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STATUTORY INSTRUMENTS

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**2015 No. 559**

**The National Health Service (Clinical  
Negligence Scheme) Regulations 2015**

*Payments out of the Scheme*

**Payments out of the Scheme: liabilities of members**

**14.**—(1) Where a payment falls to be made by a member of the Scheme in connection with a claim in respect of a liability to which the Scheme applies, the Secretary of State may pay to the member or on the member's behalf an amount determined by the Secretary of State under regulation 18.

(2) No payment may be made under paragraph (1)—

- (a) in respect of any liability of the member which is excluded from the Scheme by any of paragraphs (3) to (5); or
- (b) in respect of any liability of, or payment by, the member which is excluded from the Scheme by regulation 16 (exclusions from the Scheme).

(3) Any liability which was incurred by an eligible body before it became a member of the Scheme is excluded from the Scheme unless—

- (a) the claim by a third party against the eligible body in respect of the liability was made after the start of its membership of the Scheme;
- (b) the Secretary of State is satisfied that the eligible body informed the Secretary of State before the end of the qualifying period that the claim had been made;
- (c) the Secretary of State agreed before the start of the eligible body's membership that any liability of the body that results from a claim to which sub-paragraphs (a) and (b) apply should not be excluded from the Scheme; and
- (d) that agreement remains in force at the date on which the claim against the eligible body falls to be met.

(4) Any liability of a member which falls to be met after the member gives notice of cancellation under regulation 6(2) (cancellation of membership by a member) but before membership has ceased is excluded from the Scheme unless the Secretary of State is satisfied that the liability would have fallen to be met at that time irrespective of the member's decision to give such a notice.

(5) Any liability of a body ("B") which falls to be met after its membership of the Scheme has ceased is excluded from the Scheme unless—

- (a) the claim by a third party against B in respect of the liability was made before B's membership ceased;
- (b) the Secretary of State is satisfied that B informed the Secretary of State before the end of the qualifying period that the claim had been made;
- (c) the Secretary of State agreed before B's membership ceased that any liability of B that results from a claim to which sub-paragraphs (a) and (b) apply should not be excluded from the Scheme; and
- (d) that agreement remained in force on the date on which B's membership ceased.

(6) In paragraph (3)(b) and (5)(b), the “qualifying period” is the period of 14 days starting with the date on which the member became aware that a claim had been made or, if earlier, the date on which the Secretary of State considers that the member ought to have become aware that a claim had been made.

### **Payments out of the Scheme: liabilities of former members**

**15.**—(1) Where—

- (a) a payment falls to be made by a body (“B”) which has at any time been a member of the Scheme in connection with a claim in respect of a liability to which the Scheme applies; and
- (b) the claim relates to a breach of the duty of care by B whilst it was a member of Scheme, the Secretary of State may, if the conditions specified in paragraph (2) are met, pay to B or on B’s behalf an amount determined by the Secretary of State under regulation 18.

(2) The conditions are that—

- (a) before B’s membership of the Scheme ceases, the Secretary of State agrees with B that, in respect of the membership year immediately preceding the cessation of B’s membership, the amount to be paid by B under regulation 12 (duty of members to make contributions to the Scheme) is also to include an additional amount determined for the purposes of this regulation;
  - (b) that amount is determined by the Secretary of State as being sufficient to meet any liabilities of B falling within paragraph (1) which were incurred whilst B is a member but fall to be met after the date on which B’s membership ceases; and
  - (c) before that date, B either pays the additional amount in full or enters into an agreement with the Secretary of State to pay it in instalments.
- (3) No payment may be made under paragraph (1) in respect of any liability of, or payment by, B which is excluded from the Scheme by regulation 16 (exclusions from the Scheme).

### **Exclusions**

**16.**—(1) Except to such extent as the Secretary of State may determine, the following are excluded from the Scheme—

- (a) any liability admitted by a member without first obtaining the Secretary of State’s written consent;
- (b) any liability determined by a Court in proceedings which are conducted by a member otherwise than in consultation with the Secretary of State;
- (c) any payment falling to be made by a member where the member has not complied with any condition imposed by the Secretary of State relating to a claim;
- (d) any payment falling to be made by a member where, without first obtaining the Secretary of State’s written consent, the member agrees—
  - (i) to be bound by the determination of any person or body as to the making of a payment by that member in respect of a liability; or
  - (ii) to make any other payment in respect of the liability otherwise than in the course of legal proceedings or in consequence of a settlement of legal proceedings agreed to by the member;
- (e) any liability that is of an amount less than the amount which is for the time being agreed between a member and the Secretary of State as being the minimum amount of any liability in respect of which a payment is to be made under the Scheme.

