This guidance note describes the NHS indemnity scheme introduced in January 1990 and alerts members to its limitations. Members are advised to retain defence body membership or take out personal indemnity insurance and ensure that the cover is adequate for the activities they undertake.

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Introduction

1.1 On 1 January 1990 health authorities took over financial responsibility for negligence attributable to medical and dental staff of the hospital and community health services. The arrangements, which have since been extended to NHS trusts, apply throughout the UK.

1.2 As a result, it should no longer be a contractual requirement for NHS employed doctors to hold indemnity insurance, ie membership of a defence society, for work undertaken as part of their employment contract.

1.3 However, work which does not fall strictly within a doctor’s NHS contract is not covered by employing authority/trust indemnity. It is vital that doctors understand what their contracted NHS duties are, and decide what separate indemnity cover they need for any work they may do outside the scope of the employing authority/trust indemnity scheme.

1.4 Doctors are strongly advised to brief themselves on the extent of the employing authority/trust indemnity scheme (‘the indemnity scheme’) by reading this guidance note and Health Service Guidelines HSG(96)48, NHS indemnity: arrangements for handling clinical negligence claims against NHS staff. Separate indemnity through the defence societies or other insurer must be taken out by the doctor for any work which is not covered by the indemnity scheme.

1.5 Doctors should contact their medical defence society or other insurer for advice on the type of cover they require, depending on both the services they need and the nature of the work they undertake. Both the BMA and the health departments advise all doctors employed by the NHS to retain defence body membership or take out other personal indemnity.

1 Health circular (England) HC(89)34 – Claims of medical negligence against NHS hospital and community doctors and dentists, December 1989. Similar circulars have been issued in Scotland, Wales and Northern Ireland.
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insurance. They should also ensure that the cover they opt for is adequate for the activities they undertake.

1.6 Doctors who are thinking of changing their defence union should consider the wider implications of such a transfer, for example which union will provide cover for past events.

History

2.1 Prior to the introduction of the indemnity scheme, doctors in hospital, public health and community health services (‘NHS employed doctors’) were contractually obliged to be fully subscribed members of a recognised professional defence organisation. Until 1 January 1988 all NHS employed doctors had to meet the full cost of the defence body subscription themselves.

2.2 Considerable problems arose in the mid to late 80s, as the cost of defence body subscriptions rose at an astronomical rate. Several alternatives were considered by the profession, the Department of Health and the defence societies for the future arrangements for medical indemnity. A no-fault compensation scheme, funded by the state to cover past and present liabilities, was the BMA’s preferred option, although such a scheme could only be considered as a partial solution as it would not preclude the patient’s right to sue for negligence, and doctors would therefore continue to require separate indemnity cover. Partial reimbursement of defence body subscriptions was not acceptable as a long-term measure to the Department of Health or the profession because of the considerable costs to health authorities and doctors and the anomalies already referred to.

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2 Those doctors who objected to such membership on the grounds of conscience or on some other grounds, approved by the Secretary of State, were obliged to take out an insurance policy to cover themselves in respect of professional liability.
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2.3 Prior to the rapid escalation in rates of defence body subscriptions, the profession had been reluctant to accept a system of Crown indemnity because of the possible implications for professional independence and reputation. However, in view of the considerable cost to individual doctors, the profession did agree that a system which significantly reduced the expense for NHS employed doctors would be advantageous, provided safeguards were built in.

2.4 In March 1989, the Department of Health put forward its formal proposal that health authorities should take over financial responsibility for medical negligence. The Department saw many advantages to health authority indemnity for NHS employed doctors and dentists, including quicker settlements, some cost savings and benefits to practitioners. Also, it was stressed that the scheme involved no new principle, as health authorities already had a responsibility for the acts and omissions of all their employees, and provided indemnity for all staff other than doctors and dentists.

2.5 The scheme came into effect on 1 January 1990.

Employing authority/trust indemnity: who is covered for what?

3.1 NHS employing authorities/trusts are formally responsible for the handling and financing of claims of negligence against their medical and dental staff. They are also financially responsible for outstanding claims initiated before 1 January 1990. The scheme covers work undertaken by doctors under their contract of employment with the employing authority (health board in Scotland and Wales) or trust. It does not apply to general practitioners except to work under an employing authority/trust contract of employment, for example as a hospital practitioner or a clinical assistant.
3.2 Since the implementation date, it has ceased to be a contractual requirement for NHS employed doctors to be members of a medical defence organisation - though employing authorities/trusts could insist on this for private practice undertaken on NHS premises (see para 3.5.3 (c) for the position of junior doctors) and some trusts might insist on it for work undertaken outside their contract with the trust. Nevertheless, it is of paramount importance that doctors indemnify themselves, either through defence body membership or other indemnity insurance, for all the work they undertake which does not fall strictly within their NHS contract, including, for example, ‘good samaritan’ or category 2 work (see para 3.5.4 (b) below), irrespective of the frequency of the work or the risk of litigation. Doctors must ascertain whether any of their work is not covered by the NHS indemnity scheme, and if in any doubt, check with their employing authority/trust or defence body.

