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Professional negligence is also called

Doctors Defence Service represents doctors who are being sued for clinical negligence by former patients. We also defend doctors who are being pursued by a former employer for a contribution or indemnity relating to a claim by a former client or patient. Below we set out in headline terms the clinical negligence process. Each case however turns on its own facts and not all clinical cases will require each of the steps below to be taken. What is Clinical Negligence? Clinical Negligence is the professional negligence of a clinician in their practice that (usually) causes damage to a patient. Damage can be physical or psychological, and also extend to any losses accrued in their lives as a consequence of the negligent act. A doctor owes a Duty of Care to all patients to make a competent diagnostic assessment, prescribe or deliver appropriate treatment, and to refer to other specialists for further investigations, clinical assessment or treatment where necessary. A doctor who fails to reach a level of competence commensurate with the level of care and skill that is expected of all doctors operating at that level (known as the 'Standard of Care' in clinical negligence law) may be of risk of being found to be in breach of their duty of care towards a patient. If the doctor's acts or omissions in some way cause a clinical injury or an exacerbation of an otherwise treatable condition, a doctor may be liable to pay the patient compensation (also known as 'Damages'). There may be occasions where there have been multiple failings by a number of clinicians over a number of years, causing additional complexity to the case. Defending a Clinical Negligence Claim Doctors at some time in their career will likely receive a civil claim for damages from a current or former patient, who claims that their doctor has caused them harm as a result of poor clinical care. Some claims are speculative and can be knocked out with a robust defence at an early stage, while other claims may take some considerable time to resolve. All Clinical Negligence claims can lead to worry on the part of the doctor who is being sued and most fear, quite understandably, a reputational risk if their client goes public with the story. Even where a patient has wholly misunderstood a doctor's past conduct, the patient may (either maliciously or because of cognitive overlay) choose to contact newspapers and media organisations to 'raise awareness' of the "butcher surgeon" or "incompetent physician" that is 'out there' and which the 'GMC is doing nothing about!'. Admissions / Denial of Liability In some instances, doctors might accept that they have in good faith made a clinical error of judgement which has unintentionally harmed a patient. In such cases, a careful assessment will need to be undertaken to determine whether the doctor should accept responsibility (called in legal terminology 'Accepting Liability'). In some cases, no harm will have been caused by the error of judgment, and there will be a denial of causation, even where a breach of duty of care is admitted (without the admission of liability – ie. causation of injury being formally denied). However, where liability is accepted, and there is an acceptance therefore that damage has been caused, there will need to be an assessment of damages (known as 'Quantum' in legal terminology). Advancing a good (and well-evidenced) counter-argument to the damages claim can lead to significantly lower compensation being paid by a doctor or their insurer to the patient. Where a doctor denies an element of a patient's allegations of clinical negligence, the doctor may need to give oral evidence at a trial before a civil judge. Clinical Experts in the doctor's specialist fields may also need to be instructed to give a written opinion and to give evidence. Clinical Negligence Explained Duty of Care (A doctor owes a duty of care to patients to care for them) Breach of Duty (Where the doctor has failed to do so) Standard of Care (Failing Below the Standard Expected) Causation (the injury or loss is caused by the acts or omissions of the doctor) Damages (also called Quantum), may be Foreseeable and Claimable, or Too Remote and unrecoverable) If any one stage is not satisfied, the claim fails. Offers to settle may be made along the way. A failure to reach settlement will usually lead to a claim being lodged with the courts, and a civil trial taking place before a judge. Damages Compensation for clinical negligence (also known as 'damages') falls into two categories: (1) Pain, Suffering and Loss of Amenity (shortened to 'PSLA') – for the physical or psychological injury, and any longer term impairment that arises. And: (2) special damages for other losses, such as past losses and future anticipated losses. A simple example would be compensation for the (avoidable) loss of a leg. This damage would be quantified, to include the pain and longer term suffering associated with the loss, along with the future impact of living without a leg and the personal effect that this would have on the injured patient – the loss of amenity. Separately, any losses associated with living expenses past and future, for example: an adapted home and adapted car costs, travel costs, impact of being able to obtain suitable work (making up the likely difference in earnings), future care and treatment (at private rates), among other things. Those items are known as "special damages". The global figure awarded (taking both types of compensation into account) is known as "quantum". Interest will also apply to the award, as it is usually calculated from the date that the injury occurred. The idea is that an injured claimant is put in the same position as if they had not been injured. While this is not possible physically, in most cases, monetary compensation is the nearest best thing to achieve the same outcome. This is a matter of well established public policy that has existed for many years. It is applicable to clinical negligence compensation claims. See some example cases that illustrate possible quantum calculations on our Clinical Negligence Case Law Digests page. Costs The costs in clinical