

# 50 predictions: Medical Malpractice

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## Increase in personalised and digitised healthcare

The delivery of healthcare is changing, bringing with it the availability of personalised healthcare insurance. The introduction of robotics and machine learning and the proliferation of healthcare wearables and diagnostic artificial intelligence (AI) bring huge change, with both advantages and risks for consumers and healthcare providers. The supply chain is changing from a simple one to an extended, multilevel model, involving AI, diagnostic and software suppliers to augment individual practitioners. Insurers of healthcare providers will need to obtain additional knowledge of the diagnostic intelligence and software suppliers being introduced into the supply chain so that they can properly assess their risk.

## Litigation will retain focus on consent

Causation and consent will remain a fertile battleground for litigation. The Court of Appeal in *Webster v Burton Hospitals NHS Foundation Trust* has reaffirmed that the Bolam test has no place in determining breach of duty when considering consent in medical malpractice cases: the only test will be that laid down in *Montgomery*. While we have further guidance for assessing the significance of a particular risk (including the claimant's education, conduct throughout the treatment and evidence during the litigation), further case law will be required to determine the precise extent of a doctor's duty to delve into a patient's particular idiosyncrasies.

## Fixed costs will be introduced in medical malpractice

After some delay, the Government has now produced its public consultation for a scheme to introduce fixed recoverable costs for medical malpractice litigation. The Government's current preference is to fix the costs recoverable by claimants for all claim awards between £1,000 and £25,000. This preceded Jackson LJ's recommendation that the Department of Health should work with the Civil Justice Council to implement a stand-alone procedure for clinical negligence claims (of up to £25,000). A fixed costs regime will be welcomed by insurers for providing certainty for losses at this level. However, the detail of the regime is to be decided, together with the transitional arrangements for its implementation. While the scheme will encourage earlier resolutions of claims when introduced, insurers should brace themselves for an increase in notifications in the lead up to introduction and, if implemented, potentially significant procedural change where parties are to be expected to disclose their expert evidence within their pre-action protocol letters of claim and response.

### Key developments

- [Webster v Burton Hospitals NHS Foundation Trust](#)
- [Fixed Recoverable Costs](#)

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