# Medical litigation: who benefits?

The primary purpose of clinical negligence litigation is to obtain compensation for the victims, and thereby to provide a system of professional accountability and medical investigation. It ought to benefit patients; the reality is different—a state funded, largely self serving industry that is detrimental to patients and clinical practice.

Legal aid provides the oxygen of medical litigation as most cases are publicly funded. Understanding legal aid is the key to understanding the politics and economics of medical litigation. It is intended to give access to justice for those who cannot afford legal services. However, most people are financially ineligible for legal aid but cannot afford legal services. Many lawyers are unwilling to use the conditional fee system while legal aid is available, so most people are denied access to justice.

Legal aid is granted by the Legal Services Commission on the basis of advice from the applicant's lawyer. Such advice is not independent as the lawyer has a direct financial interest in advancing the case. There is a conflict of interest; it is a fundamental rule of natural justice that where there is a pecuniary interest there is a presumption of bias. However, the commission disregards this basic legal principle and maintains perverse incentives for lawyers to provide what euphemistically can be called overoptimistic assessments of the merits of cases. This is amply borne out by the low success rates of clinical negligence litigation.

In England the usual litigation costs rule is that the loser pays the winner's legal costs; this sensible rule (which does not apply in the United States) discourages speculative litigation and encourages cases to be settled according to their merits. It imposes a mutuality between the parties with respect to the risks of litigation. Under the legal aid legislation this rule does not apply; the legally aided person enjoys a costs protection such that neither he nor the commission is generally liable for costs should the case fail. Thus a legally aided claimant has nothing to lose and a health service defendant has nothing to gain. This costs protection is inherently unjust and infringes the right to a fair trial under the Human Rights Act. It means that legally aided cases may be settled regardless of merit to avoid irrecoverable legal costs, a practice referred to as "legal aid blackmail" in Parliament and by the Bar Council.

A report issued last week by the National Audit Office showed that the NHS is facing a £3.9bn bill for negligence, double the amount it faced in 1997 (*BMJ* 2001;322: 1081). There is evidence of defensive medical practices in response to the threat of litigation.

The medical establishment appears incapable of formulating any coherent policy to address the adverse economic and clinical implications of litigation. Perhaps it is symptomatic of the malaise affecting our professional leadership across many areas. The BMA parades tired arguments about a no fault compensation scheme, which successive governments have firmly rejected, but it stubbornly refuses to recognise that a no fault system, while suitable for motor and industrial accidents where causation is not at issue, is generally unhelpful in the clinical context. In cerebral palsy only 15% of cases appear to be due to an intrapartum event and so capable of being compensated. Under the Vaccine Damage Payments Act 1979, barely a handful of payments are made each year. So much for no fault systems.

> Legal aid diverts scarce funds for patient care to lawyers' pockets

Lord Chief Justice Woolf recently delivered a speech called "Are the courts excessively deferential to the medical profession?" He referred to the "disaster area" of medical negligence litigation and quoted the success rate of 17%; he stated that "the medical profession could not be relied on to resolve justified complaints justly." There was no mention that under legal aid it is the applicants' lawyers who assess the merits of cases, effectively granting themselves funding; that too often lawyers are the only beneficiaries of litigation; that under an inherently unfair costs rule health service defendants may settle cases regardless of merit to avoid irrecoverable costs. Lord Woolf concluded: "It is unwise to place any profession or other body providing services to the public on a pedestal where their actions cannot be subject to close scrutiny." So what does he have to say about the lack of accountability of the judiciary for their own negligent acts and omissions?

Are the courts excessively deferential to the medical profession? No. The medical profession is too accepting of a litigation process which, through legal aid, is biased and inherently unfair; it lacks independence and accountability. Legal aid means access to lawyers, not justice. It does not ensure compensation for deserving cases (most people are ineligible), but diverts scarce funds for patient care to lawyers' pockets. Unmeritorious litigation encourages defensive medicine. It enriches lawyers and impoverishes the health service, with little benefit for the alleged victims of negligence. If doctors are to respond effectively to the challenge of medical litigation they need to understand how it works.

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