



# MDU

## Medico-legal guide to Clinical Negligence

# 5.1

### Introduction

#### **Support when you need it**

The MDU has produced this guide to provide clear, stage-by-stage information about the process of claims for clinical negligence. It is designed to help members facing allegations of negligence relating to their clinical practice. It sets out the legal context, what you need to do and what you can expect to happen.

The text is written by practising doctors, solicitors and medical case handlers who have a great deal of experience in clinical negligence cases.

Please remember that the MDU is at your service throughout what may be a disruptive and distressing process. The team handling your case will include a doctor, a case handler and sometimes a solicitor. You are always welcome to telephone or write to any member of your team. You can also call our 24-Hour advisory helpline on 0800 716 646 for help at any time.

#### **Anticipating the unexpected**

Remember, too, that you can contact the MDU about incidents which might give rise to a complaint or claim. We can help you to write an account of your own role at the time of the event. This can be an invaluable investment if a complaint or claim is made at a later stage. So if a problem occurs, please tell us about it.

#### **Opportunities for resolution**

Although the MDU continues to receive a steady stream of claims for clinical negligence, this does not reflect changing

standards of clinical practice, which remain very high. Rather, it reflects an increase in patients' expectations and their tendency to resort to litigation in the UK.

Do remember that many claims notified to the MDU do not go beyond initial disclosure of medical records. Only two per cent of all claims get as far as a court hearing.

The legal process is now much more flexible than it used to be, thanks to recent reforms. The system is quicker and it is designed to prevent claims without merit going forward to court, so that confrontation may be minimised. This is good news for doctors and patients.

However, since time is of the essence, it is more important than ever that you respond promptly and appropriately to correspondence about a claim. We need you to help us to help you. This guide tells you how.

Legal terms are defined in the glossary (sheet 5.7).

*For individual medico-legal advice:*

*24-hour advisory helpline*

**T** **0800 716 646**

**E** ***advisory@themdu.com***

**W** ***themdu.com***

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-a-1612 - Clinical Negligence 5.1



## Medico-legal guide to Clinical Negligence

# 5.2

### Your response to litigation

Many doctors who have gone through clinical litigation tell us that coping with personal feelings at the beginning of the process and at other key points is perhaps the most difficult aspect of this stressful time.

#### Keep it in perspective

Receiving a letter from a patient's solicitor containing criticism of you, often entirely without warning, is very unpleasant. Sometimes the solicitor will send a standard form asking for disclosure of a patient's records to make a claim against you. If you are reading this guide because you have recently received either a solicitor's letter or a form, then it is understandable that you may be anxious, especially if you have no previous experience of litigation. It is important to try to keep some sense of perspective in spite of what is going on around you.

#### Acknowledge emotions

Your first reaction may well be an emotional one. Many doctors tell us they feel anger. Sometimes this is directed towards the patient or other colleagues involved in the case. It is far better to acknowledge these emotions than suppress them, though of course this is much easier said than done. You may sometimes feel ashamed at being involved in a case and you may withdraw and fail to confide in anyone. It may help to reduce your anxiety and stress if you find a colleague you can trust and share your feelings – always respecting patient confidentiality, of course.

#### Maintain objectivity

There may be times when your emotions interfere with your work, sleep and home life. This is natural and you should make allowances for yourself. Remember that your colleagues and family can only support you practically or emotionally if they know what you are going through.

Solicitors' letters are often written in an adversarial and aggressive style. Often containing detailed references to legal procedures, they are at best disconcerting and at worst intimidating. Try to avoid taking the contents of any legal document too personally.

The claimants' solicitors are simply doing their job in giving you notice that they are investigating a potential claim against you. There is no pleasant way to do it. It is likely that parts of the letter or form may appear to misrepresent or misinterpret the facts as you remember them. The solicitor's letter is based largely on their client's instructions and may not be a balanced or objective account of the facts as you remember them.

Try not to be too disturbed by this. You can call the MDU's advisory service to discuss any aspect of such a letter.

