Medico-Legal **Opinion**

MS DEE DUFFY

# Breaking down the elements of a claim

***Ms Dee Duffy,*** *Legal Counsel at Medisec, explains why gaining familiarity with the steps involved in litigation can help doctors prepare and manage expectations*

Some doctors will be involved in the defence of civil litigation during the course of their career. The incidence of litigation is undoubtedly higher in some medical specialties, but it tends to arise in particularly challenging cases, where there have been unexpected complications or a poor outcome, or where the patient was more medically vulnerable to begin with. Medical negligence claims may result from an adverse outcome caused by error or oversight, but it is important to recognise that a claim in itself does not always indicate substandard care. Indeed, sometimes, doctors are named on proceedings where they have limited or even no involvement in the plaintiff's care.

**Human toll**

While acknowledging the struggle for patients and their families who embark on medical negligence proceedings, it can have significant impact too for doctors who find themselves facing a claim. It is understandable to feel a wide range of emotions from shock, sorrow, anxiety, denial, panic, anger, and betrayal. It can affect a doctor's mental wellbeing as they try to process what happened and face into an often lengthy, adversarial legal process.

Some doctors may revise and update their practice or procedures to prevent similar outcomes, while others may lose confidence in their clinical judgment. The importance of a support network should not be underestimated. In our experience, doctors who have the support and understanding of family and colleagues tend to cope better with the strain of litigation and we would always encourage members to reach out for support.

Familiarising yourself with the steps involved in litigation can help you prepare and manage expectations.

**Contacting your indemnifier**

It is imperative that you contact your indemnifier as soon as you are aware that a patient intends to take a claim against you. This may be following an adverse event and/or a patient complaint.

Sometimes a patient may request a copy of their records either personally or via a solicitor. This does not in itself mean a claim is inevitable, but a solicitor may be instructed to investigate any potential grounds for a claim and it is advisable to contact your indemnifier. If you become aware of an adverse outcome or incident, we recommend always taking the precaution of speaking with your indemnifier regardless of whether there has not been any formal complaint, records request or correspondence from a solicitor as early notification requirements apply under most forms of professional indemnity cover.

The clinical records are an extremely important piece of evidence and will be central to any litigation. Retrospective changes even to provide clarity should never be made to contemporaneous records following receipt of a claim. Any such changes can be detectable and would have a severe impact on a doctor's credibility, not to mention constituting grounds for a possible complaint to the Medical Council and/or the Data Protection Commissioner. In the unlikely circumstance where a retrospective addition or clarification is needed your indemnifier can advise you on the best way to do this, by ensuring the date of the addition and the identity of the author is recorded.

**Formal documents**

Formal correspondence and court documents can seem aggressively worded, but they need to contain certain legal terminology to satisfy obligations under legislation and the tone shouldn't be taken personally.

Following a records request, a patient's solicitor may issue a 'pre-action letter' or 'letter of claim', which sets out a formal intention to issue proceedings. This should be passed to your indemnifier who will usually arrange for a solicitor to write to the patient's solicitors confirming they have authority to accept service of proceedings. This means that the formal court documents can be sent directly to the solicitors, instead of to the doctor.

*It is important that you are open and honest when liaising with your indemnifiers and solicitors and you may need to explain clinical terminology and processes to them*

The first formal pleading is called a personal injuries summons and it is issued in the Circuit Court or High Court, depending on the estimated value of the claim. The summons sets out the details of the parties to the proceedings: The plaintiff(s) (ie, the patient or their family member(s)) and the defendant(s) and it sets out certain allegations.

The solicitors instructed on your behalf will file a document known as an 'appearance'. Filing an 'appearance' means formally coming on record for you and confirming they now represent your interests in the litigation.

