THE NHSLA's 2015 Annual Report
Comment and review part 3
Should fixed fees be introduced to restrain lawyers who represent injured patients?

Abstract

Following the 2 previous articles published in July and August 2015, in this article Andrew Ritchie QC examines the role of the NHSLA in the DoH's drive to fix fees in clinical negligence claims and concludes that: (1) the NHSLA does not have effective published KPIs (key performance indicators); (2) the 2015 annual report is politicised in breach of the NHSLA's Framework Document's requirements; (3) its recommendation that fees should be "more proportionate to damages" is based on unsound reasoning and the wrong figures; (4) fixing fees will discriminate against retired and elderly patients who are injured by negligent clinicians.

1. THE NHSLA – An Arms Length Organisation

In the 2015 Triennial Review of the NHSLA Lorraine Thomas the lead reviewer described the NHSLA thus:

> *"The NHS Litigation Authority (NHS LA) is a Special Health Authority operating under direction from the Secretary of State for Health. The NHS LA operates at arm's length from the Department of Health."*

In the 2008 Annual Report the NHSLA set out a summary of the framework document which governs its operations. This is what it said:

> ***"Aims and objectives***
> *When the NHS Litigation Authority was first created in 1995, our main functions were to administer schemes under which NHS bodies could pool their clinical negligence liabilities and to promote high standards of risk management in the NHS. Since then, our work has expanded to include schemes and risk management standards for non-clinical liabilities, the provision of an information service for the NHS on human rights case-law, dispute resolution between primary care practitioners and their local Primary Care Trusts, and advice and assistance to NHS bodies when handling equal pay claims.*
> *Our aims and objectives are set out in our Framework Document:*
> *The Secretary of State's overall aims for the Authority in administering the schemes are to promote the highest possible standards of patient care and to minimise the suffering resulting from any adverse incidents which do nevertheless occur. In particular, the Authority will contribute to these aims by its efficient, effective and impartial administration of the schemes, and by advising the Secretary of State on any changes that may be needed in the light of experience in running the schemes and of changing circumstances.*
> *In pursuit of this overriding aim, we seek to:*
> - *" ... maximise the resources available for patient care, by defending unjustified actions robustly, settling justified actions efficiently, and contributing to the incentives for reducing the number of negligent or preventable incidents ..."*
> - *" ... ensure that, where liability has been established, patients have appropriate*

access to remedies including, where proper, financial compensation …"

- *" … contribute to the improvement of the quality of patient care by providing incentives within the schemes for NHS bodies to improve cost effective clinical and non clinical risk management …""*

I commented in my earlier paper: *Clinical Negligence Claims in England and Wales published 21.8.2015* that the comments made by the Chairman Ian Wilks and the CE Helen Vernon in their sections of the 2015 report lacked impartiality and approached being political in that they omitted to highlight good news that the NHSLA were performing well and keeping expenditure down. Instead they both raised profound criticisms of lawyers who represent injured patients and asserted that they were charging too much and should be restrained financially.

In this final paper I consider the key performance indicators for the NHSLA and the evidence which they produce to support the Department of Health's proposal to introduce fixed fees for patients' lawyers and show that in fact claimant lawyers' fees have gone down by 38% over the last 7 years when inflation and VAT rises are stripped out.

2. Key Performance Indicators:

The KPIs for the NHSLA were listed on p35 of the NHSLA annual report in 2008. They included the ratio of defence and claimant legal costs to damages and the shelf life of claims.

They were not published in the 2008 or the 2015 reports so we did not get to see them.

Lorraine Thomas made 3 recommendations in the 2015 triennial review of the NHSLA one of which was:

> *"Recommendation 3. Following this review and by 30 November 2015, the NHS LA Board should develop and agree with the Department a set of Key Performance Indicators (KPIs) which are a balance between quantitative and qualitative metrics – qualitative metrics should include regular member satisfaction surveys."*

Below I shall explain how the NHSLA's KPI figures are messy and unfocussed and that the facts asserted and opinions passed to justify fees which are proportionate to damages, namely fixed fees are unimpressive and faulted.

3. The CE's comments on the Drivers of Clinical Negligence claims

In the 2015 report the CE (at p8) listed what she called eight "drivers of clinical negligence" costs. Examining each in turn produces a remarkable insight into how political the NHSLA report has become:

1. *"An increase in the number of patients being treated by the NHS"*

   Facts: this is undoubtedly true: the NHSLA 2015 Report noted a 26% increase in NHS Activity (as measured by 'Finished Consultant Episodes') over 9 years (page 8). There were 15.462m total hospital admissions in 2013/14, 32% more than a decade earlier (11.699m); the total number of outpatient attendances in 2013/14 was 82 million, an increase of 8.8% on the previous year (75 million); and in 2013/14 there were 64% more operations were completed by the NHS compared to 2003/04

(see the NHS Confederation website).[1]

2. "An increase in the number of reported incidents. This may indicate an increasing and positive reporting culture and so is not necessarily reflective of an increase in incidents occurring"

The fact set out in this point is correct, the comment is not supportable. The National Reporting and Learning System (NRLS) reported an increase in adverse incidents in the NHS (excluding where the degree of harm is unknown). In 2006/2007 there were 773,089[2] adverse incidents and in 2013/2014 there were 1,637,260[3] (of which more than 10,500 incidents resulted in severe harm or death). This was an increase of 212% over 7 years.

