal to £25,000

	Litigation Status				
Fiscal Year	Pre-issue	Issued	Allocated	Listed	Total
Fiscal Year 12/13	879	232	29	17	1,157
	75.97	20.05	2.51	1.47	100.00
Fiscal Year 13/14	1,288	376	54	23	1,741
	73.98	21.60	3.10	1.32	100.00
Fiscal Year 14/15	1,090	486	86	33	1,695
	64.31	28.67	5.07	1.95	100.00
Fiscal Year 15/16	1,020	441	136	63	1,660
	61.45	26.57	8.19	3.80	100.00
Total	4,277	1,535	305	136	6,253
	68.40	24.55	4.88	2.17	100.00

The combined dataset contains over 6,000 claims settled with a value up to £25,000 over a period of 4 years. One noticeable feature of this table is the marked increase in the proportion of post-issue settlements – from 24% of the total in 2012/3 to 39% of the total in 2015/6. The following graphs illustrate this trend using monthly counts of pre- and post-issue settled claims under £25,000 in value (Figure 2.1) and the distributions of case durations for these claims over time (Figure 2.2):







#### Figure 2.2 Distribution of case durations for these claims over time

Table 2.1 and Figure 2.1 taken together show that, while the overall numbers of claims settled by Acumension have remained fairly stable, the proportion of these which were settled pre-issue has fallen steadily. Figure 2.2 shows that the distribution of case lengths have shifted upwards at the same time as the increase in the proportion of issued claims. For the purpose of this report, these developments are relevant insofar as the objective is to use information on current cost recoveries to indicate reasonable levels of FRCs, and if current cost recoveries are not stable, the derived fixed costs may be inappropriate going forwards. It is of course possible that the costs recovered within each stage have remained stable, and the increase in overall costs is purely due to the increase in the proportion of cases that are litigated.

However, the following table (Table 2.2) shows that the mean profit costs recovered at each stage of litigation has indeed changed over time, although not to the same extent as overall recovered costs.

#### Table 2.2 Means and Frequencies of Profit Costs Settled (net)

Litigation Status						
Fiscal Year	Pre-issue	Issued	Allocated	Listed	Total	
Fiscal Year 12/13	5893.58	12577.60	23639.26	23813.66	7941.95	
	879	232	29	17	1157	
Fiscal Year 13/14	6055.47	12270.18	19115.74	21831.09	8011.14	
	1288	376	54	23	1741	
Fiscal Year 14/15	6212.10	12882.76	21560.18	21390.78	8956.53	
	1065	415	75	28	1583	
Fiscal Year 15/16	6575.92	13999.46	23227.62	25770.03	10640.76	
	1020	441	136	63	1660	
Total	6186.08	13013.45	22087.61	23888.56	8952.63	
	4252	1464	294	131	6141	

Means and Frequencies of Profit Costs Settled Net

Table 2.2 shows that the overall mean profit costs recovered for settled claims under  $\pounds 25,000$  in value rose from  $\pounds 7,942$  in 2012/3 to  $\pounds 10,641$  in 2015/6 – a rise of 34% - due to a combination of a higher post-issue settlement rate and increases in the cost per stage. But why has the cost per stage increased? Clearly, on grounds of timing it seems that LASPO may be at least part of the explanation, but first it is necessary to discover whether costs have increased due to an increase in the duration of claims, or an increase in the costs recovered on claims of similar case lengths. The following graph (Figure 2.3) attempts to do this by reference to the costs recovered on each monthly cohort of new claims which settled for no more than  $\pounds 25,000$  within one year of the letter of claim:



Figure 2.3: Mean cost recoveries arising from monthly cohorts of new claims settled within 12 months

