

# MDS

MOOSA - DUKE SOLICITORS

## UNDERSTANDING CLINICAL NEGLIGENCE



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## WHAT YOU HAVE TO PROVE

To succeed in a claim for medical/clinical negligence you must be able to establish 4 key things;

- Duty of care,
- Breach of duty of care,
- Causation and
- Damage or injury.

## DUTY OF CARE

This is the easy one. All doctors and health professionals owe a duty of care to their patients to exercise reasonable care in carrying out their professional skills.

## BREACH OF DUTY OF CARE/ NEGLIGENCE

Did the doctor do something wrong or fail to do something that s/he should have done? Was the care you received below the required standard?

Trying to establish that there has been a breach of duty of care can be difficult. Before you allege that a doctor has been negligent it is important that your claim is thoroughly investigated. The standard by which doctors are judged is set out in a case which was decided many years ago in 1957 called Bolam -v- Friern Hospital Management Committee. The standard is as follows:

A doctor is not guilty of negligence if he acts in accordance with what a responsible body of medical opinion considers to be proper practice at the time.

A doctor must exercise the skill of a competent doctor in his field. A doctor is not negligent if there is a responsible body of medical opinion who would have acted in the same way as the doctor.

It is useful to know that a doctor is judged according to the practices of the day. This is because there are changes in accepted practice all the time. Therefore if your claim arises out of treatment that you received in 2001 and your case comes to court in 2007 the standard will be that of practices in 2001.

**What is a responsible body of medical opinion?**

This is a responsible group of doctors who all agree that something is done in a particular way. There may of course be more than one responsible body of medical opinion.

There is nothing to say that the group must be of any particular size. A very small group of doctors who do things one way may amount to a responsible body of medical opinion.

At trial the judge will need to decide what a responsible body of medical opinion is. He will do this by hearing evidence from both sides' medical experts. The medical expert evidence must be logical and stand up to analysis.

When we investigate your case, it may become apparent that there may be more than one way of treatment that is considered to be reasonable. It may come to light that treatment methods and standards across the country vary. This variation does not necessarily make the method used in your area negligent. For these reasons it can sometimes be difficult to establish a breach of the duty of care.

## CAUSATION

**Did the negligent treatment cause or materially contribute to the injury?**

If you can show that the doctor made an error and that this error was negligent, you must then prove that the negligence caused you some harm.

Proving causation can be difficult in medical negligence cases. You must remember that you went into hospital for treatment of some kind. We need to help you find out if what happened to you would have happened anyway or it happened because of the negligent treatment you received. Sometimes the injury is confused with the underlying condition for which you went into hospital in the first place.

In most cases you will need the opinion of an independent medical expert to help you prove that what happened to you would not have happened if the doctor(s) had not been negligent.

## INJURY

Not all errors result in an injury and not all injuries are caused by error. To succeed in a claim you must show that you have suffered an injury or some damage and that that this was as a direct result of or materially contributed to by the treatment you received.

## SUMMARY OF WHAT YOU HAVE TO PROVE

*It is important to remember that just because something has gone wrong medically does not always mean that someone has been negligent and that there is a case to be answered. The success or failure of a medical negligence case will depend on the strength of your expert evidence.*

*You not only have to show*

- 1. that there was a breach of duty BUT ALSO*
- 2. that the breach of duty caused or materially contributed to you suffering damage or an adverse outcome.*

*In some cases there will be a breach of duty but it will have made no difference. You must therefore show both things and that the 2 things are linked.*

*If the expert evidence is supportive we can proceed with your case. If the expert evidence is not supportive we will usually advise against proceeding any further with the claim. Without the backing of a supportive expert it is generally very difficult to succeed with a claim for Clinical Negligence. The reason for this is that the judge will want to hear what the expert has to say. Whilst you can help the judge by giving the facts in your case, the judge will decide on whether there has been negligence or not on the basis of what the experts say.*

*It is also important to remember that if you go ahead with a claim you may have an expert that supports your case. Your opponent may however have an expert that does not agree with your expert. The judge will therefore have to decide which expert's evidence he or she prefers in the circumstances of the case.*

## HOW CAN WE HELP YOU?

### **The first appointment**

When you first come to see us we will ask you for details of what happened to you. It is always helpful if you can bring any letters you have received from your hospital or doctor as these may help us to advise you.