- (2) In paragraph (1), references to “member” include a former member of the Scheme—
- (a) in respect of which the requirements of regulation 14(5)(c) and (d) are met (agreement that Scheme to cover existing claim not met before membership ceases); or
  - (b) to which regulation 15 applies (liabilities of former members).

**Payments out of the Scheme: liabilities for which members are treated as liable**

- 17.—(1) Paragraph (2) applies to any payment in connection with—
- (a) a claim in respect of a qualifying liability falling within regulation 9 (liabilities of insolvent former members for which members treated as liable); or
  - (b) a claim in respect of a qualifying liability falling within regulation 10 (other liabilities for which members treated as liable),

where the payment falls to be made by a member of the Scheme which under regulation 9(3) or 10(4) is treated as being liable in respect of the claim.

(2) Regulations 14 to 16 (circumstances in which payments are to be made out of the Scheme in respect of liabilities of members and former members) are to apply to enable payments to be made to or on behalf of any member of the Scheme in respect of qualifying liabilities as those regulations apply in respect of the member’s own liabilities.

(3) In the application of regulation 14, 15 or 16 for the purposes of paragraph (2), references to anything being done by, to or against a member in respect of a liability to which the Scheme applies includes references to it being done in respect of a qualifying liability for which the member is treated as being liable.

**Determining the amount of any payment to be made out of the Scheme**

18.—(1) In respect of each liability to which the Scheme applies, the Secretary of State must determine the amount of any payment which is to be made under regulation 14(1) or 15(1) (payments out of the Scheme in respect of liabilities of members and former members).

(2) In determining the amount of the payment to be made in circumstances specified in each of paragraphs (3) to (8), the Secretary of State must have regard to the relevant matters specified in that paragraph.

(3) Where an award of damages has been made by a Court against the member, the relevant matters are the amount of—

- (a) the award;
- (b) the legal and associated costs awarded to the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the member.

(4) Where legal proceedings are the subject of a settlement agreed to by the member, the relevant matters are the amount of—

- (a) any sum paid or payable by the member in relation to the claimant’s claim for damages;
- (b) the member’s contribution towards any legal and associated costs incurred by the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the member.

(5) Where, in any legal proceedings, a Court has declined to award damages against the member, the relevant matters are—

- (a) the amount of any legal and associated costs incurred by or on behalf of the member; and

- (b) the extent to which those costs are not recoverable either from the claimant or from the Legal Aid Agency under regulations made by virtue of section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012(1) (costs in civil proceedings).
- (6) Where a member has, otherwise than in the course of legal proceedings, agreed to make a payment in settlement of a claim, the relevant matters are the amount of—
  - (a) the payment agreed; and
  - (b) any legal or associated costs incurred by or on behalf of the member in connection with the claim.
- (7) Where, otherwise than in the course of legal proceedings, a member has agreed to make any contribution towards legal or associated costs incurred by a person in connection with that person's claim against the member in respect of a liability to which the Scheme applies, the relevant matters are the amount of—
  - (a) that contribution; and
  - (b) any legal or associated costs incurred by or on behalf of the member in connection with the claim.
- (8) Where a member has agreed to be bound by the determination of any person or body as to the making of a payment by that member in respect of a liability to which the Scheme applies, the relevant matters are the amount of—
  - (a) the payment;
  - (b) any legal or associated costs incurred by the claimant in connection with the claim; and
  - (c) any legal or associated costs incurred by or on behalf of the member in connection with the claim.
- (9) In this regulation, references to “member” are to be construed in accordance with regulation 16(2).

#### **Power to make payments on account**

- 19.**—(1) Where, in any membership year, a payment falls to be made by a member in connection with a claim in respect of which an amount may become payable by the Secretary of State under regulation 18 (determining the amount of any payment to be made out of the Scheme), the Secretary of State may make a payment on account of any amount which may become payable.
- (2) A payment on account may be made to or on behalf of the member.
  - (3) Where the amount of any payment on account exceeds the amount subsequently determined under regulation 18 as being the amount of payment to be made in connection with the claim, the excess is recoverable from the member.