#### Practical steps

- Seek professional assistance from the MDU
- Acknowledge your feelings
- Talk to a close colleague
- Consider talking to your spouse, partner or a close friend (always maintaining patient confidentiality).

### Let the MDU deal with it

You may be tempted to write to the solicitors or contact the patient to refute the allegations. Avoid this and channel your energies into dealing with the practicalities.

Let the MDU deal with the matter for you. It is our role to act on your behalf, providing a buffer between you and the legal process, but **your co-operation is vital**.

In the next section, we will guide you through what to do. Please follow our instructions as soon as possible and deal promptly with correspondence from the MDU or our solicitors throughout the life of the claim. The legal process sets strict timetables and any failure to conform to these may mean the claim is lost by default.

*For individual medico-legal advice:*

---

24-hour advisory helpline

**T** 0800 716 646

**E** [advisory@themdu.com](mailto:advisory@themdu.com)

**W** [themdu.com](http://themdu.com)

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-b-1612 - Clinical Negligence 5.2



## Medico-legal guide to Clinical Negligence

# 5.3

### Background to litigation

To succeed in a claim of clinical negligence against a doctor, the patient (who becomes the claimant) has to prove, on the balance of probabilities, that:

- the doctor owed a duty of care
- there was a breach of that duty
- harm followed as a result (i.e. that causation is established).

#### How is breach of duty decided?

Your clinical management will be assessed by independent medical experts. They will use the Bolam standard.

The Bolam standard means that the experts will consider your clinical management against that of a responsible body of doctors practising in the same field. Your management of the patient does not have to be the standard of the majority; it just has to be consistent with a responsible body of your professional peers.

The onus is on the claimant to prove that your management fell below the standard expected and that this has caused the harm.

There is also a strong onus on experts to give reasonable and logical evidence about standards of care. A judge may decide not to accept an expert's view if that expert's evidence does not stand up to close scrutiny.

#### Timescale

In the civil justice system, the emphasis is on speed and efficiency. You must respond quickly if you are asked to

disclose your records and the MDU must respond quickly to the claimant's solicitors.

After you have disclosed your notes there may be a long period when nothing seems to happen while the claimant takes advice and decides whether to proceed. This may be months or even years.

We will keep you informed if anything significant happens, but if you do not hear from us during this time, it is simply because we have nothing to report. However, you are always welcome to contact your MDU team at any time.

If the claimant decides to pursue the claim, once the formal process starts, the court will impose a strict timetable which you must follow.

#### The concept of 'limitation'

Formal proceedings must begin within three years. Otherwise, the case will be statute-barred and cannot progress.

The three-year timescale can run from the date of the incident or from the date of knowledge, which may be some time later. 'Date of knowledge' is the date at which a patient becomes aware that their injury may be attributable in whole or in part to the alleged clinical negligence. This applies only to competent adult claimants.

After an initial exchange of correspondence, the claimant's solicitor should tell us whether or not the matter will be pursued. We will pass this information on to you.

However, this is not always a guarantee that the claim has been discontinued

because, occasionally, another solicitor may take the case up on behalf of the claimant.

Remember, too, that the court also has discretion to allow claims to proceed even though they have been issued outside the limitation period.

**Children**

The situation is different with children. By law, children have until their 21st birthday (that is, up to their 18th birthday

plus three years) to issue proceedings. For example, a seven-year-old can wait for 14 years before beginning legal action. For those involved in the care of children there is the possibility, however remote, of receiving a claim brought by a child at any time up until the claimant's 21st birthday. It may be that the claim can be brought even later if the patient is justifiably still unaware that a cause of action exists.

Legal action is usually conducted on behalf of minors by a close relative who acts as their litigation friend.

