

NHS contract review with private providers

As the NHS sub-contracts more clinical and non-clinical services to private providers, it has become even more important for there to be careful consideration of the contractual arrangements between these parties, particularly relating to indemnity, limitations on liability, scope of services / clarity of obligations, termination and extension provisions and performance management / KPIs.

We have dealt with numerous claims made against the NHS, in which the documentary evidence as to where responsibility lies is either unavailable or unclear. For the NHS this can result in liability exposure, reputational considerations and costs (sometimes into the hundreds of thousands and millions), which could have otherwise been avoided had clear contracts with robust indemnity arrangements been in place between the NHS and private provider.

HOW WE CAN HELP

We offer the following assistance to NHS organisations to help to protect your interests where you have sub-contracted with private providers. This can involve one or all of th

- A review of all of your existing contracts with private providers, with a focus on key areas of risk and what solutions may be available;
- Advice on terms of new contracts with private providers;
- A contract management service, which notifies you when a contract term is coming to an end, provides you with an opportunity for advice on reviewing and re-negotiating contract terms and which allows easy access to a contract in the event that a claim is made.

The objective of these services is savings to NHS clients – in compensation and costs and therefore potentially CNST contributions and general liability – in the event of a claim being made.

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CASE STUDY 1

A pregnant patient telephoned an out-of-hours GP service, reporting severe pain in her lower abdomen and the feeling of being unable to sit down. The patient was advised to attend the GP out-of-hours service, which she did. She was examined by a GP, who called for an ambulance. Whilst the patient was standing, the baby was delivered on to the floor and was not breathing. The patient and the baby were transferred to hospital. The baby suffered hypoxia and was later diagnosed with cerebral palsy. Claims were brought on behalf of the child and by the parents for psychiatric injuries.

There were no contractual arrangements in place between the NHS Trust and the out-of-hours GP provider and the position with respect to responsibility for the claim was unclear. The costs of the claims to the NHS could have been avoided or reduced had clear contractual indemnity arrangements been put in place.

Likely damages exposure: £10m +
Likely claimant costs exposure: £300,000 +
Plus defence costs

CASE STUDY 2

An NHS Trust sub-contracted the reporting of radiology to a private provider.

A claim was brought against the NHS Trust relating to a delay in diagnosing lung cancer. It was alleged that there was a failure to identify persistent abnormalities on the imaging reported by an independent radiologist engaged by the private teleradiology provider. The patient was subsequently diagnosed with lung cancer, which metastasised to the brain. The lung cancer was found to be inoperable and the patient was treated with palliative care and sadly subsequently passed away. The patient was in their 50s, with a high-earning job in finance and 3 dependent children and a surviving spouse.

There were three parties in the chain of indemnity in this case: the NHS Trust contracted with the private teleradiology provider who, in turn, contracted with the independent radiologist. The NHS Trust could not locate the contract they had with the private teleradiology provider and the indemnity position was unclear. This case demonstrates the importance of clear contractual indemnity arrangements between NHS Trusts and teleradiology providers. In addition, we would recommend that, if private providers are further sub-contracting the clinical service to, for example, independent clinicians, NHS Trusts ensure they have a contractual right to request and receive details of indemnity arrangements for all parties in the chain.

Likely damages exposure: £750,000 +
Likely claimant costs exposure: £200,000 +
Plus defence costs

CASE STUDY 3

A patient was seen in the ED of an NHS Trust by an emergency nurse practitioner under a clinical navigation unit, which was run by a private provider.

A claim was brought by a patient in their 20s relating to a failure to diagnose and inadequate treatment of a femur fracture, resulting in a longstanding and permanent injury affecting their mobility and earnings with a prognosis of deterioration in later life. Court proceedings were issued and served only against the NHS Trust. Neither the patient nor their advisors were aware of the private provider's involvement in the delivery of the services in the ED.

The NHS Trust was not able to produce a copy of any contract with the private provider. We were able to engage in discussions with the private provider to obtain their written confirmation that they were responsible for the treatment which was the subject of the claim, which, in turn, allowed us to persuade the patient's advisors to discontinue the claim against the Trust. The production of the NHS Trust's contract with the private provider and a clear explanation to the patient's advisors at the outset as to where responsibility lied could have saved the NHS money in defence costs. Had the private provider disputed their responsibility or not engaged with the claim, without a contract, the NHS Trust could have faced the following.

Likely damages exposure: £500,000 +
Likely claimant costs exposure: £200,000 +
Plus defence costs

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