

Charles Foster looks at Christian options in an increasingly litigious society

Litigation, blame and justice

Everything, including intangibles like pain and inconvenience, is presumed to have a price tag

In 2001 the net value of known and anticipated clinical negligence claims within the NHS was £4.4 billion, almost doubled from £2.3 billion in 1998.¹ In England, the NHS received around 10,000 new claims in 1999-2000. The rate of new claims judged against the number of 'finished consultant episodes' rose by 72% between 1990 and 1998.² The same document notes that cerebral palsy and brain damage cases account for 80% of outstanding cases by value. These figures do not include claims against general practitioners or clinicians in private practice.³

Clinical negligence litigation is big business and many lawyers grow rich on doctors' mistakes. This state of affairs is bad for everyone except lawyers. As well as having been injured in a medical accident, claimants will often have to wait years for compensation, frequently putting their lives on hold until it is over. Some bereaved relatives cannot start grieving properly until the case is over. Litigation itself is time consuming and stressful. The English adversarial process raises emotional temperatures. It turns colleagues, patients and formerly trusted medical advisers into opponents. The clinicians involved are often traumatised and professionally damaged.

Litigation promotes expensive defensive medicine. Few professionals perform best when they think that someone might be looking critically over their shoulder. As clinicians try to cover their own backs, patients are sometimes subjected to

unnecessary investigations or unnecessarily distressing and explicit explanations. Trust, formerly the basis of the doctor-patient relationship, is a casualty. Money, better spent on patient care, goes to barristers, solicitors and expert witnesses.

How it was

It wasn't always like this. Doctors used to be regarded as all-knowing and beyond contradiction. Anything that fell from the lips of a man in a white coat who had stumbled through basic medical exams and avoided censure by the GMC was regarded as indisputable. A patient injured through medical incompetence would limp out of the hospital and buy the doctor a bottle of whisky to help him get over the trauma of a bad result. He would shrug off his own misfortune, thinking that he was lucky to have had any medical attention at all and saying, 'These things happen'. It would never occur to him to question his doctor's version of events or competence, let alone instruct solicitors to sue.

Why the change?

Why such a radical change? Many reasons have been suggested and some are considered below.

Is more compensation needed now?

No. If anything, less compensation is needed now because the NHS meets many more medical and nursing needs. In addition, there is more state

Above: Leading gynaecologist Rodney Ledward, 58, outside the General Medical Council in London, after he was struck off the medical register, for a seven-year catalogue of surgical blunders.



Photo: PA

and charitable funding of the financial consequences of disability.

Are we following the USA?

As in so many areas of life, are we in fact aping the USA? Can it be that we find everything about US culture so irresistibly attractive that we swallow the lot, always arriving at their conclusions ten years after them? This seems unlikely. To say that we are just getting like the US explains nothing: it simply pushes the question one stage back and forces us to ask, 'Why is the US like that?'

Is a new crusading instinct responsible?

Are we more concerned about basic injustices, wanting to put things right so that others don't suffer later? Do we have a new or revived instinct to make things right? It seems unlikely that we are suddenly more morally aware or altruistic creatures than we were. It is more probable that we are less religiously reverential of doctors, just as we are less religiously reverential of almost everything and more aware of our right to sue. Today, more lawyers are prepared to do clinical negligence work, previous difficulties about the funding of actions can be overcome and doctors are less coy about breaking ranks and criticising their professional colleagues.

Are we greedier than we were?

Certainly, financial expectations are higher than they were. Materialism has had a further by-product: everything, including intangibles like pain and inconvenience, is presumed to have a price tag.

Does bad luck no longer exist?

Increasingly, there is a tendency to believe that we are masters of our own destinies. Although individual doctors are fallible, properly practised medicine is seen as being omnipotent. There seems little room in the modern mind for bad luck, fate or the 'will of God'.

