

## Considering a clinical negligence claim

You are asking advice from Thomson Snell & Passmore about a possible clinical negligence claim. Such claims are complex and it would greatly assist your understanding of the issues if you read this explanatory leaflet.

### What gives rise to a clinical negligence claim?

To claim compensation (what the law calls “damages”) the patient has to establish, on the balance of probability (i.e. more likely than not), that they have suffered injury or harm which would not otherwise have been suffered and that this was caused by negligent medical treatment. There are thus three questions to be answered:

- 1 Was the treatment negligent? If not, then there is no case.
- 2 If it was, then has the negligence caused injury or harm? This is what the law calls the issue of “causation”. If it has not, then there is no case. You cannot claim damages simply because there has been negligence. You can only claim damages to compensate you if the negligence has caused injury or harm.
- 3 If the answer to the first two questions is ‘yes’, then what injury or harm has been caused and what are the financial consequences of this for you? This determines how much the claim is likely to be worth.

### What is the test of negligence?

In essence, a doctor is negligent (i.e. they are in breach of the duty of care) if they

have fallen below the minimum standard of skill or care which the medical profession generally would regard as acceptable in the particular circumstances. Generally, the doctor will not be judged by the standard of the very best but by the standards of the average competent doctor. This is not assessed with the wisdom of hindsight but on the basis of what the doctor knew or should have known at the time. Doctors frequently have to make a decision when there are a number of alternatives open to them. If it turns out, with hindsight, that they made the wrong decision this will not be negligent if, in practice, a significant number of other doctors would have done the same under the same circumstances. To prove negligence it is not enough to find a doctor who would have dealt with matters differently. In essence, there has to be a situation in which no reasonable doctor, acting competently, would have dealt with things in the same way. In this paragraph (and throughout this information sheet) we refer to “doctor” but the same principles apply if the criticism is made of a nurse, dentist, physiotherapist, or other health care professional, or if the complaint is about a hospital rather than an individual person.

### What about the issue of causation?

It is quite common to find in clinical negligence cases that this issue is much more complicated and difficult than the question of whether the treatment was negligent. The reason for this is that invariably the patient has something wrong with them to start off with (e.g. they have an illness, or have suffered an accident), which is why they are having to seek the medical

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treatment which gives rise to the potential claim. Often we have to consider a long medical history and then try to unravel a complex chain of cause and effect to establish

- a what the natural progression of the underlying condition or illness would be;
- b what the likely outcome would have been if non-negligent treatment had been given;
- c what difference, if any, the negligent treatment has probably made. This can be best illustrated by some examples:

### 1 Example A:

A patient is referred to hospital in January 2000 with pain and swelling in the foot. It is not until July 2002 that the hospital diagnoses that there is a tumour present. The only treatment then is below knee amputation. It is established that the hospital were negligent and that the diagnosis should have been made in June 2000. The question then would be: What would the patient's probable prognosis have been if the diagnosis had been made and appropriate treatment given in June 2000? Suppose that the expert medical evidence is that this particular type of tumour was so malignant that, even in June 2000 the only treatment would have been below knee amputation. In that case the patient cannot establish that the negligent delay in diagnosis and treatment caused the need for the below knee amputation. In reality the need for this arose from the basic underlying condition.

### 2 Example B:

Take the above example but suppose instead that the expert medical evidence is that in June 2000 it would have been

possible to remove the tumour by simply excising it from the foot but that by July 2002 the position had changed so that below knee amputation was then the only possible treatment. In that case the delay in diagnosis and treatment would be the cause of the below knee amputation.

### 3 Example C:

Take example B but suppose that, in addition, the natural progress of the underlying condition is that, even if removed in June 2000, the tumour would recur five years later in any event and that, at that stage, the only effective treatment would be below knee amputation. In that case the difference the negligent delay in diagnosis and treatment makes is that the amputation has been carried out in July 2002, whereas in the normal course of events it would not have become necessary until June 2005, i.e. the negligent delay in diagnosis and treatment has caused an acceleration of the inevitable amputation by a period of three years.

