

Learning from our mistakes

Last week in “A fair few quid” Roy discussed the NHSLA annual report which identified £1.2bn spent by the NHSLA on medical negligence claims as well the increasingly astronomical fees charged by some of the less altruistic lawyers involved.

The questions asked year after year by the NHSLA, the Parliamentary and Health Services Ombudsman and all NHS complaints departments only seem to get more frantic.

- How can we cut the costs?
- How can we reduce the number of complaints?
- Should we have a no-fault system ?

But if the complaints and litigation systems are so patently failing, why are we not looking at better, more effective solutions?

Dame Julia Mellor in the 2013/14 annual report of the Parliamentary and Health Services Ombudsman describes:

“a toxic cocktail of patients and carers reluctant to complain, coupled with a culture of defensiveness by NHS organisations”

The obvious solution across the NHS and the NHSLA is to introduce independent mediation as the default solution for all but the few exceptional cases.

Research again and again demonstrates that most people who begin genuine complaints are seeking:

- An apology
- An explanation of what happened
- Reassurance that it can't happen to anyone else
- Recompense/ compensation.

Our archaic litigation system only ever offers blame and then compensation, which invariably leaves the claimant (and the clinicians) feeling very angry and frustrated and increasing the demand for money.

In the current system it is far too easy for the lawyers or complaints managers to tick the box which says they have considered mediation as not being relevant.

Independent mediation in contrast allows for all four of these demands to be met. It is also a key element of a learning organisation as clinicians and patients meet in a safe environment to discuss and learn from each other about what did, or did not, go wrong.

But we do have an option for mediation in all cases the critics will claim.

In July 2014 the NHSLA introduced its own mediation service and in the first 9 months of operation 65 cases were identified as potential

for mediation. 2/3 of these were rejected by the claimant's solicitors which left only 23 being referred for mediation. That is 23 cases out of 12,100 cases referred to the NHSLA during the same period i.e. 0.19%.

Given that mediation is quicker, far better for the long term mental health of the claimants and the clinicians and cost much less why are the NHSLA, the Ombudsman and the numerous reviews of the NHS complaints system so reluctant to make it routine?

Their answers are usually related to not wanting to prejudice a client's right to choose. Equally they argue that every case has an option for mediation if both parties are willing, but we know that for the NHSLA that results in a paltry 0.19% of the 12,000 cases.

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The cynics would argue that this is because mediation would reduce their fees and no doubt for a few lawyers this is their agenda. My own research suggests that this is not the case for the majority; rather it is a mixture of perverse incentives, an overly protective approach to their clients along with a fear of losing control of their client's best interest in a mediation situation.

Fears which in my experience are not realised in practice.

Given the obvious benefits it is difficult to understand the reluctance of the NHSLA and the NHS complaints departments to insist on mediation as the default option. Other than reflecting the deep conservatism and unwillingness to take risks ingrained in our legal system.

A fear that somehow insisting on mediation will result in legal challenges, even though the evidence is clear that prolonged and unsatisfactorily resolved disputes causes far more harm to the complainant and their families than an effective mediated resolution.

To affect such a change would not require any changes in legislation or significant risks for the organisations. Simply a procedural change by the NHSLA /NHS complaints systems/ Ombudsman etc to make mediation the default position for all bar a few, clearly defined exceptions.

A time limited pilot in a defined geographical area would soon demonstrate the effects of such a simple change to the procedures.

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