Comment: To suggest that this increase was *not necessarily* reflective of an increase in incidents is likely to be a gross distortion of the facts. The most probable reason for the increase in reported incidents is an increase in the number of adverse incidents.

3. "An increase in the number of patients claiming compensation as a proportion of reported incidents"

Facts: in 2006/07 there were 5,426 reported claims (cases both pre- and post-Letter of Claim) and according to the NRLS 773,089 reported adverse incidents[4] and the ratio of claims to incidents was 0.007%.

By 2013/14 the number of claims reported had risen 220% to 11,945 (assuming the reported figure is the equivalent) and the number of incidents has risen 212% to 1,637,260[5] incidents in England and Wales. The ratio of incidents to claims was 0.007%.

Comment: There was no increase in the proportion. Unless I misunderstand the figures the CE's comment appears to be lacking in objectivity. The balanced way to describe these figures would be: *"the ratio of claims to reported incidents has stayed steady at around 0.007%*."

4. "An increase in the number of patients who claim but who do not recover compensation"

Facts: as a fact this is correct. The number of clinical negligence incidents has risen year on year since 2008 and before then too. And it is a fact that the number of claims brought against the NHSLA from such incidents has risen year on year since 2008 (with a small decrease of 3.7% in 2014/2015, see the Annual report of 2015 at p18). However the key fact is that the number of cases "closed" has risen year on year since 2008.

- In 2008: 6,670 claims were closed (p14 of the 2008 report) and
- In 2015: 16,459 claims were closed (p19 of the 2015 report).

Comment: The way this phrase is used as a *driver of clinical negligence claims* is dripping with implications of fraud and ambulance chasing lawyers. It sounds ominous but is actually a meaningless statistic when it is put in context. The number of cases closed has risen dramatically over the last 7 years. As a result the number of cases in

[1] With thanks to Dr J MacKenzie of Anthony Gold for highlighting these figures.
[2] National Patient Safety Agency issue 6, 2007.
[3] National Patient Safety Agency Quarterly data work book Dec 2014
[4] National Patient Safety Agency issue 6, 2007.
[5] National Patient Safety Agency Quarterly data work book Dec 2014

which the NHSLA pays damages has likewise risen and so the number of claims which are defeated or withdrawn has risen. To single this out as a *driver* is evidence of a rather poor effort to make a political point.

5. *"An increase in the number of lower value claims"*

   Fact: There is an increase in all claims, lower middle and high value. This would only be persuasive if the proportion of lower values claims to other claims had increased significantly and these figures are not published.

6. *"Disproportionate claimant legal costs for lower value claims"*

   At p 21 of the 2015 report the NHSLA wrote:

   "It is impossible to justify the increasing number of cases where significantly more money is billed by claimants' solicitors in legal costs than is paid in compensation"

   Fact: In lower value clinical negligence claims the damages are low. When compared with the cost of investigating and proving breach and causation by obtaining expert evidence, the costs are nearly always greater than the damages awarded. This has remained unchanged since clinical negligence claims started decades ago.

   Comment: This fact is not a driver for clinical negligence claims. It is a result of the difficulty which is inherent in proving clinical negligence. Medical experts are the only ones who can prove breach and causation. They have to read the medical notes and the claimants witness statement and provide reports. These reports cost money and take legal time to arrange. Clinical negligence claims are utterly different from simple low value road traffic claims where no expert evidence is required to prove breach and causation. It is not *impossible to justify* the costs inherent in proving the claimants case. Quite the contrary. The costs are inherently not proportionate to damages. They are proportionate to the number of experts, witnesses and medical notes.

   The NHSLA's interpretation of "disproportionate" is created by using a Nelsonian approach. They are comparing the legal costs, VAT, court fees and expert fees only to the damages paid out. Through their telescope they failed to look at the complexity of the litigation, the legal work required to satisfy the burden of proof and the wider factors involved. The CPR (44.3(5)) states "costs incurred are proportionate" if they bear a reasonable relationship to:

   > (a) The sums in issue in the proceedings;
   >
   > (c) The complexity of the litigation;
   >
   > (d) Any additional work generated by the conduct of the paying party; and
   >
   > (e) Any wider factors involved in the proceedings, such as reputation or public importance".

