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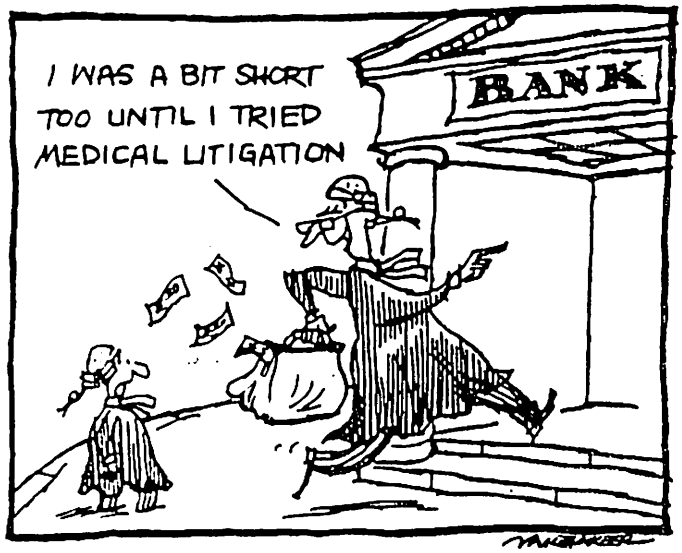
A case for treatment

Anthony Barton on the use of legal aid for multi-party medical litigation



Difficulties encountered in large, multi-party medical and pharmaceutical litigation highlight the problems inherent in the present system in the UK of providing legal aid to allow such cases to come to court.

The collapse earlier this year of the largest publicly funded personal injury claim in the country illustrates the disadvantages of the current system. The action, brought by 5,000 claimants against Roche and Wyeth, the manufacturers of the benzodiazepine (tranquilliser) drugs Valium and Ativan, collapsed after six years, at an estimated cost to taxpayers of £35m. The action fell apart when the Legal Aid Board of England and Wales withdrew funding, saying the claims did not satisfy the requirements for legal aid.

Legal aid, according to the board, is a system of government funding for those who cannot afford to pay for legal advice, assistance and representation. Civil legal aid is available to those able to demonstrate they have "reasonable grounds" for bringing a claim and who satisfy the stringent financial eligibility criteria. Middle-income people, therefore, are effectively denied access to justice, however good their claim.

Even those claimants who do qualify for legal aid frequently receive no compensation, because of the low success rate in court. Lawyers are too often the only beneficiaries of medical and pharmaceutical litigation.

Is legal aid, then, merely a state-funded and self-serving industry which suits lawyers as justice-mongers and purveyors of compensation?

In the benzodiazepine case, the main beneficiaries were certainly the lawyers and experts: not a penny has been obtained for any claimant. The irrecoverable expense to the manufacturers was also passed on to the public.

Other multi-party actions involve infant drinks, smoking, diagnostic agents, surgical devices, various drugs and the power industry. These are invariably legally aided, widely advertised and are conducted with much media hype.

The Legal Aid Board recently published a report on multi-party actions, following the benzodiazepine case. It makes disturbing reading, and raises questions over both the cost and the quality of such cases.

The board admits that it has "doubts over the extent to which legal aid lawyers can have regard to the costs of litigation". And it concedes that "there is no incentive on the solicitor to act as a responsible filter for dubious cases, as there is no effective sanction available for shoddy work or bad cases being taken".

The report implies that fraud by solicitors on the legal aid fund is "widespread", because it is not possible for the board to exercise detailed control over all publicly funded litigation. It has to rely upon the assisted persons' legal advisers to act responsibly and competently.

The board recognises that many funded actions are "weak" or "hopeless". It describes a "bandwagon effect" with "legal advisers getting carried away by everything surrounding the action and losing sight of the viability of individual cases". The board acknowledges that applicants may often feel that they have nothing to lose by giving it a go - the lawyers, however, are paid whatever the outcome.

Contrary to popular belief, legally aided claimants against institutional or corporate defendants enjoy a strong position.

First, they are not liable for the defendant's costs, even if they are unsuccessful. The defendant must pay his own costs, even if successful. Thus the plaintiff is in a no-lose position and the defendant is in a no-win position.

The courts have expressed concern that this rule could give rise to abuse and injustice. Lord Denning referred to the "inequality of bargaining power" in favour of legally aided parties. Lord Donaldson observed that "legal aid helps those who lose cases, not those who win them". Most recently, the Court of Appeal has remarked: "It is no answer that there are public authorities or insurance associations that are footing the bill. The National Health Service has better things to spend its money on than lawyers' fees."

Second, the board relies on the advice of plaintiff lawyers in deciding whether or not to fund a claim. Such advice by definition cannot be independent, since the plaintiff's advisers have a financial interest in the advancement of the claim.

Medical and pharmaceutical claims are complex, expensive and have a low success rate. The legal and scientific issues are not readily separable. The legal process imposes a separation of medical and legal professional roles. Further, the legal aid area committees consist only of lawyers, and do not contain scientists and clinicians. It is difficult to see, therefore, how these committees are able to evaluate complex scientific issues. The board, however, asserts that these committees are "well positioned to form a clear and objective opinion of the prospects of success".

Despite using phrases such as "shoddy work", "weak cases", "dubious cases", "hopeless cases" and "lawyers getting carried away", the board insists: "It is wrong to assume that the opinions based on behalf of the applicants would give a misleading or over-optimistic assessment of a case."

The facts, however, speak for themselves. According to an independent survey, the success rate of legally aided pharmaceutical actions is zero.

In the benzodiazepine action, there were 3,000 Ativan claims. According to the plaintiffs' advisers, four barristers had assessed 1,200 cases as "strong in law" and had "very good high prospects of success". The Court of Appeal, by contrast, referred to the "considerable problems on causation ... distinguishing between the effects of the drug and the underlying condition for which it was prescribed". The court observed that "these considerations may present real problems in many, if not all, of the cases". Moreover, if only 1,200 cases were "strong", why were proceedings started in 3,000?

Decisions involving the expenditure of millions of pounds of taxpayers' money ought to be based on independent, objective and expert advice. There must be independent claims assessment if public confidence in legal aid is to be restored.

The present system is unacceptable to plaintiffs, defendants and the taxpayer. What is required is a judicial process which is investigative, independent, expert and integrated so as to straddle law and medicine.

The board acknowledges that courts may not be appropriate for these cases, and proposes a tribunal consisting of a legal chairman and appropriate medical experts. The idea is to change the process, not the basis, of compensation.

A contingency "no win, no fee" system, for paying solicitors according to results in certain cases, is due to come into effect later this year. It will widen access to justice. Far from leading to a US-style litigation "free for all", the risk of legal costs (which does not generally apply in America) will impose a commercial discipline, so that claims are only advanced when properly investigated and assessed. The pursuit of hopeless claims will remain the privilege of the rich, the foolish and the legally aided.

Change seems inevitable. Whatever solution is adopted, there is one certainty: any proposal to remove from lawyers the indiscriminate largesse of the state, and impose any effective form of accountability, will be met with howls of protest.

The author is a medically qualified solicitor who specialises in medical and pharmaceutical litigation