COVID-19 Clinical Negligence Protocol: 2020

This protocol is modelled on the best practice approach to litigation agreed between the Association Personal Injury Lawyers (APIL) and the Forum of Insurance Lawyers (FOIL) and the protocol agreed by the Association British Insurers (ABI) and various signatories in the conduct of personal injury litigation during these unprecedented and difficult times which have arisen as a result of Covid-19. This protocol is not intended to create legal relations or to be a contract. It is not intended that individual claimant or defendant firms specialising in clinical negligence work should have to sign up to this protocol.

Apart from where otherwise stated (clause 1b) in this protocol, the term "parties" is used in this protocol to refer to any defendant indemnified by a defence organisation which is a signatory to this protocol as well as Claimants represented by firms of solicitors who are either members of Action against Medical Accidents (AvMA) Panel or Lawyers Service, or members of the Society of Clinical Injury Lawyers (SCIL) or any other organisation who becomes a signatory to this protocol.

Unlike personal injury litigation, clinical negligence litigation relies on medical expert opinion to identify and determine both liability (breach of duty/causation) and quantum issues. In both public and private healthcare sectors, many medical experts have been called to healthcare's front line in the fight against Covid-19 and this has created a shortage of available experts from whom claimant and defendant lawyers can commission reports on liability and/or quantum.

In many cases, NHS and private hospital complaints processes have been suspended and internal investigations such as serious incident reports (SIR) or similar investigation processes have been delayed. The NHS Resolution's "Covid-19: Position Statement – 6 May 2020" says that as a matter of principle they will not be approaching front line or redeployed staff where it could disrupt patient care or have an adverse impact on staff. These are just some of the factors which result in inevitable delays in progressing clinical negligence litigation. These factors support the need for parties to be able to rely on a clinical negligence specific protocol for those involved in the conduct of clinical negligence litigation at this time of national emergency and the recovery period which will follow. This protocol should be seen as a reflection of the cooperation between the parties in clinical negligence claims

It is intended that this protocol will encourage positive behaviours from both claimant and defendant lawyers and organisations as well as consistency of approach in practices around England especially at a time when parties may experience difficulties in pursuing clinical negligence cases because of a shortage of experts or other issue directly related to COVID 19 – for the avoidance of doubt this protocol encourages firms to progress clinical negligence cases that can be progressed. It should reduce the risk of costs being spent on issuing proceedings, applications to extend time or stay proceedings. We propose that the parties should be allowed to refer the court to this protocol for non-compliance if subsequently there are issues or arguments about costs being incurred unnecessarily by either party during this time, and also to demonstrate compliance e.g. with service provisions. Referral to the court should only occur to demonstrate a matter of fact. The parties are not permitted to request the court to adjudicate over the wording of the protocol or make submissions as to the protocol's intentions.

It is proposed that once this protocol has been agreed that it comes into effect immediately and can be relied upon throughout the duration of the Covid-19 pandemic and recovery.

It is also proposed that the protocol should be reviewed every 8 weeks from the date it is agreed. The eight weekly review is to enable notice to be given to all clinical negligence practitioners of any changes to be made to the protocol and for the parties to give notice of their intention to terminate their participation. Any signatory wishing to terminate their participation should give 4 weeks' notice, in writing to the other signatories to this protocol.

For the avoidance of doubt, any signatory giving notice to terminate their participation in the scheme does not bring the scheme to an end. The signatory giving notice will continue to be bound by the terms of the protocol until the four-week notice period has expired. They will also continue to be bound in cases where they have already received written notification in accordance with paragraph 1c, limitation in those cases will continue to be suspended in accordance with paragraph 1a of the protocol.

Distribution of notices concerning the protocol shall be promoted through the Law Society Gazette, if possible. Each signatory will also use their best endeavours to notify their membership of any termination/updates.

The parties responsible for reviewing the document are a representative from NHS Resolution and a lawyer from one of NHS Resolution's panel firms of solicitors; a representative from the Society of Clinical Injury Lawyers (SCIL); a representative from Action against Medical Accidents (AvMA) who represent the injured claimant's interests; representatives from any other organisation agreeing to comply with the terms and spirit of this protocol.

