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20 October 1997

Dr G A Murnaghan
Director of Risk & Litigation Management
Royal Group of Hospitals and Dental Hospital
Health and Social Services Trust
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Dear Dr Murnaghan

REVIEW OF MEDICAL LEGAL LITIGATION

As part of our ongoing commitment to providing the Trust with a quality service in relation to the provision of legal services and in particular, in relation to the highly complex area involving matters of alleged clinical negligence, we have recently carried out an audit of your clinical negligence files with a view to measuring the services which we provide to you and our joint ability to respond to the needs of the clinical negligence process.

At the outset, we recognise and understand entirely, that there has been an exponential growth in referrals, not only in relation to matters where clinical negligence is alleged, but also there has been an increased burden placed on the Trust by more applications for access to medical records. We believe it would not be inaccurate to suggest the system has only continued to work through the valiant and selfless commitment of individual members of staff within the Trust who use and continue to use their best endeavours to ensure no disadvantage is occasioned to the Trust and in these matters.

That being said, we do believe that those systems which have served us well, and in many instances, were developed in or around the introduction of Crown Indemnity in 1990, ought now to be subject to a radical review given the new environment in which we are obliged to operate. Additionally, we believe the Trust must take cognisance of the recent guidance issued by the Department in relation to clinical negligence matters; the radical proposals contained within the Woolfe Report and finally, those comments recently made by the Lord Chancellor (Lord Irvine) in relation to the overhaul of the Civil Legal Aid Scheme.

Posted copy amended

Brangam Bagnall

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You and I have talked on many occasions concerning the 'Anatomy of a Claim', and I believe in general terms we are both agreed that the anatomy of the claim can be divided into the following subcategories:-

1. The Discovery process
2. Preliminary litigation assessment
3. Marshalling of evidence
4. Preparation for Trial
5. Trial
6. Risk Management lessons to be learnt.

In the past we have tended to deal with Discovery and the preliminary gathering of evidence contemporaneously, this has simply not worked for a number of reasons. Firstly because clinicians too are becoming increasingly more busy people, they are quite rightly irked and unsympathetic to general requests being made to them for the provision of medical legal reports which can only deflect them from carrying out their core responsibilities. This has been an index of the system, given that Plaintiff's Solicitors have been less than willing, if not unable, to provide basic information at the outset of a claim. I believe that this process ought to be abandoned forthwith. Instead, it would be my recommendation in the majority of the cases that the first matter to be dealt with, on an open, frank and economic basis must be the Discovery of documentation. I can see no good reason why, in the majority of cases, Discovery could not be effected within a period of 28 days from the first notification of the matter. There will of course be intrusions where notes are required for clinical purposes, or where notes cannot be found and these must be legislated for within the particular process which we adopt.

If you were minded to accept that advice, then within that part of the anatomy of the claim, dealing with Discovery, upon instructions we would ask for the relevant notes to be made available to us, we would undertake to sift the documentation with a view to ensuring that it was in a proper format and did not include extraneous material which would not be required for the purposes of Discovery. Upon completion of the Discovery process and again, we believe that process i.e. the Plaintiff's Solicitors coming to look at the notes, could be concluded within a period of a further 28 days, we would return the original notes to you and hopefully at that stage we would have a better idea of the nature of the concerns being raised by the Plaintiff's Solicitors.

This brings me to the second point, where previously we had asked for a 'blanket' report from the Consultant in charge of the patient's treatment. If the new procedure were to be adopted, we believe it would be important to seek information direct from a number of persons on a best evidence principle, i.e. junior doctors, from nurses, from PAMS or indeed from the Consultant concerned. In any event, obviously as a matter of courtesy, that Consultant will of course be notified of the claim; the investigations which had been recommended to the Trust; those persons from whom the Trust sought information and clearly he/she would be given an opportunity to comment and to add anything to the reports prior to them being submitted to your Directorate.

Assuming that that process had been completed, again with a 28 day period, then upon receipt of the information we would provide you with further written advice in relation to the liability issues, matters concerning quantum, and evidential issues with a view to obtaining further instructions from you and having the matter listed for discussion at a review meeting, not less than 28 days from the day upon which you furnished the clinical and other statements.

At the review meeting, we believe that a number of issues would require to be discussed and these would include:-

- Completeness of evidence
- Liability issues
- Need for Independent Expert
- Present state of action, i.e. have proceedings been issued
- Reserve
- Litigation plan.

Thereafter each case would be dealt with within the confines of the bespoke litigation plan which had been developed by the Trust and its lawyers and which would from time to time be subject to amendment, alteration or addition in the light of new information. Choice of Counsel, the choice of Independent Expert, and the issues relating to tactics would require regular review and would obviously be part of the ongoing monitoring of the case.

We are aware of the documentation which was recently issued by the Management Executive in relation to the handling of claims, as we are likewise aware of the fairly trenchant criticisms which the NHS Litigation Authority had made of some advisors retained by Trusts in England and Wales. We believe that the

management and stewardship of legal issues which has been applied by the Trust is to the benefit of all. It is much easier for us as lawyers to work within an environment where we receive crisp, concise and pragmatic instructions at an early stage, and this has always categorised the working relationship which we have had with your Directorate. We do, however, believe that we can enhance that relationship to our mutual benefit by developing a model which will ensure, that at an early stage three of your major expectations of your lawyers will be achieved viz:-

- an early, inexpensive, and accurate view on liability and
- a realistic guesstimate on quantum and
- the formulation and adherence to an agreed litigation plan.

There is one final point which I would wish to make, and that concerns, the position in the past, where within the NHS family, there was a sharing of information, a wish to collaborate and to co-operate with colleagues, but this, to some extent, has evaporated given the opportunity for conflict of interest as between statutory bodies and the fact that there are now a number of firms providing legal services to those bodies. In England and Wales in the past, regional legal advisors met on a regular basis to discuss matters of general importance and protocols in relation to the sharing and dissemination of information, and I believe there would be substantial merit in re-establishing that group, but at the same time ensuring that the users of the services were also involved in those meetings.

We recognise that a number of the proposals which we have made herein will take us some little distance from the previous processes, however we would ask that you give this matter careful consideration and I would of course be happy to meet with yourself and your colleagues to discuss the way in which the matter might be taken further.

I have enclosed a flow chart which sets out the proposals which I have suggested to you, and I look forward to hearing from you concerning this matter at your earliest convenience.

Kind regards.

Yours sincerely

Brangam, Bagnall & Co

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