

UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST
BOARD OF DIRECTORS
26 OCTOBER 2016

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| Title: | LITIGATION AND INSURANCE REPORT |
| Responsible Director: | David Burbridge, Director of Corporate Affairs |
| Contact: | Debra Barton, Head of Legal (ext. 17205) Berit Reglar, Associate Foundation Secretary (ext. 14324) |

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| Purpose: | To present an update to the Board |
| Confidentiality Level & Reason: | N/A |
| Annual Plan Ref: | |
| Key Issues Summary: | <p><u>Insurance</u> The Trust has completed its tender for all top-up insurance policies bar its motor (Fleet) insurance. This has resulted in savings of over £10k after the deduction of the actual costs of the tender.</p> <p><u>Claims</u> The total number of claims has risen from the same period last year, although the number of new clinical negligence claims received has fallen slightly.</p> <p>4 high value clinical negligence claims have been finalised.</p> |
| Recommendations: | The Board of Directors is requested to accept this report. |

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| Approved by: | D Burbridge | Date: 26 October 2016 |
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UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST

BOARD OF DIRECTORS 26 OCTOBER 2016

LITIGATION AND INSURANCE REPORT

PRESENTED BY DIRECTOR OF CORPORATE AFFAIRS

1 Introduction

This paper is the half yearly litigation and insurance report on clinical, employer, public liability and insurance claims for the first six months of FY 2016/17 (the "reporting period").

2 Trust Insurance Arrangements

- 2.1 All payments for settled clinical negligence claims are made by the NHS Litigation Authority (NHSLA). All payments in relation to the LTPS (Liabilities to Third Parties Scheme), encompassing Employer Liability (EL) and Public Liability (PL) Claims relating to NHS activity, and the PES (Property Expenses Scheme) are also made by the NHS Litigation Authority, although in relation to the latter Schemes, excesses of £10,000, £3,000 and £20,000 respectively apply.
- 2.2 The Trust's main insurance brokers (Marsh Ltd) carried out a tender for all top-up policies, save for the motor vehicle insurance (Trust fleet insurance) policy which is governed by a separate broker agreement with Portmore. Following a discussion with the Acting Deputy Director of Finance it was decided to renew all top-up policies for one year only. The insurance tender fell therefore just short of the OJEU levels.
- 2.3 **Top-up property policy with Zurich:** The NHSLA scheme is capped at £1million per building. The Trust therefore holds commercial insurance for property losses in excess of this value for the old Queen Elizabeth Hospital site and its satellite sites on Whittall Street, Melchett Road, Elliot Road, Printing Room at Raddlebarn Road, Regent Court, Yardley Court, Rabone Lane and Fisher House (the latter will be cross charged to UHB Charity), but not the new hospital which is insured by Consort under the Project Agreement.
- 2.4 As part of the insurance tender managed by Marsh (see 2.2 above), a building and content survey was carried out to calculate the 'Maximum Loss' of Trust property insurable under the property top-up policy. It is recommended to carry out such survey at least every three years to insure that property is neither under-, nor over-insured. Both could invalidate cover. The Trust has not had an extensive survey done since Marsh has taken over brokerage from Willis Ltd in 2011. The building

survey showed that values have increased by £96m from £272m to £368m. The final content valuation report is still outstanding. However, it is anticipated that there has been a similar significant increase due to the purchase of expensive equipment in recent years.

