BABY LIFELINE DINNER – KEYNOTE SPEECH

There can be few more devastating experiences in life than to experience the effects of a serious mishap in the delivery of a baby resulting either in the baby's death or serious and lifelong injury. Yet out of these tragedies comes the most humbling courage and commitment in the face of adversity – as shown by the children themselves who often achieve remarkable feats in combating what life has thrown at them – and their parents, who shrug off what to many of us would be completely overwhelming odds, and fight and fight again for the best for their children devoting their lives to their care. The results of all this dedication can be astonishing.

A career in clinical negligence cases has given me the sad but humbling privilege of meeting many such people.

Judy Ledger personifies them tonight.

Yet is this sacrifice a necessary and unavoidable consequence of nature getting things wrong? I don't believe so.

My perspective on obstetrics comes from dealing with many cases over far too many years. Spending as much time as I have dealing with obstetric disasters must not of course skew one's perspective. The vast majority of mothers receive good,

effective and above all safe care and enjoy the delivery of healthy babies. That does not in the least minimise the pain and the awful challenges faced by those who are not so fortunate.

Some figures from litigation – and remember this is likely to be only the tip of the iceberg in relation to what goes wrong. We know that in general about 10% of medical interventions involve an error though fortunately only a proportion of those result in actual lasting harm.

In 2000 obstetric claims accounted for 50% of the litigation bill and the CMO's report Organisation with a Memory set as a target the reduction by 2005 of 25% in the numbers of incidents of negligent harm resulting in litigation. While there appears to have been a reduction [and I have not analysed the figures] in absolute numbers the value of totals claimed rose.

In 1974 the cost to the NHS of all clinical negligence claims was about £1million. By 2002 this had risen to £446 million. 10 years later CNST expenditure for 2012-2013 is reported to be £1,117,655,000 [let me say that again £1.117 billion]. [Of that figure some 54% is said to be spent in legal costs.] That is about 10% of the NHS budget as a whole. A recent NHSLA report analysing maternity claims shows that of the total figure 37% is associated with obstetric and gynaecological claims. That is £413,532,350 [£413.5 million] or 3-4%

The toll in the obstetric world is enormous: From 1st April 2000 to 31 March 2011 there were 5,087obstetrics and gynaecological claims classified as maternity claims with a value of £3,117,669,88 [£3.117 billion]. That this amounted to 0.1% of births during that period is not I think a reason for self-congratulation or lack of concern. All too often in health matters the fact that adverse occurrences only amount to a small proportion of events is used to give false reassurance, and an acceptance of the unacceptable, even where events, such as these have a devastating effect on a large number of people.

After all, each of those cases involves a baby, the parents, and of course siblings and the effects on all their lives. So, assuming an average family size, that means that nearly 30,000 people are affected fairly directly by these tragedies. And as life expectancies for these children increase so does the period of need.

As the report rightly points out this does not take account of the cost to the staff involved in these incidents. For many they remain haunted for the rest of their lives by some of their experiences. Also it does not take account of the even larger number of cases where no claim is brought, the cases which have yet to be brought for births arising in this period, or additional treatment costs within the NHS. It has been generally thought

that the harm associated with delivery is only avoidable in some 10% of cases. Note that legal claims represent only 0.7% of incidents reported to the NRLS.

The report considers the factors involved in negligence cases. Not surprisingly a large number include a failure to interpret a CTG correctly. Uterine rupture - comparatively rare as an occurrence but the 85 claims attracted a liability of £100 million, reflecting the catastrophic effects of this complication.

The publication of this report and the NHSLA annual report led to a predictable outcry about fat cat lawyers and scandals about fees exceeding the damages and so on. A salutary rejoinder was offered by James Badenoch QC in a typically robust letter to the Times:

> *To lawyers like me who work in the field it is dispiriting to note the lack of comparable concern about the fact that the cost of these negligence claims is because of negligence.*
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> *Negligence requires (by definition of the term) the making of an error which would have been avoided if merely reasonable skill and care had been exercised. And high damages awards are necessarily made to meet the needs of those seriously and irreparably harmed by that negligence.*

Is it unreasonable to ask that your correspondents' outrage be diverted to the alarming incidence of serious avoidable harm done by failures of reasonable standards of care in our health services?

Clearly some of this appalling catalogue of injury and associated misery can be reduced by improvements to training and I am really glad to see this charity's contribution to this.

I believe my report and the Government's encouraging response to it may have some of the means of reducing the errors on obstetrics even of that speciality did not receive a special focus at the inquiry. Let me take a few of the themes:

- The duty of candour: a culture change in which professionals are encouraged to be keen to share their concerning cases with others and for the lessons to be learned should lead to any necessary changes in local practice happening much more quickly. Prompt sharing of information about cases where harm has been caused with parents should also prompt proper investigation of what has happened in more cases: I find it astonishing how many cases come my way where there has been no formal review of the case before a claim is made.
- Transparency: Outcome figures for maternity should be published on a service specific basis: this should allow any

pattern of damaging poor practice to come to light earlier and better informed parents' choices about where to have their babies.

- Staffing guidance – some of what goes wrong is likely to be down to inadequate numbers of midwives. A requirement for hospitals to publish their staffing levels and the benchmarks against which these are measured should drive staffing numbers to safe levels. The beginning of the process towards this has been the publication of the CNO's guidance with regard to responsibilities for this. [*check*]
- Standards – clear standards should assist staff and patients to know what is expected and whether what is being provided is sufficient. And safe.
- Better support of nursing [including midwifery] staff including consistent appraisal should encourage improvements in standards of care.
- Better leadership through leadership training and support, should also help.

