LETTER FROM WESTMINSTER

Prime Minister's mind not closed on medical defence

JOHN WARDEN

The wheels of government have been turning in the matter of medical defence insurance. And while they may not have resolved fast enough to pacify doctors facing premiums of over £1000 this year, they have at least been driven by the Prime Minister herself. On the subject of compensation for medical negligence Mrs Thatcher has redefined the government's view. This she undertook to do in the Commons last summer in response to concern about the first £1m award in a medical negligence case—an event that caused ministers to pause and ponder (25 July 1987, p 280).

In the interim the government seems to have been persuaded against making any radical change in the present arrangements for compensating the victims of medical accidents or doing much to alter the balance between doctors who are sued and their patients who suffer. This much is clear from a long and sympathetic letter from Mrs Thatcher to Mr Michael McNair-Wilson, the Conservative MP for Newbury, whose own distressing iatrogenic experience drives him to champion the cause of reform.

Mrs Thatcher acknowledges that compensation for medical negligence is a complicated question touching on the interests of the victim, the medical profession, and the National Health Service. While the Premier's letter makes it clear that her mind is not closed, it is plain that some of the factors that worried the government last summer—mainly the additional call on public funds—have on examination lost much of their force. For example, Mrs Thatcher has this to say on the 87% hike in defence premiums:

"The medical profession are understandably concerned by the increase in the subscriptions of their defence societies even though these are met by the taxpayer. NHS GPs have their subscriptions reimbursed as expenses. NHS hospital doctors have their subscriptions taken into account by the Doctors' and Dentists' Review Body in their recommendations about pay. Whilst subscriptions have increased they are still modest in comparison with premiums paid by other professions who unlike doctors do not obtain unlimited cover."

Mrs Thatcher adds that the direct cost to the NHS in compensation payments by health authorities is still modest (£9.3m last year, not all of which related to accidents suffered by patients). But what of the potential cost to the NHS of a shift towards defensive medicine, which in the United States is a costly consequence of litigation? Defensive medicine entails the ordering of unnecessary tests as a precaution against litigation.

The prospect of medical practice in Britain going the same expensive way was certainly something that ministers put in the balance when they considered whether it might not prove cheaper all round to fund a system of no fault compensation for medical accidents, as favoured by the BMA. In the end, however, the government has concluded that the menace of defensive medicine does not loom sufficiently large in Britain to justify a change.

Mrs Thatcher's letter lists several reasons why, she says, the importance of the American experience is limited. She points out that courts in the United States have tended to establish negligence by stretching the traditional concepts of duty, breach, and damage. In the United States damages are determined by the jury, not the judge, with power to make punitive awards, which English law restricts. And finally, she says, the contingency fee system in America leads to high costs and awards.

What it all means, in short, is that the government has decided that the profession is well able to take £1m awards in its stride. Doctors can bear the cost, the defence societies can pay, and the NHS won't suffer. In any case, the lawyers say that when inflation is taken into account the level of damages for a person rendered quadriplegic has not risen greatly over the past 20 years. The government estimates that the total cost to public funds, including legal aid, comes to no more than £50m a year.

Cost to the public

From the patient's standpoint, however, other imperatives come into play. For most victims litigation is simply too expensive to contemplate. Mr McNair-Wilson tells of a recent case in which a girl suffered a brain injury and was awarded damages of £550 000 including costs. But the family was still left owing £65 000 for other expenses. He adds: "Suing in suspected cases of medical negligence can be undertaken only by those who are very well off or on legal aid."

Mrs Thatcher addresses this problem, too. Her letter recalls that the Pearson Commission 10 years ago looked at the case for alternative means of compensating victims of medical accidents and came down against a system of no fault compensation. The Prime Minister believes the arguments for and against have not fundamentally changed and goes on:

"No fault compensation would certainly overcome the perceived unfairness of treatment between those victims of medical accidents who are awarded damages after proving negligence and those who are not compensated because either they fail to prove negligence or because negligence was clearly not involved. However such a scheme would, in its turn, create unfairness between those who are disabled by a medical accident, who would then be compensated, and those who are equally disabled as a result of the natural progression of their disease."

Instead, the government's answer is to look at ways of reducing the delays and expense of going to law. A formal review of the civil justice system has just been completed and proposed reforms to cut the cost and complexity of legal proceedings in personal injury cases are about to be recommended to the Lord Chancellor.

Mr McNair-Wilson, however, is not satisfied that enough is being done for the many victims of medical accidents who, he says, carry their scars to the grave with no hope of financial compensation. He is pressing for a new inquiry to come up with a form of compensation which would be available in all such cases. It would not necessarily be a no fault scheme, in the sense that he suggests that there should be a disciplinary body to assess the skill and ability of the medical staff concerned.

Although the government seems to resist setting up an inquiry, it has not closed the door completely, for Mrs Thatcher writes: "We are, nevertheless, keeping this question under regular review and will be prepared to consider a change in policy should circumstances appear to require it."

Moreover, in a Commons adjournment debate before Christmas the Attorney General, Sir Patrick Mayhew, confirmed not only that the Department of Health and Social Security had the whole matter of compensation under review but also that discussions were planned between officials and the BMA about a possible pilot scheme for no fault compensation.

The wheels are still turning, however slowly.