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A GUIDE TO CLAIMING COMPENSATION FOR CLINICAL NEGLIGENCE

In this fact sheet, we have considered some of the general principles of medical negligence claims. You must remember, however, that this information sheet is intended as a guide only and is not meant to be a full statement of the law applying to medical negligence claims. If you find yourself in a situation where you feel negligence has occurred, we recommend that you take legal advice. Your Legal Advisor will at that stage be able to take you through all the relevant facts and fully explain to you your rights.

If you have already taken legal advice, we hope that you find this helpful as an explanation of the general principles involved in Clinical Negligence litigation. We recommend that you keep this document as you may find it helpful to refer to it in the future.

Freeth Cartwright LLP Solicitors

**Cumberland Court
80 Mount Street
Nottingham
NG1 6HH**

Tel: (0115) 9369369

**2nd Floor, West Point
Cardinal Square
10 Nottingham Road
Derby
DE1 3QT**

Tel: (01332) 361000

**One Colton Square
Leicester
LE1 1QH**

Tel: (0116) 2481100

**Julie Hardy
Karen Reynolds
Jane Williams**

Julie.hardy@freethcartwright.co.uk
karen.reynolds@freethcartwright.co.uk
jane.williams@freethcartwright.co.uk



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CLAIMING COMPENSATION FOR CLINICAL NEGLIGENCE

1. INTRODUCTION

In order to bring a claim for Clinical Negligence, it is necessary to establish that the Doctor or Nurse involved in your medical treatment was negligent **AND** that that negligence caused your injury.

2. THE LAW NEGLIGENCE

Just because a Doctor makes a mistake does not necessarily mean that he is negligent. English law requires that before compensation can be paid, the Doctor must have been at fault or negligent.

The Courts have decided that a Doctor is only negligent if he does something which no reasonably competent Doctor would have done - something that is often extremely difficult to prove. Only an independent medical specialist will be able to give evidence as to whether or not a Doctor is at fault.

CAUSATION

You must also show that it was more likely than not that any act of negligence identified by the independent medical specialist has caused (or materially contributed to) your injury; in other words, that the negligence "made a difference". This can also be difficult to prove. We will need to obtain another report from an independent medical specialist to prove your case.



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3. WHAT COMPENSATION CAN I CLAIM?

You can claim damages for the loss you have suffered as a result of the negligence.

You need to be able to say:-

- (a) what would have happened if the negligence had not occurred, and
- (b) what has and will happen as a result of the negligence

and then "measure" the difference. You are entitled to damages for "the difference".

If negligence and causation are demonstrated, a claim for compensation will be put forward consisting of three basic elements:-

- (a) A sum of money to represent any pain, suffering and injury received. This sum is called **general damages**.
- (b) A claim for out of pocket expenses. These are known as **special damages** and will include all expenses that directly flow from the act of negligence including for example, loss of earnings, prescription charges and travelling expenses. You will need to keep careful notes of your expenses.
- (c) A claim for **future losses**, which cover any losses which might reasonably be incurred in the future, including loss of earnings and loss of pension. It will be necessary to try and assess the costs of any future care or accommodation, treatment or drugs and to include those costs in the claim for future losses.

Often, you need to get independent experts to help work out how much you can claim. We will help you deal with this.



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4. HOW LONG HAVE I TO CLAIM?

Legal advice should be sought as soon as possible in order to ensure that the evidence is considered whilst it is still fresh. There is in any event a three year period by which time Court proceedings have to be issued in order to pursue a claim for compensation for personal injuries. In the case of children or those suffering some kind of mental incapacity, the three year rule does not apply. A child is not prevented from bringing a claim by this rule until he is twenty one. The sooner you take advice, the better.

5. AGAINST WHOM IS THE CLAIM MADE?

This depends on who you say has been negligent.

- (a) If a General Practitioner, the claim for compensation is addressed to the General Practitioner who is at fault and will be dealt with by his or her defence society.
- (b) If the claim arises out of treatment at a Hospital, then the claim will be dealt with by the Hospital Trust or the Health Authority concerned. Hospitals and Health Authorities are not allowed to insure against claims, but will pay compensation if the case is proved.
- (c) If a claim is made against a Nurse, this will usually be dealt with by the Doctor concerned if she is a practice Nurse in a GP's surgery or by the Hospital or Health Authority concerned if the Nurse is employed in a Hospital.

Claims can also be made against any other Practitioner who may have been negligent, for example, a Dentist, a Physiotherapist, an Osteopath and so on. It does not matter whether you have been treated under the NHS or privately.



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6. MEDICAL RECORDS

A patient is entitled to access to his or her medical records. All records, whether produced on computer or manually, have to be disclosed under the Data Protection Act 1998 unless they include entries which could cause mental harm to the patient if the patient were to see them or they refer to another patient where disclosure might constitute a breach of confidentiality for that other patient.

As solicitors experienced in Clinical Negligence work, we are well aware of the procedure to adopt in order to obtain medical records. When those records are obtained, they are available for you to consider with us as part of the preparation work for the presentation of your Clinical Negligence claim.

7. INTERPRETING THE RECORDS

We will arrange for a nurse to read and sort the medical records and provide a summary of the treatment recorded in those records. A detailed statement will be taken from you and compared to the information contained in the medical records. Even if the claim does not involve your General Practitioner, we will obtain the General Practitioner's records because these help fill in the total picture of medical treatment you have received.

