BRINDLEY TWIST TAFFT & JAMES SOLICITORS

# CLINICAL NEGLIGENCE

*Efficient and effective help is at hand*

# INTRODUCTION

*Brindley Twist Tafft & James has one of the country's leading Clinical Negligence Departments with a reputation for outstanding success.*

Every year we achieve millions of pounds in compensation for our clients. Your case will be handled by one of our experienced lawyers from start to finish, giving you a specific point of contact as the matter progresses. Other members of the team may assist from time to time.

From our office in Coventry our team is led by a partner who is a member of the Law Society Clinical Negligence Panel and Action against Medical Accidents (AvMA) Clinical Negligence Panel.

We have a franchise from the Legal Aid Agency and we are able to offer clients Legal Aid in appropriate cases.

We are also members of APIL (Association of Personal Injury Lawyers) and SCIL (Society of Clinical Injury Lawyers).

*You have asked us to investigate the medical care you have received, to see if you have a claim for compensation. This information booklet explains how we do this, and what we have to prove to win a case.*

### What we have to prove

For you to be awarded compensation (damages) we must be able to show:-

i. Breach of Duty – that the medical care you or a loved one received was negligent

and

ii. Causation – that you or a loved one suffered harm as a result of that negligent treatment.

## BREACH OF DUTY

There are several tests we can use to determine whether the medical care received was negligent.

***For example***

*Did the person who treated you reach the standard of a reasonably competent medical practitioner in his/her field? If not, we may be able to say they were negligent.*

*Did the person who treated you do so in a way that no responsible body of medical experts would have done? If so, again, we may be able to say they were negligent.*

Sometimes however, medical professionals may have different but acceptable ways of treating the same condition.

Generally, choosing one rather than the other will not be negligent.

Similarly, if a doctor follows an accepted standard practice, this will not usually be negligent.

## CAUSATION

If we can show breach of duty, we must also be able to show that this caused you some injury or harm.

