Written evidence submitted by Ben Gent (NLR0033)

- ***What is the impact of the current cost of litigation on the financial sustainability of the NHS and the provision of patient care?***

  Medical negligence litigation involving the NHS

  a. arises in the context of a consistent civil justice regime that does not and cannot carve out exceptions for specific parts of the state
  b. arises as a result, by definition, of avoidable errors
  c. provides accountability and the opportunity to learn form errors
  d. meets needs of injured people that would otherwise fall to other departments
  e. is being undertaken at reducing cost on the part of Claimants
  f. costs more than it should because of the defence of valid claims for too long by NHS legal teams
  g. does not threaten the financial stability of the NHS; that threat arises as a result of other aspects of government policy

- ***What are the key changes the Government should consider as part of its review of clinical negligence litigation? In particular:***

  - ***What changes should be made to the way that compensation is awarded in clinical negligence claims in order to promote learning and avoid the same problem being repeated elsewhere in the system?***

    Shielding the NHS from claims will not promote learning from mistakes; without objective analysis of standards, learning is inhibited. This much is clear from the number of internal reports into adverse events that are later demonstrated to have been inadequate or flawed.

  - ***How can clinical negligence processes be simplified so that patients can receive redress more quickly?***

    Early ADR, early exchange of evidence, greater penalties both for running inappropriate claims and for defending valid claims

  - ***How can collaboration between legal advisors be strengthened to encourage early and constructive engagement between parties?***

    As the majority of lawyers dealing with this work are either AvMA or Law Society Panel members, being specialists ensures continuity when talking with Defendants such as MDU, MPS, NHSR and their panel firms. The SCIL Scheme further encourages collaborative working and resolution of claims without the need for Court proceedings.

  - ***What role could an expanded Early Notification scheme play in improving transparency and efficiency system-wide?***

Potentially a significant role but this will require application of objective standards, transparency and respect for families' independence and freedom of choice over how adverse incidents should be investigated.

- ***The Government has reiterated its intention to extend fixed recoverable costs, which limit the amount that can be paid out to meet legal costs, to clinical negligence cases with settlements of less than £25,000. At what level should these fixed recoverable costs be set, and are there any circumstances in which they should not apply to low value clinical negligence cases?***

  Compensation levels do not equate to complexity or significance, fatal cases being the clearest example. There should be sufficient funds to allow equality in terms of access to expert evidence, with built in exceptions where serious and tragic outcomes need full investigation outside a fixed costs regime

- ***To what extent does the adversarial nature of the current clinical negligence system create a "blame culture" which affects medical advice and decision making?***

  I can only offer subjective responses but have observed that

  Many/most clinicians do not appreciate the threshold for civil redress, assuming that an unavoidable adverse outcome could give rise to a claim.

  Several important developments in litigation have led to widely appreciated improvements in health care, obvious examples being the move from paternalism with law on consent, recognition that all employees have a duty to offer reasonably accurate, considered advice to patients.

- ***How important is it that any clinical negligence system encourages lesson learning and commitment to change as the result of any action?***

  Clearly fundamental

- ***What changes should be made to clinical negligence claims to enable a move away from a blame culture and towards a learning culture in the NHS?***

  The NHSR Report referred to above does not find any evidence of a blame culture caused by clinical negligence litigation, rather the blame culture (if it exists) is one within NHS organisations. It is simply wrong to lay the blame for that at the door of the innocent victims of clinical negligence.

- ***How can the Healthcare Safety Investigation Branch work to improve short term responses to patient safety incidences and therefore reduce the number of those who are forced to pursue litigation as a means of obtaining non-financial remedies?***

  The short answer is that it will involve a lot more funding for it to increase the breadth, most importantly the depth to capture all patient safety learning points, and speed of its investigations.

External investigation of incidents is to be welcomed as internal investigations are, for obvious reasons, carried out by the colleagues and employees of the organisation which creates a risk of defensive investigation. It is true that many patients would not resort to litigation if they received a full and honest apology together with an explanation of what went wrong and confirmation of the steps that are being taken to prevent the same thing from happening to another patient.

However, financial circumstances and the provision of care, equipment and therapies in the NHS sector means that many will be left with no choice but to seek compensation. For those patients, an apology is the starting point but not the end point.

- ***What legislative changes would be required to support these changes?***

The current tort system works well and has adequate tests in place to ensure that matters are looked at properly and properly compensated. As above, any tort reform would have to be across the whole of the civil justice system to avoid a very easy judicial review of its reasonableness, and so would require primary legislation to alter the common law and it's long-established 100% compensation principle which the Government is on recent public record as supporting. Given that targeting clinical negligence claims is to approach the issues from the wrong end, it is difficult to see how there would be legislative appetite for this non-solution to the actual issue of failure of patient safety learning across the whole of the NHS - which in fact probably needs better-spent scrutiny of meaningful NHS structural reform instead. If we make the NHS safer, we have no need of other reform.

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