
Litigation Policy

(previously known as Claims Management Policy)

Solent NHS Trust policies can only be considered to be valid and up-to-date if viewed on the intranet. Please visit the intranet for the latest version.

Purpose of Agreement	To effectively manage litigation against the Trust regarding allegations of clinical or general negligence giving rise to liability for the Trust.
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1.0	10.01.2020	Ben Heaton	Policy Steering Group.	New policy. Replaces the Claims Management Policy.

SUMMARY OF POLICY

- The Trust is a member of the NHS Resolution (NHSR) litigation indemnity schemes.
- These schemes cover clinical, employee, public and property liabilities.
- The Trust pays an annual contribution to the schemes.
- There is no excess for costs regarding clinical liabilities, although there are excesses for employee, public and property liabilities that must be met by the Trust.
- The Trust will abide by the requirement of the schemes for administration of litigation.
- These requirements are outlined in the appropriate NHSR guidance documents.
- This document outlines the procedures in place to ensure compliance with the NHSR requirements.
- All staff in the Trust are required to co-operate with the Trust's application of the NHSR requirements as appropriate.

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LITIGATION POLICY

1. INTRODUCTION & PURPOSE

- 1.1 The Trust may be subject to litigation regarding the application of its statutory duties and obligations. The trust is a member of the NHS Resolution indemnity schemes. These schemes ensure the Trust is protected against the negative impacts of litigation.

2. SCOPE & DEFINITIONS

- 2.1 This policy applies to locum, permanent, and fixed term contract employees (including apprentices) who hold a contract of employment or engagement with the Trust, and secondees (including students), volunteers (including Associate Hospital Managers), bank staff, Non-Executive Directors and those undertaking research working within Solent NHS Trust, in line with Solent NHS Trust's Equality, Diversity and Human Rights Policy. It also applies to external contractors, agency workers, and other workers who are assigned to Solent NHS Trust.
- 2.2 Any litigation outside the scope of the NHS Resolution schemes is out of scope of this policy.

3. PROCESS/ REQUIREMENTS

- 3.1 Solent NHS Trust is a member of the NHS Resolution (NHSR) Clinical Negligence Service for Trusts (CNST), and the Risk Pooling Scheme for Trusts (RPST).
- 3.2 The CNST handles all clinical negligence claims against member NHS bodies where the incident in question took place on or after 1 April 1995 (or when the body joined the scheme, if that is later). Cover under CNST includes the cost of representation at inquests if the eligible criteria are met.
- 3.3 The costs of the scheme are met by membership contributions. The projected claim costs are assessed in advance each year by professional actuaries. Contributions are then calculated to meet the total forecast expenditure for that year.
- 3.4 Individual member contribution levels are influenced by a range of factors, including the type of trust, the specialties it provides and the number of "whole time equivalent" clinical staff it employs. Claims history is also taken into account meaning that members with fewer, less costly claims pay less in contributions.
- 3.5 When a claim is made against a member of CNST, the NHS body remains the legal defendant. However, NHSR take over full responsibility for handling the claim and meeting the associated costs. Until April 2002, trusts handled claims within their chosen excess themselves. Such claims were then "called-in" and all CNST claims are now handled centrally regardless of value.
- 3.6 The Risk Pooling Schemes for Trusts (RPST) is the collective name for two separate schemes covering non-clinical risks, the Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES).

- 3.7 Both schemes date from 1 April 1999, and cover begins from that date, or from the date when the NHS organisation joined the scheme where that is later. NHS organisations may join either or both schemes. All NHS trusts and Foundation trusts in England currently belong to both schemes.
- 3.8 LTPS and PES claims are subject to excesses, with members responsible for funding below-excess claims themselves. Both schemes are funded by contributions from members and contributions are calculated on an annual basis using actuarial techniques, including the member's previous claims experience.
- 3.9 The Trust will adhere to the requirements of the appropriate version of the Reporting claims to NHS Resolution guidance document with regard to the process for managing litigation. This document is found on the NHSR website.
- 3.10 In addition to the guidance document, the Trust will apply the requirements of NHSR policy and guidance such as that outlined in NHSR guidance booklets and leaflets etc.