These examples may give some insight into the complexity of causation issues which can arise. As the law stands it is not enough to prove that the negligence **possibly** made a difference to the outcome. It has to be proved that it is **probable** (i.e. a greater than 50% chance) that it did so. Lawyers call this the "balance of probabilities" test.

Some potential claims which seem very strong initially on the issue of negligence cannot ultimately proceed because causation cannot be proved. In our experience it is just as common for someone not to have a case because causation cannot be established as it is because negligence cannot be proved.

## Considering a clinical negligence claim (continued)

### What about the value of the claim?

It is thus clear that we cannot evaluate the claim properly until it has been established, with the benefit of expert medical advice,

- a whether there has been negligence and, if so,
- b whether it is probable that this has caused harm and
- c if so, what harm.

For example, there is a considerable difference in value between the potential claim under example C above in comparison with example B. In example A the claim is effectively valueless. At the outset the best any lawyer can do is to advise what maximum value a claim could have, on the information then available, so that it can be decided whether it is worthwhile to investigate the matter at all. However, when the issues of negligence and causation have been fully investigated, the claim may well turn out to be for less, although sometimes in contrast it can turn out to be worth more.

In essence an award of compensation (called “damages”) covers two things, namely (i) general damages to cover pain, suffering and loss of amenity and (ii) special damages to cover the financial consequences of the injury, both past and future.

### How are these cases proved?

With the help of independent medical experts. These are doctors who we know from our experience to be impartial and fair, prepared to give an opinion in these cases and to stand by their opinion. Ten years

ago it was less easy to find doctors willing to become involved in clinical negligence cases but there has been a considerable change of attitude since then. There are now quite a large number of doctors who find no difficulty in giving an opinion and who are willing and interested to do so. The ideal expert is completely fair and impartial. One who instinctively sides with the claimant is not good because they may lead the claimant to think that they have a good case when in reality they do not. In contrast, one who instinctively sides with other doctors is not good either, for obvious reasons. The expert instructed would be from outside the area and not in any way connected with the doctor whose treatment is complained of.

It is essential for an independent medical expert to advise on the question of negligence. For example, if the claim concerns a GP’s alleged failure to diagnose, then another GP would be the appropriate expert to comment on negligence; or if the claim concerns alleged negligence in the performance of a hysterectomy, then the appropriate expert would be a Consultant Gynaecologist. Independent medical experts are also needed to deal with the issue of causation. Often this may be a different expert from that needed to deal with negligence. Take for example an allegation that a baby has been born brain damaged because of negligence in the management of the labour/delivery. The issue of negligence would be considered by a Consultant Obstetrician (or by a Midwife if it was a Midwife’s management which was allegedly at fault) but the question of causation would be dealt with by a Paediatric Neonatologist or Paediatric Neurologist. Sometimes the causation issues are so complex that a number of different experts are needed.

## Considering a clinical negligence claim (continued)

### How are these cases investigated?

Often it is necessary to carry out a preliminary "screening" investigation to assess whether there is the potential for a claim. This is because these claims are potentially very expensive and whoever ultimately is going to be financing the case (whether the client, the Legal Services Commission, insurers, the solicitors, or a combination of these) needs to establish at an early date that there is at least some prospect of a claim succeeding before committing themselves to any significant expenditure.

If the preliminary screening investigation indicates that there is the potential for a claim then a full investigation is needed. What follows explains what is involved in that process.

Firstly, we have to obtain a detailed statement from the patient. All the medical records have to be obtained. Experience has shown us that it is invariably desirable to have not only the records from the treating hospital or doctor but all the GP records as well and also records from any other relevant hospital or doctor from whom the patient has had treatment either before or after the events complained of. We have to go through the records to ensure that they are complete and legible. Any missing items have to be obtained. Records which are kept separate from the patient's main folder of records invariably have to be requested separately, e.g. X-rays. There may well be points in the records on which we need the patient to comment. However, once all this factual raw material has been gathered together we then send it to independent medical experts. We instruct them to prepare reports dealing with the

issues of negligence and causation. Sometimes it is necessary for a medical expert to see the patient at that stage but generally, since they are commenting on past events, it is not necessary for them to do so. Once they have reported it is often desirable to discuss the case with the medical experts in more detail. This gives the opportunity for clarifying points raised in their reports, for asking questions, establishing what line of defence may be put forward, etc.

