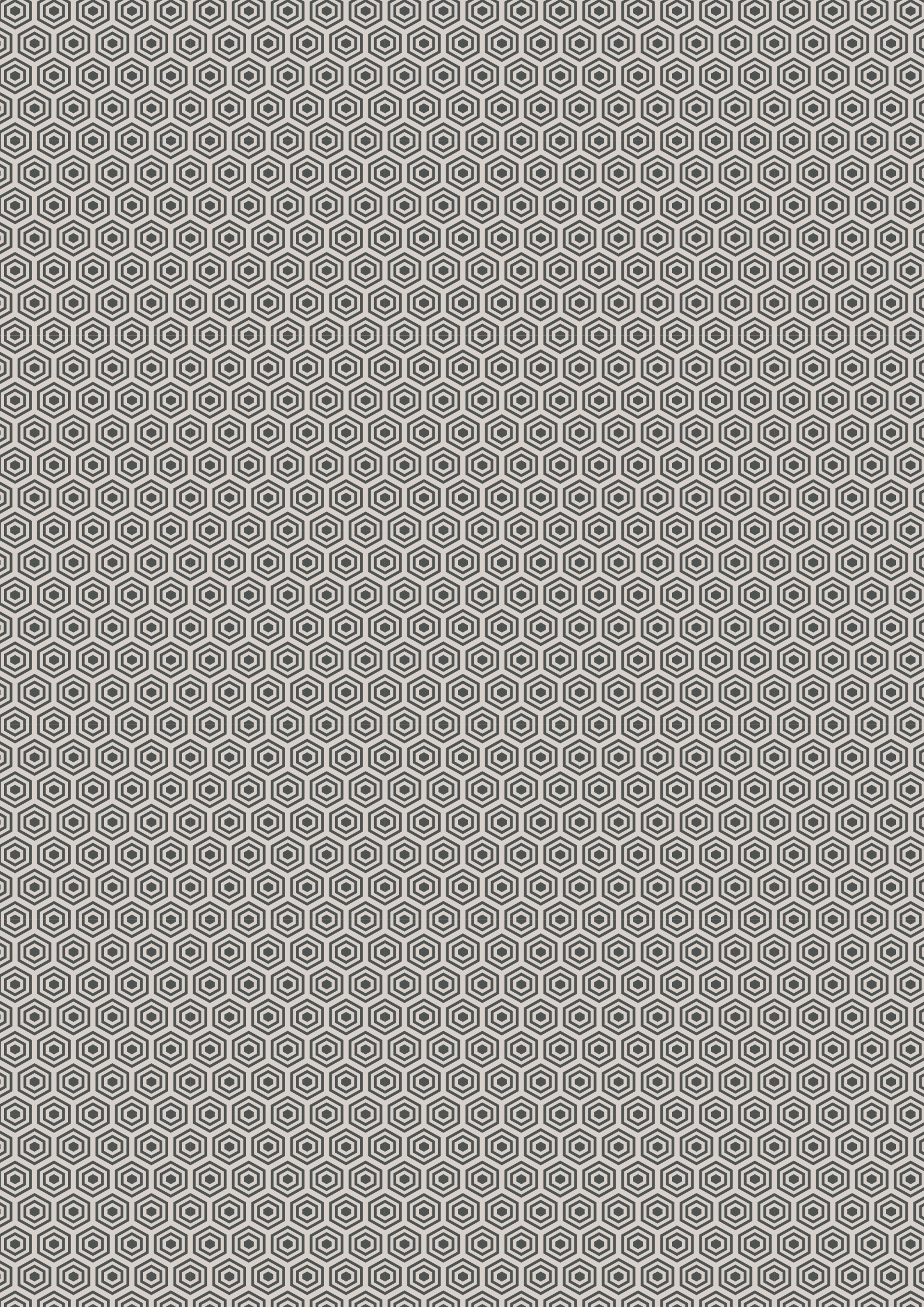


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A GUIDE TO CLINICAL NEGLIGENCE IN MENTAL HEALTH





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THE AIM OF THIS BOOKLET IS TO PROVIDE SOME ASSISTANCE IN THE FIELD OF CLINICAL NEGLIGENCE IN THE COMPLEX AREA OF MENTAL HEALTH.

