Welsh Risk Pool Services & Legal and Risk Services

Annual Report
2014/2015
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CHAIR’S FOREWORD

The majority of people who receive care from NHS Wales receive an excellent service which is provided by a workforce of over 72,000 whole time equivalent employees. Never the less, the demands on NHS Wales have never been greater with increases in life expectancy, technological and clinical advances and a challenging financial climate.

Whilst NHS Wales should be justifiedly proud of what it achieves there is no room for complacency and sadly when mistakes do happen or processes break down, there are both human and financial costs. The human costs cannot be under estimated and can be difficult to capture and quantify.

The financial costs range from the need to provide remedial care through to the more visible costs associated with litigation. The cost of litigation is met directly from the budget available to deliver patient care and, therefore, there is a real incentive to ensure that wherever possible, the need for litigation is avoided.

The introduction of Putting Things Right has provided NHS Wales with a real opportunity to address concerns at an early stage and make an offer of redress where appropriate but, where litigation is necessary, Legal and Risk Services provides a robust defence whilst ensuring fairness and efficiency in achieving a settlement. The rising cost of litigation, however, is placing an ever increasing burden on NHS finances and last year the Welsh Risk Pool incurred expenditure of £78.043m.

The purpose of this report is to provide further information on the costs associated with litigation and highlight the work being undertaken with colleagues across NHS Wales to ensure quality and safety remain paramount.

Margaret Foster
Chair
September 2015
OVERVIEW OF THE WELSH RISK POOL AND LEGAL AND RISK SERVICES

The Welsh Risk Pool Service is based in Alder House in North Wales and administers the risk pooling arrangement for NHS Wales though reimbursing members for losses over £25,000. The reimbursements mainly relate to clinical negligence and personal injury although the scope of the risk pool includes buildings and, in exceptional circumstances, equipment. A significant number of large value claims are now settled using annual payments to claimants over their lifetime and this scheme is managed by the Welsh Risk Pool Service.

The growth in claims in recent years is placing an ever increasing financial burden on NHS Wales and a key aspect of the Welsh Risk Pool Service is undertaking financial modelling to ensure adequate financial resource is available to meet its commitments. The experiences of Wales are similar to England and are being driven by a number of factors including an increase in the number of patients being treated. A robust but fair approach is adopted for defending claims and a significant number are finalised without compensation.

The Welsh Risk Pool emphasis is on improvement and the team works with NHS colleagues to ensure that learning is in place for each claim. Also, the Clinical Assessors undertake a range of clinical assessments in high risk areas. The Welsh Risk Pool also undertakes an annual assessment of the arrangements for the management of concerns, claims and learning from events.

Legal and Risk Services is based in Companies House in Cardiff and provides a comprehensive legal service for NHS Wales. The traditional core business relates to the management of clinical negligence and personal injury claims against NHS Wales and significant growth has been experienced in both of these areas in recent years.

In addition to the core activities the department has specialist knowledge in a range of relevant areas including court of protection work, property and commercial work and employment advice.

More recently, the department has appointed two additional solicitors who will be dedicated to providing support to Health Board and Trusts in respect of Putting Things Right following recommendations in the Evans review which identified weaknesses in the management of patient concerns.
Legal and Risk Services is integrated with the Welsh Risk Pool Service to ensure a co-ordinated approach to the management of losses arising from claims.

The work of the two services is overseen by the Welsh Risk Pool Committee which is a formal sub-committee of the NHS Wales Shared Service Partnership (NWSSP) Committee. The Committee meets on six occasions each year and considers all claims submitted for reimbursement.

The focus of the Committee is on ensuring a system wide approach to improvement and fully supports the provision of education and training for NHS Wales. The teams provide support and training across NHS Wales to a range of staff including Board Members, clinicians, claims managers and administrators.
Claims against NHS Wales

The NHS in Wales has seen an unprecedented number of new clinical negligence claims in recent years and growth in the costs and damages associated with the claims. This growth is not restricted to Wales and has been experienced across the NHS in England, Scotland and Northern Ireland. The recent growth in England and Wales has been driven, in part, by changes to the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) which came into effect on 1st April 2013. The legislation has reformed the funding arrangements for civil litigation including the “no-win, no-fee” arrangements which allowed claimant solicitors to charge a 100% success fees on their costs. In order to offer some balance where costs recovery in a claim would be lower, general damages were increased by 10%. The changes have helped to introduce some degree of proportionality between the value of the damages awarded for harm and the costs recovered by the successful claimant for the payment of his legal team. However, there are still many claims ongoing under the old scheme in which the value of the costs will continue to be disproportionately high as against the settlement achieved on damages. Immediately prior to the implementation of these changes, there was a huge increase in claim numbers brought on behalf of claimants to guarantee the higher level of costs with success fees. A significant number of these have been successfully repudiated or settled rapidly but a sizeable number continue to be managed.

Costs Budgeting

A process of costs budgeting has been introduced by the Courts which require both parties to put forward and agree estimates of their costs over the lifetime of the claim. This process is difficult due to the uncertain nature of claims and requires an assessment of how investigations, deliberations and negotiations will unfold. The process has been challenged by the judiciary on the grounds of effectiveness given the high level of estimates involved and the need to review bills at the end of the case.

