

## **Does indemnity follow the patient?**

**Dr Dawn McGuire, Medicolegal Consultant at Medical Protection, discusses.**

There is a general belief that clinical indemnity follows the patient. In other words, doctors require their own indemnity or insurance if they treat a private patient, and state indemnity schemes apply when treating NHS patients.

The following two histopathology cases demonstrate how this is not always the case, and why it is important to ensure that your indemnity arrangements are adequate and appropriate.

### **Case scenario 1**

Mrs P had a skin biopsy and this was sent for histology report. She was an NHS patient and the procedure was carried out in an NHS hospital and processed in an NHS lab. Due to the NHS backlog, the slides were sent to a private remote reporting company for more expeditious reporting. Dr A carried out the analysis and reporting of those slides.

Two years later, Mrs P brought a clinical negligence claim against the NHS trust for failure to diagnose basal cell carcinoma, alleging that the slides were erroneously reported as trichoepithelioma. The trust initially accepted liability for the claim, but later requested substitution as a defendant, stating that the trust was not responsible for the private remote reporting company or Dr A's acts or omission. The contracts between the NHS trust and the company, as well as Dr A's employment or service provision contract, specified that Dr A would be required to hold his own indemnity in the event of a clinical negligence claim. Dr A was therefore individually pursued as a defendant after court proceedings were served, much to his distress.

Dr A had read the contracts carefully. He was a member of Medical Protection and had obtained the appropriate indemnity protection for the nature of the work he was undertaking. Medical Protection was able to provide legal representation in a timely manner and averted a default judgment being served on Dr A.

### **Case scenario 2**

Mr S had a lump removed from his right upper arm privately. As the private hospital did not have their own histopathology lab service, the excised samples were sent to an NHS hospital for processing and reporting under the service agreement through a commercial contract between the two hospitals. Dr C was a Consultant Histopathologist employed by the NHS hospital and provided the histology report for Mr S's lump, concluding it was a benign soft tissue tumour.

18 months later, Mr S pursued a clinical negligence claim against the NHS hospital for incorrect reporting of the histopathology slides by Dr C, alleging that the lump was in fact a malignant sarcoma. The claim was valued at £1.5 million as Mr S required amputation of his dominant arm.

The NHS trust initially refused to indemnify Dr C as the patient was not an NHS patient of the hospital. Understandably, Dr C was very distressed and contacted Medical Protection for advice. Medical Protection argued that the reporting formed part of Dr C's NHS job plan and she was paid by her NHS employer for it. Dr C never had a separate contract or pay arrangement with the private hospital.

The NHS employer eventually agreed to accept full responsibility for this claim. Medical Protection continued to support Dr C with her professional report to her NHS employer to assist with the defence of the claim.

### **Learning points**

1. Due to Waiting List Initiatives, there are currently a myriad of agreements and contracts across the UK between independent healthcare providers and state commissioners, do not assume each agreement or contract is the same.
2. Do not assume your medical defence organisation will be aware of what the various contracts stipulate and what indemnity you require. Always check your contract(s) carefully and make sure you are clear on whether or not you need to arrange your own protection for clinical negligence claims.
3. If in doubt, or you feel there is ambiguity, ask your employer for confirmation and request they provide the confirmation in writing.
4. Always keep your contracts - you may need to revert to them many years from now. Clinical negligence claims can often surface several years after you have stopped working.
5. If you have ascertained that state-backed indemnity will protect you against clinical negligence claims as part of a particular contract or agreement, remember a state scheme will not provide assistance with other medicolegal matters such as complaints, disciplinaries, regulatory investigations, inquests and criminal investigations. Ensure you have membership with a medical defence organisation where you can request support with these issues.