

15 January 2019
Our Ref: M14CT321/074

Confidential
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By Email: lizlondonyoga@yahoo.com

Dear Ms Perloff

Your claim against Barnsley Hospital NHS Foundation Trust

Happy New Year to you, and I trust you enjoyed your birthday.

I am writing further to my email of 15 November 2018 but as requested in your email of 17 November 2018 have waited until the middle of January before doing so.

I have now completed my investigation into the concerns you have raised regarding the handling of your claim against Barnsley Hospital NHS Foundation Trust by NHS Resolution. I have summarised the issues which you helpfully repeated in your email dated 11 November 2018 as follows:

1. There was a failure by NHS Resolution to investigate your concerns regarding substandard treatment you received at the trust when first raised in 2015.
2. When Barnsley Hospital NHS Foundation brought evidence of substandard treatment to the attention of NHS Resolution in 2016 this evidence was disregarded.
3. NHS Resolution ignored your concerns regarding your substandard treatment when raised again in 2017 and 2018.
4. You believe that the wrong medical expert was instructed by NHS Resolution.
5. You found the solicitors instructed by NHS Resolution to be unprofessional.

I believe this also deals substantially with the outstanding concerns you raised with Ms Tinku Mitra and which I summarised in my letter to you of 21 September 2018.

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our [privacy statement at www.nhs.uk/About-us/Privacy-policy](http://www.nhs.uk/About-us/Privacy-policy)



I will respond to each of your concerns in turn and then summarise my conclusions. In the interest of brevity I have not repeated the points made in my letters of 21 September and 26 October 2018 concerning my remit, the basis on which our indemnity schemes operate and the respective responsibilities of NHS Resolution and care providers, nor the explanation in my email of 11 October concerning the basis on which independent expert witnesses are used. You may though find it helpful to refer back to that correspondence.

1. There was a failure by NHS Resolution to investigate your concerns regarding the substandard treatment you received at the trust when first raised in 2015.

The first notification of your claim was from your former solicitors, Fletchers. By a Letter of Claim dated 27 March 2015 from Fletchers it was alleged that the trust failed to diagnose a talonavicular joint dislocation on 20 and 21 October 2011 and as a result you were '*subjected to additional pain, suffering and loss of amenity until her talonavicular joint dislocation was diagnosed and appropriately treated by the Barnsley Hospital NHS Foundation Trust*'

Investigations were commenced immediately following the receipt of the Letter of Claim and an expert report commissioned from an independent orthopaedic surgeon. The expert advised that the trust had failed to diagnose the talo-navicular joint dislocation but that this resulted in no more than 2-3 days additional pain and suffering and your recovery period was unaffected.

NHS Resolution provided a full and prompt response to the Letter of Claim in compliance with the Pre-Action Protocol for the Resolution of Clinical Disputes. A Letter of Response dated 23 June 2015 was sent to Fletchers that admitted the delay in diagnosis of the talonavicular joint dislocation on behalf of the trust. In addition an offer was made to settle your claim for £500 and to settle your legal costs for the sum of £1,500.

As far as I can establish, NHS Resolution heard nothing further from Fletchers, despite sending a number of chasing letters. Some eight months after sending the Letter of Response, in February 2016 we were notified by the trust you had contacted them directly, that Fletchers were no longer acting on your behalf and that you wished to advance further allegations of negligence regarding the treatment provided by the trust.

I therefore cannot agree that we failed to investigate and respond to your claim when it was first presented in 2015. It seems that we did investigate on a timely basis, responded to your solicitors with an acceptance that there was a failure of diagnosis and indeed went further to continue to chase your solicitors for a response to progress the claim.

2. When Barnsley Hospital NHS Foundation brought evidence of the substandard treatment to the attention of NHS Resolution in 2016 this evidence was disregarded.

In March and April 2016 you supplied us with a number of emails setting out new allegations of negligence which were not included in the Letter of Claim served by Fletchers on your behalf in 2015. The new allegations were that there was a failure to diagnose an undisplaced fracture of the anterior process of the os calcis and a small avulsion type fracture of the sustentaculum tali.

We investigated these new allegations promptly by seeking input from the independent expert and from the trust in accordance with our recognised practice. A letter dated 26 May 2016 was subsequently sent to you that admitted there was an undisplaced fracture of the anterior process of the os calcis and a small avulsion type fracture of the sustentaculum tali. However, it was denied that the trust was negligent to miss these fractures because they were subtle and our expert could only diagnose them with hindsight. It was also stated in the letter that even if the additional fractures had been identified earlier,

they would not have been treated with surgery and your medical outcome was not affected by missing these fractures.

The findings of the independent expert were shared with the trust in accordance with our recognised practice and the trust agreed that liability should be denied. I therefore do not agree that we disregarded any input or evidence from the trust in 2016. The evidence was reviewed and the conclusions reported back to you.

3. NHS Resolution ignored your concerns regarding your substandard treatment when raised again in 2017 and 2018.

It appears that we heard nothing further from you in response to the letter dated 26 May 2016 for a period of 19 months until we received your letter dated 18 December 2017. In this letter you made a number of new allegations of negligence against Barnsley Hospital NHS Foundation Trust which you then supplemented with further allegations by an email dated 30 January 2018.

