Clinical Negligence Claims Agreement 2024

This Clinical Negligence Claims Agreement 2024 ("the Agreement") is the successor to the COVID-19 Clinical Negligence Protocol 2020 ("the Protocol") agreed between Action against Medical Accidents (AvMA), NHS Resolution (NHSR) and the Society of Clinical Injury Lawyers (SCIL). It recognises the gradual 'normalisation' of claims management practices as the COVID-19 pandemic restrictions come to an end. This Agreement is not intended to create legal relations or to be a contract. It is not intended that individual claimant or defendant firms specialising in clinical negligence work should have to sign up to this Agreement.

Apart from where otherwise stated in this Agreement, the term "parties" is used in this Agreement to refer to any defendant indemnified by a defence organisation which is a signatory to this Agreement (including GPs indemnified by NHSR) as well as claimants represented by firms of solicitors who are either members of AvMA's Panel or Lawyers Service, or members of SCIL or any other organisation who becomes a signatory to this Agreement.

This Agreement aims to build on the existing collaboration established between the parties in the development of the Protocol. The parties agree that the Protocol has demonstrated improved working practices for both claimant and defendant lawyers and their clients and costs savings for the benefit of all concerned.

It is intended that this Agreement will continue to encourage positive behaviours from both claimant and defendant lawyers and organisations as well as consistency of approach in practices around England. For the avoidance of doubt, it is expected that claimant and defendant firms and NHSR case handlers will progress clinical negligence cases that can and should be progressed, including in the absence of formal court timetables. We propose that the parties should be allowed to refer the court to this Agreement for non-compliance if subsequently there are issues or arguments about costs being incurred unnecessarily by either party, and also to demonstrate compliance e.g. with service provisions. Referral to the court should only occur to demonstrate a matter of fact. The parties are not permitted to request the court to adjudicate over the wording of the Agreement or make submissions as to the Agreement's intentions.

It is proposed that once this successor Agreement to the Protocol has been signed that it comes into effect immediately and can be relied upon throughout the duration of its existence.

It is also proposed that the Agreement should be reviewed every 26 weeks from the date it is agreed. The 26 weekly review is to enable notice to be given to all clinical negligence practitioners of any changes to be made to the Agreement and for the parties to give notice of any intention to terminate their participation. Any signatory wishing to terminate their participation should give four weeks' notice, in writing to

the other signatories to this Agreement.

For the avoidance of doubt, any signatory giving notice to terminate their participation in this Agreement does not bring the Agreement to an end. The signatory giving notice will continue to be bound by the terms of the Agreement until the four week notice period has expired. They will also continue to be bound in cases where they have already received written notification in accordance with paragraph 1f - limitation in those cases will continue to be suspended in accordance with paragraph 1a of the Agreement and/or the Protocol.

Distribution of notices concerning the Agreement shall be promoted through the Law Society Gazette, if possible. Each signatory will also use their best endeavours to notify their membership of any termination/updates.

The parties responsible for reviewing the document are a representative from NHS Resolution and a lawyer from one of NHS Resolution's panel firms of solicitors; a representative from the SCIL; a representative from AvMA who represent the injured claimant's interests; representatives from any other organisation agreeing to comply with the terms and spirit of this Agreement.

Should claimant solicitors become concerned with their counterpart's failure to act in accordance with this Agreement they should contact the lead signatory detailed below for the organisation concerned. Participants should note that the intention of the escalation process is to deal with repetitive failures to comply with the Agreement, not individual interpretations of the wording or evidential facts of the case.

Should an indemnifier become concerned with their counterpart's failure to act in accordance with this Agreement they should contact the managing/complaint partner of the individual organisation/firm.

For the avoidance of doubt, the provisions in this Agreement are to apply to civil claims under domestic law (including claims under the Human Rights Act 1998) as well as claims under the European Convention on Human Rights.

