

RESOLVING CLINICAL NEGLIGENCE CLAIMS USING PERIODIC PAYMENTS

David Roberts, DAC
Beachcroft.

John Mead, NHS
Resolution.



Introduction

- Who we are and what we do.
- Plan – to give a practical overview of the use of Periodic Payments as a method of resolving high value clinical negligence claims.
- The context is a catastrophic injury caused by clinical negligence involving significant claims for future losses.
- Must never lose sight of the fact that each claim involves devastating events for the families involved, and life changing injuries for the Claimant.

Outline

- A brief overview of NHS Resolution: its history, role, and use of PPOs.
- The interplay between liability and quantum.
- Common heads of loss sought.
- Investigating and resolving quantum.
- The role of, and issues, around pre settlement interim payments.
- The split between capital and PPs.
- The conventional lump sum and assessment of life expectancy.
- Uplifts and steps.
- Indexation arrangements.
- Security of payments.
- Preparation and role of the PPO.
- Statistics on the use of PPOs by NHS Resolution.

NHS Resolution and Periodical Payments - History

- NHS Resolution established as NHS Litigation Authority on 20 November 1995 – 1995 SI 2800
- First task was to take on the Clinical Negligence Scheme for Trusts (CNST) which was effective from 1 April 1995 – ref. 1996 SI 251
- Swiftly followed by the Existing Liabilities Scheme (ELS) – 1996 SI 686. This covers the liabilities of Health Authorities and NHS Trusts occurring prior to 1 April 1995
- NHSR inherited some existing PP settlements under this scheme
- Five waves of NHS trusts created from 1991 to 1995. They did not inherit liabilities from Health Authorities
- Non-clinical liabilities (e.g. Public and Employer's) taken on from 1 April 1999 – 1999 SI 873

Periodical Payments - History

- PPs, then known as Structured Settlements, were first used in the late 1980s
- Damages Act 1996 – Enabled courts to award Structured Settlements with agreement of the parties
- Courts Act 2003 – s.100 amended the 1996 Act to give courts power to award PPs for future pecuniary loss without the agreement of either or both parties
- Courts “shall have regard to” inter alia the form of award preferred by both claimant and defendant and their reasons, plus any financial advice received by the claimant
- Continuity of payments must be “reasonably secure”, otherwise a PP will not be approved
- Came into force 1 April 2005

Subsequent Developments

- NHSR developed model PP Order circa 2005 – still in use today with minor changes
- Increasing opposition to linking payments for future care to RPI resulted in Court of Appeal ruling in *Thompstone v. Tameside and Glossop Acute Services NHST* [2008] EWCA Civ.5
- Held: more appropriate to link such payments to ASHE 6115
- Reasonable security – government backs all NHSR cases, so statutory criterion met
- Foundation Trusts – theoretical possibility of leaving CNST and then failing financially. Patients protected by NHSR entering into agreements with all trusts under which trusts must pay NHSR actuarially-assessed value of all current PPs on departure
- No trusts have ever left CNST

Standard Orders

- Have applied to all new PPs negotiated by NHR for twenty years.
- Basic wording has served the test of time - known and respected across the clinical negligence market
- Approved frequently by High Court judges - on over 2,500 occasions
- A few minor changes implemented
- “Manchester variation”
- Occasional attempts to amend without good reason

Some NHS Data

- Over its existence, NHS Resolution has dealt with circa 3,100 PP settlements
- As at 31 December 2024, 2,861 PP cases were current
- NHS Resolution has more PP settlements than any other indemnifier in the UK
- Insurers are generally less keen on PPs because they must maintain a specified margin of solvency
- NHSR and insurers have very different experience of maximum severity injury claims
- NHSR – predominantly brain-damaged babies; insurers – predominantly adults with spinal or brain damage caused by accidents

The interplay between liability and quantum

- Liability investigated and resolved. How?
 - Full admission of breach of duty and causation – an acceptance that the Claimant's disability has been caused by clinical negligence and the Claimant is entitled to 100% compensation to be assessed or agreed.
 - Proceed to quantum investigation.
 - Or:
 - Liability denied, but an agreement reached based on relative risks to resolve the issues of breach of duty and causation.
 - The Defendant agrees to pay the Claimant x% of the full value of the claim - such value to be assessed or agreed.
 - Proceed to quantum investigation, to be discounted to x% at the relevant time.

