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How to cut NHS clinical negligence costs – reduce legal fees

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The annual cost to the health service of clinical negligence has risen astronomically – from £1m in 1975 to £2.2bn last year. This is money that could be spent on patient care. The House of Commons Health and Social Care Committee, alarmed at the cost, proposes to reform clinical negligence litigation. It is a wide-ranging consultation: it includes the basis of liability and process of compensation.

Is medicine so much less safe now? Unlikely. Clinical negligence litigation is a commercial activity, shown by the massive advertising for claims. Lawyers' pursuit of fees is a major driver -– when personal injury practice in other areas is in turmoil. Litigation is only indirectly related to compensation, patient safety, and professional regulation.

Three quarters of cases are funded by conditional fee agreement; just one per cent of cases are funded by legal aid. Payment is by result; there is no reward for failure. It demands commercial discipline and economic prudence: it is about survival of the competent. Investigation is rigorous: claims must satisfy forensic scrutiny according to accepted legal tests. Case selection is critical – many cases are investigated at no cost to the taxpayer to find sustainable claims.

Access to justice is privatised, free at the point of need, self-funded, and available to all. It has been a huge success story.

By contrast NHS lawyers are publicly funded and get paid win or lose. This provides perverse incentives to maintain unsustainable defences, and to promote 'deny, delay, defend' behaviour. It is reward for failure. Damages are paid by the NHS in 80 per cent of litigated claims.

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.

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 proposes redress “without recourse to civil proceedings”, with the health service investigating itself. Its proposed scheme is no-cost, risk-free, demand-led, and open-ended. Not surprisingly, it has accomplished nothing.

The no-fault compensation schemes of foreign jurisdictions are superficially attractive – they appear to provide quick, blame-free redress. There is, however, a requirement to prove causation. They have not been costed here but are likely to be even more expensive than litigation. Moreover, an administrative scheme does not provide the independence or procedural safeguards that the courts afford a litigant.

So 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 the anomalous section 2(4) of the Law Reform (Personal Injuries) Act 1948 which effectively allows the cost of care to be recovered on a private basis. This proposal has been around for at least two decades.

Legal fees in clinical negligence are said to be disproportionately high. Reduce legal costs. Claimant lawyers work on conditional fees – so why not NHS lawyers too? It would remove perverse incentive for ‘deny, delay, defend’ behaviour – and would deter maintaining unsustainable defence. Defendant behaviour is a driver of legal costs. Settlement at the door of the court drives up costs on both sides.

Fixed recoverable fees were proposed years ago. They should apply for both sides and would work on a ‘swings and roundabouts’ basis. Previously, it was said that clinical negligence litigation could not survive without legal aid – it has thrived. Creative and innovative lawyers will embrace the opportunity and challenge of fixed recoverable costs, as they have done with the removal of legal aid.

The solution is inevitably about money. Get the money right by rewarding lawyers for success, and things fall into place. Reward lawyers for failure and what do you get? Inefficiency and waste. Remember the expensive fiasco of legally aided health care claims!

Instead of reinventing another doomed administrative scheme, the Committee should build on the strengths of litigation and address its weaknesses. It must balance the interests of individual injured patients against the interests of patients in general.

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