In this figure the trend lines show the mean cost recoveries arising from these monthly cohorts of new claims, all of which are of comparable duration (a maximum of one year). The vertical line indicates the implementation date of LASPO in terms of non-recoverable additional liabilities. In the monthly cohorts before that date, all claims must have been financed by a mixture of pre-LASPO CFAs, LSC funding, BTE insurance etc. For claims after that date, the pre-LASPO CFAs continue to be present (where the CFA agreement pre-dates LASPO), but are gradually being replaced in each successive cohort by post-LASPO CFAs, with no recoveries of success fees, and limited ATE premiums. By the end of the period (mid-2015) it appears that the majority of new claims were funded by post-LASPO CFAs, because the mean recovered success fee is approaching zero. Observing the mean recovered profit costs for these monthly cohorts (the top line), it seems that there has been little change since LASPO, so it is possible to infer that, for claims of a similar duration, the hours worked by solicitors have not changed significantly. It follows that the increase in recovered costs per stage seen in Table 2.2 must be due to increases in claim duration. My conclusion, therefore, is that the increase in mean post-LASPO profit cost recoveries is due to the combined effect of increased claim durations together with a higher rate of issued claims (these two factors are of course related). I cannot speculate too much on what has caused this phenomenon (and it may simply be an artefact of the Acumension dataset), but one aspect of LASPO which has been put forward as an explanation is the removal of LSC funding opportunities from most clinical negligence claims. Those claims no longer covered by legal aid would need to find other sources of funding, and it has been suggested to me that a large number of these potential LSC

claims were switched to CFAs or CCFAs in the months leading up to LASPO, in order to ensure recoverability of success fees. If so, this could help explain the pattern of longer claim durations, simply because there may be delays in assimilating the claimants' circumstances and the processing of the claims.

Whatever the explanation for the increased caselength and litigation rate, the evolving nature of post-LASPO settlements in the Acumension dataset means that I will focus only on the most recent financial year available when analysing the pattern of recovered costs using this source. The following table shows the mean levels of damages, recovered profit costs, success fees and ATE premiums for claims settled up to £25,000 in 2015/6:

Table 2.3 Mean levels of damages, recovered profit costs, success fees and ATE premiums for claims settled up to  $\pounds$ 25,000 in 2015/6

Variable	Obs	Mean	Std. Dev.	Min	Max
Damages	1660	10352	7226.47	1000	25000
Profit Costs	1660	10640.8	9144.73	750	71764.9
Success Fee	1660	4121.2	6625.05	0	59814.7
ATE Premium	1660	4213.99	6770.68	0	81615.6

The mean success fee reflects the presence of claims where no success fee was recovered (55% of all settled claims in 2015/6 – most of which are presumed to be post-LASPO CFAs). The mean ATE premium reflects the presence of claims where no ATE premium was recovered (40% of all settled claims in 2015/6).

# 2.3 Defendant data: medical defence organisations

The NHS Resolution, while by far the biggest defendant of clinical negligence claims, is not the only defendant. Activities by GPs, dentists and private work by clinicians is not covered by NHS Resolution and the clinicians involved typically take advantage of the negligence cover provided by their membership organisations: the Medical Defence Union (MDU), the Medical Protection Society (MPS) and the Medical and Dental Defence Union of Scotland (MDDUS). I had helpful conversations with all three organisations, and some data were provided, but ultimately the organisations' concerns about commercial sensitivity and the difficulties in pooling all defendant sources together meant that it was not possible to use their data for the purposes of this report. They have of course provided evidence to the consultation.

### 2.4 Claimant data: SCIL

I was fortunate to be offered access to a dataset of recently settled clinical negligence claims by the Society of Clinical Injury Lawyers (SCIL). SCIL is a members' organisation for claimant solicitors practising in the field of clinical negligence. Membership is open only to firms of solicitors with at least one member of either the AVMA Specialist Clinical Negligence Panel or Law Society Clinical Negligence Accreditation Scheme. It reflects a broad spectrum of firms, from those with large teams to those handling relatively few clinical negligence cases. The dataset includes both pre and post LASPO cases that were closed with costs paid between 1st April 2015 and 31st March 2016, where the Defendant was indemnified by NHS Resolution. The table below shows the number of claims with damages less than or equal to £25,000 settled by the SCIL member firms in 2015/6, broken down by stage of settlement.

