Financial Management Directorate

HSS

HSS(F)20/98

The Chief Executive of each Health and Social Services Board
The Director of Finance of each Health and Social Services Board
The Chief Executive of each Health and Social Services Trust
The Director of Finance of each Health and Social Services Trust
The Chief Executive of the Central Services Agency
The Director of Finance of the Central Services Agency
The Chief Executive of the Northern Ireland Blood
Transfusion (Special Agency)
The Chief Executive of the Regional Medical Physics Agency

15th May 1998

Dear Sir/Madam

CLINICAL NEGLIGENCE CLAIMS: CLAIMS HANDLING

INTRODUCTION

The purpose of this circular is to set out the guidance on the handling of clinical negligence claims by Trusts. Trusts are responsible for the handling of claims which relate to incidents occurring after their establishment. Therefore it is essential that Trusts have in place adequate procedures to ensure the proper handling of clinical negligence claims.

DELEGATED LIMITS

The delegated limit for Trusts' clinical negligence out of court settlements is £250,000. Settlements above this limit must be submitted to the Health and Social Services Executive, Policy and Accounting Unit for approval.

The following guidance must be followed in respect of all settlements of clinical negligence claims.

SUMMARY

1. Trust Chief Executives should:

   1.1 ensure that their Trust has a clear policy on the handling of clinical negligence and personal injury claims, approved by the board, which conforms to the standards set out in Annex A.

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1.2 in particular ensure that:

i. there is a board member with a clear responsibility for clinical negligence issues, who will keep the board informed of major developments

ii. the Trust has access to a claims manager (or equivalent) with sufficient experience and seniority to manage claims effectively and to secure substantial savings over time in the cost of litigation, reporting directly to the board member

iii. there is a clear procedure for handling claims, which among other points will set out the circumstances in which:

- legal advice will be sought
- authority to make settlement offers can be delegated to officers below board level

iv. all claims are reviewed after closure, and a senior manager made responsible for ensuring that any necessary remedial action is taken and any general lessons disseminated

v. the board sees regular reports on the number and aggregate value of claims in progress, on their eventual outcome and on any remedial action taken or proposed

vi. the required information on clinical negligence claims is submitted as necessary to the Central Services Agency. (Circular HSS(F)19/98). **This is essential to ensure the efficient processing of reimbursement to Trusts, and for forecasting potential funding requirements.**

1.3. arrange for this letter, and the attached Annexes, to be drawn to the attention of the claims manager and other relevant staff, eg clinical directors

1.4. ensure that these policies and procedures are subject to regular scrutiny by internal audit under the supervision of the Trust's Audit Committee.

DETAIL

2. Clinical negligence is a rapidly growing cost to the HPSS and will impact, in particular, on Trusts over the next few years. A single large settlement against a Trust could place significant strain on financial resources, as well as taking up a disproportionate amount of senior management and clinical time. Trusts can reduce the incidence and adverse impact of clinical negligence by:

i. adopting prudent risk management strategies;

ii. adopting a systematic approach to claims handling in line with best current practice and guidance issued by the HSS Executive.

3. Minimum standards for the basic organisation of claims handling are set out in the attached Annex B. All Trusts should ensure that:

i. they have a clear policy for claims handling which meets all the standards set out in Annex A;

ii. this letter and its Annexes are drawn to the attention of their claims manager and other staff involved in the day-to-day handling of claims;

iii. the required information is submitted to the Central Services Agency. (HSS(F)19/98)

THE CLINICAL NEGLIGENCE CENTRAL FUND

4. The Clinical Negligence Central Fund has been established to provide funding for all clinical negligence settlements.

Trusts are only liable for clinical negligence claims which arise from incidents occurring after their inception date.

5. Trusts are fully accountable for the handling of the claim.

Guidance on the administration details of the Clinical Negligence Central Fund and the procedures to be followed by Trusts is contained in Circular HSS(F)19/98 "Clinical Negligence Central Fund: Funding and Administrative Arrangements".

Yours sincerely

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ANNEX A

HANDLING OF CLINICAL NEGLIGENCE AND PERSONAL INJURY CLAIMS: MINIMUM STANDARDS

Trusts hold a delegated limit for clinical negligence out of court settlements of £250,000. Settlements above this limit must be submitted to the HSS Executive, Policy and Accounting Unit for approval.

Trusts are responsible for the handling of their clinical negligence claims.

1. **Policy Statement**

   1.1 Trusts must have a written policy on the handling of clinical negligence and personal injury claims, approved by the board, which as a minimum covers the remaining points set out below.

2. **Board Level Responsibility**

   2.1 There will be a board member with clear responsibility for clinical negligence issues, who will keep the board informed of major developments. This may be the same individual who has overall responsibility for risk management.

