

Clinical negligence costs: can we create a system that is reasonable and affordable?

NHS Resolution's annual report for 2016/17, published in July (NHS Resolution, 2017), confirmed what many suspected. Despite a small but welcome reduction in the number of new clinical negligence claims to the NHS, the cost of claims continues to spiral with £1.7 billion paid out during 2016/17. This is up from £1.5 billion in 2015/16, and since 2010/11 expenditure has nearly doubled – an increase of 98%.

If spend continues to increase at the same rate the NHS could be paying out £3 billion a year by 2021/22 – a cost that risks becoming unsustainable for society. It is important that there is reasonable compensation for those harmed as a result of clinical negligence, but this should be balanced against society's ability to pay. The spiralling cost of clinical negligence means money is being diverted away from front-line care at a time when the NHS is facing increasing financial pressure.

In February 2017, the Medical Protection Society, a not for profit organization supporting 300 000 health-care professionals worldwide, surveyed 1109 NHS consultants to gauge their views on the situation. The findings included:

- 81% said that if the cost of clinical negligence continues to increase at the same rate, this would threaten the sustainability of the NHS
- 77% said the NHS should be spending less money on clinical negligence claims
- 85% agreed that difficult decisions are made about spending in health care every day, and how much society pays for clinical negligence must be one of them.

The case for reform

Earlier this year the Medical Protection Society published a report *The Rising Costs of Clinical Negligence: Who pays the Price*

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(Medical Protection Society, 2017a). It marked the launch of a new campaign aimed at striking a balance to ensure that compensation is reasonable but also affordable (Medical Protection Society, 2017b), and set out a package of legal reforms.

The reforms proposed are not aimed at reducing compensation to individuals or limiting access to justice, which is an important right for all. The intention is to control overall costs.

The Medical Protection Society proposes the introduction of fixed recoverable legal costs for claims up to a value of £250 000, to help stop lawyers charging disproportionate legal fees. Legal costs accounted for 37% of the £1.7 billion paid out in clinical negligence costs in 2016/17.

Other proposals are aimed at reducing the costs associated with expert reports and fees, and making the system more predictable, fair and transparent. For example, the Medical Protection Society proposes a limit on future care costs based on a tariff agreed by an expert working party.

The Medical Protection Society would also like to see the introduction of an ultimate 10-year limit between the date of an adverse incident and when a claim can be made (with judicial discretion in certain cases). This would help to reduce the number of claims that are delayed and inflate because of the loss of records, medical staff retiring or dying or having little recollection of the facts.

A whole package of reforms is necessary to really tackle the root of the problem, and in the Medical Protection Society survey 84% of NHS consultants said they would support changes to the legal system to tackle the rising cost of clinical negligence.

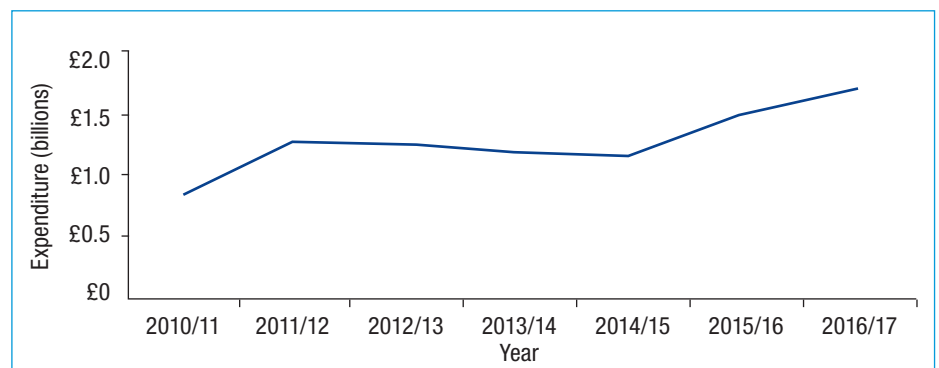
The complex drivers of claims

Of course controlling the cost of clinical negligence once a claim is made is just one component of a more sustainable system. The Medical Protection Society report also acknowledges the need for continued enhancements in patient safety, and looks at what drives a patient to make a clinical negligence claim in the first place.