3.3 All NHS employed doctors are advised to retain defence body membership or take out other indemnity insurance and to ensure that they are adequately indemnified at all times.

Category 3 work

3.4.1 Category 3 work is the term used to describe medical work involving NHS patients, outside a doctor’s principal contract of employment eg work for the employing authority/trust under a waiting list initiative.

3.4.2 The Department of Health states that where a practitioner is undertaking category 3 work for a third party other than an employing authority/trust, the practitioner is not covered by the NHS indemnity scheme. Doctors in any doubt about whether they are covered should check with their employing authority/trust in each case, and take out additional cover with their defence body if necessary.
NHS employed doctors

3.5.1 All NHS employed doctors are covered by the indemnity scheme for work under their contract and work for which the authority pays them fees. These doctors include senior hospital doctors, junior hospital doctors, doctors in public health medicine, community health doctors, NHS occupational health doctors, and medical academic staff and research workers who hold honorary or ‘A + B’ contracts (ie where the medical academic is employed either (a) on a part-time basis with both the employing authority/trust and the university or MRC, or (b) jointly on a whole-time basis).

3.5.2 An outline of the work covered and not covered under the scheme as it affects all NHS employed doctors, together with any areas which affect only certain disciplines, is given below.

Work covered

3.5.3 The following work is covered by the indemnity scheme:

a) All NHS employed doctors

- Work which falls strictly under the doctor’s contract with the employing authority/trust. Doctors are advised to ensure that their contract reflects accurately both their duties and place(s) of work.

- Family planning in hospitals.

- NHS hospital locum work, whether through a locum agency or the employing authority/trust.

- Clinical trials authorised under the Medicines Act 1968 or its subordinate legislation, for which the employing authority/trust is responsible, carried out by or on behalf of a doctor involving his/her NHS patients.
Trials which do not involve medicines are covered, unless the trial is covered by such other indemnity as may have been agreed between the employing authority/trust and those responsible for the trial. Doctors are advised to ensure that the employing authority/trust is formally informed about the trial, and that the trial has received approval from the Research Ethics Committee.

b) **Senior hospital doctors**

In addition to the work listed in (a) above:

- Domiciliary consultations (where undertaken).

c) **Junior hospital doctors**

In addition to the work listed in (a) above:

- Care of private patients in NHS hospitals where it is part of the junior doctor’s NHS contract.

- Private sector rotations covered by NHS contract. In cases where junior hospital doctors work in independent hospitals as part of their NHS training, and it is specifically covered by the NHS contract, the indemnity scheme will apply.

- PRHO work in general practice.

- Work in a hospice if the doctor is seconded from a contract with an NHS trust.

- Work in a prison if part of the doctor’s NHS contract.

**Junior doctors who are required either by their employer or by their consultant to perform work which takes them over the hours limits set down in the New Deal are covered by NHS indemnity and defence union cover.**
d) **Doctors in public health medicine and community health**

In addition to the work listed in (a) above:

- Local authority functions which fall under an employing authority/trust contract, such as advice and services relating to social services, education and environmental health (including control of communicable disease), and advice in relation to staff health schemes of local authorities and driving licences.

e) **Medical academic staff and research workers who hold an honorary or ‘A + B’ contract with the employing authority/trust**

In addition to the work listed in (a) above:

- Domiciliary consultations (where undertaken).

- Junior clinical academic staff would be covered for private practice in NHS hospitals and private sector rotations on the same basis as NHS hospital juniors (see (c) above).

**Areas not covered**

3.5.4 Separate indemnity insurance or appropriate defence body cover is required by NHS employed doctors for the following areas which are not covered by the indemnity scheme:

a) **All NHS employed doctors**

- Defence of medical staff in GMC or other professional conduct disciplinary proceedings.

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3 ‘A + B’ contracts are those in which the medical academic is employed either (a) on a part-time basis with both the employing authority/trust and the university or MRC, or (b) jointly on a whole-time basis.
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- Stopping at a roadside accident and other ‘good samaritan’ acts, which do not fall specifically under an employing authority/trust contract.

- GP locum work.

- Clinical trials not covered under 3.5.3 (a) above.