- 2.5 In the past, **terrorism** cover was only obtainable on an ‘all or nothing’ basis (i.e. either all Trust buildings were to be covered against acts of terrorism or none at all). The insurance market has since undergone some significant changes in this regard and it is now possible to choose specific buildings for stand-alone cover. Based on a risk assessment and in order to save costs where possible, it was decided to insure all buildings on the old QEH site against acts of terrorism up to a maximum loss of £50m at a cost of £12,500pa (plus IPT) compared with £19,255 in 2015 using the old property valuations¹. The satellite sites on Whittall Street, Melchett Road, Elliot Road, Raddlebarn Road, Regent Court, Yardley Court and Rabone Lane clinics were considered not to be at the same level of risk and are insured under conventional property insurance terms only. (However, Fisher House also benefits from terrorism cover and any associated insurance costs have been cross charged to UHB Charity.)
- 2.6 The property top-up cover further includes ‘**Contracts Works Expenses**’ cover with a value of up to £500k. This covers the Trust against any damage to substantial building works (extension, repair, new built) where the Trust is required to insure the existing structure and the works solely in its own name or jointly with the contractor under a JCT standard building contract (e.g. Schedule 3 option C). Payment of this type of cover is adjusted at the end of June 2017 once the overall value of contract works is known. This negates the need for the Trust’s Estates department to notify the Trust’s insurers (via the Corporate Affairs department) of any significant works. If it transpires that no such cover (or cover for a lesser amount) was needed during the insurance period, the Trust will receive a refund of the amount of premium which was overpaid.
- 2.7 **Small Employer’s Liability** for the Trust’s subsidiaries with a maximum level of indemnity of £5m.²
- 2.8 **Public Liability Policy** for the Trust’s subsidiaries (and all Income Generating Activities which are conducted Outside the NHS, as defined by the Scheme) with a maximum level of indemnity of £15m.

¹ The Trust had three options available for the chosen sites:

OPTION 1 £25m at a cost of £9,200

OPTION 2 £50m at a cost of £12,500

OPTION 3 £100m at a cost of £15,795

² All Income Generating Activities benefit from the NHSLA employer’s liability cover regardless of whether they were carried out ‘Inside’ or ‘Outside’ the NHS, as defined by the Scheme.

- 2.9 **Directors and Officers' Liability Policy** for activities by the Trust's subsidiaries with a maximum level of indemnity of £7.5m.³
- 2.10 **Professional Indemnity Insurance Policy** for any services for which the Trust receives more than just a nominal fee. Therefore, the cover for the consultancy work in Australia has been extended until March 2017 when the limitation period for any contractual disputes would lapse. Once the consultancy services in China materialise, additional cover for this will be also placed. Our insurers have further been advised of the HEFT intervention and all temporary appointments of Chair, CEO and Executive directors.
- 2.11 Cover is provided for the following 'business activities undertaken on an external agency basis' up to a maximum level of indemnity of £5m:
- Radiation advice including measurement and quality assurance for equipment emitting radiation (x-rays, microwaves and gamma rays).
 - Teaching and training.
 - Emergency planning and response.
 - Pathology, Histopathology and Neuropathology advice and testing.
 - Provision of payroll services, marketing, advertising and Public Relations.
 - General lab testing services.
 - Pharmacy consultancy.
- 2.12 **A combined personal accident/travel insurance policy with AIG:**
- 2.12.1 A personal accident insurance policy for 30 UHB fire marshalls has been renewed.
- 2.12.2 The travel insurance policy currently covers 50 individuals (including research staff) for the following journeys: 4 internal trips (average duration 2 days), 10 trips to Europe (average duration 3 days), 4 to USA (average duration 6 days) and 13 Rest of the World (average duration 7 days). The adequacy of the travel insurance arrangements is being reviewed on a monthly basis by the Associate Foundation Secretary and where required, an extension is requested.
- 2.13 **A motor vehicle fleet policy**, placed with Liverpool Victoria under the brokerage with Portmore. The policy currently comprises 32 vehicles (compared to 30 in 2015/16). Vehicles are added and removed throughout the year.

³ Under the NHSLA Scheme rules, all Income Generating Activities benefit from D&O cover regardless of whether they were carried out 'Inside' or 'Outside' the NHS, as defined by the Scheme (similar to Employer's Liability cover).

- 2.14 The Trust had seen a steep increase in motor vehicle accidents in 2015/16 which resulted in an increase in premium. The Corporate Affairs department has conducted a review of the Trust policy and associated procedures to tighten controls around vehicle checks, the issuing of driver permits and handling of motor vehicle accidents. Due to tighter procedures being introduced, the number of motor vehicle accidents is back to 'normal' levels. However, motor insurers consider the last three years' claims history. Hence, even if the current accident rate is being maintained, premiums will remain high until the end of 2018/19.
- 2.15 The current Fleet policy expires on 1 April 2017 and the Corporate Affairs department is considering the procurement options to obtain best value for money.

