

Commentary

Medical Negligence Costs are Unsustainable

The Lancet medical journal¹ recently stated that medical negligence does not have any winners. The comment was prompted by an award of £19m to the family of a brain-damaged baby. In 2017/18 the NHS paid out £1.8bn in legal settlements. Half of this quantum was related to birth asphyxia cases. The projected total spend for 2018/19 is £1.984bn. Since 2010 the negligence costs have doubled. It is estimated that if all the current legal claims are successful, the future bill will be £65bn. In the case of brain damaged babies a lump sum is paid up front with annual payments for the rest of the person's life (periodic payments orders). The cost of meeting these annual payments, will increase over the long-term as more patients are compensated. This heavy financial burden will inevitably impact on the money available for the future development of acute and secondary healthcare services. The UK experience has been replicated in the health services of many developed countries including Ireland. The word being used repeatedly by many commentators is 'unsustainable'. This is particularly the case in Obstetrics, where the cost of the payouts are now almost as great as the cost of the actual operational service. Improvements in clinical care will ultimately slow down because of the lack of money. The interface between healthcare and civil justice is becoming more complex and frustrating. In addition to the important medical and legal considerations, there is a societal component. It is regrettable that there is such frequent legal acrimony between caregivers and the patients that they care for. This gulf in trust makes clinical practice more stressful and can be counterproductive to good medical care. It is puzzling that the rising rate of complaints and litigation is against a background where medical outcomes have never been safer or better. Recent English data on perinatal care reported that neonatal deaths have been reduced to 1.71 per 1000 live births, and stillbirths to 3.93 per 1000 total births.

Hospitals are compelled to spend considerable amounts of time, money, and personnel in dealing with the medicolegal burden that they are facing. In many hospitals the medicolegal/ risk management department is larger and better staffed than the library. The library, which represents an important pathway in the acquisition of knowledge, clinical judgment, and best patient care is relegated to a lesser place in terms of priority. There is no immediate or complete answer to the current negligence crisis. However, there is a better understanding of the pathway from patient dissatisfaction to an eventual court case. A key issue is the long delays in dealing with a complaint. There is a need to move upstream in the provision of action closer to the incident. Delays build up resentment. The actions between the healthcare staff, the organization, and the patient are very important in achieving a resolution to a compensation claim. Renewed efforts must be made to keep cases out of the formal courts. In the UK there is the proposed introduction of a rapid resolution and redress scheme for brain

injury due to birth. The initial step is to capture all incidents within 30 days of birth. A five-year analysis of cerebral palsy claims concluded that women and their families offer invaluable insight into the care they received².

A greater understanding is needed into what causes a patient to make a claim for compensation. This is important in determining how a resolution can be best delivered. In particular it is imperative to determine what the patient is looking for. The more common items that individuals seek following a complaint lodgment are an explanation, an apology, an assurance that the organization has taken positive steps to learn lessons, or compensation. We need a better understanding of what causes harm. We need a better understanding of the root cause of incidents. We need better insight into the factors that turn an incident into a claim. Common factors that contribute to an adverse incident are poor communication, sub-optimal skill levels, insufficient guidelines and policies, insufficient knowledge. Other factors to be considered are inadequate staffing levels, poor teamwork, excess workload pressures, and inadequate equipment issues.

In addition to the financial costs of litigation there are also the costs to staff. Caregivers frequently suffer on in silence at the time of the incident and in the subsequent months and years as the case proceeds through the legal processes. They find themselves frequently recounting the events around the incident. Anxiety, depression and burnout are common consequences. A lack of support and supervision of staff after an adverse case has been identified as a key reason why trainees may leave their chosen specialty or why their older colleagues take early retirement. Society can ill afford to continue losing valuable, highly trained staff in this way. Informed consent and patient education results in fewer medical errors. Effective doctor-patient communication results in improved patient outcomes and fewer compensation claims. There needs to be increased respect for patient autonomy. The doctor and patient should engage in dialogue about treatment options with an emphasis on their benefits, risks, consequences and alternatives. The information should be provided without bias and should take into account the patient's culture and background. The unsustainability of the current negligence costs is a major driver in the search for alternative solutions. Much emphasis is placed on the use of mediation services. There is a report of 47 legal cases referred to mediation with an 81% settlement rate². There is a suggestion that there should be a fixed costs scheme for smaller claims up to £25,000. It is recommended that there should be just one expert to act jointly for both the plaintiff and the defendant. In addition the expert witness fees could be capped at £1200. The UK authorities have stated that they will continue to challenge over-charging claimant lawyers. Claims for excessive compensation will be resisted. The legal processes will remain vigilant for fraud.

The concerns about the rising costs of medical negligence claims are similarly being encountered in Ireland. Birth injury cases constitute a major problem with many lawsuits being settled for over €5m. Acting more promptly when a complaint is filed is an important first step. It leads to better

communication with families and increases the chances of a successful mediation process.

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Editor

References

1. Medical negligence: there are no winners. Lancet 2018;391:2079
2. Five years of cerebral palsy claims;2017. <https://resolution.nhs.uk/five-years-of-cerebral-palsy-claims/>

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