1. **Limitation and Extensions of Time:**

    a. Provided that written notification has been given in accordance with clause c below, the running of the unexpired limitation period in all clinical negligence cases, is suspended until 3 months after the end of this protocol (referred to as "limitation suspension"). Unexpired limitation shall include cases where the primary limitation period has expired but there is a current agreement to raise no limitation defence in force at the time that this protocol is signed. For clarity, any such limitation suspension vests in the case – or to put it another way, limitation belongs to a claim and so does any extension of it – and so the case continues to have the benefit of the limitation suspension for as long as the Protocol is in operation and in accordance with this paragraph.

    b. Covid-19 and the government's recommendations on social distancing have meant that the dates for many inquest hearings have been adjourned and/or inquests are not being listed until the first open date after October 2020. The delayed inquest hearing will inevitably have an effect on the deceased's representatives and/or their legal advisors to consider all available evidence and in turn their decision to bring a claim arising from the death. To accommodate this, provided that written notification has been given in accordance with clause c below, the limitation period will be suspended for three months for any claims identified either before or after the conclusion of the inquest hearing. The limitation period will be suspended for any civil claims brought under domestic law or claims brought under the European Convention on Human Rights.

    c. In order for a party to rely upon clause a or b, written notification prior to the expiry of the limitation period in the form of a letter must be sent to the

indemnifying organisation confirming that proceedings are not being issued in accordance with this clause. In respect of claims where NHS Resolution is the indemnifying organisation and they have not yet been notified of the claim, eg the Hospital Trust legal department are still dealing with the matter initially, as from July 2022 the written notification should be sent to **nhsr.limitationnotification@nhs.net** instead of limitationnotification@resolution.nhs.uk. However, for the time being both email addresses are operational.

d. Reasoned and reasonable requests to extend the deadline to comply with Court directions or a response to a letter of claim or an extension of time for service of a Defence under the pre action protocols will not be opposed save in exceptional circumstances and where possible will be made with consent of both parties. As per CPR Part 3.8(4) parties will not need permission from the court for an extension of time of up to 28 days.

e. Where a party requests an extension of time to comply with court directions which is more than 28 days that party should provide evidence to substantiate the reason for the request. For example, if the request is by reason of the unavailability of an expert report, due to the expert being involved in frontline work or because the expert or the lawyer with conduct of the case are themselves experiencing symptoms thought to be related to COVID-19 infection or by reason of a party having been furloughed, evidence of the position ought to be produced in support of the application. This is to echo the spirit of the recent case-law decision in MUNCIPIO DE MARIANA & ORS v (1) BHP GROUP PLC (FORMERLY BHP BILLITON) (7) BHP GROUP LTD (Second to Sixth Defendants not party to the proceedings) (2020) [2020] EWHC 928 (TCC) that parties should comply with timescales in cases wherever possible and despite the COVID-19 situation

f. (i) As a temporary measure, and to reflect the unprecedented challenges faced by NHS staff at the height of the pandemic and the recent COVID19 surge, it is agreed that where necessary the time for responding to Letters of Claim be extended. Paragraph 3.24 of the Pre-Action Protocol for the Resolution of Clinical Disputes is therefore automatically extended where that is required from 4 months to 6 months if the Letter of Claim is served on or after 01.01.2021 and before 31.03.2021.
(ii) This is intended to be a 'once and for all' extension of time in all such cases.
(iii) Notwithstanding the extension of time, it is intended that Defendants will serve the Letter of Response before the expiry of 6 months where practicable and within the usual 4 month period wherever that is still possible.

2. **Telephone calls/emails**

a. Good communication is very important, particularly now that many offices have closed and lawyers with conduct of clinical negligence cases are unable to access their post daily. Practitioners should engage with their counterparts by telephone and/or email with a view to resolving disputes effectively and efficiently. Firms and organisations are responsible for ensuring that their staff

who are working and continue to have conduct of files can make and receive telephone calls even while home working. Email signatures should be updated to indicate the correct contact numbers if they have changed due to remote working. Similarly, individual email addresses should be provided.

b. Where possible there should be reciprocal acceptance of encrypted emails by all parties. The parties agree to use their best endeavours to accept encrypted emails, although it is acknowledged that some systems will not be permitted due to firewall/ISO policy compliance.

c. Defendant organisations/lawyers will send all documents by electronic means wherever possible.

d. Claimant organisations/lawyers should accept correspondence by email, wherever possible including court documents.

e. Claimant solicitors should note that NHS Resolution have specifically requested that correspondence is sent to them by email only. If for any reason this is not possible then the claimant representative should contact the allocated NHS Resolution case handler or lawyer.

f. Letters of Claim copied to NHS Resolution (as required under the clinical negligence pre-action protocol) should be sent to: **ClaimsEnquiries@resolution.nhs.uk**.

g. NHS Resolution are not authorised to accept formal service of court documents but their panel lawyers, where appointed, are authorised to accept service of court documents via email.

h. Should Claimant solicitors become concerned with their counterpart's failure to act in accordance with this protocol they should contact the lead signatory detailed below for the organisation concerned. Participants should note that the intention of the escalation process is to deal with repetitive failures to comply with the protocol, not individual interpretations of the wording or evidential facts of the case.

i. Should an indemnifier become concerned with their counterpart's failure to act in accordance with this protocol they should contact the managing/complaint partner of the individual organisation/firm.