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INTRODUCTION

IN THE UNITED KINGDOM, WE ARE MOST FORTUNATE TO HAVE SOME OF THE BEST MENTAL HEALTH CARE IN THE WORLD, MOSTLY DELIVERED BY THE NATIONAL HEALTH SERVICE ('NHS'). THE HISTORY OF MENTAL HEALTH CARE AND PROVISION HAS SEEN DRAMATIC CHANGES AND MODERNISATION SINCE THE ORIGINAL COUNTY ASYLUM/LUNACY ACTS IN 1845.

SINCE THE 1980S, WE HAVE SEEN THE CLOSURE OF THE LARGE PSYCHIATRIC INSTITUTIONS IN FAVOUR OF SMALLER, LOCALLY BASED, SPECIALIST UNITS, WHICH FOCUS ON SHORT-TERM IN-PATIENT ADMISSIONS.

ADDITIONALLY, WE HAVE SEEN THE GROWING NEED OF THOSE CLIENTS IN THE COMMUNITY BEING ADDRESSED THROUGH THE DEVELOPMENT OF COMMUNITY MENTAL HEALTH TEAMS, ASSERTIVE OUT-REACH TEAMS AND CRISIS RESOLUTION AND HOME TREATMENT TEAMS. UNFORTUNATELY, DESPITE THE MODERNISATION OF MENTAL HEALTH SERVICES AND THE DEVELOPMENT OF A GROWING EVIDENCE BASE AS TO WHAT WORKS AND WHAT DOES NOT WORK, NEGLIGENCE DOES HAPPEN. THE CONSEQUENCES CAN BE DEVASTATING, DEBILITATING AND LIFELONG, OR EVEN LIFE-ENDING.

MENTAL HEALTH CLINICAL NEGLIGENCE

CLINICAL NEGLIGENCE (SOMETIMES REFERRED TO AS MEDICAL NEGLIGENCE) OCCURS WHEN A PERSON HAS SUFFERED AN INJURY, WHETHER PHYSICAL OR PSYCHOLOGICAL, AS A CONSEQUENCE OF A HEALTH CARE PROVIDER'S ACTIONS, WHICH WOULD NOT USUALLY HAVE BEEN EXPECTED TO HAVE BEEN DONE BY A REASONABLE BODY OF ALTERNATIVE HEALTH CARE PROVIDERS.

In addition to health care providers under the wider umbrella of the NHS, mental health clinical negligence can also take place in the private sector by treating consultants, nurses or specialists at private hospitals, private nursing homes, residential homes or by the emerging private community care organisations. In addition to consultants and nurses, it can include therapists and counsellors, whether working for the NHS or in independent practice.

There are of course many solicitors, lawyers and barristers, across the UK, that profess to be able to advise you in relation to potential claims in the mental health field. However, it is important that you choose representation that is not only right for you personally but also has the necessary expertise and experience in dealing with your claim to best advise you throughout this process. It is crucial that your case is dealt with in a transparent and honest way, even if that means giving you legal advice which is important and correct, no matter how unpalatable it may be, our role is to advise you as to the likely chances of a successful claim against another party and to ensure that you are fully aware of the process involved.

Clinical negligence in the area of mental health is an extremely difficult process to navigate without an experienced solicitor at your side. Whilst there is emerging evidence as to what types of treatment, care or management are "best practice" (e.g., the NICE guidance), there is also much that is unknown and uncertain. Therefore, what constitutes negligent behaviour is dependent upon the opinions of expert evidence as to what represent a reasonable body of opinion in relation to what should have occurred in a case such as yours.

It is therefore most important that not only do you understand the process that is adopted throughout your claim but also the potential positive and negative outcomes of pursuing a claim. For this reason, it is most important that you have the appropriate support and advice from an experienced and knowledgeable specialist solicitor.

