

Claimant firms must prepare for the long haul

Understanding how litigation strategies affect cash flow will allow claimant firms to hold their nerve in the face of obstructive defendant tactics, advises **Matthew Gwynne**



Matthew Gwynne is a director of SpectraLegal @SpectraLegalLtd spectralegal.co.uk

Claimant clinical negligence lawyers will be all too aware of obstructive defendant tactics when it comes to attempting to reach a settlement. Even some NHS chief executives have spoken out about the tactics of their own lawyers.

These tactics can range from the infuriating to the ridiculous. Ignoring timelines stated in the established protocols, an issue that I understand both the Society of Clinical Injury Lawyers and Action against Medical Accidents are focusing on currently, is very common. Failure to settle strong cases at an early stage is another, with defendants letting claimants proceed to a full letter of claim in the knowledge that they will settle, admitting liability on the eve of a trial, and then querying all the avoidable costs involved.

Further, interim payments are often extremely difficult to obtain in clinical negligence cases, and so claimants are under much

greater stress and can be tempted by low offers, particularly around Christmas time.

Yet our experience in the Canadian market, working with over 750 firms over the past 11 years, is that defendants will vary their tactics depending on the law firm they are litigating against, something which we are seeing in England and Wales too.

Defendants will consider whether a firm is publicly listed, has external backers, or is known to have deep enough pockets for a fight. However, as this does not apply to the vast majority of firms running clinical negligence cases in England and Wales, many firms are left having to deal with litigation tactics designed to put them on the brink of financial collapse.

Cash-flow pressures

Newcomers are particularly at risk and will find that every aspect of the litigation will be delayed until the firm's strength of character and ability to litigate is proven (for example, by taking cases to trial). Once this has been achieved, then the experience will be different, but it means that newcomers may find it more difficult to continue trading in the early days.

The pressure can also be particularly great in multi-disciplinary firms, where the rest of the firm may see itself as shoring up the delayed revenues from clinical negligence departments. Understandably, for many it can be difficult for

them to hold their nerve.

Of course, it is completely understandable that some firms are tempted when money is tight, but in our experience the worst thing they can do is focus solely on cash collection through any means. While all firms will strive to maximise clients' damages, they will often, due to cash-flow pressures, not be able to adopt the same approach to their own costs negotiations, and this can often lead to costs negotiations being settled too soon and at a lower value. Such an approach only sacrifices profit for cash.

We all know that defendant behaviour is unlikely to change unless legislation forces it to, and our advice to firms is usually to prepare for the long haul. The reality is that you can't control defendant behaviour but you can control the way your firm operates and responds.

Case management

A major problem for claimant firms is identifying in advance the appropriate amount of working capital they need to fund the business, and this is often the cause of cash-flow pressures. It is not a straightforward process and needs a thorough understanding of how different case types and litigation strategies impact cash flow and working capital requirements.

In our experience, those firms that proactively analyse their past cases and use these insights to predict future performance tend to be more successful at

navigating the cash-flow uncertainty of running clinical negligence cases. After all, knowledge is power.

Most firms have some sort of case management system in place and so already have at their fingertips the capability to better understand their case load and make accurate predictions around future performance and cash availability. Yet failure to keep accurate, detailed, and consistent records is a common problem.

We try to help the firms we work with to gain real-time clarity on the current state of all their cases. Only once you have this information can you know the real value in your business and make accurate future predictions.

It is also important to remember that there is a competitive market of financial products out there designed to help firms navigate the ups and downs of litigation, including help with work in progress, disbursement, and costs funding.

Banks, insurers, and funders continue to be active in supporting law firms in straitened times, yet in a market where a consultation on fixed costs is imminent, those operating in clinical negligence will increasingly be expected to demonstrate a thorough understanding of the value in their own businesses and have an ability to model the impact on cash flow and profitability that these changes may bring at their fingertips. **SJ**