4. ROLES & RESPONSIBILITIES

- 4.1 **Chief Executive** – Trust Accountable Officer with the AEO responsibilities as set out in the Accountable Officers Memorandum issued by the Department of Health.
- 4.2 **Chief Finance Officer** - responsible for ensuring the Trust is adequately protected against the financial risks of litigation.
- 4.3 **Chief Nurse** - responsible for ensuring the Trust has the appropriate processes in place to enable protection from the impacts of litigation. The Chief Nurse is responsible for ensuring responses requested from NHSR or their panel solicitors are appropriately authorised e.g. Letters of Response, admission of breach of duty etc.
- 4.4 **Head of Risk and Litigation (HoRL)** - responsible for managing the Trust's application of the requirements within the Reporting claims to NHS Resolution guidance document when a claim is received by the Trust. The HoRL is responsible for managing and communicating with NHSR and their panel solicitors and up and downloading information via the online NHSR claims management system. The HoRL is responsible for arranging support for staff if they are required to attend Court.
- 4.5 **Heads of Quality and Professions (HQP)** - act as the service liaison points for the Head of Risk and Litigation. HQPs will ensure the requirements of the NHSR Reporting Claims to NHS Resolution guidance are adhered to by their service line.
- 4.6 **Head of Health and Safety** - responsible for acting as the liaison point for any litigation in regards to Health and Safety incidents.
- 4.7 **Staff employed by the Trust** - responsible for co-operating with the application of the NHSR requirements. This includes (but not limited to) carrying out investigations, providing information, providing witness statements, completing claim forms, providing roster and earnings information, corresponding and communicating directly with NHSR panel solicitors and appearing in Court as witnesses if required.

5. TRAINING

- 5.1 The Head of Risk and Litigation will attend any panel solicitor or NHSR training events and conferences as appropriate.
- 5.2 Formal training within the Trust is not required. Awareness raising can be provided by the HoRL if required.

6. EQUALITY IMPACT ASSESSMENT AND MENTAL CAPACITY

- 6.1 The Impact Assessment has indicated no negative equality impacts. (See Appendix A).

7. SUCCESS CRITERIA / MONITORING EFFECTIVENESS

- 7.1 The effectiveness of this document will be reviewed via a report to the Board once every six months.
- 7.2 The Head of Risk and Litigation will carry out the review. The NHSR report system will be the tool. The results will be presented to the Board via the report every six months. Actions will be monitored by the Board governance process.

8. REVIEW

- 8.1 This document may be reviewed at any time at the request of either staff side or management, but will automatically be reviewed 3 years from initial approval and thereafter on a triennial basis unless organisational changes, legislation, guidance or non-compliance prompt an earlier review.

9. REFERENCES AND LINKS TO OTHER DOCUMENTS

- 9.1 NHS Resolution website <https://resolution.nhs.uk/>
- 9.2 NHS Resolution website claims management section <https://resolution.nhs.uk/services/claims-management/>
- 9.3 NHSR Claims Reporting Guidelines <https://resolution.nhs.uk/resources/claims-reporting-guidelines/>
- 9.4 NHSR Being a witness in a clinical negligence claim <https://resolution.nhs.uk/resources/being-a-witness-in-a-clinical-negligence-claim/>
- 9.5 NHSR Being a witness in a non-clinical negligence claim <https://resolution.nhs.uk/resources/being-a-witness-in-a-non-clinical-negligence-claim/>
- 9.6 NHSR Giving evidence in court <https://resolution.nhs.uk/resources/giving-evidence-in-court/>
- 9.7 Policy for Staff on Giving Statements and Attending Court Hearings and Inquests http://intranet.solent.nhs.uk/DocumentCentre/SOPsandGuidelines/_layouts/15/WopiFrame2.aspx?sourcedoc=/DocumentCentre/SOPsandGuidelines/TeamDocument/GO02%20-%20Policy%20for%20Staff%20on%20Giving%20Statements%20and%20Attending%20Court%20Hearings%20and%20Inquests.pdf&action=default
- 9.8 NHSR claims management system (requires account set up by NHSR, restricted access). <https://extranet.resolution.nhs.uk/Pages/login.aspx>
- 9.9 Equality, Diversity and Human Rights Policy <http://intranet.solent.nhs.uk/DocumentCentre/PublishedPolicies/HR53%20Equality%20Diversity%20and%20Human%20Rights%20Policy.pdf#search=equality%20policy>

10. GLOSSARY

10.1 NHS Resolution (NHSR). Government funded body who deal with claims on behalf of members of the NHSR insurance schemes and pay out compensation on their behalf.