Medical negligence cases are not always clear cut and in many cases we cannot always say whether or not it is likely that there has been some medical negligence until we have seen your medical records. Our aim in the first appointment will be to assess your case on the facts you provide. Based on what you tell us, we will advise you if we consider your case is one that should be investigated further. We will then tell you of the steps that you will need to take.

## WHAT HAPPENS NEXT?

### Stage 1 Getting Your Medical Records

If on our advice you decide that you want to investigate further we will take steps to get hold of your medical records. We will usually need to see copies of all your records from all the places at which you have received treatment. We must have your permission to see your records. We will ask you to sign forms giving us this permission.

It is only when we have seen your records that we can begin to consider whether you have a potential case.

Health professionals must provide records within 40 days of our request. This does not always happen as sometimes those involved in the case are unhappy to let you see them. We may in some cases need the courts help in getting hold of your notes.

When we get your notes, we will check them to see that they are all there. We will sort them out, read them and establish whether or not you have a potential claim. We will advise you of what is said in your notes and help you to understand them. We will tell you of the issues raised by the notes and the questions we consider need to be answered. We have the added benefit of a doctor in - house who will help you understand your notes.

Your notes are obtained under the Data Protection Act 1998 and the cost is limited to £50.00. If the claim involves a deceased member of your family, then the records are obtained under the Access to Health Records Act 1990 and the cost is dependent on the volume of material.

*Timing:* Minimum 40 days from our application. In reality, this can take longer.

### Stage 2 Getting an Expert's View on Your Case

To prove your case in court you need an independent expert to provide an opinion that supports your case. It is important that the medical expert who is instructed can provide an opinion on your case. He must be from the correct speciality.

When we have all your medical records we will ask an independent medical expert to review your medical records and advise whether or not the care which you received was negligent. We have worked with independent medical experts for many years and we have an extensive database of experts from all different specialities who can help.

We will ask the medical expert to tell us whether a mistake was made and whether this mistake was negligent.

We will also need an opinion from an expert advising on whether or not the mistake caused or materially contributed to your injury or whether you would have had the injury anyway.

The expert may need to examine you to help him/her prepare a report.

Do not be surprised if we advise you that you may need more than one expert medical opinion. This will usually be necessary if there are overlapping specialties involved in your care.

*Timing:* Getting a first (preliminary) opinion can take 3-6 months from when we send the expert your records. It all depends on how busy the expert is.

### **Stage 3 What Did The Expert Say?**

When we receive the expert's opinion, we will review your case again with you very carefully. We will consider what the expert has said and advise you whether or not you have a case which is worth pursuing. We may even suggest that a specialist medical negligence barrister's opinion is obtained on whether or not your claim is likely to succeed if taken further. We may need to go and see the barrister with the experts who have given an opinion in the case. We may also advise that we need more evidence.

*Timing:* Assuming a barrister is not needed or no more evidence is needed, around 3 -6 weeks. If a barrister is needed around 1-3 months or more, depending on the availability of the doctors and the barrister.

### **Stage 4 Letter of Claim**

Up until now the doctor/hospital will not know for certain that you are going ahead with your case. They will have an idea from the initial request for records but they will not know the basis of the claim.

Once we have a supportive expert opinion and know that you have a claim that is worth taking further, and once you have decided to carry on with your claim, we have a duty to tell your opponent about your claim. We must send them what is known as a 'Letter of Claim.

This letter must set out all the facts, and the allegations that you are planning to bring against your opponent and give details of the compensation you want. Ideally this letter should be sent to your opponent 3 months before you start formal court proceedings. There is not always enough time to allow this to happen.

## **Stage 5 Letter of Response**

The Letter of Claim gives your opponent a chance to carry out investigations into the claim. The findings of their own investigations may mean that they realise that they cannot defend the case and they may decide to settle the case by offering you compensation. If this happened, it would mean that you did not need to issue court proceedings (register your claim with the court). They may just admit that they were liable but hold off offering compensation because in some cases it can be quite difficult to work out how much a case is worth. If this happened at least you would know for sure that you were going to recover some compensation. You would then concentrate on proving how much your case was worth.

