No-Fault Compensation for injury resulting from medical treatment: Consultation Questions

1. The research team supporting the review reported (Farrell *et al*, 2010[19]) that previous research suggests that when an error has occurred, patients expect doctors to make a meaningful apology, provide an explanation and take steps to prevent the error from recurring. The findings of their research would appear to support the contention that for many, if not most, patients this is the primary aim, rather than a financial award.

2. The Scottish Public Services Ombudsman (SPSO) has published advice in relation to apology[20]. This advice was referenced in the guidance issued to NHSScotland in March 2012 on the handling and learning from feedback, comments, concerns and complaints.

Question 1: What, if any, steps do you feel are necessary or appropriate to ensure that when an error has occurred, patients receive a meaningful apology?

Written apology and acceptance of what happened. Also steps to offer support and guidance. Appropriate discipline when apology is not forthcoming.
Also depending on the severity or the circumstance a public notification needs to be issued.

[19] http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/No-faultCompensation/Volume-II-report
[20] http://www.spso.org.uk/files/2011_March_SPSO%20Guidance%20on%20Apology.pdf

3. The Review Group considered that the following were essential criteria for a compensation scheme for injuries resulting from medical treatment:

- The scheme provides an appropriate level of compensation to the patient, their family or carers
- The scheme is compatible with the European Convention on Human Rights
- The scheme is easy to access and use, without unnecessary barriers, for example created by cost or the difficulty of getting advice or support
- People are able to get the relevant specialist advice in using the scheme;
- Decisions about compensation are timely
- People who have used the scheme feel that they have been treated equitably
- The scheme is affordable
- The scheme makes proportionate use of time and resources
- The scheme has an appropriate balance between costs of administration (e.g. financial or time) and the level of compensation awarded
- Decisions about compensation are made through a robust and independent process
- The scheme has an independent appeal system
- The scheme treats staff and patients fairly/equitably
- A reasonable time limit is set for compensation claims.

Question 2. Do you agree that the principles and criteria set out above are essential in a compensation system?

Yes x No ☐

2.1 Are there any to which you would attach particular priority or importance? Are there any others you would add?

1. **Clarity on payments if a person is injured in the country where to reside in another area/country.**
2. **That the compensatory amount, be judged on the level of disability and care required. This should be determined at the beginning and not constantly trying to reduce the amount in effect it should increase not decrease throughout their life.**
3. **Legislation should be clearly written and not left up to the interpretation of individuals.**

4. **When a case is initially accepted it should include the immediate family/carers that may be seriously effect. As a result of the injury changing their lives.**
5. **That family/carers be treated in a friendly and caring manner genuine.**
6. **That family/carers are not made to feel like liars.**
7. **Not to constantly have assessments and harassment from the agency. (that lots of genuine people are extremely distressed about what has happened and the constant questioning and constant going over what they have been through seriously mentally effects)**

4. The Review Group identified a number of issues it believed were relevant to the likely success of any system and agreed that the following criteria were desirable, and considered and highlighted the importance of the wider issues detailed below:

Desirable

- The public in general trusts the scheme to deliver a fair outcome
- The scheme does not prevent patients from seeking other forms of non-financial redress, including through the NHS Complaints system
- The scheme encourages transparency in clinical decision-making
- The scheme contributes to rehabilitation and recovery.

Question 3: Do you agree that these criteria are desirable in a compensation system?

Yes x **No ☐**

3.1 Are there any others you think are desirable and should be included?

1. **The scheme contributes to rehabilitation and recover, but if there is a treatment that may help that person and is not provided in Scotland or the UK that assistance should be forthcoming to pursue out of the country.**

Wider issues

- The scheme contributes to:
  - organisational, local and national learning
  - patient safety
  - quality improvement
- Lessons learned can be used to influence organisational risk management in the future
- The scheme encourages and supports safe disclosure of adverse events
- The scheme does not put barriers in place for referral to regulators of any cases which raise grounds for concern about professional misconduct or fitness to practise.

Question 4: Do you have views or ideas on how a compensation scheme could more effectively contribute to the wider issues identified above?