Christians and litigation

God recognises that laws are necessary in societies although he is distinctly dubious about the power of law to produce moral behaviour.⁴ God gave man stewardship responsibilities over the

world.⁵ He appoints the rulers of societies: in some sense, their authority is his.⁶ The Old Testament is full of elaborate rules of criminal and civil law.⁷ However, Jesus does urge his followers to steer clear of the court: although not denying the need for a justice system, counter-productive acrimony and legal expenses can result.⁸ Lord Woolf expressed similar concerns, recently railing against the sloth, complexity and expense of legal proceedings. As Jesus did, he urged the use of Alternative Dispute Resolution.^{9,10}

It is often not sufficiently understood that our legal system is based on fault. Only if a claimant proves that there was negligence is he entitled to compensation. This can lead to some apparently unfair results. For example: two children, A and B, suffer identical obstetric brain injuries. Child A can prove that his injury was as a result of failure to do a Caesarean section. Child B cannot. In terms of cost of care, their needs are colossal and identical. Child A will get an award running to millions of pounds and his life will be correspondingly easier. Child B will get nothing and will have to make do with less care.

These examples can make would-be litigants search around for fault where fault is not easily found. They have grounded calls for no-fault liability schemes, by which Child A and Child B would both get what they needed from some very expensive, state-operated insurance fund. There are such schemes in various jurisdictions, the one in New Zealand being the most discussed. They give injured people what they need and avoid the need to point accusatory fingers at clinicians who were generally acting in good faith and simply made an honest mistake. Christians may applaud such schemes for precisely those reasons. However, it would be a mistake to conclude that a system of litigation that gives a remedy in some cases is wrong because it does not give an answer in all.

What doctors should think

The practice of medicine is the exercise of a stewardship responsibility. All that the English law says is that if you choose to exercise a responsibility, you must do it properly. There is nothing offensive to Christians in that idea. If something goes wrong, the law tries, insofar as money can do it, to put the victim back into the position in which he would have been in had the job been done properly. Again, there is nothing offensive about that. Damages for the intangible elements of a civil claim (what lawyers call damages for 'pain, suffering and loss of amenity') are notoriously small. Nobody in England launches a civil action to get rich. A judge should rigorously stick to the rule that damages must do no more and no less than compensate. Part of the civil litigation problem in the USA is that damages are not assessed scientifically but by juries who tend to assess damages by multiplying their cat's birthday by their orthodontist's phone number and adding the National Debt. This makes

Left: Diana Hill and son James Parker lay floral tributes outside the General Medical Council where three doctors at the centre of the Bristol heart surgery scandal were found guilty of serious professional misconduct.

Below: Maralyn and Alvin Adey, parents of Kristian Adey, a 15-year old boy with Down's Syndrome, lost their legal action against Leeds Health Authority and the NHS Litigation Authority. They claimed hospital consultants were negligent in failing to advise them that Kristian needed surgery when he was a baby to treat a congenital heart defect.



Photo: PA

KEY POINTS

The recent escalation in negligence claims reflects changes in patients' expectations, doctors' status, media publicity and the availability of lawyers. Litigation can promote expensive defensive medicine, damage relationships and yet still fail to satisfy aggrieved patients. But whilst there are morally bad reasons for litigating (avarice, revenge and self-vindication) just compensation for breach of duty is a biblical principle and money, although it cannot restore lost function, can be a tremendous help in living with the consequences of medical misadventure. Honest explanations and apologies may mean that litigation can be avoided, avoiding the acrimony and legal expenses of the courts.

Below: Helen Rickard holds the hand of Sam Shortis (12), as bereaved families held a minute's silence outside the General Medical Council, where three doctors at the centre of the Bristol heart surgery scandal were found guilty of serious professional misconduct. The GMC ruled heart surgeon James Wisheart and Dr John Roylance, former chief executive of the United Bristol Healthcare NHS Trust, should be struck off the medical register. A second heart surgeon Janardan Dhasmana was banned from carrying out heart surgery on children for three years.