   So to rely only on (a) as the only measure of proportionality is truly Nelsonian. A better KPI or measure would be: the number of medical experts needed to prove breach, causation and quantum.

7. *"Excessive claims for legal costs from some claimant firms"*

   The NHSLA relies on three facts to justify the allegation that "some" claimants' costs

are excessive:

- Firstly that claimant legal costs are higher than the NHSLA's asserted defence legal costs;
- Secondly that damages in low value claims are less than the legal costs; and
- Thirdly the NHSLA cite various bills which they have received and challenged successfully at detailed assessment.

Comment:

To compare claimant legal fees and defence legal fees in the manner in which the NHSLA Report does is misleading for the following reasons:

a) Outside lawyers who work for the NHSLA are paid win or lose. Lawyers who act for patients are only paid if they win. The NHSLA figures show that 46% of claims notified to the NHSLA are withdrawn or lost. So to make the same profit as NHSLA lawyers, claimant lawyers have to charge 46% more per hour. It would not be right to say: "well they should never have brought the claims" because lawyers do not have the medical knowledge or expertise to decide at the start which claims will be successful. They need expert medical opinions to determine liability and causation.

b) Outside lawyers who are paid by the NHSLA have one institutional client which sends them an ever increasing flow of work. They do not need to advertise for their work. Lawyers who act for injured patients have to advertise for their work and advertising costs money. So to make the same profit as defence lawyers, claimant lawyers have to charge an hourly rate which includes a mark up for advertisements to gain clients.

c) Outside lawyers who are paid by the NHSLA are paid within 3 months of doing the work (as far as I am aware). Lawyers who act for injured patients have to wait until the end of the case and then wait until the end of assessment of the costs before they are paid. This delay is usually between 3 and 6 years. So to make the same profit as defence lawyers, the claimants' lawyers' hourly rates have to be increased by the cost of borrowing money during the 3-6 year delay.

d) The burden of proof is on the claimant: accordingly, it is the claimant who is the party who has to establish the evidence to overcome this hurdle. The NHSLA lament claimant solicitors for 'front-loading' work and costs but a claimant has to carry out investigatory work before a claim letter can be sent. Medical expert opinions are needed on breach and causation just to establish whether a valid claim exists.

e) The NHSLA have an in house legal team who do legal work on many cases. The cost of this team is completely ignored in the NHSLA defence costs figures. So the comparison is inherently inaccurate.

f) The NHSLA use costs draftsmen called Accumension to challenge claimants' lawyers' legal fees. Their costs do not appear to have been included in NHSLA's figures for defence legal costs. Whereas the claimants' legal costs figures do include their costs draftsmen.

I have dealt with the second point above and the third point has no merit because assessment of costs is designed to allow the NHSLA to challenge bills and if it produces reductions then assessment is effective.

8. "Rising lump sums and annual costs (usually for care), over and above inflation, for high value claims"

This is a complaint about the awards made by judges and the settlements which the NHSLA themselves have made with legal advice.

4. HAVE CLAIMANTS COSTS ACTUALLY GONE UP? COMPARING 2008 FIGURES WITH THE 2015 FIGURES SUGGESTED KPIs for the NHSLA

To put the NHSLA's 2015 figures in context we should compare them with the 2008 figures. Remember that 2008 was the year before the banking crisis. The year before fiscal tightening and cost cutting was necessary throughout Government. A year when success fees were paid by the NHSLA and ATE premiums as well.

Let us look first at the way in which the chairwoman, the CE and the FD presented their reports in 2008.

4.1 Chairwoman's report 2008

In her report Professor Joan Higgins made no political statements, no attacks on claimant lawyers and was impartial in her presentation of the facts. Ian Dilks statements in the 2015 Report were by comparison less than *impartial.*

4.2 CE's report in 2008

Steve Walker's report in 2008 as CE is equally impartial and comments on the law on PPOS and the effects on the NHSLA's finances. Compare that with the report of the CE in 2015 which is aimed almost solely at criticising lawyers who represent injured patients and seeking to make legal costs *proportionate to damages*.

4.3 The Financial Directors report 2008

The FD in 2008 stated:

"Avoiding litigation

Our remit when handling claims against NHS organisations, as set out in our Framework Document, is to "maximise the resources available for patient care, by defending unjustified actions robustly (and) settling justified actions efficiently". We aim to settle claims as promptly as possible and we encourage NHS bodies to offer patients explanations and apologies. We seek to avoid formal litigation as far as possible and our historical data show that only about 4% of our cases go to court, including settlements made on behalf of minors, which must be approved by a court."

