NEWLINE GROUP®

On the pulse

NEWLINE GROUP'S MEDICAL MALPRACTICE NEWSLETTER

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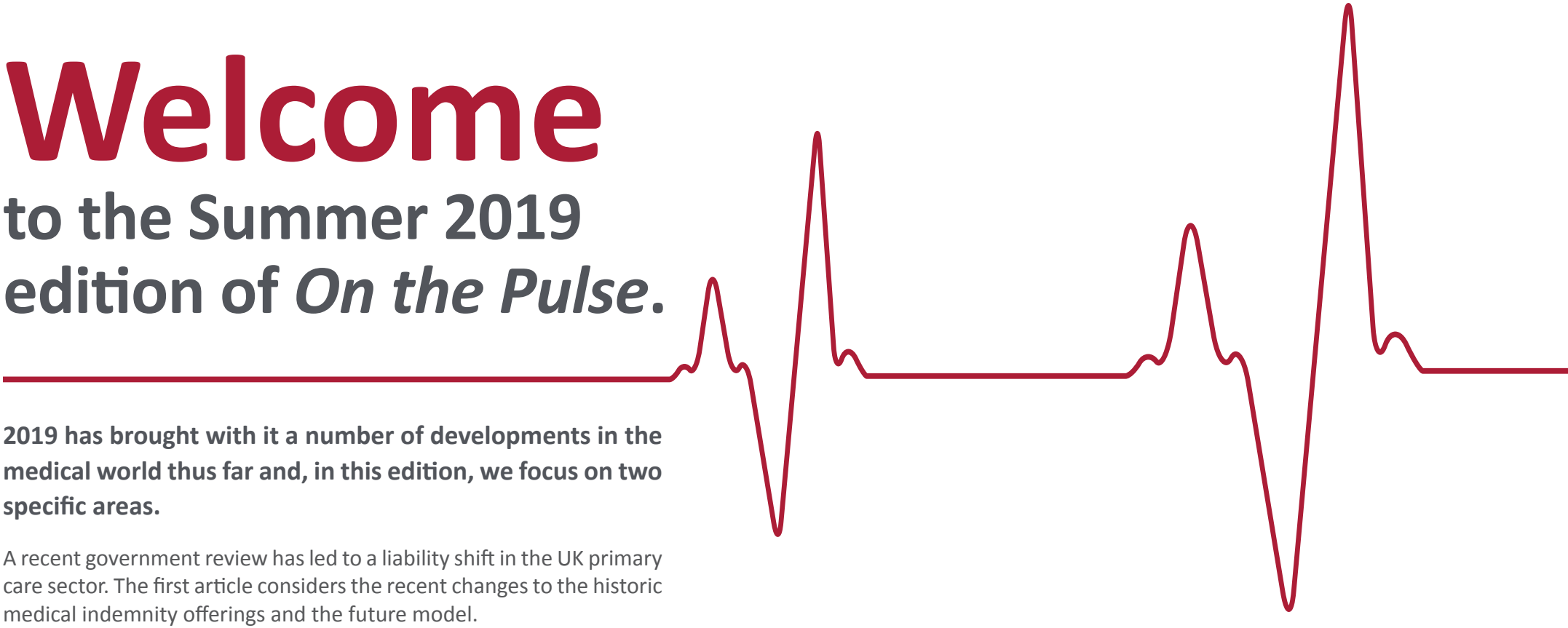
Welcome

to the Summer 2019 edition of *On the Pulse*.



2019 has brought with it a number of developments in the medical world thus far and, in this edition, we focus on two specific areas.

A recent government review has led to a liability shift in the UK primary care sector. The first article considers the recent changes to the historic medical indemnity offerings and the future model.

There is also an article considering the challenges resulting from the interaction between medicine, law and technological advancement, in which we review in depth a recent High Court case involving the use of genetics.

As a provider of medical malpractice insurance and facultative reinsurance for over 12 years, Newline Group is well placed to assist you with your (re)insurance needs. We work closely with our clients to tailor products to meet their requirements. Inside you will find information about some of our products, together with contact information for our medical malpractice underwriters. We look forward to working with you.

MDOs UNDER PRESSURE

THE CHANGING NATURE OF MEDICAL INDEMNITY IN 2019

2019 has seen two very important developments in the field of medical indemnity that are likely to significantly impact the ways in which individual healthcare professionals and entities seek to protect themselves against the ever increasing financial cost of medical malpractice.

Clinical Negligence Scheme for General Practice

The first substantial change was the introduction in April of the state-backed Clinical Negligence Scheme for General Practice (CNSGP). This has significantly extended the scope of state-backed indemnity cover to all providers of NHS primary medical services. The new scheme, which will be administered by NHS Resolution, will sit alongside the Clinical Negligence Scheme for NHS Trusts and independent sector providers treating NHS patients. Previously, the majority of GPs were indemnified for claims by their Medical Defence Organisations (MDOs).

Under CNSGP, state-backed cover is now available from 1 April 2019 for all GPs and other healthcare professionals who carry out activities in connection with the delivery of primary medical services as part of an NHS contract. The scope of CNSGP cover is wide and extends to other NHS primary medical services (known as “ancillary health services”). Eligible professionals include salaried GPs, locums, students and trainees, practice nurses, clinical pharmacists and other practice staff. A full list of who and what is covered can be found on the NHS Resolution website.