Clinical Negligence Scheme for Trusts (CNST). One of the schemes run by NHSR for dealing with and paying out compensation in respect of clinical negligence claims.

Risk Pooling Scheme for Trusts (RPST). The collective name for two separate schemes covering non-clinical risks, the Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES).

Liability to Third Parties Scheme (LTPS). One of the schemes run by the NHSR for dealing with and paying out compensation in respect of claims pursued by third parties, e.g. visitors or members of staff. This will include personal injury claims.

Property Expenses Scheme (PES). One of the schemes run by the NHSR in respect of property claims pursued by the Trust, members of staff or patients.

Claim. Any request for imbursement of damages against the trust, either clinical or non-clinical.

Subject Access Request (SAR). A request for all records (usually System1) regarding an individual the Trust has had contact with. Solicitors can do this on behalf of their claimant client if they have permission from that client. Often this is the first indication of a potential claim.

Letter of Claim. The first stage in the claims process prior to the issue of formal proceedings.

Panel Solicitors. Pre-approved list of solicitor firms that can be used to handle legal issues.

Hampshire County Council (HCC) – County Council Legal Services. On the Trust list of panel solicitors.

Patient Advisory Liaison Service (PALS) – Trust team that handles signposting enquiries and complaints.

Letter of Response (LoR) – letter from NHSR or NHSR panel solicitor to the claimant or their representative outlining the Trusts response to the alleged claim for damages.

Head of Risk and Litigation (HoRL) – Trust lead on litigation process.

Head of Quality and Professions (HQP) – leads for litigation for their individual service areas.

DAC Beechcroft (DACB) – Panel solicitors used by NHSR.

Appendix: A Equality Impact Assessment

Step 1 – Scoping; identify the policies aims	Answer		
1. What are the main aims and objectives of the document?	To outline the policy of the Trust regarding litigation brought against the Trust.		
2. Who will be affected by it?	Patients and staff.		
3. What are the existing performance indicators/measures for this? What are the outcomes you want to achieve?	To satisfy the NHR requirements as outlined in the Reporting claims to NHS Resolution guidance document.		
4. What information do you already have on the equality impact of this document?	None.		
5. Are there demographic changes or trends locally to be considered?	None.		
6. What other information do you need?	None.		
Step 2 - Assessing the Impact; consider the data and research	Yes	No	Answer (Evidence)
1. Could the document unlawfully discriminate against any group?		No	The NHR Reporting claims to NHS Resolution guidance outlines the national requirement of scheme members.
2. Can any group benefit or be excluded?		No	The Trust and Panel solicitors will facilitate any requirements regarding changes to processes to accommodate any requirements.
3. Can any group be denied fair & equal access to or treatment as a result of this document?		No	The Trust and Panel solicitors will facilitate any requirements regarding changes to processes to accommodate any requirements.
4. Can this actively promote good relations with and between different groups?		No	
5. Have you carried out any consultation internally/externally with relevant individual groups?		No	
6. Have you used a variety of different methods of consultation/involvement		No	
<u>Mental Capacity Act implications</u>		No	