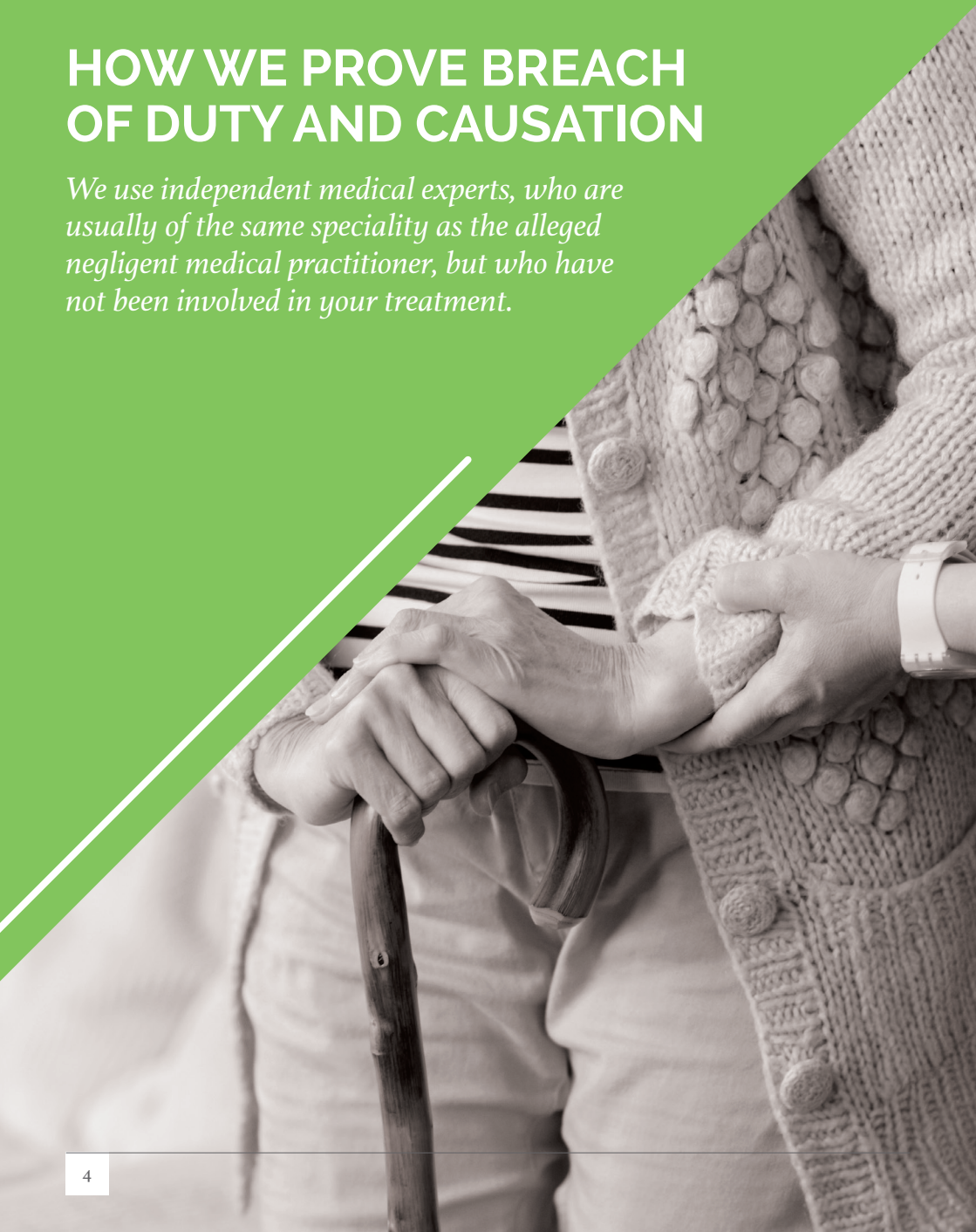
***For example***

*If a doctor is negligent in prescribing you the wrong tablets, but you do not actually take those tablets, we cannot prove that you have suffered harm.*

*Similarly, in an obstetric case, it is essential that we can link any mismanagement during labour with the child's disability.*

# HOW WE PROVE BREACH OF DUTY AND CAUSATION

*We use independent medical experts, who are usually of the same speciality as the alleged negligent medical practitioner, but who have not been involved in your treatment.*



*Each independent expert will study your medical records, your statement, and any other relevant documents. They may need to also examine you.*

They will then advise us whether they consider any of the medical practitioners who treated you fell below a reasonable standard of skill or care.

From this, we should be able to assess whether you are likely to succeed with a negligence claim.

## First Interview

### *Finding out about your Case*

We will explain the law and legal process to you. We will also advise you about the likely costs of your case and what funding options are available to you. We will discuss with you whether any other action should be taken (such as a complaint to the hospital).

## Next

### *Getting your Medical Records*

Once appropriate funding is in place we may take a more detailed statement from you and let you have a copy of this to keep and refer to later.

We will then write to the hospital/medical practitioner and inform them of your possible claim. We will ask them to send us your medical records.

We will also write to other hospitals/doctors for extra records. This is because our expert witnesses need to know your whole medical history before they can comment on your treatment. Your written authority is needed before your notes can be released. We will send you the necessary forms to sign.

Obtaining your notes often takes time, and it may be several months before we have them all. If you are still having treatment at the relevant hospital, it can be difficult to copy the notes between appointments.

If, however, the other side unreasonably refuse to send us your notes, we can ask the Court to order disclosure.

We will first try to get the notes by agreement, however, as the costs of the Court application cannot usually be recovered from the other side, this is usually a last resort.

## Sorting and Checking your Records

Once we have all of your notes, we will sort them and make sure we have copies of everything relevant. In some cases we may ask a nurse to do this for us.

