

A CLIENT GUIDE TO CLAIMING DAMAGES FOR CLINICAL NEGLIGENCE

1. INTRODUCTION

Making a claim for damages (compensation) for clinical negligence can be a worrying and stressful experience. We recognise that most of our clients have never been involved in anything similar before, and are unclear as to what their role and ours may be. This Guide has been prepared to help you.

We recognise that your primary concern may not be to recover compensation. Perhaps you seek an apology, and an assurance that what happened to you will not happen to others. Perhaps you just want to know whether what happened could have been avoided. You must tell us if this is the case, because it may affect our advice as to the best way of proceeding.

When you have suffered injury following medical treatment, your faith in the medical profession can be affected. It can be difficult to put yourself in the hands of doctors, even if they were not involved in your original treatment. If we are to help you, however, we will need to instruct medical experts to advise us, and it may be necessary for them to see you. We will do what we can to make this as easy for you as possible.

Clinical negligence claims are notoriously difficult to pursue. Medical defence organisations tend to defend claims even when they know they are justified. The percentage of claims that succeed is much lower than for other personal injury claims. Clients tell us that the stress of making a claim can be as difficult to cope with as the original injury. We will try to keep things as straightforward as we can, but it will help you to be aware that making a claim is not an easy course to take.

The legal system in this country is complicated, and is not user-friendly. It is changing all the time. Some of the principles which the courts apply in considering claims for clinical negligence are confusing and difficult to understand. We will do our best to explain them, but please do not worry if you feel you do not understand all that is happening. The important thing is that you feel confident that we have your best interests at heart. If you lose that confidence, then it will be difficult for us to continue to advise you.

2. RECOVERING COMPENSATION

To recover compensation ('damages') for personal injury sustained in a medical accident, you will have to show the following:-

- that the treatment or diagnosis about which you are complaining occurred wholly or in part through errors on the part of the hospital or clinician concerned (the issue of **negligence** or breach of duty);
- that the negligent treatment has caused the injury, loss and damage in respect of which you are seeking compensation (the issue of **causation**); and
- that the injury, loss and damage you have sustained was a reasonably foreseeable consequence of the negligent treatment (the issue of **foreseeability**).

In clinical negligence cases it is often difficult to say whether the hospital or clinician were negligent, or whether your injuries were caused by that negligence. You do not have to prove these things beyond all doubt, but you have to show that they are more likely than not (this is called proving 'on the **balance of probabilities**'). You must appreciate that:

- Medical treatment may produce a less than perfect result (an adverse outcome)

- Even where an adverse outcome could have been avoided, the treatment is not necessarily negligent
- Even where negligence can be shown, you do not necessarily have a valid claim.

Before we can advise you whether your claim is likely to succeed, we have to obtain all the relevant **medical records** from the hospital and/or your G.P. We then arrange for the records to be put into chronological order and for any gaps in the records to be identified. If medical records which may be relevant to your claim have not been disclosed by the hospital, then it may be necessary to apply to court for an order requiring that they be disclosed.

Once the medical records are available, we will then instruct an independent **medical expert** or experts to study them, and to advise whether there are sufficient grounds for alleging negligence against the hospital or clinician to justify starting proceedings through the courts. More than one expert will be necessary if there is more than one area of medical expertise involved. For example, where a failure to diagnose a fracture is alleged, a report from a radiologist might be needed as well as from an orthopaedic expert.

These experts will be based in a different part of the country from the place where the negligent treatment occurred. They will usually be busy clinicians themselves, with their own patients to look after, and often it can take weeks or even months for them to complete their reports, particularly if they are well-known in their field of work. The cost of expert reports is heavy. However, the choice of expert is crucial, since the claim is likely to stand or fall depending on what they say. We will tell you why we recommend a particular expert.

We will advise you of any areas of **difficulty** there may be in your particular case, in establishing negligence on the part of your opponent or causation of your injury.

