

Our Ref.: SW

Your Ref.:

17th July 2006

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Dear Colleague

### **PERIODICAL PAYMENTS AND CNST**

I am writing to notify you of a change in the way that the CNST will operate in order to keep in step with recent legislation.

#### **The Change in the Law**

You may be aware that the courts have been given the power to order a Defendant to make periodical payments in personal injury and clinical negligence cases. Prior to this change, such arrangements could only be entered into voluntarily, with the consent of both Claimant and Defendant.

The court's new power comes from the amended Damages Act 1996 and has been in place since April 2005. It applies to any cases which come before the courts after that date. In essence, rather than ordering a Defendant to provide a single lump sum to pay a successful Claimant's damages, the court can now order that all or some of that liability shall be met by annual periodical payments. To make such an order, however, the legislation requires the court to be satisfied that the continuity of payments is 'reasonably secure'.

If the NHSLA and the Defendant Trust are unable to demonstrate 'reasonable security', it would be open to a court to order a solution which would provide it. An alternative and far more expensive solution would be for the court to order a Defendant Trust to purchase an annuity on the open market. In larger cases, we estimate that this would cost hundreds of thousands of pounds per claim, money that could be better used for patient care.

#### **Demonstrating Reasonable Security**

Whilst a Trust is a member of CNST, the source of any compensation payment on behalf of that Trust is the NHSLA; the legislation deems the Litigation Authority to provide 'reasonable security'.

The possible insolvency of a Foundation Trust and the ability of any Trust to leave the CNST, however, recently led the legal teams representing two Claimants to challenge whether or not any Trust should be treated by the courts as 'reasonably secure' for these purposes (*YM v Gloucestershire Hospitals NHS Foundation Trust; Kanu v King's College Hospital NHS*

*Trust*). Given that all Trusts are being encouraged to become Foundation Trusts by 2008, the issues raised had major financial implications for the NHS.

The problem if a Trust chooses to leave the CNST arises because the scheme is not an insurance policy, but a 'pay as you go' scheme. The Litigation Authority calculates the required funds necessary to meet the calls under the scheme in that year and levels contributions from its members to discharge the anticipated liabilities. No reserves are retained from year to year. It is for this reason that any Trust leaving the CNST must take its liabilities with it; otherwise it would be passing its liabilities onto the other continuing members. In taking its liabilities with it, however, it no longer benefits from the deemed 'reasonable security' of the Litigation Authority.

In the case of a Foundation Trust, this problem is more acute due to the potential for a Foundation Trust to fail and become insolvent. The concern raised by the Claimants and the Judge in *YM* and *Kanu* was that the Claimant could be relegated to the status of an unsecured creditor in the event of an insolvency.

### **The Solution**

The Litigation Authority and the Department of Health have put considerable thought and effort into resolving the 'reasonable security' issue, culminating in a policy decision by the Secretary of State for Health to adopt the solution set out in this letter. The decision has also been approved by the Minister of State for NHS Delivery, the Minister of State for Quality and Patient Safety and Monitor. The solution is in two parts:

- a) The Litigation Authority will undertake direct responsibility for future payments if the Trust signs a contract agreeing to pay a lump sum for all continuing future periodical payments liabilities if and when it chooses to leave the CNST voluntarily;
- b) In the event of the insolvency of a Foundation Trust which has signed that contract, the Secretary of State for Health has confirmed that she will place the Litigation Authority in funds to meet the ongoing liabilities to periodical payments.

I am pleased to say that Mr Justice Forbes accepted this solution in the *YM* and *Kanu* cases at the end of January, describing it as an 'elegant solution' to the problem.

In order to put the Secretary of State's policy decision into effect, I am writing to every Trust's CEO asking him/her to consider and sign the attached Agreement as soon as possible and to return it to me. I also attach the Appendices to the Agreement and a copy of the letter from the Department of Health dated 20 December 2005, setting out the Secretary of State's decision.

I look forward to receiving the signed Agreement shortly.

Yours sincerely

Steve Walker  
**Chief Executive**