I understand that at the same time you made a complaint regarding our handling of your case. A response to your complaint was provided by Lee Adams, Team Leader, by his letter dated 1 February 2018. I understand that you were dissatisfied with the response provided and you escalated your complaint to Ms Mitra who in accordance with our policy referred it to NHS Resolution's Chief Executive, Helen Vernon. By her letter dated 4 April 2018, Ms Vernon made an offer of mediation, in order to resolve and address your various allegations most of which are now outside the time limit for bringing a claim. As you know the mediation took place on 2 July 2018 and during this process NHS Resolution agreed in principle to investigate your new allegations. Although it is not our normal practice to obtain alternative/additional independent expert reports because of the disagreement of the report by a claimant, we agreed in this case to commission fresh expert reports from a Consultant Orthopaedic Surgeon and a Consultant Radiologist given your strong objections to the medical evidence from the original expert which had been disclosed to you.

However you were asked to confirm the following for these steps to be taken:

- That you would, for the purposes of clarification, set out in writing your date of knowledge for your new allegations of negligence.
- That you would consent to disclose all your medical records.
- That you would agree to attend an examination by the new independent Consultant Orthopaedic Surgeon.

The offer to obtain new independent expert opinions in response to new allegations made almost 7 years after the initial incident goes beyond what we would normally do. It seems to me that this was a very reasonable offer and certainly wasn't a case of ignoring your concerns. There were a few conditions attached and these seem reasonable in the circumstances but from the correspondence on our files I understand that you have not agreed to proceed on this basis. I therefore cannot agree that NHS Resolution has ignored your concerns as you allege. The evidence is to the contrary, that proactive attempts have been made to progress your case and indeed the offer to do so remains open.

4. You believe that the wrong medical expert was instructed by NHS Resolution.

I explained in my email of 11 October 2018 the basis on which independent experts are appointed and their responsibilities as *independent* experts.

You have stated that you do not accept the findings of the independent expert we appointed and that he is not an appropriate expert to report on your case. Whilst I can see that you are disappointed by and disagree with the expert's conclusions, I have no evidence as to why you consider he was not appropriate. According to the information on our files the expert concerned was instructed in accordance

with our usual processes which involve choosing experienced experts to comment on cases within the area of their specialism. I note that you have disclosed a report from a radiologist in support of your case. However, the report does not specifically address the treatment you received from the trust nor does it set out the position regarding the extent of your injury caused by the trust's alleged negligence.

The central issue in your case is whether the alleged failings in diagnosing and treating your fractures have affected the course of your treatment and your overall recovery. This is an issue for an expert orthopaedic surgeon to address. The expert was appropriately instructed to do this; he is a very experienced orthopaedic surgeon with an interest in foot surgery and he prepares reports on behalf of claimants as well as defendants.

5. You found the solicitors instructed by NHS Resolution to be unprofessional.

I am sorry if you consider DAC Beachcroft to have been unprofessional. This is not our general experience of them, which is why they are instructed by us on a significant proportion of the claims for which external lawyers are involved. My investigation has not found any evidence of unprofessionalism in our files. I accept there may have been communications we have not seen or been party to but I can only reach conclusions on the basis of evidence available to me. If you have any specific examples of unprofessionalism you wish me to consider then please let me have details.

I note that you have objected to the involvement of DAC Beachcroft and you do not wish to correspond directly with them in future. Accordingly, as previously advised, all future correspondence with you regarding your claims will be conducted by Julianne Vernon, Head of Claims Management Quality in NHS Resolution.

Conclusion

In summary, whilst I can see that you appear unsatisfied by the current position and my conclusions may not accord with your views, I believe that NHS Resolution has demonstrated from the outset a willingness to seek a resolution to your claim. The case advanced by Fletchers on your behalf in 2015 was investigated promptly, liability admitted and a financial offer made in settlement. When Fletchers did not respond to this offer we chased them for several months in an effort to progress the claim. Our expert evidence has been shared with you and a mediation was scheduled with the best of intentions to progress your claim. At the mediation we agreed in principle, despite the elapsed time, to investigate your new allegations and instruct new medical experts subject to your agreement to the approach proposed.

Our offer to take these investigative steps is still on the table and we can proceed if you agree. Equally I will understand if you want to commission your own expert evidence. However, your claim against Barnsley Hospital NHS Foundation Trust cannot stay open indefinitely. You may recall that in my letter dated 26 October 2018 I explained the time limit for bringing a claim for compensation for personal injury/clinical negligence. Your claim is now out of time. I understand that Fletchers issued a Claim Form and the court extended the time for service of the Claim Form to 29 April 2016, failing which your claim would be struck out. The Claim Form was never served by you or Fletchers by this deadline and you have not commenced any new proceedings.

We are not therefore under any obligation to do anything further. However we do believe we have a responsibility to make fair compensation and having accepted liability for your initial claim over three years ago we still consider that some compensation is due to you in the amount offered. NHS Resolution is therefore prepared to extend the limitation period for your claim against Barnsley Hospital NHS Foundation Trust to **15 May 2019**. This means that we will not take any issue regarding limitation for your claim against this trust provided that either legal proceedings are commenced no later than **15 May 2019** or alternatively you agree to the basis of the proposal offered at mediation to instruct new experts to investigate the new allegations.

You may wish to seek independent legal advice on how you wish to proceed but for the avoidance of doubt if you decide not to accept our proposal to obtain fresh medical reports you must commence legal proceedings by **15 May 2019**.

This now completes my review in accordance with the Complaints Policy of NHS Resolution. I hope I have addressed all your questions but if not you have a right of appeal to the Parliamentary Health Service Ombudsman (PHSO) and I set below the contact details:

PHSO
Millbank Tower
30, Millbank
London
SW1P 4QP

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Dilks', with a stylized flourish at the end.

Ian Dilks
Chair