

Comments by **Kathryn Bradbury, Partner and Head of Citizenship & Immigration at Payne Hicks Beach**, first published in The Times on 28 June 2018 and reproduced with kind permission <https://www.thetimes.co.uk/article/anniversary-celebrations-that-mask-nhs-crisis-2ddkv5gkq>

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Anniversary celebrations that mask NHS crisis

Staff are scared to speak out and lawyers say it does not learn from its mistakes

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The NHS is turning 70 amid the scandal at Gosport War Memorial Hospital
CHRIS RADBURN/PA

What a rapturous week. Aside from England delighting football fans in the World Cup, every other moment seems to have been dedicated to swooning over the glories of the NHS in its 70th-anniversary year.

But is the cult of the NHS well grounded? It is not just the shortage of doctors that is a problem — Kathryn Bradbury, a partner at Payne Hicks Beach, highlights the long delay in the government lifting the cap on the number of migrant visas for doctors — but a succession of scandals (deaths at Gosport War Memorial Hospital being the latest) that reveal chronic abuse and failure at an organisational and individual level.

“The Gosport overdosing scandal highlights just how hard it is to monitor the goings-on inside what should be a highly regulated NHS institution,” says James Cahan of Thomson Snell & Passmore.

What has gone wrong? Lawyers are well placed to see what is happening, whether in terms of medical negligence, rogue surgeons or the closing of ranks. “The big problem is that the NHS does not learn from its mistakes,” says Lisa Jordan, the head of medical negligence at Irwin Mitchell. “I’d like to say that I have seen improvements and a greater willingness to admit liability for mistakes early on, but I cannot.”

Jordan points to the trust structure as one of the key weaknesses in how the NHS operates and the deep reluctance of NHS managers to admit that errors have occurred. “The ‘duty of candour’ which is now required of trusts has not been embraced in practice,” she says.

As a result, Jordan says, it is only “very brave doctors” who are prepared to blow the whistle on where things are going wrong. This is despite recent reforms to protect whistleblowers by releasing them from the tyranny of disclosure agreements.

“A valid act of whistleblowing is carved out of the agreements and gagging is essentially illegal,” says Brian Gegg of Bircham Dyson Bell. “However, passing the tests for bringing a valid protected disclosure is a far from easy exercise and historically the NHS world has not been short of allegations that whistleblowing has been discouraged.”

In practice, doctors, nurses and other members of staff will be subject to “social pressures” not to rock the boat, as Jonathan Davies of Serjeants’ Inn Chambers describes it. “There will be the fear of being excluded from the employment market and being seen as a troublemaker. It will have a chilling effect on your career and don’t expect to have the support of your colleagues.”

That is not quite the idyllic image of the NHS presented by Danny Boyle at the opening ceremony of the London Olympics in 2012. Nor did we see the shortcomings in skills and knowledge arising from inadequate training.

“A growing problem is likely to be an increase in the number of medical negligence claims arising as a direct result of the marked reduction in the amount of training given to doctors, before they attain the grade of consultant,” Cahan says. “Unless the gaps in the training and experience of these purportedly senior doctors are rectified, it may be the case that patient safety will be negatively affected.”

Raquel Sigantoria of Bolt Burdon Kemp argues that junior doctors are often dropped in the deep end without enough support from above. All this leads to errors. And when, subsequently, lawyers issue letters of notification to trusts as the first step in legal action for compensation, the reaction is passive. “The sooner trusts respond the better, but sometimes they simply seem not to take the matter seriously,” she says.

As Neil Clayton of Lime Solicitors puts it: “Claims are defended for far too long — they can easily take three to four years to settle. And you have to bear in mind that we screen out a large number of claims that have no legal merit. No more than four out of ten cases I see actually proceed. We need to mediate more cases earlier.”

Lucy Wilton of Russell-Cooke highlights her concern that trusts do not necessarily take into account the views of independent experts in deciding how to respond to claims. They may then fight cases only to admit liability later, which adds to the cost.

Meanwhile, Sigantoria draws on her experience with the Association of Personal Injury Lawyers’ *Serious Injury Guide*, which is much faster in offering support and moving cases towards settlement. “We’ve asked the NHS to look at doing something similar, but it would not engage in the discussion.”

So, what next? Sarah Ellson of Fieldfisher raises the question of whether we want a “blame or no blame” culture in the NHS. “The new Healthcare Safety Investigations Branch is proposing to work without attributing blame, but the Gosport report leaves families and wider society calling for accountability and wanting to blame,” she says. Solve that conundrum, then maybe we can celebrate.