4.4 Comparing the time between notification and settling claims

Facts:

- In 2008 the average time between notification and settlement was 5.36 years (P10). It is not clear whether that period includes the further time taken with assessment of costs before payment is actually made.
- The 2015 report contains no such comparable figure and instead asserts on page 19 that the average time for settling clinical negligence cases is 1.31 years.

Comment: The 2015 figure cannot be right unless the terminology has been radically altered and the NHSLA are referring to the time between issuing the writ and settling the claim. It does not match the experience of clinical negligence lawyers. There is a misleading element to this 2015 statement. A FOI request is needed for like for like figures. I suggest that the average time from notification to settlement should be a KPI for the NHSLA and should be published.

4.5 Comparing the % of claims which are settled, tried or withdrawn

Facts

- In 2008: 41% were withdrawn, 42% settled and 4% went to trial. 13% were *unresolved* (the NHSLA's terminology (P10)).
- In 2015: there was no comparable chart and no figures were produced so comparison is impossible. On p19 the NHSLA stated that 46% of claims were "resolved with no damages payment".

Comment:

If the terminology is equivalent this means that withdrawn cases have gone up from 41% in 2008 to 46% in 2015. If on the other hand the 2015 figure includes not only withdrawn cases but also cases defeated at trial (no damages paid) then there may have been minimal change in the percentages.

The rest of the claims brought against the NHSLA are settled *with damages paid* so 54% of claims succeeded and damages were recovered. That would be an increase on the figure in 2008 which was between 42 and 46% and shows that more claims are succeeding against the NHSLA now that 7 years ago.

The NHSLA did not disclose overall what % of all claims made were taken to trial so no comparison can be made with the 4% of cases tried in 2008.

I suggest that the percentage of cases taken to trial should be a KPI for the NHSLA and published.

On p25 of the 2015 report the NHSLA assert that they fought some cases to trial and won 64% of these. This is a substantially worse success rate than they had in 2013/2014 when they won 79% of their clinical negligence trials.

So of the cases which the NHSLA took to trial they lost 36%. This is a high percentage. I suggest that the % of wins and losses at trials should be a KPI for the NHSLA and should be published.

The NHSLA have not disclosed how large the bill of costs was for losing those 36% of cases taken to trial. A FOI request should be made.

The percentage of claimant costs and defence costs thrown away by losing trials and interlocutory applications should also be a KPI for the NHSLA and should be published.

4.6 Comparing how many claims are notified to the NHSLA each year

- In 2007/2008: 4,512 letters of claim were received and 842 were being investigated, total 5,354. The number of claims was reported to have remained steady for the previous 3 years.
- In 2014/2015: the NHSLA state that 11,497 claims were reported.

Comment

The terminology has changed to claims "reported" from "letters of claim" received. The NHSLA should remain consistent in its terminology year on year.

Assuming that "reported" includes claims being investigated before letter of claim there has been a massive increase in claims over the 7 years since 2008. That increase is born out by the CRU figures for the last 5 of those 7 years. (I have not researched back all 7 years)

Year	Clinical Negligence claims reported to the CRU
2014/15	18,258
2013/14	18,499
2012/13	16,006
2011/12	13,517
2010/11	13,022

Just looking at the CRU figure and the NHSLA figure for claims reported in 2014/2015 they are way out. The CRU says 18,258 cases were notified to them and the NHSLA says 11,497 claims were reported. A FOI request is needed to sort this discrepancy out.

Even using the NHSLA figure, if the number of claims has more than doubled over 7 years, we can foresee without any more information that the sums spent in damages and costs will probably have more than doubled between 2008 and 2015. In addition the VAT rise from 15% to 20% in this 7 year period and the rise in court fees and inflation (RPI increased by over 19%) will all have increased the total sums paid out.

4.7 Comparing how much the NHSLA paid out in damages and all legal costs in 2008 and 2015

- In 2007/2008: the NHSLA paid out £633,325,299 on clinical negligence claims (p13). That sum related to the 6,679 clinical negligence cases which they "closed". The total amount shown included: damages paid to patients and the legal costs incurred on both sides where these were met by the NHSLA, but excluded their reserves. Broken down: £382,401,232 was for damages and £108,626,201 for claimants' costs (and expert fees and VAT and court fees and interest on late payment of costs) and £56,512,580 was for defence lawyers costs and experts and VAT (but not including court issuing fees and not success fees and not ATE premiums and not costs draftsmen's fees).
- In 2014/ 2015: the NHSLA paid out £1,192,538,084 in total for damages, claimant costs and defence costs. That sum arose from 16,459 closed cases. Broken down: £840,751,934 was in damages and £259,252,650 was for claimants' legal costs (and experts' fees and VAT and court fees etc). The defence legal costs were £92,553,300. The NHSLA did not make it clear whether the same basis was used for "defence costs" in 2015 as in 2008.