OUR EXPERIENCES IN MENTAL HEALTH CLINICAL NEGLIGENCE

Our experience is wide and vast and covers care that has been offered in both Wales and England. We have experience of claims against the NHS and the wider private sector. We are experienced in claims of clients who have both been in the community or in in-patient settings and across a wide variety of age ranges.

Our experience notes the absolute importance of the risk assessment / management processes where it relates to:

- Suicide, attempted suicide;
- Serious self-harm;
- Violence to others;
- Restraint;
- Absconding or attempted absconding; and,
- Accidental injury due to a failure to protect someone who is vulnerable.

Additionally, we have acted for claimants related to:

- The failure of nursing staff to adequately observe clients as per the documented care plan;
- The failure to adequately monitor a client's adherence with their medication;
- The incorrect application of rapid tranquilisation where significant harm has occurred including death;
- The incorrect application of physical or environmental restraint;
- The incorrect application of seclusion; and,
- The failure to take into account the client's complexity of problems, especially when related to those clients with dual diagnosis whereby their mental health disorder is co-morbid with another mental health condition, usually an addiction of some kind.

We have access to a range of well-regarded, experienced experts who have excellent track records and work with us regularly. Their professions include: consultant psychiatrists and forensic psychiatrists, consultant professors of neuropsychology, professors in mental health and forensic mental health, clinical psychologists, nurses, cognitive behaviour therapists, other therapists and counsellors. These specialists have both adult and child mental health specialities.

Our legal team, in conjunction with those we instruct, are experts in their respect fields and have published medico-legal papers in relation to mental health issues.

WHO IS THE CORRECT DEFENDANT?

Many people who are considering a potential clinical negligence claim are unsure of, or have no knowledge as to who, the correct defendant is. Quite often it is the case that treatment has been provided by a number of experts, across a whole spectrum of specialities, and this can lead to confusion. In addition, some treatment can be provided under the NHS, some private or indeed a mixture of both.

It is therefore necessary to understand who provided the care to you, as well as the basis upon which such care was provided. If a potential defendant provided treatment to you on a private basis, investigations should be carried out to determine that the potential defendant has the means to pay in the event that your claim is successful.

Sometimes **pyrrhic victories** can be obtained, that is in the event that the defendant does not have insurance to pay compensation, and you are left with a judgement, but the defendant does not have the means to pay. Luckily, this is a rarity. It can be different when the health professional treats you in a private hospital, but again your solicitor will be best placed to investigate this and advise you accordingly. If a healthcare professional provided you with treatment under the NHS scheme, then the National Health Service is vicariously liable for the acts and/or omissions of the treating health professional. This means that, even though the health professional may have done wrong toward you, the hospital is liable for their actions.

PATIENT REDRESS SCHEME/COMPLAINT

NHS IN ENGLAND:

In relation to any treatment provided by the NHS in England, if you are unhappy with the care or treatment you have received, or if you have been refused treatment for a condition, then you have the right to complain, have your complaint investigated and be given a full and prompt reply.

The NHS has provided a constitution that details all the rights that you have regarding complaints and how they should be dealt with.

They confirm that your complaint should be:

- Dealt with efficiently and investigated properly;
- To be advised of the outcome of your complaint following an investigation; and,
- You may take your complaint to the Independent Parliamentary and Health Service Ombudsman if you are not satisfied with the way that your complaint has been dealt with to make a claim for a judicial review, if you have been affected directly by an unlawful act or a decision made by a body of the NHS or receive compensation if you have been harmed.

Sometimes, taking into account the duty of candour that now applies on NHS professionals, issues can be resolved with the need for a complaint, and it is always a good idea to speak to your doctor or a member of staff before adopting the formal complaint process. Again, this is something that your solicitor can advise you about.

NHS IN WALES:

If the clinical negligence that you complained of occurred in Wales then, the Welsh Government have implemented the Patient Redress Scheme. This was initiated in April 2007 and was seen as an innovative new system to investigate and resolve concerns about low value clinical negligence cases.

The ethos behind the scheme is an extension of the complaint process but giving the victim of clinical negligence the ability to recover compensation of up to £25,000 without the need of Court intervention. Many victims have utilised the scheme and indeed have been compensated. The system was started to encourage hospitals to apologise, enter open dialogue early on in the process and to compensate victims without the need of legal advice.

