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Department of Health, Social Services & Public Safety
An Roinn Sláinte, Seirbhísí Sóisialta agus Sábháilteachta Poiblí

Subject:

Circular Reference: HSS (F) 20/2002

Clinical Negligence – Prevention of Claims and Claims Handling

Date of Issue: 12 September 2002

For Action by:

- Chief Executive HPSS Boards
- Chief Executive HPSS Trusts
- Chief Executive Central Services Agency
- Chief Executive NI Blood Transfusion Service
- Chief Executive Regional Medical Physics Agency

For Information to:

- Health Promotion Agency
- NI Practice and Education Council for Nursing and Midwifery
- NI Post Graduate Council for Medical and Dental Education
- Directors of Finance of HPSS Boards
- Directors of Finance of HPSS Trusts
- Clinical Negligence Contact Points

Summary of Contents:

The purpose of this circular is to advise HPSS Boards, Trusts and certain agencies ("HPSS bodies") of developments in the management of clinical negligence claims.

Enquiries:

Any enquiries about the contents of this Circular should be addressed to:

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Related documents

HSS (F) 20/98
HSS (F) 21/98
HSS (F) 28/99
HSS (F) 19/2000

Superseded Documents:

HSS (F) 1/1990
HSS (F) 26/97
HSS (F) 20/98 Supplement No 1
HSS (F) 17/2001

Review Date:

30 September 2003

Status of Contents:

Action

Implementation:

Immediate

Additional Copies:

[redacted]
FPAU[redacted]

INVESTOR IN PEOPLE

HSS(F) 20/2002

12 September 2002

Dear Colleague,

CLINICAL NEGLIGENCE CASES – PREVENTION OF CLAIMS AND CLAIMS HANDLING

The purpose of this circular is to advise HPSS Boards, Trusts and certain agencies ("HPSS bodies") of developments in the management of clinical negligence claims.

The guidance reflects the Department's intention of developing an approach that:

- Provides for redress for individuals and their families who have suffered as a result of clinical negligence;
- Provides value for money for the taxpayer;
- Protects staff from vexatious allegations; and,
- Ensures that where necessary appropriate action is taken to prevent the occurrence of similar incidents in the future

Implementation of the changes recommended may require substantial change in the clinical negligence management process for some HPSS bodies. In recognition of this, the Department anticipates reviewing the guidance and its implementation by 30 September 2003.

HPSS bodies are encouraged to follow the principles and timescales recommended within the Clinical Negligence Pre-action Protocol drawn up by the Lord Chancellor's Department for use in England and Wales. It is acknowledged however that full implementation of that protocol here is possible only with the support of the legal profession. The Northern Ireland Court Service are currently working with the Law Society of Northern Ireland to introduce a local protocol for personal injury cases and are about to address a protocol for clinical negligence cases. In due course, HPSS bodies and the legal profession will be obliged to follow this NI protocol and any amended principles or timescales.

The Department is currently considering the establishment of a Claims and Litigation Steering Group tasked with:

- Assessing the implications of the NIAO and PAC reports on clinical negligence, ensuring relevant action is taken;
- Assessing the implications of the CMO Review of Clinical Negligence in England and Wales and considering any relevant recommendations;
- Advising the Department on the future managerial and administration of litigation claims and the promulgation of good practice.

The Department will wish to work closely with HPSS representatives in taking this work forward.

If you have any queries regarding this circular, please contact Adrian Murphy, Finance Policy and Accountability Unit, Room 522 Dundonald House [redacted] or email Adrian.Murphy[redacted]

Yours sincerely,

ANDREW HAMILTON
Director of Financial Management

CLINICAL NEGLIGENCE CASES – PREVENTION OF CLAIMS AND CLAIMS HANDLING

Introduction

1. Definition

Clinical negligence is defined as:

" a breach of duty of care by members of the health care professions employed by HPSS bodies or by others consequent on decisions or judgements made by members of those professions acting in their professional capacity in the course of their employment, and which are admitted as negligent by the employer or determined as such through the legal process".

The term health care professional includes hospital doctors, dentists, nurses, midwives, health visitors, pharmacy practitioners, registered ophthalmic or dispensing opticians (working in a hospital setting), members of professions allied to medicine and dentistry, ambulance personnel, laboratory staff and relevant technicians.

Summary

2. The Northern Ireland Audit Office (NIAO), in its recent report on "Compensation Payments for Clinical Negligence", identified a number of areas that require improvement within the systems and procedures for dealing with clinical negligence and any resulting compensation claim.