Table 2.4.1: Claims with	damages less than o	or equal to £25,000	settled by the SCIL	member firms in
2015/6				

Stage	Freq.	Percent	Cum.
Pre-issue	202	70.88	70.88
Post-issue, pre-defence	45	15.79	86.67
Post-defence, pre experts meeting	33	11.58	98.25
Post-experts meeting, pre-trial	5	1.75	100.00
Total	285	100.00	

The following table shows the mean levels of damages, recovered profit costs, success fees and ATE premiums for claims settled up to £25,000 in 2015/6:

2.4.2: Mean levels of damages, recovered profit costs, success fees and ATE premiums for claims settled up to £25,000 in 2015/6

Variable	Obs	Mean	Std. Dev.	Min	Max
Damages	283	10944.95	7259.35	1000	25000
BaseCosts	283	14871.36	14983.08	1003.04	149203
SuccessFee	283	4368.625	8103.367	0	62329
ATEPremium	283	4989.584	7003.419	0	43725

The mean success fee reflects the presence of claims where no success fee was recovered (55% of all settled claims in 2015/6 – most of which are presumed to be post-LASPO CFAs). The mean ATE premium reflects the presence of claims where no ATE premium was recovered (40% of all settled claims in 2015/6).

# 2.5 Claimant data: APIL members and other firms

In addition to the data provided by SCIL, I was also provided data by several claimant firms through their membership of the Association of Personal Injury Lawyers, as well as other claimant firms who expressed a willingness to help with data. Some of these firms provided data that were not complete and these were omitted from the analysis. Others provided complete data, and included settlements from years prior to 2015/6 which I have also omitted, as explained above. For each firm, the numbers of claims settled for no more the £25,000 in 2015/6 is shown in the table below:

Firm	Freq.	Percent	Cum.
Firm 1	31	6.49	6.49
Firm 3	13	2.72	9.21
Firm 5	13	2.72	11.92
Firm 6	38	7.95	19.87
Firm 7	8	1.67	21.55
Firm 8	375	78.45	100.00
Total	478	100.00	

#### Table 2.5.1: Numbers of claims settled for no more the £25,000 in 2015/6 by firm

The table below shows the number of claims with damages less than or equal to  $\pounds 25,000$  settled by these firms in 2015/6, broken down by stage of settlement.

Table 2.5.2: Number of claims with damages less than or equal to £25,000 in 2015/6, by stage of settlement

phase	Freq.	Percent	Cum.
Pre-issue	409	85.56	85.56
Post-issue, pre-allocation	57	11.92	97.49
Post-allocation, pre-listing	11	2.30	99.79
Post-listing	1	0.21	100.00
Total	478	100.00	

The following table shows the mean levels of damages and recovered profit costs for claims settled by these firms up to £25,000 in 2015/6:

2.5.3 Mean levels of damages and recovered profit costs for claims settled up to £25,000 in 2015/6

Variable	Obs	Mean	Std. Dev.	Min	Max
Damages	478	7888.639	6060.055	1000	25000
Profit_Costs	467	9173.592	8583.026	291.66	85505.87

These mean damages and mean recovered profit costs are lower than those reported by the SCIL sample, and those reported by Acumension. However, the largest number of claims came from firm 8, which has been expanding its clinical negligence portfolio in recent years – implying that those claims settled in 2015/6 were not as "mature" on average than other sources (i.e. their average duration, and hence average complexity, was likely to be lower than the comparable samples from other sources). This may also explain the relatively low level of issued claims in the previous table.

### 3. Analysis

The summaries above show clear differences in mean damages and recovered costs across the various sources that were available to me on 2015/6 clinical negligence settlements. However, some of these differences may be due to a portfolio effect – namely, a variation in the mix of case characteristics relating to complexity and value – influencing the pattern of settlement outcomes observed in each data source. In this section, I will attempt to explore statistically the relationship between recovered profit costs and damages at different stages of litigation using all of the available data, pooled together into a single estimation sample.

