FORMAL RESPONSE

TO DCA CONSULTATION

ON PART 36 OF THE CIVIL PROCEDURE RULES: OFFERS TO SETTLE AND PAYMENTS INTO COURT (CP 02/06)

AvMA response to the DCA consultation paper: Part 36 of the Civil Procedure Rules: Offers to settle and Payments into Court (CP 02/06).

About AVMA

Action against Medical Accidents (AvMA) was originally established in 1982. It is the UK charity specialising in advice and support for patients and their families affected by medical accidents. Since its inception AvMA has provided advice and support to over 100,000 people affected by medical accidents, and succeeded in bringing about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. The legal reforms of Lord Woolf in the clinical negligence field and the creation of agencies such as the National Patient Safety Agency and the Healthcare Commission have followed after years of campaigning by AvMA.

AvMA is proud of the key role it has played in making clinical negligence a specialism within legal practice. It continues to accredit solicitors for its specialist panel (without membership of AvMA's or the Law Society Panel a law firm is not entitled to a clinical negligence franchise) and promotes good practice through comprehensive services to claimant solicitors.

Overview

AvMA welcomes the opportunity to contribute to the Department of Constitutional Affairs consultation in relation to the Part 36 procedure. There is little doubt that the Woolf reforms and Part 36 have changed the litigation landscape easing the path toward earlier resolution of disputes. Broadly, Part 36 of the Civil Procedure Rules (CPR) in combination with payments in has worked well. Therefore, the question that needs to be addressed is whether or not there is a pressing need to change anything?

The rationale for reform is said to originate from the recent Court of Appeal judgments in which the Court has permitted written offers from certain defendants to have the same effect as a payment into court. However, within this it is apparent that the philosophy underpinning proposed reform of Part 36 rules is the levelling up of the tactical armoury available to both defence and claimant lawyers. In effect, it seeks to redress a perceived imbalance whereby rules may operate more favourably to the claimant than defendant. In adoption of this approach, the department seemingly misunderstands the position of the personal injury claimant or the victim of a medical accident. The latter seeks financial redress for a wrong committed to him/her. There is no issue in parallel for the defendant. For the claimant everything rides on the ability to enforce monetary orders/settlements. The same cannot be said of most defendants. The philosophy behind this form of "equalising" is therefore not appropriate.

This is not to say that AvMA does not support some reform to Part 36 of the CPR. Indeed, we make suggestions that have not been touched upon by the

DCA but would strongly urge them to consider. In particular, we invite the DCA to consider:

- The incorporation of a clarification power and sanctions (see page 6, response to Q.7))
- Extension of time in which offer can be accepted from 21 days - 28 days

We also, of course, respond to the specific questions posed by the DCA as follows:

1. ***Do you agree that defendants who can be assumed to be "good for the money" should not be required to make actual payments in support of offers as provided in recent case law?***

The rationale for this proposal is stated to be the avoidance of "tying" money up "for a potentially long period of time." In the case of a public body this means that "limited resources cannot be used elsewhere." AvMA cannot speak for other bodies but in the case of the NHSLA, the Clinical Negligence Scheme for Trusts (CNST) (to which all NHS Trusts, including Primary Care Trusts (PCTs) belong) is funded through its members' contributions that meet the costs of all clinical negligence claims. These contributions are paid on an annual basis. Therefore, when the NHSLA make a payment into court, funds are not being diverted from core services (this is the erroneous assumption in the commentary that precedes this question). Rather, in doing away with the requirement that an NHS defendant be required to make a payment in, the NHSLA effectively receives a windfall whilst membership contributions presumably sit on an interest bearing deposit account.

Notwithstanding this, the advent of periodical payment orders has made the matter of offers not supported by periodical payments probably of less relevance now. A defendant can make a periodical payment offer without a payment in. Accordingly so far as the larger cases are concerned whether the offer is a written one via Part 36 or a payment in is probably less of an issue now. There may be a further silver lining in that settlements may in the past have been held up whilst the NHSLA had to seek release of monies from its funds in order to pay them into court.