This scheme has further been implemented by recent legislation that was imposed by the government on a duty of candour.

CAN I MAKE A CIVIL CLAIM FOR COMPENSATION?

Unfortunately, it is a fallacy that you are automatically entitled to compensation if the way that a health professional has treated you was wrong. To be successful in making a clinical negligence claim, you must satisfy two tests.

You firstly have to establish that the way that you were treated fell below the standard of care that you were entitled to expect. The test for this is an established principle called the Bolam Test. This means that it is necessary to show that the standard of care by the health care provider fell below a reasonable body of opinion. Just because a treating healthcare provider may treat you in a different way or do something that you feel is not right does not necessarily make it negligent. The test is to show that the way that the treating healthcare provider treated you fell outside that of a reasonable body of opinion acting in those circumstances at that time.

Thereafter, if you can show that the health professional has treated you in a way that would not be shared by a reasonable body of opinion, then there still has to be a causal link. This is the second test. Put simply, this means that once you can show that the standard of care provided to you fell below the requisite standard, you must be able to go on to show that, as a result of the negligence, you have suffered a loss.

It is therefore often the case that negligence can be shown, in other words that the health professional has treated you outside what would be considered to be a reasonable body of opinion. However, if the outcome is likely to have been the same, but for the negligent act/omission, then there would be no loss and thus no claim.

This is an area of law which has developed recently over recent years. The court has now held that a material contribution towards the loss can be sufficient to enable the court to order compensation. For material contribution to be proved, the breach need not be the sole cause of the injury however, it must have materially contributed to it. Put simply, a claim will be successful if the Defendant materially increased the risk of harm.

Where there are a number of possible causes of the injury, the burden of proof lies with the claimant who must still prove that the defendant's breach of duty materially contributed to the injury. It may be sufficient for the claimant to show that the defendant's breach of duty made the risk of injury more probable.

Accordingly, it is not necessary to show certainty. Rather, the evidential test for your case is on the balance of probability. In other words, there must be at least a 51% chance that the treating health care provider caused the damage or loss.

This is a complicated area of law, and this is why it is vitally important to use a solicitor that not only understands the tests to establish clinical negligence, the necessity to show a causal link, but, sometimes even more importantly, to understand the principles of material contribution.

WHEN SHOULD I MAKE A CLAIM?

Ordinarily, the Limitation Act 1980 states that a person must make a claim within three years from the date of knowledge. This means that if you are aware, for instance, that your claim happened on the 1st January 2016 then you would have until the 1st January 2019 to pursue the claim. Following this date, you would not be able to pursue the matter and it would effectively become statute barred.

The start of this three-year period varies depending on the facts of the claim.

Sometimes, in clinical negligence cases, persons who have been harmed are not aware of their loss until much later. In such cases, the time for calculating the three years runs from the date that they required the knowledge. Limitation can often be very confusing. If the victim of clinical negligence is a minor, so under the age of 18, then, the three-year limitation period runs from the child's 18th birthday. Limitation is further complicated where a person lacks capacity, for instance, because they have mental illness or brain damage. In such scenario, limitation runs from the time that they acquired capacity.

However, in the scenario that a person never recovers capacity, then there is effectively no limitation because limitation can never start to run. This can be complicated even further when people retain capacity for a short period of time and then lose capacity again. In this case, the three-year limitation period would start at the point they recovered capacity, and the same would not continue to run even when a person loses capacity again. Sometimes, grave mistakes can be made by not taking this into account.

If there is a death as a result of clinical negligence, then the three year limitation period runs from the date of death. A family member, sometimes known as an administratrix or administrator, is entitled to pursue the claim on the part of any deceased party.

In most cases, the Limitation Act provides certainty as to when a person should seek to claim for compensation without being time barred, in other words prevented from pursuing the claim. However, there is provision for the Court to allow claims to be made out of time. This is very rare and therefore, it is important to be aware of time limits when making a claim.

