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What to do when the letter arrives

SO YOU HAVE RECEIVED A LETTER OF CLAIM?

Multimillion pound medical negligence claims are no longer a rarity, but receiving a solicitor's letter can feel like a shocking blow. Although so much seems to be at stake, MDU claims handler Dr John Dale-Skinner recommends some ways in which consultant orthopaedic surgeons can help themselves.

In recent years, the Medical Defence Union (MDU) has seen a disturbing rise in the number of high value claims against consultant members, including our highest settled claim to date: £9.2 million in compensation and legal costs for a patient left tetraplegic after spinal surgery.

In 1995, the MDU settled one medical negligence claim for over £1 million. By 2015, there were 12 such claims. Within the private sector, orthopaedic specialists are at greater risk of a claim than, say, ophthalmologists or general surgeons.

Despite what some commentators might suggest, the increase in high value claims and the rise in negligence claims generally are not caused by a fall in clinical standards. In fact, during 2015 the MDU successfully defended 80% of claims brought against our medical members.

If you are unfortunate enough to receive a claim, here are the five most effective ways that you can help us to help you:

1. Notify your Medical Defence Organisation

The first you are likely to know about a claim is when you receive a solicitor's letter which sets out the allegations and is accompanied by the patient's signed consent to release their records. This is known as a Letter Before Action and can be upsetting but do not be tempted to write to the solicitors or contact the patient directly to refute the allegations. Doing so can make the claim more difficult to manage. Instead, notify your Medical Defence Organisation (MDO) straight away; they will guide you throughout the process.

2. Get your paperwork in order

It is not a good idea to leave a solicitor's letter on a pile of papers. The civil litigation process runs to a strict timetable. You will have 40 days in which to respond to a letter requesting clinical records, and four months to respond in full to a Letter of Claim.

It might seem a long way ahead but time is always pressing and your MDO will need to assemble the necessary documentation. We ask members to send us all the correspondence from the patient's solicitor, a signed note formally instructing us, your contact details, the patient's records and a factual report of your involvement with the patient, and details of any other clinicians involved.

If a case proceeds to the next stage where you receive a Letter of Claim (and many cases do not), we continue to investigate the claim and may seek advice from an independent medical expert as to whether there is any liability.

If the expert evidence suggests a claim should be settled, then that should be done at an early stage, with your agreement, to avoid causing unnecessary distress to all concerned. However, it is important not to settle defensible claims on purely economic grounds. Rest assured, you will be involved in such decisions.

3. Seek support if you need it

It is natural to feel angry or upset when you are involved in a claim. You may even feel ashamed but please remember that a claim is not an indictment of you or your practice. Claims are increasingly common nowadays, and you may face one even if your clinical management has been exemplary. Remember that the vast majority of claims do not result in compensation being paid and a claim is very unlikely to be career-ending.

If you are feeling anxious or stressed, it may help to find a colleague you can trust and with whom you can share your feelings – always respecting patient confidentiality, of course. You can also talk to your claims handler about your concerns as he or she will be able to provide support, advice and reassurance, based on their experience of managing hundreds of similar cases.

4. Respect the claimant's confidentiality

If you are approached by the media for comment about a case, do not be tempted to give your side of the story. There is a real risk of breaching patient confidentiality and being censured by the GMC, as well as helping the journalist get more column inches from the story.

The best approach is to explain that your duty of patient confidentiality prevents you from commenting (even if the claimant has spoken to the press). Depending on the outcome, you may want to make a brief statement at the

end of a case but your MDO can advise you on this when the time comes.

5. Let your Medical Defence Organisation do the work

The civil litigation process can move quite slowly. Years can pass between receipt of a Letter Before Action and a formal Letter of Claim, and many claimants will decide not to take things further. Even after formal proceedings have begun, it is not unusual for claims to be discontinued, particularly after expert reports have been obtained and exchanged.

For this reason, it is advisable to leave the day-to-day management of the claim to your MDO. They will liaise with the claimant's solicitor and prepare carefully, according to a timetable determined by the court. It is very unlikely that a claim against you will proceed to a trial but for the few cases that do, your MDO can provide you with legal representation and help to prepare you for a court appearance.