The following chart (Figure 3.1) shows each data point from all sources (Acumension, SCIL and other claimant firms). The plots show agreed base costs at settlement on the vertical axis, and damages on the horizontal axis. Each quadrant shows the data for the different stages of settlement. The red lines show the "best fit" relationship between costs and damages, estimated using the combined sample. The statistical results, using ordinary least squares regression analysis, are provided in the Appendix.



#### Figure 3.1: Scatter plots of agreed costs against damages – claims settled in 2015/6

While it is clear from the scatter of data points that case value alone is by no means the only factor determining the level of agreed costs at settlement, the "best fit" lines are statistically robust with high levels of confidence. These estimated best fit relationships are summarised in the following table:

#### Table 3.1: Best fit relationships – all claims under £25,000

	Lump sum (£)	% of damages
Pre-issue	£4,767	30%
Issued	£7,821	56%
Allocated	£16,487	56%
Listed	£20,999	56%

This means that it is possible to use these relationships to reveal the expected (i.e. most likely) agreed costs for a claim if we know its value and the stage at which it settled. They capture the average relationship between costs, damages and settlement stages in 2015/6. As such they can provide a benchmark for determining what might be an appropriate level of fixed recoverable costs in the way suggested in my first report. If overheads, processes and behaviour all remained as they were in 2015/6, then the above relationships would ensure no change in the overall amounts of costs recovered if they were used to determine fixed costs in each case. However, as I pointed out in my first report, introducing a fixed cost regime has consequences for all of these factors. In the next section I will explore what evidence might be used to take account of these consequences and thereby to propose a viable set of fixed recoverable costs.

### 4. Fixed Costs: proposals

The DH proposals "aim to ensure that patients maintain access to justice by streamlining the system and incentivising earlier resolution of such claims, setting FRC rates at the right level and considering appropriate exemptions to the proposed FRC scheme". One of the key exemptions proposed is an exemption for claims where the number of experts reasonably required by both sides on issues of breach and causation exceeds a total of two per party. This means that the formulae in Table 3.1 would overestimate the costs of claims settled under the new regime, as they are based on a sample including all settled claims, including those with more than two experts. Fortunately, one of the sources (SCIL) provided data on the number of experts used in claims settled by their members in 2015/6, which allows me to make an estimate of the likely impact of this exemption. The following table (Table 4.1) shows the breakdown of the SCIL sample by the number of experts used (by the claimant) for claims settling at different stages of litigation in 2015/6.

Experts	Pre- issue	Post- issue., pre- defence	Post- defence, pre- experts meeting	Post experts meeting, pre-trial	Total
0	62	6	0	0	60
0	03	0	0	0	09
1	82	16	3	2	103
2	36	15	13	1	65
3	12	6	12	0	30

Table 4.1: Number of experts used for claims settling at different stages of litigation in 2015/6 (SCIL)

4	5	0	3	2	10
6	1	0	1	0	2
7	0	1	0	0	1
9	0	1	1	0	2
Total	199	45	33	5	282

Table 4.1 shows that the proposed exemption would affect 45 out of the 282 claims settled – that is, 16% of the total. As stated by the DH in para. 6.11 of the consultation document, the intention of the proposed exemption would be to take only the most complex low value claims out of the FRC scheme. This objective appears to be confirmed by the following table (Table 4.2) which shows the difference in mean agreed base costs between those claims with more than two experts and the remainder of the low value claims.

Experts	Mean Costs	Mean Damages	N	%
No more than 2	11,900	10,216	237	84
3 or more	30,331	14,806	45	16
Total	14,842	10,948	282	100

Table 4.2 shows that the mean costs of claims where no more than two experts are used are 20% lower than the mean costs of all claims in this category (low value claims settled in 2015/6). The mean cost of the claims using more than two experts (i.e. subject to the proposed exemption) was over £30,000.

I therefore suggest that a 20% reduction (applied to the mean costs from the previous section as shown in Table 3.1) provides a basis for a set of FRCs, as shown in the following table (Table 4.3), which also shows the resulting minimum and maximum cost recoveries available at each stage of settlement.

