Association of Personal Injury Lawyers

GOVERNMENT PROPOSALS FOR REFORM OF LEGAL CLAIMS AGAINST THE NHS

A BRIEFING FROM THE ASSOCIATION OF PERSONAL INJURY LAWYERS (APIL)

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INTRODUCTION

The NHS brings hope, health, and life to millions of people, but on rare occasions it also fails in its care for the unfortunate few who are made more ill, injured, or even killed while in NHS care. When failures could and should have been avoided, it is only right that the patient should be able to seek redress to help him get his life back on track.

Injured patients need guidance and representation, particularly at a time when they are at their most vulnerable and facing a Goliath organisation like the NHS Litigation Authority.

The Government plans to cut the fees paid to lawyers who provide this representation. It is critically important, however, that the fees allow lawyers to do their job for injured patients. If the fees are not right, it will affect how much work lawyers are able to do, to the point that some cases may never get off the ground. Medical negligence claims are usually complicated, and involve vulnerable people who already needed medical care to begin with. They have effectively been injured twice. These cases require a lot of investigation, evidence gathering, negotiation, time, and pursuit of the NHS for replies. This is explained further in this briefing.

The NHS's priority should be to look after people, not to save money for itself. But that is not to say that improvements cannot be made for the benefit of our beloved health service, and for its patients. Savings can be made without ripping away access to justice.

The bottom line is that while the NHS continues to injure its patients, paying compensation is necessary. At the centre of all this let's remember that patients are killed and injured when they should not be.

If you find this briefing helpful, you may also wish to read its sister publication *'Managing the Cost of Medical Negligence Claims - a Strategy for Improvement'.*

Deborah Evans
Chief Executive
February 2016

5 WAYS FOR THE NHS TO SAVE

While the NHS continues to harm its patients through negligence, it will continue to generate a compensation bill for itself. Legal costs are a necessary part of negotiating the right level of compensation for injured patients. While there are certainly ways in which legal costs on both sides can be reduced, there are also other ways the NHS can save money.

Medical negligence claims by nature are rarely straightforward. Proving what went wrong and whether the action was negligent can be extremely difficult for claimant lawyers because the defendant (the NHS) holds all the information. Medical negligence cases are very different from road traffic claims where the harm usually happens out in the open, possibly with witnesses, and it is usually clear who was negligent and who was behind the wheel. Also, proving how patients are harmed specifically, and to what extent, can be complicated in medical claims due to the fact that most patients already have something wrong with their health to begin with.

The Government is looking at fixing the fees paid to lawyers acting on behalf of injured patients. In doing this it is important to remember that the fees paid to claimant lawyers need to reflect the work which is necessary. If the fees are set too low, the work which lawyers will be able to do on behalf of injured people will be restricted.

The claims process must be improved first to tackle the issues which make medical negligence cases take so much time and work, before then assessing and setting the fees at a correct level.

Setting fees with a view to saving money for the NHS is clearly not a right and just way to cut the health service's bills. The focus should be on making the claims process more efficient, and less wasteful, and making sure the representatives of injured patients are able to perform.

Here are APIL's suggestions for how the NHS, and the NHSLA, can cut its spending:

1. Saying sorry costs nothing

A failure by the NHS to apologise is the most common complaint raised by patients in England. It was the reason behind 34 per cent of cases investigated by the Parliamentary and Health Service Ombudsman in 2014-15.[1]

In some cases, the simple recognition that he or she suffered because of a failure, or an explanation of what happened, might be enough to help an injured patient move on. The president of the Royal College of Pathologists said recently that the parents of stillborn babies were all too often forced to take legal action as a means of getting answers as too many hospitals have a 'do not apologise, do not explain' mentality.[2]

Of course, other patients really do need financial compensation to help put their lives back on track. Medical failures usually happen to patients who are already vulnerable and the injuries can be life-long and life-changing. But there are cases where candour will save the NHS a legal bill.

To be concerned that an apology could be used as legal ammunition to prove guilt is the wrong approach. The primary concern of the NHS should, surely, be for its patients rather than itself.

2. Admit when it has done wrong

If the NHSLA were to accept its failures when they happen, it would save a lot of money in legal costs. A 'deny, defend, delay' tactic is used all too often, and drags cases out unnecessarily only for them to be settled at the door of the court, if at all.

The NHSLA is its own worst enemy by driving costs up in this way. Claimant lawyers have to gather additional reports, statements and records, issue court proceedings unnecessarily, and chase for responses, all the while conferring with patients and keeping them informed. The NHSLA has to pay for all this needless work and wasted resources if the injured patient's claim succeeds.

1. www.ombudsman.org.uk/reports-and-consultations/reports/health/complaints-about-acute-trusts-2014-15/5 22 September 2015
2. www.dailymail.co.uk/news/article-3308816/Parents-forced-sue-hospitals-truth-stillborn-babies-Couples-pushed-legal-route-health-trusts-not-apologise-attitude-says-medic.html 7 November 2015

3. Quicker recovery of medical records

Requests for access to medical records should be met within 40 days, according to the Data Protection Act 1998. But Government guidelines for healthcare organisations state that medical records should be released within 21 days. Often, neither of these time periods is met.