ISSUES OF CAPACITY

We all make daily decisions about our day to day lives by ourselves. We may require information and/or advice to assist us in making our decisions. Most people make their own decisions about their lives. However, some people, approximately two million people in England and Wales, do not have the sufficient capacity to make decisions about their day-to-day life because their thinking is affected either temporarily or permanently.

Mental capacity means the ability to make your own decisions and is governed by the Mental Capacity Act (2005). The Mental Capacity Act is legislation which protects and empowers individuals who may lack the necessary mental capacity to make their own decisions about their care and treatment. It is a law that applies to individuals aged 16 and over.

Sometimes, it is claimed that a lack of capacity can arise from an illness/disorder or disability such as a mental health problem. In effect, a lack of mental capacity means the inability to do any of the following four things:

- Understand information that has been provided;
- Retain that information for enough time in order to make a decision;
- Weigh up all the information that is available in order to make a decision; and,
- Communicate their decision.

Examples of people who may lack capacity include those with:

- A mental health disorder (e.g., schizophrenia, bi-polar disorder or PTSD);
- Those intoxicated by the effects of drugs or alcohol;
- Dementia;
- An acquired head / brain injury;
- A learning disability; and,
- Those who are unconsciousness.

Where there is doubt about capacity, your solicitor or advocate might need to assess your capacity. Lack of capacity may not be a permanent condition. Assessments of capacity should be time, and decision-specific.

WHAT WILL MY SOLICITOR DO ONCE I HAVE PROVIDED INSTRUCTIONS TO THEM?

During the course of initial meeting with your solicitor, he will discuss with you the concerns that you have, the treatment that was provided to you and any losses you have suffered as a result. Your solicitor, whilst not necessarily being a qualified doctor will have considerable experience in cases of this nature and in all likelihood would also have dealt with similar cases in the past.

Therefore, this is beneficial to you on the basis that the Solicitor should be able to engage with you to discuss the treatment that was provided to you and identify any areas of concern. Subject to the solicitor being satisfied that there is potential in your claim, issues of funding will be discussed with you.

Those issues are set out in the proceeding subparagraphs:

Once funding matters have been discussed, your solicitor will then arrange to obtain your medical records from the relevant healthcare providers and also on some occasions, your historic medical records from people like your General Practitioner (GP).

In accordance with the Data Protection Act, once a request has been made for your medical records and the requisite fee paid (currently £50.00), the health care provider must release the records within 40 days of any payment being made. If they fail to do so, an application to the court can be made to force the healthcare provider to disclose the records and pay the costs incurred by having to make an application.

Once those records have been received, it is usual practice for the records to be uniquely paginated, using sequential numbering, and those medical records kept in bundles to refer to at a later date. All parties can use those bundles and their unique numbering, to refer to if necessary.

It is also common procedure to prepare a chronology, which accompanies the medical records setting out what the solicitor considers to be the salient entries in the medical records and, may assist any Expert instructed in your case in identifying treatment that was provided which was negligent.

Once the medical records have been received, then it is usual practice to instruct an expert to advise in the case. Obviously, your solicitor will be well versed in the legalities of any potential claim, but he is not entitled to give medical evidence on the level of care that was provided to you. Therefore, an independent medical expert, usually in the same field as the health care provider that has wronged you, will be instructed to prepare a report.

Often, people believe that it is best to go to the most eminent expert although this is not correct and indeed the court will not allow you to rely on such evidence.

Tests to show negligence must be on a like for like basis, in other words an expert with a similar level of experience in circumstances identical to those that occurred at the time that the healthcare provider treated you.

This can sometimes cause problems, particularly in respect of historic claims. Medical science may have evolved since the time you were treated. As such, any expert instructed must put himself in the circumstances as they would have presented him at the time that you were treated.

When experts are instructed, they are usually instructed on two basis: firstly, to advise on liability, in other words to discuss the treatment that was provided to you at the requisite time and say whether it fell below the standard of care that you were entitled to expect and, thereafter, to show a causal link. This often warrants a further report which will thus deal with long term prognosis.

Once medical reports have been obtained to show negligence for the reasons set out above, your solicitor will be able to pen a letter of claim to the defendant.