3. This guidance: (i) advises on action the Department has initiated towards enhancement of the clinical negligence settlement process ("claims process"); (ii) promulgates the use of the guidance contained in Circular HSS (F) 20/98 Supplement No 1 which is now superseded, and (iii) encourages the taking of certain measures to improve the complete clinical negligence process.

Action Initiated

Centralised Database

4. A principal finding of the recent NIAO Report on Clinical Negligence was that the lack of a central regional database of all clinical negligence information constrained the sharing of knowledge, experience and good practice within HPSS Bodies. In order to address these concerns, a small working group from across the HPSS has been established with the objective of delivering an interim regional database by – mid September 2002 and a longer-term objective of delivering a more functional and comprehensive database by March 2003. Separate instructions will be issued regarding input of data to the central database on a regular basis.

5. To maintain an effective central database it is essential that all HPSS bodies dealing with clinical negligence cases maintain appropriate databases in line with guidance contained in Annex B of Circular HSS (F) 20/98. The Department will regularly review the data supplied by HPSS bodies to the central database to ensure full compliance with this guidance.

Accounting for Clinical Negligence

6. The Department has accepted the necessity to review the basis of valuation of provisions for clinical negligence held by HPSS bodies and has consequently adopted a revised valuation methodology for its Departmental Resource Accounts for 2001-02 aimed at acknowledging the actual claims experience of HPSS bodies. A small group of finance practitioners and other professionals tasked with preparing detailed guidance on the accounting and budgeting treatment of clinical negligence claims for HPSS bodies will report on this issue by 28 February 2003.

Pre-Action Protocol for the Resolution of Clinical Disputes

Content of Protocol

7. This protocol was brought to the attention of HPSS bodies as an example of good practice in January 1999 as circular HSS (F) 20/98 Supplement No 1. It was not

intended to be comprehensive but rather to provide a code of best practice for dealing with cases where litigation is a possibility. It covers two central areas: (i) a set of good practice commitments by those involved, with particular emphasis on better handling of potential disputes and more effective and efficient management of information and investigation; and (ii) a set of steps to be followed where litigation is in prospect, focusing on management of information (e.g. the handling of health records and exchange of formal records).

8. In particular, the commitments state that by implication HPSS bodies should:
    a) Ensure key staff are appropriately trained;
    b) Develop a coordinated approach to clinical governance;
    c) Set up an adverse incident reporting system;
    d) Use the results of adverse incidents and complaints positively;
    e) Ensure that patients are fully aware of how to raise their concerns or complaints;
    f) Establish efficient and effective systems of recording and storing patient records;
    g) Advise patients of a serious adverse outcome.

9. The timetable for the protocol steps requires that:
    a) Medical records should be provided within 40 days of the request for them, with any delay beyond this having to be explained to the plaintiff's solicitor;
    b) HPSS bodies should adopt a policy on which cases will be investigated fully;
    c) HPSS bodies should acknowledge a Letter of Claim within 14 days of receipt;
    d) HPSS bodies should provide a reasoned answer within 3 months of the Letter of Claim.

10. The protocol aims to improve the pre-action communication between parties by establishing a timetable for the exchange of relevant information and by setting standards for the contents of correspondence. It includes guidance on alternative approaches to settling disputes ("Alternative Dispute Resolution"). Compliance with the protocol timetable should assist parties in making an informed judgement on the merits of their case earlier than usual and will provide an opportunity for improved communications between the parties, intended to lead to an increase in pre-action

settlements.

11. The Clinical Disputes Forum drew up the protocol in GB. The Northern Ireland Court Service are now working with the Law Society of Northern Ireland to introduce a local protocol for personal injury cases and are about to address a protocol for clinical negligence cases.

Compliance with Protocol

12. In order to put this into effective operation, the Department has re-issued the protocol and it is included as Appendix A. As the protocol was developed in GB, compliance with it is not mandatory for the legal profession and some of the legal references are not appropriate for Northern Ireland. However, HPSS bodies are advised that compliance with its basic principles and timetables advocated is encouraged, subject to legal advice. The protocol is also available from the Lord Chancellor's Department at the following website address: (www.lcd.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm).

13. HPSS bodies are asked: (i) to ensure that all claims managers and other relevant staff have access to it; (ii) to examine their caseload to check the level of compliance with the time limits shown in it and rectify instances where the limits have been exceeded; and, (iii) to confirm in writing that their staff are actively taking its contents into account in processing cases. Appendix B contains an annual statement to be signed by Chief Executives confirming or otherwise that these and a number of other new obligations are being met. The statement must be submitted by 30 June of each year.

