

# What happens when a claim is brought?

A practitioner's guide to the key procedural steps in claims for clinical negligence

Finding yourself involved in a clinical negligence claim can be a daunting experience. Our guidance 'When is compensation due' explains the legal tests that apply and this guidance sets out some of the procedural steps that you may encounter as a claim progresses towards resolution.

It is important to remember that you are not alone in this process. Most healthcare practitioners experience a claim for compensation at some point in their career and NHS Resolution will do everything possible to support you and answer any questions that you may have throughout. A compensation claim is not about blame and your engagement throughout in an open and transparent way is key to achieving resolution of the matter as soon as possible.

## **What is a clinical negligence claim?**

A claim is a formal request for compensation as a result of something that has gone wrong in relation to a patient's healthcare. It should be made in writing and can come directly from the patient or a family member, or from their lawyer or representative.

The claims process is separate from a complaint or other investigation, although the same set of facts can give rise to both. Where a case includes multiple issues, such as an inquest and/or GMC proceedings, we will work closely with your MDO/indemnity provider to ensure that they are managed in a consistent manner.

Irrespective of whether a claim has been brought or is likely, it is extremely important that you are open and transparent with the patient and spend time with them to explain what has happened.

If their care was not as it should have been, you should apologise. An apology is **not** an admission of liability and should always be offered when something has gone wrong. Our guidance, "Saying Sorry", is available [here](#).

## **What should I do if I receive a claim or learn about a potential claim?**

There is separate guidance on when and how to report a claim or potential claim, which can be [found on our website here](#).

If you receive a claim it is important that you report it to us as soon as possible and in accordance with our guidance. This is because the courts impose strict timescales for responses. Failure to comply with these timescales could not only mean that a court judgment is entered against you but could also prevent us from defending the claim.

## Procedural steps you may come across

The following is a general road map of a clinical negligence claim:

- i) Disclosure request
- ii) Letter of claim
- iii) Letter of response
- iv) Alternative Dispute Resolution (“ADR”)<sup>1</sup>
- v) Claim form and Particulars of claim
- vi) Defence
- vii) Witness statements and expert witnesses
- viii) Conference
- ix) Trial

Clinical negligence claims are governed by a pre-action protocol which sets out how claimant (the patient or their family) and defendant (the healthcare practitioner) should interact before formal court proceedings are issued. This allows differences between the parties to be narrowed and encourages them to attempt to resolve matters without going to court.

### Time limits

We will do everything we can to avoid a claim ending up in formal legal proceedings. Time limits can be very strict when this happens and even where a case is not in formal proceedings, time limits may affect the outcome.

### Table of time limits for responding to a claim

Document received	Action required	Time limit to comply
Disclosure request	Send disclosable material to the claimant	Within 1 month of receipt of request

<sup>1</sup> It is important to be aware that ADR and settlement options should be considered throughout the life of a claim, and can occur at any point.

<b>Letter of claim or Letter of Notification</b>	<b>Acknowledge letter of claim / letter of notification</b>	<b>Within 14 days of Letter of Claim (NHS Resolution will acknowledge the letter of claim on your behalf)</b>
	Detailed letter of response	Within 4 months of Letter of Claim (NHS Resolution will prepare and send the Letter of Response in consultation with you)
Particulars of claim <sup>2</sup> (attached to, or following, the Claim Form).	Serve an Acknowledgement of Service	Within 14 days of service
	Serve a Defence	Within 28 days of service <sup>3</sup> as long as an Acknowledgment of service was served within 14 days

Only a small minority of claims go to court. The vast majority are resolved before that stage.

### **i. Disclosure**

In order for the patient's solicitors to consider whether they have a valid case they need to review all of the available records and information. Most records will come from you and you are under a duty to comply with a correctly made disclosure request when it is made. Separate guidance about dealing with such requests is [available here on our website](#).

### **ii. Letter of claim**

The next step for the patient or their representative to prepare and "serve" (deliver) a formal letter of claim. This should be based on independent expert evidence and set out the following information:

- The claimant's details;
- The detailed factual background, including:

<sup>2</sup> Particulars of Claim can be served at the same time as, or shortly after, the Claim Form.

<sup>3</sup> Given the nature of clinical negligence claims and the need for independent expert evidence, this can often be extended by agreement between the claimant and the defendant.

- What treatment the claimant received;
- Where and when the claimant received that treatment;
- Who gave that treatment;
- The injuries the claimant says they suffered as a result of the alleged breach of duty; and
- Allegations of breach of duty and causation

We have 14 days to acknowledge receipt of the Letter of Claim and 4 months to investigate and serve a Letter of Response.