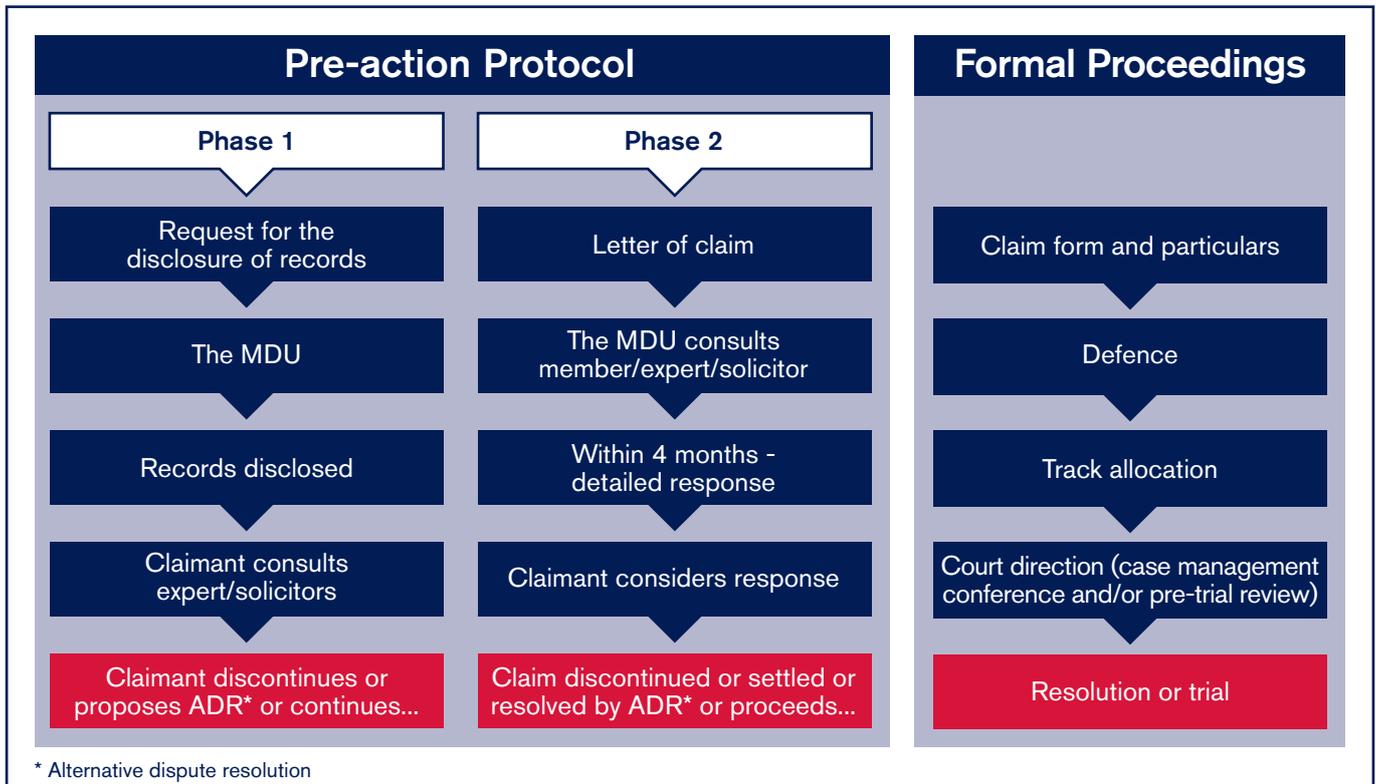
**Mental capacity**

Time limits do not apply to patients who are deemed to lack competence to conduct their own affairs. For example, children with cerebral palsy after birth, or neurological damage following meningitis, and other brain-damaged patients, have no limitation on their claims.

Formal proceedings may begin on their behalf at any time, regardless of the date of alleged negligence.

**Milestones in the legal process**

The civil procedure rules allow for flexibility and openness so that both sides can be constructive about resolving the dispute. Mediation and arbitration may be used as part of the resolution process, as shown in the diagram below.



