COMPENSATION FOR MEDICAL ACCIDENTS

Paper for PS(H)

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HC(A)4D

10 August 1992

COMPENSATION FOR MEDICAL ACCIDENTS

Present position

1. If a patient suffers injury as a result of medical treatment, he or she can go to court to claim compensation. To be successful, the patient must succeed in proving that there has been negligence on the part of the NHS.

Costs

2. Health Authorities paid out over £53m in 1990/91 in settlement of around 1,700 medical negligence claims (which averages out at £29,000 a case). A breakdown by Region is at Annex A. On top of this, around £7m was contributed by the Medical Defence Organisations, making a total of around £60m. The Department's best estimate for 1992/93 is around £80m, though Regions have made an overall provision of about £110m to be on the safe side.

3. Potential costs are included in the evidence in support of the Department's annual PES bids. But if settlements exceed the amount budgeted for, the amount of cash available for care is correspondingly reduced.

A growing problem?

4. Available evidence does suggest that both the number of cases and the size of awards are increasing. Subscription rates to the medical defence organisations rose from £40 a year in 1978 to £1,350 in 1989. This does not necessarily mean that there is more medical malpractice. Instead, it probably reflects a growing level of consumerism among patients, coupled with easier access to legal aid and greater awareness of the possibility of legal redress.

5. Law suits against obstetricians as a result of accidents at birth are often cited as a particular problem. Numbers are

growing, and the settlement costs are usually very high because of the need to provide lifetime support for the injured child.

NHS Indemnity

6. Up until January 1990, hospital doctors were responsible for insuring themselves against medical negligence claims. But the rapid growth in subscription rates to the medical defence organisations was causing problems in setting doctors' pay. Therefore hospital doctors were brought within NHS indemnity from 1 January 1990. This means, in effect, that health authorities and Trusts assume responsibility for negligence by medical personnel, in the same way as they do for all other NHS staff.

7. In order to fund the extra cost of negligence claims the Medical Defence Organisations agreed to transfer to the Department a proportion of their reserves. Districts can claim from the fund if the negligent party is a doctor or dentist and the damages awarded exceeds £300,000.

"No fault" compensation

8. The whole business of going to court with a medical negligence claim can be lengthy, costly and traumatic for the individual concerned. From time to time there are calls for the introduction of "no fault" compensation - meaning that compensation would be payable on proof that injury had been sustained, regardless of whether negligence had been involved.

9. This, it is argued, would reduce the adversarial nature of court action, and make it quicker and easier for individuals to obtain recompense. It would also reduce the tendency towards "defensive medicine" - where doctors order unnecessary tests to cover themselves in case they are subsequently sued.

10. The last major challenge was in February 1991, when Rosie Barnes' Bill on the subject was defeated. The House of Commons Library produced a research note on the subject at the time (Annex B) which usefully sets out the background and the pros and

cons on no fault compensation. A copy of Mr Waldegrave's speech during the debate is at Annex C.

11. The Government have consistently resisted no fault compensation for a number of reasons.

Cost. If the need to prove negligence was dropped, the number of claims could multiply, leading to a sharp increase in the amount of compensation the NHS had to pay out. One estimate suggests that costs could rocket from £60m a year to between £235m and £350m.

Keeping in line with the general approach on compensation. Negligence and compensation in the health care field is not regarded as being essentially any different from negligence and compensation in other spheres. In other walks of life, claims for compensation are resolved through the courts.

Doctors have the right to defend themselves. The individual who has been accused of being negligent has the right to defend his or her professional reputation.

Accountability. The tort system arguably has a deterrent effect on malpractice. No fault compensation could make doctors less careful, and would reduce the element of accountability.

Proof of causation. It could be just as difficult to establish that medical treatment had caused injury as it would be to prove that someone had been negligent.

Unfairness. Those disabled as a result of a medical accident would be compensated, whereas those disabled as a result of disease would not be.

Availability of services for disabled people. People who suffer disability (whether due to a medical accident or not) are entitled to free care from the health and social services, and cash benefits from social security.

