Recovery of NHS Costs

Response from UNISON Scotland to the Scottish Executive Consultation Paper: The recovery of NHS costs in cases involving personal injury compensation
Summary

UNISON Scotland is opposed to the Executive’s proposals as they presently stand.

- The Executive has not had regard to the cost to the union in pursuing personal injury cases.

- The Executive has not had proper regard to the risk occasioned to the union in pursuing personal injury cases.

- It is unfair that the Executive allows monies to be accrued to the taxpayer from the costs and risk taken by the union without any commensurate means of improving the ability of the Union to pursue cases.

- The Executive is being unfair in allowing a position in England and Wales to exist whereby we as a union are able to recover notional insurance premia in successful cases but not in Scotland. The accidents and diseases and health considerations are the same for members in Scotland as in England and Wales.

- As a major NHS union with considerable health and safety issues we consider that any additional funds from recovery of NHS charges should be channelled into improving the health and safety of our members employed by the NHS.

- We also consider that resources from NHS charges recovered should be applied to occupational health projects for our members in the NHS and workers across Scotland.

- We are not satisfied that any funds recovered by recovery of NHS charges would not be used to deplete the overall NHS budget.
Introduction

1.1 We are Scotland’s largest Trade Union, representing 150,000 members delivering public services in Local Government, Health, further and higher education, energy (gas and electricity), water, transport and the voluntary and community sector. We represent the majority of the employees of the National Health Service in Scotland.

1.2 We provide our members with a legal advice and assistance service. The service is for members who suffer injury in the course of their work through accident or industrial disease. The service is also extended in relation to personal injury sustained by our members and their families outside work. The cost of providing the service to our members is considerable both in terms of actual cost and administration costs. This shall be discussed further below.

1.3 By way of an insight into the extent of the service we provide, we can confirm that during the last quarter, one of the Solicitors whom we instruct concluded 218 cases of which 60% were successful. The cases covered the full spectrum of personal injury claims including accidents at work, criminal injury compensation applications, lung disease, deafness, vibration white finger, strain injuries and road traffic accidents.

The Cost of Providing Legal Services

2.1 As things presently stand, running the legal service to which we have referred above requires considerable resources and costs both in terms of actual costs and administration costs. We shall describe each of the costs in turn.

2.2 The cost of ongoing funding

When a Court action is successful, the successful party is of course entitled to recover Court expenses from the Defender. Court actions can however take a considerable period of time to be brought to a conclusion. The statistics produced by our Solicitors for the previous quarter shows that the average length of the cases concluded for that quarter was two years. During the course of an action it is necessary to fund various expenses and outlays including the cost of obtaining a medical report, medical records, an engineers report and Court dues. These costs must be met as they are incurred and there is accordingly a considerable delay between us funding Court costs and recovering same. This cash flow issue clearly places a strain on our members’ funds.

2.3 Unrecovered disbursements
Allied to the previous point, is the fact that there will inevitably be items of expenditure which the Auditor of Court will not permit our Solicitors to recover from the Defenders. It is necessary for us to write off these items of unrecovered disbursements from our members' funds as part of our legal service budget.

2.4 Investigations

In certain circumstances it is necessary to carry out investigations before it is possible to take a view upon whether or not there is any merit to a compensation claim. In cases, such as strain or stress injuries, where the key element is whether or not the injury can be tied, as a matter of medical causation, to the working activity, it is necessary to obtain a medical report before any view can be taken upon the likelihood of success. Medical reports can be extremely expensive and he who pays the piper does not pick the tune. There are accordingly many instances where a report obtained upon our members' behalf in those circumstances concludes that there is no link between the strain or stress and working environment. In those circumstances no claim can be advanced but the Union has incurred financial costs. The costs cannot be recovered from any other party and the Union must meet the cost from it's own funds.

2.5 Lost and Abandoned Cases

Not every Court action that is raised will be successful.

Firstly, there are occasions where it is necessary to raise Court proceedings simply to protect a members' rights in relation to the time bar provisions in the law and to thereafter carry out investigations into the likelihood of success of the action. This is commonly the case with industrial disease claims. As discussed in the preceding paragraph, there will be occasions where the investigations disclose that there is no basis of claim and it is necessary to abandon the action. The cost of raising Court proceedings, investigating the action and the cost of any medical is obtained must be met by the Union.

Secondly, our members are not always successful when their cases are heard before a Judge. Cases are often lost on the basis of credibility. There is no way to predict whether or not the Judge hearing a Court action will find the Pursuer to be a reliable witness. If the Pursuer is not found to be reliable he will lose and the cost to the Union will be considerable. The cost of losing a four day Hearing in the Court of Session is substantial. Our Union's funds cannot withstand too many hits on that level.

2.6 Administration Costs
The legal service we provide for our members also carries a “hidden” administration cost. We employ full time staff to assist with the administration of the service. We employ administration staff and a legal officer. Our regional officers and Scottish Organisers also assist with certain claims in terms of undertaking investigations and obtaining supportive documentation.