The relationship between medical errors and litigation is more complex than it may first appear; a number of motivational factors are likely to be at play. For example, while some patients or their families seek financial redress through litigation to support long-term care or loss of earnings, others may pursue legal action to obtain an acknowledgement, explanation or apology – or to ensure steps have been taken to stop the same thing happening again.

A YouGov survey of over 2000 members of the public in Britain, conducted on behalf of the Medical Protection Society, showed that a third of those surveyed (33%) said that patients should have access to compensation when something goes wrong regardless of whether harm was caused. Furthermore, one

Figure 1. Expenditure on clinical negligence claims by NHS Resolution. From NHS Resolution (2017).



in five (20%) said they would bring a claim against a health-care professional if they were dissatisfied with any aspect of the service they received.

If a patient is harmed as a result of clinical negligence, he/she should have access to reasonable compensation. But many people who take action against their doctor often do so as a result of their unmet expectations or from a perceived lack of communication or information. Other concerns may relate to a feeling of limited involvement in decision making, a lack of empathy and other behaviours relating to manner and attitude. These experiences alone may not result in a claim, but may influence a patient to make a claim should an adverse event occur.

Management of expectations is therefore a key factor and highlights the importance of communication. Exploring what a patient believes is possible or what he/she is hoping to achieve may avoid the 'disappointment gap'. Disappointment can quickly progress to anger and frustration and, in turn, the pursuit of a claim. Similarly, transparency and openness after an adverse event and good complaint handling can also influence a patient's decision on whether to take legal action.

Conclusions

While minimizing risk and continual improvement of clinical standards can go some way to the prevention of adverse events and errors clinicians must also strive to understand the psychological drivers involved when patients make a claim. If clinicians can better understand the motivations this will give them some indication as to how claims – whether associated with negligence or not – might be prevented.

This knowledge, combined with legal reforms to tackle the spiralling costs once a claim has been made, could deliver significant benefits to patients, the health-care community and the NHS. **BJHM**

Medical Protection Society (2017a) The Rising Costs of Clinical Negligence: Who pays the Price. www.medicalprotection.org/docs/default-source/sab-docs/5892-striking-a-balance-policy-paper-web.pdf (accessed 15 August 2017)

Medical Protection Society (2017b) Clinical Negligence Costs: Striking A Balance. www.medicalprotection.org/balance (accessed 15 August 2017)

NHS Resolution (2017) Annual Report and Accounts 2016/17. www.nhs.uk/AboutUs/Pages/AnnualReport.aspx <http://www.nhs.uk/AboutUs/Documents/NHS%20Resolution%20>

KEY POINTS

- It is important that there is reasonable compensation for those harmed as a result of clinical negligence, but this should be balanced against society's ability to pay.
- A package of legal reforms would help to achieve a balance between compensation that is reasonable, but also affordable.
- Controlling the cost of clinical negligence once a claim is made is just one component of a more sustainable system.
- There is a need for continued enhancements in patient safety, to help prevent more adverse incidents.
- We must also look at what drives a patient to make a clinical negligence claim in the first place. If clinicians can better understand the motivations this will give them some indication as to how claims – whether associated with negligence or not – might be prevented.

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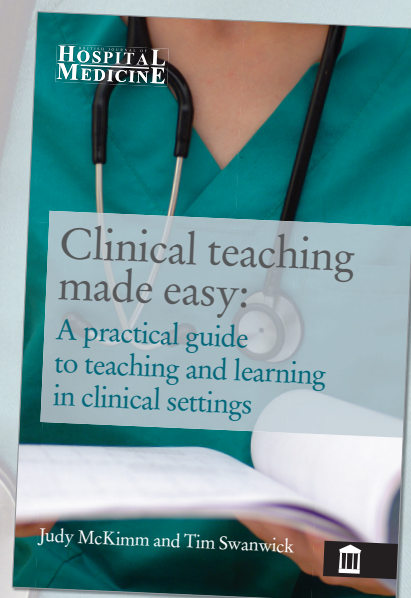
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