Putting Things Right

The introduction of Putting Things Right in 2011 has provided NHS Wales with a simpler, more responsive and comprehensive complaints procedure which permits a health body to make an offer of redress where harm has arisen from treatment. Unfortunately most claims received by Legal and Risk Services still begin without any previous investigation into the circumstances and often some years after the treatment complained of. Regrettably, as identified in the review undertaken by Keith Evans, the Gift of Complaints, the perception is that NHS Wales has not, generally, been able to put sufficiently
robust systems in place to underpin the principles of the Putting Things Right Regulations. Consequently, many firms of solicitors acting on behalf of potential claimants are advising their clients to reject the Putting Things Right process and proceed straight to litigation.

Court Timescales

The increase in the number of claims is not the only challenge being faced as the need to comply with Court timescales is paramount if costly sanctions are to be avoided and the public purse protected. It is important that there is early engagement with clinicians and claims managers within health bodies and prompt instruction of independent expert opinion to establish if the case is defensible. It is probable that cost sanctions will be imposed in future where a response to a claim is not received within four months.

Reducing the burden

Legal and Risk Services encourages health bodies to engage with them as soon as a claim or potential claim is received. This enables an early assessment to be undertaken which may include a review of the Putting Things Right investigations and admissions or other internal investigations. Where it is clear that the claim has merit this enables an early admission to be made to limit the costs escalating. Other claims may need more extensive investigation including obtaining the comments of external experts as well as the treating clinicians and consideration of the merits with a barrister.

In every case the expectation is that the outcome should be fair and reasonable to the claimant who believes he has suffered harm, whilst ensuring that the public purse does not spend more than necessary to achieve redress.

A significant number of cases have been taken to trial involving both clinical negligence and employer’s liability claims with successful outcomes. Careful assessment must be made before proceeding to trial because the costs can very quickly exceed the value of the claim. However even the best case with excellent witnesses, good records and supportive experts does not have a guaranteed outcome in court and circumstances are beyond a good lawyer’s control. Furthermore, matters in which only the value of the claim is at issue very rarely succeed, when taken to trial, in reducing the financial cost to the NHS.

Success at trial - clinical negligence. L&RS successfully defended a claim brought by a claimant who felt that there had been inadequate assessment of her injury and the exercise regime given by a physiotherapist was too intensive leading to damage to ankle ligaments. At trial the physiotherapist was able to confirm to the nature of the clinical assessment and also the
exercise programme given and this was supported by our expert as reasonable. The judge found in favour of the health board with costs. The detailed clinical records and credible witnesses provided the necessary evidence to win.

**Success at trial involving a visitor slipping on a wet floor** - A claim brought by a visitor to a Health Board had slipped on a washed floor and sustained injury. The Health Board in question was well supported by witnesses and the judge accepted that the obligation that the Board owed to visitors was different to the obligation that it owed to its own staff in relation to the safety of floors within the hospital. The judge accepted the Health Board’s barrister’s submission that whilst the condition of the floor had to be reasonably safe for visitors it did not have to be perfectly safe. The fact that the visitor had been informed that the floor was about to be cleaned, that there was a cone present, and that the visitor observed the cleaner washing the floor, were sufficient warnings to the visitor to render the floor reasonably safe even though there was some residual water left on the floor. The Claimant’s solicitors sought leave to appeal the decision and were refused such permission by the Circuit Judge. The Health board was awarded their full costs in this matter.

**Settlements**

Even where it is not possible to repudiate claims the proactive and robust management by Legal and Risk Services can support a reduction in the value of the claim to ensure a fair and equitable settlement. The table below provides an overview of the professional influence savings which have been recorded for 2014/2015 and reflect significant achievements in reducing the final settlements from that of the claimant’s initial estimate.

<table>
<thead>
<tr>
<th>SAVINGS</th>
<th>£’m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claims below £100k</td>
<td>3</td>
</tr>
<tr>
<td>Claims above £100k</td>
<td>4</td>
</tr>
<tr>
<td>Savings in relation to costs</td>
<td>10</td>
</tr>
<tr>
<td>Repudiated Claims</td>
<td>1</td>
</tr>
<tr>
<td>Miscellaneous Savings</td>
<td>94</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>112</td>
</tr>
</tbody>
</table>

Table 1 - Professional Influence Savings 2014/2015
Legal Developments and Recent case law

Personal injury claims including clinical negligence depends largely on the Courts to set precedents both in respect of the interpretation of the statutory law and the common law and also in respect of the appropriate level of damages for a particular harm. Taking a case to court can risk an unexpected finding for the claimant which may then apply to all similar cases in the future. The courts tend to follow modern mores in some of their decision and patient autonomy is very much in the limelight at present. The following are examples of important cases which are relevant to claims against NHS Wales.

Montgomery v Lanarkshire Health Board

A recent decision involving a Scottish Health Board has changed the way a doctor offers a patient treatment choices for ever. In Montgomery v Lanarkshire Health Board 2015 the claimant sought damages for the failure of her obstetrician to warn her of the risk associated with diabetes in pregnancy. In 1999 she gave birth to a baby who suffered both brain and brachial plexus damage after his shoulders became stuck during delivery resulting in a delay before he could be delivered. She said that she ought to have been offered a caesarean section which would have avoided the risk. Her doctor accepted that there was a risk but that it was very small and she did not want to increase the incidence of caesarean section which carries with a risk to the mother. The Scottish Court agreed but on appeal to the Supreme Court in London, it was held that there had been a significant move towards patient autonomy and away from the traditionally paternalistic stance of a medical practitioner. It was therefore necessary to advise the patient in these circumstances of both the risk to her and to her unborn child to enable her to make a choice.