14. Governance arrangements implemented in pursuance of the obligations within the protocol must integrate fully with the clinical and social governance framework envisaged within "Best Practice – Best Care". The framework is designed to ensure that high quality, effective care is delivered and that where things go wrong they are quickly put right and lessons are learnt to help prevent reoccurrence. This will require HPSS provider organisations to put and keep in place arrangements for monitoring and improving the quality of health and social care that they provide in line with the introduction of a statutory duty of quality.

Promulgation of Other Good Practice

15. In addition to the action initiated above, a number of other measures are required to further improve the operation of the clinical negligence process for HPSS bodies and plaintiffs.

Corporate Responsibility for the Management of Clinical Negligence

16. Chief Executives are reminded of their obligation set out in circular HSS (F) 20/98 to ensure that clinical negligence is managed appropriately. They should be aware of the increasing complexity and potentially considerable increase in clinical negligence workload that has been predicted and consider this when assessing managerial arrangements. The Department asks each HPSS body to confirm that managerial responsibility and arrangements for reporting clinical negligence information to board level complies with this guidance. Appendix B contains an annual statement to be signed by Chief Executives confirming or otherwise that these obligations are being met.

17. Alongside compliance with the principles and timetables of the pre-action protocol, HPSS bodies must ensure that the complete clinical negligence compensation process from incident through to legal settlement is managed professionally. There should be no attempt by HPSS bodies to delay the process at any stage, for example, HPSS bodies should promptly instigate search for, and provision of, medical records for legal discovery and in particular, once a court date has been set, should not seek to put off or delay the court process.

18. Existing procedures for handling of claims are set out in circular HSS (F) 20/1998. Retention of information in compliance with these minimum requirements is essential and HPSS bodies must ensure that full information on each element of the claim is held, in particular making sure all legal costs associated with the case are separately identified.

19. To strengthen the procedures in relation to provision of data to the Clinical Negligence Central Fund, revised arrangements have been put in place (Appendix C).

In future, each responsible Director will be asked to certify that the material submitted: has been extracted from financial or management information systems; has been fully reviewed; and any estimates made are based on professional opinion obtained and/or historical precedent. Circular HSS (F) 17/2001 is now withdrawn.

20. Information regarding forecast and actual provisions on clinical negligence is currently required from HPSS bodies on a monthly basis in compliance with circular HSS (F) 9/2002. HPSS bodies are reminded that accurate forecasts are essential to manage overall clinical negligence expenditure within the Departmental budget.

21. HPSS bodies are no longer required to provide quarterly information on clinical negligence claims to the Department and the Central Services Agency. The Department will instead use data extracted on a quarterly basis from the central clinical negligence database to manage Departmental cash flow.

Apologies and Explanations

22. There is a view, based on the experience in GB of dealing with clinical negligence cases where limited injury or loss has occurred, that a patient who suffers an adverse effect as a result of treatment can be diverted from making a claim for compensation. It is suggested that this can be done at the stage where the patient is first told of the adverse result. If this stage is well handled a number of potential claims will not proceed.

23. In line with the concept of being as honest and open with patients as possible, it is recommended that the following should be given: (i) an expression of sympathy and sorrow or regret at the outcome of the treatment; (ii) as full and factual an explanation as possible, without any admission of liability, of what has happened and its effects; (iii) if appropriate, an offer of early corrective treatment and/or rehabilitation; and (iv) advice on accessing the complaints system.

24. It is recommended that HPSS bodies consider how best this policy may be adopted within each clinical/professional area based on the competence and expertise of the staff involved. HPSS bodies should set guidelines for the involvement of complaints officers or more senior members of staff in fulfilling this obligation on behalf of the

Board or Trust. It is acknowledged that staff within HPSS bodies may require coaching or training to put such change into effect.

Alternative Dispute Resolution

25. Paragraph 5 of the pre-action protocol refers to alternative approaches, requiring the consent of the parties to settling clinical negligence disputes including arbitration, mediation and determination by an expert. The use of 'mediation' in particular has found favour in GB as a method that will work in certain cases. It should be explored as a possible option in any instances where ongoing negotiations with the plaintiffs suggest that it would work. Information on its use is available on the NHS Litigation Authority website (www.nhsla.com) and on the Law Society of Northern Ireland website (www.lawsoc-ni.org). In judging whether to try this option, or other alternatives, regard would need to be given to the likelihood of success. Otherwise, it could become just another step in the process with both a consequential delay and generation of additional cost.

Admission of Liability in Cases that are Difficult to Defend

26. There are and have been many instances where the defence of cases has been prolonged even when the defendants have recognised that their liability is clear cut. This raises a question as to whether HPSS bodies should prolong the defence of difficult cases to defend when to do so would incur unnecessary additional expense. The Department recognises that often the plaintiffs will not want to settle any earlier in the proceedings and strategically it may not be sensible to admit liability, or otherwise agree to settlement, until the last stages of negotiation (e.g. "at the door of the Court").

