



Medical Malpractice Predictions 2024

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1. Healthcare AI litigation will raise liability apportionment issues and litigation costs

The benefits of healthcare AI are already being seen in radiological analysis. However, as more AI devices come to market, there will also be increased risks. For example, as the devices self-learn, the thought processes by which they make decisions may not be transparent (known as the 'black box problem'). The present law of medical negligence is ill-equipped to deal with AI, causing uncertainty over how claimants will litigate AI claims. Will they pursue AI claims through Bolam negligence, on the basis that the AI product should be judged according to the same principles as a human clinician? Will they pursue these claims as product liability claims? Or even a mixture of both? In addition, there will be the question of how blame should be apportioned between clinicians and AI producers. These factors will increase litigation complexity and costs.

2. New discount rate review in 2024 may impact insurance reserves

Following the implementation of Part 2 of the Civil Liability Act 2018, the first review of the Personal Injury Discount Rate took place in July 2019, when the Discount Rate was set at minus 0.25%, where it has stayed to date. As a review must take place every 5 years, we can expect the next review to commence by July 2024. Underwriters will therefore want to keep a close review on reserves towards the last quarter of 2024 and the first quarter of 2025. Following a government consultation looking at the discount rate in other jurisdictions, we wait to see whether a dual rate approach will be adopted in the UK for the first time. This may allow longer-term losses to benefit from a higher discount rate (and therefore reduction in overall quantum) but may be offset by higher legal costs per claim amid more use of financial specialist evidence.

3. Financial pressures in the NHS and long waiting times will increase demand for private hospital provision

We expect the surge of self-pay patients in the UK private healthcare market to continue. With incessant financial pressures in our primary care system, acute shortages of doctors and nurses and a record 7.3mn people on the NHS surgical waiting list, the number of patients purchasing medical insurance or who elect to self-pay for their treatment to skip the queue is at a record high. This provides significant opportunities for growth in the medical malpractice market for healthcare providers, independent surgeons and their insurers.

4. The rise of private General Practice will continue as NHS GPs struggle with soaring demand and bureaucracy

As General Practitioners struggle with ever-growing patient lists and it becomes increasingly difficult for patients to get appointments, more GPs and patients are moving across to private GP practice. While this will create opportunities for insurers to provide med-mal cover for private GP providers, paying patients may expect a higher standard of care than they may have received in primary care, and increased patient expectations may lead to increased complaints and claims over time.



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5. Fundamental dishonesty will be firmly under the spotlight in 2024

The last 12 months have seen an increased number of findings of fundamental dishonesty – claimants exaggerating their injuries when making claims – in the medical malpractice space. This may be due to the availability of good surveillance evidence, the continued cost of living crisis, and the appetite of the NHS and insurers to take on cases where the evidence warrants it. DACB has secured a record number of decisions on fundamental dishonesty in the last year, and we have also been instructed on appropriate cases to bring contempt of court proceedings, to highlight this practice as a means of deterrence against others.

6. Expect greater regulation of non-surgical cosmetic procedures to promote higher standards and best practice

The non-surgical cosmetic procedure sector contributed over £24bn to GDP in 2022, and has increased exponentially over the last 10 years. Anti-wrinkle injections (commonly known as Botox), dermal fillers and chemical peels are increasingly popular and now commonly available on most British high streets. However, concerns over safety and outcomes of unlicensed treatment have caused the government to consult on the introduction of a licensing regulation scheme, including a practitioner licence and a premises licence, potentially to be administered and enforced by local authorities. Insurers of cosmetic treatment providers will want to keep a close eye on the scope of this consultation, so that their evaluation and underwriting of risks in this space are updated accordingly.

7. Med mal claims will be impacted by the new fixed costs regimes

After several years of speculation and several consultations, two regimes will introduce fixed recoverable costs into medical malpractice claims. The first applies to the introduction of fixed costs for all money claims valued over £25,000 up to £100,000, where the cause of action accrued after 1 October 2023. Clinical negligence claims will be included in this regime if breach of duty and causation are admitted, so long as no exception applies. The second regime, expected in April 2024, will introduce fixed costs for all clinical negligence claims valued up to £25,000 (excluding stillbirth and neonatal claims). This will introduce early exchange of evidence and a neutral evaluation (to be paid for by the defendant) if a matter is not resolved. Where claims fall within scope, healthcare providers and their insurers will need to accelerate investigations and decisions on admissions or defensibility at the earliest opportunity in order to benefit from better proportionality of costs.



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