Only when all this has been done is it possible to assess whether there is a claim which can be brought with a reasonable prospect of success or not. Also, this is the stage at which we can form a more accurate view of the potential value of the claim.

Of course, the fact that there are experts prepared to back the claim does not necessarily mean that the claim will succeed. The Defendant to the claim will also seek independent expert medical advice in due course and those experts may take a different view and in that event the Defendant may be able to successfully defend the claim.

What happens if there is a case which can be pursued?

Medical reports have to be obtained dealing with the different aspects of the Claimant's condition and prognosis. Details have to be obtained of the financial losses and expenses suffered as a result of the injury caused by the negligence. Evidence may well need to be obtained in support from various witnesses, e.g. an employer, workmate or spouse. Once this has been done, we are required, under a Pre-action Protocol, to write a detailed letter of claim to

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the Defendant setting out fully the basis of the claim. The Defendant is required to respond fully within 3 months (although in practice it can take longer) giving a reasoned response and either admitting the claim or, if it is denied, saying in detail why this is so. This assists to clarify the issues at an early stage.

Sometimes the detailed letter of claim will be accompanied by a formal offer by the Claimant to settle the case for a specified sum.

If the Defendant refuses to settle for that sum and the Claimant is later successful in recovering that sum, or more, then the Defendant can be penalised financially for being unreasonable in refusing to settle. This “offer to settle” procedure can put powerful pressure on a Defendant and is always worth consideration in appropriate cases, especially since it can speed up resolution of a claim.

However, often a Defendant will not settle a claim without Court proceedings. In that event each side has to set out (or plead) its case in documents which are filed with the Court. The Court gives directions regarding the procedural steps to be taken in the case and the timetable for these. Arrangements then have to be made for a trial date to be fixed.

It is important to stress that the trend these days is very much towards what is called the “cards on the table” approach to Court proceedings. In essence, at just past the halfway stage in a clinical negligence case, each side has to disclose to the other the statements of any witness upon whom they intend to rely for the giving of evidence. Soon after that the reports of any independent medical expert have to be

mutually exchanged with the other side. The respective experts will then be directed to discuss matters to see if they can narrow the areas of disagreement between them.

By then, effectively all the cards are then on the table since all the evidence which would be relied upon at a subsequent trial is now out in the open, i.e. the medical records, the witness statements and the independent expert reports. This is therefore the stage at which each side can take stock of its position and determine the strength or weakness of its case in comparison with the other side’s case.

If the case is one which is going to settle out of Court then, if it has not already done so, it is likely to do so once all the cards are on the table. If the Defendant does not have a strong case then this will become apparent and it is likely to want to settle it. If, on the other hand, the Claimant does not have as strong a case as was previously thought, then now is the time to withdraw from the case. If both sides feel that they have a reasonably strong case then a compromise settlement may emerge which fairly reflects the risks to each side of going on with the case. In practice very few clinical negligence cases ever go to trial, partly because the costs of the trial itself are so enormous. One has to pay not only to be represented by a Barrister in Court but there are also a number of highly-paid medical experts who may have to attend Court to give evidence. Because the issues are complex a trial can easily last for several days.

The fact that Court proceedings are started certainly does not mean that the case has to go to trial. In practice, as indicated above, nearly all clinical negligence cases

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are resolved before trial and once all the cards are on the table, if not before.

It is also possible for a case to be mediated, and this is now becoming more common in clinical negligence cases.

### What about legal costs?

If you win the case then, in addition to receiving damages, you also recover from the other side the majority of your legal costs and expenses of bringing the case but invariably not all. Until Court proceedings are started you incur no liability towards the other side's costs. However, once Court proceedings are started you do have a potential liability towards the other side's costs and would have to pay the majority of them if the case was unsuccessful or if you had to withdraw. (However, there are different rules if you have public funding. Invariably, in that situation, the Legal Services Commission pays your costs in full and you do not have to pay the other side's costs).

