National Assembly for Wales / Cynulliad Cenedlaethol Cymru
Health and Social Care Committee / Y Pwyllgor Iechyd a Gofal Cymdeithasol
Legislative Consent Memorandum: Medical Innovation Bill / Memorandwm Cydsyniad Deddfwriaethol: Y Bil Arloesi Meddygol
Evidence from Dr Anthony Barton - Solicitor and Medical Practitioner - MIB 06 / Tystiolaeth gan Dr Anthony Barton - Cyfreithiwr ac Ymarferydd Meddygol - MIB 06

SOLICITORS JOURNAL

Former Lord Chief Justice unable to substantiate argument for Medical Innovation Bill

LEGAL NEWS | 11 December 2014

Debate over consequences of Bill rages on while spokesperson for Saatchi says Bill has changed following feedback from doctors and lawyers

A 'sloppy' Lord Woolf cannot remember cases he believes would have benefitted from the divisive 'Saatchi Bill' after arguing their existence in a piece for The Telegraph.

Writing for The Telegraph in April, the former Lord Chief Justice of England and Wales stated: "What I do know about, from sitting as a judge, are the cases where doctors are sued for negligence because they have innovated in the treatment they offer, rather than following generally-accepted medical standards."

Having read this piece with some interest, Dr Anthony Barton, who is a co-editor of a text on clinical negligence, as well as a solicitor and medical practitioner, wrote to the high-profile supporter of the Bill requesting the case authorities relied upon by the peer in his article: "Your words are cited by supporters of the Bill. Would you be able to identify those cases where doctors are sued 'because they have innovated in the treatment'...In my professional experience as a clinical negligence practitioner, doctors depart from generally-accepted medical standards because of poor practice, not innovative practice," said Barton.

In an email received by Barton, and seen by SJ, the peer responded: "In the time available, I cannot find references to the cases I had in mind when I wrote the article for The Telegraph. I am afraid that it is most unlikely that I will be able to do so even if I had more time but I apologise and have to ask you to accept my recollection, which is of cases I was involved in very many years ago. My general position remains, however, [that] what is needed is protection available before the event and not a defence, the existence of which can only be determined after a doctor is accused of departing from proper standards of practice."

It clearly came as something of a surprise to Barton that the former Master of the Rolls could not remember, let alone substantiate, the specific cases he wished to rely upon in his argument. It is this argument that many supporters of the Bill have flocked to promote as clear evidence of why the proposed legislation is important. Unhappy with the email, the clinical negligence solicitor wrote to Lord Tebbit who, in another letter seen by SJ, responded: "Thank you for letting me see a copy of the reply you received from Lord Woolf. I wonder what he would have made of a witness who gave an answer like that!"

'Sloppy comment'

Commenting on Lord Woolf's article in The Telegraph, Terry Donovan, a clinical negligence specialist and spokesperson for the Association of Personal Injury Lawyers (APIL), said: "When I read Lord Saatchi's Bill I struggled to make sense of it. I can think of no case I have been involved in, and no reported case, where there has been an allegation of negligence after a doctor has 'innovated'. It just would not stack up. I think Lord Woolf made a sloppy comment. He was a great lawyer in his time and was responsible for some big reforms in the law but I struggle to think of a case where this has happened."

He continued: "In an allegation of negligence you are saying a doctor has failed to do some standard item that he should have done, has failed to follow the practice in the guidelines or the techniques that are set out in the medical literature, or failed to follow a standard of care that is regarded as being acceptable by experts in the field."I have never had a case where a doctor has defended an allegation by saying they were innovating. A lawyer acting for said doctor would call them 'barking'. They would be going off-piste and doing something that wasn't validated. In medicine that makes you a rogue. You don't try something out on vulnerable people. Innovation as described in Lord Saatchi's Bill is not good science. If a doctor innovated outside of a clinical study they would not only be sued but would also be in the GMC being struck off because it is unethical to experiment on somebody," concluded Donovan.

APIL, which has staunchly opposed to the Bill, has been unable to find any reference to cases where medical professionals have been sued for attempting innovative treatments. In October, the association produced a 'Myth vs Reality' report to debunk claims made by supporters of the Bill.

John Spencer, president of APIL and director of Spencers Solicitors, said at the time: "We are worried about the myth that the Medical Innovation Bill would only apply to dying people who are willing to give anything a chance. In fact, the Bill will affect all patients who, in their vulnerability, may be tempted to take risks at the hands of maverick doctors who are over-ambitious in their drive to make names for themselves."

He continued: "The Bill is both ill-conceived and completely unnecessary. We hear wonderful stories of medical breakthroughs every day, and have heard no cases of a doctor being sued for using an innovative treatment. The current legal requirement of doctors has been helping to protect patients for nearly 60 years. If a lack of understanding is in fact stopping some doctors from taking what could be the best course of action for their patients, then there should be an effort to educate, not legislate."

In November, while speaking at APIL's Autumn conference, Suzanne White, a partner in Leigh Day's medical negligence team and a member of the Stop the Saatchi Bill Alliance, said that lawyers need to 'wake up' to the potential impact of Lord Saatchi's Bill. She went on to warn the legal profession that in Lord Saatchi they had a real adversary able to sway public opinion due to his expertise in public relations.

