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Confrontation finds the truth

It is risky to make clinical negligence cases less adversarial, writes Anthony Barton

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Recent reports into scandals involving Shrewsbury and Telford Hospital and other trusts highlight a systemic problem: the NHS cannot be trusted to investigate itself.

Serious untoward incident investigation reports are triggered by unexpected harm to hospital patients. They can be a useful tool for medical learning.

The reports are usually reliable, but not always. They can fail to address the material question and deal at length with irrelevant ones in a defensive "fobbing off". A fundamental weakness involves hospitals investigating themselves in situations of clear conflict of interest.

Nor is the coronial system fit for purpose. It ought to provide a robust, rigorous, independent fact-finding process, but the reality is different.

The coroner's duty to investigate is triggered by suspicion of an unnatural death. It is a low legal threshold. Too often coroners do not investigate suspected iatrogenic deaths [those caused by medical treatment] and when they do, too often they do not commission independent medical expert reports, preferring to rely on witnesses involved in the deceased's care.

The supposed strength of the inquest is also its weakness: it is inquisitorial, not adversarial. There are no parties. Bereaved relatives have limited opportunity to participate in determining the scope and direction of inquiry.

The coroner's court is an inferior court of record which does not determine rights, and its findings are not binding. What purpose is there in a legal challenge of an inadequate inquest?

Not surprisingly, injured patients and their relatives turn to civil litigation not so much for compensation but to seek the truth. As Lord Hunt of Kings Heath said in parliament in February, "…the adversarial system provides a robust, rigorous and independent review of patient care according to clinical norms…".

Years ago, the tort-based NHS Redress Act 2006 was passed to provide a consensual alternative to litigation. It envisaged an administrative process, with the NHS offering compensation according to its own investigation.

But that system has not been implemented and there are no plans to implement it. It occupies its rightful place in the dustbin of history.

Meanwhile, the well-intentioned but misguided Commons health and social care committee has proposed to reform clinical negligence litigation by making the compensation process less confrontational.

It is the adversarial nature of litigation that ensures rigour and independence that gets to the truth that injured patients and their relatives seek, not a health service that cannot be trusted.

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