This principle applies to all care and not just in the particular circumstances of pregnancy although subsequent cases have not always followed the Montgomery judgement depending on the risks warned of. The ruling puts an additional burden on the medical practitioner to exercise judgement about what information will have an impact on a particular patient’s health and wellbeing as well as how it will affect his decision making ability.

Strict Liability

A recent change in the law means no more strict liability in cases where work equipment fails. It is now possible to win cases if it can be proved that reasonable steps have been taken to ensure the equipment was in good working order. This is achieved by producing evidence of maintenance and inspection of the equipment in question. It is clear that because of the sheer volume of equipment in hospitals and clinics in Wales pro-active or planned
maintenance is not achievable for all equipment and maintenance is therefore reactive and carried out when a problem is identified.

For such matters, being able to produce evidence that employees who were expected to use the equipment have been reminded to inspect the equipment before use will be of great value in defending such cases. The prevention of such incidents would be better. Consideration could be given to setting out such an instruction in one of the many mandatory online Health and Safety courses that all staff complete online.

The downside to this change in the law is that Claimants will now demand to see maintenance and inspection type evidence at pre-action stage. Wider and more frequent disclosure requests are being made which is putting a huge strain on Claims Managers. It is imperative that those requested to supply documents in legal cases to try to comply and do so quickly to avoid justified legal challenges. Pre-action disclosure costs are getting more and more expensive.

**Maximum severity claims**

In England a significant number of cases requiring the assessment of damages in high value cases involving children with severe neurological damage have been taken to the High Court recently. Damages awards in these cases have been increasing very substantially partly due to the increasingly varied and expensive therapies and aids and equipment including swimming pools and ponies. Unfortunately, in almost all of those taken to trial in England the outcome has been wholly unfavourable to the Defendant Health bodies which will have the effect of permanently increasing the value of such cases. An example is that of James Robshaw v United Lincolnshire Hospitals NHS Trust in which a 12 year old boy who suffered significant brain injury as a result of the circumstances of his birth which was admitted by the Trust, who was seeking an appropriate settlement of his claim for damages. The trial was originally expected to last between three and four weeks because all the heads of damage were contested but due to some compromises being reached beforehand, trial lasted eleven costly days. Trials involving damages only are an exceptionally expensive process for the Health Board which is bound to be the paying party whatever the outcome and should be avoided if possible. Mediation can achieve an appropriate compromise figure in most cases.

This case resulted in a decision to allow a swimming pool in the home, an adapted motorhome, long haul holidays, case management at a much higher rate than had previously been agreed, allowance for an Ipad despite the almost universal ownership and renewal every three years for life, and membership of a sailing club. The arguments over care and life expectancy all were resolved in the Claimant’s favour. The ruling has already resulted in
higher settlement values for NHS Wales where quantum cases are routinely compromised out of Court to avoid such decision.

**Fixed Costs**

The vexed question of disproportionately high legal costs to pursue a claim against the damages recovered has been considered by the Department of Health in England with the National Health Service Litigation Authority whose recently published annual report makes reference to the causes of the rise in claims and costs. It is proposed that a fixed costs scheme for clinical negligence matters will be introduced in October 2016. The costs will be determined for solicitors, barristers and experts in the various phases of a claim. There is no doubt that any such proposal will be strongly contested by the organisations representing patients’ interests. There are many difficulties with fixed costs in cases which may not be of intrinsically high value but are of utmost importance to the person or family harmed where the costs of investigating, especially where such a claim is resisted by the defendant health body, far outweigh the possible value of the damages. Even a sliding scale carefully applied is unlikely to offer full justice in such cases.

**Costs budgeting**

It is anticipated that the issue of costs budgeting will be reviewed in the future to consider the value added by the process given the high degree of uncertainty in the early stages of a claim. It is likely that all claims on behalf of children will be excluded from the requirement to prepare budgets.
FINANCIAL ASPECTS OF CLAIMS

The WRPS administers the risk pooling arrangement and meets the cost of financial losses over £25,000. The most significant element of expenditure relates to clinical negligence matters which includes the annual cost of claims settled using a periodical payment order (PPO).

In recent years, NHS Wales has experienced a significant growth in the number and value of claims involving negligence. All clinical negligence claims are professionally managed by Legal and Risk Services and the table below provides a summary of open clinical negligence matters by financial year. A 60% increase in open matters has been experienced between 1st April 2009 and 31st March 2015 which equates to an average of 10% each year. The rise experienced during 2013/2014 was most marked at 23%. The number of new matters opened during 2014/2015 was in excess of 1,000 and whilst past experience suggests that a significant number will not result in damages being paid, the operational staff time required to properly investigate and repudiate such claims cannot be underestimated.

The increases in the number and value of claims experienced by NHS Wales are consistent with those of other nations and indemnity providers. The factors influencing the increases in number and value are wide ranging and include:

Graph 1 – Open Clinical Negligence matters by Financial Year
• An increase in the number of patients being treated by NHS Wales. The measure of Finished Consultant Episodes shows a 35% increase between 2002/2003 and 2014/2015.
• There has been an increase in the value of claims for which it is necessary to make provision for ongoing care over the lifetime of the claimant.
• The significant claimant costs associated with smaller value claims, especially where a historic no win no fee arrangement is in place. For claims with damages below £25,000 the average costs paid to claimant solicitors is 2.2 times the value of damages (and increase of over 120% since 2006/2007).