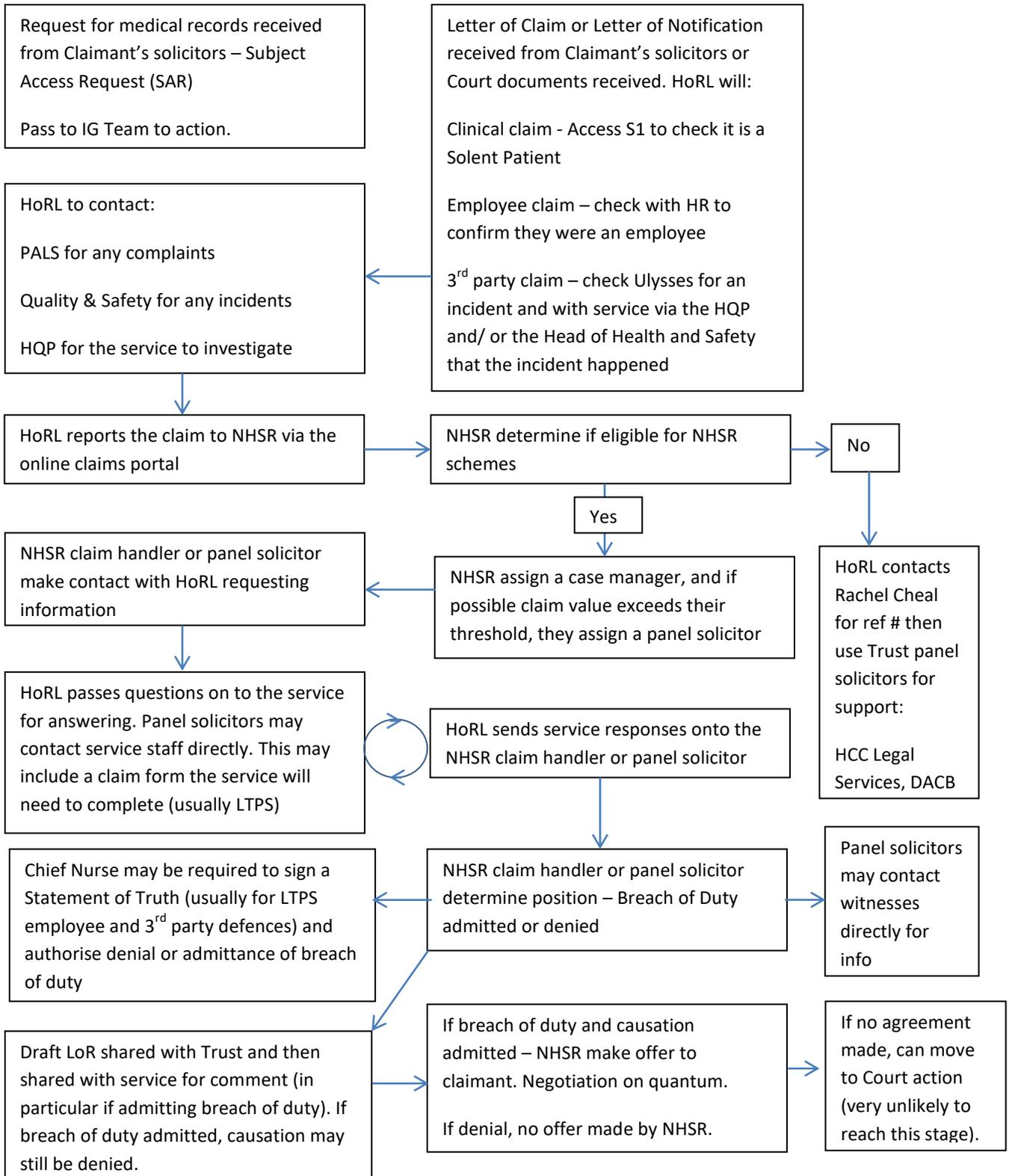
7. Will this document require a decision to be made by or about a service user? (Refer to the Mental Capacity Act document for further information)		No	
<u>External considerations</u>			
8. What external factors have been considered in the development of this policy?			National requirement of scheme members.
9. Are there any external implications in relation to this policy?		No	
10. Which external groups may be affected positively or adversely as a consequence of this policy being implemented?		No	None.

If there is no negative impact – end the Impact Assessment here.

