PREVENTION. CARE. RECOVERY.
Te Kaporeihana Āwhina Hunga Whara

ACC Treatment Injury Cover

External Clinical Advice Guide

September 2020

1. Purpose

This Treatment Injury External Clinical Advisor Guide informs you of:

- your role as a Treatment Injury External Clinical Advisor (**ECA**)
- ACC's role
- the treatment injury provisions.

2. External Clinical Advisor: your role

Impartial clinical advice helps us arrive at a decision for the client

Your role is to provide impartial advice to ACC in keeping with professional requirements for honest, accurate, objective reports that are delivered promptly and are based on relevant information.

You should give opinions only on matters within your area of expertise. If you do not consider yourself suitably qualified to provide the advice, you should notify the person at ACC who requested it.

It is essential that your advice is free from bias or any appearance of bias. The test for bias is whether there is any risk, or perceivable risk, that the ECA might unfairly favour or disfavour the injured person they have been asked to advise on. Any personal connection with the injured person or involved practitioners must be disclosed to ACC.

If you would like to read further information on providing objective clinical advice to ACC, click here.

Quality of advice

Your advice must be accurate and shouldn't be speculative or be based on insufficient or flawed information. If you are not satisfied that a medical opinion can be accurate, based on all the information provided in the file, you must clearly state this in the report.

If you use references to substantiate or qualify your opinion these must be from reputable medical journals, or medical webpages used by your profession.

Consultation and review

It is acceptable to discuss issues with a professional colleague; provided the colleague has no connection to the claim and no identifying details are revealed. Where input of this nature helps to form your opinion, it needs to be referenced in your report, including the qualifications of the colleague.

Timeliness

ACC recognises that as a registered health practitioner your first priority is to the patients you see and treat every day, as a result we understand that completing clinical advice for ACC can take up to a few weeks.

If for whatever reason your advice is likely to take longer than this please let us know. We will either make alternate arrangements, or at least we will be able to inform the client why there is a delay.

Similarly, where there is urgency in receiving your advice we will let you know.

In relation to frequency of requests, this is for your determination. If you only want one request at a time to provide a report, please let us know as we appreciate that you are very busy.

Privacy

Privacy is a core focus area for ACC. ACC's privacy framework (available here), sets out the principles used by ACC to collect, use, disclose and store personal and health related information. As our partner you need to be aware of your responsibilities when handling our clients' information so please take some time to read the information linked.

3. ACC's role

We issue a decision based on all the relevant clinical information on file

The role of an ECA is to provide clinical expertise to ACC. When asked to provide your opinion on a claim, ACC will provide you with copies of clinical records and any relevant reports from other providers. You will be asked specific questions to respond to. Please do not provide a cover decision recommendation. This is ACC's role to determine cover.

Feedback: sometimes we may seek clarification or further comment

On receipt of your completed report we assess the summary and opinion provided. If we have any outstanding questions or need to clarify a specific point with you, then we will get in touch as your report forms an important part of ACC's decision-making process.

How the process works

All treatment injury claims are assessed by Cover Assessment staff. Once they have received all the relevant clinical information but outstanding questions remain, ECA advice may be sought.

Our Recovery Administration staff facilitate this process by contacting you and sending the report request (TI40 attached) and the relevant clinical information (password protected) via email.

Once complete, if you have a Healthlink account please send your report to the Healthlink mailbox: ACCSPECR, alternatively you can email to ACC at recoveryadmin@acc.co.nz with "Treatment Injury Advice" in the subject header.

You'll have been provided a purchase order that covers what services we've approved. Make sure you include on your invoice the:

- purchase order number
- service code or description you're invoicing against
- terms of the purchase order, e.g. quantity and service dates
- address on the purchase order request

For more information about how to invoice ACC, follow this link.

All clinical information provided to you must be securely destroyed. Physical files that cannot be securely destroyed must be returned to ACC via courier.

4. The treatment injury provisions at a glance

The treatment injury provisions were introduced in 2005 following a government review which identified the ACC medical misadventure scheme had several inherent problems. These were; it:

- was inconsistent with the rest of the no-fault accident compensation scheme
- duplicated the role of other agencies – in trying to identify fault (for claims related to medical error)

Treatment injury

When a claim is lodged, we look at the rules set out in the Accident Compensation Act 2001 (the Act) to see if we can cover the claimed personal injury. When the Act says a claimant has cover, it means that the claimant has cover for a personal injury.

