

## Protecting the NHS from extortion

Joe Egerton

Last month, the National Health Service Litigation Authority (NHLA) published its annual report for 2008/9. This shows that the NHS paid £769 million in compensation in 2008/9, including over £100 million to lawyers acting for claimants. Ahead of the NHLA's public meeting next week, Joe Egerton argues that this demonstrates a flawed understanding of the relationship between the NHS and those it serves.

Each year, the NHS is the subject of just under 5,500 claims arising from alleged clinical negligence.<sup>1</sup> Of the larger claims over the last ten years, 53% have led to an award, and 47% have been abandoned or failed. The total paid out rose from £560 million in 2005/6 to £633 million in 2007/8 and £769 million in 2008/9.<sup>2</sup>

A recent programme on the BBC's *File on 4*<sup>3</sup> concentrated its attention on the amount paid to lawyers, in particular those acting for claimants against the NHS. The legal costs incurred are horrifying. There was a good deal of discussion on *File on 4* over whether such charges were necessary or reasonable. Over-charging of legal fees is a matter on which St Thomas Aquinas and St Augustine had a firm view: 'If, however, they wickedly extort an immoderate fee, they sin against justice. Hence Augustine says that "it is customary to demand from them [lawyers] restitution of what they have extorted by a wicked excess, but not what has been given to them in accordance with a commendable custom."<sup>4</sup> The cost of litigation, including the effect of the conditional fee system, is currently under review.<sup>5</sup>

But what about the principle of bringing a claim against the NHS in the first place? Should the NHS be made exempt from such claims?

'But surely', it will be said, 'are you really saying we should not claim for clinical negligence? We have an entitlement, a right, to be compensated for errors. If you want to give up your right to compensation, that

is up to you; why enforce your willingness to waive a claim on me?'

To make the NHS immune from litigation for clinical negligence is not a step that should be taken lightly. Even imposing limits raises questions. The consequences of medical negligence can be horrific, that cannot be at issue; nor can the need for development of care and for learning from and preventing mistakes. But the cost of the present system means that

we need to ask searching questions.

We might start by drawing a distinction between claims made when somebody dies and claims for damage to somebody who survives.

Last year, I went to a funeral of an old colleague who had left an eleven-year-old daughter – his symptoms, at an early stage, had been mis-diagnosed. In 1992, our son was still born – possibly as a result of an inexperienced midwife not summoning a specialist earlier. There have been many well-publicised cases of hospitals failing in various ways. *File on 4* provided harrowing examples of avoidable deaths: of a young husband dead within 11 months of marriage, and of a man waking up to find his wife dead beside him. But money cannot bring the dead to life. The immediate consequence of bringing a claim against the NHS is to reduce the amount available for other patients. Such claims may result in the NHS learning, in potential future errors being avoided (and it should be said that in the examples given, the wife of the young husband and the widower were both clearly persons whose



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motivation was to save others from similar mistakes); but there is also a risk that fear of litigation may encourage the covering up of errors and suppress the honest and thorough examination of what has tragically gone wrong in such cases.<sup>6</sup>

The situation is different when an individual is damaged through clinical negligence, left unable to work or in need of expensive support; and of course in some cases the death is of a breadwinner, so there is a financial hole caused by the clinical negligence. Where there is real need for help, then help must be provided – but surely this needs to be for all such cases, not only those where negligence is proved.

The instinct to make claims arises from treating the NHS as any other provider of services. If my plumber is careless and floods my house, I can look to him to make good the damage; if my surveyor overlooks a serious defect in a house that I am going to buy, I can sue him. But is the NHS just like another provider of services? It seems to me that it is not. The healthcare provided by the NHS is in the nature of a gift offered to me by my fellow citizens. As fragile and vulnerable human beings, it is in our mutual interest that we should have arrangements to secure care in illness just as it is that we should have support in old age and as it was that we should have been supported as babies and young children. But the NHS is not an institution sustained solely by self-interest, any more than were the great Benedictine Abbeys that provided ‘a welfare state’ before the ‘monstrous rapine of King Henry VIII’.<sup>7</sup>

It is a defect in much contemporary thinking to assume that every relationship is ultimately based on self-interest. And not just contemporaries make this error: [the labourers in the vineyard](#) (Matthew 20:1-16) thought that eternal salvation was something they had earned! This error allows all relationships to be represented as, at root, relationships of exchange. Although the benefit of commercial relationships was famously articulated by Adam Smith – ‘It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner, but from their regard to their own interest’ – we should note that he preceded this with the observation: ‘Man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only.’<sup>8</sup>