	Lump sum (£)	% of damages	Min (Damages=£1000)	Max (Damages=£25,000)
Pre-issue	£3,800	24%	£4,040	£9,800
Issued	£6,250	45%	£6,700	£17,500
Allocated	£13,200	45%	£13,650	£24,450
Listed	£16,800	45%	£17,250	£28,050

#### Table 4.3: Proposed fixed costs – claims with no more than two experts

While the fixed cost formulae in Table 4.3 reflect the impact of the proposed exemption based on the number of experts, they do not reflect the proposal for a streamlined process as set out in the consultation document. The Civil Procedure Rule Committee (CPRC) has supported the DH by developing an illustrative set of rules for a possible pre-action protocol, which "establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets out the standards for the content and quality of letters of claim and sets standards for the conduct of pre-action negotiations" (Consultation Document, Annex D, para 3.5.). The hope is that an early exchange of evidence will allow for an earlier admission of liability and consequently an earlier, less costly settlement. In my first report, I drew on evidence from Acumension on the date at which liability was admitted in order to ascertain the likely saving in costs from early admission. I have updated this analysis for the current report.

Using the Acumension data from 2015/6, the following figure shows the distribution of time taken from the letter of claim to the defendant's admission of liability, where liability was admitted (868 claims, or 55.5% of the total):



Figure 4.1: Distribution of time from letter of claim to admission of liability

The number of admitted liability claims where admission took place within 4 months (120 days) was 347, or 40% of all claims where liability was admitted.

In the table below I set out the mean profit costs recovered (net) for pre-issue and postissue settlements of claims with a settlement value between £1,000 and £25,000, and compare claims with an early admission of liability (i.e. within 4 months of the letter of claim, in compliance with the proposed protocol) with other claims (i.e. those where no liability was admitted, or where liability was admitted at a later stage beyond 4 months). Table 4.4 Mean profit costs recovered (net) for pre-issue and post-issue settlements of claims with a settlement value between  $\pounds$ 1,000 and  $\pounds$ 25,000

	Mean pro	% reduction	
	Early adm liability wi of claim		
	No	Yes	
Pre-issue	£6,240	£5,738	8.04%
Post-issue	£14,915	£12,351	17.19%

For claims that were settled pre-issue, the reduction in mean profit costs recovered was 8.04%; for those settled post-issue, the reduction was 17.19%. I therefore recommend that, to encourage early admission of liability in compliance with the proposed protocol, a reduction in the fixed costs should be applied. Where the claim settles pre-issue, I suggest the reduction should be 10%. Where it settles after issue, the reduction should be 20%. These adjustments are suggestive only, and the figures could be reconsidered if necessary alongside the further development of the proposed protocol, including any extension of the protocol to cover post-issue behaviour. I assume that both claimant and defendant organisations would be involved in the development of this protocol.

### 5. Conclusion

The objective set by the DH for this report was "to take forward the work ... using a matrix derived from average base costs to calculate the rates of FRC, and options to reduce the fixed costs where there is an early admission of liability". This work was intended to produce some evidence-based figures for option 4 in the consultation document – the option based on recommendations made in my first report. I have drawn on data provided to me by both claimant and defendant organisations, and I am satisfied that this has provided a representative picture of current (2015/6) settlement outcomes. These outcomes have been adjusted to reflect the proposed exemption for the most complex claims with more than two experts, and evidence has been put forward in relation to the cost savings accruing from early admission of liability within the proposed protocol. Taking this together, the following table sets out my final FRC recommendations:

#### Table 5.1: Proposed FRCs

Stage:	Clinical negligence claims with value less than or equal to £25,000
Pre-issue	£3,800 + 24% of Damages Reduced by 10% if there is an early admission of liability
Post-issue, pre- Allocation	£6,250 + 45% of Damages Reduced by 20% if there is an early admission of liability
Post Allocation, pre-Listing	£13,200 + 45% of Damages Reduced by 20% if there is an early admission of liability
Post listing, pre- Trial	£16,800 + 45% of Damages Reduced by 20% if there is an early admission of liability
Trial advocacy fee	To be determined

These fixed cost formulae would allow current case selection and behaviour to continue for those claims with no more than two experts; that is, they would be neutral with respect to the impact on access to justice. At the same time, it provides a framework of incentives that will encourage early settlement within the proposed FRC protocol and therefore reduce the overall cost to defendants.

