

Treating the NHS: how the law may help

Edward Fennell

In the run-up to the budget the chancellor Philip Hammond made it clear that there would be no extra money for the NHS. Instead the government is looking for improved organisational performance. Whether the law is helping or hindering that process must now be a matter for debate. "It is a truism that the NHS is beset with difficulties, but it's not always appreciated how much of a part in the drama legal challenges play," says Fenella Morris, QC, at 39 Essex Chambers.

The standout issue is medical negligence. The NHS Litigation Authority is undertaking a tendering exercise that is expected to slim down its panel of law firms. Greater cost effectiveness will, no doubt, be required. This has become an even bigger issue since the lord chancellor, Liz Truss, used her powers last week under the Damages Act 1996 to increase compensation awards for serious personal injuries (*see story, left*). The cost of this to the NHS is predicted to run into an extra £1 billion a year and is a wake-up call for how the NHS handles such cases, underlining the need to slash the number of these incidents.

"Last year the Care Quality Commission issued a briefing on 'Learning from serious incidents in NHS acute hospitals,'" says Deborah Blythe of Russell-Cooke, pointing out the comment by Professor Sir Mike Richards, the CQC's chief inspector of hospitals: "A service that is safe and well-led will see every serious incident as an opportunity to improve."

However, this doesn't always happen. "One issue is the discretion allowed to trusts in deciding how and whether to investigate deaths," says Blythe. "This allows inconsistencies to emerge, such as the disproportionately small number of investigations held into the deaths

of those with learning disabilities."

Southern Health NHS Foundation Trust has proved to be one of the worst offenders in this respect and was back in the headlines this week when it was announced that it was to be prosecuted by the CQC (under powers granted after the Mid-Staffordshire scandal) for failing to provide safe care and treatment after a patient fell from a hospital

roof. How that prosecution progresses will be viewed with great interest across the NHS.

Meanwhile, at the other end of the scale are endless debates about reconfiguring NHS management. "Legal problems will surface from the transformation of the health service," says Richard Clayton, QC, of 7BR. "A national system administered by central government has changed into a localised decision process, run by NHS trusts and clinical commissioning

groups. For the first time debates are taking place about whether a decision maker has acted within its powers — or has, instead, acted *ultra vires*. As more health care cases litigate, complaints of *ultra vires* will become routine."

Under the spotlight is the creation of "Sustainability and Transformation Plans", where there is potentially a legal minefield ahead, says Morris, due to processes of consultation and the need for an equality impact assessment. "An NHS body proposing a substantial change to its arrangements [will have to] get these right, and come to a rational and proportionate decision, or face the risk of a judicial review," Morris says.

Bruce Potter, the chairman at Blake Morgan, highlights the need to change service models "at speed and scale". "The legal challenge here will be avoiding the historic delay that has plagued every major service change — and this must happen across the whole NHS."

The other big problem, pinpointed by Potter, is the need to integrate services within the health sector and between health and social care. "The legal challenge is that while they are very similar services, they are being contracted for, funded and provided in very different ways," he says.

Any further reform is likely to have an effect on employment and redundancy. "A key issue in NHS employment law is the proposed £95,000 cap on exit payments," says Andrew Davidson of Hempsons, adding that the result will be a quick move to the redundancy door by those who might be affected.

So can the law help to solve any of these problems? "It's not so much the legal processes that need changing," says Rachael Heenan of Capsticks, "but

the political and regulatory framework which needs to be streamlined to reduce the burden on NHS organisations. Often these have a clear plan about what they need to do, but either they don't have the legal power to do it or it will be blocked locally or nationally." So Hammond is right. More money alone is not the answer.





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The government wants to see improved organisational performance in the NHS