This is a detailed letter that sets out the history of the matter, the reasons why the treating health care provider is alleged to be at fault and, the remedy that you seek.

Once the letter of claim has been sent to the treating health care provider, they have 14 days to acknowledge receipt of the letter. Thereafter the defendant, their insurance company or, indeed a solicitor acting on their behalf, must respond to the letter within four months.

Any letter of response must set out what parts of the claim are admitted, what parts are denied and, if parts are denied, provide any documentation in support.

This is referred to as the protocol period and is set out in the guidelines issued by the court called the Civil Procedure Rules moreover, the protocol for the resolution of clinical disputes.

Any party that fails to adhere to the protocol can incur serious cost consequences which can be substantial. Your Solicitor will be able to advise you as to whether or not it will be appropriate to disclose early on in proceedings the medical report that you have obtained. Sometimes, the medical report is not disclosed until later on in the case but again this is something that will be discussed with you.

It is important to note that in certain circumstances the report can ordered to be disclosed on the basis that any Expert advising in the case has an overriding duty to the court withstanding the person that pays their fee.

There are certain caveats that apply to this and again your solicitor will discuss with you the principals and legal privilege.

THE DEFENDANT HAS DENIED MY CLAIM

In many cases, the defendants deny claims for a whole plethora of reasons, some with but some without merit. If the response from the defendant undermines the credibility of your case, then of course your solicitor will discuss with you that denial and whether it be appropriate for your claim to continue. If your claim does not continue at that stage, then of course no further action would be taken and that is the end of the matter.

Please of course read the matters in the proceeding subparagraphs as to funding of your claim at this stage.

Where however your solicitor feels that, notwithstanding the letter of response and any disclosure provided by the defendant, there is merit in your claim continuing, it is usual process for your solicitor to obtain independent opinion from a barrister who will advise on the merits of your claim and draft pleadings (the court papers setting out details of your claim). Sometimes, experienced solicitors can draft the pleadings themselves. Pleadings include, amongst other documentation, a formal document for the court setting out the nature of your claim and again the remedy that you seek.

The Particulars of Claim are sometimes quite analogous to the letter of claim that was sent previously, and an experienced solicitor would have already fully set out your case when they penned the letter of claim at the initial stages of your claim.

The Particulars of Claim, however, are sometimes more detailed to take into account any of the responses that the Defendant has set out.

The solicitor must also set out the potential value of your claim to the highest possible level to enable the court to calculate the appropriate court issue fee (sometimes referred to as a disbursement). Court fees are calculated in bands which means that the potential value of your claim is limited to a certain amount and this in turn calculates the court fee to issue your claim.

Court fees can be substantial and indeed have been subject to many increases over recent years, and, again, you should read the paragraphs below as to funding in this regard.

Once your claim has been issued, the defendant has 14 days to acknowledge receipt of the claim and, once acknowledged, a total period of 28 days to file a formal defence.

Again, this is most analogous to the letter of claim procedure whereby the defendant is required to set out in a pleaded document the full details of their claim.

The only difference between the letter of claim procedure and pleadings is that in accordance with the Civil Procedure Rules referred to above, you must serve medical evidence upon which you intend to rely and without such medical evidence it is likely that the court will strike out the claim.

If a Defendant files a defence, then the Court will issue a series of directions to enable the claim to be ultimately listed for trial.

There are various ways in which your case can be dealt with in Court, either before the County Court or the High Court, and, again, your solicitor will be in a better position to advise you of the correct and most appropriate venue for your claim.

FUNDING

The funding of clinical negligence cases over the last few years has become more and more complex. There are various methods of funding a clinical negligence claim as follows:

- Private funding whereby you would fund the claim yourself from your own means.
- Assistance through the Legal Aid Agency (formerly the Legal Aid Board) which has now become very rare.
- Conditional Fee Agreement.
- Damages Based Agreement.
- Before the Event Insurance.
- CFA or DBA with the benefit of after the event insurance.

PRIVATELY FUNDED MATTER

This is very much self-explanatory. As set out above, the claimant would use their own funds to fund and pay the solicitor's fees, including all of the disbursements that would be incurred (for instance, barristers' fees, court fees, medical report fees, etc.) Many potential claimants do not have the significant funds available to them to fund any claim of this nature.