There is a need for relationships that are not based on calculation if commercial relationships are to contribute to overall flourishing rather than to undermine and corrupt communal ties. Commercial relationships need to be embedded in non-commercial relationships, relationships that are based on humanity.<sup>9</sup> The Chinese philosopher Mencius said that ‘all human beings have the mind that cannot bear to see the suffering of others...when a human being sees a child fall into a well they all have a feeling of harm and distress.’ This cannot be based on any relationship, familial or commercial, other than that of being members of the human race: to fail to go to the child’s aid is to show one is lacking in humanity.<sup>10</sup>

Such an approach sits uncomfortably with modern analyses that separate justice from generosity. Justice, it is generally conceded, is about rendering what is due – but that is often expressed in terms of strict legal liability; and generosity is about giving of one’s own possessions what is not due – generosity, it is said, is altruistic. As we have noted, this division is at odds with the underlying thought of Adam Smith; and it may be added that it is at odds with that of the former Minister of Health who did most to introduce the economic thinking of Hayek to British political economy but remained firmly committed to the NHS.<sup>11</sup>

The sharp division is rejected explicitly by St Thomas Aquinas, and it is illuminating to explore his reasoned arguments, as they are more detailed than those of later thinkers.

St Thomas’s approach involves a consideration of what is due in strict justice; of liberality; of the virtue of doing good (*beneficentia*); and of the virtue of taking pity (*miser cordia*). Both *beneficentia* and *miser cordia* are seen as the effects of *caritas*, the redeeming love of the Father and Son working through the Holy Spirit. *Caritas* is thus the pre-eminent theological virtue. Justice on the other hand is a moral virtue, necessary for the good functioning of any society. Every human being has the potential to understand what justice requires of him or her.

Justice is related to liberality or generosity: ‘Liberality is not a species of justice, since justice pays another what is his whereas liberality gives another what is

one's own. There are, however, two points in which it agrees with justice: first, that it is directed chiefly to another, as justice is; secondly, that it is concerned with external things, and so is justice, albeit under a different aspect. Hence it is that liberality is reckoned by some to be a part of justice, being annexed thereto as to a principal virtue.<sup>12</sup>

Although *miser cordia* is a theological virtue, it would be a mistake to suggest that St Thomas thinks it plays no part in the secular world. His discussion draws on the Roman philosophers Cicero and Sallust, as well as Aristotle. The central feature of *miser cordia* is that it moves my reason by perceiving another's suffering as my own. It is not just that I feel unhappy at your misfortune, or that you feel unhappy at mine; it is that my reason is moved and hence I am (or you are) driven to act.<sup>13</sup> And, quoting St Augustine, St Thomas links this to justice, which is safeguarded when help is given to the needy.<sup>14</sup> *Miser cordia* is a virtue at work in the world, notwithstanding its origin in divine grace, and one necessary to the survival of a society of vulnerable human beings. Where it differs from justice is that your misfortune (which I can take into myself as my misfortune because I could at any moment fall ill or be injured, or suffer some other deprivation) places upon me a demand that is determined solely by your need: in the case of the NHS, your and my need for medical attention.

Although there have been occasional acts of spectacular generosity by individuals, there has never been a time at which it has been feasible for everyone in need to be cared for by the generosity of individuals. Some institutional arrangement is needed. President Obama is currently grappling with the defects of the American system, defects exemplified by its failure to provide adequate help for the poor. In many countries, this is provided by a comprehensive insurance system. In Britain, there has been a principle of health care free at the point of delivery and a National Health Service directly under the control of a Minister.<sup>15</sup> So the NHS cannot be regarded as simply a commercial supplier; nor is it a product of an unconstrained liberality by the rich: it is part of the community to which we all belong. And so it would seem that bringing a claim against the NHS cannot be regarded in the same way as bringing a claim against a negligent surveyor, and is a very questionable activity indeed.

In any discussion of what might be done, we must be careful to avoid indifference to the need to minimise cases of negligence. St Thomas is quite clear about negligence being wrong: 'Negligence denotes lack of due solicitude. Now every lack of a due act is sinful: so it is evident that negligence is a sin.'<sup>16</sup> 'Solicitude' according to St Thomas is connected with being watchful or alert and is a part of *prudencia*, the cardinal virtue necessary for sound reasoning – a virtue that is displayed by a person whom we would characterise as 'responsible'. In any reformed system, there must still be careful investigation when something goes wrong, but the focus needs to be on *learning*. The NHS Litigation Authority has developed a modular approach to risk management that looks impressive and valuable in its encouragement of learning across the organisation. In debating reform, we must be careful not to convey any message that this achievement is in question or that these skills may no longer be required.