Common heads of loss sought

- General Damages – pain, suffering, loss of amenity.
- Special Damages to meet past and future needs and financially ‘put the Claimant back in the position they would have been’:
 - Care and Case Management.
 - Accommodation.
 - Aids and Equipment (including Assistive Technology).
 - Therapies.
 - Loss of earnings.
 - Professional costs – Deputy and Court of Protection.
 - Others relating to the Claimant's circumstances and needs.

Investigating and resolving quantum

- The Claimant provides factual evidence about their life and needs.
- Documents to evidence expenditure.
- Expert evidence on:
 - Condition, prognosis, and life expectancy.
 - The heads of loss sought – the Claimant's needs and how they should reasonably be met.
 - Unilateral or joint instruction?
 - Sequential exchange of Claimant's Schedule and Defendant's Counter Schedule setting out respective valuations supported by evidence.
 - Dispute Resolution process – often Counsel led settlement meeting.
 - Experts' meetings.
 - Trial.

The role of, and issues around, pre settlement interim payments

- Once liability resolved payments can be made to assist the Claimant.
- Court oversight.
- Start to put a funded professional regime in place, and provide suitable accommodation.
- Limited assessment of the purpose or reasonableness of the expenditure.
- Ensure that when making interim payments the ability of the Court to resolve the claim though a PPO is not fettered – *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204.

The split between capital and PPs, the conventional lump sum, and assessment of life expectancy

- Decisions about which heads of loss to deal with by a lump sum, and which as periodic payments.
- The need for capital – accommodation and immediate needs.
- Annual expenditure planning.
- The need for certainty and security.
- What is right for this claimant?
- Valuation on a conventional lump sum basis if all heads capitalised?
- Uncertainty around life expectancy?
- Balance often struck with PPs used for care and case management; everything else capitalised.

Steps

- Planned step changes in the PP to reflect anticipated changing needs often:
 - £x pa to age 15.
 - £y pa from 16-19.
 - £z pa from 19 for life.