3 Premiums and service fees

- 3.1 The table in Appendix 1 compares the renewal premiums paid by the Trust in 2016/17 compared to the premiums paid in 2015/16. As a result of the insurance tender managed by Marsh, the Trust has made a saving of £10,151.27.

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| Saving in insurance premiums: | £23,401.27 |
| - Costs of insurance tender: | £13,250 ⁴ |
| Overall saving: | £10,151.27⁵ |

- 3.2 In addition, the Trust had to pay the usual annual service fee for Marsh (£9,000) and Portmore (£1,875).

4 Current Developments

4.1 NHSLA Scorecards

The Trust has been sent clinical and non-clinical scorecards from the NHSLA (Appendices 2 and 3 to this report refer). These are being assessed and used to inform organisational learning, together with other relevant data relating to claims and incidents.

4.2 Claim withdrawn prior to trial

A claim concerning a patient DC, due to go to trial in September, was successfully defended with the claimant solicitors agreeing to withdraw the claim and bear their own costs just a week before the Court date. This was a good result for the Trust, since counsel had reviewed and

⁴ Fee for undertaking the tender: £1,000 (Marsh); Fee for content valuation (Marsh): £8,250; Fee for building survey (Valuation Office Agency): £4,000. A mini competition had been undertaken for the latter two.

⁵ The overall savings fair even higher when considering that the property premium has increased by £5,672 (which equates to 109% of the previous premium) despite the property value having risen by £96k (which equates to 135% of previous property values).

reassessed the case at this time, viewing the prospects of success for the claimant very close to 50%. Thus there was a substantial risk that the Trust could lose at Court and bear the responsibility for the claimant's full damages and costs. The claim concerned a patient who fell when using a disabled toilet (having left the Ward) and claimed that he had negligently sustained an injury to his right hand.

4.3 **NHSLA Conference**

The NHSLA's first Patient Safety Seminar is being hosted by the Trust on 30th November. It is called 'Voices from the past' and will focus upon real stories from patients and staff involved in clinical negligence claims. The aim is to examine the impact of claims and incidents, looking at safety challenges and strategies to overcome them. There will be discussion around what types of attitudes and behaviour across healthcare organisations can reduce the risk of harm.

5 **NHSLA Schemes - Total Ongoing Claims Activity**

5.1 At present there are 525 litigation claims against the Trust, comprising:

452 clinical claims;

59 employer liability; and

14 public liability.

5.2 For the reporting period, a total of 91 new claims were received (compared with 84 during the same period of the previous financial year), 62 claims across all categories of the claims portfolio were withdrawn (39 for the previous period) and 21 claims were settled (cf 26), of which 13 related to clinical cases. For the financial year 2015/16, 218 new claims were received, 108 closed and 52 settled.

6 **Clinical Claims**

6.1 Of the 452 clinical claims currently open, the breakdown of cases is as follows:

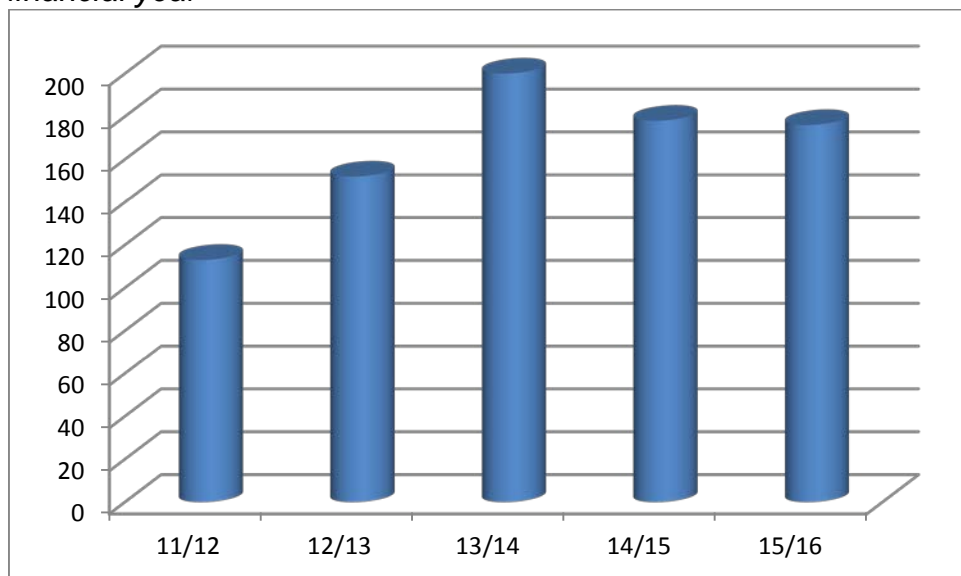
120 A&E/Burns/Plastics/Trauma
87 Neurosciences
48 General Surgery
31 Cardiac
33 Renal/Urology
35 Medicine
15 ENT/Maxillofacial
14 Anaesthetics/ITU
30 Liver
15 Oncology/Haematology
11 Imaging