When this has been done we may need to see you again, to go through your notes and, if necessary, to add to or amend your statement. Usually, we will let you have a set of your records (or a chronology of the same depending upon the volume of records) to read through so that you are familiar with the notes, and will be able to understand the reports of our expert witnesses.

## Instructing an Expert Witness

We have a central database of independent medical experts who are known to be sympathetic to medical accident victims. If your particular case falls outside the speciality of the experts we know personally, we also have access to expert databases held by other Clinical Negligence practitioners and organisations.

When we instruct an independent expert witness, he/she has to be sent all of your medical records, a copy of your statement, and any other relevant documents (such as results of any hospital complaints or Health Ombudsman report).

In some cases we may need more than one expert. For example, in an obstetric case, we may need an obstetrician to comment on the antenatal care and labour, and a paediatric neurologist to determine whether any negligence could be the cause of the child's disability.

The more experienced and highly regarded an expert is, the more they are sought after. This may mean that they have lengthy waiting lists. However, we will always try to use the most appropriate expert in your case, and we will advise you about the likely time-scale envisaged by the expert.

Usually, if the expert's report is unfavourable to your case, we will not be able to do anything more. Sometimes, however, if the first expert's report is unfavourable, but for some reason has not covered all of the relevant points, it may be possible to get a second opinion from another expert. We will advise you whether we think it is worth approaching a different expert.

## Barrister's Opinion

Once we have obtained expert evidence on Breach of Duty and Causation, we may need to send your papers to a Barrister who specialises in Clinical Negligence cases.

The Barrister will represent you at Court if the case proceeds further, and will draft the relevant Court documents if appropriate. It is, therefore, important that the Barrister is involved in the case at an early stage. Instructing a Barrister may have financial consequences should the case be successful, we will discuss this with you should it become necessary.

Usually, if the Barrister considers Court proceedings should be issued at that stage he/she will also draft them. Sometimes, the Barrister may suggest obtaining further reports and/or a meeting with experts, before proceedings are issued.

## Letter of Claim

In all claims a letter of claim must be written to the Defendant at least 4 months before the issue of proceedings. The letter must contain full details of your claim including allegations of negligence, the present medical condition and future prognosis and a valuation of your claim where possible. The Defendants must acknowledge receipt of the letter within 14 days and then have 4 months in which to reply in detail. The letter of response must include full details of whether liability is being disputed. A Claimant is not allowed to issue proceedings until the Defendant's 4 months to respond has expired.

## Issue of Court Proceedings

Before Court proceedings are issued, we must have an expert report on breach of duty and causation which supports your case. We must also have a report setting out your current condition, and your likely prognosis for the future. The breach of duty and causation report will not necessarily be disclosed to the other side when proceedings are issued, although it will form the basis of the claim.

The current condition and prognosis report will be attached to the Court documents. The Barrister will draft details of your case, setting out (based on the medical expert's report) why we consider


that your treatment was negligent, and what harm you suffered as a result. When we issue Court proceedings, we also need to be able to set out details of your financial losses. This may include, for example, loss of earnings, prescription charges, travelling expenses, or the cost of any private medical treatment.

Usually, if your claim is worth £50,000 or less, proceedings will be issued in the County Court. If, however, your claim is worth more than £50,000, we may issue proceedings in the High Court. In some circumstances, such as restricted time limits, we may have to issue protective proceedings without having all of the necessary evidence. We will advise you if this becomes necessary.

## The Other Side's Response

Once the Court proceedings have been issued and served upon the other side or their solicitors, they will have a specified period to reply and set out their version of events. In many cases, the other side contact us and ask for more time in which to draft their response. Usually, we are willing to agree to a certain amount of time, since by this stage we have usually spent many months ourselves investigating your case, and until the Court documents are served the other side are not aware of the detailed allegations to be made.

