

CLINICAL NEGLIGENCE COST BENEFIT ANALYSIS AND REVIEW OF DAMAGES & PROSPECTS OF SUCCESS

1. Introduction

The purpose of this paper is to ascertain the impact of applying the general funding code ratios to clinical negligence cases compared to the impact of lower alternative ratios. This analysis tests these cost benefit ratios, which are under consideration and which will determine the grant or refusal of legal aid, on cases which have progressed to conclusion through the Legal Aid process. In addition damages marked, damages awarded and marked prospects of success have been examined and compared for the same set of cases.

The general funding code cost benefit ratios and alternative ratios for testing are outlined below.

General Funding Code cost benefit ratios

Cost Benefit – Quantifiable Claims

If the claim is primarily a claim for damages by the client and does not have a significant wider public interest, Full Representation will be refused unless the following cost benefit criteria are satisfied:

- (1) If prospects of success are very good (80% or more), likely damages must exceed likely costs;
- (2) If prospects of success are good (60%-80%), likely damages must exceed likely costs by a ratio of 2:1;
- (3) If prospects of success are moderate (50%-60%), likely damages must exceed likely costs by a ratio of 4:1.

Alternative cost benefit ratios

If prospects of success are good (60% – 80%) a 1.5:1 ratio is required. For cases falling into the 50 – 60% range, a 2:1 ratio is required.

As outlined above, marked prospects of success, marked damages and final costs are required to calculate ratios.

An initial sample of cases for testing was selected from applications registered in the period 00-03, which had concluded, which were direct authority cases (won or settled) and which had awards of damages. Direct authority cases were selected for the full analysis on the basis that damages marked and damages awarded could be compared; it must be noted that the Legal Services Commission (LSC) does not pay for these cases but records the value of costs. LSC pay costs on lost, withdrawn or transferred cases which have no awards of damages. 117 cases fitted the selection criteria of the initial sample. Within the total of 117 cases, 33 recorded actual awards of damages of less than £5,000. The impact of ratios and comparisons have been examined for these 33 cases separately and are outlined below overall figures throughout this analysis. The initial sample test results are detailed in sections 2 to 5 of this report. A flow chart summarising diagrams and tables 2 to 8 is at Appendix A.

A second sample was selected from LSC paid cases over the same period to ensure the analysis was fully representative. Sections 7 & 8 of this report detail ratio tests, prospects of success analyses and conclusions for the second sample of 395 non direct authority cases.

Columns 3 and 4 of Table 1 chart the volumes of cases which were sampled.

Table 1 Volumes of cases sampled

Year	Volume of Direct Authority cases	Volume of Direct Authority cases with Damages amounts	Volume of Non Direct Authority cases
00-01	66	63	161
01-02	28	26	136
02-03	28	28	98

Of the 117 (33)¹ direct authority cases above, 109 (31) were traced and individually scrutinised. Of the 395 non direct authority cases, 332 were traced and individually scrutinised. Diagrams 1 and 2 below show the number of cases which recorded the information needed to calculate ratios.

¹ Figures in brackets represent volumes of cases with damages amounts awarded less than £5,000

Diagram 1 - Direct Authority cases

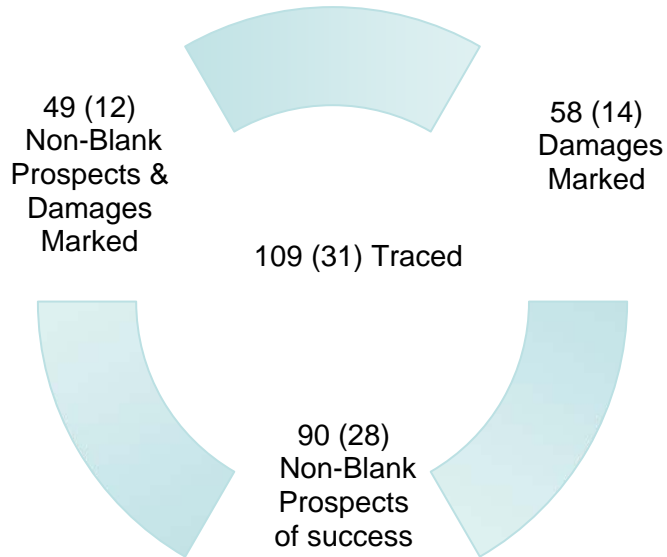


Diagram 2 - Non Direct Authority cases



2. Ratio analysis for Direct Authority cases

Of the 49 (12) cases with non-blank prospects of success and damages marked, 7 had marked prospects which were unclear. 42 (12) cases contained a marked damages value and marked prospects of success which could be interpreted in the context of the cost benefit ratios.