3. TAKING COURT PROCEEDINGS

If the expert advice is that there are sufficient grounds to justify bringing proceedings against the hospital or clinician, then we will consider with you the next step to take. Taking **proceedings through the courts** is a long and expensive process, and not a step to take lightly. There may well be other ways of achieving a satisfactory outcome, which do not involve the courts. We will advise you about them. In connection with any court proceedings, we will comply with the Code of Practice drawn up by the Association of Personal Injury Practitioners of which this firm is a member.

The Code says that we will not commence court proceedings unless and until:-

- Your claim has been properly investigated
- All relevant obtainable material has been assessed
- Your claim is supported by appropriate expert medical opinion
- The amount likely to be recovered is in proportion to the legal costs likely to be incurred
- The pre-action protocol for clinical negligence cases has been complied with
- Other ways of resolving the claim or of seeking appropriate redress have been explored
- Appropriate funding arrangements are in place between us
- You authorise us to start proceedings.

The Code also provides that where proceedings are started, we will endeavour to ensure that your own privacy is respected, and that the case is not conducted in a manner which may unfairly injure the practice or reputation of the offending medical practitioner.

Sometimes it may be necessary to start court proceedings even though these provisions have not yet been complied with, where we have to protect your entitlement to bring a claim. The law provides that you have three years in which to commence court proceedings, starting with the date on which you should have been aware that someone had made a mistake and that you had suffered some injury (the **limitation period**). We will monitor the limitation period for you to ensure that the three year period is not overlooked, but you should be aware of this period also.

4. WHAT WE WILL DO FOR YOU

In pursuing your claim, we will be taking the following steps:-

- Obtaining details from you of all loss and expense both to date and in the future;
- Obtaining expert medical evidence to show the extent of your injuries and to establish the prognosis;
- At the appropriate stage commencing court proceedings on your behalf, and dealing with the necessary procedural steps which have to be taken to get the case ready for trial;
- If appropriate, instructing a barrister who specialises in clinical negligence cases to advise on your claim.

We will keep you informed of our progress in taking these steps by sending you copies of our correspondence, by writing to you, and where possible by regular interviews with you. If there is anything you are unsure about at any stage, you should not hesitate to telephone us for advice. We are here to help you, and to make things as easy as possible for you. We recognise that it helps you if you have confidence in what we are doing on your behalf.

5. WHAT YOU NEED TO DO

There is much you can do to assist us in dealing with your claim. It is important that you keep written records of the following:-

- The circumstances of your original treatment and the names and addresses of the hospitals and doctors involved;
- Details of all expense or loss you incur which you wish to claim from your opponent;
- Details of your injuries and treatment at various stages (this may be particularly useful when you are examined by our medical expert, who will want you to describe your symptoms and treatment to date);
- Any questions which you may wish to raise with us when we next meet.

We will need to prepare a written **statement** of your evidence in relation to both the circumstances of your treatment, and the sums you are claiming as a result. It is important that this statement is as accurate and comprehensive as it can be, because you may not have a chance to expand on the contents of your statement if the case were to be heard at trial. You should therefore check the statement through carefully, making sure not only that it is accurate and comprehensive, but that you are happy with the words used. Do not let us put words into your mouth – the judge will want to read your evidence, not your lawyer's version of it.

6. RESOLVING YOUR CLAIM

Clinical negligence claims can often take a **long time** to resolve. One factor which delays the resolution of a claim is the time it takes to establish a firm prognosis in respect of your injuries, for example how long it is likely to be before the effects of your injury disappear, and whether you are likely to be left with any

permanent symptoms. The period varies according to the severity of the injury. In cases involving head injuries or serious orthopaedic injuries, it may take up to five years for the claim to be concluded, or even longer in certain cases.

The other factor which causes delay is the length of time it takes to obtain all the expert evidence necessary to support your claim. In addition to experts dealing with liability, we may also need to call experts to establish the extent of your injuries, and that they were caused by the negligence alleged.

