CLINICAL NEGLIGENCE

The accusation no nurse ever wants to face

NHS staff are insured by their employers, but indemnity cover for nurses in independent settings is less clear-cut.

Indemnity insurance – those two words hold huge significance for every NMC registrant. This is because a clinical negligence claim has the potential to devastate the professional life of any nurse, midwife or nursing associate. And while anyone employed by the NHS is secure in the knowledge they are indemnified against such claims, insurance arrangements for staff on other contracts has not been so clear-cut.

A clinical negligence scheme set up earlier this year is an attempt to dispel the concerns of nurses working in general practice. The Clinical Negligence Scheme for General Practice provides indemnity cover for all general practice nursing staff who provide NHS services in England. Staff in out-of-hours services, walk-in centres and prison primary care services are covered too.

**Covered by new scheme**

Since 1 April, the scheme has covered clinical negligence liabilities arising from an act (or omission to act) of someone providing a general practice service connected to diagnosis, care or treatment that results in personal injury or loss to the patient.

In Wales a similar scheme, called General Medical Practice Indemnity, was introduced at the same time. Scotland is understood to be considering a general practice indemnity scheme. In Scotland and Northern Ireland, GPs currently continue to arrange indemnity cover through their medical defence organisations.

The RCN welcomed the scheme, saying it has had to support nurses in the past whose general practice employers had failed to indemnify them adequately, or had even left them out of their indemnity packages altogether.

Litigation represents vast expense for the health service. In 2017-18, the NHS in England paid more than £1.63 billion in damages to patients, and NHS Resolution says the cost of clinical negligence is at an all-time high.

Most claims relate to emergency care and orthopaedic surgery, but obstetrics claims are the most costly.

**Working outside the NHS**

Being sued for clinical negligence is a nagging fear among many healthcare professionals.

If you work in the NHS, the principle of vicarious liability means that, should you be found to have acted in a negligent manner, your employer accepts financial liability.

Those employed outside the NHS or general practice – in a private clinic, for example – do not always enjoy that level of certainty. Although their employer is still liable, this does not guarantee it has the correct insurance cover in place in the event of a claim.

The employer could seek a contribution towards costs.
How to avoid claims and complaints

Medical Defence Union (MDU) medicolegal adviser Kathryn Leask says: ‘Our advice to help nurses minimise the risk of a complaint or claim includes keeping your knowledge up to date and working within your level of competence.’ She advises:

» If in doubt about a diagnosis, get advice from a medical colleague or refer the patient for further investigation and make a note of this

» Communicate clearly with patients about the risks, benefits and alternatives of any treatment, and check that the patient knows under what circumstances and timeframe to seek further medical advice

» Keep a record of all discussions with patients and advice sought from colleagues, and record positive as well as negative findings

» If an error occurs, apologise to the patient, explain what has happened and what can be done to rectify things

RCN head of legal services (regulatory) Roz Hooper says:

» Checklists are a powerful means of supplementing patient records and can help reduce the need for lengthy notes

» Include photographic evidence in records, where appropriate

» Adhere to local and national practice guidelines

from the nurse whose practice was implicated in the claim. In reality, says RCN head of legal services (regulatory) Roz Hooper, the risk of this happening is minimal: ‘In theory, employers outside GP services and the NHS could seek a contribution from somebody but it is our experience that they do not.’

The Medical Defence Union (MDU), which offers support to nurses as well as doctors, says that in the five years to 2015 it helped with more than 400 complaints, claims and other issues that involved nurses.

MDU medicolegal adviser Kathryn Leask says: ‘We’re supporting an increasing number of nurses with cases and there is a trend towards allegations being made against nurses, particularly nurse practitioners, in their own right.’

Indemnity and registration
She emphasises that all nurses must take responsibility for their own indemnity – not only because the number of cases they are involved in is rising but also because it is a legal requirement.

Since 2014, all healthcare professionals have been required to hold appropriate indemnity cover. In fact, nurses cannot register or renew their registration without it.

The requirement is explicit in the Nursing and Midwifery Council’s (NMC) professional code, section 12 of which states: ‘You must make sure that you have an appropriate indemnity in place relevant to your scope of practice.’