Good For The Money

Nevertheless, there is still the question of what constitutes a body that is deemed "good for the money" and this remains a real concern to us. We note the DCA definition of "health service body" or an "insured defendant". However, neither definition in our opinion suffices. So far as a "health body" is concerned this presumably incorporates the Foundation Trust. The problems in securing financial settlements against such defendants became apparent in the recently decided case of **WM –v- Royal Gloucestershire Foundation NHS Trust.**

Although, Forbes J, has yet to make a declaratory judgment in that case, a model order has been made. The issues in that case related to the long term security of a periodical payment order in circumstances where a Foundation Trust can be bankrupted and the tab not "picked up" by the government. Although agreement has been reached and the CPR amended to cover periodical payment scenarios (that will still effectively be covered by CNST) the core principle that led to that decision still remains good. A Foundation Trust cannot be deemed "good for the money", unless the CPR is amended to similarly encompass the principles pertinent in the Gloucestershire case. The Trust's Part 36 offer needs to be accompanied by an undertaking from the NHSLA that the Trust in question is a member of the CNST and cannot withdraw from the CNST without meeting its liabilities to include offers of settlements first.

Furthermore, the NHS landscape has shifted and continues to shift so much that private and other independent treatment centres now may be deemed to constitute "NHS bodies" but also fall out of the CNST scheme. This is a matter that the NHS and NHSLA combined have not fully grappled with and liability in many of these cases is dependent upon complex commissioning and contractual relationships between many parties. These relationships are still novel and AvMA has already witnessed a trickle of cases where liability is contested. We fully expect this trickle to become a steady stream once complications in treatment centres become apparent. Many of these treatment centres are run and staffed by overseas companies. Many of these companies sub-contact services, particularly from clinicians. The clinicians in many cases are expected to self-insure. However, even before such arrangements came about, AvMA has been aware of problems in suing overseas doctors with insurance either being non-existent or with so many caveats inserted as to be not worth anything at all. Besides which, the insurance contract is between clinician and insurer and the claimant has no power to enforce the agreement.

All this is to ignore the problems in pursuing private clinics and private doctors in the UK generally. All practitioners know that private health is rife with problems when it comes to redress. Although the Medical Defence Union (MDU) has instituted a formal insurance arrangement with its members, the Medical Protection Society (MPS) still operates as a mutual. Both defence unions, like insurers, are free to abnegate responsibility for cover if they choose so to do, even in the course of litigation. In the circumstances we do not consider that they can be deemed "good for the money." It goes without saying, that any independent or private treatment centre not underwritten by either an acute Trust or PCT (and thus covered by CNST) similarly cannot be deemed "good for the money." Private clinics and centres do and have gone "under".

Finally, a recurrent theme that AvMA hears of is difficulties in recovery of payment following acceptance of a Part 36 offer. This contrasts with the case where acceptance is made of a payment in. In the latter case, payment out usually materialises in seven days. Not so, with Part 36. The issue is particularly

pertinent in relation to interim payments. The court can order that an interim payment be paid out of the funds at the CFO. Accordingly, the claimant is not prejudiced by delays in receiving payment. In the absence of a payment in, the CPR ought to make clear that in circumstances where a Part 36 offer has been made, an interim payment order must be satisfied within 14 days otherwise interest accrues from the date that the order is made.

AvMA therefore recommends that if some clearly defined public bodies are to avail themselves of a provision whereby the Part 36 offer has the same effect as a payment in then a rule must be devised whereby payment following acceptance of the offer must be made within 7-14 days, failing which judgment can be entered with enhanced interest from the date of acceptance.

In summary certain pre-conditions must apply if the payment in can be dispensed with:

- The body must be "good for the money"
- The claimant must not be unfairly disadvantaged
- The defendant must not be unfairly advantaged
- The Part 36 payment should operate as if it were a payment in the Court Funds Office (CFO).

2. ***If so, do you agree that so far as possible those categories of defendant should be defined in the rules to increase certainty for defendants making, and claimants accepting, offers unsupported by payments?***

Please see comments above. Those defendants that are permitted to treat Part 36 offers in the same manner as a payment in need to be clearly defined for the reasons set out in great detail in our response to question 1 above.

3. ***If so do you agree that the categories defined in the draft rule are appropriate? What other categories would you include or exclude and why?***

Again, this aspect is covered extensively in our response to question 1 above. It needs to be emphasised that our response derives from our niche experience of clinical negligence. Our concerns about the definition of "health body" have been explained already. CNST membership as well as an undertaking from the NHSLA that it will apply for the purpose of the action has to be given to the court. We see no place for dispensation with payments in when it applies to individuals or private treatment centres.