The Act has different rules for different types of personal injuries. Treatment injury is a type of personal injury we can consider for cover. A treatment injury occurs when a person suffers a personal injury when undergoing treatment by a registered health professional (RHP); we must consider in the following order:

- the client must have suffered a personal injury
- the personal injury must have happened in the context (involvement of an RHP) of treatment
- there must be a clear causal link between the treatment and the personal injury
- the personal injury must not be a necessary part or ordinary consequence of the treatment
- the claim must not fall under any of the treatment injury exclusions from cover.

Key terms or phrases

The table below provides a summary of the key terms or phrases that relate to the treatment injury provisions. The treatment injury provisions in full can be found in the Appendix (2).

Term or phrase	Meaning
Personal or physical injury	Damage or harm to tissue
Registered Health Professional	For a treatment event before 01/10/2019; a **list of professions defined in the Act**. For a treatment event on or after 01/10/2019: a list of professions defined in the **Accident Compensation (Definitions) Regulations 2019**
Context of treatment	Seeking or receiving treatment from 1 or more registered health professionals, or at the direction of 1 or more registered health professionals
Causation	A physical injury in the context of and caused by treatment
Not a necessary part	A physical injury caused by treatment which was not intentional
Ordinary consequence	A consequence of treatment that is within the normal range of outcomes taking into account the individual circumstances of the person and the treatment, and which doesn't occasion a measure of surprise.
Failure to provide treatment, or to provide treatment in a timely manner	The registered health professional involved *could and should* have taken a different treatment pathway or provided different treatment (including diagnosis). What must be established is that a failure has caused physical injury, this can include a material progression of disease.

Reporting a belief of a risk of harm

ACC has a legal obligation to make a notification to the authority responsible for patient safety when we believe there is a risk of harm to the public. Your report may be used and disclosed for this purpose.

It is not ACC's role to make any findings. Nonetheless where we have a belief of harm while investigating a claim we must pass this information on to the relevant authority.

6. Communication

If your circumstances or availability changes let us know

It's really important that the decision-making process is not unduly delayed for our clients so please tell us how things are going and how many report requests you can manage at a time. We understand that you may not always be able to complete reports for us (due to annual leave) or your capacity to do them may change – so just let us know by contacting our Clinical Administration team at CSAdminTeam@acc.co.nz.

Our aim is to foster a good working relationship as the role you play in helping us to assess claims for treatment injury and reach a decision is vital.

We look forward to working with you.

Appendix

1. Further Information on Treatment Injury
2. Relevant Treatment Injury Legislation
3. TI40 Letter of Agreement

1. Further Information on Treatment Injury

Framework for considering a possible treatment injury

1. Is there a personal injury?
2. Did that injury occur while seeking or receiving treatment by or at the direction of a RHP / RHPs?
3. Was the personal injury caused by the treatment? Taking into consideration:
    - whether the client's underlying health or mental condition(s) wholly or substantially caused the injury
    - whether the client unreasonably withheld or delayed their consent to undergo treatment
4. Exclusions:
    - the injury was a necessary part or ordinary consequence of treatment
    - the injury was caused solely by a resource allocation decision
    - the treatment did not achieve the desired result
    - implant or prosthesis failure due to wear and tear or an intervening act

Necessary part: E.g. an incision for a surgical procedure.

Ordinary consequence: A personal injury, caused by treatment, that is *not* an ordinary consequence is one that is *an outcome outside of the normal range of outcomes, and something that is out of the ordinary which occasions a measure of surprise.*

E.g. a scar that results from a surgical incision, or hair loss following chemotherapy is an ordinary consequence of treatment (Outcomes within the expected treatment process and recovery times, taking into consideration the circumstances of the treatment, i.e. clinical knowledge at the time of treatment and the underlying health condition).

Consider all circumstances of the treatment and the particular person to get a clear understanding of how the injury occurred. The circumstances must be relevant, having a material impact on the injury, considered alongside each other, not in isolation.

Ordinary consequence is case specific and needs to be considered in light of the individual patient circumstances and the specific treatment. This includes:

- The nature of the injury suffered
- The duration and severity of the injury
- Any other circumstances pertaining to the client which may have rendered them more or less susceptible to the adverse consequence

Includes considering the clinical knowledge at the time of treatment including accepted practice and New Zealand and international knowledge.

Assessment of ordinary consequence may be informed by medical studies including relevant statistical analysis, taking into account the study size, population cohort, and relevance of the study.

- statistics may be in relation to a small number of cases
- statistical analysis may involve a different group with differences to the particular client
- statistical association is not causation

Assessing 'ordinary consequence' may take into account statistical assessment of risk but should not be the sole basis of assessment – applying statistical analysis to the individual client requires the exercise of judgement.