Analysis

These figures are very compelling when they are analysed properly but they do not support the NHSLA's complaints in the Chairman and the CE's reports in 2015.

- The number of cases closed in 2015 was 246% higher than in 2008. It is clear that many more claims are being brought and much more clinical negligence is occurring now than in 2008.
- Note however that the total paid out in damages and claimants costs and experts fees VAT and court fees and defendants legal costs was only 188% higher in 2015 than 2008. So between 2008 and 2015 the number of claims closed more than doubled and the damages and costs paid out for both claimant and defence lawyers and experts and VAT and court fees have increased by much less than double. These figures clearly show that the cost per case has fallen dramatically.
- Another way of measuring the performance is to assess the average cost per closed case (including damages and costs on both sides). Doing this produces the following actual figures:
    - **£94,823 in 2008**
    - **£72,455 in 2015**.
- So between 2008 and 2015 the average cost per case in damages and legal costs and expert fees and VAT and court fees **fell by 24%.** This fact was not reported in the NHSLA Annual report in 2015.
- **On this factual analysis there is no basis whatsoever for asserting that the sums paid out in damages and to claimant lawyers has increased in an improper or inappropriate way. The opposite applies. It has decreased per case.**
- Are there any factors which obviously distort the actual costs figures between 2008 and 2015? There are:
    - Firstly VAT went up from 15% to 20% which increased the sums which the NHSLA had to pay out on lawyers' fees and experts fees by that sum.
    - Secondly, inflation went up by 19% over the 7 year period and damages are affected by RPI as are lawyer's fees.
- Taking into account these two factors alone and updating the sums paid out in 2008, in today's money they would be increased by 19% for inflation and 4.3% for VAT[6]. The total increase due to factors wholly outside litigation would be about 23.3%. That would make the 2008 sums equivalent to £780,899,000 for damages and costs for the 6,679 closed cases. Yet in 2015 for the 16,459 closed cases the cost was £1.192 billion. So whilst the number of cases closed increased by 248% the total sums paid out only increased by only 53% after stripping out inflation and VAT increases.
- Taking into account the rise in VAT and inflation, the cost per case in 2008 was £116,917. In 2015 it was £72,455. So in fact in real terms **the costs per case has fallen by 38% over 7 years.**

Comment

Comparing the sums like for like it becomes clear that although the number of claims

[6] 1.20/1.15 = a 4.3% rise.

has risen by 248% in the last 7 years but the cost per claim has fallen dramatically, by 38% net of inflation and VAT rises.

Therefore overall there is no red flag indicating an inappropriate increase in claimants' costs and damages in clinical negligence claims. On the contrary the NHSLA are to be congratulated for their efficiency in reducing the sums paid out per case.

This analysis shows that the NHSLA are doing well to decrease expenditure on damages and legal costs.

5. COMPARING JUST CLAIMANT LEGAL COSTS BETWEEN 2008 AND 2015 HAVE THESE GONE UP?

5.1 Has there been an increase in the legal costs associated with clinical negligence claims?

Fact: On the NHSLA's figures more sums have been paid to claimants lawyers to cover fees and disbursements this year (nearly £292 million) than last year (£259 million). The NHSLA CE complains that costs are "*disproportionate and excessive*". I shall compare the 2015 costs with 2008 in which only £108,626,201 (£109 million) was paid out on claimants costs.

Daily Mail style comment: *"The claimants' lawyers' costs have nearly trebled in 7 years at the tax payers' expense! Surely the CE is right! Claimant lawyers are rotten ambulance chasers who should be financially hobbled."*

Facts:

The increase in costs is directly tied to the number of claims which the NHSLA "closed" (settled or lost at trial) in 2015 compared with previous years:

- In 2007/2008 the NHSLA closed 6,679 claims and paid out £108,626,201 to Claimant lawyers in fees, expert fees, VAT and court fees.
- In 2013/2014 the NHSLA "closed" 15,384 claims (p19) and paid out £259,252,650 to claimant lawyers.
- In 2014/2015 the NHSLA closed 16,459 (p19) claims and paid out £291,909,829 to claimant lawyers.

Analysis

It is beyond dispute that the more cases that the NHSLA close in any year the greater the sums which they will have paid out. So relying on the headline sum paid out is meaningless as a way of assessing whether the claimants costs were reasonable. As a general rule greater pay outs only indicate more negligence in the NHS.

When we compare this years pay outs with previous years will the figures show overcharging? And what are the best KPIs to use?

5.2 Have Claimants lawyers fees actually increased when we strip out VAT rises and inflation?

Taking the average claimant legal fees, expert fees, VAT and court fees, cost per case from the above figures:

- In 2007/2008 the NHSLA paid out £16,263 per case.
- In 2013/2014 the NHSLA paid out £16,852 per case.