negligence claims are usually front-loaded, because such cases are so complicated and require expert evidence and full disclosure at the outset. A claimant's costs for a claim valued at around £200k could easily reach £120,000. A small claim, say £60k, could see the claimants costs being around the same figure. Defence costs will also be significant. Where a doctor is uninsured because of a failure to have appropriate insurance in place, or because the insurers or medical defence organisation refuses to cover it, they will have to meet their own defence costs, which could add tens of thousands to the costs bill. If a doctor can successfully defend the claim, they might be able to recover some or all of their own costs outlay. If they reach a part settlement, they will be responsible for the associated costs of that aspect of the claimant's claim, but the doctor might also be able to recover part of their own costs outlay for the relevant element of the claim that they successfully defended. A claimant's costs will usually be significantly more than the defendant doctor's legal costs. However, some cases are particularly complex and protracted, and on occasions costs might match or exceed those of the claimant. Budgeting for costs is an important part of defending a clinical negligence claim. Where other clinicians or parties are involved, and there is a claim for shared responsibility, there may be other parties costs to pay at the conclusion of the case. For example, if three clinicians are sued they would each need to defend their position. If any one doctor was found not to be liable, the other two doctors might have to pay the cleared doctor's legal costs of defending the claim. However, the claimant is also at risk of having to pay a successful defendant's costs. There are many variables to clinical negligence claims, and cases can take twists and turns along the way, making costs estimates difficult to predict at the outset of a claim. Costs must be individually proportionate, and globally proportionate to the work done, taking into account a variety of factors. Costs orders can include disbursements, such as expert fees, court costs, and other expenses. Costs will either be assessed by the court at the substantive liability or quantum trial hearing, known as a summary assessment, or at a separate, formal costs hearing, known as a detailed assessment – unless the parties reach agreement informally. Costs must be paid within a few days. Costs schedules must be produced for either type of assessment, and must be served on the other party at least 24 hours prior to assessment for summary assessments, and a longer period for detailed assessment. Costs specialists are usually instructed to handle the costs claims at the end of the case, where there has been a settlement or there is to be a detailed assessment. Pre-Action Letters / Letters of Claim There is a court protocol for clinical negligence cases that both a claimant and defendant must follow. A failure to adhere to the steps set out within the protocol could lead to adverse costs orders being made against the offending party. See the terms of the statutory Clinical Negligence Pre-Action Protocol (for England and Wales) that a defendant doctor should follow In England and Wales, once they are in receipt of a Letter of Claim. Offers to Settle There are various ways to make offers to settle and any party can send one. A formal offer process exists within the court rules called a Part 36 Offer. Such offers if rejected can lead to extra costs becoming payable, if the maker of an offer, which is rejected, beats their offer by way of later settlement or at trial. The court can order a paying party in such circumstances to pay extra interest to a successful party. The court can also order that costs should be assessed on the indemnity basis rather than the standard basis. Where costs are assessed on the indemnity basis, in. simple terms the benefit of the doubt will be exercised in the favour of the receiving party, whereas on the standard basis it is the other way around. Cooperation Between the Parties The courts expect parties to an action to cooperate and to try to narrow the issues and save costs. A failure to do so could lead to extra costs being incurred, which would have to be met by a party who has caused them to be incurred. The court disapproves of such conduct and might therefore use evidence of such conduct to justify the penalising the 'offending' party. Court Procedures in Clinical Negligence Claims The progression of clinical negligence claims is strictly governed by the Civil Procedure Rules (in England and Wales) and a judge will case manage the claim. Parties must follow the Rules closely or risk being in breach. Sanctions follow significant breaches, and so doctors must respond to correspondence and plan for the relevant stages in good time, otherwise they might find that their defence is struck out, they are at risk of a huge costs bill, or at risk of other sanctions being imposed. Missing deadlines and failing to provide information in time can be fatal to a doctor's defence. Where a claimant's case is weak, it may be possible to have the case struck out in part or entirely. Such applications require attendance before a judge, who will hear argument and look at the evidence available, before making a judgment. Where a party fails to meet the requirements of the court rules, the court may impose sanctions either at the discretion of the judge or automatically under the court rules. An application for relief from sanctions would have to be made in such circumstances but the courts will not always grant relief. There are a number of other procedures that the court will require the parties to comply with, such as the lodging of costs estimates, the filing of allocation questionnaires, and the adherence to standard and specific directions. Trial The parties attend a hearing before a judge, with witness evidence and witnesses being presented. There will be a trial bundle, witness statements and exhibits, chronologies, precedents, pleadings, and skeleton arguments. The judge will make a decision on the balance of probabilities (in most factual disputes) as to which version of events is