Written evidence submitted by MPS (NLR0032)

Introduction

Medical Protection Society (MPS) welcome the Health and Social Care Committee's decision to carry out an inquiry on NHS litigation reform. Our submission is informed by our direct experience of assisting doctors, dentists and other healthcare professionals with clinical negligence claims not just in the UK but across many different countries. We would be very happy to provide oral evidence if required.

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world. Our in-house experts assist members with the wide range of legal and ethical problems. Of particular relevance to this inquiry, membership to MPS provides members with the right to request indemnity for claims arising from professional practice.

Our submission is focused on two main areas that we believe provide solutions to the rising cost of clinical negligence claims.

1. **Creating an open culture and reducing error.** A fundamental part of the strategy for addressing the rising cost of clinical negligence claims must be a shift towards an open culture which promotes learning instead of one that is highly litigious and searches for blame.

2. **Legal reforms aimed at reducing cost.** It is important that there is reasonable compensation for patients following clinical negligence, but this must be balanced against society's ability to pay. If the balance tips too far, the risk is that the cost becomes unsustainable. Legal reforms are needed that would reduce legal costs and which would ensure compensation payments are fair and proportionate.

Background - the rising cost of clinical negligence claims

Over the last 10 years the annual cost of clinical negligence to the NHS in England has increased by 156%; £2.2bn was paid out in 2020/21 compared to £863m in 2010/11.

The total estimated liabilities now facing the NHS are extraordinary. NHS Resolution has estimated that nearly £76.3bn will be needed for future Clinical Negligence Scheme for Trusts (CNST) costs and £1.1bn for Existing Liabilities for General Practice (ELGP) and Clinical Negligence Scheme for General Practice (CNSGP) costs. This relates to claims arising from incidents that have already occurred.

The government has acknowledged that 'this represents the diversion of resource from front line services and a significant source of fiscal risk'[i]. At a time when the NHS is facing even more pressure because of the pandemic, difficult decisions about how it allocates its limited and precious resources must be made.

As well as the cost to the NHS, the rising cost of clinical negligence also has a very significant impact on healthcare professionals not covered by a state-backed scheme, including doctors working in private healthcare and dentists. Responsible and well-managed defence organisations such as MPS have an obligation to reflect the rising costs of clinical negligence in membership subscription fees that healthcare professionals pay so we can be in a position to defend members' interests long into the future.

It is important that there is reasonable compensation for patients who are harmed due to clinical negligence, but this must be balanced against society's ability to pay. We have long highlighted that if the cost of claims rises too high then the balance could tip too far, and the cost will become significantly greater for the NHS, for healthcare professionals and for society.

Aside from the financial cost, there is also a very real human cost to litigation. The current clinical negligence system is an adversarial one in which patients have to identify and prove "fault". Injured patients face delays in receiving compensation, patients and healthcare professionals go through long, costly and stressful process. This is particularly true for birth injury claims, where the system proves to be neither equitable nor appropriate as it does not provide all families and children who suffer child-birth injuries with appropriate compensation and support, only those who are able to prove fault against a healthcare worker. A failure to be able to do so results in children and families with major challenges getting no compensation while for the few who do succeed the financial gain can be enormous.

1. Reducing error and creating an open culture

Preventing negligent harm in the first place is obviously the right thing to do, and also has the potential to reduce the costs of clinical negligence. There is wide acceptance of this and the NHS Patient Safety Strategy: Safer culture, safer systems, safer patients, published in July 2019, set out a range of patient safety strategies.

Defence organisations also have an important role to play. At MPS, our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We draw on our experience and expertise to raise awareness of the causes of claims, the conditions behind these, and how errors can be prevented. We also aim to reduce the prospect of claims, by offering education programs and advice to our members.

We also fully support moves towards creating a culture of openness and learning in the healthcare sector, such us our Speaking up for safety initiative. We believe in creating an environment where clinicians feel empowered and confident to admit errors, and learn from mistakes, without fear of incrimination. There needs to be explicit support from leaders who need to be equally committed to the principles of open disclosure, in order for clinicians not to fear being blamed when admitting a mistake.