For individual medico-legal advice:

24-hour advisory helpline

**T 0800 716 646**

**E advisory@themdu.com**

**W themdu.com**

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS © 2016 ADV205-c-1612 - Clinical Negligence 5.3



## Medico-legal guide to Clinical Negligence

# 5.4

## Notification of a claim - the next steps

As soon as you receive notification of a claim, you should send the MDU:

- a copy of the letter or standard form you have received from the claimant's solicitor
- a brief, personally signed note instructing the MDU to assist you
- a note of the address you would like us to use for future correspondence
- the records, including a printout of all computer-held records. Send either the originals (by recorded delivery) or clear and complete photocopies
- a report of your own role, with the full name and contact details of any other doctor who may be vulnerable to the allegations.

Records **MUST** be disclosed within 40 days of a request at the very latest, so please act quickly.

It is likely that the MDU will write to the claimant's solicitors to say we have received their letter and confirming that we will be representing your interests in the future. We ask the solicitors not to communicate directly with you again, but to correspond via the MDU.

If you receive further correspondence or court documents from the claimant's solicitor, please forward the letter or the original documents, including the envelope in which they are received, to the MDU by first class post on the day of receipt. You should keep a photocopy for your own file.

We may also ask you to prepare:

- a typed transcript of the relevant clinical entries, indicating who wrote each entry (for example, by using the initials of the staff involved)
- a clear photocopy of any entries from relevant records, such as the visit book, message book, appointment diary and specimen log.

The MDU usually photocopies all the documents and provides a copy for the claimant's solicitors. We mask the names of any other patients involved (for example, in an appointment diary) to preserve patient confidentiality.

### The records

Please tell us if the records contain any references to third parties or any entries which you believe should be withheld because disclosure is likely to breach the confidentiality of a third party, or to be seriously detrimental to the patient.

Unfortunately, the realities of clinical practice mean that notes are often brief, abbreviated and hurriedly-written. Any shortcomings in your notes can be addressed in your factual account. **It is vital that you do not attempt to amend the original records in any way.**

### Your factual account

We ask you to give us a full, typed factual account of the events in question, made with reference to your clinical notes.

This is solely for our use and is not designed for the purpose of disclosure to the claimant's solicitors.

You may find you cannot remember everything that happened. If this is the case, tell us clearly and comment on your clinical management based on your usual practice and on what you wrote in the notes at the time. If you can, please give us details of any witness who can support your account of the events or who has evidence to give about the events.

If you **can** remember the relevant consultations then it is important that you give the MDU as full an account as possible at this stage. The claimant may have several years in which to decide whether to pursue a formal claim, so it is obviously vital to your interests that you write down what you remember sooner rather than later.

This may take time and effort, but it is time well spent if we need to prepare a defence of your clinical management later.

*For individual medico-legal advice:*

*24-hour advisory helpline*

**T** **0800 716 646**

**E** ***advisory@themdu.com***

**W** ***themdu.com***

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-d-1612 - Clinical Negligence 5.4



# MDU

## Medico-legal guide to Clinical Negligence

# 5.5

## Aspects of the legal process explained

### The pre-action protocol

The pre-action protocol begins with a request for disclosure of the records.

### Letter of claim

If, after disclosure of records and taking expert advice, the claimant decides to proceed, his or her solicitors will send a letter of claim to you or, more probably, to the MDU as your representative. The letter must give a detailed description of the claim.

The claimant should not issue formal proceedings until four months from the date of the letter. This gives you and the MDU a further opportunity to consider the claim fully. The MDU will take expert medical and legal advice on your behalf and discuss their views with you.

### Letter of response

A letter of response must be provided within four months of the letter of claim. The MDU will prepare this on your behalf and with your co-operation.

In some cases, with your agreement, the letter may say that the claim is admitted in part or in its entirety and any admissions made will be binding. We will offer to settle the case on your behalf and negotiations will then begin.

If the claim is going to be denied, clear and detailed reasons must be given so that the claimant can consider his or her position. Your arguments may persuade the claimant to withdraw.

The aim here is to ensure that both sides have every chance to resolve a dispute informally. It is open to either side to suggest alternative ways of resolving the dispute at any time up to the start of formal proceedings.

