

The proposed Redress Scheme and Human Rights

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The problem

- Hospital practice is 'high risk'
- About 10% patients suffer an adverse event caused by health care management rather than the disease process
- Around half of these events are preventable
- Around 1% patients could get financial compensation
- But less than 1 in 10 make a claim



Peter Ransley: a writer of TV plays

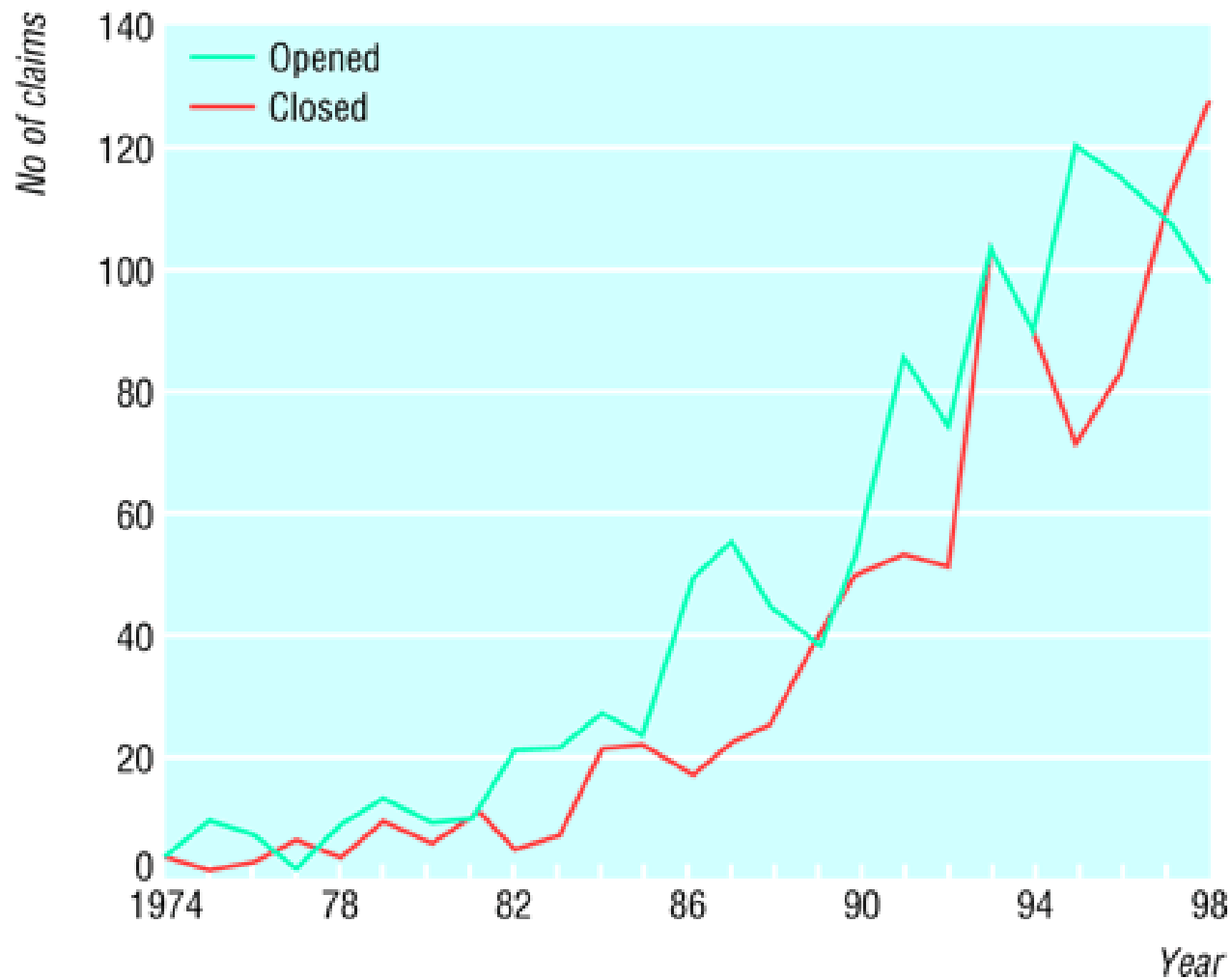
“Minor Complications”