In our experience more often than not, apologising, admitting a mistake and communicating effectively will help to mitigate litigation. However, this is only plausible if there is a change in the current mentality which allows for healthcare professionals to be open about mistakes without the fear of being blamed and subsequently faced with regulatory, civil or criminal proceedings.

The Healthcare Safety Investigation Branch has an important role to play in promoting an open and learning environment where clinicians are encouraged to share their experiences in order to learn from events, without fearing litigation as a result of being open.

Recommendation: we would recommend that the Department of Health and Social Care and all organisations involved in healthcare work to:

• encourage incident reporting and learning from events

• promote a culture of speaking up
• encourage a culture that prioritises safety, quality, learning and improvement
• manage behaviour that undermines a culture of patient safety
• move away from a 'blame and shame' culture to one that promotes openness, transparency, candour and fairness.

The above needs to be achieved through a positive culture rather than law and criminalisation – which creates a negative culture.

2. Legal reform

When a patient has been harmed due to clinical negligence there needs to be a balance between ensuring fair compensation is available to patients while ensuring the compensation awarded is fair, that legal costs are kept proportionate that the wider costs are affordable. We propose a number of legal reforms which, if implemented effectively, will begin to tackle the cost of claims.

Future care costs and future earnings

It is important that claimants receive an award that provides them with the care they need. However, there can be enormous differentials between costings proposed by care experts for the claimant, and the defendant. Public resources are limited and the money spent by the NHS on a compensation payment is money that could be spent on frontline patient care. It is a question of sustainability, and reasonable compensation must be at the heart of all awards.

There is also a significant issue of fairness relating to future earnings as high earning claimants are often able to claim more in damages than lower earners. Ultimately, this means that higher earners can receive more in compensation than lower earners. Some Australian states have introduced limits on the loss of earnings at typically a multiple of two or three times the average weekly earnings.

Recommendations: we recommend the following:

- a limit on future care costs, based on the realities of providing home based care as well as a tariff for annual care costs, dependant on injuries, with an overall cap
- a limit on future earnings which recognises national average weekly earnings.

Minimum threshold

We believe that where only very minor injuries or inconveniences are suffered, it is not beneficial to society to shoulder the extra burden that the cumulative cost of these pay-outs result in.

It seems fair to question whether it is reasonable to pay damages where an injury sustained, or inconvenience caused, is minor, whereas the cumulative cost impact on the public purse would be significant.

We would welcome consideration of a tariff for damages in the same way as is proposed for Road Traffic Accidents (RTA) claims. For example, where there has been a prescription error or delayed diagnosis leading to a short period of discomfort for the claimant, which has been resolved or been treated within a few months.

Recommendation: we recommend consideration of a minimum threshold for cash compensation (PSLA) in clinical negligence claims

Fixed Recoverable Costs (FRCs)

Legal costs account for a significant proportion of total clinical negligence costs. From the £2.2bn the NHS in England paid out on clinical negligence costs in 2020/21, legal costs accounted for £600m (27%) of that bill.

It is not unusual for claimant lawyers' costs to exceed the damages awarded to claimants in lower value clinical negligence claims even where claims are settled at an early stage. This is why we support the introduction of fixed recoverable costs (FRC) for claims of clinical negligence.

FRCs increase transparency and proportionality for all parties, and this will help ensure more informed decision making in regards to a legal action. It would also benefit both parties financially, as it would no longer be necessary to prepare and then agree or dispute budgets in claims that fall under the regime.

We support a system of FRCs in principle for all clinical negligence claims up to a value of £250,000. The idea of introducing a FRC scheme has already been considered by the Government in clinical negligence claims up to £25,000 which has recently been subject to a consultation. A separate FRC scheme will shortly be implemented in all Fast-Track Civil Litigation. However, we would envisage that a FRC scheme could also apply to higher value clinical negligence claims. NHS data demonstrates that disproportionate claimant legal fees are still a significant issue in higher cases. When looking at claims with damages payments between £50,001 and £100,000 in 2015/16, the total defence costs were 19% of the damages - whereas the claimant costs were 99%. For claims between £100,001 and £250,000 the total defence costs were 15% of the damages, whereas the claimant costs were 72%[1].Whilst we understand the arguments for not introducing FRC's for the most expensive and complex of claims, in our experience it would remain appropriate and viable to include claims up to £250,000. It would be important for such a scheme to be supported by data and analysis to drive a more cost-effective scheme fit for the future and not entirely based on average historical costs settlements which in many instances were considered to be disproportionate.