Your opponent may of course deny responsibility altogether. It is not enough to simply deny responsibility. They must give you a detailed answer and explain why.

Your opponent must provide a Letter of Response within 3 months of receiving the Letter of Claim. It is not unusual for defendants to ask for extensions of time. If they do so, we will advise you if they should be agreed or not.

*Timing:* 3 months from sending your opponent the Letter of Claim.

## **Stage 6 Starting Court Proceedings**

Up until now the court has not been involved. Unless there is a problem with limitation, (see below) court proceedings will be issued at this stage. This means that we will register your case with the court.

As you will see from the above steps, court proceedings are not taken lightly and they are only started after we have looked at your case very carefully with medical expert help and often with the input of a specialist barrister. We will usually only advise you to start court proceedings after your case has been carefully investigated in detail. Getting to this stage can take as long as 12-15 months and even longer in cases involving complex issues.

If you decide to go further with your case at this stage, proceedings will be issued in court. We are required to send to court and your opponent a number of documents which we will prepare with the help of a barrister and your medical expert. These documents are

- Particulars of claim
- Schedule of special damage
- Medical report on condition and prognosis

*Particulars of Claim* - The facts upon which your claim is based and the allegations of negligence which we intend to pursue in court on your behalf.

*Schedule of Damages* - A detailed list of financial losses which you have incurred to date and your predicted future losses.

*Medical report on present condition and prognosis*- a report saying what your condition is now and how your condition will develop/change over time.

Because a case can take some time to get from start to finish, we will if necessary update the above if there are any material changes in evidence that emerge.

We will send these documents to you for approval before we send them to court. You must be happy with the content of the documents as you will need to sign the particulars of claim confirming that what they contain is the truth.

*Schedule of special damage* - this is a document that gives details about your losses and out of pocket expenses. It is important that you keep details of your expenses and losses as you go along with your case. We may even need an expert to help prove your losses.

## **Stage 7      The Defence**

Your opponent who is now the 'defendant' will have received your pack of documents. They must consider what you have said and respond in a document called the 'Defence'. The defendant must admit or defend the allegations you have made and give reasons for what they say. This allows us to consider your position with you and your medical expert.

*Timing:*      The defendant should strictly speaking let us have a defence within 14 days but in reality this does not happen. In medical negligence cases it is recognised that more time is needed and this can take up to 3 months. It is not unusual for defendants to ask for extensions of time. If they do so, we will advise you if they should be agreed or not.

## **Stage 8      The Case Management Conference.**

Now that the court is involved, it plays a role in the way in which your case progresses. The case management conference is the name given to a short hearing before the court where a timetable is imposed on the parties. The aim of the timetable is to help both sides prepare the case for trial as quickly as

possible. The court will also decide roughly when the case should be ready for trial and shortly after the case management conference we will apply to get the date for trial finalised. This gives everyone a firm date to work to. The date will usually be some months away and could be as many as 9 months away to allow both parties enough time to prepare their case. You will not need to attend this hearing.

*Timing:* this hearing is usually 1-2 months after the defence has been served.

## **Stage 9 Exchange of Evidence**

We will prepare your final witness statement and also those of any of your witnesses. These will be exchanged for those of the medical staff who were involved. We will also exchange your expert evidence for that of the defendants. Before we do so however we may even need another meeting with the barrister. We will also be looking at the value of your case and finalising evidence about this.

*Timing:* witness statements are exchanged about 3 months after the hearing. Expert evidence is usually exchanged 3 months after witness statements.

## **Stage 10 Final Preparations**

The court usually likes to check that everyone is on track and all preparations are on course for trial. There will usually be a short hearing called a pre-trial review at this stage. You will not need to attend. This hearing gives the 2 sides a chance to discuss any issues that can be sorted out before the case gets to trial.

Before the trial there will be a meeting with the barrister who will present your case at trial and the medical experts. You will be asked to come to this meeting. The aim of the meeting is to talk about the forthcoming trial and any outstanding issues.

Only 2% of clinical negligence claims ever get to trial. Most cases are settled out of court because the defendants decide that they cannot continue with the case to trial.

## LIMITATION

### How long do I have to bring a claim?

#### The 3 year rule

The law allows you 3 years from the date of the negligent act or from the date it was known or ought to have been known that an injury was as a result of a negligent act (the date of knowledge). It is safest to assume that the 3 years from the negligent act unless you can clearly identify the date of knowledge.