The marked prospects of success were interpreted as follows:

Comments such as - strong, very good, excellent were assumed to fit ratio 1;
 Good, clear prima facie were assumed to fit ratio 2 &
 Prima facie, moderate, reasonable were assumed to fit ratio 3.

Actual costs were used in the ratios as costs were not marked on any of these cases.

The ratios were applied firstly using marked damages **(A)** and secondly using actual damages awarded **(B)**.

(A) Using damages marked in ratio

On examination, using the general funding code cost benefit ratios, 23 (3) of the 42 (12) cases would not have received funding & 19 (9) would have received funding. See Table 2a.

Table 2a Using General Funding Code Ratios

Overall Sample	Number of cases	% of Total
Would not have received funding	23	55%
Would have received funding	19	45%
Total	42	

Set with Damages < £5,000	Number of cases	% of Total
Would not have received funding	3	25%
Would have received funding	9	75%
Total	12	

The 23 (3) cases which would not have received funding were further examined. If the award of damages was less than the final costs, the case was categorised as would fail the ratio test.

If the award of damages was greater than the final costs, the case was analysed to determine which component of the ratio excluded that case – the marked damages, the marked prospects of success or both. The results of this analysis can be seen in Table 3.

Table 3 Examination of Failures

Overall Sample	Number of Cases	% of Total
Case would fail ratio test	9	39%
Case would have passed if marked damages had reflected award and if marked prospects had been stronger	8	35%
Case would have passed if marked damages had reflected award	3	13%
Case would have passed if marked prospects had been stronger	3	13%
Total	23	

Set with Damages < £5,000	Number of Cases	% of Total
Case would fail ratio test	0	0%
Case would have passed if marked damages had reflected award and if marked prospects had been stronger	0	0%
Case would have passed if marked damages had reflected award	0	0%
Case would have passed if marked prospects had been stronger	3	100%
Total	3	

Using the general funding code ratios, 61% of the cases that failed, failed because of low markings.

On examination of the 19 (9) cases which passed the general funding code ratio test, 2 (1) resulted in costs greater than damages awarded suggesting that perhaps these cases should not have been granted full representation.

Using alternative cost benefit ratios, 21 (10) cases would have received funding and 21 (2) would not, out of a total of 42 (12) cases.

For this particular sample an additional 2 (1) cases would have received funding using alternative cost benefit ratios as opposed to the general funding code ratios. See Table 4a below.

Table 4a Using Alternative Cost Benefit Ratios

Overall Sample	Number of Cases	% of Total
Would not have received funding	21	50%
Would have received funding	21	50%
Total	42	

Set with Damages < £5,000	Number of Cases	% of Total
Would not have received funding	2	17%
Would have received funding	10	83%
Total	12	

(B) Using damages awarded in ratio

On examination, using the general funding code cost benefit ratios, 29 (9) of the 42 (12) cases would not have received funding & 13 (3) would have received funding. See Table 2b.

Table 2b Using General Funding Code Ratios

Overall Sample	Number of cases	% of Total
Would not have received funding	29	69%
Would have received funding	13	31%
Total	42	

Set with Damages < £5,000	Number of cases	% of Total
Would not have received funding	9	75%
Would have received funding	3	25%
Total	12	

The 29 (9) cases which would not have received funding were further examined. 18 (5) cases would have received funding with stronger marked prospects of success.

Using alternative cost benefit ratios, 21 (5) cases would have received funding and 21 (7) would not out of a total of 42 (12) cases.

For this particular sample an additional 8 (2) cases would have received funding using alternative cost benefit ratios as opposed to the general funding code ratios. See Table 4b below.

