



COMMENT | DR ANTHONY BARTON

Clinical negligence cost £2.2 billion last year — we need urgent reform

Patients injured by negligence are rightly entitled to compensation, but their lawyers' fees are out of hand

Dr Anthony Barton
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The annual cost to the health service of clinical negligence has risen from £1 million in 1975 to £2.2 billion last year — money that could be spent on patient care.

Even allowing for inflation and growth, it is implausible that doctors are 2,000 times more negligent now. There must be other drivers. The Commons health and social care committee, alarmed at the cost, proposes to reform clinical negligence litigation.

Adversarial litigation provides robust, rigorous, independent review of patient care according to accepted clinical norms. It is regulated by a fair and just judicial process which ensures finality and certainty according to established legal principles.

Most healthcare cases are funded by conditional fee arrangements that impose economic discipline and financial prudence. Many cases are necessarily investigated to find a sustainable claim, at no cost to the taxpayer; just 1 per cent of claims against the NHS are legally aided.

Accordingly, litigation rightly has a central role in investigating and compensating medical injury; all proposed alternatives have failed. This is the political and economic reality.

The tort-based NHS Redress Act 2006 proposed redress “without recourse to civil proceedings”, with the health service investigating itself. Its proposed scheme was no cost, risk free, demand led, and open ended. Not surprisingly, it has accomplished nothing. And the question remains: how to reduce the spend?

There is irreducible cost: patients injured by negligence are rightly entitled to compensation and connected reasonable legal fees.

What is reducible? Reduce damages by repeal of an anomalous element of the Law Reform (Personal Injuries) Act 1948 which effectively allows the cost of care to be recovered on a private basis.

Legal fees in clinical negligence are said to be disproportionately high. Reduce legal costs. NHS lawyers are paid win or lose; pay NHS lawyers by conditional fees where liability is disputed (in 80 per cent of litigated claims the health service pays damages).

There should be no reward for failure or perverse incentive for “deny delay defend” — this drives up costs on both sides. Claimant lawyers work on conditional fees and so should their NHS counterparts — with fixed fees for both sides.

It is about money and how it moves. Get the money right by rewarding lawyers for success, and things fall into place. Reward lawyers for failure and you get poor results.

Instead of devising another doomed administrative scheme, the committee should build on the strengths of the litigation process and address its weaknesses. It must balance the interests of individual injured patients against the general interest.

Dr Anthony Barton is a solicitor