We must also bear in mind that the threat of litigation may actually make a learning process harder. We know from St Ignatius of Loyola that regular reflection on our day is a means of learning both from what we have done right and what we have done wrong<sup>17</sup>, and that applies both universally and to the specific case of reducing clinical errors. Such reflection is harder when there is a fear that admitting a mistake can lead not to the matter being remedied but to protracted litigation, with all that entails.

There are a range of options for reform. One possibility would be to confer on the NHS immunity from action for negligence. A number of regulators enjoy such immunity. Another would be to limit damages and award them based on criteria of 'need'. Another still would be to restrict the costs that could be awarded to lawyers. Any discussion must, as noted above, address the problem of support for those whose lives are severely curtailed by something going wrong during treatment – but the principles that give rise to the provision of a national health service would also point to providing help based on need for all those who suffer, not just those able to prove negligence.

If our Parliamentary system were functioning properly, one would hope that there would be a full debate in the House of Commons on the present deplorable state of affairs. If it became clear that the

House of Commons would pass an Act to restrict the scope for litigating against the NHS, then the precise changes could be hammered out either by the Health Select Committee inviting evidence or by a White Paper or draft Bill. Is it too much to hope that our MPs have now grasped the extent of public fury at their failure to deal with such issues and that they will insist that there is such a debate?

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<sup>1</sup> [National Health Service Litigation Authority](#) (NHSLA) receives claims against NHS trusts and previous NHS bodies (e.g. Regional Health Authorities) The most recent figures are to be found in its [Annual Report and Accounts for 2009](#) The NHSLA deals with almost all claims – some of which relate to employment matters etc. For a full understanding of its activities, please see the report. I have given figures for clinical claims.

<sup>2</sup> Awards often include periodic payments and historically these have been increased by the RPI (the Retail Price Index); however in January 2008 the Appeal Court in a case referred to as *Thompstone* determined that these payments should be increased according to ASHE (The Annual Survey of Hours and Earnings). This has significantly increased awards.

<sup>3</sup> Tuesday 30 June

<sup>4</sup> Summa Theologiae IIaIIae Q71 Art 4  
<[http://www.ccel.org/ccel/aquinas/summa.SS\\_Q71\\_A4.html](http://www.ccel.org/ccel/aquinas/summa.SS_Q71_A4.html)> St Thomas's quotation from St Augustine comes from Ep. cliii ad Macedon.

<sup>5</sup> By an [inquiry by Lord Justice Jackson](#). An interim report has been published.

<sup>6</sup> I have written earlier in *Thinking Faith* on the [vice of accountability](#) and how it can distort our judgment and lead to wrong actions.

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<sup>7</sup> Robert Parsons: *Jesuit's Memorial for the Reformation of England*, London 1790, page 60. (The edition edited by Gee – reproduced by [Kessinger Publishing Rare Reprints](#).) The damage done to the welfare of the people of England by the destruction of the monasteries features prominently in Disraeli's novels, *Coningsby* and *Sybil*; significantly, he follows Parsons' analysis even to the point of praising the favourable treatment of tenants by monastic landlords (page 53).

<sup>8</sup> Smith 1776, book I, chap. 2, para. 2; available online at: <http://oll.libertyfund.org/220/111839/2312795>.

<sup>9</sup> This is a brief and rather crude summary of an argument developed by Alasdair MacIntyre in *Dependent Rational Animals: Why humans need the virtues*, especially chapter 9. *Dependent Rational Animals* is largely based on St Thomas Aquinas's account of the virtues and develops a Thomistic argument for today.

<sup>10</sup> MacIntyre, *op cit*, page 123

<sup>11</sup> Enoch Powell. See Simon Heffer's biography *Like the Roman* Weidenfeld and Nicholson London 1998 both for an account of Powell's role in promoting the ideas of Hayek and for his views on the NHS.

<sup>12</sup> [ST IIa IIae Q 177 Art 5](#)

<sup>13</sup> [ST Iia IIae Q30 Art 3](#)

<sup>14</sup> *De Civitate Dei xi, 5*

<sup>15</sup> Aneurin Bevan rejected the model of the nationalised industry boards established by Herbert Morrison and once declared that he would be responsible for everything – down to the last dropped bedpan! Intermediate bodies have been established over the years and ironically the Conservatives are now talking of an NHS Board, making the NHS a Morrison style nationalised industry.

<sup>16</sup> [ST IIa IIae Q54 Art1](#)

<sup>17</sup> The Examen is in the First Week of the Spiritual Exercises but these are notes for directors helping individuals to do the exercises. The Examen needs to be experienced. There are numerous examples on the web - for an online, guided experience, go to the [Pray-as-you-go](#) website and then click on the box marked "Review of the Day". This is a talked-through examen.