The graph below shows the number of clinical matters by financial year of closure and included a damages settlement. This confirms an increase over 50% since 2006/2007. Historically approximately 80% of matters conclude with damages below £100,000 (including those that settle below the WRPS excess of £25,000). Further analysis of the breakdown of reimbursements is provided in Table 3.

Graph 2 – Number of Clinical Negligence matters closed with damages paid

The increase in the number of claims has also impacted on the Welsh Risk Pool Service and the graph below shows the in year resource utilised on settled claims and annual payments for claims settled using a periodical payment order (i.e. excludes increases in provisions for ongoing claims).
The above resource is sourced from the healthcare budget for NHS Wales and in 2014/2015 the expenditure of £78.043m which is in excess of 1.2% of the NHS budget. The table below provides a more detailed breakdown of expenditure.

<table>
<thead>
<tr>
<th>Expenditure heading</th>
<th>2014/2015 £’m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reimbursements to members for clinical negligence matters</td>
<td>55,775</td>
</tr>
<tr>
<td>Reimbursements to members for personal injury matters</td>
<td>3,038</td>
</tr>
<tr>
<td>Reimbursement to members - other claims</td>
<td>191</td>
</tr>
<tr>
<td>Former Health Authority claims managed by WRPS</td>
<td>2,803</td>
</tr>
<tr>
<td>Periodical Payments – annual payments</td>
<td>8,174</td>
</tr>
<tr>
<td>Movement on claims creditor (amounts paid by members but not yet claimed from WRPS)</td>
<td>8,062</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>78,043</strong></td>
</tr>
</tbody>
</table>

**Table 2 – Analysis of WRPS expenditure 2014/2015**
The WRPS also accounts for its share of long term liabilities and this includes a provision for ongoing matters assessed as probable or certain and also an estimate of future costs associated with settling claims using a periodical payment order (PPO). As at 31st March 2015 the value of the liabilities on the WRPS balance sheet were £674m with a further £684m disclosed as a contingent liability in respect of estimates for claims currently assessed as possible.

**Graph 4**– Welsh Risk Pool liabilities by Financial Year

<table>
<thead>
<tr>
<th>Ongoing Liabilities by Financial Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>£'m</td>
</tr>
<tr>
<td>09/10</td>
</tr>
<tr>
<td>Provisions</td>
</tr>
<tr>
<td>200</td>
</tr>
</tbody>
</table>

Graph 4– Welsh Risk Pool liabilities by Financial Year
ANALYSIS OF CLINICAL NEGLIGENCE REIMBURSEMENTS

Table 2 confirms that total expenditure of the WRPS during 2014/2015 was £78.043m of which £55.8m related to reimbursements to members in respect of 318 clinical negligence matters. During the course of a claim the responsible body will make payments which include damages, claimant costs and defence disbursements. The life cycle of a claim may last many years, especially for large value claims and it is not uncommon for members to submit a number of interim claims for a matter before it is fully concluded. Therefore, the expenditure in year will relate to both finalised and ongoing matters.

Claims received for reimbursement are classified by speciality and the table below provides a breakdown of the value of reimbursements made.

Table 2:

<table>
<thead>
<tr>
<th>Speciality</th>
<th>Reimbursement (£'000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maternity</td>
<td>£15.8</td>
</tr>
<tr>
<td>Trauma and Orthopaedics</td>
<td>£8.8m</td>
</tr>
<tr>
<td>General Surgery</td>
<td>£3.8m</td>
</tr>
<tr>
<td>General Medicine</td>
<td>£3.2</td>
</tr>
<tr>
<td>Emergency Department</td>
<td>£2.8m</td>
</tr>
<tr>
<td>Mental Health</td>
<td>£2.6m</td>
</tr>
<tr>
<td>Pathology</td>
<td>£2.5</td>
</tr>
<tr>
<td>Nursing</td>
<td>£2.2m</td>
</tr>
<tr>
<td>All other specialties</td>
<td>£14m</td>
</tr>
</tbody>
</table>

Graph 5 – 2014/2015 – Clinical Negligence Reimbursements to members by Speciality

During 2014/2015 the WRPS reimbursed amounts in excess of £1m in respect of 12 clinical negligence matters. The lump sum value of these reimbursements was £18.5m and seven of these matters will also receive...
ongoing annual payments for ongoing care with an estimated future value of £22m.

The life cycle of a claim may mean that payments are made over a number of years. Of the claims submitted for reimbursement, a total of 251 were finalised in year and the total costs associated with these claims are provided below in the table below. The table provides a split between the damages received by claimants and the amounts paid to the claimant lawyers. It is clear that for lower value claims the burden of claimant costs is extremely high.

