

Guidance note two: Being a witness in a clinical negligence claim

The CNST provides an indemnity to members and their employees in respect of clinical negligence claims arising from events on or after 1 April 1995. It is funded by member contributions and administered by NHS Resolution, which is part of the NHS.

Why will you be asked to give evidence?

When a claimant decides to bring a claim against one of our members, their solicitors will set out the circumstances of the claim; how it is alleged that the care provided has fallen below the acceptable standard; and what injury, loss and damage is said to have been caused to the patient and perhaps members of their family. If you were involved in providing care and treatment to the claimant on behalf of our member (for example, a trust) you may be approached to provide evidence as a witness.

Our solicitors may have to ask you questions about your decisions and actions. Please try not to take this personally and be assured that our solicitors are not seeking to 'point the finger', or blame you for your

actions. They need to ask these questions in order to explore your evidence and test the strengths of the case.

Don't take it personally; you are a factual witness as to events.

Do I need to tell my defence organisation?

A clinical negligence claim is usually pursued against an organisation (your employing body) and not an individual. Unless the claim is against you personally, your defence organisation will not usually need to be involved. Our member's solicitors will provide you with support and advice. However, if you are concerned about your own involvement, you should contact your defence organisation who can provide separate advice.

What is my role?

Your role as a witness of fact is crucial. Your evidence will 'bring to life' the medical records. You need to bear in mind that what may be second nature to you in your professional work will need to be explained, so that it can be understood by someone without medical training. Being able to provide evidence starts with good record-keeping practice which accords with your professional code of conduct.

Success in defending claims depends on the judge understanding what happened, why and that it accorded with responsible clinical practice.

Your evidence will need to explain:

- what you did;
- the reasoning behind any decisions you made;
- what your entries in the medical records say; and
- why you may have departed from guidelines or usual practice.

You may be asked to respond to the allegations made by the claimant as well as to consider what you would have done in a hypothetical situation.

Your statement will be seen by various people. You should be happy with it. It should be in your words not the lawyer's.

Your evidence may be seen and considered by:

- your employing body;
- the firm of solicitors instructed on their behalf;
- medical and nursing experts to help us assess whether a claim should be defended or whether it is appropriate to resolve the claim;
- the patient's legal team and perhaps also the patient and their family; and
- the court.

How can good medical records help?

Your contemporaneous entries in the records are a vital part of your evidence. You may be approached to be a witness many years after the events in question when you have little or no recollection of the patient or the events, especially if there was no obviously adverse outcome at the time. The records will help you to piece together what was happening and enable you to explain your normal practice at the time. The more comprehensive the medical records are, the easier your job will be when giving evidence.

In an obstetric brachial plexus injury case the delivering doctor recorded 'normal difficulty with shoulders'. You should avoid ambiguity or be prepared to explain it!

Good records are:

- full, concise, factual, consistent, clear and accurate;
- dated, timed and signed;
- contemporaneous or written as soon after an event as possible (and, if appropriate, stated to be retrospective);
- recorded carefully (especially telephone messages); and
- inclusive of discussions with the patient's family.

What should my statement look like?

If you are providing comments to the internal legal services team, there are no formal requirements, but the legal team will be aware that any statement provided in the course of a root cause analysis or incident investigation is likely to be disclosed to the claimant and his/her solicitors before or during proceedings.

It is helpful for your statement to include a brief summary of your qualifications and training at the time of the incident, followed by your account of your involvement. You should try to explain the circumstances behind the entries in the medical records as well as interpreting the records themselves which may use abbreviations and 'short-hand' descriptions.

If you think there is further documentation available regarding the circumstances at the time in question, please highlight this to our member's solicitors when you are working with them to draft your statement. This includes documents which help in either establishing the claimant's case or in refuting it.

You will be asked to sign a "statement of truth". It is important that you are satisfied that the statement contains all the evidence you will give in court and is as accurate as possible, to the best of your knowledge. If the matter goes to trial, you are likely to be cross-examined on its contents. You will be asked to sign a "statement of truth" which confirms to the court that you believe the contents of your statement are accurate.

Do I have to help? What if I have retired or moved on?

Without the assistance and evidence of those involved, we would be unable to defend the NHS and the care you may have helped to provide, or identify cases where the care has not reached the appropriate standard, so that compensation is properly due to the patient.

We cannot defend the NHS without witnesses. Always give forwarding details when you move on.

Your professional code of conduct is likely to require you

to co-operate with formal enquiries and complaints procedures and to offer all relevant information. Entitlement to indemnity under the CNST, through your employing body, is also based on co-operation.

You will need to preserve patient confidentiality but the exceptions to this include providing information which relates to a patient who is making a claim and is relevant to that claim or to your employing body's defence.

Some claims can take many years to be investigated and as a witness, it is important that you keep our member informed of any changes of address and telephone number so you can be contacted, even if you are no longer working for our member.

It is for the benefit of the NHS as a whole that claims are properly dealt with and our members will understand the need for you to be involved in cases arising from your former employment.

What happens after I have provided a witness statement?

You may be required to attend a meeting with our legal team to discuss your involvement in the case in more detail.

Less than 1% of claims against our members end up at trial.

Please remember that our panel solicitors will be there to help guide you through the entire process. If you have a question, please ask.

Claims that proceed to trial:

- It is likely you will be served with a witness summons. The court requires this to be done so that trials are not disrupted by non-attendance
- Please remember that failure to attend court in response to a summons puts you at risk of being found in contempt of court
- If you are unable to attend for a legitimate reason you must tell our solicitors as soon as possible
- Our legal team will keep you closely updated as to your involvement. They will meet you before the hearing and answer any questions you may have about the process and discuss court etiquette

Publicity

It is possible that there will be press interest.

You will not be expected to deal with the media.

You should not feel under pressure to respond to any approaches from the media. Press statements will be agreed and issued by our member's communications office usually after consultation with us. If there are any elements of publicity personal to you, The panel firm and your professional body will be able to advise you and provide support.

Please contact your nominated NHS Resolution team leader or a Nominated Partner at your Panel solicitors if you wish to discuss anything arising from this guidance note.

Prepared with the assistance of the NHS Resolution legal panel