

FAQ's for acquired brain injury treatment providers within a compensation claim process

Recently a number of guides have been written for professionals working in the rehabilitation sector where there is a legal claim ongoing. A bibliography is provided at the foot of this document but this paper is designed to cover the headline issues by answering a number of frequently asked questions.

I'm about to commence treatment for someone who tells me they have an ongoing litigation claim. What should I do?

First, it is important to establish who is going to pay for the treatment. Normal principles dictate that if the treatment is reasonably required, it should be compensated within the claim, for injuries directly arising out of a negligent act or omission. However what is deemed to be "reasonable" can be a matter of opinion and the safest course of action is to take the following steps: –

- Ask the details of the patient's lawyer and/or case manager and notify them of your treatment plan, likely costs and duration to obtain pre-authorisation, rather like you would if acting under a private health-insurance scheme.
- Do not include references to the litigation within your treatment notes, as those notes are disclosable documents to the compensator. If you need to record information about the litigation, for whatever reason, that should be kept in a separate without prejudice file.
- Depending on the severity of the injury, ask to be included within any multidisciplinary team meetings that may be held by the private therapists funded by the compensation claim. This is to ensure a joined up process. Sometimes meetings will be held which include a mix of both private and state funded practitioners and once again it is important to ensure your contribution is represented there.
- If you are acting under a private health-insurance scheme, still follow the steps above, as a guarantee of payment to you by the private health insurer is not the same thing as recovery by the patient of the outlay from their compensator.
- Ensure all of your paperwork is kept in good order so it can be produced in court if necessary. Do not prepare update reports for the solicitor or case manager unless they ask for them – many compensators do not want to reimburse the additional time spent preparing such reports and prefer to rely simply upon treatment notes and records.

When should I notify the patient's lawyer that I envisage further programmes of treatment that I have not yet discussed with them?

Depending on the compensator involved, and the status of their enquiries, there can be significant delays in obtaining either authorisation for a specific treatment cost or a general payment on account of interim damages which, at their discretion, the patient's lawyer may release for specified treatment. It is therefore essential that you keep the patient's lawyer and/or case manager completely up-to-date with any proposed treatment plans. Failure to do this can cause upsetting, difficult and potentially dangerous gaps in treatment provision if the funding is simply not put in place in time for when it will be required. Sometimes the patient's lawyer may have to take out a court application if funding is not available on a voluntary basis and there can be a waiting time of several months for a court appointment date.

I do not understand the difference between my role as a treating professional and that of the patients' expert witness in their litigation claim. How do the two roles work together?

- The first thing to say is that within the English court jurisdiction, treating therapists should not also act as an expert witness in the case. This is because the court requires a level of impartiality which judges consider is difficult to attain, despite the highest standards of professional integrity, if a provider also engages as an expert witness.
- The expert witness is the person who will review your treatment notes and provide the court with their own independent view as to what is reasonable in terms of content, duration and price of therapeutic input. The views of the expert are generally persuasive for a court on the amount of reimbursement of providers' fees.
- The duty of the expert witness is to the court, not to the patient. The duty of the provider is to the patient and not to the court. It is highly unlikely that you would ever be asked to attend court as a provider, and if you did so it would be as a witness of factual evidence and not to provide an expert opinion.
- The role of the provider may well last beyond the life of the litigation claim. The role of the expert witness ceases when the litigation is concluded.

I have been approached by a patient's lawyer and asked to provide details of my qualifications and my business model before they will allow the patient to instruct me.

Why is this?

- Within the legal process it will be the responsibility of the patient's lawyer to ensure that, as far as possible, all outlay on treatment is recoverable through the claim. Also the patient's lawyer or case manager will want to help their client to secure the most appropriate treatment for their injury. So, for example when choosing a case manager, they will want to ensure that they have paediatric experience if looking after a child and also have cared for other people with acquired brain injury, rather than having years of experience in other types of injury such as amputations. It is therefore extremely helpful to both you, in securing business, and to the patient's advisers, if you keep your CV up-to-date and ensure it includes the relevant experience for the type of patient you are being asked to see. Evidence of ongoing training is also important to show that expertise remains up to date.
- Lawyers and case managers will want to ensure that the services you provide are both timely and cost-effective. Compensators are becoming increasingly reluctant to pay large sums of money for travel for treatment providers unless there are very good reasons why someone more local to the patient's home cannot be engaged. They will also want to ensure that you can quickly access the patient in a time of crisis and that you have good supervision levels and holiday cover arrangements which are satisfactory.
- It has always been important to satisfy a patient that you have appropriate levels of professional indemnity insurance. Recent case law has emphasised the need for this within litigation cases.
- It can also be helpful to offer other clients as referees for your service if you have been approached by someone who has not instructed you previously.

I am looking after someone whose lawyer does not appear to be progressing interim funding as quickly or effectively as I would expect. I am concerned that the patient is suffering as a result. What should I do?

You need to remember that at all times your duty is to your patient. Sometimes there can be difficulties within the litigation process which even the most competent legal practitioner cannot overcome. However whenever you encounter difficulty of this type it is appropriate, acting in your client's best interest, to question the cause of the delay and ensure that the impact of that on the treatment programme is understood by both the patient and their advisers. If this fails to produce a satisfactory explanation, it would be in the client's best interests to recommend that they seek a second legal opinion. The Association of Personal Injury Lawyers (APIL) runs a specialist brain injury accreditation scheme and details of accredited professionals are available on their website at <http://www.apil.org.uk/accredited-specialists>.

Further reference materials:

UK Rehabilitation Council- standards for providers- available from
<http://rehabcouncil.org.uk/pages/DownloadForm.aspx?Type=Standards>

British Standards Institute- PAS 150-available from
<http://shop.bsigroup.com/ProductDetail?pid=00000000030203157>

APIL – Think Rehab! Best Practice Guide on Rehabilitation - available from
www.apil.org.uk/files/best-practice-guide-on-rehabilitation.pdf