The good news is that even in these increasingly litigious times, if you do receive a claim, it is more likely to be successfully defended than for compensation to be paid. It is always reassuring to know that your MDO is there to support you.

CASE STUDY

The MDU successfully defended at trial a claim against a consultant orthopaedic surgeon in respect of alleged failure to diagnose avascular necrosis.

The patient was referred to the surgeon, an independent practitioner, by her GP with severe back pain and sciatica with radiculopathy. She saw him on a total of six occasions and also periodically wrote to him to update him on her progress.

By the time of the sixth consultation, the patient had reached the limit of her private medical insurance cover. The surgeon suggested that she return to see him as an NHS patient and, in particular, investigate newer symptoms she had recently complained of that potentially related to her hips.

The patient thereafter attended her GP who, due to PCT constraints, could not refer the patient back to the same orthopaedic surgeon who had been treating her. She was eventually seen six months later by an NHS orthopaedic surgeon. By this time the patient's right femoral head had collapsed as a result of avascular necrosis and she underwent a right total hip arthroplasty the following month.

In her claim for clinical negligence, the claimant alleged that the private orthopaedic surgeon had failed to properly diagnose and treat her hip condition.

At trial, it became clear that although the claimant argued in evidence that her symptoms had deteriorated, the contemporaneous record and the correspondence sent to the surgeon by the claimant (all kept in her clinical file) described a marked improvement in her symptoms following epidural injection.

It was only at the sixth and final consultation with the surgeon that the claimant complained of hip pain and difficulties with walking. As she had by then exhausted her private medical insurance cover, the surgeon recommended that she should be referred via the NHS for further investigations.

Liability was denied throughout the history of the claim and the case was brought to trial. In his judgment, the judge commented that the claimant showed a tendency to view events subjectively and with the benefit of hindsight. He concluded that her opinions on the merits of the case had coloured the evidence she gave.

He considered it likely that the claimant did have some symptoms, although not to the extent that she claimed. The judge concluded that there could be no finding of lack of care in the surgeon's treatment during the period alleged by the claimant.

The claim was therefore dismissed and the member successfully defended.

DOCTOR'S PERSPECTIVE

'This claim against me and my professional conduct came out of the blue. The patient had presented with a severe back situation and radiculopathy and had responded very well; she even wrote and thanked me.'

'In the end, when her back and leg pain had settled, she complained of hip joint symptoms, but had run out of insurance cover and I suggested she saw me on the NHS. That never happened.'

'The action against me started two years after I last saw her, and the final Judgement came in almost four years later. It was a gruelling and unpleasant experience. It couldn't have been defended without diligent record keeping (including all of the claimant's letters to me).'

'I would have found the process unsustainable without the support of the MDU and the legal team they instructed. All of them were totally honest with me and diligently warned me at the start how long and hard it would all be.'

EDITORIAL COMMENT

It is useful to have a framework and guidance on how to respond in this difficult and unpleasant situation. Clearly the comments above only apply to claims made within the private sector as claims through the NHS are administered through the Trust legal team and ultimately the NHSLA. One hopes and expects that similar guidance and support would pertain within the NHS.

The importance of clear and detailed medical records cannot be overemphasised in day-to-day clinical practice. When a case is being reviewed by experts on either side, as the claim progresses, it is much easier to support and defend if there are clear and detailed records that outline the surgeon's position and decision-making processes throughout. This applies to these important areas:-

1. *The decision to operate and the reasoning behind it.*
2. *The information provided to the patient prior to surgery, including the consenting process.*
3. *The performance and technical details of the procedure itself.*
4. *Post-operative management, particularly if a complication occurs.*

It is also important to document clearly any reasons for divergence from Trust, Specialist Society or NICE guidelines, if these have not been followed, as claimant solicitors are quick to pick up on these and use them as a basis for criticism of the consultant. Deviations from protocols laid down in guidelines are usually defensible as long as there are good scientific, practical or patient-specific reasons for them.

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