- 2 Histology
- 3 Ophthalmology
- 6 No allegations

During the reporting period, there has been an increase in the claims recorded against Neurosciences, General Surgery and A&E/Burns&Plastics/Trauma. There has been a decrease in the number of cardiac claims.

6.2 78 new clinical claims were received in the reporting period, as opposed to 84 during the last six months of 2015/16. In total, 176 new clinical claims were received in 2015/16, 178 in 2014/15, 200 in 2013/14, 152 in 2012/13, 113 in 2011/12, 108 in 2010/11, 77 in 2009/10.

Table One: Number of new clinical negligence claims received by financial year



6.3 Of the 58 claims withdrawn during this period, a number were closed following robust letters of rebuttal being served on the claimants' solicitors by the Trust.

6.4 The total value (including damages and costs) of the 13 claims settled during this six month period was £2.35m. Of this figure, £1.5m relates to damages, £774k to claimants' costs and £45k to defence costs.

6.5 Of the 13 clinical claims which were settled, 4 settled with damages of £100,000 or over.

6.6 The first case involves a patient admitted for a laparoscopic cholecystectomy, who unfortunately suffered a common bile duct injury (the bile duct was transected). The procedure was converted to open surgery, which revealed that the right hepatic artery had also been cut. An HPB surgeon attended immediately and completed the repair. It

was admitted that the Trust was negligent in causing injury to the right hepatic artery and common bile duct. This admission followed unresponsive comments from our in house HPB Team and also an instructed medical expert. A letter of apology was sent to the claimant in respect of the admitted breach.

As a result of the injury and the anastomosis performed during the repair, the claimant was at risk of complications, including anastomotic stricture and ascending cholangitis. Sadly, the claimant did indeed suffer these complications. As a result of this she has had to undergo a number of investigations, both invasive and non-invasive. She has suffered two incisional hernias, one of which is large, together with ongoing bouts of cholangitis and fatigue. Following careful quantum assessment regarding the extent of the injury, loss and damage, a damages settlement was agreed of £167,500.

- 6.7 The second claim involves a patient who underwent a liver transplant in 2010. At the time, a central line was inserted and the surgery proceeded without incident. Noradrenaline was infused through the central line. The claim was that there was a negligent leak of noradrenaline resulting in a significant extravasation injury to the claimant's neck. It was alleged that the claimant was left with significant scarring to her neck, under her right breast and to her thigh (donor sites). It was also alleged that the claimant suffered complications with her shoulder, due to an infection at the site of her wound, requiring additional treatment. Finally, it was alleged that the claimant was left with pain and restriction of movement in her shoulder as a result of the extravasation injury.

This claim was initially felt to be defensible; however, our independent medical expert was highly critical of our care, although the weaknesses he identified were not initially within the pleaded allegations. Our expert believed that the injury was caused by a reaction to the Mepore dressing used (to which, it was noted in the medical records, the claimant was allergic). Our expert also felt that there was a delay in recognising and acting upon the injury. Our in-house consultants could not agree on the mechanism of the injury, but fully agreed that the complication was not managed appropriately and that this caused harm to the patient. Admissions of breach of duty were therefore made and a detailed assessment undertaken of the causation arising from the breach. This led to a damages payment being made of £107k.