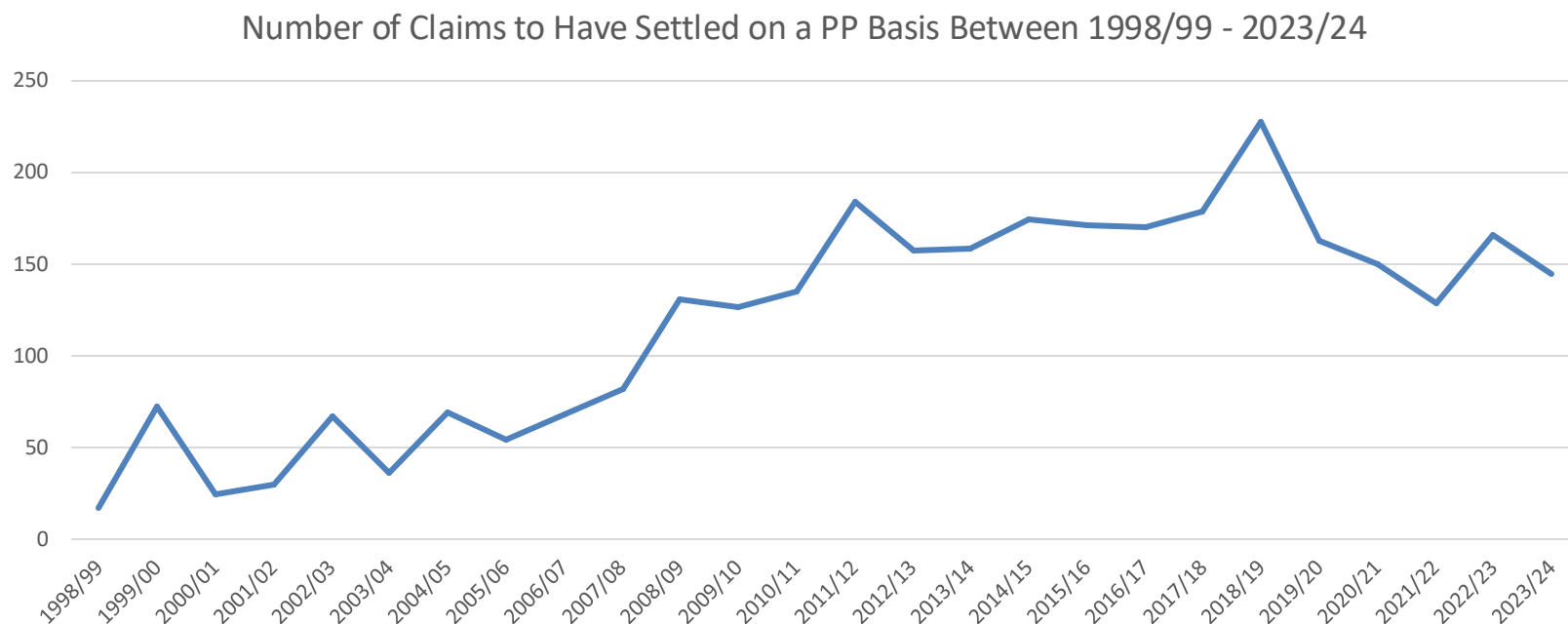
Indexation

- Essential to ensure sum agreed or awarded maintains value, indexed linked from date of Order.
- Index used depends on the purpose of the PP and can be subject of discussion.
- Care and CM
 - Office for National Statistics Annual Survey of Hours and Earnings (ASHE).
 - Index used is ASHE 6115 ASHE 6115 based on care earnings data from two Standard Occupational Classifications (SOC).

Preparation, and role of the PPO

- Standard Order used which deals with all the above.
- Familiar to all involved including the High Court Judges who consider approval.
- Amended as needed centrally to deal with issues that arise, try to avoid ad hoc changes.
- Detailed formula to deal with indexation.
- Insert all terms agreed into relevant sections.
- Approval process focusses on the terms agreed rather than the mechanics of the Order.
- Order sets out the annual process to be followed to ensure appropriate PP reaches the Claimant on 15 December each year.

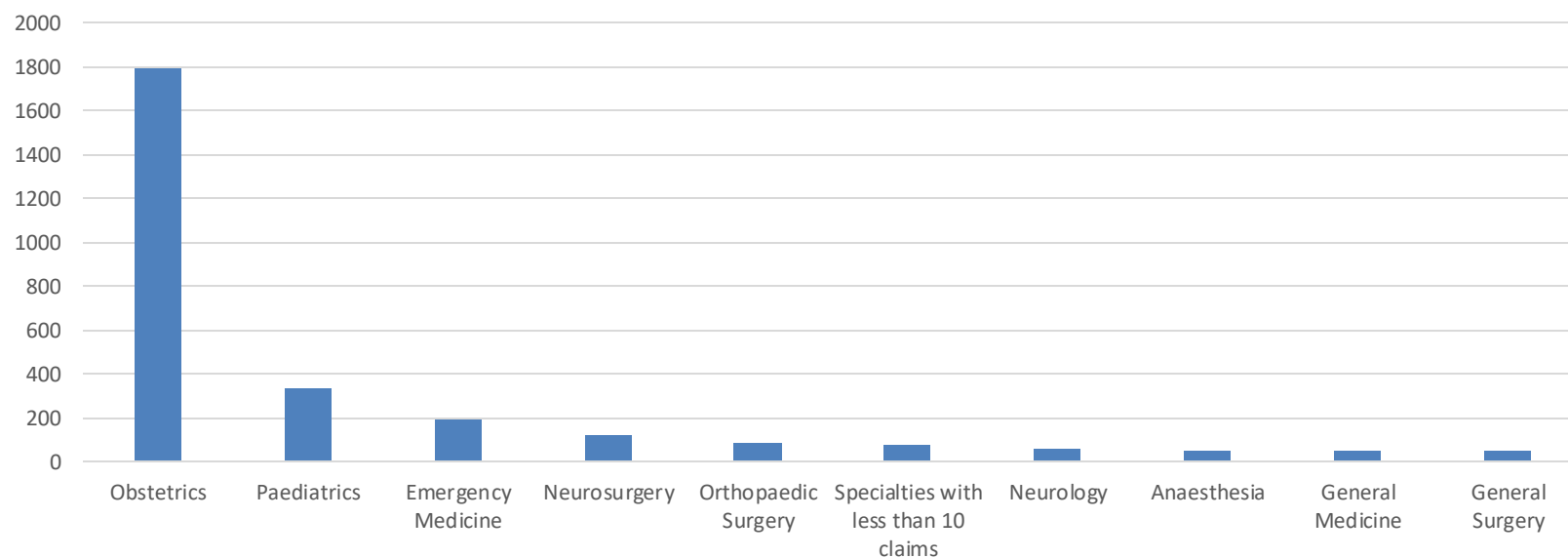
Number of Claims to Have Settled on a PP Basis Between 1998/99 - 2023/24