### **iii. Letter of response**

Once a decision has been made about whether to admit the claim in part or in full, or to deny it, a detailed Letter of Response will be prepared on your behalf. This will set out exactly which allegations are admitted or denied. Where denials are appropriate, we will set out the reasons. Where we propose making admissions in the Letter of Response we will seek your agreement before serving it.

It is common for offers of settlement to be made at this stage, where appropriate.

### **iv. Negotiations/ADR**

In cases where a liability exists, NHS Resolution will seek to achieve settlement at the earliest opportunity, to avoid the expense and stress of litigation for both practitioner and patient

### **v. Claim form & Particulars of claim**

If the case cannot be resolved after the Letter of Response, the patient may start legal proceedings – the formal court document is called a 'Claim Form'.

Once the Claim Form has been issued (which means lodging it with the court) the claimant has 4 months to serve it on the defendant. This is usually done by post and it may be sent directly to you by the court or the patient's solicitors. In cases that we know about, NHS Resolution will instruct solicitors to accept service.

The Particulars of Claim is a formal document which sets out the exact facts that the claimant relies upon and the allegations made against you. They may be served at the same time as the Claim Form or within 14 days.

If you are served with a Claim Form concerning treatment after 01.04.19, it is imperative that you send it to NHS Resolution immediately. It is equally important that you do the same upon receipt of Particulars of Claim (if served separately from the Claim Form).

We have 14 days from the date of service of the Particulars of Claim to acknowledge receipt formally with the court. Failure to do so may result in the court entering judgment against you.

## **vi. Defence**

The Defence is the formal response to the Particulars of Claim. It will respond to each paragraph and state whether it is admitted or denied. If the latter, it will put forward your case in detail.

We must serve a Defence within 28 days of service of the Particulars of Claim (unless the Claimant agrees an extension).

The Defence needs to be verified with a statement of truth and signed by you. It is very important that you read the document carefully before signing it. You must make sure that you know or believe everything in the Defence to be true.

Failure to serve a Defence will also result in a court judgment being entered against you and prevent us from defending the claim on your behalf.

## **vii. Witness statements and being a witness**

As the claim progresses, the parties will need to exchange factual witness statements. Your statement will be very important. This is a factual account of what happened and will include a description of:

- the actions you took;
- the reasoning behind taking those actions, or why you did not take a particular action; and
- sometimes, you will have to explain what you would have done in a hypothetical situation.

You will not be required to write the statement yourself. Your statement will be prepared by our lawyers on the basis of your notes and comments, and often following a meeting with you or a telephone discussion. However, the statement is yours and you must be entirely happy with its content. When you receive a draft you should read it carefully and please do not hesitate to contact us or our solicitors if you think that any part of the statement should be amended.

A witness statement also needs to be verified by a statement of truth and signed by you. It is crucial that you read the statement carefully before signing it. You must make sure that you know or believe everything contained in it is true before you sign it.

## **viii. Experts**

Your witness statement is a statement of fact (not your opinion) and is not an expert statement or report for the purposes of the claim.

We will instruct relevant independent expert witnesses to provide their opinion on the claim. Experts can comment on breach of duty, causation or both. It is not uncommon for experts in the same field to have opposing views and the judge (if the claim goes to trial) will assess the credibility of each expert in deciding which opinion s/he prefers.

Expert evidence must be exchanged before trial. Once this step has taken place there will usually be a meeting of experts practising in the same field. Following this, the experts will produce a joint statement setting out their respective opinions on the key issues that are within their expertise. This is often an important stage in the claim, because such meetings allow the parties to narrow the issues that are in dispute.

#### **ix. Conference**

A conference is a meeting between our barrister, our solicitor, experts, witnesses and you. Conferences can be held in person or over the phone/by video or skype. The purpose is usually to assess the strength of our evidence or particular parts of our evidence and whether we can continue to defend the claim.

#### **x. Trial**

Very few claims actually end up going to trial and so this part of the guidance is kept intentionally brief. If the claim against you does go to trial you will receive support and guidance from us and from our solicitors. The factual witnesses (which will include you and the claimant) will give evidence and be asked questions by the barristers for each side. The experts will also give evidence at the trial.

The trial will be heard and decided by a judge sitting alone (i.e. without a jury).

If, at any point during the claims process, you have any concerns or questions, please do not hesitate to contact your NHS Resolution case manager.

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