### Formal proceedings

If the claim cannot be resolved informally the claimant may begin formal legal proceedings by issuing a claim form. The claimant must deliver ('serve') this within four months of its issue. The solicitors instructed to act for you will usually accept it on your behalf. We will let you know when this happens.

Very occasionally the claimant's solicitors or the court may serve proceedings on you in person. The MDU takes all possible steps to prevent this. However, in the unlikely event that it happens, there are only 14 days in which to acknowledge that the documents have been served. Pass them to the MDU immediately, otherwise a judgment may be lodged against you.

### Particulars of claim

Particulars of claim must be sent with the claim form or served within 14 days. These repeat the details of the claimant's case and state the amount of damages sought. In most cases they must be sent with a medical report about the personal injuries which are alleged in the claim.

### Defence

A detailed response to all aspects of the claim (a 'defence') and a signed statement

of truth must be given to the court 28 days, at the latest, after the particulars of claim are served.

The court now takes charge of the case. It serves an allocation questionnaire for each party to complete. When it receives the completed questionnaires, the court allocates a claim to a 'track'. Which track depends largely on the complexity and the value of the case, but the court may take the wishes of both sides into account.

There are three tracks:

**Fast track** - for personal injury claims of between £5,000 and £15,000, and where the court considers that

- the trial is likely to last no more than one day, and
- oral expert evidence at the trial will be limited to one expert for each side of any one discipline, and not more than two disciplines.

The case will run to a strict timetable imposed by the court and the trial will take place within 30 weeks of the case being allocated.

**Multi-track** - for claims above the fast track ceiling and/or greater complexity.

The court manages the claim and sets a timetable for exchange of witness statements and expert advice. This will include a likely date of trial, which will be fixed later. The court will set up a case management conference, often at an early stage, or give directions for the further conduct of the case.

The case management conference is attended by both sides and/or their representatives. At these meetings the judge will review the steps taken by both sides, ensure that they have narrowed down the issues as far as possible and consider alternative ways of resolving the dispute. The court will try to ensure that costs are kept in proportion.

Most clinical negligence claims will be allocated to either the fast or multi-track.

Occasionally, a third track for **small claims** will be used but we will give you details of this if needed.

## Disclosure

During the proceedings you must disclose to the claimant's solicitors copies of all relevant documents you hold. Your solicitors will advise you and will do this on your behalf. You will be asked to:

- make a disclosure statement confirming that you have carried out a reasonable and proportionate search to locate all documents you are required to disclose.
- confirm that you understand the duty to disclose and that, to the best of your knowledge, this has been carried out.

## Your witness statement

If formal proceedings are issued against you, then the MDU needs to mount a defence. The cornerstone of this is your witness statement. To prepare this you may be asked to visit the solicitors dealing with your case before proceedings are issued.

The MDU has its own in-house legal team but we also use external firms of solicitors who are experts in clinical negligence litigation.

The witness statement is your signed factual account of events. It is an important document as it will be used should the case go to trial.

The document will be shown to the claimant and lodged with the court so it is essential that you are completely satisfied with its accuracy and detail. Your solicitor will help you put your statement together, but it is your evidence alone and should contain nothing with which you are not entirely satisfied. You are obliged to sign a statement of truth which will form part of the document.

## Expert reports

Experts are doctors with a broad experience of a particular field of medicine and medico-legal work. They are usually still in practice or have recently retired. The expert will comment on your management in general compared to that

which would be expected of a reasonable practitioner in your specialty and with equivalent experience (see sheet 5.3 Background to Litigation).

The process of clinical negligence litigation depends on reports from independent expert witnesses. The MDU may ask the opinion of an independent expert whether there is any potential liability related to your clinical management. This will happen quite early in the case so that you and the MDU can be guided by the expert's advice. The MDU initially instructs experts from your own specialty, so if you are a general practitioner, we will ask a general practice expert for an opinion.