<u>Step 3 - Recommendations and Action Plans</u>	Answer
1. Is the impact low, medium or high?	Low
2. What action/modification needs to be taken to minimise or eliminate the negative impact?	None, no negative impacts.
3. Are there likely to be different outcomes with any modifications? Explain these?	Not applicable.
<u>Step 4- Implementation, Monitoring and Review</u>	Answer
1. What are the implementation and monitoring arrangements, including timescales?	3 yearly review of the policy.
2. Who within the Department/Team will be responsible for monitoring and regular review of the document?	Head of Risk and Litigation.
<u>Step 5 - Publishing the Results</u>	Answer
How will the results of this assessment be published and where? (It is essential that there is documented evidence of why decisions were made).	Published with the Policy – SolNet.

****Retain a copy and also include as an appendix to the document****

Annex 1: Claims Process Flow Chart



Annex 2: Claims Frequently Asked Questions

What do we do with a request for medical records received from Claimant's solicitors – Subject Access Request (SAR)?

When a request for medical records is received from the Claimant's solicitors in relation to a potential claim ensure this is sent to Information Governance (InformationGovernanceTeam@solent.nhs.uk) for them to action. There is no need to report the claim to NHS Resolution at this stage as no formal claim against the Trust has been received.

What is a Letter of Claim or Letter of Notification received from Claimant's solicitors?

A Letter of Notification or Letter of Claim is likely to be sent directly to the Trust from the Claimant's solicitors and will usually be headed as a Letter of Notification or Letter of Claim.

A Letter of Notification can also be referred to as a Letter Before Action. This means that the Claimant's solicitors are letting the Trust know about a claim before taking formal action. This letter is usually quite brief in relation to the allegations made against the Trust. It is not governed by the Civil Procedure Rules (CPR) so there is no formal deadline to respond to the Claimant's solicitors. It is however usually best practice to respond as soon as possible.

A Letter of Claim is when the Claimant (patient or patient's representative if they are Deceased, a child or lack capacity) take legal action regarding a complaint against the Trust. This procedure is governed by the CPR. Once a Letter of Claim is received the Pre-Action Protocol is then activated. This means that the Trust and NHS Resolution will have 4 months from the date of the Letter of Claim to formally respond to the Letter of Claim. The response is called a Letter of Response. The Letter of Response will be drafted by NHS Resolution or Panel solicitors but will always be sent to the Trust for approval before it is sent.

When a Letter of Notification or a Letter of Claim is received, we access System1 Referral Viewer to check where the treatment received relates to and whether the Trust is responsible for the treatment provided in the first instance. We only have limited access to the records though, so our use is limited to seeing which service they had contact with.

If the claim does not relate to the Trust then we let the Claimant's solicitors know and ask them to address the claim to the correct Defendant (i.e. most likely to be another Trust).

If the Trust is responsible for the treatment we ensure this is reported to NHS Resolution as soon as possible via the online NHSR Claims Management System.

Information from the Letter of Claim or Letter of Notification is used to fill in the online NHSR claim notification forms.

NHS Resolution will then either accept or reject the claim and then allocate this to a claims handler. We will be notified of NHS Resolution's reference.

NHS Resolution will then have conduct of the claim, and will assign the case to their Panel Solicitors. This simply refers to a list of solicitor firms NHSR has agreement with to use.

For Solent NHS Trust this is usually DAC Beachcroft, based in Winchester.

What actions required once a Letter of Claim or Letter of Notification has been received?

- The Letter is sent to the Information Governance team (InformationGovernanceTeam@solent.nhs.uk) requesting relevant medical records. We ask for an email to be sent to the legal services inbox when the records have been located. The Information Governance Team will then save the records to the R Drive in the IG and Litigation folder under the patient's name so they can be easily located.
- The Letter is sent to PALS (Pals@solent.nhs.uk) to see whether there has been any previous complaint/s in relation to the incident.
- The Letter is sent to the Quality & Safety team (Quality&Safety2@solent.nhs.uk) to see whether there are any incident reports and/or investigation documents.
- If we are able to ascertain what service the Letter relates to, a copy is sent to the relevant Head(s) of Quality and Professions.

Once we have received copies of the above, the documentation is sent to NHS Resolution or to the Panel solicitors if we have been advised by NHS Resolution that they have been instructed.

It is likely that the Trust will be asked to obtain comments from the clinicians who were involved with the Claimant's care and treatment. We will review the Letter of Claim and/or Letter of Notification or the medical records to try and locate this information. We will then contact the Service Lead and ask them to obtain comments from the clinician/s involved.