3. **Experienced Claims Manager**

   3.1 The Trust will have access to a claims manager (or equivalent) reporting directly to the responsible board member. This is a key appointment. Trusts must ensure that their claims manager:

   (i) is of sufficient seniority to carry influence within the organisation and is given the status to do so; and

   (ii) has sufficient experience of and/or training in clinical negligence issues.

4. **Qualified Legal Advice**

   4.1 The Trust will have a clear policy on the circumstances in which qualified legal advice will be obtained. Whatever the locally determined policy, qualified legal advice must always be obtained at an appropriate stage for all claims involving potential expenditure above the standard delegated limit for *ex gratia* payments (£1,000) and in any case before making any firm offer to settle the claim. This should cover:

   i. liability and causation

   ii. an assessment of the strength of the defence and the balance of probabilities

iii. the likely quantum of damages, including best and worst case

iv. the likely legal costs of defending the claim.

Legal advice may also be helpful in deciding what expert witnesses to call, and whether the dispute could be resolved in other ways eg through mediation.

4.2 Nevertheless, the final decision to seek to negotiate a settlement or to continue defending the case should be taken by the board or by the claims manager within delegated limits (see paragraph 9 below).

4.3 Trusts will wish to bear in mind that those who advise them in any capacity should be regarded as owing a duty of care to them. They may wish therefore to ensure that their advisers carry a sufficient level of professional indemnity cover.

5. Involvement of Front-Line Staff

5.1 There should be clear procedures for involving front-line staff, in particular medical and nursing staff, whose co-operation is essential if claims are to be successfully defended. In clinical negligence cases the view of those involved in the treatment which has given rise to a claim must be considered carefully by the claims manager before a decision is made to settle or contest the claim.

6. Procedure for Handling Claims

6.1 There will be a well-understood and clearly documented procedure for handling claims. This should cover the following aspects:

i. setting up a record on the claim and maintaining a claims review system (see paragraph 7 below);

ii. establishing when needed an objective account of the original incident, giving appropriate weight to the recollection of the staff originally involved;

iii. identifying all records related to the incident;

iv. establishing and maintaining contact with all staff involved in the original incident;

v. obtaining an in-house "expert view" of the claim and, if appropriate, securing suitable external expert witnesses;

vi. initial valuation of the claim;

vii. instruction of solicitors, briefing counsel and monitoring their costs;

viii. negotiation of out-of-court settlements and the delegated limits which apply (see paragraph 9 below);

ix (for large settlements, in particular those over £250,000, where the plaintiff is agreeable) evaluation of the costs and benefits of structuring the settlement, negotiation of the details, and preparation of the VFM report for the HSS Executive;

x. procedures to identify any procedures or aspects of clinical practice requiring remedial action, including systematic review of all cases after closure;

xi. clear allocation of responsibility for carrying through any remedial action required and for disseminating any wider lessons, both within the Trust and (where appropriate) more widely;

xii. arrangements for analysis of claims against the Trust in particular of trends and emerging patterns with implications for the Risk Management policies of the Trust;

xiii. arrangements for regular reporting to the board or to a subgroup of the board, both in aggregate and on individual claims; and in particular for securing board agreement to proposals for settlements outside the claims manager's delegated limits.

7. Claims Database

7.1 The Trust will set up and regularly maintain a database with information on all claims. Care should be taken to maintain patient and staff confidentiality. Appendix 1 sets out an indication of the information which might be held on the Trust's own database for clinical negligence claims. Records should be held for a very substantial period after the claim has been closed or become inactive - it has been known for claims to be brought up to 25 years after the original incident. The use of microfiche can be considered for storage of apparently inactive files.

The Trust will be required to submit a subset of this information annually to the Central Services Agency. A service-wide report will be prepared and issued annually by a working group established to review more strategic issues involved in clinical negligence and assess remedial actions to be taken.

The information required to be submitted to the Central Services Agency is set out in Appendix 1 to Circular HSS(F)19/98 "Clinical Negligence Claims Central Fund".

8. **Linkages to Other Systems**

8.1 There will be appropriate linkages for claims handling to (a) functional directorates, (b) clinical audit, (c) risk management (including compliance with health and safety at work legislation).

8.2 Many clinical and other functional directors will already appreciate the importance to the Trust's reputation of the effective handling of claims. Nevertheless, the Trust will wish to ensure that all directorates are fully consulted on the Trust's claims handling policies and that appropriate arrangements are in place to enable them to support the Claims Manager in the day-to-day handling of claims. Clinical directors will also wish to consider how the results of retrospective review of claims can be used as input to clinical audit.