An expert may also be asked to give an opinion on causation. The aim is to establish whether there is a causal link – that is, that the alleged negligent act or omission led to the harm that the patient claims resulted. If there is no link, then you would have what is called a 'causation defence'.

For example, a patient might seek compensation for a depressive illness following excessive scarring after surgery. The doctor might admit to a deficient surgical technique but still have a causation defence if it can be shown that the depression was due to other factors.

The expert's duty is to give dispassionate advice to the court. The expert is not there to plead the case of the party who has instructed him. That is the job of the lawyers.

Experts generally give their advice in a written report. If the case proceeds, the court may ask the expert to give oral evidence. Both sides may put written questions to an expert about his report and these must be answered.

As it is the expert's duty to advise the court, he may himself ask the court for directions.

### Exchange of evidence

Witness statements and expert reports are exchanged at this stage, giving the

MDU the opportunity to re-evaluate the merits of the claim with you.

### Meetings with counsel

One of the most effective ways of assessing your legal case is to have a meeting with the barrister(s) representing you.

This meeting, usually referred to as a conference (sometimes shortened to 'con'), is chaired by counsel (a barrister) instructed by the MDU. It is usually held in counsel's chambers.

These meetings can sometimes seem rather daunting. It is quite common for six or more people to attend, including your barrister(s), solicitor, experts and a member of the MDU team.

However, the meeting is entirely informal. Counsel will have reviewed the papers beforehand. He or she will usually begin by talking through the events of the case, asking for clarification of the facts from you and comments from the experts. Counsel may play devil's advocate and is likely to ask you to see it from the claimant's point of view to get your reaction. Do not take this personally - remember that everyone has your best interests at heart.

The meeting is a chance to explore your own views about the case in detail, to voice your concerns and to have your questions answered. Do not be afraid to ask for any points to be explained. A clear plan usually emerges on how to proceed and we will ask you for your agreement to it.

### Defend or settle?

Sometimes a case cannot be defended because of non-clinical factors. The most common factor is lack of adequate clinical notes. Or it may be that, on this occasion, the member's management cannot be defended successfully.

In such cases and after consulting you, the MDU will negotiate a settlement on your behalf, usually without admitting liability. In some cases we may need to admit liability or acknowledge that there

has been a breach of duty to achieve an out-of-court settlement.

It is the MDU's policy to involve members in conducting their own case and to take the decisions you want whenever possible. But we cannot mount a defence without your full co-operation. Time is of the essence and letters must be answered quickly. Occasionally, a member may ask us to settle a claim which we feel should be defended or vice versa. After discussions we are usually able to agree a common way forward.

### Trial

Given the complexity of the legal system and the fact that only a tiny minority of cases go to trial, we have not looked at the process of trial in these advisory sheets. But in the unlikely event of your case going to court, you can be assured of the continuing, personal support of the staff at the MDU and your legal team.

*For individual medico-legal advice:*

*24-hour advisory helpline*

**T** **0800 716 646**

**E** ***advisory@themdu.com***

**W** ***themdu.com***

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-e-1612 - Clinical Negligence 5.5



## Medico-legal guide to Clinical Negligence

# 5.6

### Your questions answered

---

**Q A patient is alleging negligence against me. Does that mean my case will be referred to the GMC?**

- Not automatically. The GMC can investigate only serious cases where there is significant concern about the safety of patients or others, or where there are grounds to suspect a doctor's fitness to practise is impaired. This is entirely separate from clinical negligence proceedings. As there is no automatic referral process, the claimant, the health authority or other interested party would need to make a separate complaint to the GMC.

---

**Q What happens when several doctors are involved in the same case?**

- The MDU writes directly to other MDU members, telling them they may be implicated and offering assistance if necessary. We may also liaise with any other medical defence organisation involved or the NHS Litigation Authority if the claimant was also treated in an NHS hospital. If there is a conflict of interest between individual MDU members, separate case handlers and solicitors may assist different members, without access to each other's files.

