

# **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 1<sup>st</sup> April 1995. It is funded by contributions from NHS Trusts and is often compared to having an in-house mutual insurer. This approach brings many benefits. In particular, because the scheme operates on a 'pay-as-you-go' basis, it means that funds are not diverted from frontline patient care unnecessarily.

The CNST covers incidents which occur in the context of NHS trust employment. Clinicians' own medical defence organisations continue provide a separate indemnity scheme in respect of private practice and independent GP and dental practice.

When a claim is made against the NHS, whether big or small, it will be alleged that clinicians have failed to work to a suitably professional standard and that, as a consequence, the patient has suffered injury and/or loss. This is known in legal circles as the Bolam/Bolitho test.

The NHSLA maintains a carefully selected panel of firms of specialist solicitors who represent the interests of the NHS and employees when claims are made. Whenever possible and appropriate we attempt to settle claims before they reach court. This approach limits costs, reduces anxiety and saves time for all concerned.

The rest of this section contains answers for clinicians to some of the most frequently asked questions about claims:

### **WHAT DOES THE PATIENT NEED TO PROVE?**

- that the treatment fell below an accepted 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?**

We robustly defend unwarranted claims and we make sure justified claims are settled fairly. Our aim is to get the right money to the right people at the right time.

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 £5,500 for an unnecessary laparotomy scar, through about £172,500 for blindness to about £225,000 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 as a clinician 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 could 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 and know goes without saying and it 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:

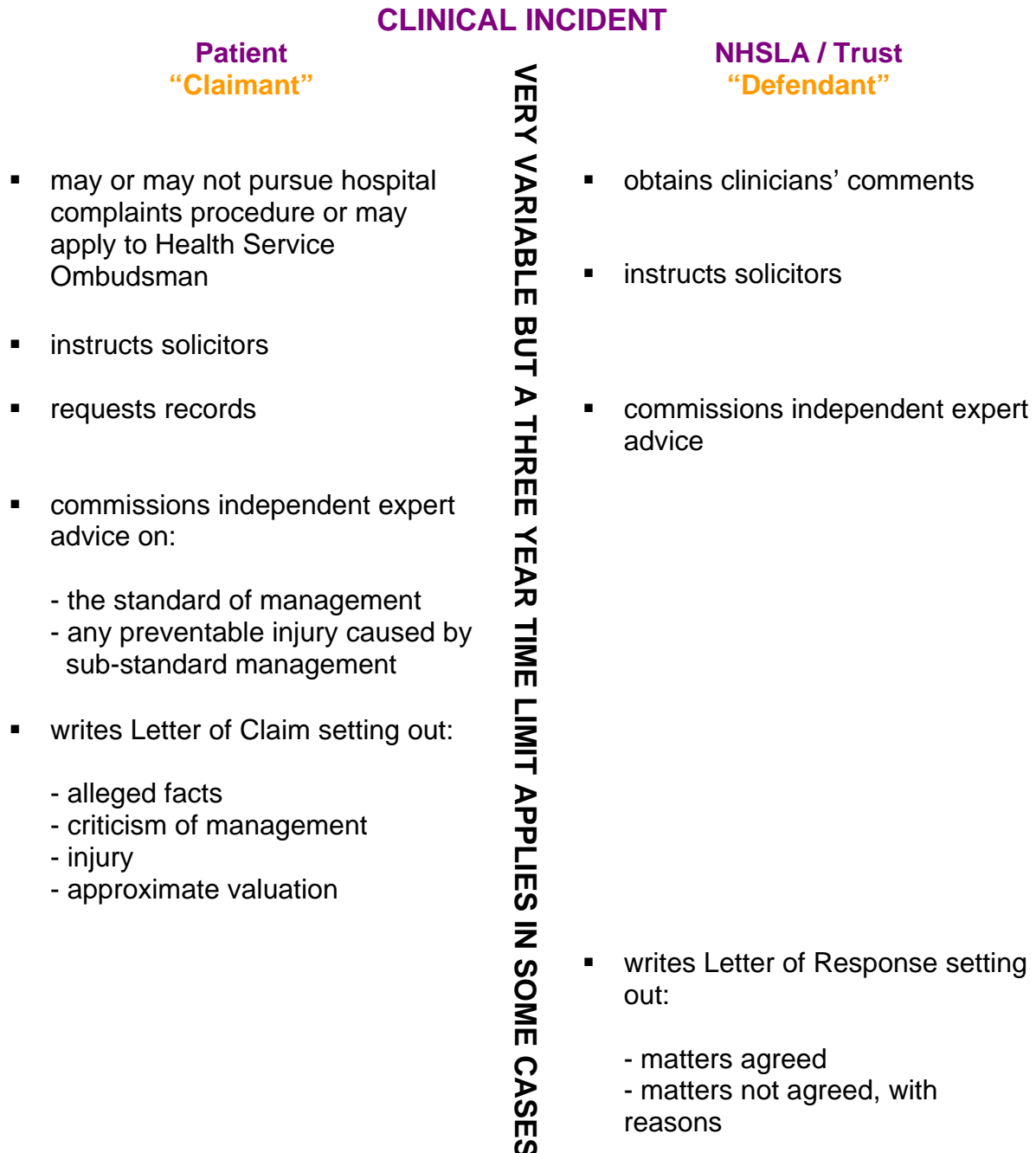
- the need for the prognosis to stabilise before an accurate valuation can be made. This can take years where the claim is on behalf of a young child with a brain injury.
- other calls on the time of medical experts. There are frequently issues which cannot be resolved without both parties having had 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 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:



**FORMAL LEGAL PROCEEDINGS**  
Claim Form Issued at Court  
(additionally mediation or formal negotiations may be appropriate at any of 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 not 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

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The NHS Litigation Authority is grateful to Weightmans, 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.