Other countries

12. New Zealand are reviewing their no fault compensation scheme, which applies to accidents generally, and is thought to cost around 1.4% of their gross national product. An independent estimate of Sweden's scheme, translated to the UK, has suggested an annual cost of £300-£400m.

Improvements in Court processes

13. A series of changes have been introduced, as a result of the Lord Chancellor's Civil Justice Review, to make life easier for people pursuing civil claims though the courts. The changes are designed to ensure more appropriate allocation of cases to courts, earlier exchange of information and arrangements to reduce delays. (However, we understand the new arrangements may not be working well.)

Arbitration

14. A submission currently with Ministers sets out the option of a system of arbitration for medical negligence as an alternative to court proceedings. The idea was raised by Lord Griffiths and picked up by Mr Waldegrave during the debate on Rosie Barnes' Bill. In brief, the idea is that a small panel of doctors and a lawyer would consider the evidence on paper. Arbitration would not be suitable for the more complex or contentious cases, which would continue to be dealt with through the courts.

15. Our submission points out that an arbitration system could reduce administrative and legal costs, but could generate more claims. Many people who would not submit themselves to the ordeal of the witness box might well be prepared to have their case examined by an arbitration panel.

Ex gratia payments

16. Health Authorities have the power to make ex gratia payments

up to a specified limit where they consider there is a good case. This can be used to provide recompense to patients.

Structured settlements

17. "Structured settlements" provide a steady stream of income for life to an individual damaged through medical negligence. The benefit to the individual is an assured, index-linked income. The benefit to the NHS is that there is a "discount" on the amount that would have been paid as a lump sum.

18. There are two methods of funding a structured settlement. The first is to purchase an annuity through a life office. The second (which is better value for the NHS) is for the HA to fund it directly from its own resources.

19. The Department is in favour of structured settlements. Two things remain to be resolved. First, how can the Secretary of State guarantee to the satisfaction of the plaintiff's solicitors that the HA won't renege on the agreement if cash is tight. The second concerns the method of funding structures generally with particular reference to the use of MDO reserves. We hope that both issues will be resolved shortly.

Pressure for "no fault" payments for specific conditions

20. There have been two recent campaigns which have challenged our line on no fault compensation.

HIV\AIDS

21. In December 1990 the Government agreed to make payments of £42m to the HIV infected haemophiliacs in settlement of the litigation. (This was in addition to ex gratia payments of £10m in 1987 for those in special need and £24m in 1989 for payments of £20,000 to each HIV infected haemophiliac.)

22. Following settlement of the haemophiliac litigation, pressure mounted for similar treatment for the HIV infected blood and tissue recipients. In announcing extension of the special

provision for haemophiliacs to this group the Government made it clear that it did not accept the case for no fault compensation for medical accidents. It accepted the arguments that the blood and tissue recipients were in the same special category as the haemophiliacs, since both groups were infected with HIV as a result of NHS treatment.

Human growth hormone\Creutzfeld Jakob disease

23. Human growth hormone (hGH) was used in the UK between 1959-85 to treat short statured children. The product was withdrawn in 1985 when its use was associated with Creutzfeld Jakob disease (CJD) - a rare spongiform encephalopathy of humans which is invariably fatal within 3 to 12 months. A fuller description is at Annex D.

24. Potential victims and their families have been pressing for compensation. The line agreed with PS(C) is that we have no plans for compensation or payments to this group of people, but the full range of support services and benefits available to people with disabilities and their families is available. Any legal action will be defended on the grounds that the treatment given at the time conformed with the knowledge then available about good clinical practice.

25. Correspondents have argued that redress should be made available to anyone potentially affected. They have also suggested that the trauma and expense of litigation could be humanely and usefully avoided by providing a form of net financial redress beyond those benefits and services available in the event of actually contracting the disease. We have based our rejection of this suggestion on the reasons given by Mr Waldegrave during debate of the Rosie Barnes Bill on no fault compensation.

26. We understand that legal aid has been granted in one case, but no details are available as yet. It is too early to speculate on the likely outcome.

Conclusion

27. We are continuing to hold the line that claims for compensation must be pursued through the courts. There will no doubt be calls from time to time for no fault compensation to be introduced. This will continue to be resisted for the reasons given in this paper.