- 6.8 The third claim settled at the very high sum of £650k and is a neurosurgical case. The claim arose out of the delay in scheduling surgery to treat the patient's progressive cervical myelopathy and spinal cord compression, following an appointment in 2011. For a number of reasons, the surgery did not take place for over 12 months, by which time the claimant's condition had significantly deteriorated. The comments of the neurosurgeon concerned were that a 5 months'

wait for surgery was not atypical at the time and that a further 5 months delay after the “all clear” was given by cardiology was also unavoidable, due to the pressure of urgent cases. Our investigation, however, noted that there were a number of administrative errors which contributed to the delay in surgery. These were brought to the attention of relevant senior clinical staff, including the Trust’s Deputy Medical Director. Before the claim was settled, detailed reports were obtained from psychiatric experts, spinal rehabilitation experts, physiotherapists and accommodation experts. A large component of the claim related to the claimant’s requirement for single level accommodation which is wheelchair accessible and with room for a night carer.

- 6.9 The final high value claim settled at £350k. This case concerns an admitted failure to diagnose a spinal lesion in the A & E Department in May 2012 (the claimant having attended A&E twice previously). The claimant returned to the A&E Department two days following her initial attendance, complaining of numbness to both legs and stating that she had been unable to walk for two days. Imaging revealed spinal compression with an invasive soft tissue lesion involving the T6 vertebra. The claimant underwent laminectomy at T5 and T6 for decompression of the thoracic cord and pedicle screw fixation later that month. The claimant is permanently paraplegic, with no sensation at all from the chest downwards. Her life expectancy is limited due to the underlying myeloma.

Based upon legal advice, breach of duty was admitted in respect of the third attendance to A&E rather than the initial two. The claimant’s case on causation was admitted, namely that, but for the admitted breach of duty, the claimant would still have been a paraplegic, as she now is, however, she would have been able to walk short distances without sticks or other appliances and up to a mile with the help of sticks. It is claimed, but for the negligence, that the claimant would have been pretty much self-caring, other than help being required with heavy gardening. Following detailed assessments with neurosurgical, OT, haematology and accommodation experts, the claim was settled in February this year at a figure substantially less than the initial damages reserve of £1m.

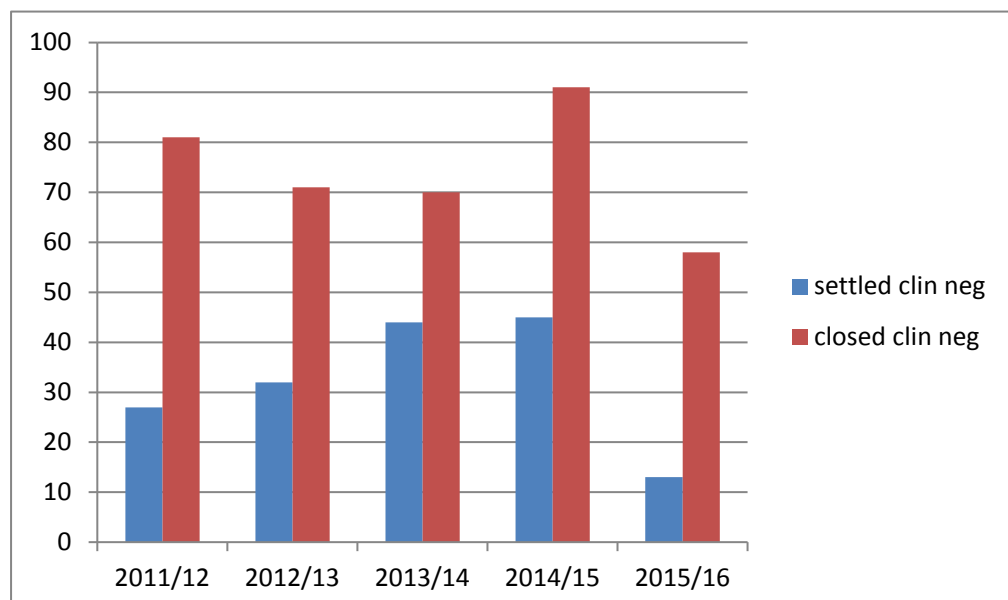
7 Trends and Patterns with Clinical Negligence Claims – wider Context

- 7.1 Prior to 2014/15 the number of new UHB clinical negligence claims had increased steadily for 8 years, in line with a pattern seen across the NHS as a whole. However, from 2013/14 to 2014/15 the number of new claims fell by 12.5% (from 200 to 175) and from 2014/15 to 2015/16 the fall was 1.1% (from 178 to 176.) This compares to a fall of 3.8% across the NHS as a whole for 13/14 to 15/16 and a fall of 4.6% from 14/15 to 15/16 (cf NHSLA Financial Accounts).