Most claims are resolved by **negotiation** rather than by a trial in court. The advantages of a settlement over a trial are that the claim can be concluded that much more quickly, and the outcome is one which you have had an opportunity to consider. At trial, the evidence does not always go the way one expects it to, and surprising results do occur. In acting for you, we will do our best to negotiate a settlement of your claim on the best terms available, while at the same time pursuing your claim to trial without delay.

We will do what we can to resolve your claim in the shortest possible time. It is not, however, in your interests for a claim to be settled too soon. Once a claim has been settled, it is too late to ask your opponent to pay you more money, if the injury turns out to be more serious than was thought at the time you settled. You should not agree to settle your claim until the prognosis is clear from the medical evidence which has been obtained.

Sometimes it is useful to make a formal **complaint** to the hospital or clinician, for investigation under their internal complaints procedures, before undertaking any investigation into the claim. The advantage of this is that a full account of the treatment you have received is given, and the hospital will explain why it took the action complained of, or why there was an unsatisfactory outcome. We may decide not to incur the expense of further investigation in the light of this reply. The Legal Services Commission usually requires a formal complaint to be made and investigated before legal aid is applied for.

Where we are successful in recovering compensation for you, we may not be able to release the money to you until the **claim for legal costs** is concluded. Remember that whatever type of funding arrangement we have (legal aid, conditional fee agreement, after-the-event insurance), some money may have to be deducted from your compensation towards the expense of conducting the case.

7. THE AMOUNT YOU CAN CLAIM

Your claim for **damages** may include the following:-

- Any financial loss or expense you have suffered, for example prescription charges, travelling expenses and telephone calls, and the cost of private medical treatment
- In particular, any lost earnings through having to take time off work following the negligent treatment, or while further treatment is undertaken
- All anticipated future loss and expense, including any loss of earnings which is likely to arise in the future
- Damages to reflect any disadvantage you may suffer in the future in seeking employment
- Damages to reflect the pain, suffering and restrictions caused by your injuries
- If your claim arises as a result of the death of someone close to you, you may be entitled to damages for bereavement, funeral expenses and other associated losses.

We will advise you of the likely value of your claim at the outset, and at intervals throughout the case. The more information we have about your injuries and losses, and about the prospects of success, the more accurate we can be.

We may advise you at some stage to make a formal **offer of settlement** to the opponent. This can be a helpful step in starting the process of negotiation, and may also be advantageous tactically.

8. WELFARE BENEFITS

If you have been off work as a result of your injuries, you should be aware of the **welfare benefits** to which you may be entitled, such as disability working allowance, incapacity benefit and severe disablement allowance. We can advise you on this if you think you may be eligible.

Where you have been in receipt of welfare benefits as a result of your injuries, the **Compensation Recovery Unit** of the Department of Work and Pensions has the right to deduct from your claim the benefits which you have received up to the date on which your claim is concluded, or up to five years from the date of the accident if earlier. The benefits are recouped from the different heads of loss for which you are claiming, on a 'like-for-like' basis. For instance, benefits you have received because you have not been working (such as Income Support) can only be recouped from any sum you recover for lost earnings.

If you receive **means-tested state benefits** from the Department for Work & Pensions or Local Authorities, you will cease to be eligible if you receive a lump sum or substantial periodical payments from an injury claim (whether an interim payment or a final award) which takes your capital above the maximum for eligibility. Not having means-tested benefits may also prevent you receiving other valuable services such as free prescriptions and school dinners for children.

If your spouse or partner is in receipt of means-tested benefits, their entitlement might also be affected by your receiving a personal injury award.

By setting up a **Compensation Protection Trust**, you can have your compensation and retain your means-tested benefit entitlement indefinitely. The regulations treat Compensation Protection Trusts in a special way so you can retain benefit entitlement as long as necessary. The special rules only apply, however, if you enter into such a Trust within a year of receiving the compensation. If you would like more details or advice about this, please let us know.

The information contained in this guide is for generic use only and cannot be relied upon for any specific purpose. We recommend that specialist professional advice is taken before entering into (or refraining from entering into) a particular transaction.

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