All Change for Clinical Negligence

The webinar will start shortly

4th May 2022

House of Commons

Health & Social Care Committee, chaired by Jeremy Hunt MP

“NHS LITIGATION REFORM”

Published 20 April 2022

Evidence

- Live witnesses over three days
- Written submissions from nearly 70 sources including:
  - Government
  - AVMA
  - APIL
  - Solicitors on both sides
  - MDU
  - MPS
  - Academics

KEY CONCLUSIONS

KEY PROPOSALS

STATUS OF THE REPORT – WILL THE RECOMMENDATIONS BE IMPLEMENTED?

KEY CONCLUSIONS

"The system for compensating injured patients in England is not fit for purpose" [84]

"Outdated, arbitrary and scandalously expensive" – Sir Ian Kennedy QC [36]

Notable reliance on lived experience (three witnesses), Sir Robert Francis and the Centre for Socio-Legal Studies (Oxford)

1. Cost
2. Delay
3. Does not promote learning or patient safety

COST

Some headlines [41-43]:

- 2011 £900 million in compensation
- 2021 £2.17 billion
- Set to double by 2031
- Total liabilities £9 billion at March 2007, now £82.4 billion
- Projected costs by end of decade £155 billion and annual cash payments of £4.3 billion
- Legal costs increased from £98 million in 2006 to £496 million in 2016
- Treasury figures 2020: provision for clinical negligence claims is £3,600 per household in England (£700 10 years ago)

DELAY

- 2017 average time period from a birth-related injury to settlement was 11.5 years (Centre for Socio-Legal Studies in Oxford) [52]

- NHS's Early Notification Scheme ("ENS") has had some success [57-59]

LEARNING AND PATIENT SAFETY

- Involvement of lawyers and “the screening process” prevents data sharing [60-61]
- Trusts do not share learning [64]
- Litigation may impede development of clinical practice (Hempsons example) [64]
- Threat of litigation undermines confidence and behaviour of health professionals [72]

PROPOSALS FOR CHANGE

Notable reliance on international schemes – New Zealand, Sweden, Japan and some US states (Virginia, Florida)

Evidence that administrative schemes reduce overall costs even though claims increase

Independent administrative body to investigate harmful medical events [84]

- Inquisitorial
- Was harm avoidable?
- Focus on system

Initially confined to birth injury cases, but intended to be rolled out for all clinical negligence claims [85]

What test would the new body apply?

- “Correct procedures not followed”
- “System failed to perform” – NOT negligence [119]
- Recognition that the threshold might be difficult to define
- Causation in NZ caused real difficulties [103]

Level of damages

- Same as for a tort claim BUT:
- Abolish *Peters* principle (i.e. claimant can elect private care provision) – "top up" NHA/social care provision only
- Repeal s 2(4) of the Law Reform (Personal Injuries) Act 1948 [123]
- Loss of earnings standardised at average national wage for all claimants under 18 [124]

Effect on litigation

- Right to litigate preserved but claimants must go through the new system before being granted access to courts [189]
- This includes compulsory ADR if claim not dealt with satisfactorily by the new body [193]

Delay

- The new system will establish liability and compensation entitlement “within weeks rather than years” [186]

Regular reviews

- Move away from “once and for all” settlements

Promotion of learning

- Parallel investigations [142]

Staff support

- NHS staff should be trained in “just culture” practices

Challenges to Government

- Explain the inability of NHS to conceded cases [196]
- Explain how fixed costs in £25K claims will not inhibit access to justice [197]
- Abolish QOCS (i.e. claimants lose protection if they fail to accept compensation from the new body)? [198]

Status of the report

Chances of its recommendations being implemented?