The next phase of the litigation involves investigating the claim against you thoroughly and you should expect interaction with your indemnifier and solicitor as they work with you to clarify and understand your position in respect of the various different allegations against you. It is important that you are open and honest when liaising with your indemnifiers and solicitors and you may need to explain clinical terminology and processes to them. They should be able to consider the best strategy to adopt and provide sound, non-judgmental advice.

Other formal documents in the process include a 'notice for particulars' and 'replies to particulars,' where further details of the claim are sought and received. In some cases, it may be necessary to obtain or provide documentary evidence, such as medical records, through a process called discovery. Sometimes court applications or 'motions' are made by either party, in order to compel the other party to take a step in the proceedings.

Your 'defence' will usually be drafted by your legal representatives, setting out the particulars of any admissions or denials made on your behalf. You will be required to approve the 'defence' and swear an 'affidavit of verification,' meaning that the contents of the 'defence' are true. It is essential that you can fully stand over the contents of any 'defence' delivered on your behalf and you should take particular care when approving any draft 'defence' put to you, as you may be subject to cross examination in court on its contents.

Unfortunately, litigation can be a lengthy process due to court lists, expert availability and other delays, and it is important to prepare for extended periods of inactivity.

**Expert evidence**

The onus is on a plaintiff to prove on the balance of probabilities that the doctor has breached their duty of care (ie, was negligent) and that the injuries suffered by the patient were caused by that breach (causation). A plaintiff will use factual evidence (eg, their own testimony) and expert evidence to prove their case.

Unless a patient is nearing the time allowed to issue their claim under the relevant statutory limitation period, they are required to have an expert report supportive of their allegations of breach of duty before issuing proceedings. It usually constitutes an abuse of process to issue and pursue proceedings against a professional without an independent expert report which underpins the specific allegations made.

Usually, during the course of the proceedings, further expert evidence is compiled on behalf of both plaintiff and defendant in the form of expert reports. The experts giving evidence on breach of duty usually practise in the same specialty as the doctor being sued. These expert reports must be exchanged before trial. The experts are retained on the basis that they will give evidence at trial. It is very common that plaintiff and defendant experts have opposing views, but their overriding duty is to the court.

**Settlement**

The majority of medical negligence cases are resolved without the necessity for a full trial. Often, settlements are agreed before trial when all expert evidence has been exchanged and a comprehensive risk/benefit analysis of proceeding to trial can take place. Some settlements are agreed for nominal amounts and sometimes, plaintiffs discontinue proceedings. Settling out of court may be recommended for a number of reasons and it is not necessarily an indication that a doctor was at fault. Most settlements are agreed without admission of liability and some include confidentiality clauses.

Mediation, as an alternative to trial is becoming more common. This is where the parties engage the assistance of a mediator to try reach an acceptable agreement to resolve the dispute. It can enable patients and doctors to express their own views and can be less polarising than litigation.

When deciding on whether it is appropriate to settle a claim, a doctor's own views are very important. Some indemnity policies, such as the policy arranged by Medisec, have a consent to settle clause meaning your consent will be sought before settling any claim. This can provide you with some element of control and reassurance about the protection of your professional reputation.

If it is necessary to fully defend a claim at trial, you will be advised about what to expect. It can be stressful, particularly hearing the plaintiff's evidence. Medical negligence trials are heard in open court meaning they can be reported in the media. When all the evidence is heard, a judge will make a decision as to whether or not the plaintiff has proved their claim and, if so, what compensation will be awarded. A judge may decide that the claim has been successfully defended, in which case no award will be made and usually in those circumstances, the plaintiff will be responsible for the defendant's legal costs.

**Conclusion**

It is important to look after yourself while dealing with a claim and to seek support from your GP, family members, and colleagues, while maintaining patient confidentiality.

It can help to communicate your preferences regarding contact from your indemnifier/solicitor – eg, if you would prefer only to receive updates when your input is required, you can inform them of this.

Remember not to let adverse events or claims distract from or minimise the good patient outcomes and positive impacts you have had on many patients' lives.