Even though a no-fault system is being reviewed. If a health professional has made severe mistakes that could have been avoided, then they need to be accountable so that it is still possible to maintain appropriate levels of care. If they are not held accountable they may continue to make the same mistakes over and over with no consequence. Thus not providing patient safety. Also then not improving on the quality. As personally experienced with the No fault New Zealand scheme. There should be a transparency regarding misconducts and misadventures open to the public so that they can make an informed choice regarding the professional and the treatment.

5. When considered the Review Group's suggested essential principles and criteria against other schemes and the Swedish model came out on top. Based on this the Review Group offered:

Recommendation 1 - that consideration be given to the establishment of a no-fault scheme for medical injury, along the lines of the Swedish model, bearing in mind that no-fault schemes work best in tandem with adequate social welfare provision.

Question 5: Based on the background information on the system in operation in Sweden given in Annex A would you support the approach suggested in Recommendation 1?

Yes ☐ No x

If not, why not and what alternative system would you suggest?

Even thou I somewhat disagree with the American system of over the top blame, there is a need for accountability without which there may be a door or window of opportunity, for so called professionals to continuously perform acts of mall practice. Thus not offering an acceptable service as they would be more inclined to not give a high level of care. For instance I know of a midwife that had lots of complaints about her quality of care, yet she was still able to continue to practice including homebirth were she did not have any form of supervision and still to this day continues to practice even after causing harm and death to multiple clients.

Recommendation 2 - that eligibility for compensation should not be based on the 'avoidability' test as used in Sweden, but rather on a clear description of which injuries are **not** eligible for compensation under the no-fault scheme.

Question 6: Would you support the approach in Recommendation 2? This would mean for example that where treatment carries a known risk and the patient has given consent to that treatment it would not be eligible.

Yes ☐ No x

If not, why not?
I do not agree with this, as everything that a person has done has a small amount of risk. Even to give birth has a small risk. Also even with a small risk the doctor, midwife or dentist would also not aim to increase the risk. It's all about making them accountable for their actions and making sure that they are on top form with their service they are offering. I am afraid that if you remove the ability to make them responsible they may become irresponsible. If the health professional performs to the best of their ability and education then there should not be a fault or problem.

If yes, what other injuries would you consider should not be eligible?

6. The Review Group was of the view that any recommended changes to a no-fault system should cover all healthcare professionals including those not directly employed by the National Health Service. The group believed that fairness dictated that all patients whether treated by the NHS or privately should have access to an improved system if possible. If this proved impossible, the group nonetheless believed that there were benefits that could be obtained by a move to no-fault for NHS patients. The group's preference was that **all** patients should be covered by the no-fault scheme and offered:

> **Recommendation 3 -** that the no-fault scheme should cover all medical treatment injuries that occur in Scotland; (injuries can be caused, for example, by the treatment itself or by a failure to treat, as well as by faulty equipment, in which case there may be third party liability)
>
> **Recommendation 4 -** that the scheme should extend to all registered healthcare professionals in Scotland, and not simply to those employed by NHSScotland.

(As explained in the Cabinet Secretary's foreword we acknowledge that further work is needed to help in our understanding of the volume, level and cost of compensation claims handled by the Medical Defence Unions and private healthcare providers. We will seek to explore this further with the relevant stakeholders during the consultation period.)

Question 7: Do you support the view that, if introduced, a no-fault scheme should cover all clinical treatment injuries (e.g. private healthcare and independent contractors) and all registered healthcare professionals and not just those directly employed by NHSScotland?

Yes x **No ☐**

If not, why not?

7.1 What, if any, difficulties do you foresee in including independent contractors (such as GPs, dentist etc) and private practice?

One difficulty I can foresee is that the NHS has a governing body to oversee practices, yet if private what governing body would monitor them. This is difficult.

7.2 What are your views on how a scheme could be designed to address these issues?

This is difficult, with our experiences of a no fault system where do you stop, i.e. if somebody ran a person over with a car can they then claim no fault? Because a health professional can seriously injure a person then claim no fault. It is quiet similar really.

Question 8: The intention is that if introduced the no-fault system will not be retrospective. However, consideration will need to be given to when and how we could transfer to a new system and how outstanding claims could be handled if/when a no-fault system was introduced. What are your views on how outstanding claims might be handled?