If the relevant clinicians are no longer employed by the Trust then we will ask the service or HR for forwarding details and provide them to NHS Resolution or Panel solicitors as they have resources in place to try and locate them.

What happens when Court documents are sent to the Trust?

Sometimes the Claimant's solicitors will send Court Documents (serve proceedings) to the Trust without taking any of the above steps first. This therefore may be the first time that the Trust is aware of a claim/complaint made against them. This can happen for various reasons:

- The Claimant's solicitors have just chosen not to utilise the Pre-Action Protocol
- Limitation is about to expire. A Claimant has 3 years from the date of the incident or the date of knowledge of the injury to make a claim. If the Claimant is a minor then they have until the age of 18 to bring the claim.

If Court documents are sent to the Trust directly then it is extremely important that this is reported to NHS Resolution as soon as possible. The Claimant's solicitors usually send a Claim Form, Particulars of Claim, an expert report and a Schedule of Loss. If the Claimant's solicitors do not send the Particulars of Claim at this stage then they have 14 days after sending the Claim Form to do so.

NHS Resolution will usually instruct Panel solicitors at this stage so it is important that all documentation is sent to them. If it is a completely new claim then we will take all the steps required when a Letter of Notification or a Letter of Claim is received as outlined above.

If it is an existing claim that has now turned into a litigated case (i.e. we have now received a Claim Form from the Claimant's solicitors) then Panel solicitors will take/retain conduct of the claim and the Trust will have to assist Panel solicitors as and when required. The Trust will be asked to approve certain documents but Panel solicitors will provide their advice and guidance.

What is an LTPS Claim Report Form (Portal Claims)?

The Head of Risk and Litigation may request the service to complete an LTPS Claim Report Form (Portal Claims). This is a standard claim form that the service needs to complete so NHSR can take on the case. It is for Claims against the Trust regarding Employee and Public Liability such as injury to staff or visitors.

What if NHSR Panel Solicitors have questions?

NHSR and/ or their Panel Solicitors may require further information from the service and have questions that may need answering. These will be sent on to the service leads or corporate service for answering, e.g. roster changes, loss of earnings details, risk assessments etc.

Will Panel Solicitors contact me directly?

They might. Clinicians who were involved in the care of the patient involved may be contacted by the Panel Solicitors. This is to seek your input as a factual witness and not an expert. Claims are brought against the Trust and not against clinicians personally, because as an employer the Trust is vicariously liable for the acts and omissions of its staff.

The panel solicitors will often obtain expert evidence to inform a preliminary view on whether the claim can be defended. If that is not the case, we would be looking to settle and would not be contacting you.

Whilst we may deny any liability, the patient's solicitors will often obtain their own expert reports which may disagree, and so they are likely to issue Court proceedings at some stage. As a result, our panel solicitors may arrange a conference with those involved in the case and a barrister to consider in depth whether there are any risks which would lead us to consider a compromise settlement or whether we are confident of a successful defence. In practice, these types of claim often carry considerable risk in that much will come down to how a judge feels on the day if we went to trial.

The reason the panel solicitors need to speak to you is to get a better idea of the decision making at the time and how you might respond to questions about the same. It is natural that you would not have a detailed recollection off the top of your head, and we would provide you with access to your notes for the purpose of refreshing your memory. It is an unavoidably difficult aspect of the process that these claims often rear their heads sometime after the events in question.

Are you obliged to act as a witness?

As outlined in the Litigation Policy, you are obliged to co-operate with the process, both as an employee of the Trust, and as a clinician.

Can the Claimant or their solicitors ask you for a witness statement?

Yes they can, witnesses are not restricted to one party only. You can be a witness for both Claimant and the Trust. However, unlike when we ask you for cooperation, you can choose whether or not you wish to do so for the Claimant. The Trust has no say in the matter.

Will I have to attend Court?

Highly unlikely, but yes, you may be required to attend Court. By far the majority of cases never reach this point as NHSR seeks to resolve cases outside of the Court process. Going to Court is the last resort and given the risk of high costs, all parties seek to avoid this.