

CLINICAL NEGLIGENCE LITIGATION

A VERY BRIEF GUIDE FOR CLINICIANS



CLINICAL NEGLIGENCE SCHEME FOR TRUSTS (CNST)

The CNST, administered by the NHS Litigation Authority (NHSLA), provides an indemnity to members and their employees in respect of clinical negligence claims arising from events which occurred on or after 1st April 1995. It is funded by contributions paid by member trusts and is often equated to an in-house mutual insurer.

The Scheme relates to incidents occurring in the context of NHS trust employment, and Clinicians' own medical defence organisations (MDOs) continue to provide an indemnity in respect of private practice, and independent GP and dental practice.

In all cases, major or minor, it will be alleged that clinicians have failed to work to a suitably professional standard, (the Bolam/Bolitho test) and that, in consequence, the patient has suffered injury and/or loss.

SOLICITORS PANEL

The NHSLA has a panel of specialist solicitors and allocates practices to trusts. Once a panel firm has been instructed, it will represent the interests of the Authority, the member, and the member's employees' trust.

One of the objectives set for the NHSLA by Parliament is "*to minimise the overall costs of clinical negligence...to the NHS and thus maximise the resources available for patient care by defending unjustified actions robustly [and] settling justified actions efficiently*". It is for the panel firms, in conjunction with the Litigation Authority, to work out the chances of a claim succeeding at trial, and the damages likely to be awarded and then to advise on whether/how the claim should be defended or settled.

WHAT DOES A PATIENT NEED TO PROVE?

- ◆ That the treatment fell below a minimum standard of competence; and
- ◆ That he/she has suffered an injury; and
- ◆ That it is more likely than not that the injury would have been avoided, or less severe, with proper treatment

WHAT IS THE TIME LIMIT FOR MAKING A CLAIM?

The basic rule is three years from the date of injury but it can be longer if:

- ◆ The patient is a child, when the three year period only begins on his/her eighteenth birthday.
- ◆ The patient has a mental disorder within the meaning of the Mental Health Act 1983 so as to be incapable of managing his/her own affairs, when the three year period is suspended.
- ◆ There was an interval before the patient realised or could reasonably have found out that he/she had suffered a significant injury possibly related to his/her treatment.
- ◆ A court is persuaded that it is fair overall to allow a longer period.

HOW ARE DAMAGES CALCULATED?

There are two elements to an award. The first recognises the “pain, suffering and loss of amenity” caused by the injury. It varies from about £4,000 for an unnecessary laparotomy scar, through about £140,000 for blindness to about £200,000 for quadriplegia. The remainder of any award is wholly related to the financial losses and extra expenses caused by the injury.

WHAT IS MY ROLE?

Your role is crucial. Unless we have your views and know what you would say at trial about all the relevant factual issues we cannot accurately work out the chances of the claim succeeding. That would increase the risk of paying too much to settle the claim or going to trial and losing.

We need to know:

- ◆ what you did
- ◆ the reasoning behind any decision you made
- ◆ what your notes say

In some claims we may also need you to think through what you would have done in a hypothetical situation. Remember that what you think goes without saying may well not be the same for someone outside your field. Please explain even the “obvious”.

WHY DOES IT TAKE SO LONG?

Lawyers are very conscious that the time taken to resolve claims must seem particularly odd to clinicians who have to deal with major problems in minutes or hours. The reasons for the time taken include:

- ◆ the need for the prognosis to stabilise before an accurate valuation can be made. This can take years where the claim is on behalf of a young child with a brain injury.
- ◆ other calls on the time of medical experts. There are frequently issues which cannot be resolved without both parties having had independent expert advice and it is not unusual for respected experts to have an eight - twelve month waiting list.
- ◆ It may also take time before a trial date can be allocated.

HOW MANY CLAIMS GO TO TRIAL?

Very few. Most claims are either discontinued or settled by negotiation or mediation for whatever proportion of their full value matches the chances of success of trial.

HOW WILL THE CLAIM UNFOLD?

The diagram below illustrates the typical progress of a claim, but there is a good deal of variation from case to case:

CLINICAL INCIDENT

Patient
“Claimant”

- ◆ may or may not pursue hospital complaints procedure or may apply to Health Services Ombudsman
- ◆ instructs solicitors
- ◆ requests records
- ◆ commissions independent expert advice on:
 - the standard of management
 - any preventable injury caused by sub-standard management
- ◆ writes Letter of Claim setting out
 - alleged facts
 - criticism of management
 - injury
 - approximate valuation

VERY VARIABLE BUT A THREE YEAR TIME LIMIT APPLIES IN SOME CASES

NHSLA / Trust
“Defendant”

- ◆ obtains clinicians’ comments
- ◆ instructs solicitors
- ◆ commissions independent expert advice
- ◆ writes Letter of Response setting out:
 - matters agreed
 - matters not agreed, with reasons



FORMAL LEGAL PROCEEDINGS

Claim Form Issued at Court

(additionally mediation or formal negotiations may be appropriate at any of the above stages)



**FORMAL LEGAL PROCEEDINGS**
(Claim Form issued at Court)**PARTICULARS OF CLAIM**

(formalises the Letter of Claim)

TYPICALLY NINE -
TWELVE MONTHS**DEFENCE**

(formalises the Letter of Response)

EXCHANGE OF WITNESS STATEMENTS

The parties now know what the witnesses of fact would say on oath

TYPICALLY
THREE MONTHS**EXCHANGE OF EXPERT EVIDENCE**

The parties now know what the independent medical experts would say on oath

SCHEDULE(of financial losses and expenses
associated with the injury)TYPICALLY SIX -
NINE MONTHS**COUNTERSCHEDULE**(may challenge fact/extent of financial
loss)**TRIAL**Usually avoided if proper information is available
from the factual and expert witnesses

The NHS Litigation Authority is grateful to Weightman Vizards, a member of its panel of legal firms, for the draft on which this document is based.

Anyone involved in litigation which might be the subject of an indemnity under any of our Schemes should feel free to contact the Authority for additional information by correspondence, telephone or e-mail:

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Alternatively the employing trust can be contacted for guidance, advice or counselling.