Stella aged 35 with 2 children – in 1975 her life was ruined by unrecognised complications following a laparoscopic minor gynaecological procedure – she was left with a high ileostomy, a badly scarred abdomen and no husband. At follow-up clinic she was told “Bad luck about the minor complications”

- Sought legal help unsuccessfully – used up all her savings
- Decided on DIY – got her records and, with the aid of knowledgeable friends, worked out what went wrong
- Re-mortgaged her house
- Got the hesitant backing of a consultant surgeon
- Found a leading barrister (solicitor told her that she was wasting her money)







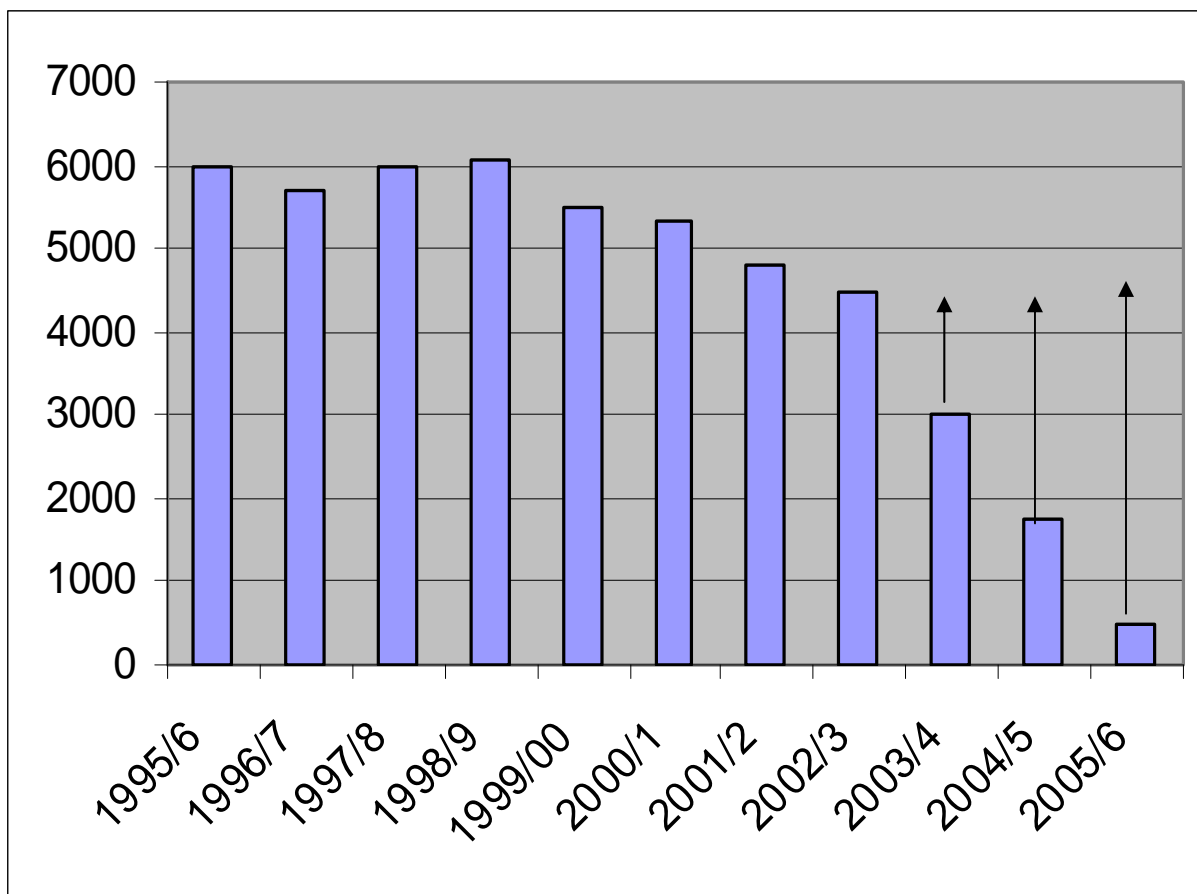
Opened and closed claims for medical negligence,
Oxfordshire Health Authority, 1974-98 P.Fenn: BMJ 2000

