

House of Lords

Health and Care Bill (committee, day 8)

4 February 2022

I am very influenced by a paper produced by Michael Powers and Anthony Barton on clinical negligence litigation reform. I think it is fair, as they point out, that the adversarial system provides a robust, rigorous and independent review of patient care according to clinical norms, being self-funding and free at the point of need, with the defence costs being paid and taken on by the legal firms, rather than the individual. However, there are ways we can improve it...

...we have to look searchingly at the performance of NHS Resolution. The Society of Clinical Injury Lawyers has argued that it can reduce costs by making early admission of liability and making or accepting early offers of settlement. This is strongly backed up by Powers and Barton, who have argued that we need to look at how the conduct and cost of litigation can be influenced by the behaviour of lawyers, which is in turn influenced by how they are paid. Claimant lawyers are privately funded; NHS lawyers are publicly funded. Three-quarters of cases are funded by no-win no-fee agreement, and just 1% of cases is funded by legal aid, which imposes commercial discipline and economic prudence. Case selection is clearly critical here: many cases are investigated at no cost to the taxpayer in order to fund a suitable claim.

In contrast, damages are paid by the NHS in 80% of litigated claims—how many of those cases could have been settled without resorting to litigation? We should certainly consider paying NHS lawyers a conditional fee in cases where proceedings are issued because liability is an issue. Surely there should be no reward for failure or incentive to deny, delay or defend behaviour, which is the common experience, I am afraid, in the huge amount of time that it seems to take to settle these claims. We can improve the system in other ways as well. (Lord Hunt of Kings Heath, House of Lords; 4 February 2022, column 1245)