### Are there other alternatives?

Sometimes it may be better, instead of seeking to take legal action for damages, to take advantage of the various complaint procedures available. We will discuss this with you.

### Is there any time limit for taking Court proceedings?

Usually Court proceedings have to be started within three years of the events complained of, or within three years of the time when you first knew, or should have known, that you might have suffered injury as a result of the events complained of.

(This covers circumstances in which there is a delay between the negligent treatment and your appreciation that you may have been harmed as a result of it. Example A above is a good one, since there the patient would not have known that he had suffered injury until the diagnosis was finally made and so the three years would start from that time). If you have suffered injury whilst under age, the time limit for starting Court proceedings is your 21st birthday. There are certain circumstances in which these time limits can be "stretched". However, the basic principle is that if a claim is out of time then, however meritorious, it is generally very difficult, if not impossible, to pursue it. If the events complained of are more than three years ago, we shall certainly need to go through the history with you carefully to advise whether your claim is time-barred or not.

Having explained the background to clinical negligence claims we now consider in more detail the question of costs, since this is a vitally important subject as far as clients are concerned.

### What are the ways in which a case can be financed?

In practice these days it should always be possible to finance a claim which has a reasonable prospect of success. There are various possibilities and these include:-

- 1 Public Funding (previously Legal Aid): We will advise you if you qualify for public funding, which is means tested. If you do, then you may qualify with no financial contribution to pay, or you may have to pay a regular monthly contribution for as long as the Certificate of Public Funding is in force. If there is no contribution to pay or only a small

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one, public funding is the best option. If the contribution is a high one then one of the alternatives set out below may also need consideration.

- 2 A Conditional Fee Agreement (popularly called a “no win-no fee” agreement): Under such an agreement your Solicitors only get paid for the work done if the case is successful. The Claimant needs to take out insurance to safeguard against the risk of losing the case. For further information about such agreements, please refer to our information sheet entitled “Conditional Fee Agreements.”
- 3 Legal Expenses Insurance: Many people these days have legal expenses insurance - sometimes without realising it. Often a household contents policy will have a legal expenses section. It is the insurance policy in force at the time the injury was suffered which is the relevant one not the policy in force now. Sometimes it is possible to pursue a clinical negligence claim with the backing of one of these policies though generally they have a number of drawbacks as far as clinical negligence claims are concerned. For example, the indemnity limit under them is often insufficient, the strict wording of the policy often rules out many types of claim and many of the insurers do not give you freedom of choice over which a solicitor can act for you. We would however always consider whether you could take advantage of such a policy and would review the policy documentation. It is important that we make any approach to the insurance
- 4 company rather than you doing so yourself since otherwise the insurance company is likely to simply go ahead and appoint a solicitor for you (assuming you are covered by the policy) without reference to you.
- 5 If you are a union member you may well qualify for legal assistance under your union membership.

### What do legal costs consist of?

When we talk about legal costs we do not mean the Claimant’s own financial expenses or losses as a result of their injury. What we mean are the legal fees and expenses of investigating and bringing the case. These consist of various elements:

- 1 Your own Solicitor's fees: Solicitors charge at an hourly rate for the time spent on the case, to which is added VAT. The hourly rate includes all the overheads of running the Solicitor's office.
- 2 Disbursements: These are items of expense incurred by the Solicitor on your particular case. Typically, in a clinical negligence case, disbursements would include the cost of obtaining copy medical records and X-rays, the fees for experts' reports, Court fees, travelling expenses.
- 3 Counsel's fees: It is invariable practice, if a clinical negligence case is to be pursued by Court proceedings, to use a Barrister (Counsel) to advise, to draft Court documents and to appear in Court. Counsel usually charge at an hourly rate plus VAT.

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Once Court proceedings are commenced your opponent ("the Defendant") will also incur legal costs which will include the same three elements - Solicitor's fees, disbursements and Counsel's fees.

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