- In 2014/2015 the NHSLA paid out £17,735 per case.

That is an increase in the claimants' costs per case of 9.2% over the 7 years from 2008.

Comment

This KPI does not support the NHSLA assertion that the total sums paid out for claimant lawyers fees, experts fees, VAT and court fees, are increasing either dramatically or are excessive.

The figures include VAT which increased between 2008 and 2015 from 15% to 20% and they include inflation which went up by 19% over the 7 year period.

To compare like with like we must strip the VAT and inflation increases out of the figures for claimants legal fees and expert fees. When we do so the costs in claimants legal fee and experts fees have **fallen from £20,194[7] per case in 2008 to £17,735 in 2015**.

This is a fall of 12% over 7 years.

Comparing the Claimant legal fees and expert fees net of VAT and RPI and net of success fees and ATE premiums per case is a useful KPI and should be used by the NHSLA and published.

5.3 Comparing claimants legal costs with defence legal costs

Facts:

- In 2008: the NHSLA paid out in the 6,679 clinical negligence cases which they "closed" the sum of £108,626,201 for claimants costs (and expert fees and VAT and court fees and interest on late payment of costs) and £56,512,580 for defence lawyers costs and experts and VAT (but not including court issuing fees, costs draftsmen's fees, in-house lawyers fees, success fees or ATE premiums).
- In 2015: the NHSLA paid out in 16,459 closed cases and £259,252,650 was for claimants' legal costs (and experts' fees and VAT and court fees etc). The defence legal costs were £92,553,300. The NHSLA did not make it clear whether the same basis was used for defence costs in 2015 as in 2008.

Analysis:

- In 2008: Claimants' legal costs, experts' fees, VAT and court fees were 192% higher than the outside legal fees paid by the NHSLA to defence lawyers. But no figures are available for the amount the NHSLA spent on in its house legal team or costs draftsmen. **The average claimants' costs per case were £16,263 and the average defence costs per case were £8,461.**
- In 2015: Claimants' legal costs, experts' fees, VAT and court fees were 280% higher than the outside legal fees paid by the NHSLA. But no figures are available for the amount the NHSLA spent on in its house legal team or costs draftsmen. **The average claimants' costs per case were £17,735 and the defence costs per case averaged at £5,623.**

Comment:

If one looks only at the overall sums paid out there is a substantial change between 2008 and 2015 between the ratio of the total spend on "claimants legal costs" and "defence legal costs". This increase is what the NHSLA rely on to assert an improper increase in claimant legal fees.

[7] (The 2007/2008 figure was £16,263. Increasing that by 1.20/1.15 (for VAT) and by 19% for inflation that rises to £20,194).

If one looks at the average costs per case and strips out the VAT rises and the inflation, the claimants' fees have gone down over the last 7 years by 12%.

If one looks at the average costs per case for defence costs they have gone down as well but by a greater amount.

We can only identify the real reason why the cost of outside defence lawyers has gone down so much in the 7 year period if the NHSLA publishes the figures for how much it spent on its **in house legal team in 2008 and 2015.** If for instance the NHSLA spent £1,500 per case in salaries and pensions and secretarial support and accommodation for its in house legal team in 2008 and £4,400 per case in 2015 that would make a substantial difference to the comparison (net of VAT).

In addition a comparison can only be made if the fixed hourly rates paid by the NHSLA to defence lawyers are published. If the NHSLA fixed the defence solicitors and barristers hourly rates in 2008 and did not increase them for inflation over the 7 years, whereas the Claimants hourly rates did increase by 19% for inflation over the 7 years, then that explains 19% of the difference.

In addition the NHSLA should disclose whether they are excluding the costs they spend on costs draftsmen from their figure for defence legal fees.

We can only compare like for like if we strip out the elements which are included in the claimants' *legal costs* and **not included in the** *defence legal costs.*
Claimants' legal costs in 2015 will have included:

- Claimants solicitors' base costs;
- Claimant's barristers' fees;
- Success fees (for pre-LASPO cases);
- ATE insurance premiums (for pre-LASPO cases);
- Courts fees;
- Disbursements on travel and misc items;
- Disbursements on experts (experts fees);
- The costs of assessing costs;
- Interest on late payment of lawyers fees;
- VAT;
- Fees unnecessarily incurred by the NHSLA due to the fighting and losing interlocutory applications and the 36% of the trials which they defended (2014/15 annual report p27).

Whereas defence legal costs do not include success fees, ATE premiums, court fees for issuing claims, or interest on late payment of fees and probably do not include their costs draftsmen's fees. These sums will make an enormous difference in the comparison.