<table>
<thead>
<tr>
<th>Value of damages</th>
<th>Number</th>
<th>Damages £’m</th>
<th>Claimant Costs</th>
<th>Defence Costs</th>
<th>Claimant costs as a % of Damages</th>
<th>Time between incident and date of claim (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to £25,000</td>
<td>99</td>
<td>1,361</td>
<td>2,995</td>
<td>303</td>
<td>220%</td>
<td>2.03</td>
</tr>
<tr>
<td>25,001-50,000</td>
<td>41</td>
<td>1,478</td>
<td>1,597</td>
<td>166</td>
<td>108%</td>
<td>1.57</td>
</tr>
<tr>
<td>50,001-100,000</td>
<td>47</td>
<td>3,425</td>
<td>2,812</td>
<td>357</td>
<td>82%</td>
<td>2.71</td>
</tr>
<tr>
<td>100,001-200,000</td>
<td>17</td>
<td>2,629</td>
<td>1,410</td>
<td>92</td>
<td>54%</td>
<td>2.21</td>
</tr>
<tr>
<td>200,001-500,000</td>
<td>24</td>
<td>7,248</td>
<td>3,308</td>
<td>383</td>
<td>46%</td>
<td>3.92</td>
</tr>
<tr>
<td>5001,000-1,000,000</td>
<td>15</td>
<td>11,338</td>
<td>2,652</td>
<td>411</td>
<td>23%</td>
<td>1.42</td>
</tr>
<tr>
<td>£1m+</td>
<td>8</td>
<td>19,505</td>
<td>2,576</td>
<td>391</td>
<td>13%</td>
<td>3.78</td>
</tr>
<tr>
<td>Total</td>
<td>251</td>
<td>46,984</td>
<td>17,350</td>
<td>2,103</td>
<td>37%</td>
<td>2.29</td>
</tr>
</tbody>
</table>

Table 3 – Analysis of finalised clinical negligence claims reimbursed by the WRPS during 2014/2015

The above claims only represent those with costs in excess of £25,000 and it can be seen that almost 40% have damages below £25,000. These claims now fall within the threshold of Putting Things Right and afford NHS Wales with a significant opportunity to address issues within a timely manner and, where possible, avoid formal litigation. Once a matter become litigious it is clear from the table above that the claimant costs place further burden on NHS resources.

At any given time the claims managed by legal and risk services cover a large time frame in terms of date of incident. However, using the finalised claims with cumulative costs over £25,000 as an indicator, the claim rate as a
percentage of finished consultant episodes is 0.027%. Whilst claims as a percentage of all care are low the financial impact is much greater and the expenditure of £78.043m represents 1.22% of the total health and social care budget for NHS Wales for 2014/2015. This excludes the full cost of claims settled using a periodical payment order and including the £22m the percentage would increase to 1.57%.
LEARNING FROM CLAIMS

All claims received for reimbursement are reviewed by the WRPS Clinical Assessment team to ensure that proportionate action has been taken to reduce the risk of recurrence. Claims are also presented to the WRP Committee which is an Executive level multidisciplinary group from across Wales for further consideration. The WRP Committee may also seek further assurance on individual claims by requesting a claims review.

It is evident from the claims received that whilst each claim has different clinical characteristics there are common aspects which include:

- Weakness in obtaining informed consent to treatment
- Failure to act on abnormal readings in electronic foetal monitoring
- Delay in diagnosis and/or implementing treatment
- Failure to act on abnormal results of diagnostic investigations
- Failure to refer for specialist medical opinion
- Substandard surgical procedures
- Poor postoperative management
- Failure to recognise patients’ deteriorating conditions
- Development of pressure ulcers
- Failure to provide adequate nutrition/hydration
- Failure to provide appropriate training or supervision
- Communication failures
- Poor record keeping

Generally the claims received demonstrate that action has been taken to identify weaknesses and action plans developed. However, it is often noted that action plans are not routinely followed up or assessed to ensure that the proposed actions have improved quality and safety. It is clear that often there is an individual focus on learning rather than a team, department or organisational emphasis. In particular, monitoring arrangements through effective clinical audit or performance management data are not routinely developed.

The outcomes of claims reviews are shared with individual Health Bodies to ensure that any outstanding weaknesses are identified and addressed. Once complete, anonymised summaries are shared across NHS Wales to support learning and improvement. Anonymised reviews are available to NHS organisations for use for teaching purposes.
SAFETY AND LEARNING – HIGH RISK AREAS

The Clinical Assessment Team undertakes clinical assessments in respect of areas which are at high risk of litigation. For each area of assessment a clinical evidence criteria is developed which is based on current recognised good practice. The assessment comprises of a documentation review of each organisation’s arrangement to gauge the extent to which the organisation can demonstrate compliance. The documentation review includes policies, procedures, training logs and also clinical audit reports. As the clinical evidence criteria are based on recognised good practice including the methodologies of the 1000 Lives Plus campaign in Wales, the assessments should not place additional requirements on the service. In addition to reviewing the documented arrangements interviews with a range of staff are undertaken to gauge the level to which the documented arrangements are embedded in actual practice.

Surgical claims and assessment

During 2014/2015 a total of £3.8m was paid in respect of 29 surgical claims, of which were 26 finalised in year. A review of the finalised claims has identified that, whilst they all present with different clinical features, the key risk areas are:

- Weaknesses in clinical assessment resulting in either a delayed diagnosis or failure to refer on.
- Management of infection
- Poor documentation

7 claims involved laparoscopic cholecystectomies and in general these related to failures in the post-operative management of the patient where damage had occurred during the initial procedure.

