Medical negligence: what crisis?

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The medical defence organisations allege that there is a "medical negligence claims crisis" and an "epidemic of medical litigation" in this country, yet the facts do not support such extravagant assertions.

In April 1991, the Federal Government established *The Review of Professional Indemnity Arrangements for Health Care Professionals* (the PIR). It spent four and a half years examining the evidence touching on the need for changes to the tort system as it applies in the health care context. In its final report published in November 1995, the inquiry had this to say:

> *The evidence for a so-called claims crisis is scant - while the reporting of incidents has increased, this has been in response to direct efforts by Medical Defence Organisations (MDOs) to get early notice of potential claims, and does not, thus far, appear to be reflected in increased legal claims. Some MDOs have been making such claims publicly without the production of data to substantiate them.*

What the final report of that wide ranging investigation revealed was that there was indeed a crisis. But it was not in the number of legal claims. Rather it was in the incidence of medical negligence in this country. Its findings were as shocking as those of the Harvard Medical Practice Study of the extent of medical malpractice in the United States. The PIR's research concluded that there were very many adverse patient outcomes which arose out of health care in the Australian health care system - probably considerably in excess of 400,000 per annum, with around 230,000 being preventable with current knowledge. Of such adverse outcomes, 20% resulted in permanent disability or death.

The notion that the proper response to such statistics should be to punish the victims of such carelessness by restricting their rights to be compensated is as irra tional as it is offensive. The time, resources and energy of the medical profession and its medical defence organisations would be better spent on education and training in an effort to reduce the incidence of such preventable problems, rather than on attempts to change the tort system, recourse to which by patients is only had after the damage has been done.

An address to the NSW Medico - Legal Society on behalf of APLA, September 1997

Rising professional indemnity premiums

The proponents of tort reform say that the rising cost of medical insurance

premiums is due mainly to the abuse of the current tort system. Indeed, the Federal Minister for Health was reported in January of this year as claiming that negligence cases, some involving millions of dollars in compensation, caused escalating premiums for medical insurance and in return are responsible for fewer general practitioners choosing obstetrics, which was a big problem in rural areas with shortages of doctors. The evidence is to the contrary.

The cause of rising medical defence contribution rates was closely examined by the Professional Indemnity Review. The report noted that the fostering of a claims crisis mentality can serve to deflect attention from irresponsible financial management by medical defence organisations and can be used to disguise later rises in contributions which have, in fact, arisen because of this financial improvidence. Such improvident strategies can also be used by such organisations to increase cash flow at the expense of longer term financial viability, if an organisation is short of funds. Nevertheless the report further noted that no data has been made publicly available by the medical defence organisations about their operations against which to judge these possibilities. Until such data is available for scrutiny, it is impossible to evaluate claims about the rising cost of premiums and about the probable cause for such rising cost.

On May 21 of this year, the Law Reform Committee of the Victorian Parliament produced a 264 page report, *Legal Liability of Health Service Providers*. Its conclusions were consistent with those of the PIR, finding that the perception of the medical profession concerning recent increases in the cost of professional indemnity insurance is not reflected in a significant increase in either the quantity of claims or their quantum.

While noting that the Australian common law solution to the legal liability of medical practitioners is disapproved of by many doctors, the Committee found that on the evidence before it there was no public benefit in making changes to the common law. The Committee could find no better formulation to balance the interests of doctors and patients than the current tort system.

Urged on by the medical defence organisations, the New South Wales Government has recently decided to reinvent the wheel. It has established its own Medical Liability Forum to consider health professional liability reform. The two main areas identified for review are the limitation of damages and the conduct of medical liability cases in court. These are areas which were fully investigated by the Federal enquiry between April 1991 and November 1995 and by the Victorian inquiry between November 1995 and May 1997. ▶

Caps on damages

At the top of the "wish list" of those who advocate tort reform is a proposal that the damages awarded to the victims of medical negligence should be capped; however such capping will impact most heavily upon those with the most severe disabilities. If proper allowance for these costs is not made in damages award, the costs of such care will still need to be met. The victims will be forced to rely upon the public health and social security systems. The costs will have to be borne by the community. There is no public benefit to be gained by shifting the financial responsibility for catastrophic injuries, from careless doctors to the community, and in the process disadvantaging the innocent victims. Such cost shifting is as individually unjust as it is socially undesirable.

The benefits of the tort system

In the barrage of criticism of the tort system, made by politically influential leaders of the medical profession, the benefits of that system are often overlooked. Foremost amongst such benefits is the deterrent effect of a medical negligence claim on careless professional behaviour. Additionally, the tort system encourages the discovery of medical care mistakes which would not be found but for diligent investigation.

Well publicised medical negligence cases such as *Rogers v Whitaker* have brought about significant beneficial changes in the way in which medicine is practised in this country. Communication between doctor and patient has improved, warnings about risks are more comprehensive, note-taking and record keeping is enhanced, doctors seek second opinions where they are not sure of what they are doing, and doctors are less liable to venture outside their area of expertise. The Private Doctors' Association of Australia saw the tort system as an appropriate system for maintaining professional standards.

Given that professional reputations are at stake in medical negligence litigation, it is incumbent on the medical defence organisations who make decisions on behalf of their members to make reasonable settlement offers at an early stage. Early reasonable settlements minimise the anguish of both the plaintiff patient and the defendant doctor, and contain the costs of the litigation process. I believe that too many medical negligence cases go to court; not enough effort is made by those who make the final decisions in the medical defence organisations, to settle cases and reduce costs. The members of medical defence organisations should demand greater accountability from those who make such decisions and manage their funds.

Conclusion

Inquiries, both here and in the United States have repeatedly shown, the crisis is not in the number of legal claims, but in the extent of medical negligence. The solution to that crisis will not be found by dismantling the tort system and in the process penalising the victims of such negligence. No-one would suggest that the tort system is perfect. However, as a means of resolving disputes and assessing proper compensation, it probably strikes the best balance between the personal interests of doctors, the protection of health care consumers, and the public interest as a whole. ■

Peter Semmler QC will provide the opening address at the upcoming APLA National Conference at the Hyatt Regency Coolum on Friday 31st October.
Phone 02 9904 8200 to register for this event.