It is, however, important to note that CNSGP cover only applies to clinical negligence claims. The financial cost of medical malpractice legal disputes can, of course, be much wider than this and may include regulatory or disciplinary proceedings, criminal investigations, inquests and employment / contractual disputes.

It is also important to be mindful that claims will not be covered by CNSGP if they relate to care provided before the scheme came into operation. CNSGP will only cover treatment that occurred after 1 April 2019.

It is, therefore, essential to ensure that appropriate cover is in place to avoid claims falling between the gaps and not being covered.

The Government Consultation

The second major indemnity development was the launch in December 2018 of the Government consultation on "Appropriate Clinical Negligence Cover". This consultation sought industry views on the MDO indemnity model that is widely used by clinicians in private practice. It was launched as a result of concerns highlighted by the independent inquiry following the conviction of breast surgeon, Ian Paterson, in 2017.

The Government’s principal concern surrounds the suitability and sustainability of the current form of ‘discretionary cover’ offered by the MDOs. There is widespread concern that, under the discretionary indemnity model, there is no legal obligation on the indemnifier to meet the cost of a claim. This creates a risk — for private patients and clinicians alike — of being exposed to very

substantial financial loss. There are also concerns that, unlike regulated insurance companies, the MDOs have no legal obligation to hold financial reserves and that they are not subjected to the same financial regulatory scrutiny as insurers.

The paper has accordingly sought the industry's views on two options — whether to leave arrangements as they are, or whether to introduce legislation to ensure clinicians practising in the private sector hold more tightly regulated cover — in effect from commercial insurance companies.

The consultation has now closed and the outcome is awaited later this year. However, the Government has indicated that its preference is to introduce legislation, which could well lead to substantial changes to the indemnity model for private healthcare professionals.

Will Marshall, Healthcare Partner, DWF Law LLP

WILL GENETIC MEDICINE CREATE A NEW DUTY OF CARE?

Genetic medicine has long been recognised as an increasingly valuable tool in informing and improving the diagnosis, prevention and treatment of ill health. There is little doubt that the ability to predict, diagnose and treat inherited and acquired disease confers huge benefits for patients, leading to greater understanding and engagement in their health and care and resulting in earlier, personalised interventions. As genetic and genomic medicine becomes more integrated into mainstream medicine, however, new legal and ethical issues arise for healthcare providers.

Recent case law has highlighted a particularly important aspect in which genetic medicine has the potential to impact on two of the core medico-legal principles — namely the extent of the duty of care owed by a clinician to people other than the patient and the doctrine of patient confidentiality. The GMC's guidance states: *"doctors owe a duty of confidentiality to their patients, but they also have a wider duty to protect and promote the health of the patients and the public"*. Accordingly, while patient confidentiality remains of the greatest importance, the GMC recognises that, under certain very limited circumstances, this may be outweighed by the wider interest in sharing information without consent for important health and social care purposes. This somewhat blurred line is brought into sharp focus in the context of genetic medicine, where clinical information about an individual may also be critically important to others.

These issues were highlighted in the recent case of *ABC v St George's Healthcare NHS Trust & Others*[1]. The case concerned the treatment of the Claimant's father, who was suspected to be suffering from Huntington's disease. The father expressed his wish to his doctors that his children should not be informed of his suspected condition. The Claimant informed her father that she was pregnant. The chance of a child inheriting Huntington's disease from a parent is 50%. The father's doctors considered overriding the duty of confidentiality owed to the father and informing the Claimant of the diagnosis, but eventually decided against

[1]ABC v St George's Healthcare NHS Trust & Others [2017] EWCA Civ 336.

it. The Claimant duly gave birth and subsequently accidentally learned of her father's condition. Genetic testing was conducted and sadly confirmed the diagnosis of Huntington's disease in both the Claimant and her child.

The Claimant sued her father's doctors, maintaining that they also owed her a duty of care and were negligent, as they should have informed her of the genetic risk to her and her (then unborn) child. She stated that she would have terminated her pregnancy had she tested positive for Huntingdon's disease.

Initially, the High Court dismissed her case on the basis that there was *"no reasonably arguable duty of care owed… to the Claimant".* However, the Claimant appealed and relied on specific clinical genetic guidance that stated that there were clear obligations owed by clinicians to those with a *"vital interest"* in the genetic information obtained, even if they were not a patient. The Court of Appeal agreed that it was arguably *"fair, just and reasonable"* to impose such a duty on clinicians treating a patient with an inherited genetic condition such as Huntington's disease. One of the Judges commented that *"it is only in the field of genetics that the clinician acquires definite, reliable and critical medical information about a third party, often meaning that the third party should become a patient."*

The case demonstrates that where a patient's identity cannot be protected, but genetic testing has identified a significant risk of harm to others, healthcare professionals will need to weigh this against their professional obligation to protect patient confidentiality. An obvious consideration in deciding whether or not to breach a patient's confidentiality is whether withholding information from the non-patient could risk injury to that person by missing out on vital preventative measures such as early screening.

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Will Marshall, Healthcare Partner, DWF Law LLP

GET IN CONTACT WITH NEWLINE GROUP'S MEDICAL MALPRACTICE TEAM

At Newline Group, we possess the knowledge and experience to meet the challenging demands of insureds, both large and small, offering solid security and tailored coverage. Please feel free to contact one of our Medical Malpractice team members with any product enquiries you might have.

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