3. **Service by email including new proceedings**

a. Service of documents via email including the Claim Form, particulars of claim and any supporting evidence is to be an accepted method of service in clinical negligence claims under, and for the duration of, this protocol unless that is expressly disallowed in advance with a good reason provided for doing so. If the email is not delivered for any reason, eg its file size is too large, the burden is on the serving party to ensure it is served either by breaking the message and

attachments down into receivable sizes and/or by using a different method of service.

Note – The provisions contained in clause 3a can only apply to participants of this protocol and their panel firms. Defendant indemnifiers agree that if service of a document is undertaken by email and they subsequently become involved in the litigation, they shall not take issue with service by email.

b. To facilitate the smooth administrative running of service of documents by email, the email address of the conducting fee earner on correspondence shall be deemed the suitable address for service of documents and proceedings.

4. **Medical examinations of clients for Condition and Prognosis reports**

It is inevitable in the current circumstances that face -to-face examinations will be difficult to arrange and undesirable, given the Government's guidance for travel. Parties should not attempt to pressure Claimants to attend such appointments e.g. by refusing to agree to an extension for service of any expert reports. Both parties should consider and promote the use of remote/virtual examinations wherever possible to ensure cases proceed. If both parties are intending to call upon the evidence of an expert of like discipline, then unless otherwise agreed both examinations should take place utilising the same basis to facilitate the examination; face to face or remote/virtually. The parties should cooperate to ensure, where necessary, a patients' medical records and imaging are shared electronically to avoid any delay in the resolution of the claim.

5. **Exchange of evidence**

Further to paragraph 3 above, the parties should wherever possible agree to the exchange of witness evidence and expert evidence by encrypted email.

6. **Interim payments**

Parties ought to adopt a reasonable approach to requests for interim payments of damages and payments on account of costs. In the current climate, such payments are likely to be of vital importance, and any unnecessary applications to the court ought to be avoided. Reasonable requests will be considered by indemnifiers. This clause does not have the intention of mandating an indemnifier to always make an interim payment for damages or costs on all cases. All such requests should be responded to within 21 days, wherever possible.

7. **Settlement Meetings & Mediations**

Consideration should be given, wherever possible, to all settlement discussions whether pre- or post-issue of proceedings taking place via secure electronic means (e.g. video conferencing) to avoid unnecessary delay in matters.

8. **BACS payments**

To enable a more efficient and effective transfer of funds for damages and costs firms should use BACS payments wherever possible.

9. **Cost Budgeting**

It is recommended that where possible parties exchange their costs budgets in good time. The parties should consider whether the budgeting aspect of the CCMC hearing should be adjourned.

10. **Hearings including adjournments**

a. The parties should seek to agree Orders, including directions timetables, wherever possible to avoid the need for hearings.

b. Generally, NHS staff whether they are clinicians or managers should not be required to do anything which affects frontline clinical care. Equally however, the COVID-19 situation should not be used as an excuse for avoidable delay in matters.

c. It is inevitable that some adjournments will be required due to non- availability of clients, witnesses, or experts. They should however be kept to an absolute minimum and the opposing party notified of the risk of non-attendance as soon as it becomes apparent.

d. HMCTS has issued guidance on the wider use of remote hearings, by telephone or Skype. It is recommended that parties adopt this guidance. This can be accessed here - https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf

e. A list of which courts are open has been compiled on the judiciary website - https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak

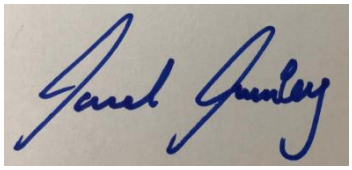
Signatories/lead individuals:

Name: Simon Hammond

Signature: 

Organisation: NHS Resolution

Name: Paul Rumley

Signature: 

Organisation: SCIL (Society of Clinical Injury Lawyers)

Name: Lisa O'Dwyer

Signature: 

Organisation: AvMA (Action Against Medical Accidents)

Dated: 8th June 2021.