20 October 2021

# Response to the Health and Social Care Committee Inquiry into NHS Litigation Reform

## 1.The Background

The pursuit of litigation in the NHS has much wider implications than financial. Patients are distressed and dissatisfied, and doctors fear being investigated in a court of law. The annual cost new liabilities is £2.2 billion. When liabilities from previous years are taken into account this rises to £10 billion/year , a figure that is seldom acknowledged. The total contingency that is anticipated is £83 billion.

£10 billion would:
Build 20 new hospitals
Train 200,000 nurses
Train 50,000 doctors

## 2. The Principle

Patients deserve to have their concerns resolved quickly and independently.

## 3. Education

1. Education about how to avoid common pitfalls must begin at medical school. The Director of IMNR was a co-author of a study that was published that showed that only half of Foundation Year 1 doctors had received any teaching at Medical School on this topic.[1]
2. Qualified doctors in all specialties should be required to undertake regular updates on how to avoid common pitfalls that trigger litigation. This should be a mandatory part of the annual appraisal that leads to revalidation by the GMC.

## 4.Early Resolution

1. When a patient has not had the outcome that they were hoping for and want to make a complaint they will normally be directed to the Patient Advice & Liaison Service (PALS ). All too often this does not offer a pathway to resolution. Patients deserve access to a rapid and independent investigation of their concerns. There is an imitative from the Royal College of Surgeons of England 'First Responders'. Early medication could play an important role.

5. No fault compensation

1. In Australia, New Zealand and Canada medical mistakes are investigated by doctors who are independent of wherever the patient's care was undertaken. Patients know that their concerns will be resolved quickly in a no-fault compensation culture.

6. Patient Pathway

1. Medical litigation in the UK is initiated by solicitors, who ask for medical expert reports and instruct barristers to draw up a claim on the basis of these reports. The claim is then investigated by a branch of the NHS called NHS Resolution, on whose behalf other solicitors ask for more medical reports. Barristers for the defence then draw up a counter argument. This to-ing and fro-ing can go on for years.

7. Mediation

1. Mediation may be offered but, by the time the claim reaches NHSR it is usually too late. Only a minority of claims is resolved in this way.
2. Mediation needs to be introduced at the beginning and not at the end of a negligence claim.

8. The Role of Lawyers

1. The current system assumes that lawyers are better able than doctors to investigate and understand a complex medical scenario. There is no evidence to support this contention.
2. A confrontational legal process is inappropriate. There are shades of grey in all case. Lawyers from both sides want to win. Such an approach is not in a patient's best interests.

9. Cost Savings

1. The pursuit of medical negligence claims is big business for lawyers. If lawyers were eliminated from the pursuit of resolving a claim there would be savings in the region of
2. Appointing single joint experts would reduce by half the cost of medical reports.
3. The current system encourages the practice of defensive medicine, which is poor, expensive and time consuming.

4. The current system encourages the practice of risk averse medicine, which is different, and which can diminish the availability of some high-risk surgery.

5. The Director, who acts as a medical expert witness in cases of alleged medical negligence, acting for both claimants and defendants, has identified an increasing number of agencies whose role is to bank roll solicitors. On direct questioning, the NHSR said that they did not know by how much such agencies increased costs. The Director has dealt with 12 different agencies and had been unable to identify any benefit. Eliminating agencies would reduce costs.

## 10. Encourage Learning

1. In every specialty the triggers for negligence cases need to be identified and appropriate teaching available. The Director is the author of a recent publication in the Annals of the Royal College of Surgeons of England, identifying both the causes of and the increasing numbers of cases over the last ten years.[2] The conclusion was that at least one third of these cases, and possible as many as one half, were avoidable.
2. All specialties should provide appropriate teaching to those practising in their specialty.

## 11. Improving the work of the Healthcare Investigation Branch

1. Instigate an in-depth analysis in all specialties of the causes of claims. NHSR has an enormous database that will allow this. Enquiries may be resisted by those specialties in which the largest costs are incurred.
2. In each specialty appoint a senior doctor in all health regions to whom all cases of concern would be reported by every hospital. In many specialties such a regional network already exists. Pockets of poor practice could be identified most quickly in this way. The Early Notification System could be integrated with this change. Doctors and not mangers must lead this initiative.

## 12. Legislative Changes

1. Introduce mandatory ADR, as has been recommended by the Lord Chancellor.
2. Introduce a no-fault compensation scheme that does not involve any legal input.

## 13. Ethical Issues

1. In a recent publication by the Director, ethical considerations were raised about the use of 'Short Reports'[3] Legal teams for both claimants and defendants instruct experts to provide a brief overview of the potential for a claim to be successful. This is unethical for two reasons. Without full documentation the concerns of a patient cannot be properly investigated. The stress for doctors under investigation cannot be justified if full documentation is not available.
2. Lawyers seldom if ever warn their clients that the resolution of their claim will take years.
3. Lawyers seldom if ever warn their clients that in one third of cases that reach the NHSR they will not receive any compensation.
4. Legal Fees may be influenced by the outcome of a case.

## 14.How to move away from a Blame culture

1. In the last five years, following medical negligence investigations, two doctors were reported to the GMC and subsequently underwent a trial for medical manslaughter. Both were convicted. One served six months in prison. Both doctors subsequently had their convictions overturned. These two cases have had a negative impact on the confidence of the medical profession in the current system.
2. Lessons can be learned from the airline industry and advice should be sought from the appropriate leaders in that field.

## 15. Conclusions

1. The patient must be at the centre of the process. Patients with concerns are the principal stakeholders. Secondary stakeholders are all other patients who are cared for by the NHS.

2. Patients' concerns should be investigated by independent, medically qualified assessors.

3. Organisations that represent the interests of patients, e.g. The Patients' Association and Action against Medical Accidents (AυMA) should be consulted about how the current system could best be changed.

4. Patients' concerns should be resolved within a twelve-month interval after the Index Event.

5. There must be an integrated approach:

    1. Education of medical students in their Medical Schools.
    2. Education of all doctors throughout their career.
    3. Introduction of a no-fault compensation system.

6. The adversarial legal mechanism that currently exists must be abolished.

Independent Medical Negligence Resolution is the only organisation that can contribute to the education of medical students and doctors, provide early, independent assessment and offer mediation.

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