There are a lot of issues with this, i.e. with claimants that have had injuries or tried to claim for injuries are then open to reclaim as there is no fault to prove. From our experience this opened up every opportunity for people to "rip" the system, i.e. claiming they have hurt themselves and claiming as they have no fault to prove. I have seen this first hand for example I had a neighbour in New Zealand who claimed she slipped and hurt her back/shoulder then got an allowance for this as there was no fault to prove she received house cleaner, gym financial assistance. Yet she was out in her garden gardening and doing all the other things that she claimed she could not do. I have seen this so many times. I find it difficult to recommend a way to transfer over as I have seen so many problems with the no fault system.

7. The Review Group did not favour the use of a tariff system for compensation, as it felt that this would not address individual needs and it was unlikely that people would buy into a system where compensation was based on a tariff. The group therefore offered:

> **Recommendation 5 -** that any compensation awarded should be based on need rather than on a tariff based system;

Question 9: Do you support the approach in Recommendation 5?

Yes ☐ **x** **No** ☐

If not, why not?

I put an x in-between as I sort of agree, from our experience when that person has the first physical/psychological assessment grading there level of injury/disability should reflect the financial needs and requirements to assist that person. For example our little girl was classified as 100% disabled. The amount should reflect that for the rest of her life not then to be assessed to cut the amount constantly if there are any improvements in the quality of her life as opposed to there ability. It can make some claimants apprehensive with pushing to help those people to try and promote the improvement of quality of life.

9.1 What are your views on the assumption that the level of payments will be similar to those settled under the current system?

If this were true then that would be great, sadly thou the cost surely would come to much more, i.e. (and sorry for keep using i.e.) but we are in a system that is supposed to be a no fault system. The costs are very high, for specialist, assessors, doctors etc. The commission constantly say no or argue even when assessors recommend and advice, so this then has the claimants having to go to review which costs a fortune as they get lawyers assessors ect involved. If you add up the cost of what my daughter has cost through this no fault system it costs more than if we had been awarded a certain amount that we could put in trust and use to help her quality of life, we would have avoided all the heart ache all the arguments. We would not have had to go to the press to get help lawyers or court. It's a very costly thing in the end.

1. **Very simple example this year we requested two specialist cups (nosey cups) with a total cost of under ten pounds, for this we had to have an assessor sent out to see us they did a review they investigated. All this came to a estimated fee in excess of 200 pounds. This is for one item imagine the cost for a more complex item.**

8. The Review Group was satisfied that a no-fault scheme established as they describe would be fully compatible with the requirements of the European Convention of Human Rights, based in particular on the need – as in Sweden and New Zealand – to build in appropriate appeals mechanisms, with an ultimate right to appeal to the courts on a point of fact or law. In addition, retention of the right to litigate will ensure that those for whom the no-fault system is felt to be inappropriate will still be able to raise claims using this route. The group recommended:

> **Recommendation 6 -** that claimants who fail under the no-fault scheme should retain the right to litigate, based on an improved litigation system
>
> **Recommendation 7 -** that a claimant who fails in litigation should have a residual right to claim under the no-fault scheme
>
> **Recommendation 8 -** that, should a claimant be successful under the no-fault scheme, any financial award made should be deducted from any award subsequently made as a result of litigation
>
> **Recommendation 9 -** that appeal from the adjudication of the no-fault scheme should be available to a court of law on a point of law or fact.

Question 10: Do you support recommendations 6 – 9 as proposed by the Review Group?

Yes x☐ No ☐

If no, why not?
Recommendation 7 sometimes i.e. birthing injury cannot find fault it is purely accidental. But if serious fault was found then litigation should be allowed to take place.

10.1 Do you have any concerns that the Review Group's recommendations may not be fully compatible with the European Convention of Human Rights?

Yes ☐x No ☐

If yes, what are your concerns?