The 2014/2015 assessment followed the patient pathway for elective procedures from pre-operative assessment through to discharge. There was a high level of compliance and organisations had policies and procedures in place although improvements in the clinical audit arrangements to strengthen the assurance framework were recommended. Progress had been made within organisations to standardise procedures and good practice was identified in relation to record keeping and assessing of patients’ fitness for anaesthetic. A review of compliance with mandatory training identified that improvement was required to ensure regular updates were accessed in a timely manner. This is a national issue across all specialities and this will be a focus for the WRP Committee moving forward. The national early warning scoring charts appear to be embedded in practice. A common theme across organisations was concern regarding medical patients being treated as outliers on surgical wards.
The Assessment of surgical pathways was completed and reported to operational leads, Chief Executives and the Welsh Government by the end of July 2014. Areas for improvement were identified for all Health Bodies and this is monitored via ongoing claims and claim reviews. The composite report has been shared with all Chief Executives and with colleagues in the Welsh Government.

A claim was settled due to failures in the treatment of a patient’s right heel ulcer following cardiac surgery, resulting in a below knee amputation. The nursing care was deemed to be substandard and the Wound Care Team was not involved in his care once a pressure ulcer had developed. Nursing records of positional change and documentation of wound dressing were unavailable and records that were available contained significant gaps which were crucial to demonstrating the care provided.

The Health Board confirmed that all staff have completed training in identification, documentation and ongoing care of patients with pressure damage. Patient at a glance boards have been established to ensure all patient information is clear, concise and communicated to all staff members, and a culture of safety briefings at ward rounds is now embedded to ensure all staff take responsibility for communication. Pathway documentation is to be altered to ensure a nursing care plan is clearly developed for all patients to confirm the care delivered to each individual patient. The Senior Nurse monitors nursing metrics relating to pressure damage, nutrition and hygiene. Risk assessments for skin integrity are completed on admission and regularly reviewed to reflect any changes in clinical need.

£54,238.00 damages, £55,000.00 claimant costs, £6,423.50 defence

There was a delay in diagnosing a biliary leak and instituting the appropriate treatment in a patient who had undergone an elective laparoscopic cholecystectomy. She underwent surgery on a Friday but the leak was not detected until the following Monday by which time she had significantly deteriorated and further surgery was required. She also developed hospital acquired pressure sores and infection. At the time of the incident there was an agreement in place that the on call Consultant and Registrar were responsible for reviewing all surgical patients but this protocol was not followed. There is now an Emergency Surgery Department Protocol in place. Patients are assessed in theatre to ensure they meet the criteria for discharge back to the ward. All staff on the wards have received training in the use of the National Early Warning Score (NEWS) charts which are used to aid the detection of the deteriorating patient and escalation for medical review. The Heath Board has also implemented the NICE guidance for Acutely Ill Patients in Hospital and the Sepsis Six Care Bundle. On call junior doctors are responsible for completing a summary of each patient for the on call team with a brief history, plan of care and potential problems that may occur over the
weekend period. The Health Board is participating in the National Audit of Laparoscopic Cholecystectomies which is multi-centred and monthly spot audits are undertaken against the Sepsis Care Bundles and revalidation of medical staff has been undertaken.

£155,000.00 damages, £156,499.00 claimant costs, £11,015.00 defence

Maternity claims and assessment

Reducing the incidence of harm in any clinical setting is a laudable goal and this is especially the case within the maternity setting where there is a high human cost associated with harm. The consequences can be devastating to both babies and mothers but is also far reaching within families and wider social networks. The impact on NHS staff involved in the care of babies and mothers harmed cannot be underestimated.

Maternity claims consistently represent the speciality with the highest level of reimbursements and this reflects both the volume and value of claims. During 2014/2015 the WRPS reimbursed £15.8m in respect of 45 maternity claims. Of these claims, 27 had finalised with cumulative costs of £16.2m. Each claims presents with different clinical aspects and a review of the finalised claims has identified the following key issues:

- 3 claims involved failures to act on foetal distress resulting in long term harm to the baby. The total payment in respect of these matters was £10.9m with an estimated further £14m to be paid out in future years for ongoing care.
- 9 claims involved still births which were considered to include clinical weaknesses which may have been preventable. Two of these included the management of shoulder dystocia.
- 5 claims involved complications arising to mothers as a consequence of caesarean section.
- 5 claims involved perineal tears which should either have been avoided or managed more appropriately.
- 1 claim relates to a failure to refer a woman in the post natal period when cervical cancer was suspected in labour resulting in her death.
- 2 claims involved damage arising from the management of shoulder dystocia.

The review of claims has identified weaknesses in clinical assessments resulting in a failure to identify or act on complications, poor or incomplete documentation, weaknesses in undertaking the treatment or procedure and ongoing monitoring and review of the patients. The clinical aspects of claims have been taken forward to the Maternity Improvement Network to ensure that appropriate action is taken.
During October 2014 and April 2015 the WRPS completed an assessment of maternity services across Wales. The work in each Health Board has been concluded and reported and a composite report will be drafted and available via the WRP’s intranet site.

The WRPS is an active participant on the newly formed national Maternity Improvement Network. The Network has representation from all Health Boards and the Quality and Safety sub group is currently pro-active in developing an all Wales dashboard of clinical data and a consistent trigger list of events which should be subject to investigation. As part of this work the group is also working to ensure that common definitions are used. The National Stillbirth Working Group is also part of this Network and has produced an All Wales Pathway and guidelines for reducing stillbirth in Wales. An information leaflet has been developed by an expert group brought together by the Department of Health and the stillbirth charity, SANDS, the purpose of this leaflet being to increase awareness to women of the risk of stillbirth and to highlight how women can reduce their risk of stillbirth.

