

## Clinical Negligence Fact Sheet

- **Have you got a claim?**

On rare occasions things can go wrong when you are receiving medical treatment. When that happens the effect on you and your family can be immense. Whilst this does not necessarily mean that the healthcare professionals are to blame, sometimes they do make mistakes which could and should have been avoided with a reasonable level of care and skill. This is called clinical negligence. When this happens there is a potential claim for compensation. This may be against an NHS Trust Hospital, a Private Hospital, a GP, a dentist or some other type of healthcare professional, including a nursing home or private clinic.

Proving negligence and causation against a healthcare professional is often complex and so it is important that you seek expert legal advice as early as possible.

HRJ Law LLP (HRJ Law) is one of less than 200 firms in the UK which has a member of the Law Society's Clinical Negligence Panel on its staff. We have a longstanding commitment to this field of the law and over the years have acted for many victims in successfully pursuing clinical negligence claims.

Our aim is to support victims of medical accidents; to find out what went wrong; why it happened and to give guidance and advice.

- **What is clinical negligence?**

There are three essential elements necessary to prove clinical negligence:

### **Duty of care**

All doctors and other healthcare professionals owe a duty of care to their patients. This is to exercise reasonable care in carrying out their professional skills. In most clinical negligence cases, establishing a duty of care is unlikely to be a problem.

### **Breach of duty of care (negligence)**

The second element is to establish a breach of duty of care, i.e. to show that the healthcare professional has been negligent.

The law on this issue is found in the case of *Bolam v. Friern Hospital Management Committee* (1957) where the test for establishing clinical negligence was set out. A doctor is



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required to exercise the ordinary skill of a competent doctor in his or her field. He or she must exercise this skill in accordance with a responsible body of medical opinion skilled in that area of medicine. A doctor is not negligent if there is another responsible body of medical opinion who would have acted in the same way. Errors of judgment or mistakes are not necessarily negligent.

The judge at trial will assess what a reasonable body of medical opinion is by listening to the medical experts on each side. In *Bolitho v. City and Hackney Health Authority* (1997), the House of Lords held that where the body of expert opinion cannot be logically supported, the judge can look behind the medical evidence being presented and reject the evidence on the grounds that it is not reasonable.

It is important to understand that there may be more than one “responsible” method of carrying out the treatment. This is one of the matters for the medical experts on each side to advise and comment on.

### **Causation of injury**

If it can be proved that the doctor was negligent, the next step is to show that the negligence caused a significant physical or mental injury. We have to consider what would have happened to you if there had been no negligence or if the treatment had been unsuccessful for another reason.

### **Obtaining an expert opinion**

The Courts determine the standard of care received by reference to independent medical opinion. Therefore clinical negligence cases rely very heavily on expert witness evidence. Independent medical experts are instructed to review medical records and to consider whether or not the care received was negligent. It is sometimes difficult to obtain advice in certain areas of medicine from experts who have good medico-legal experience. However, we keep a database of medical experts who have been used by us in the past and who we know from our own experience are willing to criticise unacceptable practice or standards in their profession if and when it is justified to do so.

Similarly, medical experts will be asked whether the mistake (if any) in your treatment actually caused or contributed to your injury or whether the injury would have occurred in any event. Often additional experts have to be instructed to consider this issue. If settlement cannot be reached ultimately it is for a Judge to decide which parties’ evidence is preferred.

### **Limitation**

There is a statutory limitation period of three years in which court proceedings should be commenced. The three year period runs either from the date of the negligence or from your “date of knowledge” that your treatment has caused significant injury, whichever is the later. Except where the date of knowledge is clearly identifiable, we recommend you assume that the three years run from the date of negligence. The court has discretionary power to override this three year limitation period.

With children and persons under a disability (i.e. those who are incapable of managing their own affairs), the rules are different. The three year period does not start to run until the child’s 18<sup>th</sup> birthday or until the person ceases to be under a disability.

We will advise you, if we think that limitation is likely to present a problem, and we will advise on what action you can take to protect your position as far as possible.

- **Alternatives to legal proceedings.**

Financial compensation may not be your first priority or objective. You may want to make a complaint about the service or treatment you received. It may be that you would like an apology or some assurance that changes have been put in place to prevent the same mistake happening again.

In cases where treatment has been provided under the NHS you have a right to complain. NHS Hospitals and GP practices are now required to have a complaints procedure and to publish its details. Any complaint should normally be made to the Complaints Manager within 6 months of the incident and should be responded to quickly. You can ask the Patient Advice & Liaison Services (PALS) office at the hospital for information and help on using the complaints procedure. PALS will act on your behalf and attempt to resolve the complaint. Your local Citizen's Advice Bureau may also be able to offer advice. The hospital or GP surgery may suggest conciliation.

If you are unhappy with the outcome of your complaint or the conciliation you can ask for an independent review to take place. You must do this within 28 days of being informed of the outcome of your complaint or conciliation.

If you remain dissatisfied after this stage you can refer the matter to the Health Service Commissioner or Ombudsman, who is independent of the NHS.

Unlike NHS hospitals, private hospitals are not required to have a complaints procedure although some do. If you are dissatisfied with the service or treatment received you should write to the private hospital or doctor concerned and ask for the complaints procedure to be operated, if there is one.

If your complaint is relating to serious professional misconduct of a healthcare professional the matter should be reported to the General Medical Council or the UKCC (nurses and midwives). Dentists are regulated by the General Dental Council.

## **Funding A Claim**

HRJ Law is one of a very limited number of firms awarded a Specialist Quality Mark by the Legal Services Commission and a Contract to offer public-funded legal services in the Clinical Negligence category.

For clients who are not financially eligible for public funding (although if you are bringing a claim on behalf of someone else e.g. a child, it is their financial circumstances, not yours, which is taken into account), then there are other ways a claim can be funded.

Depending upon your personal circumstances these can include:

- a Conditional Fee (no win, no fee) Agreement;
- Legal Expenses Insurance;
- Union Funding;
- or indeed paying for initial investigation yourself.

We can advise on funding options at the initial interview.

- **Contact**

David Brown F Inst L Ex, Head of Clinical Negligence Department, is a Member of both the Solicitors Regulation Authority Clinical Negligence and Personal Injury Accreditation Schemes. He is also an Accredited Senior Litigator of the Association of Personal Injury Lawyers. He has more than 25 years experience of handling clinical negligence and personal injury litigation.

Emma Lutrario is a solicitor specialising in Clinical Negligence and is a member of the Association of Personal Injury Lawyers.

Please contact us to arrange an initial free interview with him.

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Or write to us at either of the following addresses:

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Interviews are available at our offices in Welwyn Garden City, Hitchin or, when necessary, at home by arrangement.