Your opponents will serve a Defence to your claim or, in more rare circumstances, an admission of it. We will send you a copy of this document, and will probably need to see you to discuss it. It is likely we will also send it to our Barrister, and possibly to our medical expert witness to comment on.

## Directions

When the Court provides us with a copy of the Defence it will attach a Directions Questionnaire. The purpose of the Questionnaire is to establish certain facts about your case which will help the Court to decide how the case will be heard at trial. At the Directions stage either the Defendants

or ourselves may ask for a "Stay", which means that proceedings will be frozen in the hope that a negotiated settlement may be reached.

When the Directions Questionnaire is returned to the Court, a District Judge will place your claim in either the fast-track or the multi-track. The fast-track is generally used for more straightforward cases which have a value of no more than £15,000 and in which the trial is expected to take no longer than one day. When a case is assigned to the fast-track, the District Judge will decide at the same time when the trial is likely to take place. It will be no longer than 6 months after Directions.

More complex cases are placed in the multi-track. If your case proceeds on the multi-track there will be a series of meetings between the parties and the Judge with the intention of identifying which issues will need to be decided at trial.

Most clinical negligence claims are placed in the multi-track.

## Cost Budgeting

At Directions stage the Judge will also assess the likely future costs of the case and set a budget for your future costs which you should be able to recover from your opponent in the event your claim is successful. A Court will only allow costs it considers reasonable and proportionate to the value of your claim. If your actual costs are greater than those allowed in the budget, there may be occasions where you will have to pay the difference from your damages.

## Conferences with Counsel/Experts

In many cases, once we have seen the other side's response, it is useful to have a meeting with the Barrister, the expert witnesses, and you. This gives everyone the chance to discuss the strengths and weaknesses of the case, and to share their views. It also gives the barrister and experts a chance to consider whether any response to the Defence is needed. Amendments may be made to the experts' reports, so that they are suitable for disclosure to the other side.

## Exchange of Documents/Statements

After the Defence has been served, the Court will make various directions for the future conduct of the case. This includes a direction for list of documents to be exchanged between parties so that we are able to see all relevant documents which the other side have and they are able to see our documents.

There will be an order that experts' reports and the statement of other witnesses be exchanged. The other side's experts may want to examine you, and will certainly want to consider your medical records. They will provide an expert opinion to the other side, and their reports will be swapped with those of our own experts. Around the same stage, we will have to prepare a formal statement for you setting out your claim in detail.

Your initial statement taken at the first interview will form the basis of this document. This will be sent to the other side, and at the same time they may send us the statement of any medical practitioners who were involved in your treatment. Again, at this stage we may have to go back to our Barrister or the medical experts to consider the evidence produced.

## Statement of Truth and your Responsibility

All of the documents which we rely upon in your case will include a Statement of Truth. These documents will include your Statement of Case, the Lists of Documents and any Witness Statements.

The Statement will be in the form, "I believe the facts stated in this [the document being verified] are true". It is important that you are satisfied with the accuracy of such documents. Signing any documents which you know to be inaccurate may constitute a criminal offence.

You should also be aware that it is your responsibility to not exaggerate any part of your claim. If the Court concludes that you have knowingly exaggerated any part of your claim, you may not receive any damages and may be liable for all costs of both parties.

## Assessing the Value of your Claim

During this time, as well as being in touch with the other side, and the experts and barristers about the negligence aspect of your case, we will also be working out how much compensation we should claim. This may involve you being seen by a number of different sorts of experts, including doctors who will prepare reports on condition and prognosis, nursing experts to prepare reports on future care which may be needed, housing experts to give us advice on any adaptations which need to be made to your surroundings and the cost of these, and employment experts to advise about your future job prospects, bearing in mind your medical condition and future prognosis.

As with the medical experts and Barristers, many of these experts, whilst experienced in these types of claims, do have lengthy waiting lists and we may have to wait several months before we can obtain the experts' reports. However, we will advise you of the likely time-scale, bearing in mind the individual experts we intend to use.