**Funding a Legal Service in England & Wales**

3.1 From the foregoing the cost of providing our members with a legal advice and assistance service is a considerable drain on the member’s funds. In contrast the UK Parliament has recently acknowledged the benefit of Trade Union legal assistance services and accordingly alter the position in relation to funding union backed Court actions in England and Wales. This union with regard to similar claims for its members arising in English and Welsh institutions in the Health Service and elsewhere is now able to recover a notional insurance premium from the defenders at the conclusion of the claim for compensation. This recognises the considerable risk that the union is taking in pursuing these cases and from which the tax payer through recovery of CRU benefit and NHS charges would gain. It also enables the union to continue to sustain the actual hidden costs in providing such a legal service.

3.2 The same costs similarly apply in Scotland but there is no provision for recovery on notional insurance premium to recognise the risk. We can see no reason whatsoever why a similar system cannot be implemented in Scotland.

**Accidents and Diseases within the NHSiS**

4.1 Many of our members incur injury and disease in the course of working in the Health Service. The NHS and Trusts have failed in many cases to exercise reasonable care and comply with the relevant Statutory Regulations in protecting our members in their work. The spectrum of cases to which we have referred applies to the NHS.

4.2 We are also extremely concerned regarding the number of criminal assaults on our members which is giving rise to an increasing number of CICA claims.

4.3 We are also extremely concerned regarding the rise in work related stress cases. A personal injury case is not necessarily the means of assisting our members. Often by then it is too late. The harm as it were has been done. It also has to be borne in mind that pursuing a case for compensation carries its own stress when it can least be sustained. Studies show that an early, caring and amicable intervention will often prevent the situation escalating and will allow the individual affected to continue working in a fruitful and positive manner.
We are far from satisfied that the NHS is providing our members with a proper health and safety environment, attending to increasing number of assaults on our members, and is certainly failing to address the problem of work related stress.

Grounds of Opposition

We have four main grounds of opposition to the proposals as they currently stand.

1. Accident Prevention In The NHS And Occupational Health

1.1 As the Executive acknowledge, a positive benefit of the proposals is in terms of accident prevention. The higher sums an employer/insurer is required to pay in the form of compensation the greater incentive there is for the employer to improve its own health and safety at work. We agree with this position and confirm that such means of accident prevention is not only legitimate but one for which more consideration should be given.

1.2 As we have previously stated, we represent a large number of the staff employed by the NHS and we are extremely concerned to see that our members employed in that service shall not benefit from the same protection of the proposed law. We understand why it would not be appropriate for the NHS to make a payment in respect of NHS charges in a claim directed against it. We however are firmly of the view that some measure must be taken to ensure that our members who are employed by the NHS also have improved health and safety. To do otherwise is to suggest that employees of the National Health Service are less entitled to a safe working environment than other employees.

1.3 The money recovered by the NHS should be used to benefit NHS employees both in terms of prevention and occupational health. Rather than the NHS charges which are recovered being absorbed or lost in the general NHS budget, the funds should instead be directed towards improving the NHS’s health and safety record and also for the benefit of NHS workers who have been injured by increasing the NHS’s occupational health provision. As we have indicated to the Executive we are already increasingly concerned regarding the number of criminal assaults to our members in the NHS and the rise of work related stress.

1.4 Allocation of resources to occupational health would also assist other workers who have been injured as a result of negligence of employers. Compensation is only one factor in a worker coming to terms with injury and disease. Occupational health would also play a role in prevention of such accidents or diseases.
2. **Additional Strain On The Union's Resources**

2.1 We have already set out the actual and administrative costs to the Union in providing a full legal service to its members. The proposals will increase the strain on the Union. It will lead to an increase both in terms of actual costs and administration.

2.2 It will also increase the potential to the union of bearing the costs of lost Court actions.

2.3 It is common to hear an Insurer say that a case is being settled on “an economic basis”. This represent the fact that the compensation value of the case is relatively low and that, in light of the low value, the Insurer is not prepared to take the risk of meeting the cost of a Court action. The proposals will increase the amount that an Insurer will be required to pay in every case. There will be many cases where the level of compensation to which an injured party is entitled is small but the recoverable NHS charges is high. In those cases there will no longer be an economic incentive to the Insurer to settle. This in turn means that it will be necessary to litigate more cases. We have already explained why and how Court actions are a drain on the Union’s fund. Accordingly, the proposals, if introduced, would result in the Union incurring greater costs than present in terms of funding, investigation and unrecovered disbursements. It will also be appreciated that if it is necessary to raise more Court actions there is a likelihood that more cases will be lost to the significant cost of the Union.

3. **NHS Budget**

3.1 In any event we are also concerned that the Government may use the sums recovered under the proposals to decrease the funds that the Government would otherwise have made available to the NHS. This would be entirely unacceptable. The proposals must exist to provide additional funding over and above that which the Government is prepared to commit to the NHS in any given year.

4. **Inequality**

4.1 The Executive honestly describes the proposals as parasitical. We echo this view. The particularly unfair aspect is in respect that the Executive benefits from the proposals but take no risks whatsoever. In contrast, for all of the reasons described above, the proposals shall increase the risk to us and shall increase the cost of our legal service. The position is not acceptable.

4.2 The Executive should acknowledge the additional strain it is placing on the Union by bringing Trade Unions in Scotland in line with Trade Unions in
England and Wales and by allowing the recovery of notional insurance premiums.

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