8. INDEPENDENT EXPERTS

The next step is to submit all the medical records and your statement to an independent expert who will consider whether or not there is evidence of negligence. If there is evidence of negligence, then a specialist will also be employed to consider the degree to which that negligence affected your medical condition. We have our own database of experts whom we use to prepare independent medico-legal reports.

Our responsibility is to co-ordinate the obtaining of all this expert evidence and to interpret it for you. It may be necessary for a meeting to take place at which you and the experts can be present, together with us and any



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Barrister who we may engage. It may be necessary in due course to obtain further evidence from Nurses, Occupational Therapists, Architects and Accountants for the purposes of calculating the compensation claim.

9. ASSESSING THE CLAIM

Court proceedings will only be necessary if it does not prove possible to settle a claim and only when we have enough evidence we will assess the case and advise you about your chances of succeeding at Court. We must be satisfied that:

- there is good evidence of negligence; and
- there is good evidence that you were injured as a result of that negligence; and
- that the value of the claim is such that it will be reasonable to proceed bearing in mind the potential costs involved.
- We may need to report to the Legal Services Commission or to any insurance company which might be helping you finance your claim before the final assessment is made.

10. WHAT HAPPENS THEN?

If we advise you that you have a claim which has a reasonable chance of succeeding, we will explain this to you and will work towards obtaining compensation. There is then a fixed course which is taken for the case to go forward towards a Trial

10.1 Pre-action Protocol

Before asking the Court to become involved, we must first approach the Defendant's solicitors and tell them what the case is about and why compensation should be paid.



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The Defendant's solicitors will then have a reasonable time (usually 3 months) to respond to the claim. They can then:

- (i) either admit the claim and offer to pay compensation; or
- (ii) reject the claim, explaining exactly what they dispute and why.

Many claims will be resolved at this stage. However, if there is still a real dispute then the case may go forward to Court.

10.2 Starting Court Proceedings

We will discuss the exact procedures which will apply in your case at the beginning and will keep you informed as things progress.

Generally, a Claim Form will be issued with a statement explaining exactly what the case is about and the Defendant will have a short time to file its Defence. The solicitors and a Judge will usually then meet to decide how the case will be dealt with and a strict timetable will be set. Usually the Judge will give a date for the final Trial at this first meeting, and will decide what evidence will be required. This means that everyone will know as far as possible what will happen, and when.

The Court case is controlled by the Civil Procedure Rules 1998 which came into force on 26th April 1999. The objective of these rules is to ensure that cases are dealt with justly, quickly, fairly and proportionately and that, at all times, the parties to the case are on an equal footing. The Judge who has control of the case has various powers to ensure that these objectives are met, and the solicitors are also under a first duty to the Court to help it meet those objectives.

11. HOW MUCH WILL IT COST?

At the outset, we will discuss with you how your case may be funded.

Funding options may include:-

- Legal Aid
- "No win, No fee" (see below)
- Legal Expenses Insurance
- Private payment
- After the event insurance

We will always keep you regularly informed about the costs that are incurred in your claim as the case progresses. Where appropriate, we will try and help you budget for costs.

Usually, if you take a case and win compensation, most (if not all) of your costs and expenses will be paid by the other side. There are exceptions to this and we will make sure you know in advance about the possible costs that might be involved.

Generally, it is very important that you and we are always aware of the costs which are involved - Clinical Negligence cases can be complicated and expensive. We will always try and be up-front with you and answer any queries you may have about costs.

12. NO WIN, NO FEE

As solicitors specialising in medico-legal work, we are able to offer our clients the advantage of our "No win, No fee" Scheme. Once we have evaluated a claim, usually after we have obtained the independent expert's report, we are able to offer that we should continue the claim on the basis that we should only be paid if the claim succeeds. You may have to pay for the costs of this evaluation - and, if so, we will tell you well in advance. This means that if the claim fails, we do not receive any costs. If you succeed, in return for taking the risk, we are entitled to charge a success fee which is usually payable by the losing Defendant.

It is essential that you take out insurance to cover the risk of losing the case and being ordered to pay the Doctor's or Hospital's legal costs. We will advise you of the cost of taking out that insurance. If you win, the insurance premium is usually paid by the losing Defendant. We can also arrange loan facilities to help you pay for the insurance premium and for the cost of paying expenses such as Doctor's fees. We will provide you with more details of the "No win, No fee" Scheme and our clients' loan scheme if it becomes apparent that your case could qualify for the Scheme.

13. AFTER THE EVENT INSURANCE

Because we are specialists in this field, we are sometimes able to arrange insurance for the legal fees you incur even after you have instructed us. We will advise you of the details of what is involved when we discuss costs with you. If an insurance premium is payable, we can offer our clients' loan scheme to help you pay for this. This may mean that you end up paying little or nothing towards your legal costs.

14. COMPENSATION

Once the damages have been obtained, we can advise on how the compensation could be invested and can arrange Independent Financial Advice. Damages are tax free. If the award is sizeable and is designed to cover a substantial period of time of projected future loss, it is always wise to seek our advice on investment. If you are in receipt of State Benefit, we can advise you on how you may be able to receive compensation without it affecting your entitlement to Benefit.



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15. FURTHER INFORMATION

This information sheet is not intended as a comprehensive legal statement, but rather a very basic general guide to Clinical Negligence claims. Readers are strongly advised to seek professional guidance. We offer a free initial review at an initial interview or by telephone without obligation. House or Hospital visits can also be arranged.

For more details of our medico-legal services, please contact Mike Bird at our Nottingham office, Karen Reynolds at Derby or Jane Williams at Leicester. Their contact details are as below.

**Cumberland Court
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