preferred, and how much compensation should be paid to a party (some of which is a matter of judgment and discretion). A defendant might admit liability but challenge aspects of causation and quantum, or challenge all matters. Cases that reach trial are the most expensive, costs wise. There is an appeal process should there be an adverse outcome at trial or at an earlier procedural stage, but there are no guarantees of success on appeal. After the Event Insurance for Doctors in Clinical Negligence Cases The products available to doctors can be very expensive, and often require high prospects of success. For example, one insurance product we know of requires there to be a 60% or more likelihood of completely and totally defending the claim. That is a high burden. Products change often and so it may be that there are more attractive products that become available over time. It has to be more likely than not at the very least that the doctor will successfully defend the claim for most such products to pay out. Many claimants also take out After the Event Insurance policies, which add to claimants' costs. There are court rules as to what can be claimed by the claimant from a defendant, where such policies have been taken out. Legal Status - Sole Trader or Limited Liability Entity Where a doctor acts as a doctor in their own capacity, as a sole trader (i.e. outside of the protection of a limited liability company), and their indemnity insurance fails them or their medical defence organisation discretionary benefits are refused at the point of claim, a doctor might find themselves fully liable in their personal capacity for any damages and costs claims that arise from their negligence. Where a doctor has worked within a limited liability legal entity, such as a limited company or limited liability partnership, they might be protected by the limitation imposed by law, but still see their company liquidated because they have too few assets to meet the overall quantum and costs of the negligence claim. If the doctor has been in any way dishonest, the corporate veil might also be pierced by a court judgement. Regrettably, doctors are found to have been dishonest, not taking out insurance so as to save money, and falsifying insurance certificates. In some instances, a doctor might have entered into a contract with another organisation, where the contract has been written in such terms that it holds them personally liable in their own right, and in the alternative to, operating a limited company. This type of contract can create personal exposure to liabilities that could have been avoided with a better contractual agreement. We have seen a few doctors suffer as a consequence of their signing contracts that give them little protection. Also, where the legal status of a doctor (working within a limited entity rather than as a sole trader) has not been conveyed in any meaningful way to the person or organisation that they are contracting with, the doctor might create personal exposure to liabilities flowing from a negligence claim, because the evidence is weak that they were working for a limited liability entity. By way of example, where a doctor's paperwork and advertising fails to declare that they are operating through a limited liability company, and they sign everything in their own name, they might be held personally liable for damages, by a judge looking at the case, especially when to not so find would leave an injured claimant without a route to compensation. GMC Misconduct Risk for Failure to Meet Claim The GMC code of conduct for doctors requires all registrants (all registered and provisionally registered medical practitioners) to be appropriately insured. The GMC disciplines some doctors each year where they fail to have appropriate insurance in place. Where the conduct has been deliberate and persistent there is a greater likelihood that a misconduct investigation will be opened. Where a doctor's insurance fails them and a claimant is without a source of compensation, there is a risk of being referred to the GMC by the claimant. The GMC does not open misconduct proceedings in all cases. Where there has been an innocent oversight and a doctor has taken out retroactive cover this will often be acceptable. A tricky position arises where a doctor is uninsured in circumstances that were not intentional but a claimant is without a remedy for full compensation. Where a doctor makes no attempts to meet the claim (or in the event that the value of the claim is too large to meet in full, where liability and causation is established), there is a risk that the GMC will open an investigation. It should be borne in mind that the GMC is there to protect members of the public and act in the public interest. Where the GMC opens an investigation, GMC conduct cases can be protracted and costly to defend, and these factors should be borne in mind when seeking to come to a settlement with a claimant. We do not seek to exaggerate the risk here; it is just one factor to bear in mind. For further reading on this topic, see our article: GMC Insurance Requirements for UK Registered Doctors Defending Doctors Here at Doctors Defence Service we have specialist lawyers who have a strong record of acting for the defence in clinical negligence claims. We have represented private hospitals, GPs, Physicians, General Surgeons, Cosmetic and Plastic Surgeons, Anaesthetists, and other specialist doctors over the years. Our lawyers have a good understanding of clinical matters and of the system of civil compensation. Each cases turns on its own facts and our general observations in our articles in our website may not relate to your own circumstances. Our Legal Services in Clinical Negligence Defence Work Our lawyers can give general advice, assist with writing letters of defence in response to Pre-Action Letters, instruct experts, draft robust formal defences to clinical negligence claims, advise on evidence and procedure, and represent doctors in court. Contact Doctors Defence Service to discuss any clinical negligence aspect on: 0800 10 88 739 View our Digest of Clinical Negligence Cases See our Clinical Negligence Lawyers' Profiles

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