- Work for other agencies on a contractual basis, eg the Prison Service.

- Work for voluntary or charitable bodies, eg the Red Cross (except where the employing authority/trust is responsible for the medical staffing of the voluntary/charitable body).

- Work overseas.

Note: For category 3 work see paragraph 3.4 above.

b) Senior hospital doctors

In addition to the areas listed in (a) above separate cover is needed for:

- Category 2 work or fee paying work,\(^4\) eg examinations and/or reports on patients for courts, insurance companies, the Department for Work and Pensions etc; making court appearances; or completing cremation certificates. As a general rule, category 2 work or fee paying work\(^5\) is that which is not principally to do with the prevention, diagnosis and treatment of illness, and a fee can usually be requested from a body outside the health service.

\(^4\) As defined in the 2003 consultant contract Terms and conditions of service

\(^5\) See footnote 4
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Note: The indemnity scheme should cover work for which the employing authority/trust pays a fee, such as family planning in hospitals or domiciliary consultations.

- Private practice, both in NHS hospitals and elsewhere.

Note: For senior hospital doctors, except consultants, care of private patients in NHS hospitals, which is part of their NHS contract, is covered by the indemnity scheme. However, for category 3 work see paragraph 3.4 above.

c) Junior hospital doctors

In addition to the areas listed in (a) above, separate cover is needed for:

- Category 2 work, eg examinations and/or reports on patients for courts, insurance companies, the Department for Work and Pensions etc; making court appearances; or completing cremation certificates. As a general rule, category 2 work is that which is not principally to do with the prevention, diagnosis and treatment of illness, and a fee can usually be requested from a body outside the health service.

Note: The indemnity scheme should cover work for which the employing authority/trust pays a fee, such as family planning in hospitals or domiciliary consultations.

- Private practice or work in independent hospitals, which is not covered by 3.5.3(c) above.

- Work during the GP year as a GP registrar (see para 3.7.1 below).

d) Doctors in public health medicine and community health

In addition to the work referred to in (a) above, cover is needed for:
NHS indemnity

- Private practice, both in NHS hospitals and elsewhere.

- Extra contractual work, such as medical referee to a cremation authority, work for water authorities, including medical examinations in relation to staff health schemes, or attendance as a witness in court.

e) Medical academic and research staff who hold an honorary or ‘A + B’ contract with the employing authority/trust

In addition to the work listed in (a) above, separate cover is needed for:

- Category 2 work or fee paying work,\(^6\) e.g. examinations and/or reports on patients for courts, insurance companies, the Department for Work and Pensions etc; making court appearances; or completing cremation certificates. As a general rule, category 2 work or fee paying work,\(^7\) is that which is not principally to do with the prevention, diagnosis and treatment of illness, and a fee can usually be requested from a body outside the health service.

Note: The indemnity scheme should cover work for which the employing authority/trust pays a fee, such as family planning in hospitals or domiciliary consultations.

- Work within the university, including work for pre-clinical departments.

- Private practice, both in NHS hospitals and elsewhere, whether for personal gain or not. Junior clinical academic staff should note the provisions in paragraph 3.5.3(c), for which they do not require separate cover.

- Academic general practice.

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\(^6\) As defined in the 2003 clinical academic consultant contract Terms and conditions of service

\(^7\) See footnote 6
General practitioners

3.6.1 General practitioners and their employed staff are not covered under the scheme except for work they may undertake which falls strictly under a contract with an employing authority/trust, for example, as a hospital practitioner or clinical assistant or as a hospital locum. Work under a hospital practitioner or clinical assistant contract will be treated on the same basis as other senior hospital doctors (see paras 3.5.3 and 3.5.4 above).

3.6.2 The NHS Executive has indicated that where GPs have contracts with NHS purchasers to provide non-GMS services, they will not be covered by NHS indemnity. In such cases, the GPC advises that the contract should specify what arrangements have been made for indemnifying the GP and include reimbursement of any indemnity cover incurred.

3.6.3 In PMS contracts, for example, providers’ and employees’ medical indemnity cover should be included in the contract price. Providers should pass on this funding to employees as part of their salary. GPs should inform their indemnity organisation if they move to a PMS contract.

3.6.4 In cases in which the patient remains in the care of the general practitioner, and only ‘hotel services’ are being provided by the hospital, the general practitioner retains responsibility for the patient and requires separate indemnity cover.

3.6.5 Although NHS general practitioner principals are not obliged by their terms of service to carry medical indemnity cover or insurance they would be well advised to do so. The cost of indemnity is reimbursed through indirect expenses.