4. ***Should the court be allowed to a) extend and/or b) abridge the time for accepting a part 36 offer? If so, what factors or criteria would be relevant?***

AvMA is somewhat sceptical about the need to create a rule with regard to extension/abridgement of time as in practice this ought to be a matter of discretion applied by the court. In general terms we are in favour of granting an extension of time for acceptance, particularly in relation to the high value cases where the defence frequently make early Part 36 offers before affording the claimants an opportunity to fully work up the quantum aspects of the claim. In cerebral palsy cases involving infants it is frequently difficult to assess condition and prognosis – and hence quantum - until the child matures.

So far as abridgment is concerned, we broadly agree that such a power would provide a deterrent to situations where late service of evidence occurs.

It does appear to AvMA that the 21 day time limit is a tight one. The reason for this 21 day rule is no more than historical. We recommend that the DCA considers extending the time from 21 days to 28 days.

5. If the court has the power to extend then should the offeror also have the right to make an offer beyond 21 days in the first instance?

We do not consider this to be an issue of which we are aware. This course of action operates in practise already. A rule is not required.

6. Do you agree that the requirement to obtain the court's permission to accept a part 36 offer out of time should no longer apply? If you disagree, please explain what purpose permission serves?

If the parties can agree the terms of acceptance between themselves then we believe that the need to seek court permission on every occasion ought to be dispensed with. However, there may be extenuating circumstances where despite the fact that acceptance is out of time the ordinary cost rule ought not to apply (e.g. late service of evidence). In these circumstances the provision to obtain the courts permission ought to be retained as a safeguard.

7. Should parties refusing an offer be required to give reasons?

Emphatically, no. However, AvMA proposes that an amendment to the CPR ought to be made to invite a party to clarify an offer. As it stands there is seemingly no sanction to be applied in circumstances where a defendant does not clarify the offer. If the court subsequently concludes that that clarification was necessary in order to assess the payment in in circumstances where it was not accepted timeously or at all because clarification failed to be forthcoming - the court ought to be entitled to take this into account in making its final cost order.

8. Should withdrawal of offers be permitted:

a. during the period for acceptance with the courts' permission and thereafter by serving a notice of intent to withdraw; or
b. at any time by serving a notice to withdraw; or
c. at any time only with the court's permission or
d. only after the period for acceptance and with the court's permission; or
e. only after the end of the period for acceptance, without requiring the court's permission?
During the time for acceptance with the court's permission…or at any time….with or without court permission…

a. Offers should be deemed irrevocable without the court's permission during the acceptance period. Parties need predictability and ground rules*.* In the event that an offer is withdrawn, it should not have the effect on costs that it otherwise would have had if the offer had remained. If an offer is withdrawn after the regulated period of acceptance, then we believe notice of withdrawal ought to be served (8b).

9. Should defendants normally be entitled to (a) indemnity costs and (b) enhanced interest where a claimant fails to beat the defendant's offer at trial?

CPR 44(3) already permits the court to order indemnity costs against the claimant.

If the mischief of any proposed amendment is to provide a deterrent, the fact that the claimant has costs deducted from damages is already punitive and deterrent enough. There is no evidence that the deduction of costs from damages does not already act as a tactical inducement. Accordingly, defendants ought not to be entitled to either indemnity costs or enhanced interest.

10 Should Part 36 offers and notices be served or simply given?

AvMA believes notices should be served with effect from date of receipt.

11. Do you agree that the requirement to file a notice of a Part 36 payment with the court should be removed?

No. The notice with the court corroborates the fact that a Part 36 offer was made.

12. Do you have any views on these [additional] proposals [other changes in paragraph 56 of the consultation paper] or do you have any other amendments to Part 36 that you feel are necessary? If so please specify.

AvMA has already made comments as to other potential amendments to the CPR and these have been covered above. So far as the additional proposals are concerned we comment specifically as follows:

Amending CPR 36.20 to include the criteria that appear in rule 36.21(5).

We do not believe that granting additional discretion is necessary or desirable. In order for the system to work effectively there must be some element of predictability.

Amending Part 36 and Part 52 to clarify that fresh offers are required to have effect in appeals.

Is this correct? Our understanding is that the law as it currently stands is that Part 36 offers do, indeed, have currency until the conclusion of the case, including any appellate stages.

If this is not a correct understanding, and either way, it would be useful to amend Part 36 and Part 52 in order to have these matters clarified.

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