Photo: PA

References

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2. *Handling Clinical Negligence Claims in England*. London: HMSO, April 2001
3. Fenn, P. Current Cost of Medical Negligence in NHS hospitals: analysis of Claims Database. *BMJ* 2000; 320:1567-1571
4. Ezra 7:25-26; Romans 6-7; Galatians 3-4
5. Genesis 1:26-29
6. Romans 13:1-7
7. Exodus 21-23; Numbers 5:5-10, 35:11-33; Deuteronomy 19-25
8. Matthew 5:25-26
9. Woolf, Lord. *Access to Justice*. London: HMSO, 1996: chapter 15
10. Mulcahy L et al. *Mediating Medical Negligence Claims. An Option for the Future?* London: The Stationery Office Books, 2000
11. Luke 10:25-37

American litigation a lottery that is worthwhile spending a lot of money to enter. It makes avarice a reason for entering it. So, as long as damages are compensatory, such civil actions are surely all right.

Of course it is true that lots of people litigate for the wrong reasons. Many actions are launched for revenge, explanations or apologies rather than compensation. Some actions would not have been launched if the doctors involved had sat down with patients and families, explained and, if necessary, apologised. Often it is true that the law will seem to be unfairly overcompensating patients, for instance by awarding patients damages to cover the cost of private treatment when the patient will have the necessary treatment free on the NHS. Still, the basic principle is sound: a breach of duty that has caused damage deserves compensation.

What patients should think

It is wrong to think that everything must be somebody's fault. Human beings are immensely complex organisms. Biology is unpredictable. Not everything that goes wrong with our bodies can be repaired perfectly and not every bad result is a consequence of somebody's mistake. Medical science has made huge strides over the last few decades and the lay understanding can be that there is nothing that it cannot do. That is simply not the case. Doctors have become the victims of the unrealistic expectations that their own success has generated.

There is an increased tendency to talk in terms of 'rights'. Christians will be wary of this; Christian morality expresses itself in terms of willingly shouldered obligations to others. The parable of the Good Samaritan says nothing about the right of the Jew to be looked after: it is all about the obligation that the Samaritan felt.¹¹ So, Christians will be slow to assert that they have a right to anything. Still, sometimes it will be necessary to insist on reparation. We live in a world in which money is necessary. If a negligent act has deprived a patient of his ability to work, then there is nothing impressively spiritual about battling on in poverty where a claim against the negligent doctor would help. Sometimes there may be a positive moral duty to sue. A simple example is the case of a child who has suffered a brain injury at birth because of obstetric negligence. The child will need expensive expert care for his whole life. Money would make his/her life a great deal easier. It could well be argued that the mother's duty to her child demands that she bring legal proceedings in the child's name.

Of course, as mentioned above, there are some very bad reasons for litigating. Some are morally bad: avarice, revenge and vindication of one's own ideas. Others are just an unwise use of the process of litigation. If an explanation is sought, there are now various ways of obtaining one. Litigation often obfuscates rather than clarifies. If one is concerned that no one else should suffer in a similar way, there



Photo: PA

Above: Jayne Elliot with her sons Andrew (hugging) and Sean (left) outside the General Medical Council, where three doctors at the centre of the Bristol heart surgery scandal were found guilty of serious professional misconduct.

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are better ways than litigation, one example being the NHS complaints procedure.

Conclusion

In a fallen world, professionals make mistakes; sometimes these cause damage that money can help to repair or mitigate. There is nothing intrinsically wrong with the idea of litigating to obtain just compensation, although the process of litigation can damage the individuals involved and the values and finances of the society in which it takes place. Claimants need to watch carefully their own motives for litigating. Defendants need to be sympathetic in realising what claimants' real agendas are, and should be quick to explain, apologise if necessary, and, where it is just, pay. Clinicians should be wary of the tendency towards defensive medicine and should strive to maintain trust in the beleaguered doctor-patient relationship. Christians will be keen to encourage alternatives to the acrimonious adversarial system of resolving disputes.

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