



COMMENT

Clinical negligence litigation is vital to ensure patient safety

The health service cannot be trusted to investigate itself as it places reputation above all, writes Anthony Barton

Anthony Barton
Thursday May 02 2024, 12.01am, The Times

Clinical negligence cost the health service more than £2 billion last year.

There is widespread concern that the system is economically unsustainable, prompting the proposed alternatives to fault-based litigation.

Clinical negligence litigation is a commercial activity driven by claimant lawyers. Like all businesses, it is about money and how it moves.

There are collateral benefits: truth, justice, professional accountability, and patient safety. It is in the investigation of adverse clinical outcomes that litigation makes its major contribution; the health service cannot be trusted to investigate itself — it places reputation above all.

Litigation provides independent, rigorous, judicially regulated investigation according to medical professional norms. The claimant is a party in an adversarial process and has an active role in proposing the issues: the evidence, the scope, and the direction of the claim. The same cannot be said of the inquisitorial process.

Justice is open, and subject to public scrutiny. But legal aid funds just 0.5 per cent of claims against the NHS, which means that access to justice is funded largely by conditional fees, free at the point of need, and available to all. It is a tribute to the enterprise of claimant lawyers, and a triumph of privatisation.

Last year there were 13,000 cases against the health service drawn from about 300,000 inquiries. There are many millions of healthcare encounters.

Damages were paid in about 7,000 cases. Claimant costs are usually only paid in successful claims, which means that fees generated by roughly 7,000 successful cases funded the assessment of 300,000 inquiries. This represents a free clinical scrutiny service for the taxpayer.

Trials are expensive — last year there were 29 — nine of which were in the High Court, figures that demonstrate the efficiency of the litigation process. But while litigation is efficient, there is a weakness that originates in its funding.

There is a striking asymmetry in how lawyers are paid. Claimant funding is privatised, mostly conducted on a no win, no fee basis — it is payment by result that compels competence and economic prudence. There is also the marketing cost of claims acquisition.

Defendant lawyers are state funded. They are paid regardless of the outcome. It sustains reward for failure, and provides perverse incentive for “deny, delay, defend” behaviour. There are no claim acquisition costs.

Claims are started by claimants but generally settled by defendants — it is consensual. The costs of successful claims are influenced by defendant behaviour. Money affects behaviours and it is a matter of getting the money right for any system to work properly.

As long as the health service places its reputation above investigation, there is a need for litigation.

Dr Anthony Barton is a solicitor and the co-editor, with Michael Powers KC, of the sixth edition of Clinical Negligence, published by Bloomsbury.

[This was a speech given at the book launch held in the Old Hall, Lincoln’s Inn on 18 April 2024.]