

Medical Consumers Association was formed at the University of NSW in 1977. Its main role has been to ensure that the so-called 'consumer voice' is taken in vain as any sort of rationale for reforms. Medical consumers do not have a common voice, nor should they. After all a medical practitioner is also at times a medical consumer. The concerns of patients, their carers, and their health professionals may at times conflict. Thus, MCA is putting in more than one submission so that the different perspectives, based on different experiences, may be taken into account.

Below is a summary of the issues in the terms of reference of the Productivity Commission:

Real costs of legal representation and trends over time

Medical errors cannot be remedied easily in law. Courts are limited to economic settlements. Costs are born by the entire community, particularly carers. Legal representation, therefore, has as its main overall benefit a deterrent effect. As Lord Hewart put it: “ ... *what is really of value, and of inestimable value, is the public and permanent spectacle which shows that if contracts are broken damages must be paid, if torts are committed unpleasant consequences follow, and if crimes are perpetrated punishment must be suffered; with the total result that in general contracts are not broken, torts are not committed, and crimes are not perpetrated. It is really a vast system of public insurance. The knowledge that the machinery exists, and that when it is employed it is employed with skill and without favour, has the effect of rendering its employment unnecessary save only in the exceptional case.*”

Clearly both sides in a dispute need affordable representation. MCA is aware of negligence cases that have gone on as long as 20 years, even in highly-publicised circumstances such as the Chelmsford saga, in which there was general consensus of scandal. Slow speed is therefore one of the main costs. The uncertainty hangs over the heads of both the injured patient and the health practitioners.

Passing this to complaints bodies such as the HCCC or Ombudsman is only a partial solution. Often the patient is unaware of the issues and only a whistleblower nurse or doctor would be the one in a position to complain. Their route should be internal, rather than having to stick their necks out by going to an outside body. The inadequate protection of whistleblowers is yet another part of the real cost of lack of legal remedies as their careers are often shattered.

Despite some legislation, these issues have not improved much in recent years.

Level of demand for legal services

Medical error will become an ever-greater issue. This is the irony of Medicine: as more diseases are conquered people live longer. As they age they may visit hospitals more often and in a more vulnerable state. Smaller errors will have disproportionate effects. Thus with no other available remedy there is bound to be increased demand for legal remedies resulting from medical error. These people will be inherently disadvantaged through disability. Their cognitive deficits may prevent them seeing the situation and may lead them to make poor decisions.

Factors that contribute to the cost of legal representation in Australia

Victims of medical error are in a particularly vulnerable economic position. They are unemployed, incapacitated and already have incurred expenses for medical care. Even if insured, they pay the price of time off work for selves and their carers.

The difficulties in 'scoping' a case are one of the first hurdles. Legislation has attempted to curb unrealistic and 'unwinnable' cases going forward but the complexities of medical error make it

difficult to affordably work out what actually happened. Often expensive expert witnesses must be called in from the very beginning. Medical colleagues are sensibly reluctant to get involved.

Whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute

All the costs such as expert opinions are amplified by these having to go through lawyers. It is not uncommon for the lawyer to get paid more for a one-page letter requesting an assessment and expert opinion than the practitioner makes for doing the review of records, interview and tests of the patient, followed by an extensive report and being subjected to cross-examination.

This is an artefact of the 'billable hours' and high hourly rates charged by lawyers. There are no market mechanisms such as competition holding down costs. While some of the high cost is justified by the extensive training and indemnity coverage to practice law, there has long been a concern that many costs can be invoked at will, rather than from any market considerations.

The impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services

The fact that cases were able to drag on for 20 years speaks for itself. There have been many reforms since. There are inherent problems because both parties have rights to appeal. Clearly, constraining rights is not a solution.

It should be noted that many of the key actions in a medical case need to be taken by colleagues and not patients. Patients may be the last to know anything went wrong. A big issue then becomes access to legal protections and services for health professional whistleblowers as well as the patients.

MCA has cause for concern based on experience. It is not uncommon for the blame to end up attached to the whistleblower rather than the perpetrator. Even when this has been exposed publicly via the media and widely condemned the outcome remains the same: the whistleblower is demoted, the perpetrator is promoted. This puts the patient at the centre of all this even further behind.

Economic and social impact of the costs of accessing justice services, and securing legal representation

The impact of a medical error is felt by many beyond the victim. The workforce may lose a taxpayer and add a dependent. It may also take a 'carer' out of the workforce, doubling the economic impact from unemployment and dependency. Adding legal costs to this foundation can lead to bankruptcy noting that the proportion of bankruptcies is one factor in assessing the economic health of a nation.