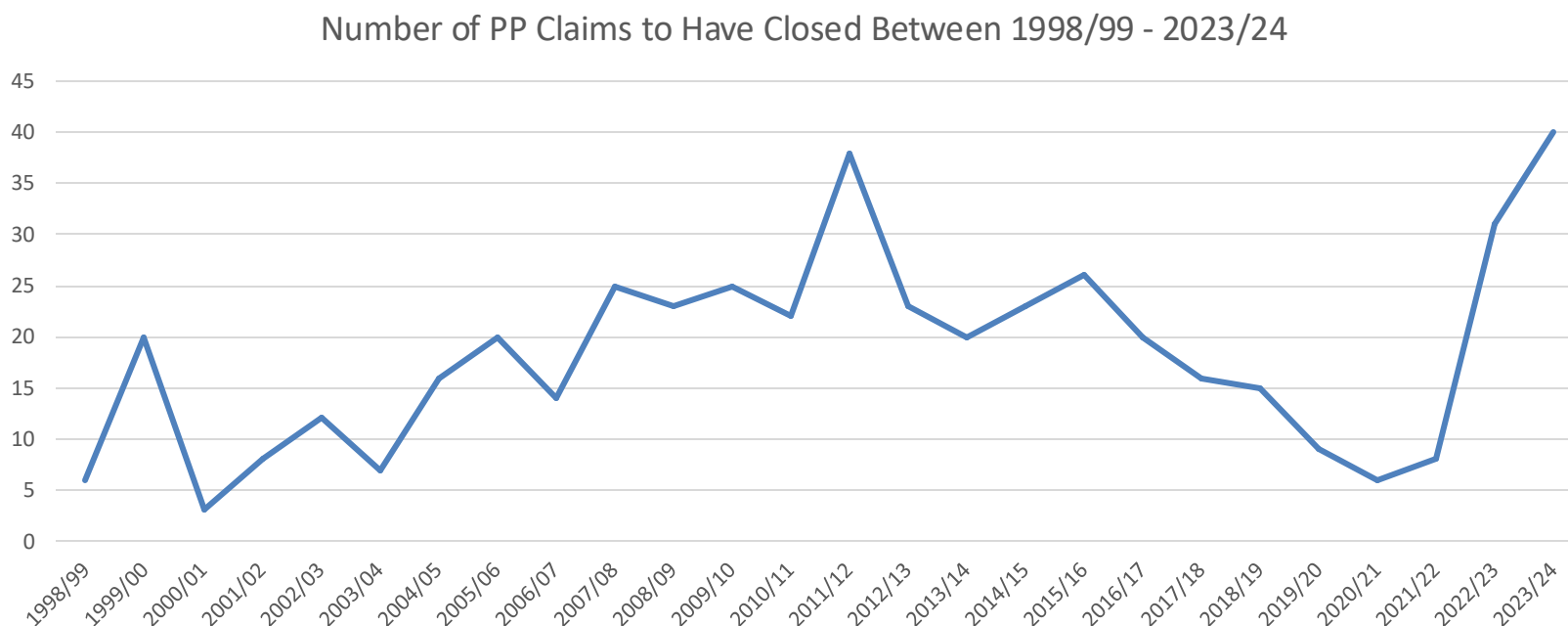
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Broken Down by Primary Specialty

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Broken Down by Primary Specialty



Number of PP Claims to have Closed Between 1998/99 – 2023/24



Any Questions?