

The £140 million cost of defending NHS negligence

Jonathan Ames, 18 July 2019

Legal fees went up 8 per cent last year, even though the health service received only five more claims than the year before

Doctors are human and they make mistakes. That must be the starting point for any analysis of litigation costs generated by negligence at the NHS.

Just as those who have been seriously injured by NHS negligence must be fairly compensated, health service bosses have a duty to taxpayers to ensure that they are not paying more than they should. That takes lawyers.

However, critics point to the publication this week of annual litigation figures as evidence that defence costs at the NHS are out of control and that the taxpayer is not getting value for money.

The report from NHS Resolution — what used to be the NHS Litigation Authority — showed that defending clinical negligence lawsuits cost the health service 8 per cent more last year than the year before. The total spent by Resolution on defence fees in 2018-19 was £139.6 million, up from £128.9 million the previous year. That rise came despite the NHS receiving only five more clinical negligence claims last year, taking the total to 10,678, and the number of claims has remained steady for more than a decade.

Dr Anthony Barton is a solicitor at Medical Negligence Team and the founder of the Society of Doctors in Law. He is also one of the harshest critics of the NHS Resolution. “Access to justice in clinical negligence is mostly now privately funded by no win, no fee arrangement,” Barton says. “It is free for all at the point of need. Payment of claimant lawyer fees is by result, which imposes commercial discipline — only sustainable cases are pursued.”

However, he adds: “The same cannot be said of NHS defence lawyer fees, which are paid win or lose; it incentivises delay, deny, defend behaviour. The NHS ends up paying compensation in over 80 per cent of litigated claims. It is reward for failure. The NHS should look to how it pays its own lawyers if it wants to save money.”

Other claimant lawyers are more diplomatic. Gordon Dalyell, the president of the Association of Personal Injury Lawyers, says: “The attitude of denial and resistance until the later stages of cases is still very prevalent. Greater consistency and avoidance of negligence in the first place is the key to doing the best thing for injured patients and helping the NHSR keep a lid on its own costs”.

To be fair to Resolution, health service bosses must defend all allegations of negligence. Last year, the organisation spent £21 million in defending claims that had a potential cost to the NHS of £2.68 billion — and yet they were resolved without payment.

As Helen Vernon, Resolution’s chief executive, points out, that resulted in billions that “remained available to use in frontline services”. She adds that, overall, Resolution “keeps tight control over defence costs and secures value for money using its purchasing power through regular and rigorous procurement, and via performance management of its legal services panel”. That panel consists of ten of the biggest names in clinical negligence and insurance litigation: Bevan Brittan, Browne Jacobson, Capsticks, Clyde & Co, DAC Beachcroft, Hempsons, Hill Dickinson, Kennedys, Ward Hadaway and Weightmans. Places on the panel are retendered every four years. While the firms are pressed to offer fixed and capped fee options, they have not been ordered to ditch hourly billing completely.

Vernon adds that defence figures cited in the annual report include expert and court costs as well as other disbursements. “Defence costs are less than a third of claimant costs and have not experienced anywhere near the same high level of inflation due to the market controls in place,” she says.

However, critics argue that Resolution is not living up to claims made by health ministers last year in parliament that “all its cases are thoroughly reviewed and in the great majority of clinical negligence cases, NHS Resolution obtains independent expert evidence before reaching a decision on liability”.

Barton asks: “How is it that all cases can be thoroughly reviewed if NHS pays up in 82 per cent of litigated cases?” Meanwhile, Dalyell takes a more analytical view.

He says: “As in previous years, a relatively small number of errors represent the bulk of NHSR’s compensation bill. Obstetrics claims, which include large payments to care for brain-damaged babies, represent 10 per cent of claims, but make up half of the value of all claims received last year. These injuries are lifelong and a lifetime of care is expensive. If birth injuries were avoided, the amount spent on compensation would be reduced dramatically.”