---

**Q What should I do if a patient is starting legal action against me and yet remains registered with me?**

- This is not an unusual situation, and perhaps indicates that the patient does not view the claim in such a personal way as does the doctor.

The GMC states that you must not allow a patient's complaint to prejudice the care you provide.

- Many practices are able to continue to treat patients during the course of a complaint or claim. However, at some stage, you may feel that your relationship is irretrievably damaged and that the patient would be better served by transferring his care elsewhere. You must bear in mind that the GMC requires that you do not end a professional relationship with a patient solely because he has made a complaint about you. We believe this guidance applies equally if a patient has made a claim against you.

---

**Q Should I tell my colleagues that a patient is contemplating legal action against me?**

- Many doctors feel it is far better to be open about such matters. As discussed in sheet 5.2, it can be helpful to develop a confiding relationship with a sympathetic colleague. Remember the importance of preserving patient confidentiality.

---

**Q What is the best way of responding to a journalist who wants to discuss a case against me?**

- The MDU press office assists members in dealing with media enquiries. This is a 24-hour service and you can contact the press officers directly on telephone 020 7202 1535 or 020 7202 1504 (daytime) or 0800 716 646 (out of hours) or your case handler can refer you.

Because of your duty of confidentiality, beware of being drawn into any conversation with journalists, however innocent it may seem.

**Q I am having increasing difficulty in coping because of the pressures of a claim against me. What should I do?**

- Unfortunately, it is quite common for doctors to develop symptoms of anxiety or depression in response to the threat of litigation. It is important that you recognise this and get help and support. Please speak to your medical case handler at the MDU to discuss your difficulties. Your own GP will be able to assist you and you may wish to tell a senior colleague of your difficulties and ask for help.

Your specialist association may provide support for members who encounter difficulties of this kind. Details are usually given in the association's journal or on its website.

**Other sources of support**

**Support4Doctors**

Support4Doctors is a project of the Royal Medical Benevolent Fund that provides access to support and advice for doctors and their dependants at times of crisis.

[support4doctors.org](http://support4doctors.org)

**BMA Counselling and Doctor Advisor Service**

The BMA offers a counselling service and peer support for doctors and medical students who are in distress or difficulty.

[bma.org.uk](http://bma.org.uk)

For individual medico-legal advice:

24-hour advisory helpline

**T 0800 716 646**

**E [advisory@themdu.com](mailto:advisory@themdu.com)**

**W [themdu.com](http://themdu.com)**

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-f-1612 - Clinical Negligence 5.6



## Medico-legal guide to Clinical Negligence

# 5.7

## Glossary of legal terms

### Alternative dispute resolution

There are several alternatives to litigation to resolve disputes.

- The NHS complaints procedure, where the patient seeks an explanation rather than compensation.
- Mediation is a form of assisted negotiation through an independent neutral party.
- Arbitration by an independent neutral party.

### Application on behalf of a patient for medical records for use when court proceedings are contemplated

This is a standard form which may be sent by a solicitor to a doctor when seeking disclosure of his client's records for the purpose of a claim. It may or may not be accompanied by a letter.

### Breach of duty

In order to succeed in a claim for damages alleging negligence against a doctor, the claimant must show to the court's satisfaction:

- that the defendant owed the claimant a duty of care; it is accepted that treating doctors owe this duty to their patients
- that the defendant was in breach of his duty of care towards the claimant; this is a question decided by a judge with the help of advice from experts called by both sides.

### Case handler

The MDU member of staff responsible for investigating, negotiating and advising members on claims and potential claims.

### Causation

Not only must the claimant show that the defendant was in breach of his duty but also that this breach led to the injury the claimant alleges. A causative link must be established for the claimant to recover damages.

### Civil proceedings

Broadly, in the context of clinical claims, any action seeking damages for recovery of losses as a result of breach of duty, or of failure to comply with a contract, is dealt with under the rules of civil procedure.

The claimant, usually through his solicitors, lodges the necessary documents together with the appropriate fee at court. The claim form is stamped to acknowledge that proceedings have been formally issued. The claim form is served on the defendant or his representative.