CONDITIONAL FEE AGREEMENT

Many people know such Conditional Fee Agreements, known colloquially as a no-win, no-fee agreement. This means that the solicitor will not charge their basic fees for dealing with the matter on your behalf unless the claim is successful. In the event that the claim is successful, the solicitor would then recover their base costs from the losing party. In addition to their base costs, the solicitor will apply a success fee. A usual success fee is no more than 25%, and this is a fee that is negotiable with your Solicitor which takes into account the litigation risk of your case and its complexity. Following the implementation of LASPO in 2012, the success fee element of your fees is no longer recoverable from any losing party which means the success fee would be deducted from your damages.

Hypothetically, therefore, if you were to receive £1,000 in compensation and the solicitor had agreed a 25% success fee with you, the solicitor will deduct £250.00 from your damages and you would be left with £750.00.

A Conditional Fee Agreement is a very popular way of funding a claim and indeed provides access to justice to many who cannot afford to pay privately.

DAMAGES-BASED AGREEMENT

A Damages Based Agreement operates very much like a Conditional Fee Agreement.

In turn for not paying the solicitor at the outset of the claim, the solicitor effectively takes a percentage of the compensation that is recovered from the defendant.

BEFORE THE EVENT INSURANCE

Unbeknownst to many members of the public, there is a policy of before the event insurance available on the market. This means that, in an existing policy of insurance, such as home insurance, attached is a policy covering for their legal expenses. Many people take out household and content insurance without knowing there is a legal expense element attached.

Before the event insurance would pay a solicitor to pursue a clinical negligence claim on your behalf. Other examples in insurance policies which may have legal expenses attached are: car insurance, breakdown cover insurance, credit card insurance and indeed some bank accounts.

Ordinarily, such a policy of insurance would suggest that you use the solicitor appointed by your insurance company but again your solicitor can discuss with you ensuring that that policy can be assigned to them so effectively you do not have to use the insurance company's solicitor and may use the solicitor of your choice.

Sometimes a combination of before the event insurance and Conditional Fee Agreement are used so as to avoid you paying the success fee or indeed it can be used to reduce the success fee that you are to pay. Again, this is something that your solicitor can discuss with you.

AFTER THE EVENT INSURANCE

Following the implementation of Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO"), qualified one-way costs shifting has come into operation as such that, in the event that your claim is unsuccessful, you would not have to pay the defendant's costs if you were to lose. This protection can be lost and again your solicitor can discuss this with you but the general principle is that the losing party pays the winning party's costs subject to the caveat above as to success fee.

If in the event that you lose the protection of qualified one-way costs shifting and indeed your claim is unsuccessful then you could still be forced to pay either the disbursements of your case and/or the Defendants costs. As you can imagine, these costs can be substantial.

The easiest way to protect you against such eventuality is to take out a policy of after the event insurance. Such policy of after the event insurance can be costly, the risk giving rise to a potential claim on the policy has already occurred. In other words, it is a policy taken out after the decision made to pursue a claim.

Again, this area of law is in a continual state of flux. However, at present, all policies taken out are usually on a staged process whereby the defendant has to pay for the element of the policy which relates to the investigatory stage of your claim (Stage 1) but, if your claim proceeds to proceedings (Stage 2) that element of the policy is not recoverable from the Defendant by virtue of LASPO 2012. Therefore, Stage 2 would have to be deducted from your damages.

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FUNDING (cont.)