1. Limitation and extensions of time

Cases suspended under the COVID 19 Clinical Negligence Claims Protocol

a) Providing the term 'parties' (as set out in the second paragraph of the preamble to this Agreement) is satisfied, all cases in which limitation was suspended under the Protocol will have limitation suspended for 12 months from the Agreement being signed, being 27 August 2024, unless specific limitation extension dates have been agreed with NHS Resolution members, case handlers or panel solicitors. Notwithstanding this provision, the parties can agree a further extension on a case-by-case basis should the need arise at the conclusion of the period. The expectation is this further limitation extension will be agreed provided the claimant explains what progress is being made in investigating the claim and when the defendant is likely to receive a Letter of Claim.

b) Take note that firms who are not 'parties' to this Agreement but who have taken over the conduct of a case or cases which have had the benefit of a limitation suspension

under paragraph 1 (a) of the COVID-19 Clinical Negligence Protocol 2020 will not be entitled to benefit from this Agreement. For those cases, the Clinical Negligence Protocol will come to an end on the date this Clinical Negligence Claims Management Agreement is signed, that is 27 August 2024. Firms who have conduct of cases that are unable to benefit from this Agreement have six months from the date of this Agreement to separately negotiate a further suspension of the limitation period with the NHS on a case by case basis.

c) Notwithstanding any limitation suspension or agreement under the Protocol or this Agreement the expectation is that a claim will be progressed in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes if it is capable of being progressed.

All other cases

d) In all other cases limitation extensions must be agreed on a case-by-case basis. The expectation is that a reasonable limitation extension of up to 6 months will be agreed. Notwithstanding this provision, the parties can agree a further extension on a case-by- case basis should the need arise at the conclusion of the period. The claimant should provide an explanation as to why the extension is required; for example, they have only recently been instructed and are gathering evidence. Please note the separate provision for civil claims following on from Inquests at clause 1(e) below.

e) Inquests - it is recognised that waiting for an inquest hearing will inevitably have an effect on the deceased's representatives and/or their legal advisors ability to consider all available evidence and in turn their decision to bring a claim arising from the death. To accommodate this parties have 8 weeks from the conclusion of the inquest to notify of their intention to bring a civil claim, notice is given in accordance with paragraph 1 (f) below. In recognition of the fact that to bring a civil claim the Executors/Administrators of the estate will need additional time for the Grant of Probate or Letters of Administration to be issued then provided that written notification has been given in accordance with paragraph 1 (f) below, the limitation period will be suspended for nine months from the date the coroner delivers their conclusion for any claims identified either before or after the conclusion of the inquest hearing. Further extensions may be granted on a case-by-case basis should the need arise. The limitation period will be suspended for any civil claims brought under domestic law, the Human Rights Act 1998 or under the European Convention on Human Rights. The parties recognise that extensions to limitation can only apply to claims indemnified under the schemes operated by NHS Resolution under this agreement.

f) The claimant is required to request an extension in accordance with the provisions of this agreement in advance of the primary limitation period expiring. In respect of claims where NHS Resolution is the indemnifying organisation and they have not yet been notified of the claim, e.g. the hospital trust legal department or GP surgery are still dealing with the matter initially, the written notification should be sent to nhsr.limitationnotification@nhs.net.

g) The limitation date for any claims under the Human Rights Act 1998 or European Convention on Human Rights shall be the same as for any claim under the Law

Reform (Miscellaneous Provisions) Act 1934 and or Fatal Accidents Act 1976. Any additional limitation extension granted under the paragraphs above shall apply equally to any such claim.

h) Reasoned and reasonable requests to extend the deadline to comply with Court directions or an extension of time for service of a Defence will not be opposed save in exceptional circumstances and where possible will be made with consent of both parties. As per CPR Part 3.8(4) parties will not need permission from the court for an extension of time of up to 28 days. Where a party requests any extension of time to comply with court directions that party should provide evidence to substantiate the reason for the request.

