

# Guidance note three: Being a witness in a non- clinical negligence claim

The Risk Pooling Schemes for trusts is the collective name for two separate schemes covering non-clinical risks, the Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES). LTPS typically covers employers' and public liability claims from NHS staff, patients and members of the public.

## Why will you be asked to give evidence?

When a claimant brings a claim against one of our members, for example a trust, Clinical Commissioning Group (CCG) – your employing body - they or, more commonly, solicitors on their behalf, will set out the circumstances of the claim and allegations as to how our member is said to be in breach of its duties. There are many reasons you may be asked to give evidence. You may be involved in managing or working with the claimant, responsible, for example, for aspects of health and safety/data protection for our member or have witnessed the incident in question. You may be approached to provide a statement and less often, to give evidence in court.

Even if you have changed job since the incident, you may still be a witness

Our solicitors may question you about your decisions and actions. Please try not to take this personally and be assured that our solicitors are not seeking to 'point the finger', or blame you for your

actions. They need to ask these questions in order to explore your evidence and test the strengths of the case.

Try not to take it personally. You are just a witness of facts, not in the dock.

## Do I need to/can I tell my trade union or defence organisation?

A claim is usually brought against an organisation, one of our members, and not an individual. Unless the claim is against you personally, your trade union or defence organisation will not usually be involved. A firm of solicitors from our panel will provide you with support and advice. A particular firm is allocated to each member and they will generally be aware of background information and know the relevant people within your organisation. If you are concerned about your own involvement, your trade union or defence organisation can provide separate advice.

## What is my role?

You will be a witness of fact. Your evidence will depend on your role in relation to the allegations raised by the claimant. If you are a colleague or manager of the claimant or you witnessed the incident, you will be asked to provide some background to the circumstances which gave rise to the claim and explain what you witnessed personally.

If you have a wider corporate role in respect of our member's responsibilities, you may be asked to explain what steps our member took before and possibly after the incident, for example to comply with relevant regulations on health and safety, manual handling, assessment of risks and data protection. You need to bear in mind that what may be second nature to you needs to be explained in a way that can be understood by those unfamiliar with your role or expertise. Depending on your role, your evidence will need to explain:

- your involvement in the incident in question, for example, if you were present at the time;
- your response to the allegations made by the claimant;
- any relevant background information regarding the claimant;
- the documentary evidence that exists and its relevance,
- what steps our member has taken to reduce risks.

As far as possible the statement should be accurate, clear, concise and relevant. It should not be misleading. It is important that you are happy with it. Your evidence will help us assess whether the claim should be defended or whether it is appropriate to resolve the claim by settlement.

**The claim is against the organisation, not against you.  
Our solicitors will advise and support you.**

---

## Your Statement

Your statement will be seen by various people. You should be happy with it. It should be in your words not the solicitor's words.

If you are providing comments to the internal legal services team, there are no requirements in terms of layout but all comments should be headed with the following: 'Prepared in contemplation of litigation.' You should be aware that any statement provided in the course of a root cause analysis or incident investigation is likely to be disclosed to the claimant or their solicitors before or during proceedings.

If you are providing a formal witness statement for use in proceedings, our member's solicitor will provide you with a draft in the appropriate format. The court has rules about the content of statements. It may be helpful for your statement to include a brief summary of your qualifications and training at the time of the incident in question, together with your account of your involvement with the claimant.

If you think there is further documentation available regarding the circumstances of the claim, please highlight this to the solicitors when you are working with them to draft your statement. In the event that a claimant is a member of staff, documents such as the claimant's training records may need to be attached.

Please think of all documents which may be relevant to the claim as these have to be made available to the claimant or their solicitors for them to look at. This includes any documents which help either in proving the claimant's case or in rejecting it.

Documents which may help prove what you are saying such as training records should be produced as early as possible.

You will be asked to sign a 'statement of truth'. It is important that you are satisfied that the statement contains all the evidence you will give in court and that the statement is as accurate as possible, to the best of your knowledge. If the claim goes to a trial, you are likely to be cross-examined on its contents. The wording is: 'I believe that the facts stated in this witness statement are true'.

## What happens after I have provided a witness statement?

Very few claims against our members end up in court with witnesses giving evidence. If you have to give evidence at trial, you will meet the barrister (Counsel) and solicitor representing our member before the hearing. They will answer any questions you have about the hearing and discuss the court process, what to do and what not to do. NHS Resolution guidance on going to court is also available. It is quite likely that

you will be served with a witness summons once a trial date has been fixed. This is a routine step. Failure to attend court in response to a summons puts the witness at risk of a finding of contempt of court. If you are unable to attend the listed trial dates for any reason, you must tell our solicitors as soon as possible. The court will normally not be able to move the trial date though.

## What if I am approached by a claimant solicitor?

It is possible that this will happen.

Witnesses of fact can be approached by either side involved in the claim. Your evidence is to the court, not to the party calling you.

It is a matter for you to decide whether you wish to speak to the solicitors representing the claimant. If you are going to give evidence in court, your statement will be available to both parties anyway. You do not need to speak to solicitors representing the claimant, but if you want to, it is helpful if you let our solicitors know that you are doing so, as well as the member, if you are still employed by them. You should try to ensure that your evidence is consistent and avoid saying different things to different people. If in doubt, it is sensible to seek advice.

## Publicity

It is possible that there will be press interest.

You will not be expected to deal with the media.

You should not feel under pressure to respond to any approaches from the media. Press statements will be agreed and issued by our member's communications office usually after consultation with us. If there are any elements of publicity personal to you, the panel firm and your trade union or professional body will be able to advise you further and provide support.

Please contact your nominated NHS Resolution team leader or a Nominated Partner at your Panel solicitors if you wish to discuss anything arising from this guidance note.

Prepared with the assistance of the NHS Resolution legal panel

Published November 2017

[www.resolution.nhs.uk](http://www.resolution.nhs.uk)



INVESTORS  
IN PEOPLE | Accredited  
Until 2020