## General and Special Damages

Compensation is usually split into two types of damages, as follows:

### *i. General Damages*

This represents the compensation for your Pain, Suffering and Loss of Amenity. It covers all physical aspects such as having to endure treatment which would not have been required but for the negligence, on-going difficulties as a result of the negligence and also any psychological impact of the negligence.

### *ii. Special Damages*

Special Damages are any financial consequences of the negligence. You may have lost wages or incurred the cost of travelling to additional appointments. In the more severe cases special damages can also include accommodation and care requirements.

Special Damages can be split into past special damages (those incurred prior to reaching a settlement) and future special damages (the costs which are anticipated into the future).

The way that the compensation is apportioned can have implications on your legal fees, see later.

## Settlement/Trial

Once the evidence has been exchanged, and the other side have seen full details of your claim, they may be prepared to settle your case without the need to go to trial.

Sometimes, a settlement may be made at a very late stage (even on the steps of the Court). If any offer is made to settle your claim, we will advise you of the reasonableness of this offer to enable you to decide whether to accept it.

If however, your case is not settled, we will have to ask the Court to list the case for trial. This will mean that your case will be presented by your Barrister to a Judge using the evidence of the various medical and other experts who have provided reports. The other side will have the opportunity of presenting their case, and each side will be able to cross-examine the witnesses called.

Clinical Negligence trials are often complex, and can last several days or weeks. Before proceeding to a trial, therefore, we must be as certain as possible that the potential benefits to you are likely to exceed the probable risks. Proportionality plays an important role. For example, if your claim is worth £10,000 we may not be able to proceed with a trial which may cost significantly more than that amount.

Usually at a trial, you will be required to give evidence, in the terms of the statement which has been provided to the other side. You will be cross-examined on this evidence by the other side. If you win at trial and receive an award of compensation, you should also get an award of costs from the other side.

## How long you have to bring a Claim

Generally, to protect your claim, proceedings must be issued within 3 years of the relevant treatment and/or operation.

However, in Clinical Negligence cases the rule may be different. If you do not know that you suffered significant injury or harm as a result of the negligence of the other side, the 3 years may only start to run once you have this information. We can advise you about this in detail when we know more about the facts of your particular case.

Different rules apply to children and to people without mental capacity (such as adults with severe learning difficulties or mental illness). We can discuss this with you if relevant to your case.

# FUNDING

*Do not decide against making a claim on the grounds of legal costs. Whatever your situation we offer a first interview, free of charge, with no obligation.*

*Most cases are now funded by Conditional Fee Agreements. In the event that your claim is successful, the other party will pay most of your legal costs.*

If your claim is unsuccessful for any reason, then you will not have to pay the legal costs, as these will be covered by a Conditional Fee Agreement and an insurance policy, or Legal Aid (see below).

There are various ways of funding a Clinical Negligence case including the following:-

- Privately
- Before the Event Legal Expenses Insurance
- Conditional Fee Agreement (No win, No fee). We may also take out a policy of After the Event insurance alongside the agreement.
- Legal Aid (Community Funding). We have a Legal Aid Franchise to allow us to offer you Legal Aid from the Legal Aid Agency in appropriate cases.

## Private Funding

As with all areas of law you are welcome to instruct us under a private retainer. By doing so you agree to pay the hourly rate, which you will be advised of at our first meeting. You will also be responsible for paying any disbursements necessary in investigating and pursuing your claim. We will require a payment on account before commencing work. We will continue to carry out your instructions for as long as you wish and will advise upon the merits of your claim at regular intervals.

## Before the Event Insurance

Before the Event (BTE) Insurance may be found on existing insurance policies, most often on home contents policies. It is also found more rarely on motor policies or life insurance products. Some BTE will cover both the legal costs and disbursements whilst other policies may cover the disbursements only alongside a Conditional Fee Agreement. If you are unsure whether your policy covers a Clinical Negligence claim please check with your insurer or ask us to do so on your behalf.

