



COVID-19 Briefing: Clinical Negligence and the Coronavirus

On 14th August 2020, a new Protocol was agreed between NHS Resolution, Action Against Medical Accidents and the Society of Clinical Negligence Lawyers in respect of claims for clinical (medical) negligence as a result of the impact of COVID-19.

The COVID-19 Clinical Negligence Protocol 2020 can be read and downloaded from NHS Resolution [here](#).

WHAT IS THE PURPOSE, REASON, AND NEED BEHIND THE CLINICAL NEGLIGENCE COVID-19 PROTOCOL?

The purpose of the Protocol is to promote consistent approaches from Claimants, Doctors, and the NHS in relation to conduct of clinical negligence claims during the COVID-19 pandemic.

COVID-19 has, as we all understand, placed an increased workload and pressure on all facets within the NHS.

CLINICAL NEGLIGENCE COVID-19 PROTOCOL

The Protocol governs all stages of the clinical negligence claims process from investigation to the issue of Court proceedings and the conduct of those proceedings. The main provisions of the Protocol are:

1. A moratorium on limitation periods for three months beyond the end of the Protocol.
2. Service of documents via email as the default format.
3. Where possible the Claimant's medical examinations to be conducted in a non-virtual remote manner where possible and practical.
4. Reasonable extensions to be agreed between the parties, for example, for a formal response to a Letter of Claim and the time for filing a Defence.

5. The parties to agree reasonable extensions of time for Case Management Directions without the cost, expense, and delay of applying to the Court.
6. Whether the Court appointments for dealing with costs budgeting should be adjourned.
7. The parties to adopt a reasonable approach to requests for interim payments against damages and payments on account of costs.
8. For hearings and adjournments the NHS should not be required to do anything that could adversely affect frontline clinical care.
9. The Chief Executive of Action Against Medical Accidents stated that the Protocol "Should provide assurance to those with a potential clinical negligence claim whilst also acknowledging the severe pressure that the NHS are under as a result of the pandemic".
10. The provisions of the Protocol are due to be reviewed every eight weeks and will remain in force indefinitely until one of the above-mentioned organisations provides four weeks prior notice to terminate the agreement.

COMMENT

The NHS is a service clearly under tremendous pressure at the present time and those working within it are the heroes of the hour and decidedly so. The dedication of the NHS staff working within a dangerous and on occasion a life-threatening environment is unrivalled. People have been, are, and will be affected by the pressures within the NHS as a result of Covid-19 either by virtue of the illness itself, cancelled operations, suspended treatments, and causes of contagion and many will have to face the potential moral dilemma about whether to pursue a clinical negligence claim.

There have been calls by the Medical Defence Union for the government to provide some form of indemnity for doctors following the pandemic. It is only correct to emphasise the current situation faced by the NHS. However, any client who finds themselves

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having to pursue a claim for clinical negligence does not take that step lightly. Only a very small minority of clinical negligence claims will subsequently lead to a Letter of Claim being sent to NHS Resolution or the Medical Defence Union as an affected party will still need to prove that on the balance of probabilities:

1. The standard of treatment provided fell below the standard expected of a reasonably competent health professional dealing with a patient's condition and a given set of circumstances.
2. Even where the treatment provided falls below the appropriate standard a client will then have to prove that the treatment has caused additional pain, suffering, and loss and damage than otherwise would have been the case in dealing with the original complaint, injury, or illness.
3. If a claim is successful the compensation is not a financial windfall in the form of a lottery win. Its purpose is to adequately compensate a client for the injury suffered; to cover care and treatment now and in the future such as rehabilitation, physical and psychological therapy, to cover past and future loss such as salary, medical and other expenses. Further, the compensation does not come from the same source of funds as the provision of frontline services.

The government has said they will meet the cost of future legal actions and provide indemnities under the Clinical Negligence Scheme for Coronavirus already launched by NHS Resolution to indemnify professionals within the NHS for any clinical liability arising from Covid-19. Cover is going to be provided for the contracts that have been put in place to deal with the pandemic with those organisations in the private sector supporting the NHS and assisting in the provision of the testing services.

The right for an injured party who has suffered as a result of an identifiable medical error does not detract from the huge appreciation that we all have for the NHS and their relentless handling of the current crisis.

For any concerns or questions in relation to clinical negligence please feel free to contact our specialists, Marcus James Chapman, Senior Associate Solicitor on 01354 602886, Janet Lane, Senior Associate Solicitor on 01553 666617 or Neil John, Partner and Head of Department on 01945 461456.

PEACE OF MIND THROUGH DIFFICULT TIMES

In uncertain times, the only thing we can say for certain is that nothing will stay the same for long.

It is entirely possible, therefore, that new legislation will have been introduced which will mean that all or part of this briefing no longer reflects the current law.

Because of this, we ask you to consider that, although correct at time of printing, information in this sheet may no longer be up to date and it is always best practice to consult with a lawyer about anything contained in this briefing.

Our lawyers are available to help answer any of your questions about this issue or to help with any other legal concern you have.

Please contact Fraser Dawbarns directly for up-to-date information on your specific circumstances.

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