Medico-legal actions in England

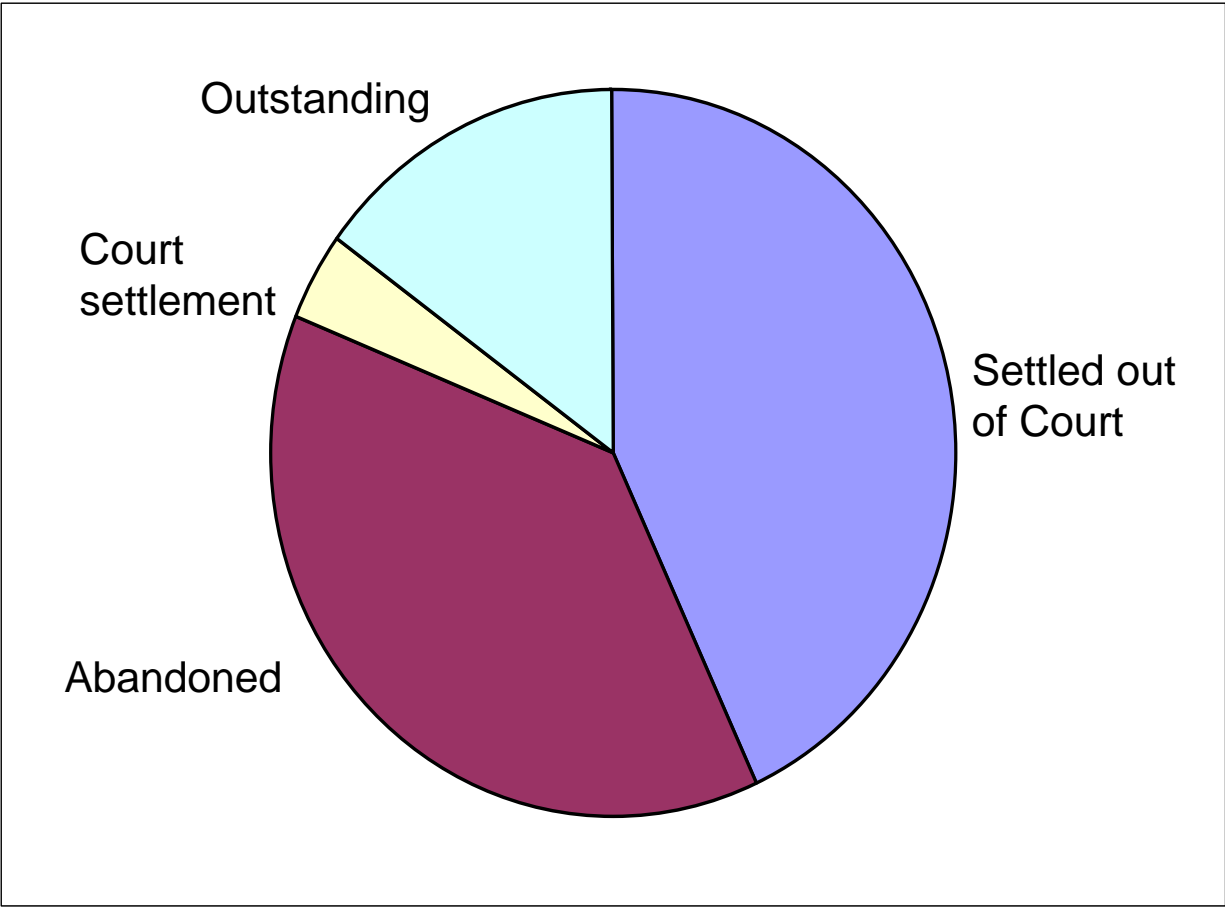
- About 8500 claims a year (was >10,000)
- Costs > £500 million
- *By value* CP and brain damage account for 80%
- Average claim takes >5 years to settle
- Costs exceed damages in 44% claims
(two-thirds in settlements of <£50,000)

