

# Facing Legal Action: An Employee's Guide

A blurred, grayscale background image showing a pair of hands holding a pen, suggesting a professional or administrative setting.

An information leaflet for employees of:

- Cambridgeshire & West Norfolk PCTs/PCP
- Cambridge & Peterborough Mental Health Partnership NHS Trust
- Anglia Support Partnership

# Introduction

The purpose of this leaflet is to advise you of the steps you should take if you are faced with a claim for compensation for personal injury relating to your employment in the Trust.

It is acknowledged that:

- Staff members are usually doing their best to carry out their work in a safe and effective manner to benefit patients.
- Adverse events (which may lead to claims) often occur due to system errors rather than an error on behalf of an individual alone.
- It is extremely rare for NHS staff to deliberately harm either themselves or others.
- Around 75% of claims against the NHS are subsequently withdrawn following further investigation.
- Being involved in a case which is being investigated as a possible claim can be a stressful experience for both junior and senior staff.
- While working for the NHS your Trust will be financially responsible for the claim in almost all circumstances.

Your Trust has a claims management policy, which sets out the approach taken when a claim arises. Claims are managed by the Anglia Support Partnership claims management team, which will support you and your manager in investigating the allegations and decide whether compensation should be paid to a claimant.

# What is a claim?

## A claim is defined as:

An allegation of negligence and/or a demand for compensation made following an adverse incident resulting in personal injury.

## A claimant is:

Any patient or their representative, member of the public, or employee who instructs solicitors to act on their behalf to pursue a claim against the Trust, or who enters legal proceedings against the Trust or who pursues compensation.

# Who pays compensation?

NHS staff are indemnified by the health service for all claims made against them as a result of the normal discharge of their duties. The NHS Litigation Authority oversees all compensation claims. Trust employees do not need to insure themselves against claims for compensation for their NHS work because the Trust is the 'defendant'. However, staff will be involved in the claims process and will need to assist with the investigations.

# Responsibilities of Trust staff

Staff have a duty to co-operate with Trust managers, ASP claims managers and the NHS Litigation Authority, and should ensure that the following steps are taken where appropriate:

- Inform the ASP Head of Risk Support or appropriate claims manager (see details below) of incidents which may lead to a claim, including clinical negligence, employer's liability (staff injury), public liability (injury to a member of the public, but not the result of clinical negligence), or property damage where the total cost of the repair or replacement is above the Trust excess - normally around £5000.

You may become aware of the possibility of legal action from a number of sources:

- The patient tells you
- A complaints investigation does not resolve the patient's issues
- An incident results in an unexpected adverse outcome (staff should record and report such events in line with Trust policy)
- A patient's or solicitor's letter requesting copies of medical records or setting out the details of a claim
- Service of Court Proceedings (rare)

**In the latter two cases, inform the ASP claims manager immediately.**

- Co-operate fully in the investigation of any claim, promptly providing comments, statements or documents (see section below on investigating a claim). Timetables for dealing with personal injury claims are short and failure to comply may lead to penalties being imposed by a Court.

- Identify and take the necessary actions to manage any risks highlighted by a claim.

## Apologies and explanations

The NHS Litigation Authority encourages staff to be open and honest with patients and their families when there has been an unexpected outcome. Apologies, explanations and expressions of sympathy, made in good faith, are encouraged.

It is Trust policy that staff can apologise to patients and their families where this is appropriate. However, always avoid making reference to matters where you are uncertain of the facts.

Staff should not indicate to patients or their families that they believe that the Trust is liable in a matter or that they consider that compensation should be paid to them.

# Disclosure of records

Everyone has the right to have a copy of information held about them (Data Protection Act 1998) including medical records. Requests must be made formally either by letter, email, fax or Trust form. A request does not necessarily mean the patient is contemplating legal action, but this should be considered as a possibility.

There are time limits which apply to the disclosure process and patients should be kept informed of any delays in meeting their requests. Advice on disclosure is available through the Information Governance Manager at ASP (see end of this leaflet for details).

Requests should be processed according to the Trust policy, and the appropriate ASP claims manager informed if necessary. The claims manager can provide advice as to whether a request could possibly be an indicator of future legal action against the Trust.