- 7.2 Although new claims numbers may be falling slightly, after a sustained period of growth, it will be noted that overall claims volumes continue to be high.
- 7.3 The rise in clinical negligence claims across the NHS from 2012/13 to 2013/14 was 17.9%. Our rise over this period was 31.5%. The rise across the NHS from 2011/12 to 2012/13 was 10.8%, compared with our rise of 34.5%.
- 7.4 The claims data held by the NHSLA for specific Trusts shows that there is considerable variation in the percentage of new claims being reported by Trusts to the NHSLA. Some examples are provided below in relation to the change in the number of new claims reported over 2013/14 and 2014/15. This is the most recent data we have, as there is currently (as of September 2016) no published data on the NHSLA website for specific numbers of claims reported by Trust for 2015/16.

| | |
|---|-------|
| Birmingham Children's Hospital | -23% |
| Liverpool Women's Hospital | -29% |
| Central Manchester University Hospitals | -3.6% |
| Chelsea and Westminster | +73% |
| Dudley Group of Hospitals | +2.3% |
| Heart of England | -60% |
| University College London | +3.1% |
| Worcestershire Acute | -31% |
| King's College Hospital | +39% |

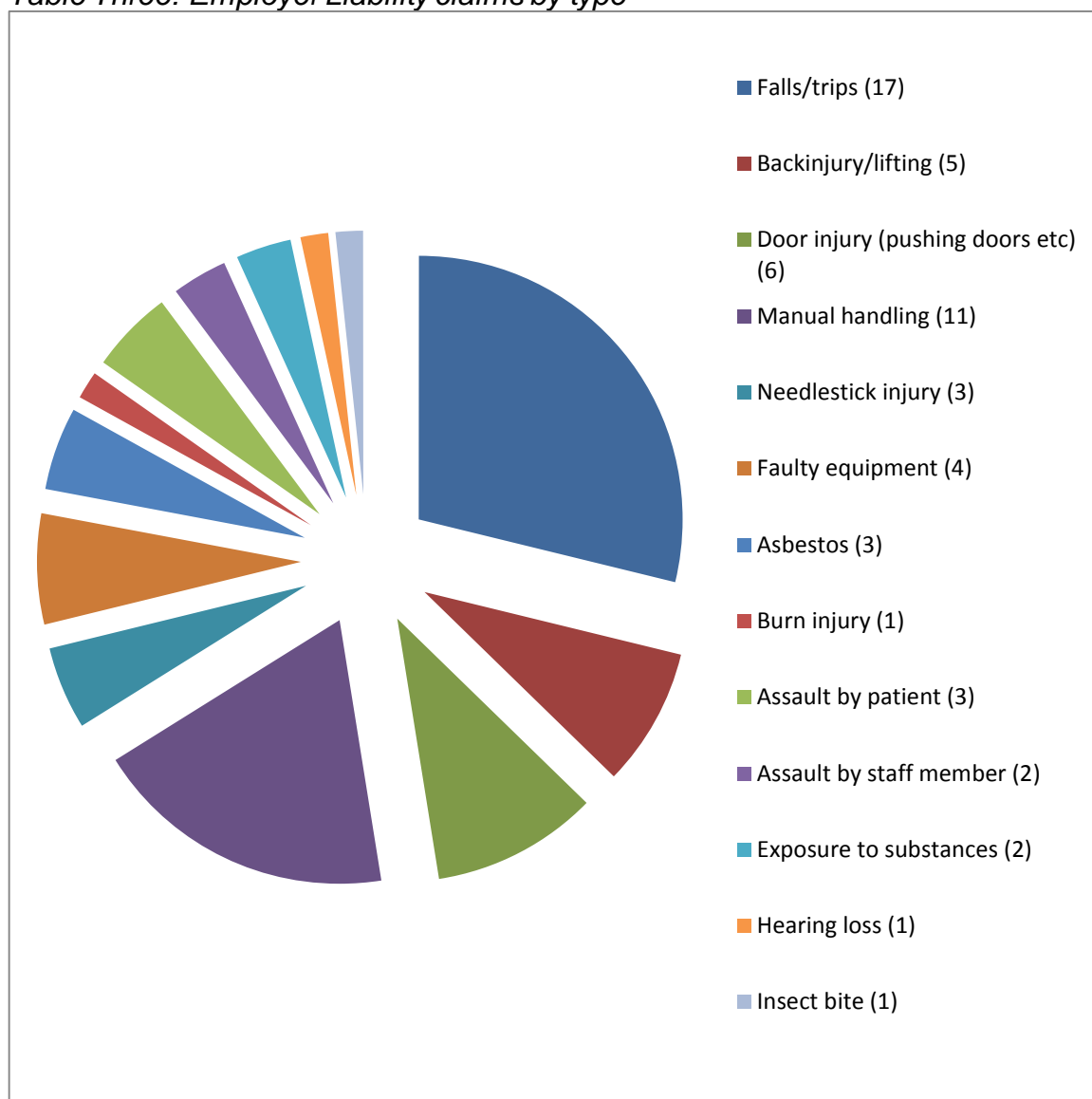
- 7.5 The table below compares the clinical negligence claims against the Trust in terms of those closed (with no payments made) and those settled (payments being made).
Table two: Number of settled and closed clinical negligence claims by financial year



