LETTER FROM WESTMINSTER

Damages unlimited

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The award of more than £1m to Mr Samir Aboul-Hosn, the young man who suffered brain damage in a medical accident, has served to concentrate minds once again on the problem of civil liability in medicine. From the junior doctor, who sees it in terms of escalating premiums, to the senior administrator, who must take notice of the ever more colossal claims, a shiver of fear as well as sympathy has shaken the medical establishment.

The anxieties promptly reached the Prime Minister, who promised in the Commons last week to consider the matter. In the light of the £1m damages it was put to Mrs Thatcher that it might be time for a royal commission on the legal consequences of medical negligence before the country was plunged into an era of defensive medicine.

The Prime Minister replied that the government did not have a royal commission in mind, and went on: "We cannot interfere in any way with the decision of the courts nor, in that case, would we wish to do so. I will consider further what you have said."

Mrs Thatcher was answering Conservative MP, Mr Michael McNair-Wilson, who is the son of a doctor and spends half his week on a dialysis machine. He was articulating a concern that is widely felt in parliament. Increasing exposure to civil liability is a hazard of other professions than medicine, though none impacts so directly on the public interest.

For while the £1m award concerned a case in the private sector, it will be only a matter of time before the National Health Service faces a similar claim, and that is something that ministers are having to take into account. By and large it is the NHS that pays the lion's share of the awards for medical damage, and the more excessive they become the sooner the government is likely to act.

To be fair, however, ministers do recognise that the arguments reach far beyond a question of money alone. Indeed, financial considerations are secondary to the main issue of the way that medicine is practised in this country and how it would change under the influence of American style defensive medicine. One example would be a swing towards caesarean births simply because of the legal risks involved in a traumatic delivery. Have no doubt that what is at stake is a whole tradition of British medicine and health care as it is now enshrined in the NHS.

Pressure is therefore increasing for the government to state its mind on the implications, financial and professional alike, of how the law is handling medical mishaps. The Prime Minister's interest, now publicly expressed, is never to be taken lightly and it may be assumed that a paper on the subject has been commanded and duly delivered to 10 Downing Street.

In this context I can disclose that ministers are dusting down the report of the Pearson Royal Commission on civil liability, which has lain neglected these past nine years. At last, it seems, they are moving to some kind of decision on a no fault compensation scheme for medical accidents on lines proposed by the BMA—a topic on which the government has pussyfooted until now.

The objective would be to provide adequate compensation within stated limits for death or personal injury based on need and without apportioning fault or blame. The Pearson commission, incidentally,

was not helpful in this respect. It came out against no fault compensation, foreseeing difficulty in distinguishing a medical accident from the natural progression of a patient's condition.

Undeterred by legal quibbles

Nevertheless, in present circumstances the government is unlikely to be deterred by legal quibbles. It is now actively weighing up the pros and cons of a statutory, insurance based, no fault compensation scheme to be offered as an alternative to litigation in medical cases. The balance of argument goes something like this.

There is the option of doing nothing and leaving it to the courts. If individual damages exceed £1m, so be it. After all, the government has a duty to protect the interests of the victim and his right of access to the courts. In any case, it is not proved that the level of damages has yet become uninsurable.

Against inaction there is the unknown burden of having to meet an open ended commitment of court awards and this appals the Treasury. On the other hand, a statutory compensation scheme with limited liability has a calculated cost of £50m a year. At present, court awards cost the NHS under £10m a year, but the NHS substantially helps to fund indirectly some £20m in doctors' premiums to medical defence insurance. It can be assumed on current trends that these costs may well double before long.

There remains, of course, the unquantifiable cost of defensive medicine with its tendency to play safe. How many thousands more clinically superfluous tests and x ray examinations will be taken just in case it is alleged in court later that proper precautions were overlooked? In other words, the cost of defensive medicine would have to be added to the cost of unlimited claims in the courts.

All this suggests a strong case for offering the victims of medical accidents some kind of no fault compensation in return for abandoning litigation. This possibility is reinforced by other sidewinds that are coming into play. One is the lawyers' device of the contingency fee. The legal profession insists that the practice of "no win, no fee" is unethical; but MPs say that there is evidence that that is happening.

Combined with that the NHS is vulnerable to multiple claims. The 1200 haemophiliacs who have been infected via their treatment with the human immunodeficiency virus are potential litigants, though so far they have been advised that they would not succeed. But what of the 487 Liverpool women whose cervical smear tests were misinterpreted in 1984-5? By a Herculean effort that extended as far as Australia and Bahrain the Liverpool health authority has traced all but 50 of the women. Most are properly grateful, but so far two have taken out high court writs and another 48 have registered claims against the authority through their solicitors.

Not surprisingly, parliament's interest in the problem of medical liability has been thoroughly aroused and will not easily subside without government intervention. As another Conservative MP, Mr Andrew Rowe, put it: "We are allowing the courts and insurance companies an increasing say in the way doctors work, and I am not sure I want to have medical priorities dictated in that way."

As this goes to press I notice that a federal jury in Washington has made an award of \$95m (£59m) to an 8 year old boy born with deformed hands and arms after his mother had taken an antinausea drug. That, too, has been noted at Westminster.