So at present this KPI upon which the NHSLA and the DoH rely heavily to attack claimants legal fees, is completely unreliable because the figures provided are not like for like. The NHSLA are comparing apples with raspberries

5.4 Comparing claimants legal costs to damages paid out - what does that show?

Facts:

- In 2008: the NHSLA paid out £382,401,232 for damages and £108,626,201 for claimants' costs (and expert fees and VAT and court fees and interest on late payment of costs etc.) and £56,512,580 was for defence lawyers costs and experts and VAT (but not court issuing fees etc.).

- In 2015: the NHSLA paid out £840,751,934 (£841 million) in damages and £259,252,650 was for claimants' legal costs (and experts' fees and VAT and court fees etc). The defence legal costs were £92,553,300.

Analysis:

- In 2008: the claimants legal costs with experts' fees and court fees and VAT amounted to 28.4% when compared with the damages paid out.
- In 2015: as a percentage of damages claimants legal costs with experts' fees and court fees and VAT were 30.8%.

Comment:

The increase in the ratio is mainly explained by the increase in VAT between 2008 and 2015. That went up from 15% to 20%. Adjusting the 2008 figures for VAT would make them £108,626,201 x 1.2/1.15 = £113,349,000 which is 29.6% of the damages paid out in 2008 and the ratio was 30.8% in 2015. This is not a statistically significant change.

In addition court fees were increased substantially in 2013 and 2015. The 2013 increase will have affected the 2015 figures so makes the difference completely insignificant.

On this KPI the cost of claimant lawyers in clinical negligence claims has stayed pretty much static over the last 7 years when measured as a proportion of the damages paid out.

6. Conclusions

On the above analysis I suggest that the NHSLA's 2015 Annual Report is not the impartial document representing the facts to Parliament that it should have been. The organisation is required to operate at arms length from the Government.

The 2015 Report is an attack on lawyers who represent patients which ignores relevant KPIs and relies on irrelevant KPIs.

An accurate and proper analysis of the NHSLA's performance shows that claimant's lawyers fees have decreased over the last 7 years by 38%.

A proper analysis discloses that the KPIs which the NHSLA relied upon are faulted and misinterpreted.

The NHSLA has disclosed and highlighted the following facts which on any proper analysis do not justify imposing fixed fees:

(1) The fact that the total figure paid out in "claimant costs" has gone up. *The reason why it has gone up is that more cases were closed in 2015 than ever before and this is because reported incidents and claims have risen at an alarming rate over the last 7 years.*
(2) Some claimant lawyers have put in bills of costs which have been assessed down by costs judges. *This is the whole purpose of assessment of costs by costs judges and this is working.*
(3) Claimant lawyers are paid more per hour than defence lawyers. *The reasons for this are set out below. I make no apology for repeating the text. I suggest that the points below are unanswerable.*

In clinical negligence work, to compare claimant legal fees and defence legal fees in the manner in which the NHSLA Report does is **grossly misleading** for the reasons given below:

a) **Lawyers who are paid by the NHSLA are paid win or lose. Lawyers who act for patient are only paid if they win. The NHSLA figures show that 40-46% of claims notified to the NHSLA are withdrawn or lost. So to make the same profit as NHSLA lawyers claimant lawyers have to charge 40-46% more per hour.**

b) **Lawyers who are paid by the NHSLA have an institutional client which sends them a flow of work. They do not need to advertise for their work. Lawyers who act for injured patients have to advertise for their work and advertising costs a lot of money. So to make the same profit as defence lawyers, claimant lawyers have to charge an hourly rate which includes a mark up for advertisements to gain clients.**

c) **Lawyers who are paid by the NHSLA are paid within 3 months of doing the work (this is an assumption). Lawyers who act for injured patients have to wait until the end of the case and then wait until the end of the assessment of the costs before they are paid. This delay is usually between 3 and 6 years. So to make the same profit as defence lawyers, the claimants' lawyers' hourly rates have to be increased by the cost of borrowing the money to pay their staff during the 3-6 year delay.**

d) **The burden of proof is on the claimant: accordingly, it is the claimant who is the party who has to establish the evidence to overcome this hurdle. The NHSLA lament claimant solicitors 'front-loading' work and costs but a claimant has to carry out investigatory work before a claim letter can be sent. Medical expert opinions are needed on breach and causation just to establish whether a claim exists.**

e) **The NHSLA have an in house legal team who do legal work on many cases. The cost of this team is ignored in the NHSLA defence costs figures. So the comparison is inherently inaccurate**.

f) **It is likely that the defence costs figures produced by the NHSLA exclude the costs of their costs draftsmen, whereas the claimants' costs figures include the costs of their costs draftsmen.**

Any comparison between claimant legal fees and defence legal fees only for outside lawyers is not valid and the NHSLA should not be raising that to Parliament as a good reason for an attack. It can only be made valid if:

- the in house legal teams costs of the NHSLA are added to the outside defence lawyers costs;
- VAT is stripped out because the NHSLA in house lawyers charge no VAT to their employer;
- Court issuing fees are stripped out, the defence lawyers incur none because they do not sue patients;
- Inflation is stripped out if the NHSLA have refused to increase defence lawyers hourly rates for many years;
- Lost trials and interlocutory applications are stripped out because those were incurred by the NHSLA making litigation decisions which were lost;
- Interest on late payment of fees to claimant lawyers as a result of the Judgment Debt rate.
- Success fee and ATE premiums are stripped out for they are no longer recoverable but many are still being paid in the cases closed this year because they are old cases.
- Costs draftsmen's' fees paid by the NHSLA are included in defence legal fees.