Desired result not achieved: The fact that the treatment simply did not achieve the desired result does not, of itself, constitute a treatment injury.

Withholding or delaying consent: Delay in the treatment for cancer resulting in disease progression whilst the fully-informed client takes time to make their decision on treatment.

Resource allocation: Treatment injury does not include personal injury that is solely attributable to a resource allocation decision.

At a glance, the table below provides what may be considered a treatment injury vs. what is specifically excluded from treatment injury:

Treatment Injury Includes…	Treatment Injury Excludes…
Seeking treatment and receiving treatment	Necessary part of treatment
Failure to diagnose or treat / failure to treat in timely manner	Ordinary consequence of treatment
Obtaining informed consent	Withholding / delaying consent
Application of support systems	Resource allocation
Equipment, device, prothesis or tool failure	Wear and tear of prosthesis or supervening act
Ethics approved clinical trials not performed for benefit of the manufacturer / distributor	Desired results not achieved

Failure to provide treatment, or to provide treatment in a timely manner

A treatment injury claim where the treatment is alleged to be about 'failure' is whether an alternative treatment that would have prevented the personal injury ***could and should*** have been given having regard to clinical indications at the time of the alleged failure.

A ***departure from a standard*** is required to establish 'failure' of the treatment.

'Failure' cannot occur in circumstances where there are ***no clinical indications*** for a different treatment course.

An alternative course of treatment needs to have been available; if there was ***no alternative treatment available***, even if the treatment that was given was a 'failure', then there cannot be a personal injury caused by that 'failure'.

Importantly, if there is a 'failure' of the treatment then it must be found that a ***personal injury was caused by that 'failure'***. The personal injury might be distinctly separate from the health condition being treated, or the personal injury may be a progression of the health condition being treated, e.g. disease progression of cancer.

Departure from clinical standards ('failure') is still required to comply with the requirement that a personal injury is ***not a necessary part or ordinary consequence*** of the treatment.

Clinical trials

Treatment injury includes personal injury from clinical trials if:

- No written consent was obtained, and/or

- An Ethics committee (approved by the Health Research Council or DG of Health) did not approve the trial and/or that trial was conducted principally for the benefit of the manufacturer or distributor of the medicine of item).

Infection transmission

If a person (person A) suffers an infection that is a treatment injury, cover can extend to person A's spouse or partner; child, or any third party, if person A passes the infection to them directly. For example, person A contracts Hepatitis C caused by blood transfusion and person A's child is born with Hepatitis C infection. In this example, if the mother is found to have personal injury, that is, Hepatitis C caused by treatment injury then the child can have treatment injury cover for Hepatitis C too.

Additional resource to help consider ordinary consequence

Patient specific circumstances:

- What was the treatment the client received that has given rise to the injury?
- Consider the nature of the injury that is being claimed for including duration and severity (and note comments below)
- Consider the circumstances in which the treatment was carried out. For example:
    - Was this emergency or urgent surgery?
    - Secondary or tertiary treatment provider?
    - What happened during treatment - what was found during surgery? e.g. deteriorated arteries that were not visible pre-surgery.
- Other client factors - note these require consideration about whether they are relevant:
    - Age
    - Comorbidities, e.g. BMI, smoking status
- Consider any pre-existing medical conditions the client had that rendered them more or less susceptible to the injury occurring, e.g. underlying health conditions.
- What were the identified risks prior to the treatment? While the assessment is outcome focussed, this is still a relevant consideration.
- What was the scope of consent prior to treatment?
    - Note - during the consent process it is usual for the provider to discuss the general risk e.g. stroke 1% following orthopaedic surgery. Occasionally they take into account patient factors and state it would be increased but often don't state how much.

Comments on duration and severity

The duration and severity of the injury suffered will have a bearing on whether it was not ordinary. For example, a small localised infection at the site of an incision that clears up within a couple of weeks may be considered ordinary, whereas an infected incision that leads to sepsis may take it beyond what would be considered ordinary.

Conversely, a severe injury will not necessarily mean it is not an ordinary consequence. It will be case specific - for example, a person having complex neurosurgery may be at a high risk of a cerebrovascular event during surgery. In this case it is likely that if a cerebrovascular event occurred it is within the normal range of outcomes, and therefore an ordinary consequence of that treatment.

2. Relevant Treatment Injury Legislation

Accident Compensation Act 2001

Section 32 Treatment Injury

Section 33 Treatment

Section 38 Date on which a person is to be regarded as suffering treatment injury

Section 57 Steps Corporation takes to action complicated claims for cover

Section 58 Effect of failure to meet time limits

Section 62 Decision on claim for treatment injury

3. TI40 Letter of Agreement