[1] Fixed recoverable costs in lower value clinical negligence claims; a consultation, Annex E: Additional data, prepared by the Clinical Negligence Policy Team
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/586647/Annex_E_data.pdf

Recommendation: we recommend that the HSCSC recommends the Government to reconsider the introduction of a system of fixed recoverable costs for all clinical negligence claims up to a value of £250,000

Small Claims Track

MPS welcomed the principle behind raising the small claims track limit for Road Traffic Accident (RTA) personal injury claims to £5,000, from May 2021.

We strongly agree that the previous £1,000 limit for personal injury claims is out of step with the small claims limit in other cases, and we note that it has not been increased since 1991. We believe that the certainty of one limit for all personal injury claims, including clinical negligence claims, will increase simplicity and transparency for all parties.

In our experience, many low-level clinical negligence claims could easily be managed within the small claims track, with the court having discretion to move a claim to another track if there are any particularly complex issues involved. We strongly believe that the £5,000 small claims track limit should be consistent across all personal injury claims, with the potential to increase further over time. There is much scope for the increase to be fully in line with all other small claims (apart from housing disrepair claims), to £10,000, but we recognised that a stepped increase, would allow an assessment of the impact of increased numbers of litigants in persons, and the Court Service's ability to support them.

Recommendation: we recommend an increase in the in small claims track threshold for clinical negligence claims to £5,000.

Support scheme for birth injury claims

As discussed above in our submission, the current clinical negligence system is an adversarial one in which patients have to identify and prove "fault". This is particularly challenging for families dealing with a childbirth injury as the current system does not provide equitable access to money for families to support their children. Only those who are able to prove fault will have access to compensation while the ones who aren't able to, will not get any support at all.

Birth injury claims tend to be very high value as they often concern providing children with lifelong care. NHS Resolution's annual report highlights that in 2020/21 obstetrics claims dominated the cost of clinical negligence, amounting to 59% of the total estimated value of incoming new claims[2]

The huge cost of claims is in real risk of not being affordable for society in countries where the state holds liability, such as the UK.

The huge cost of claims also impacts on viability of healthcare services in countries where individual doctors have to incur the increasing costs of protecting themselves from claims. These costs also create real challenges around recruitment and retention of obstetricians.

[2] NHS Resolution Annual report and accounts 2020/21. https://resolution.nhs.uk/wp-content/uploads/2021/07/Annual-report-and-accounts-2020-2021-WEB-1.pdf

The current regime is simply unsustainable. After taking account of inflation, technology advances and improving care regimes which prolong life expectancy, the cost of these claims will only increases with the resultant impact upon compensation costs.

We believe a different approach is needed that is just and equitable allowing families and children to receive compensation and support.

We advocate for a new scheme restricted to childbirth injuries – so there is equity in support for all children with severe neurological impairment. The way in which society currently compensates children and families with severe neurological injuries is neither fair nor equitable in a civilised society as only families who are able to prove fault will receive financial compensation.

The reason why we advocate for this type of scheme for childbirth injuries and not all claims is that we believe in the principle that children with severe neurological impairment and their families should not have to prove fault in order to access compensation – as this may exclude a lot of families - and the concern that if a no-fault type of scheme is introduced for all claims then it may create expectations on patients that any adverse event will lead to a financial redress.

Recommendation:

We support efforts to create a non-adversarial, open system which fosters learning to promote patient safety and reduce the number of childbirth injuries. We recommend the introduction of a type of support scheme which would provide fair and equal levels of compensation for parents and children suffering from childbirth injuries – regardless of fault being proven.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

Contact

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

Patricia Canedo
Policy and Public Affairs Manager

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[i] HM Treasury. The Balance Sheet Review Report: Improving public sector balance sheet management. November 2021.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937804/The_Balance_Sheet_Review_report____.pdf