In the case of children the 3 years begins to run from age 18. Children therefore have until age 21 to start a claim.

People under a disability have 3 years from the date their disability ceases.

#### What if I am out of time?

The court does have discretion to disapply the 3 year rule if it thinks it is fair and reasonable. Remember your opponent will argue that it is unfair and that the delay has meant that they have been unable to collect their evidence in time. Hospital staff move regularly and hospitals lose track of old staff who may be vital witnesses in the case. You will have to convince the court that you have good reason for delaying in bringing your case.

Our advice to you would be to consult a solicitor early so that you do not leave yourself too short of time.

## MAKING A COMPLAINT - The NHS Complaints Procedure from 01.04.09

Not everyone wants to pursue a claim for compensation. Some people just want some answers. What went wrong? Why did this happen to me? Why did it take me so long to get better?

The steps involved in making a complaint are set out below:

**12 months:** If you just want some answers and an explanation you may ask for this through the NHS Complaints Procedure. You must however do so within 12 months of the unsatisfactory treatment or within 12 months of when you became aware of it.

**3 days:** You should get a verbal or written acknowledgement of your complaint within 3 working days.

The NHS Trust should contact you to discuss your complaint and/or to arrange a meeting and set a timescale for the investigation and resolution of your complaint. The Trust should provide you with regular updates as to the progress of your complaint.

**6 months:** You should get a full and detailed letter of response from the Trust within 6 months from the date of your complaint, unless a different timescale has been agreed

**12 months:** If you are still unhappy after you have had a full response you can apply in writing to the Parliamentary and Health Service Ombudsman for an independent review of your complaint. You must do so within 12 months of the date of the treatment in question or within 12 months of becoming aware of it.

**5 days:** Your request should be acknowledged within 5 working days and a case manager should be appointed to deal with the review of your complaint.

**40 days:** The Ombudsman will conduct a thorough review of your complaint and will take clinical advice before arriving at a decision. You should then be provided a detailed report setting out the Ombudsman's findings and basis of the decision. It is reported that around 80% of

the cases being considered by the Ombudsman have been dealt with within 40 working days. Some cases may take longer depending on the circumstances and the complexity of the complaint.

*You can now run a claim and a complaint in tandem. There can be disadvantages or advantages in doing this, depending on your circumstances. We are happy to advise you about this. If you are going to apply for legal aid, you are advised to use the complaints procedure first as this may resolve your concerns and any issues that you may have.*

## THE PROFESSIONAL CONDUCT OF DOCTORS, DENTISTS AND NURSES

If you are concerned about the conduct of any of the above to the extent that you think that their professional conduct needs to be reported to their professional body, you can contact the following:

The General Medical Council:	Doctors
The General Dental Council:	Dentists
Nursing and Midwifery Council:	Nurses and Midwives

## FUNDING OPTIONS

To summarise they are:

- Legal Aid;
- Legal expenses Insurance;
- Conditional fee agreement;
- Private

### Legal Aid

Not all solicitors do Legal Aid (Public Funding) work. We have a franchise with the Legal Services Commission and we can therefore offer Legal Aid as an option. We will let you know if you are likely to qualify for Legal Aid. Not everyone qualifies. To qualify, the Legal Services Commission must be satisfied that you satisfy their 'means' test and their 'merits' test. They must also be convinced that you satisfy the costs/benefit ratio. This means that if it will cost more to pursue your claim than your claim is worth then they may refuse funding.

To apply for Legal Aid you will need to complete a number of forms. You will be asked to give details of your finances.

### Legal expenses Insurance

You may be covered for legal expenses under household policies of insurance. You are advised to check these.

### Conditional fee agreement -No win No Fee

Many solicitors will only consider a Conditional fee agreement after initial investigations have been carried out. This is because an assessment of your case can only be fully made once we have your medical records and an independent expert opinion.

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## Private

This is where you pay us privately per hour. We can advise you of your likely fees should you choose this method of funding.

### WHAT DO I DO NOW?

**For more information, advice, or to arrange an interview**

**Contact Ms M Duke or Ms K Kotecha on 0116 220 6433 or email:**

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