**Case example** There was poor management of the delivery of a baby resulting in the baby suffering a Stage 3 neonatal hypoxic ischaemic encephalopathy. The CTG trace was also of poor quality which made it difficult to interpret. The decision was made to perform an emergency caesarean section following a trial of labour when it was realised that the head was jammed in the pelvis and the umbilical cord was trapped, on point of transfer to theatre it was also noted that the CTG trace was so poor it could not be interpreted. The experts were supportive of the treatment provided until the point of transfer to theatre, where it was opined that the foetal heart rate monitoring was inadequate. Had monitoring been in place more promptly the foetal bradycardia would have been noted and delivery achieved earlier, with a reduction in or avoidance of the brain damage. The Health Board has confirmed that following the event Practical Obstetric Multi-professional Training (PROMPT) is in place which is a multi-disciplinary training package which enables midwives, obstetricians and anaesthetists to implement a fully evaluated obstetric emergency course within the organisation. Emergency obstetric drills are also undertaken within the clinical setting and feedback given to staff as part of their competency assessment. All CTG traces are stored in custom made robust CTG envelopes and secured in the notes to ensure the quality of the traces is maintained and forms part of the record keeping audits. The Electronic Foetal Monitoring (EFM) guideline incorporates the requirement for ongoing monitoring of foetal well being on transfer to theatre until delivery is imminent and an audit identified 100% compliance to the policy.

Total cost: £6.3m inclusive of claimant costs of £265,000 and the estimated value of annual payments for care.
ASSESSMENT OF CONCERNS, CLAIMS AND LEARNING FROM EVENTS

The Concerns and Compensation Claims Standard (the Standard) is designed as a framework to support the compliance by Health Bodies with the NHS (Concerns, Complaints and Redress Arrangements (Wales) Regulations 2011 (The Regulations) and the Welsh Government’s guidance on Putting Things Right (The Guidance).

The Standard is drafted by the Welsh Risk Pool Service in conjunction with the Welsh Government and colleagues from the service to ensure that it properly reflects the spirit of the Regulations and Guidance.

The Standard is broadly split into the following distinct areas:

1. Management of Concerns including Redress matters
2. Claims Management
3. Learning From Events

At the request of the Welsh Government, the standard is assessed annually by the Welsh Risk Pool Service with support from Legal and Risk Services. The WRPS issues reports to individual health bodies and an all Wales composite report setting out the key findings across Wales.

Concerns – Organisations were able to demonstrate documented arrangements for the management of Concerns which met the requirements of the Guidance. The practical implementation of these arrangements has proven to be more difficult than anticipated and in particular there were issues with regards to the timeliness and quality of responses. This in part has been due to the volume of concerns received across NHS Wales. Whilst there were some excellent examples of well managed and reported investigations there were issues in identifying whether there was a qualifying liability in tort. The need to identify a qualifying liability is fundamental to the success of Putting Things Right if NHS Wales is to avoid unnecessary and costly litigation. Of the 251 finalised cases reimbursed by the WRPS during 2014/2015 there were 99 matters with damages of £25,000 or less with a cumulative value of £1.4m. The claimant costs associated with these matters was £3m and the effective management of concerns has great potential to deliver savings for NHS Wales. Two additional solicitors have been appointed by Legal and Risk Services to provide specific guidance on Putting Things Right matters for all health bodies. Their roles will also include the provision of training and implementation of Putting Things Right.

Claims Management – the arrangements for the management of claims have been well established across Wales for a number of years. The growth in claims is well documented and is placing a significant burden on existing...
processes. Whilst most organisations were able to demonstrate that they largely complied with the requirements of the standard although recommendations were made with respect to the timeliness of instructing or responding to Legal and Risk Services and the processing of payments. In particular, compliance with the reimbursement timescales was proving to be a significant challenge to some organisations. Where organisations experience difficulties as a result of temporary staff shortages the WRPS and L&RS have provided dedicated support where possible.

**Learning from Events** – it is this aspect of the standard which most organisations found most difficult to evidence and the scores achieved ranged from 22.1% to 59%. Most organisations were able to demonstrate a strategic commitment to learning from events although the arrangements required strengthening through documented process maps showing how this was achieved across the organisation from an operational level through to the governance arrangements. A range of processes existed depending on the nature of events and it was clear processes were becoming embedded within organisations with some very good examples of individual learning. Whilst it was clear that actions plans were often produced these would benefit from further evaluation to confirm whether the actions gave rise to improvements.

**Responding to customers’ needs** During 2014/2015 the WRPS took action to simplify the reimbursement process and the need to submit interim claims when expenditure reached £100,000 was removed. In addition, the timeframe for the submission of claims was increased from 70 days to 4 calendar months. This decision was taken to afford members with a greater opportunity to ensure that learning was in place prior to the submission of claims for reimbursement. The WRP Committee has stressed that learning from events is not something that should be triggered by the reimbursement process but should commence as soon as breach of duty is recognised. To provide further support in this respect, Legal and Risk Services is currently appointing a paralegal to identify clinical weaknesses inherent within claims for which a breach of duty has been identified to ensure that learning is focussed and commenced as early as possible.
TRAINING AND OTHER SUPPORT

As part of the aim to support NHS organisations in Wales to develop robust risk management arrangements, WRPS offer training support to clinical groups, concerns and claims management staff and national forum members. Recent sessions have included participation in the National Leadership Programme and the clinical assessors have recently embarked on a series of training meetings for claims and concerns staff. Training to specific groups is provided on request.