The NHS Litigation Authority

Negligence claims initiated



Outcome of claims handled by the NHSLA



Lord Woolf: Access to Justice 1996

Aim to build a system that is

Just, effective and fair

Accessible, responsive and comprehensible

Reasonable speedy and not expensive

So aspire to

Less adversarial approach

More open-ness between parties

More settlement without litigation

Manage by

Judges controlling pace of litigation; weed out the weak;
encourage offers to settle

Experts to be more focussed and used efficiently

Establish a forum for all key stakeholders

Clinical Disputes Forum

Lord Woolf: Access to Justice 1996

Accepted that claims of medical negligence were significantly different from personal injury

Report designed to meet the needs of patients and health professionals and not lawyers except insofar as ensuring work done correctly

Decision on how to deal with low value medico-legal claims was deferred

Some of the features of medical culture

- Doctors are busy
- Oriented to individual autonomy
- Success-oriented
- Work in the expectation of infallibility
- Averse to conflict ('togetherness')
- Tend not to be concerned with
organisational effectiveness

Chief medical officer: Making Amends 2003

- System of complaints/claims complex and slow
- System costly:
 - legal fees
 - management time
 - clinical diversion
- Negative effect:
 - staff morale
 - public confidence
- Barrier to learning

CMO recommendations

- Comprehensive coverage of the whole field of handling claims and complaints
- 19 recommendations

Government decided to tackle just the first recommendation based on the 'low cost' claims

(Two-thirds of claims are settled for less than £20k and in these cases fees amount to more than compensation)

Some further details from 'Making Amends'

- Extent of scheme
- Organisation of scheme
- Legal aspects

Extent of scheme

To be extended to cover:

Severe neurological damage (incl cerebral palsy)

Higher awards

Primary care

Explanations to patients/relatives even if they sue

Organisation of scheme

- NHSLA to monitor
- New commission to oversee
- Board director to take responsibility at Trust level
- Training provided for NHS staff
- Provision of services for rehabilitation
- Higher quality care for the disabled
- Duty of candour to be given statutory force

Legal aspects of 'Making Amends'

- Documents and information collected for identifying adverse events to be protected from disclosure in court
- LSC to take account of Redress Scheme negotiations
- Mediation to be seriously considered before litigation
- Judges to receive training
- Payments not to reflect costs of private care
- Payments for ongoing care to be periodic
- Tests of reasonableness for costs

Redress Bill based on the first recommendation of 'Making Amends'

- To provide investigations when things go wrong
- Remedial treatment, rehabilitation and care
- Explanation and apology where appropriate
- Financial compensation in certain circumstances

Redress scheme for E&W: proposed operation

- Trust required to investigate ‘significant’ clinical events
- Explain and, if appropriate, provide an apology
- Provide report on measures taken to prevent a recurrence
- In some cases offer financial compensation – amount to be agreed with NHSLA based on “pain, suffering and loss of earnings” – up to £20k ‘without prejudice’
- Offer may be independently evaluated for a flat-rate fee paid by the Trust
- If claimant accepts the offer he/she loses the right to sue
- NHSLA to monitor scheme

Human Rights Article 6 (Right to a fair trial)

How will it be possible to satisfy the 5 rights to a fair trial?

- right to a hearing
- right to a fair hearing
- right to a public hearing
- right to a hearing in a reasonable time
- right to an independent and impartial tribunal

Human Rights Article 8 (Respect for private and family life)

Compensation for the disruption of private and family life may not be adequately compensated

Trusts will be reluctant to fund patient's choice of care if equivalent care can be provided by the NHS

The Redress Bill proposes to repeal or reform the Law Reform (Personal Injuries) Act Section 2(4) that provides financial compensation irrespective of **the patient** making use of NHS facilities for aftercare “double indemnity”

Other concerns about the Redress Scheme that may infringe Human Rights

- Adequacy of independence of schemes run by Trusts
- Adequacy of means of obtaining specialist advice
- Probability that trusts will use Bolam as the appropriate standard
- Limits on compensation likely to be artificial

More general concerns about the Redress Scheme

- No clear guidelines on how to ensure that safety lessons are learned and adequate remedial measures undertaken
- ‘Making Amends’ called for a legal duty of candour by clinicians involved in an adverse event – this is not addressed in the Redress Act