8.3 Trusts also need to recognise the close connections between risk management, complaints, and the management of claims. Where these are the responsibility of separate individuals, Trusts will wish to consider what arrangements are needed to ensure the fullest possible co-ordination.

9. **Delegated Limits**

9.1 The board will agree the circumstances, including delegated financial limits, in which settlements may be approved by (a) the responsible director, (b) the claims manager, and (c) a sub-group of the board. For claims outside these delegated limits the board should agree, case by case, a range of possible settlement values within which the director and/or claims manager has discretion to negotiate. (It should be remembered that, in the nature of the legal process, decisions on whether or not to accept an offered settlement may sometimes have to be taken at very short notice.)

10. **"Nuisance" claims**

10.1 Trusts are strongly advised to avoid settling cases of doubtful merit, however small, purely on a "nuisance value" basis. The decision to settle a case or contest it should always be based on an assessment of the risk of losing (and the cost in legal fees of continuing, bearing in mind that if the plaintiff is legally-aided these costs are unlikely to be recoverable).

11. **Reports to the Board**

1.1 The board (or a sub-group) will see regular reports on:

i. the number and aggregate value of claims, and details of any major individual claims;

ii. the progress and likely outcome of these claims, including the expected settlement date;

iii. the final outcome of the claim; and

iv. any proposed remedial action arising out of particular claims.

These reports will need to be analysed at a level of detail which will enable the board to form a view on emerging trends, and linked to similar information on adverse incidents. It is suggested that for major claims an initial report should be made within 3 months of notification, with updates at least every six months on those in which proceedings have been served or in which settlement is expected within the next twelve months.

12. Novel, contentious or repercussive payments

12.1 Despite the general approach to delegation taken in this guidance, all claims involving "novel, contentious or repercussive" expenditure should still be referred to the HSS Executive for approval. The most likely instances are:

i. claims involving some unusual and new feature which, if not correctly handled, might set an unfortunate precedent for other HPSS litigation;

ii. claims which appear to represent test cases for a potential class action, or cases which although not formally part of a class action appear to be very similar in kind to concurrent claims against other Trusts.

12.2 Trusts faced with a claim which could fall under either of these categories are asked to take action as follows:

i. Trusts should draw attention of the HSS Executive to the particular features of the claim at the earliest occasion, usually when first notifying the claim. The HSS Executive will determine whether formal DFP approval to settle the claim is required and inform the Trust of their decision, and if appropriate take responsibility for seeking authority from DFP.

ii. In all other cases, Trusts should contact the HSS Executive for advice.

13. Register of Losses and Special Payments

13.1 All payments in settlement of clinical negligence or personal injury claims should be entered into the Trust's register of losses and special payments.

ANNEX B

ILLUSTRATIVE CONTENTS OF TRUSTS CLAIMS DATABASE

Information Required

1. Patient details (name, date of birth, age, date of death)
2. Plaintiff's name
3. Plaintiff's solicitor
4. Details of all members of staff involved, including specialty and degree of involvement
5. Location of incident
6. Date of incident
7. Date of notification of claim
8. Specialty of Department of treatment
9. Nature of incident
10. Resulting harm or disability
11. Estimate of quantum
12. Estimate of plaintiff's costs
13. Other parties involved in claim and proportionate share of costs
14. Probability
15. Defence solicitor
16. Estimate of defence costs
17. Stage of claim
18. Outcome

Other Information Likely to be of Value

19. Nature of proposed defence

20. names of possible expert witnesses

21. Expert advice obtained - negligence/causation

    a. internal
    b. external
    c. exchange of witness reports?

22. Expert advice obtained - quantum

    a. medical
    b. nursing
    c. housing etc
    d. exchange of witness reports?

23. Was the incident also the subject of a complaint under the complaints procedure? Outcome?

24. Has an alternative form of dispute resolution been considered/attempted?

25. (For large claims) is structuring feasible? acceptable to the plaintiff?

Other Information to be Held

26. Objective account of incident.

27. Does the case involve novel, contentious or repercussive issues?

28. Is this a new risk and, if so, what steps have been taken to review procedures?

29. Does the case identify any systematic failings on the part of:

    i. clinical or other "front-line" staff;
    ii. clinical procedures;
    iii. operational and risk management procedures;
    iv. administrative procedures or staff;
    v. claims handling staff;
    vi. claims handling procedures;
    vii. communication issues.

    If so what are they and what action is intended to remedy the identified deficiencies and timetable for implementation of changes or improvements?

30. Any lessons of potential application to other Bodies?

31. Are there any problems with equipment identified which could usefully be communicated to other HSS Bodies?