The legal sector is like another economy. The hourly rates charged by lawyers are far beyond the capacity of the average person to pay. This is because some firms are priced to the capacity of corporate clients. Only in cases where strict case-management and opportunities for lawyers to access public funds for their fees exist do average people have a chance of accessing legal services.

The justice system employs technology which doubles in capacity/price every 18 months (Moore's Law). But these savings and efficiencies are not passed on to consumers. This is because the major billable hours are for the face-to-face human component. These rise with inflation, seldom affected by economic downturns.

Impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes

The Mental Health Royal Commission (Slattery, 1990) noted that much of the problem in medical negligence cases was from establishing parameters for professional conduct. Legal procedures merely magnify the inherent difficulties and costs in establishing these parameters by other experts. Medical errors tend to involve highly complex technological issues. The landmark US decision, *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S., 113 S.Ct. 2786 (U.S. Supreme Court, 1993), forced the US courts to go back to basics and examine the claims of scientific credibility in the following terms:

- technique "can be (and has been) tested ... can be falsified";
- "subjected to peer review and publication"
- "known or potential rate of error . . . existence and maintenance of standards controlling the technique's operation"
- per Frye " general acceptance in the field"

Daubert reduced the reliance on peer acceptance, but it may have added to costs in that lawyers and the experts who inform them are both highly-paid professionals. It may also involve additional judicial time.

Alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these

Technology has always promised to provide alternatives but runs afoul of the high cost of face-to-face billable hours for experts and lawyers. The same goes for cooperation. It might be thought that in some medical error cases a simple meeting of parties at the lower end of the spectrum, such as the ward staff, would lower costs. But this runs the risk that participating staff expose themselves to career damage. It may seem a common sense and cheap alternative for the patient but the patient has little to lose. The result in practice is that they could well see the same sorts of influences that would play out in a courtroom.

Reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system

NSW has brought in many procedural reforms through the 2005 *Civil Procedures Act*. These focus on strict case management by the Courts, time-tabling of cases, removing the opportunity for numerous interlocutory motions and mandatory pre-trial court-based mediations. Coupled with statute-based regulations regarding costs, including apportionment of costs in *Calderbank* -style cases, these appear to have been effective in reducing the number of cases actually coming to Court. Anecdotal evidence has those who benefitted from the lucrative medical-legal sector (legal practitioners and medical experts) moving to other States in order to maintain their income since these reforms, along with statutory reforms mandating and limiting payments that were introduced.

Of course, every system has its downsides and some would argue that pre-trial settlement may preclude the establishment of meaningful precedents – a consideration which is irrelevant to most medico-legal litigants who are under numerous pressures, particularly in relation to health and finances.

It is clear that the most difficult and serious cases will still involve significant costs and lead-time. Appeals, which may result in an Order that the case be re-tried, will double the legal costs for a litigant and may result in a hurried settlement, rather than a re-hearing or re-trial of the case.

There are now alternatives such as complaints commissions. Some look to overseas solutions that minimise the adversarial component. These bureaucratic and codified solutions are also subject to criticism and are of little use to litigants in medical cases as they cannot award compensation or damages.

As many medical cases involve government bodies, the judiciary is put in the invidious position of having to examine its own paymaster. At least with an adversarial system that burden can be placed on advocates, with the judges merely having to make decisions rather than presenting the cases against their own benefactors. Judicial independence may not be a sufficient barrier to this as the judges have to go through some ranks to obtain their positions and often look to post-retirement legal practice.

Data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

There are few long-term follow ups of cases. Privacy considerations might be met by having participants sign agreements that would allow authorised independent investigators such as academics to contact them. Clearly, such things can be invasive. Victims of medical error are usually subjected to medical and psychological tests for years after the accident. To then add legal researchers to the mix might seem onerous.

However, a lot of valuable information could be collected painlessly. The long-term employment outcome of litigant and carers should be documented. The length and extent of trials and appeals is a matter of public record.

There should be no 'privacy' concerns whatsoever applied to the legal profession. Their monopoly is conferred entirely through legislation. Their billable hours and expenses should be well-documented and available at the least to government reviewers and arguably made public. Much of their income derives from cases against and for taxpayer-funded institutions so is not at all a free market enterprise.

The same applies to health practitioners, most of whom are now regulated by Federal law. Their legal fees for acting as 'officers of the court' when they appear as experts should be open to scrutiny. While experts need some protection against adversarial attacks on their registration the same protections need not apply to their reports.