Points to remember, if a person were to leave the country "like ourselves" from New Zealand, if "serious injury" occurred they be covered no matter where they live. Disability does not go away and it is surly the individuals human right to live where one chooses. Also the no fault system takes away the rights for a person's/victim, to seek justice for grouse injustice. Also would it be noted that people need transparency when doctor's dentists etc. commit

mall practice and thus taking away peoples human right to be aware of previous possible injuries caused by that professional. Also that legislation if it were to come into play would need to be "not open for interpretation" i.e. again Acc in NZ has legislation that is "open for interpretation" of the case managers. So sadly this leaves peoples human rights in the hands of another, which could change on a daily basis.

9. The Review Group offered suggestions for improvement to the existing system and these are reproduced in Annex B. The group recommended:

> **Recommendation 10 -** that consideration should be given to our analysis of the problems in the current system, so that those who decide to litigate can benefit from them.

10. It is proposed that the suggested improvements will be taken forward as part of the forthcoming consultation on the Courts Reform Bill later this year by the Scottish Government Justice Directorate. In particular the Scottish Civil Courts Review[21] recommended that pre-action protocols should be made compulsory and it is considered that this would assist in resolving many of the areas identified by the Review Group In addition, Sheriff Principle Taylor's Review of Expenses and Funding of Civil Litigation in Scotland[22], which is due to report at the end the year will consider a range of issues.

Question 11: Do you agree with the Review Group's suggestions for improvements to the existing system?

Yes x **No ☐**

11.1 Do you have any comments on the proposed action in relation to these suggestions?

One suggestion could be, if there was genuine fault which could very much have been avoided i.e. A genuine accident which could not have been avoided and was not due to mall practice; the professional should have some form of protection, "but" if a professional is negligent and cause injury that they should then be accountable legally.

[21] http://www.scotcourts.gov.uk/civilcourtsreview/
[22] http://scotland.gov.uk/About/taylor-review

11. The Review Group also considered whether or not the establishment of a scheme specific to neurologically impaired infants should be created (in the event that a general no-fault scheme is not introduced). Members considered that this group of patients arguably represents a special case and certainly accounts for the most significant sums awarded in compensation and legal costs. The Group were of the view that this was worthy of consideration.

Question 12: Would you support the establishment of a scheme specific to neurologically impaired infants if a general no-fault scheme is not introduced?

Yes x **No ☐**

A system could come into effect when a neurological problem appears to have happened so that they are covered quicker. But they should also be allowed to attempt litigation. Then if serious fault was found that resulted to an infant being disabled-injured then the systems could change over.

I do think that people that are not in a situation like ourselves for instance do not understand the monitory cost of a child left with a neurological problem, i.e. especially in severe circumstances were parents are unable to work because of the complex and demanding needs of the child. Even when a child is in hospital/therapy there is the responsibility of the rest of the family. A lot of the time, especially with a complex child, the hospital requires at least one parent to be with the child at all times because they do not have the man power to maintain their complex needs. When that child is found to be disabled "life changes dramatically" for the whole family. There is I agree no monitory value

that can be put on this but it costs, emotionally, financially and physically on all the family.

12.1 What are your views on the Review Group's suggestion that the future care component of any compensation in such cases could be provided in the form of a guarantee of delivery of services (both medical and social care) to meet the needs of the child, instead of by way of a monetary sum?

This is all well and good in theory, but sadly there are limitations which in practice are very difficult to administer. This can also take away some basic human rights such as making decisions for your own child/self, i.e. if one wanted to pursue a certain type of medical treatment that was not in the suggested guidelines, then they are unable to pursue this, thus removing ones rights. This would not even have to be considered if a person wasn't injured by the hands of somebody else.

General Comments

We would welcome any further general comments you may wish to offer here.

These are a few titles to Google that hopefully will help. There are thousands of them. But this may help.

Long-range battle with ACC over girl's care

ACC pays millions to send its 'hatchets'

ACC bonus pay for claimant cull

Damien Grant: ACC has taken a turn for the worse

A point to remember that the financial and emotional cost of a, for instance severely disabled child due to major lack of oxygen at birth, is much greater expense to be cared for in a care home, than it is to keep them in the family home. But for this to happen there needs to be a good support network involved to help the "family" to continue to be a "family". Emotionally, financially and physically. Unless you experience this first hand it is very difficult to judge effectively.

We are grateful for your response. Thank you.