In reality it can take up to six months for claimant lawyers to obtain injured patients' medical records from hospitals and GPs.

With a limitation period of three years, lawyers do not have six months to waste on waiting for medical records before they can start the case. During this time the lawyer has little choice but to begin gathering information and making enquiries as to what evidence and experts will be needed. But sometimes the records finally arrive and reveal that the case is unlikely to succeed. All this time, effort and money is lost.

4. Be consistent

Some English NHS Trusts have in-house legal teams. When a complaint becomes a claim, sometimes they pass it on to the NHSLA straightaway, but sometimes they keep it in-house for far longer than necessary and only pass it on at a much later stage.

There is no consistency in procedure as to when cases are handed over to the NHSLA. Keeping a case with the Trust just prolongs the process, creating extra work and costs and uncertainty for patients.

A working group of both claimant and defendant lawyers identified that claims dealt with 'in-house' by NHS Trusts are rarely managed with a view to reaching a settlement for the injured patient. These defensive measures increase costs the longer the claim stays in-house as the claimant lawyer pursues the Trust for progress and responses.

When a complaint becomes a claim it should always be handed automatically to the NHSLA.

5. Lessons need to be learned

The most effective way for the cash-strapped NHS to save money on its compensation and legal costs is to avoid causing unnecessary harm in the first place.

Each claim for which the NHS has to pay compensation represents an injured person who needs to put his, or her, life back on track. And those are just the cases which the lawyer was able to prove, or where the claimant didn't give up.

There is a need for a change in culture. Rather than preoccupation with the idea that an increase in claims creates an increase in costs to the NHS, the focus should be on the increase in negligence and suffering, and cost of human life, which could have been avoided. For example, the number of claims for cerebral palsy and brain damage caused at birth has barely changed since 2006.

According to health secretary Jeremy Hunt nearly half a million people are harmed unnecessarily every year in the NHS: "That's more than eight patients dying needlessly every single day in our wards and operating theatres."[3] This is the key problem. It generates a cost in human suffering to patients and their families and a financial cost to the NHS.

3. Speech: The silent scandal of patient safety University College Hospitals London, 21 June 2013

EXAMPLES OF MEDICAL NEGLIGENCE

Most patients receive an excellent service from the NHS. For those people, it may be difficult to believe that the NHS can get things wrong. They may even view compensation claims as an attack on the NHS.

But former NHS Litigation Authority chief executive Steve Walker said: "If you stopped getting things wrong so consistently then you wouldn't have to pay in the first place.

"(Compensation) is paid after all only to a minority of patients who are being harmed because at the end of the day their man [the defendants' "man"] did it."[4]

APIL specialist medical negligence lawyers cite typical, avoidable errors which can, and do, cause harm. These are the failures which they, as experienced experts, see again and again:

- Delay in diagnosis and treatments.
- Failure to examine a patient properly, or at all.
- Failure to carry out tests or investigations.
- Sub-standard technique in carrying out invasive investigations.
- Failure of a GP to refer a patient to a specialist.
- Failure to report a concern about a patient's condition in a hospital to a consultant, or to do this quickly enough.
- Poor surgical technique and failures with aftercare.
- Inappropriate medication being given.
- Failure to communicate leading to medication not being given and symptoms not being followed up.
- Badly written or missing medical records.
- Failures in specialist interpretation, such as pathology or radiology.
- Failure to recognise medical or surgical emergencies.
- Exposing patients to unnecessary risks, such as the risk of contracting infection.

Often, the NHSLA will admit that the NHS has been negligent (or admit 'liability') but then goes on to argue that it did not actually cause the patient any harm ('causation').

Eventually, the harm can be proven, but it takes a lot of work on the claimant's part, especially considering that the NHS, the hospital, or the healthcare provider holds all the information.

Former NHSLA chief executive Steve Walker said: "I can guarantee you that I never paid a penny to a victim who wasn't desperately in need of the funds".

4. British Medical Journal, 19 February 2013

5 KEY PRINCIPLES FOR THE FUTURE OF MEDICAL NEGLIGENCE CLAIMS

1. Damages should not be reduced.

It is a basic tenet of the common law that injured people are entitled to be put back, so far as damages can achieve this, in the position they were prior to the negligent act.

2. Access to justice should be maintained.

The proposals should not prevent people bringing justified claims.

3. The quality of casework should not be undermined.

Proposals which deter the inexperienced solicitor and encourage the specialist will save money for the NHS and NHSLA in the long run. The lowest common denominator must not become the standard. To do otherwise will inevitably lead to additional defendant costs being incurred as a result of having to deal with incompetent or inexperienced claimant legal representatives or litigants in person.

4. The changes should not apply retrospectively.

Clients who have already received advice from their solicitor about the likely costs of pursuing their claim should be entitled to trust in this advice. If they have already been given advice about how they will fund their claim, they should be entitled to rely upon that advice and upon the binding contracts they have put in place in order to do so.

5. Reforms must be even-handed.

Positive improvements should be made on both sides of the litigation process: claimant and defendant. This is not a one-sided costs issue and reforms must be fair.

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