## Conditional Fee Agreement

Clinical Negligence claims can be very expensive and if we believe your case has reasonable prospects of success we are likely to offer you a Conditional Fee Agreement (CFA) to cover the legal costs. The CFA is more commonly known as a "no win, no fee" agreement.

If your claim is unsuccessful you will have nothing to pay and our time spent on the matter is written-off as a loss to the firm. For this reason we need to be confident of the prospects of a claim before the agreement can be offered. If we are unable to offer a CFA we will advise you of why; you may wish to consider private funding, see above, should you want an independent investigation carried out into your treatment. If we offer a CFA it is likely that we will also require you to enter into After the Event (ATE) Insurance. The insurance will cover the disbursements involved in investigating the case such as obtaining your records and expert reports. If the claim is unsuccessful the insurance premium is not payable.

If your claim is successful you are entitled to recover your reasonable legal costs, including disbursements from your opponent. However you are not entitled to recover the success fee and some elements of the insurance premium, (see next page), and these will need to be met out of your compensation.

### *Success Fee*

Because offering a CFA represents a risk to the firm we usually also charge a success fee uplift. This can be up to 100% of our base costs (i.e. the standard hourly rate) depending upon how confident we are of bringing a successful claim. The success fee is not recoverable from your opponent and will need to come out of the compensation awarded to you. The maximum we can retain for our success fee is 25% of your General Damages and Past Special Damages only. Future special damages are protected. Please see page 10 for information concerning apportionment of damages.

### *After the Event Insurance*

After the Event Insurance (ATE) is required alongside a CFA to fund the disbursements in the event that the claim is unsuccessful. If the claim is unsuccessful the insurance provider will pay all disbursements and not seek to recover the premium.

If the claim is successful, only the proportion of the premium which relates to expert reports on Breach of Duty and Causation is recoverable from the defendants; the rest of the premium must be paid out of your compensation. This is in addition to any success fee which is deducted under the CFA.

There are a variety of ATE products on the market at any time. We will endeavour to find the most appropriate product for your claim and minimise the cost to you should the claim be successful.

### *CFA Summary*

If you are unsuccessful you will not receive any compensation and will not have to pay any legal costs, disbursements or insurance premium. If you are successful you will receive your compensation less success fee (to a maximum of 25% of your general damages and past special damage) and less the proportion of the insurance premium which does not relate to expert reports.

## Legal Aid

Legal Aid, was severely restricted from 1st April 2013 by the Legal Aid and Sentencing and Punishment of Offenders Act.

Legal Aid continues to be available for suitable cases in which it was applied for prior to 1st April 2013. The only new cases which can be funded with the benefit of Legal Aid are those involving children who have suffered a brain injury within the first 8 weeks of life. Should this be applicable the implications of Legal Aid will be discussed with you in detail.

### DATA PROTECTION

All of your information and documentation will be dealt with in accordance with the Data Protection Act 2018.

# TESTIMONIALS

*"Right from our initial phone call we were made to feel supported. BTTJ explained things in simple terms and offered guidance and support at all times, at what has been a frightening and traumatic time for us. Everybody we met from lawyers to professional experts have been outstanding. We made a claim to get answers and BTTJ got these answers for us."*

*"I should like to say a big thank you for all your hard work. My case was dealt with in a kind and professional manner. I was kept informed at all times during the procedure."*

*"I cannot thank BTTJ enough for all the advice and support they gave myself and my family."*

WILLS LASTING POWER OF ATTORNEY PROBATE FAMILY & DIVORCE RESIDENTIAL & COMMERCIAL PROPERTY PERSONAL INJURY MEDICAL NEGLIGENCE EMPLOYMENT DISPUTE RESOLUTION INSOLVENCY DEBT RECOVERY CORPORATE/COMMERCIAL NOTARIAL SERVICES

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