Issues around claims

But let me turn to litigation itself. No one can pretend, least of all lawyers who practise in this field, that the system we have is satisfactory. The reasons for this are well known but worth repeating:

Time: for large cases i.e. those settled for more than £ million damages, the average time from incident to resolution is 8.57 years. Now in many cases there is good reason, from a litigation perspective, for time to be taken to assess the long term needs of the child. That is because, even with the welcome advent of periodical payments, that assessment almost invariably is a one off event which cannot be re-opened. But that does not mean that the need for help and for funds to obtain that help are not present from birth. Some of that gap is often covered by interim payments, but not always, particularly where there is a dispute about whether the incident was negligent or not.

Uncertainty: many more cases are started than end successfully in recovery of compensation. Why? Well establishing whether there has been negligence in accordance with the legal test is complicated, and the evidence is often difficult to find or interpret. Practitioners involved in the case may not be traceable; notes may be inadequate, lost or ambiguous. Experts may disagree on what should have been done. Even if negligence is established, proving that the negligent act or omission caused the injury is a formidable obstacle in many cases requiring the most sophisticated expert assistance to work out. Yet it is the person least equipped to prove all this that has the burden of doing so, the claimant, usually the mother or father of the child.

Inequality of arms: funding of legal help is challenging and becoming increasingly hard to get. Hardly anyone can afford to pay for their own lawyer in cases as complicated as these. Therefore there is an increasing reliance on no win no pay agreements. This specious alternative to the old legal aid system resulted in a narrower range of cases being taken on at even greater expense to the taxpayer in legal costs recovered by legal representatives of claimants. Why: because specialist lawyers have a nose for which cases are going to win, particularly for those which might be won without undue difficulty. So it is easy to find a lawyer for those cases, and much more difficult in the cases where there is a doubt or a difficulty. The uplift which has made such cases relatively profitable for efficient lawyers now has to be paid out of the damages: so the claimant is penalised for getting funding in this way when they really have no other choice available.

Inconsistency of treatment between those who can mount a successful claim and those who cannot. We have two classes of disabled person who has been injured from birth: those who enjoy a full compensation package judged to meet their needs and those who have to struggle to get appropriate care and support for their multiple needs from a hard pushed cash strapped state funded system.

The inappropriateness of judging entitlement to compensation by the pejoratives involved in the concept of negligence.

The test of negligence is whether the act or omission is one which no reasonably competent professional would have committed. Clearly, this is challenging for any professional to admit to. It is pejorative and implies a lack of professionalism and, not always rightly, is thought to import an impracticably high standard of care. However, the vast majority of conscientious professionals do not set out to harm their patients by their actions. But even those who try to be careful can get things badly wrong. Medicine to date has paid surprisingly little attention to human factors science, that is the science that explains or identifies the ways in which humans behave to produce unwanted results. This science is deeply embedded in the procedures adopted in the aviation, nuclear and other safety critical industries, but has rather fallen victim to that old nostrum in healthcare that medicine is different… Happily that is now changing. In a little heralded announcement following this week's response to the Mid Staffordshire inquiry the National Quality Board has issued a concordat signed by all its members committing themselves to promote the use of human factors science throughout the NHS. However this all raises in my mind and no doubt others' a question of how all this fits in with the concept of negligence. One precept of human factors science is that the learning based on safety incidents needs to

take place in a no blame atmosphere where participants are not deterred from explaining fully and candidly what they did and what others did by the fear of blame or sanctions either for themselves or their colleagues. It is important to separate out concepts of "blame" from those of responsibility. It is not too easy to see how the requirements of human factors science fit in with a requirement that patients be subjected to a binary system of blame and no blame for assessment of their entitlement to compensation. Is it perhaps time once again to revisit whether compensation should be conditional on proving negligence?

This is not the first time that this thought has been raised. In Making Amends the then CMO Sir Liam Donaldson proposed in 2003 that for obstetric cases in particular a no blame system of compensation should be adopted.

More precisely his recommendation was that

Families of neurologically impaired babies would also be eligible for the new NHS Redress Scheme if:

- *the birth was under NHS care;*
- *the impairment was birth-related;*
- *severe neurological impairment (including cerebral palsy) was evident at birth or within eight years. Genetic or congenital abnormality would be excluded.*

At a stroke this would have widened the field of eligibility for compensation to all those who had suffered avoidable harm from obstetric management. Many think that it was unfortunate that this never got adopted. Much in Sir Liam's seminal report disappeared into the long grass, where reside many such reports in a filing cabinet marked "too difficult". To my mind, his proposal deserves reconsideration in the new world which we all hope will follow from the system's response to the Mid Staffordshire scandal. This would do no more than justice to those seriously harmed at birth through no fault of their own. Surely all children in that category should be looked after properly? I recognise that this would involve giving credit for the facilities for care and treatment made available by the State, and at least consideration of a cap on compensation under other heads. But, assuming such a system could be constructed in a way which reduced or eliminated legal costs and delays, it is at least possible that it would not cost more than the current unsatisfactory state of affairs.

So this all brings me back to Baby Lifeline and tonight. There can be few more worthwhile causes than one which seeks to protect babies from damage in the course of their entry into this world. This is a remarkable charity founded and run by remarkable people. It deserves all our support.

Thank you.