Table 4b Using Alternative Cost Benefit Ratios

Overall Sample	Number of Cases	% of Total
Would not have received funding	21	50%
Would have received funding	21	50%
Total	42	

Set with Damages < £5,000	Number of Cases	% of Total
Would not have received funding	7	58%
Would have received funding	5	42%
Total	12	

Comparison of tables 2a and 2b and 4a and 4b, demonstrates that, when using the damages awarded figures (B) in the general funding code ratios as opposed to damages marked (A), more cases would fail the general funding code ratio tests; the

percentage that failed increased by 14%. This suggests that the damages marked are more optimistic than actuals. This, for the cases with damages awards of less than £5,000 was even more extreme as proportions of ratio tests success and failure reversed; 75% passed using marked damages, 75% failed using actual award of damages. When applying the same comparison to the lower alternative ratio, using damages marked or damages awarded made no difference for the overall set of data. For the set of cases with damages less than £5,000, the use of the damages awarded figure in ratios increased failure by 41%.

3. Damages Analysis for Direct Authority cases

Within the sample of 109 (31), 58 (14) cases had marked damages. The marked damages amount was compared to the actual damages awarded and results of this analysis can be seen below in Table 5.

Table 5 Damages Marked Vs Damages Awarded

Overall Sample	Number of Cases	% of Total
Damages Marked < Damages Awarded	24	42%
Damages Marked = Damages Awarded	6	10%
Damages Marked > Damages Awarded	28	48%
Total	58	

Set with Damages < £5,000	Number of Cases	% of Total
Damages Marked < Damages Awarded	0	0%
Damages Marked = Damages Awarded	1	7%
Damages Marked > Damages Awarded	13	93%
Total	14	

For the overall sample, 52% had marked damages less than or equal to the final award of damages. The variation between damages marked and damages awarded ranged from £240,000 marked less than award to £72,000 marked greater than award. For the set with damages less than £5,000, all but one estimated damages higher than the final award.

4. Prospects Analysis for Direct Authority cases

Within the sample of 109 (31), 90 (28) cases reported the prospects of success. These comments were examined and grouped according to which cost benefit ratio applied. Table 6 shows results of this examination.

Table 6 General Funding Code or Alternative Ratio Definition of Prospects

Overall Sample	Number of Cases	% of Total
1 – Strong, very good	20	22%
2 – Good	22	24%
3 – Reasonable, Moderate, Prima Facie	32	36%
Can't determine from comment	16	18%
Total	90	

Set with Damages < £5,000	Number of Cases	% of Total
1 – Strong, very good	5	18%
2 – Good	11	39%
3 – Reasonable, Moderate, Prima Facie	7	25%
Can't determine from comment	5	18%
Total	28	

For the overall sample, ratio 3 applied on 36% of cases; this ratio requires damages:costs of 4:1 for the general funding code or 2:1 as an alternative. For the set of cases with damages awarded less than £5,000, marked prospects were stronger with 57% of cases marking strong or good or equivalent comments.

This, when examined in line with the ratio test section 2(A), demonstrates why a higher proportion of the cases with damages awards less than £5,000 passed the funding code test when compared with the full sample.

5. Calculation of Actual Damages to Costs Ratio and Comparison with Marked Prospects for Direct Authority Cases

Table 7 below outlines, for the 42 cases with damages marked and marked prospects of success, the calculated ratios of actual damages awarded to actual costs.

Table 7 Calculated Ratios

Overall Sample	Number of Cases	% of Total
Less than 1:1	11	26%
1:1	12	28%
1.5:1	4	10%
2:1	13	31%
4:1	2	5%
Total	42	

In 74% of cases, awards of damages exceeded or equalled costs.

Table 8 below demonstrates the strength of prospects marked for each calculated ratio.

Table 8 Calculated Ratio and Prospects of Success Comparison

Overall Sample	Prospects	Number of Cases	% of ratio
Less than 1:1	Strong	2	18%
	Good	1	9%
	Reasonable	8	73%
1:1	Strong	2	17%
	Good	5	42%
	Reasonable	5	42%
1.5:1	Strong	0	0%
	Good	3	75%
	Reasonable	1	25%
2:1	Strong	7	54%
	Good	1	8%
	Reasonable	5	38%
4:1	Strong	2	100%
	Good	0	0%
	Reasonable	0	0%

Table 8 shows that for the cases with greater actual damages to actual costs ratios, the marked prospects were stronger and for those cases with lower ratios initial

markings had been weaker. This suggests that the marked prospects were reasonably accurate when compared to final calculated ratios for these direct authority cases.