If a patient is considering legal action, the request for disclosure should be made to the Trust on a standard form and give sufficient information about the nature of the claim. Inform the ASP claims manager without delay.

Copies of the records must be supplied within 40 days of the request, or if (rarely) this is not possible, an explanation must be provided.

## Investigating a claim and writing reports

If a request for disclosure of records indicates the possibility of legal action, ASP claims managers will undertake an initial analysis of the events and/or treatment.

If a formal letter of claim (usually from solicitors) is received by the Trust, ASP claims managers will work with the NHS Litigation Authority to provide a formal response on behalf of the Trust within the timescales. In both of these cases, Trust staff will be involved in the investigation.

In practice, this will mean that you may be asked for copies of documents relating to the allegations or events, and/or you may be asked to write a report or provide comments.

If you are asked to provide written comments at this stage, this is not the same as providing a 'statement' which is a formal legal document.

If a formal witness statement is required, you will be given assistance with this. This applies to current and ex-employees.

When providing written comments, an informal but detailed report of your involvement is required - see next section for guidance.

**Reports** should be produced with the following guidance in mind:

- Although the majority of reports will go no further, your report may be copied to the claimant or used as evidence in defending a legal claim. However, remember that all Trust staff are indemnified and the Trust will be responsible for any claim made, even for errors in the report.
- **Personal information:** include your full name and address; professional qualifications, grade and relevant experience; current post; the post held and your qualifications and experience at the time of the incident.
- **What happened?** It is very important to establish as fully as possible what happened. First-hand evidence of those involved in an incident or patient treatment is essential, even though medical records or other documents may also provide a contemporaneous account.

#### Remember to:

- Make clear what you know from your own memory, from notes, from your recollection of your standard practice at that time (perhaps substantiated by a policy or guidelines), what you remember but did not record at the time, what you have forgotten, what you know from others or from reading the records but did not witness yourself
- Explain difficult terms or abbreviations
- Obtain any records you need to refer to
- Use chronological order, giving dates, times, locations and amounts
- Identify other staff involved
- Respond in detail to the specific issues of concern
- Explain why you did what you did
- Refer to policies/procedures/guidelines in use (if appropriate) and provide copies if possible

- Provide information about what the claimant was told, for example the information the patient was given about the nature and risks of treatment
- Provide information on what was not done, as well as what was done
- Avoid ambiguous comments
- Avoid speculating or giving opinions on what others were doing or thinking unless you know something as a fact, and don't blame other staff members or departments
- Avoid hostility towards the claimant
- Avoid making reference to reports of other staff members
  
- **Was anything less than perfect?** Many departures from 'best practice' are unimportant and irrelevant, although they can be used by the claimant's solicitors to make the Trust look less capable than it is. However, all possible deficiencies need to be identified as soon as possible. Unavoidable complications of treatment need to be explained and all other unexpected outcomes need to be addressed in detail. It is for the claimant to prove that any care or procedure was below an acceptable standard.
  
- **What caused the adverse event?** It is not always the case that, just because a mistake or deficiency has been identified, this has led directly to the claimant's injury or damage. However, if you consider that a mishap has in fact led to the adverse outcome, it is important to say so.
  
- **Conclusion:** your report should state that it is written for the purpose of investigating a legal claim and should conclude with the phrase 'The contents of this report are true to the best of my knowledge', and the date and your signature. You should retain a copy of your report.

# Going to Court

In rare cases you may be asked to appear as a witness in court. All staff will be fully supported and the ASP Claims Management Team will be pleased to provide advice to witnesses or information about procedures before a case is heard in court.

## Advice

You can seek advice from a number of sources:

- Your line manager
- ASP Head of Risk Support and the ASP claims managers
- Your clinical lead or supervisor
- Your Trade Union or professional organisation

## Further advice

Out of hours advice is available through Mills and Reeve (solicitors) - information with Trust on-call managers.

**Counselling Service:** employees have access to a free confidential helpline and counselling service. The helpline is available to discuss any personal or work-related problems and is open 24 hours a day every day of the year. Telephone 0800 027 7844.

# ASP contacts

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