I respectfully suggest that the Department of Health should only compare like with like when reaching decisions.

There are obvious outside reasons why the total sums paid in 2015 for costs and disbursements to claimants' lawyers have one up in the last 7 years.

1. More patients are being treated every year in the NHS and more negligent events have occurred each year so more claims were closed in 2015.
2. VAT was put up from 15% in December 2008 to 20% in January 2011.
3. Court fees were increased substantially in 2013 and 2015.
4. Inflation has occurred. It increased RPI by more than 19% between 2008 and 2015.
5. The NHSLA lost 36% of the trials which they fought in 2015.
6. 8% interest is paid by the NHSLA on late payment of costs after a court order or settlement agreement.

The good news is that on a like for like comparison of the average costs per case, stripping out inflation and VAT, the **claimants legal and experts' costs have decreased since 2008 by 12%**.

I suggest that the NHSLA's KPIs should be made clear and should be published. At present we, as members of the public, and the DoH are kept in the dark on the real figures, whilst the NHSLA criticise claimant lawyers as the cause of increased payouts.

Looking just at what has been disclosed, there are more informative KPIs for claimants' lawyers' fees than those used by the NHSLA in their Annual Report. In my respectful suggestion 6 of the key KPIs should be:

- The *annual total* of legal costs and disbursements (excluding court fees and VAT and inflation and success fees and ATE premiums) paid to claimant lawyers over the last 7 years per case closed.
- The *annual total* of claimant's legal and experts' costs per case (excluding VAT and stripping out inflation and court fees and success fees and ATE premium) compared to the total of damages paid out.
- The ratio of claimants' costs (excluding court fees and VAT and inflation and success fees and ATE premiums) to defence costs (which must include what the NHSLA spend on their in house lawyers and draftsmen) per case and in total.
- The life cycle duration from notification to payment of claimants fees (not to settlement agreement).
- The *annual* costs of lost trials and lost interlocutory applications by the NHSLA.
- The *annual* costs in judgement debt interest wasted by the NHSLA.

So respectfully I venture to suggest that:

(1) The NHSLA does not have effective or published KPIs (key performance indicators);
(2) The 2015 Annual Report is politicised in breach of the NHSLA's Framework Document's requirements for an arms length organisation;
(3) The NHSLA's recommendation that claimants fees are disproportionate to damages in low value cases should not be used as a springboard for the introduction of fixed fees or capped legal fees for claimants lawyers because it is based on unsound reasoning and the wrong figures and in any event has been a constant for decades;
(4) Fixing fees will **discriminate** against retired, disabled and elderly patients who are injured by negligent clinicians. This is because such patients have no claim for loss of earnings. These claims

will fall into the low value category which the NHSLA are trying to prune or abolish by raising the fact that expert and legal fees are inherently disproportionate to the damages paid out. This has been so forever. It is not new.

If the DoH imposes fixed fees which are too low to prove breach and causation in such a case then access to justice will be denied by definition. Compare for instance a pensioner with a negligent operation and 1 year of suffering to a civil servant earning £40,000 GPA from the DoH with an identical clinical negligence claim to the retired pensioner. The Civil Servant will be able to sue because the "fixed fees" will be higher, being more proportionate to the higher damages solely due to the civil servants loss of earnings claim for the year off work. Whereas the retired patient will not be able to prove her claim because her damages will be much lower having no loss of earnings claim. Why is that fair?

In our society criminal law controls, prevents and punishes injury caused by intentional and reckless behaviour. Tort law controls, prevents and compensates for injury caused by negligent behaviour.

If our tort law controls are abolished for large sections of society who reply on the NHS: the retired, the elderly, the disabled and the unemployed, thereby exposing them to injury without compensation, then we are failing to protect the weak from carelessness by employees of the State.

This is not the right way forwards. Fixed fees in proportion to damages will not be a fair regime for the elderly and the weak in society and should not be introduced.

The DoH issued its pre-consultation letter on 4th August 2015 over the summer break when the object of their attack, lawyers (many of whom have kids) were away on holiday. The deadline was 31st August. The full consultation is to come.

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4 September 2015
London