2. Disclosure

a) While there is a legal obligation of disclosure, pursuant to the Civil Procedure Rules, both parties will, in the spirit of collaboration, ensure they provide full disclosure both pre- and post-issue of court proceedings.

b) The defendant should disclose all duty of candour letters, DATIX, SUI/PSIRF or similar investigations and complaints documentation. It should be borne in mind that it is individual NHS Resolution members that will be providing disclosure often before NHS Resolution are involved in a claim. Early disclosure will give the parties the opportunity to narrow the issues in the claim at an early stage and thereby reduce the costs of investigating claims wherever possible and/or appropriate.

c) The claimant should disclose as early as possible all relevant documentation which supports their special damages claim to allow for early claim quantification.

d) The parties should, at the Pre-Action Protocol stage, explore unilateral or mutual without prejudice exchange of liability evidence. The parties should endeavour to actively engage in the consideration of mutual without prejudice exchange of liability evidence, before proceedings are issued, in an attempt to narrow the issues.

3. Telephone calls/emails

a) Good communication is important to the efficient resolution of disputes. Practitioners should be able to engage with their counterparts by telephone/MS Teams and/or email with a view to resolving disputes effectively and efficiently. Firms and organisations should ensure that their staff who have conduct of files are identified and contactable, even while home working. Email signatures should be updated to include up to date contact numbers. Similarly, individual email addresses should be provided.

b) Where possible there should be reciprocal acceptance of encrypted emails by all parties. The parties agree to use their best endeavours to accept encrypted emails, although it is acknowledged that some systems will not be permitted due to firewall/ISO policy compliance.

c) Defendant organisations/lawyers will send all documents by electronic means wherever possible.

d) All parties should be prepared to accept correspondence by email.

e) Claimant solicitors should note that NHS Resolution have specifically requested that correspondence is sent to them by email only. If for any reason this is not possible then the claimant representative should contact the allocated NHS Resolution case handler or lawyer.

f) Letters of Claim copied to NHS Resolution (as required under the Pre-Action Protocol for the Resolution of Clinical Disputes) should be sent to nhsr.claimsenquiries@nhs.net.

4. Service of court documents, including proceedings

a) Service of documents via email including the Claim Form, particulars of claim and any supporting evidence is to be an accepted method of service in clinical negligence claims under, and for the duration of, this Agreement. The onus is on the serving party to ensure the email address is valid and operational and best practice would be to check it remains valid in advance of service.

b) If the email is not delivered for any reason, e.g. its file size is too large, the burden is on the serving party to ensure it is served either by breaking the message and attachments down into receivable sizes and/or by using a different method of service. Note – The provisions contained in clause 4(a) can only apply to parties to this Agreement and those represented by firms belonging to one of the Claimant Bodies or those individuals and organisations indemnified by one of the defendant indemnifiers.

c) NHS Resolution are not authorised to accept formal service of court documents, including proceedings.

d) Before issuing a claim in the County Court using the Damages Claims Portal, the claimant shall request and the defendant shall within 7 days nominate a solicitor's firm to accept service via that portal. Service will then be affected by the portal to that firm.

e) Defendant indemnifiers agree that if service of a document is undertaken by email and they subsequently become involved in the litigation, they shall not take issue with service by email.

f) Claimant to provide NHS Resolution with reasonable notice (28 days if possible) if proceedings are to be issued so the parties can explore dispute resolution before the issue of proceedings. The purpose of the notification is to support the desire to consider dispute resolution prior to the issue of proceedings. Wherever possible, this should be done to cover all issues including breach and causation with a view to early settlement if at all possible.

5. Exchange of evidence

Further to paragraph 3 above, the parties should wherever possible agree to the exchange of witness evidence and expert evidence by encrypted email.

6. Medical examinations of clients for condition and prognosis reports

The parties should consider the appropriate method for examining the claimant, in person or remote, which will be considered on a case-by-case basis.

