

**Board of Directors' Meeting Report**  
**Briefing on liability in respect of clinical claims March 2017**  
**Agenda item 28/17**

<b>Title</b>	Briefing on liability in respect of clinical claims
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<b>Authors</b>	Denise Townsend, Director of Nursing Stephen Waites, Legal Services Officer
<b>Purpose</b>	To update the Board on liability in respect of clinical claims, on changes to NHSLA reporting guidelines and on proposed changes to financial contributions to the NHSLA.
<p><b>Executive Summary</b></p> <p>This paper provides information on the clinical claims currently being brought against the Trust and the estimated value of the attendant damages and legal costs.</p> <p>The body that manages these claims on behalf of the Trust, the NHSLA, has made changes to the reporting guidelines that govern when an incident should be reported to them. An 'early notification' model will be introduced for all maternity incidents which are likely to result in severe brain injury. All such incidents occurring after 1 April 2017 must be reported to the NHSLA within 30 days.</p> <p>The NHSLA have also proposed changes to the way in which financial contributions paid by the Trust to the NHSLA in respect of maternity will be calculated from 2018/19, linking an element of them to outcome measures and harm likely to lead to claims in the future.</p>	
<b>Related Trust Objective</b>	Financial and Operational Sustainability
<b>Related Risk</b>	Risk 4 – Trust not being financially sustainable
<b>Essex Success Regime</b>	This report does not have any implications for other Trusts within the Essex Success regime at the current time.
<b>Legal implications / regulatory requirements</b>	Failure to demonstrate that our services are safe, effective, caring, responsive and well-led may lead breach of licencing conditions. Regulatory implications in terms of governance and finance.
<b>Quality impact assessment</b>	By recognising the impact of claims and ensuring appropriate controls are in place to both monitor and

	respond to these will improve our standards and ensure we provide the best possible experience for our patients and their families.
<b>Equality impact assessment</b>	As far as can be considered this paper has no detrimental impact for the 9 protected characteristics under the Equality Act 2010
<b>Recommendations:</b> The Board is asked to note this report.	

# 1. LIABILITY IN RESPECT OF CLINICAL CLAIMS

## The CNST Scheme

The Trust is indemnified against costs and damages awards in respect of clinical negligence by the Clinical Negligence Scheme for Trusts (the CNST). The scheme is administered by the NHS Litigation Authority (the NHSLA), a not-for-profit part of the NHS. Although the scheme is voluntary, all NHS Trusts in England are members.

The costs of the scheme are met by membership contributions which are based on annual projected claims costs for each Trust. Each year, the NHSLA collects from its members the amount of money they expect to pay out in the coming year. The contribution calculations include an element of 'risk pooling' designed to protect Trusts when rare, very high value claims are settled.

When notification of a clinical claim is received, the Trust must report this to the NHSLA in line with their published reporting guidelines.

## Active and on-going clinical claims

At the end of quarter 3, the NHSLA reported that there were 134 active and on-going clinical claims being brought against the Trust. These claims relate to incidents occurring between 1986 and 2016.

The NHSLA are holding £48,501,586 in reserve for payments of damages in respect of these claims. The NHSLA are holding a further £16,191,203 in reserve for payments of costs incurred in bringing and defending these claims. The NHSLA therefore assess the Trust's potential overall liability in respect of on-going clinical claims to be £64,692,789.

As the body that indemnifies the Trust, the NHSLA will pay any damages and costs on behalf of the Trust under the CNST should the claims be settled.

## Value range of clinical claims

As Chart 1 below shows, the damages for 90 of the 134 clinical claims, 67%, are valued at £100,000 or less. 10 clinical claims, 7%, are valued at £1,000,001 or more.