The Welsh Risk Pool Services has facilitated and supported a number of professional networks at a national level for risk, claims and complaints management. Such networks allow lead personnel to generate cohesion of systems and process and shared aims for the implementation of policies and strategy to deliver care in line with best practice. Examples of participation include:

- National Quality and Safety Forum and related sub groups
- Maternity Improvement Network
- Concordat/HIW/WAO
- Concerns and Claims Managers networks
- Forums where national recommendations have been made, e.g. following the Evans and Andrews reports
- National Clinical Leadership Forum
FUTURE FOCUS

Finance - The financial aspects of claims will continue to be a significant challenge to NHS Wales for the foreseeable future. The timing of settlements is often beyond the control of the defence team and therefore it is often difficult to predict with any certainty the value and timing of settlements. This is especially the case for the larger value claims which involve significant negotiations in relation to care needs.

A review of the Legal and Risk Services database has identified that about 10% of claims have an estimated quantum for damages of £700,000 or greater. These claims represent about 80% of future liabilities and highlight the financial impact of a small number of claims. Maternity claims remain the single largest challenge to NHS Wales. These claims are likely to be settled using periodical payments over the lifetime of the claimant rather than a single lump sum. Due to medical advances life expectancies have continued to increase and therefore the cost of such claims will be borne by NHS Wales for many years.

The WRPS undertakes financial modelling and has provided the estimates for the forthcoming three financial years.

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<td>Anticipated out-turn £’m</td>
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These estimates are based on a detailed analysis of open claims and a review of anticipated settlements. The in year forecast is reviewed on a monthly basis and reported to finance colleagues within Wales. The longer term forecast is reviewed monthly to identify significant changes to the claim base and formally revisited on an annual basis.

Clinical Assessments - The WRPS assessments have confirmed that organisations are pro-active in developing procedures and protocols in relation to recognised good practice. However, the operational implementation is more challenging and the claims indicate that often there are weaknesses in the fundamentals of care. These fundamentals include communication, record keeping, undertaking risk assessment and acting on observations. Furthermore, the clinical audit and performance management arrangements are not necessarily well developed to provide management and governance assurance or highlight deviations from expected practice.

The all Wales Maternity Improvement Network is taking forward the development of a national dashboard to capture aspects of care which are considered to be critical to quality. This work will include standardised
definitions and also a trigger list of clinical incidents which will prompt an internal investigation. This is a really positive step forward and the group contains representation from each Health Board. The group provides a single point for NHS Wales to receive information in respect of claims and during 2015/2016 further work will be undertaken to develop further analysis and research in relation to maternity.

The clinical assessment process for 2015/2016 will be a focus on the fundamentals of care which are relevant to claims. This will include a review of patient records and staff interviews to ascertain compliance with good practice in relation to:

- Risk assessments relevant to the patient (e.g. falls, continence, nutritional status) and evidence of compliance
- Compliance with skin care bundles
- Management of infection and sepsis
- Patient monitoring and escalation
- Evidence that test results have been acted upon
- General record keeping
- Staffing levels and acuity
- Availability and use of bariatric equipment
- Training provision of staff
- Compliance with incident reporting requirements
- Clinical audit arrangements for risk assessments, record keeping, fundamentals of care.
- Action plans and follow up arrangements

This approach focuses on the aspects of care which are present in a significant number of claims considered by the WRP Committee.

**Concerns, Claims and Learning from Events** – The assessment for 2014/2015 will be concluded and reported by September 2015. The focus of this work will be on the sharing of good practice across the network. The appointment of two solicitors to provide dedicated support in respect of Putting Things Right will enable a focus on key areas for improvement. This work will be supplemented by the Risk Management Paralegal provide support in identify the critical aspects of care which were identified as weak within claims.

**Communication and information sharing** - it is evident that the value of a claim is determined by the outcome to the patient and whether there is a long term care need or disability. Therefore, the same incident may give rise to a range of patient outcomes from none through to death. The value of claims is presenting a significant financial challenge and it is clear that NHS Wales needs to be proactive in demonstrating continued action to develop and foster a culture of learning and improvement.
During 2014/2015 the WRPS made reimbursements in respect of 318 matters with a date of incident ranging from 1997 to 2014. However, the clinical issues inherent within claims are consistent with those issues identified within concerns raised by patients and their representatives and also within incidents reports via incident reporting mechanisms. For the six month period to September 2014 a total of 34,468 incidents were reported via the national incident reporting system. Coupled with information on many thousands of concerns it is clear that a range of rich data sources is available to NHS Wales to support the improvement agenda. The WRPS is working with the National Quality and Safety Forum Data Sub Group to identify data sets to enable meaningful comparison across health bodies on aspects of care which are considered to be critical to quality.

The WRPS will continue to participate in National Groups and provide focussed education and training for clinical and non clinical staff. This will include themed reviews for specific clinical groups.