There are a number of possible caveats to this conclusion:

- 1. The statistical basis for the figures used in this report depends on the assumption that the data provided to me is representative of recently settled clinical negligence claims. The defendant data from Acumension does not necessarily reflect the experience of other defendants such as the MDOs. Moreover, it may not be fully representative of the overall NHS Resolution experience, as it does not include claims settled by NHS Resolution itself, or by their panel solicitors. Nevertheless, it does represent a significant share of all claims brought against NHS Resolution, which is by far the biggest defendant of clinical negligence claims. The claimant data provided to me by SCIL, APIL and others will necessarily reflect the experience of firms who contributed data. However, I have no reason to doubt that they are representative of the industry as a whole.
- 2. As explained in section 2.2 above, there is evidence from the Acumension dataset that the proportion of claims settled post-issue, and the average duration of cases, have been rising significantly over the last few years, and this is confirmed by some of the claimant data. This is the reason I have focussed the analysis on the most recent data in this report, but it would be of interest to have a full explanation of this trend.
- 3. I have not adjusted the figures in Table 5.1 to account for inflation since 2015/6. Presumably, if these were to be implemented, a review process would be incorporated into the scheme, which would consider both inflation and any technological changes to the delivery of legal representation and the settlement of claims.
- 4. I have made no assumptions about track allocation in this report. As the DH consultation document states, it is assumed that the vast majority of clinical negligence claims are allocated to the multitrack. However, it is possible that many claims settled pre-allocation with an early admission of liability with respect to both breach of duty and causation (i.e. the type of claim for which the FRC scheme is most appropriate) might be more suitable for the fast track. In any case, the consultation document clearly states that it is expected that the FRC scheme will "apply to all cases within the damages threshold of above £1,000 and up to £25,000 allocated to the multitrack or fast track".
- 5. Lord Justice Jackson is to report on his review of fixed recoverable costs by the end of July. Clearly the scope of his remit overlaps with the exercise described in my report. I understand that the Government will consider Jackson LJ's recommendations and will consult before any proposals are implemented.

### 6. Appendix: OLS Regression Results

9	Source	SS	df	MS	Numb	er of obs	=	1,587
					- F(1,	1585)	=	246.02
	Model	6.1990e+09	1	6.1990e+09	Prob	> F	=	0.0000
Res	sidual	3.9937e+10	1,585	25196595.2	2 R-sq	uared	=	0.1344
					- Adjl	R-squared	=	0.1338
	Total	4.6136e+10	1,586	29089274.2	2 Root	MSE	=	5019.6
	Costs	Coef.	Std. Err.	t	P> t	[95% Cor	nf.	Interval]
Da	amages	.3016622	.0192323	15.69	0.000	.2639387	7	.3393856
	_cons	4766.881	210.1101	22.69	0.000	4354.758	B	5179.004

#### Table A1: Pre-issue settlements

#### Table A2: Post-issue settlements

Source	SS	df	MS	Number	of obs	=	778
				- F(4, 7	74)	=	572.83
Model	2.9283e+11	4	7.3207e+10	Prob >	F	=	0.0000
Residual	9.8916e+10	774	127799023	R-squa	red	=	0.7475
				- Adj R-	squared	=	0.7462
Total	3.9175e+11	778	503529542	Root M	SE	=	11305
Costs	Coef.	Std. Err.	t	P> t	[95% Con	f.	Interval]
Damages	.5629413	.0570572	9.87	0.000	.450936		.6749465
_Istage_2	7820.791	855.1324	9.15	0.000	6142.137		9499.445
_Istage_3	16487.49	1205.69	13.67	0.000	14120.68		18854.3
_Istage_4	20999.17	1524.38	13.78	0.000	18006.76		23991.58