### Claimant

The person bringing a claim for damages.

### Claim form

The formal document issued in the court to begin proceedings.

### Conference

A meeting between counsel (see below), the solicitor, medical experts, the case handler and the MDU member. The aim is usually to consider issues about the evidence and to assess whether the action is defensible.

### Counsel

The term used within the legal profession for a barrister. Barristers can be categorised broadly as leading counsel (otherwise

known as Queen's Counsel, QC, or silk) and junior counsel.

### **Date of knowledge**

The date on which the claimant knew, or it is deemed by the court should have known, that he has suffered an injury which could have been caused by the negligent act or omission of another.

### **Defence**

The formal document served on behalf of the defendant setting out his defence to the allegations in the claim form.

### **Exchange of witness statements**

Among the court's directions for the conduct of the litigation is that both sides exchange statements from witnesses upon whom either party will rely at the trial.

### **Expert witness**

An expert witness is instructed by one or both sides in an action to give an independent opinion on whether there has been a breach of duty and/or whether this has caused the claimant's alleged injury. More than one expert may be needed to give advice on different issues. As with statements from witnesses, reports from experts are exchanged during the proceedings.

### **Legal funding**

A claimant does not necessarily have to fund a case privately. For instance, they may have a private insurance policy, or be eligible for Legal Aid. Alternatively claimants may enter into a conditional fee arrangement with their solicitors by which payment of legal fees is related to the eventual outcome of their case.

### **Letter of claim**

This is a letter from the claimant's solicitors which must be sent not less than four months before the issue of formal proceedings. It should:

- include a clear summary of the facts, a chronology and the main allegations of negligence
- describe the claimant's injuries
- outline the financial loss
- refer to relevant documents.

### **Liability**

It is the court's job to decide liability. In civil proceedings a judge sitting alone decides liability, with the help of expert advice and evidence from witnesses. To establish liability, the claimant must prove on the balance of probabilities (i.e. more likely than not) that there has been a breach of duty which caused the alleged injury.

### **Litigation friend**

A litigation friend is the legal term for a person who gives instructions on behalf of a child or an incompetent adult.

### **Particulars of claim**

A document accompanying the claim form (or served within 14 days thereof) giving details of the claim.

### **Particulars of negligence**

These are laid out in the particulars of claim. The claimant has to say exactly how he alleges the defendant was negligent.

### **Pre-action protocol**

This is a protocol setting out the steps which the potential claimant and defendant must take to resolve the dispute, if at all possible, before proceedings are issued. The aim is to encourage greater openness between the parties and to reduce delay, costs and the need for litigation. If proceedings are issued, the court may penalise either side if they have failed to comply with the protocol.

### **Service of proceedings**

To begin an action the claimant must ensure that proceedings are served on the defendant within four months of being issued. This is usually done by post, addressed either to the defendant or to his solicitors. The claimant can apply for this time to be extended.

### **Statement of truth**

The defence and witness statements served on behalf of a defendant in clinical negligence proceedings must contain a signed statement of truth reading as follows: 'I believe that the facts stated in this defence/witness statement are true.'

### **Statute-barred**

Statute-barred means that the time limit allowed by law for bringing the claim has expired. The time limits for different types of claim are set out in the Limitation Act 1980.

## ***For individual medico-legal advice:***

### **24-hour advisory helpline**

**T 0800 716 646**

**E [advisory@themdu.com](mailto:advisory@themdu.com)**

**W [themdu.com](http://themdu.com)**

MDU Services Limited (MDUSL) is authorised and regulated by the Financial Conduct Authority for insurance mediation and consumer credit activities only. MDUSL is an agent for The Medical Defence Union Limited (MDU). MDU is not an insurance company. The benefits of MDU membership are all discretionary and are subject to the Memorandum and Articles of Association.

MDU Services Limited, registered in England 3957086. Registered Office: One Canada Square, London E14 5GS  
© 2016 ADV205-g-1612 - Clinical Negligence 5.7