27. Nevertheless, it is recommended that in each case where it is realised that defence will be difficult to sustain, consideration be given to admitting liability and attempting to reach settlement. In taking a decision to pursue this course, consideration will have to be given to the relative costs of a likely increase in amount of settlement weighed against potential savings in legal and other costs for both parties.

Structured Settlements

28. To date, the Department is aware of only two cases in which structured settlements have been used. Whilst recognising the fact that, ultimately, the take up of such settlements is a matter for the plaintiffs to determine, the Department would commend the guidance contained in Circular HSS (F) 21/98 and exhort HPSS bodies to make use of structured settlements whenever possible in cases where settlements will be £250,000 or more, or where to do so might also represent good value for money. Each HPSS body is asked to review relevant ongoing cases to ensure that full consideration has been given to using structured settlements. It should also be noted that under the Damages Act 1996 Courts may now sanction structured settlements where the parties consent, and the Act further provides for the Department to guarantee such settlements on behalf of HPSS bodies.

Review of Cases

29. HPSS bodies are asked to carry out an immediate review of all the ongoing clinical negligence cases they have on record and, as a minimum, to review all ongoing cases on an annual basis. The review must examine cases:

    a) To review fully the base data held for each to ensure no duplication of records. (In a number of instances, cases have been registered when a 'letter of disclosure' is received and then again when an actual claim is lodged);
    b) To consider suitability of immediate closure of all cases held without contact/action on behalf of the plaintiff for 3 years or more;
    c) To consider the expected value of compensation and associated costs and expected settlement date in line with accounting guidance.

30. The Department will seek immediate positive assurance from Chief Executives, by 3 January 2003 and by 30 June of each subsequent year, that such a review has been carried out and will request a summary of its main findings. This links in with the timetable for submission of annual forecast information to the Department and CSA. Appendix D contains the immediate confirmation statement for return by 3 January 2003. In providing this immediate assurance, it is acceptable to place reliance on

evidence obtained during any previous formal review carried out for the 2001-02 annual accounts. As with other assurances required, Appendix B contains an annual statement to be signed by Chief Executives confirming or otherwise that these obligations are being met.

Action Required

31. HPSS bodies should:

a) Maintain an accurate clinical negligence database in line with HSS (F) 20/98 (Paragraphs 5 and 16 above);

b) Take action to comply with the 'pre-action protocol' (Paragraph 13 above and Appendix A), and;

   i. Ensure that all claims managers and other relevant staff have access to it;

   ii. Examine their caseload to check the level of compliance with the time limits shown in it and rectify instances where the limits have been exceeded; and,

   iii. Confirm in writing that their staff are actively taking its contents into account in processing cases;

c) Confirm managerial arrangements are in line with HSS (F) 20/1998 (Paragraph 16, 17 & 18 above);

d) Implement revised administrative arrangements (Paragraph 18, 20 and 21 above);

e) Implement Departmental recommendations regarding apologies and explanations (Paragraph 22, 23 and 24 above);

f) Review ongoing cases to ensure adequate consideration has been given:

   i. to adopting alternative dispute resolution techniques (Paragraph 25 above);

   ii. to admitting liability and attempting to settle cases which can be difficult to defend (Paragraph 26 & 27 above), and;

   iii. to using structured settlements (Paragraph 28 above);

g) Carry out the review of cases dealt with in paragraphs 29 and 30 by 3 January 2003 and annually by 30 June each year and confirm to the Department that a

formal review has been carried out, with a brief indication of findings.

32. For this purpose, HPSS bodies are asked to use the pro forma at Appendix D and to submit immediate confirmation by 3 January 2003, with the annual confirmation statement at Appendix B required by 30 June of each year.

33. For its part the Department will lead the review group mentioned in paragraph 6 above and in due course will produce full guidance on accounting for clinical negligence.

Returns

34. All returns required in compliance with the circular should be sent to:

Finance Policy and Accountability Unit,
Room 414,
Dundonald House
Belfast
BT4 3SF

Other Guidance

35. To assist HPSS bodies, a complete list of the guidance on clinical negligence issued by the Department's Finance Directorate is contained in Appendix E.

Further Enquiries

36. Any enquiries regarding the content of this Circular should be addressed to Adrian Murphy, Finance Policy and Accountability Unit, Dundonald House (Telephone number [redacted] or by e-mail to adrian.murphy [redacted]