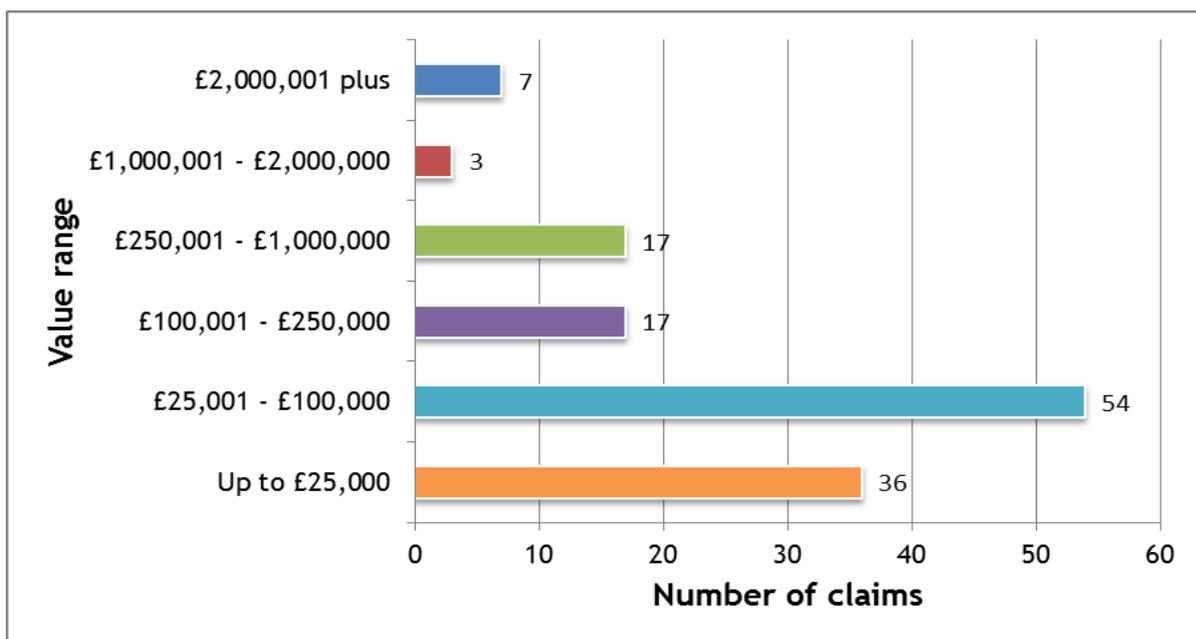


Chart 1

## High value claims

The damages for 7 claims are estimated by the NHSLA to be valued at £2,000,001 or more. The incidents that triggered all 7 of these claims occurred in 2010 or earlier. Of these claims, 4 have already been settled and periodic payments are being made by the NHSLA in respect of damages and costs.

The damages for 3 clinical claims are estimated to be valued between £1,000,001 and £2,000,000. The incidents that triggered these claims occurred between 2002 and 2007. Of these claims, 1 has been settled and periodic payments are being made.

Whilst it is encouraging to note that the events triggering these high value claims occurred 7 years ago or more, it should be remembered that claims can be brought many years after the event in certain situations. Notably, claims can be brought by children at any time before their 21<sup>st</sup> birthday, regardless of the date of alleged negligence.

## 2. EARLY NOTIFICATION OF MATERNITY INCIDENTS

Following a consultation in 2016, the NHSLA identified a strong preference from the membership of the CNST (97% of respondents) for the NHSLA to be notified of incidents that are likely to become high value claims as soon as possible after the event.

The NHSLA confirmed on 17 March 2017 that they therefore require the Trust to report all maternity incidents that occur on or after 1 April 2017 which are likely to result in severe brain injury. A severe brain injury has been defined for these purposes as follows:

*Babies born at term (≥ 37 completed weeks of gestation), following labour, with a severe brain injury diagnosed in the first seven days of life, namely babies that have one or more of the following:*

- *Diagnosed with grade III hypoxic ischaemic encephalopathy (HIE);*
- *Actively therapeutically cooled; and/or*
- *Have all three of the following signs: decreased central tone; comatose; seizures of any kind.*

Reporting of incidents which fall within the above criteria will be mandatory within 30 days of the incident. Further details of the notification process will be provided in due course. The NHSLA has previously indicated that a failure to report these incidents might result in them refusing to indemnify the Trust if those incidents later become negligence claims. The update provided on 17 March 2017 was silent as to whether this will or will not be the case but we will update the Board as and when this is clarified.

The Legal Services team have already approached the Risk & Patient Safety team and the Women & Children directorate to ensure that robust systems will be in place at the Trust to identify and report all such incidents. In addition, discussions have begun with Basildon & Thurrock University Hospitals to work in partnership with them and Mid Essex in identifying best practice and to foster a similar approach in recognising reportable incidents. This work will continue now that fuller details of the reporting guidelines have been provided by the NHSLA.

## 3. CNST MATERNITY CONTRIBUTIONS

The NHSLA have also reported that the consultation confirmed a strong preference (92% of respondents) for an element of CNST contributions to be linked to outcome measures, in turn linked to harm which is likely to lead to claims in the future. The NHSLA are therefore working towards making CNST maternity contributions more responsive to improvements in key outcomes for mothers and newborns, with a view to incentivising good practice and reducing avoidable harm and the number of maternity claims.

A new pricing model has now been proposed by the NHSLA which applies selected forward indicators to the contribution calculation. The suggested indicators are:

- unexpected neonatal admissions per 1,000 births; and
- CQC inspection ratings for Safety.

The contributions relating to maternity for 2017/18 have already been set; the Trust will make a contribution in respect of maternity of £4,127,640.

The new method of setting maternity contributions will not come into effect until 2018/19. For illustrative purposes only, the NHSLA have recalculated the Trust's 2017/18 maternity contributions with an adjustment of up to +/-5% to show the impact of implementing these new indicators. The calculation resulted in a new contribution price of £4,100,581 representing a change of -£27,059.

The NHSLA have invited feedback on the proposed new pricing model by no later than Friday 28 May 2017.

**Stephen Waites - Legal Services Officer**