6. Conclusions for Direct Authority cases

In summary, applying ratio tests to damages marked resulted in 55% failing using general funding code and 50% failing using alternative ratios; using alternative ratios did not allow significantly more to pass.

Applying the same ratio test to damages awarded resulted in more failures, particularly for those cases with damages awarded less than £5,000. This would be expected as 48% (93%) of cases had marked damages greater than actual award compared to 42% (0%) with marked damages less than actual award

For the cases that failed the general funding code ratio test from the overall sample, 39% had damages awarded less than the cost of the case; the remainder would have passed if markings of damages or prospects had been stronger. It should be noted that for this sample completion of the marked prospects of success and marked damages on application forms was not mandatory; markings may alter if this information was used, as is proposed, to determine the grant or refusal of legal aid.

Over half of marked damages were less than or equal to the final award of damages.

Table 6 in section 4 shows in 54% of cases prospects of success were either unclear or moderate requiring a ratio of 4:1 damages:costs in order to pass.

Tables 7 and 8, the examination of the true relationship between actual damages and costs and marked prospects, illustrated a link between final ratios at the end of the case and marked prospects at the start of the case. Cases with ratios of 2:1 and 4:1 had a higher proportion of strong markings.

For this set of data, 60% of cases were High Court and 40% County Court.

7. Ratio and Prospects of Success Analysis for Non Direct Authority Cases

Of the 124 cases with non-blank prospects of success and damages marked, 58 had marked prospects which were unclear. 66 cases contained a marked damages value and marked prospects of success which could be interpreted in the context of the cost benefit ratios. Interpretation of the marked prospects of success comments is noted in section 2 of this report. Ratio tests used are outlined in section 1 and tests use marked prospects of success and actual costs as in section 2(A).

On examination of the 66 cases, 100% would have passed both the general funding code and the alternative ratio tests. The cases which were paid by LSC were predominately withdrawn. Costs were low on many of the cases as they had been withdrawn after a limited period (limited certificates had been issued) on the basis of, for the majority, unfavourable experts reports. Costs were therefore not indicative of the cost of a completed case.

Within the sample of 332, 124 cases reported the prospects of success. These comments were examined and grouped according to which cost benefit ratio applied. Table 9 shows results of this examination.

Table 9 General Funding Code or Alternative ratio definition of prospects

Overall Sample	Number of Cases	% of Total
1 – Strong, very good	9	7%
2 – Good	20	16%
3 – Reasonable, Moderate, Prima Facie	37	30%
Can't determine from comment	58	47%
Total	124	

77% of cases marked prospects of success as moderate or unclear.

8. Conclusions for Non Direct Authority cases

Results of analysis suggest that non direct authority cases are not suitable to test against ratios. Costs are low as the majority of cases have been withdrawn, in many cases, due to unfavourable reports from experts; 100% of cases would have passed both general funding code and alternative ratio tests.

The marked prospects of success were either unclear or moderate in 77% of cases; this figure had been 54% for direct authority cases suggesting that legal representatives were more confident at the start of the successful cases.

For non direct authority cases, 85% were High Court and 15% were County Court. These proportions differed for the successful direct authority cases for which 60% were High Court and 40% County Court.

9. Summary

For direct authority cases (settled or won)

- Using alternative ratios when applying damages marked did not allow significantly more cases to pass. On the basis of these results the general funding code ratio test would be recommended.
- Using damages awarded figures in calculations resulted in more failures; markings of damages were more optimistic than actual damages.
- Of the cases that failed the ratio test, 61% would have passed with higher markings of prospects or damages.
- 52% of cases had marked damages less than or equal to the final award of damages.
- 46% of cases marked strong or good prospects.
- Calculated ratios revealed marked prospects to be fairly accurate.
- 60% of cases were High Court; 40% County Court.

For cases LSC paid

- Unsuitable set of cases to test against ratios – the majority were withdrawn and had low costs.
 - A higher proportion of LSC paid cases, when compared to direct authority cases, had unclear or blank marked prospects and/or damages.
 - Marked prospects for these cases were less confident than direct authority cases.
 - 85% of cases were High Court; 15% County Court.
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Appendix A