White quoted the Conservative peer from an article he wrote for The Telegraph in May to illustrate her point: "In democratic politics, perception is reality. If the people perceive a problem, there is one." She concluded: "Saatchi is a PR man. It is very difficult to compete against a PR machine."

Open door

After reporting White's comments, the team behind the Bill got in touch with SJ to take up their right to reply.

"There has been much heat generated by the debate over the Medical Innovation Bill," said Dominic Nutt, the director of communications for the Bill, "only recently this magazine described the debate as a 'PR war'."

Nutt said that for two years, the Medical Innovation Bill team had been talking to doctors, lawyers and patients about how best to encourage medical innovation in order to facilitate better, faster and safe discovery of more effective treatments for currently incurable diseases.

"The Bill has changed in light of the feedback and challenges given," said Nutt, "we have listened and the door remains open to those who wish to offer opinions directly to the team. Indeed, we have held meetings with leading medical negligence lawyers and have adapted the Bill accordingly."

Nutt added: "It will allow more doctors to consider innovating as a matter of course, rather than defaulting to procedures that are known not to work. In this respect, the Bill acts as an agent of culture change." Nutt's full comment will be published in the first issue of SJ 2015.

Nevertheless, some still remain unconvinced. David Dawson, a consultant solicitor with Price Slater Gawne, is also of the belief the Bill, if passed, would become "bad law" leading to consequences "far beyond those which Lord Saatchi intends" and "tragedies for victims and their families". He points to the growing list of medical professionals who have spoken out against the Bill and his own recent experience of bringing claims against the NHS:

"As it stands [the Bill] has the potential for depriving victims of compensation they would otherwise obtain to which many would feel they are rightly entitled," said Dawson. "In 2004, my client was in her fourth pregnancy. Sadly she miscarried. To induce delivery, the doctors treating her gave her a drug, Misoprostol, which was not licensed for induction of labour. The drug caused a catastrophic brain injury. She remains in a state of minimal awareness and will require 24 hour care for the rest of her life."

According to Dawson, the NHS defended the claim for eight years before admitting full responsibility three weeks before trial in 2012. "The defence was that the use of Misoprostol was not prohibited in this situation," continued Dawson. "The NHS asserted that it was a 'common induction agent in cases of both intra-uterine death and live foetuses'. In other words, the NHS was setting up a defence based upon the long-standing Bolam principle, that the treatment would be considered reasonable by a responsible body of medical opinion."

It is Dawson's belief that had Lord Saatchi's proposed legislation already been law, the NHS may have argued the use of the drug was "innovative" treatment the Bill was designed to protect. He concluded: "My client's family would then have been left without the funding and help they so desperately needed to enable her to be properly cared for in a loving environment. The Bill should not be enacted."

SJ offered Lord Woolf the right to reply to this article but at the time of publication none has been received.

John van der Luit-Drummond is legal reporter for Solicitors Journal

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SOLICITORS JOURNAL

Lord Woolf unrepentant over failure to substantiate support for Saatchi Bill

LEGAL NEWS | 5 January 2015 John van der Luit-Drummond is legal reporter for Solicitors Journal

"If you do not accept my word that is your problem, not mine," says former Lord Chief Justice

The former Lord Chief Justice, Lord Woolf, has said he is "not prepared to be cross-examined" over statements he has previously made in support of the divisive Medical Innovation Bill.

Speaking during the House of Lords report stage of the Saatchi Bill in December 2014, Lord Woolf said: "The progress of the Bill has been a remarkable example of this House at its very best. The Bill has been very carefully scrutinised by people who have immense knowledge of the areas covered in the Bill."

The former Master of the Rolls went on to say: "Those who have asked me to identify cases by name and reference so that they can analyse the cases and show how they do not help any particular argument might be relieved to hear me say that if they want to know where I come from, I wrote a little book called The Pursuit of Justice."

Solicitor and medical practitioner, Dr Anthony Barton, who had previously written to Lord Woolf requesting the case authorities relied upon by the peer following an article in The Telegraph from April 2014, has once again questioned the peer's support for the controversial Bill.

In a letter seen by SJ, Barton writes: "I have read your book and am unable to find the 'cases where doctors are sued for negligence because they have innovated'. Please advise where can I find the cases in your book? At page 332 you state: '...unsubstantiated opinions' which I agree would be a 'recipe for getting things radically wrong'..."

Barton continued: "Accordingly, please substantiate your opinion by identifying 'the cases where doctors are sued for negligence because they have innovated'. If you cannot identify such cases then please clarify your position."

In a combative email, also seen by SJ, Lord Woolf responded: "I am not prepared to be cross-examined further, I can only say that I am disappointed that your interest in forensic matters does not make you willing to accept that having been appointed a judge in 1979, and having tried many cases depending on medical evidence that I doubt were ever reported, it is now impossible for me to give you the information you seek and so if you do not accept my word that is your problem, not mine."

In a joint statement with Dr Michael J Powers QC, co-editor of the fifth edition of the legal textbook on clinical negligence, Barton continued to voice concerns about the proposed Medical Innovation Bill.

"The Bill's supporters have not provided any evidence that doctors are deterred from innovation by the threat of litigation," the pair state. "Parliamentary scrutiny requires solid evidence."