8 Employer Liability

8.1 The 59 employer liability claims against the Trust are split as follows:

Table Three: Employer Liability claims by type



8.2 12 new employer liability claims were received during the final 6 months of 2015/16. 34 new employer liability claims were received in total during the financial year 2015/16, 27 in 2014/15 and 31 during 2013/14.

8.3 The settlement invoices received by the Trust in the reporting period for the above category of claims totalled £101,381, which comprises the Trust's excess of £10,000 to the NHSLA (or some figures above that level where amounts greater than the excess will be refunded to us) or sums billed to us for claims settling below the excess level.

8.4 The above costs relate to the settlement of 6 claims for various types of incidents, including needlestick injuries, slips/falls and trips and lifting and back injury claims.

9 Public Liability

5 new claims in this category were received during the final six months of 2015/16. In total, 7 claims were received in this category in the whole of 2015/16 and 4 in 2014/15. The Trust has insurance cover for all claims with a maximum excess of £3000.

10 NHSLA Risk Management Recommendations

There were no risk management recommendations during the last six months of this financial year.

11 Quality and Assurance – Audit Activity for the Legal Services Department

Quarterly reports from the Head of Legal Services have been received by the Director of Corporate Affairs throughout the financial year, summarising information held within the Legal Services Department's Quality and Assurance Register and identifying whether there have been any failures in meeting key quality standards. These departmental quality standards measure timescales and deadlines involved in the investigation of claims (set out within the Trust's claims handling policies and the NHSLA reporting guidelines) and also communication with key stakeholders, such as the NHSLA, clinicians and claimant's solicitors. For the reporting period, all quality standards have been met.

12 Recommendation

The Board of Directors is asked to accept the report.

David Burbridge
Director of Corporate Affairs

26 October 2016

Appendix 1

Top-up Insurance Policies brokered by Marsh

| Policy Description | 2015/2016 GBP | 2016/2017 GBP |
|---|--|--|
| Directors and Officers | 5,500.00 | 6,000.00 |
| Professional Indemnity | 17,500.00 | 17,500.00 |
| Personal Accident (Fire Marshalls and Travel) | 1,441.22 | 1,215.57 |
| Property | 63,356.00 (for overall property value of £272m) | 69,028.00 (for overall property value of £368m) |
| Terrorism | £26,662.62 | 12,500.00 |
| Casualty (Employer's Liability and Public Liability cover for subsidiaries) | 25,575.00 | 10,390.00 |
| TOTAL | 140,034.84 | 116,633.57 |

Motor vehicle insurance policy brokered by Portmore

| Policy Description | 2015/2016 GBP | 2016/2017 GBP |
|-------------------------|------------------------------|------------------------------|
| Motor Vehicle insurance | £29,446.80 (for 30 vehicles) | £29,367.90 (for 32 vehicles) |

Appendices 2 and 3 (attached excel documents)