Where a claimant is required to travel to a consultation with a defendant's expert, that defendant shall be required if so requested, to pay in advance the reasonable travel and subsistence costs for the claimant and a chaperone (if required).

The parties should cooperate to ensure a claimant's medical records and imaging are shared electronically in a suitable format to avoid any delay in assessments.

7. Interim payments

Parties ought to adopt a reasonable approach to requests for interim payments of damages and payments on account of costs and unnecessary applications to the court ought to be avoided. Reasonable requests will be considered by indemnifiers. This clause does not have the intention of mandating an indemnifier to always make an interim payment for damages or costs on all cases. All such requests should be responded to within 28 days, wherever possible.

In a case subject to costs management, the starting point for a Payment on Account of Costs (PoA) should be a reasonable percentage of the budgeted costs for the completed phases together with a reasonable proportion of the incurred costs, with reference to authorities in this area such as **Puharic -v- Silverbond Enterprises Limited [2021] EWHC 389 (QB)**.

In cases not subject to costs management, the starting point for a PoA of costs should be a reasonable proportion of the estimated incurred costs to date.

8. Settlement meetings and mediations

Consideration should be given, wherever possible, to all settlement discussions whether pre-or post-issue of proceedings taking place via secure electronic means (e.g. video conferencing) to avoid unnecessary delay in matters. No recording of such meetings shall be made without the consent of all parties.

The defendant or their representatives, should attend such meetings with someone from their indemnifier with sufficient financial authority to settle the claim and/or have ready access to such a person via telephone etc. throughout the meeting.

This is to reduce the instances of settlement meetings and/or mediations being unsuccessful for lack of instructions on the day as negotiations develop.

The indemnifier should, where appropriate, have instructions on any payment on account of damages or costs they are prepared to make at the settlement meeting.

9. BACS payments

To enable a more efficient and effective transfer of funds for damages and costs firms should use BACS payments wherever possible.

10. Cost budgeting

It is recommended that where possible parties exchange their costs budgets in good time and undertake any other work required in advance of a CCMC.

11. Pre-action stock take

Following service of the Letter of Response, in the absence of settlement of both liability and quantum, the parties should review their positions and consider whether there should be a “stock take” discussion between the parties to identify whether it is possible to resolve the claim.

The parties should explore during this “stock take’ discussion without prejudice exchange of liability evidence in an attempt to narrow the issues on liability. The parties should also explore whether mediation or another form of dispute resolution would be appropriate before proceedings are issued.

12. Saying sorry and patient safety lessons

In cases where liability is admitted, a meaningful letter of apology should be provided as soon as possible to the claimant, if not already provided. If the apology is likely to be delayed because of further internal reviews about what went wrong, then a time estimate as to when the review or similar process is expected to be concluded and the letter of apology delivered should be communicated as soon as possible after the admission is made.

Litigation provides an opportunity for lessons to be learned and to avoid similar incidents occurring in the future. For many claimants and their families, ensuring the same thing does not happen to somebody else has great value.

The letter of apology in those cases where admissions have been made should also identify any patient safety lessons that have been learnt from the case and any measures that have been put in place as a result, as well as any lessons from the investigations conducted.

It should be borne in mind that while NHS Resolution can encourage its members to comply with this provision it cannot mandate its members to provide either apologies or patient safety lessons learnt.

13. Dispute resolution

It is acknowledged that dispute resolution assists the parties in avoiding litigation and unnecessary costs and resources, which benefits the claimant and NHS healthcare professionals. The parties agree to explore the use of relevant dispute resolution methodologies and work together to promote the judiciaries ambitions of avoiding unnecessary litigation.

Dated 27 August 2024

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Simon Hammond, Director of Claims Management

On behalf of NHS Resolution

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Sharon Allison, Chair of SCIL

On behalf of the Society of Clinical Injury Lawyers (SCIL)

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Lisa O'Dwyer, Director Medico Legal Services

On behalf of Action against Medical Accidents (AvMA)