

## Written evidence submitted by Forum of Insurance Lawyers (NLR0066)

FOIL [the forum of Insurance Lawyers] exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients except legal expenses insurers within firms of solicitors, as barristers, or as in-house lawyers for insurers or self insurers. FOIL represents over 8000 members. It is the only organization which represents solicitors who act for defendants in civil proceedings.

- **What is the impact of the current cost of litigation on the financial sustainability of the NHS and the provision of patient care?**
- The impact is both human and financial. Human on those who are made to claim compensation and those who work in the NHS. Whilst our NHS system is one of the safest in the world, it will find it difficult to withstand financial pressures from an ageing population, outdated structures and the present COVID pandemic in addition to the costs of litigation. It is worth noting that the NHS Resolution's management of clinical negligence claims reveals a sustained reduction in the costs of claims (1.5% reduction on total spend 2019/20 as compared to the previous year. Without organizational change/further investment patient care will continue to deteriorate.

- **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?**
- Review the PI Discount Rate to reflect that Claimants invest in a mixed portfolio
- Consider capping future care costs and future loss of earnings claims
- Increase use of ADR pre and post issue of proceedings
- Claimant to serve witness and expert evidence with Letter of Claim
- Cost sanctions applied for failure to follow Pre-Action Protocols
- Greater use of Joint experts on quantum
- Fund proper NHS care services for severely injured Claimants
- Restrict accommodation claims to one house per family [where parents have spilt]
- Greater use of Periodical Payments rather than lump sum payments in more serious cases

- **How can clinical negligence processes be simplified so that patients can receive redress more quickly?**
- Whilst compensation is awarded promptly in most cases, the earlier resolution can take place is the key
- Parties to meet earlier with fuller information available
- Standardise Complaints process at Trusts to head off claims
- Ensure Pre-Action Protocols are followed and have cost consequences for failure to adhere
- Stay proceedings if Pre-Action Protocol not followed
- Greater and earlier use of ADR in all forms

- **How can collaboration between legal advisors be strengthened to encourage early and constructive engagement between parties?**
- Essential for parties to meet as early as possible but with useful information provided on both sides.
- Use of NHS Resolution/SCIL Covid Protocol has shown greater collaboration on both sides across a range of issues.
- Greater use of informal meetings between parties where admissions have been made or discussions can lead to narrowing issues of breach, causation or quantum.

- **What role could an expanded Early Notification scheme play in improving transparency and efficiency system-wide?**
- It could feed back real time learning much closer to the point of incident than in cases as presently litigated where it could be years after the events although it will raise an inevitable resource issue for the increased number of cases with a consequent rise in associated costs.
- Any expanded scheme could be reserved for certain catastrophic and fatal claims with an agreed report prepared at conclusion of the case although this would inevitably need control mechanisms and adequate funding...

- **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?**
- FOIL supports fixed recoverable costs for cases with a value of £50-100k with exceptions for multi defendant claims or claims involving the death of the patient.

- **To what extent does the adversarial nature of the current clinical negligence system create a “blame culture” which affects medical advice and decision making?**
- The requirement for a finding of fault and the adversarial nature of the process contributes to a ‘blame culture’ but the introduction of a statutory Duty of Candour and the consequent actions to put a process in place to reflect a more open culture has helped to reduce any ‘blame culture’ but we agree more can be done to support NHS staff/GP’s involved.
- Healthcare professionals might find themselves subject to numerous parallel and collateral processes following an untoward incident potentially including a claim, complaint, police investigation, coroner’s inquest, internal investigation, external investigation (CQC/Royal College/HSIB), disciplinary and regulatory proceedings. In the circumstances, it is, perhaps, unsurprising that there might be a siege mentality amongst healthcare staff when something goes wrong.
- **How important is it that any clinical negligence system encourages lesson learning and commitment to change as the result of any action?**
- Lesson learning must be at the very heart of any clinical negligence system to prevent repetition of errors. To be effective however it has to be close to the point of incident.

- Continued [and expanded if possible] use of the *Getting it right first time* (GIRFT) programme will provide quality improvement, clinical engagement and better outcomes for patients.
- NHS Resolution actively support this with production of Scorecards for each Trust highlighting numbers, types of claim and in which disciplines, regular and specific collaboration with Trusts on patient safety and learning from claims and thematic reviews of claims at Trusts nationwide. NHS Resolution's annual appointment of a Fellow in a particular discipline highlights lesson learning and any relevant changes required. In addition, their Faculty of Learning showcases learning material developed by them working with other arm's length bodies, the Royal Colleges, other stakeholders and charities to promote best practice and support collaboration.

• **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?**

- Consider all clinical claims [NHS Trusts and GP's] being brought against a single legal entity rather than an individual Trust/individual.
- Better education/support within Trusts/GP's to foster a duty of candour amongst all staff.

• **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?**

- Publish an interim report on findings earlier and produce them to the Trust involved as well as the national bodies.
- Press for a greater adoption of the principles of a safety management system in the NHS
- Press for action to be taken on HSIB's recommendations
- Provide them with powers to recommend non-financial remedies.

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

- Review s.2(4) of the Law Reform (Personal Injuries) Act 1948 and utilise savings to set up specialised NHS care units and facilities.
- Review and amend the Personal Injury Discount Rate to reflect the reality of how Claimants invest in a mixed portfolio.
- Greater use of reviewable periodical payments on more serious claims.
- Cap future care and loss of earnings claims

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