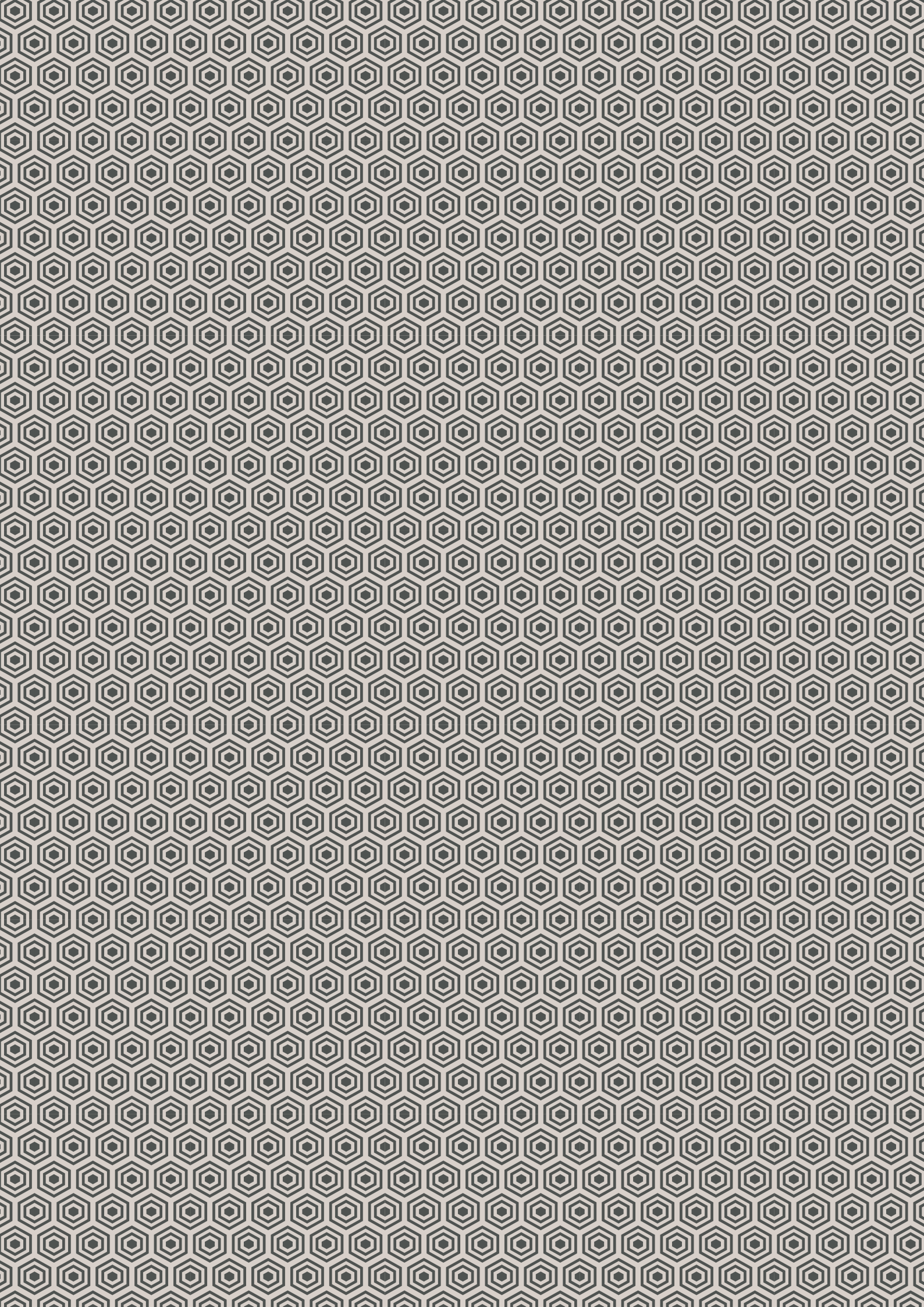
Therefore, one has to weigh up the benefit of the insurance and the protection that it provides against the cost of the policy potentially being deducted from your damages.

It is always the case that your solicitor will consider proportionality between the insurance and the potential recovery that you are likely to make. The solicitor will ensure that any insurance policy has a condition contained within it which means that you will never be left in the event of a win having to lose all of your damages.

LEGAL AID

Many years ago, our country as a whole had the opportunity to apply for Legal Aid via the Legal Aid Board (now the Legal Aid Agency). Most forms of funding via the Legal Aid Agency supported by the government have changed and most, if not all, victims of clinical negligence would not qualify.

Only certain legal practices in the country have a contract with the Legal Aid Agency to provide this type of work. This is something that you would have to discuss with your solicitor.





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