3.6.6 It is advisable for partnership agreements to include a clause which specifically requires the partners to carry this cover and for the partnership to ensure that partners do not neglect or
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forget to pay their individual subscriptions. For example, each partner’s subscription could be paid directly from a joint partnership account, although the actual expense incurred could be attributed to individual partners. The practice should also ensure that any employed staff are appropriately covered. Professional staff such as practice nurses may have individual cover through their own professional organisation.

GP registrars

3.7.1 For GP registrars working in the hospital service, the same rules apply as to junior hospital doctors (see para 3.5.3(c) and 3.5.4(c)).

3.7.2 Work in the general practice year is not covered by the indemnity scheme. For the period in which GP registrars are receiving a salary in general practice, it is advisable that both they and their trainers are fully indemnified, through defence society membership or otherwise. The GPC recommends that this issue is specifically covered in the contract between the trainer and registrar.

3.7.3 Where the GP registrar’s medical defence subscription is higher than the subscription that would have been payable in their last hospital post, s/he may apply through the trainer for the difference in subscription to be reimbursed.\(^8\) The cost of the registrar’s subscription may be reimbursed by the health authority in a lump sum or by monthly instalments.

\(^8\) Statement of fees and allowances, para 38.6 (v) (f)
Doctors who have retired or left the service

3.8 The indemnity scheme will apply to the acts or omissions of doctors in the course of employing authority/trust employment who have subsequently retired, or left the service. Any employment by an employing authority/trust following retirement would be covered, but separate indemnity cover is required for any work not falling strictly under the employment contract.

Handling of claims

4.1 The employing authority/trust responsible for the provision of service is also liable for the negligent acts of all employees, including doctors.

4.2 It is up to each employing authority/trust to determine how claims against its medical staff should be dealt with, particularly when considering whether a claim should be resisted or an out of court settlement sought. In doing so, it may employ the services of a medical defence society or other agent/adviser or deal with them itself, but the final decision will usually be made by the employing authority/trust, as it will bear the financial consequences.

4.3 However, while the costs involved must be taken into account by the employing authority/trust, the Department of Health has stressed that they should pay particular attention to any view expressed by the doctor concerned, have regard to any potentially damaging effect on the professional reputation of the doctor(s) concerned and to any point of principle or of wider application raised by the case.

4.4 The Department of Health has asked employing authorities/trusts to appoint a named officer to deal with claims and to ensure that decisions are made promptly.
Doctors are expected to cooperate with the employing authority/trust and its solicitors when it is investigating or defending claims, and to give such assistance, including statements, as may be reasonably required.

Separate representation of doctors

Doctors may be separately represented at their own cost in any case of negligence on the understanding that the employing authority/trust has the ultimate right to decide how the defence of a case is to be handled, as it is solely financially liable for the medical negligence of its staff. The Department of Health has suggested that the employing authority/trust should not, under normal circumstances, agree to the doctor being separately represented in court if it considers that this would lead to additional costs or damages falling on the employing authority/trust.

In cases where doctors wish to be separately represented and claim that their interests are distinct from those of the employing authority/trust, the agreement of the employing authority/trust, the plaintiff and the court needs to be obtained. In these circumstances, if liability were established, although the employing authority/trust would be liable for the full award of damages to the plaintiff, the doctor would have to pay not only his/her own legal expenses but also any further costs incurred as a result of the separate representation.

Financial arrangements

Under the NHS indemnity scheme, employers are financially liable for the costs of clinical negligence. However, the Clinical Negligence Scheme for Trusts (CNST) was launched in April 1995 to help employers spread the risk of indemnity.
The CNST is a financial pooling arrangement which enables members to spread the costs of negligence settlements over a number of years. The scheme is open to all NHS providers and membership is voluntary. Members pay an annual contribution which is related to their size, the nature of their clinical work and, as the scheme develops, the level of their claims.

4.7.2 The scheme is administered on behalf of the Secretary of State by the NHS Litigation Authority. The Medical Protection Society are the scheme managers.

4.7.3 For claims initiated before the establishment of the CNST, there was a separate provision for spreading costs via the Clinical Negligence Funding Scheme, which provided advances from regional health authorities and loans from the Secretary of State.

Professional independence and clinical autonomy

5.1 Many doctors have expressed concern that the introduction of the indemnity scheme may have detrimental effects on professional independence and clinical autonomy. The Department of Health has given an assurance that there is no question of employing authorities/trusts barring certain risky procedures which have a high priority for patients.

Tax

6.1 Defence body subscriptions are tax allowable. Further details are given in the BMA’s tax guidance notes.

10 EL(91)19 Clinical Negligence Funding Scheme
11 HC(89)34 Annex Question 27