While nurses working for the NHS or a private company should, through vicarious liability, be covered by their employer, separate arrangements are required by those who are self-employed, who volunteer or who act in a so-called good Samaritan capacity, in which they provide immediate basic care in an emergency situation outside work. In these circumstances, either nurses should arrange...
their own cover or check the terms of the indemnity provided by their trade union or professional body.

RCN or Unison membership, for example, will provide indemnity in good Samaritan cases, providing the person acts only within their competence.

The RCN scheme extends to those who are self-employed and is a lifeline for many bank and agency nurses.

In summary, those who comply with the law and with the NMC’s requirements in relation to indemnity are effectively safe from financial claims against them personally.

The impact on nurses
Of course, being insured does not diminish the stress of facing investigation or being found responsible for clinical negligence. ‘The experience of being involved in one of these claims is dreadful,’ says Ms Hooper. ‘Even when someone has been found not to have done anything wrong, just because of their involvement they become anxious and their confidence takes a terrible knock.’

Claims invariably relate to incidents that occurred months or, more likely, years earlier.

For the patient, it may have been a one-off interaction, and easy to remember. However, for the nurse, who has seen many patients subsequently, precise recollection of events can be difficult. And claims usually follow what might be perceived as a minor mistake or infraction. ‘There will be nothing exceptional about it to remember,’ says Ms Hooper.

Common reasons for allegations
The MDU’s Dr Leask says: ‘Common reasons for cases we see involving nurse practitioners include wrong or delayed diagnosis, delayed referrals and prescribing errors.’

MDU cases involving practice nurses commonly feature wound management, phlebotomy, vaccinations and intramuscular injections. Good practice is perhaps nurses’ best protection against allegations. Local or national guidelines, for example, are designed to minimise risk and help deliver safe, optimal care. When nurses fail to follow such guidance, the consequences can be catastrophic.

Good record-keeping
Patient records will always come under close scrutiny when negligence is alleged, so attention to detail is important. Asking yourself, ‘What makes my care safe and how can I prove it was safe?’ is a good guiding principle, Ms Hooper says.

For example, it may not be enough for a community nurse to note the date and time of each visit to re-dress a patient’s diabetic ulcer if improvement or deterioration is not also recorded, possibly with photographic evidence. Records also contribute to the overall quality of care, allowing others involved with treating the patient to note baselines, comparators, or deviations from the normal.

‘It may sound defensive and overly concerned about litigation but, as all nurses know, good observations well recorded are important in good care anyway,’ Ms Hooper says. ‘It’s a state of mind – imagine that someone else is going to look at those records.’

That said, mistakes do happen and clinical negligence claims may follow. And the staff shortages endemic in many workplaces mean that slip-ups, oversights and errors could become more commonplace.

Nurses who make mistakes are not, by default, bad at their jobs, but sound, evidence-based practice, well recorded, may lessen the risk of mistakes and subsequent complaints or claims.

The error that led to life-changing injury

Jane* had just begun a university degree when she was involved in a serious car crash. Part of her skull was removed to reduce the effects of swelling in her brain, and her parents were told she was unlikely to make any meaningful functional recovery.

Against the odds, she improved. With physiotherapy and occupational therapy, she was soon able to walk with assistance and her speech returned almost to normal.

But two days before she was due to be transferred to a rehabilitation centre, Jane was left unattended on a bed while nursing staff were helping her wash. She fell from the bed and hit her head, which had been left vulnerable after the craniotomy.

Against the odds, she improved. With physiotherapy and occupational therapy, she was soon able to walk with assistance and her speech returned almost to normal.

After nine months of intensive rehabilitation, and despite some improvement, she requires, and will continue to require, 24-hour supervision and assistance. Her personality has changed.

The health trust admitted liability and a £3 million lump sum was agreed. It is estimated that over the course of her lifetime, Jane will receive about £12 million to pay for care and therapy.

Her solicitor, Jonathan Zimmern, says: ‘Unfortunately, in too many cases involving nursing error, the breach of care clearly revolves around failure to follow the NHS’s own guidelines.

These types of injuries would be entirely avoidable if staff ensured they followed guidelines.’

*Name has been changed