

## Clinical Negligence Law Fact Sheet

### What is clinical negligence law?

Clinical Negligence is a branch of negligence (also known as tort) based law. It is a very specialised area of law that involves health care providers acting in breach of their duties in performance of their jobs which results in injury to their patient. A very simplified explanation is that it concerns mistakes made by a healthcare professional (for example, a doctor) which causes harm to (or kills) a patient.

A clinical negligence claim is usually solely financial and the claimant will receive compensation for the injury itself and compensation for future or past financial losses that have been caused by the injury.

### What do you need to prove to bring a successful negligence claim?

The modern law of negligence was established in *Donoghue v Stevenson* [1932] AC 562. In order to be successful in a negligence claim, the claimant must prove:

1. The defendant owed them a duty of care – this is always the case in a doctor/health provider-patient relationship;
2. The defendant was in breach of that duty;
3. The breach of duty caused damage (also known as causation) and;
4. The damage was not too remote.

### Duty of Care

There is a three step test to establish that a duty of care is owed:

1. The harm was reasonably foreseeable. For example, it would be deemed reasonably foreseeable that if a doctor provided incorrect treatment to a patient that harm or injury could arise.
2. The claimant and the defendant are in a relationship of proximity (familial, contractual or otherwise). For example, doctor and patient.

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3. It must be just and reasonable to impose liability on the defendant for his/her careless actions.

Put simply you must take reasonable care to avoid doing something which could foreseeably cause harm or injury to the other person. In *Donoghue v Stevenson* [1932] AC 562 Mrs Donoghue went to a cafe with a friend. The friend bought her a bottle of ginger beer and an ice cream. The ginger beer came in an opaque bottle so the contents could not be seen. Mrs Donoghue poured half the contents of the bottle over her ice cream and also drank some from the bottle. After eating part of the ice cream, she then poured the remaining contents of the bottle over the ice cream and a decomposed snail emerged from the bottle. Mrs Donoghue suffered personal injury as a result. She commenced a claim against the manufacturer of the ginger beer. The House of Lords held that the manufacturer owed a duty of care to Mrs Donoghue, as the consumer of their goods, and that duty of care had been breached. This is because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm to consumers. There was also a close enough relationship between consumers and product manufacturers to impose the duty of care. Healthcare providers automatically have a duty of care toward their patients – it is an inherent part of being a doctor (or any other healthcare professional).

### Breach of Duty

Negligence has a specialist meaning to lawyers which lay people often misunderstand. In the medical context, negligence means treatment or care which falls below medically acceptable standards - in other words, care which at the time in question no competent or responsible practitioner in the relevant field of medicine would have given. Treatment or care which is unusual or unconventional is not negligent if there is a reputable body (albeit small) of medical opinion which approves it. If a doctor is rude or indifferent, this in itself is not negligent.

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It must be shown that the care provided (or not provided) was so poor, that no reasonable body of those healthcare professionals would have provided such care. For example, in a case involving an amputated limb, if there are a body of doctors that consider the amputation to have been reasonable, it is unlikely to constitute a breach of duty.

### Causation

It is not enough to simply prove that the care was negligent. You also have to prove that the negligent care has caused identifiable injury and loss. There are cases in which the patient can prove that the doctor was negligent, but that even had the best of care been given this would not have made any difference because, for example, there was insufficient time for appropriate care to have an effect.

For example, in the case of *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428, William Barnett was a night watchman at the Chelsea College of Science and Technology in London. On the morning of 1 January 1965 he and two colleagues had tea. Twenty minutes later they started to vomit. They drove to the nearby hospital, where they were seen by a nurse. The nurse spoke to a doctor on the phone, who advised the men to “go home and call in their own doctors.” They left the hospital. A few hours later Barnett was rushed to the hospital and died from arsenic poisoning. His widow sued the hospital for negligence. The court found that the doctor failed in his duty of care. He should have examined the patient. Yet the claim failed because it could not be shown that Barnett would have survived even with proper care and treatment. The doctor was ethically culpable, but to establish negligence in law the widow had to prove, on the balance of probabilities, that the doctor’s breach of duty caused her husband’s death.

### Damage

Once negligence has been established (breach of duty and causation has been proved) the next step is to determine how much the claimant will receive by way of compensation/damages. This step is often called the quantum stage as it involves quantifying the claimant’s compensation claim.

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The purpose of compensation is to place the injured party in the same position they would have been in had the negligence not occurred. For example, if as a result of the injury the claimant is no longer able to work then a claim for loss of earnings will be made to claim for the earnings the claimant would have earned had he/she not suffered an injury. Also, if as a result of the injury the claimant is no longer able to care for himself/herself, then a claim will be made for any care that he/she requires both now and in the future.

When quantifying a claimant's damages it is important to determine what position they would have been in 'but for' their injury. For example, if before their injury the claimant was due to become a premiership footballer but as a result of their injury this is no longer possible, you would include a claim for the earnings that they would have achieved had the injury not occurred. This type of claim could result in millions of pounds of compensation!

In clinical negligence cases the claimant can claim for the following losses:

1. General Damages – this is to compensate the claimant for the injury itself and any pain and loss of amenity. For example, if the claimant has suffered a brain injury and as a result she is no longer able to pursue her hobbies, including football and dancing, she will not only be compensated for the brain injury but also the fact that she is no longer able to pursue her hobbies.
2. Special Damages – this includes past and future financial losses. Past losses include any losses incurred up to the date of trial. Future losses include any losses that are going to be incurred from the date of trial until the claimant's death.

The types of financial losses that can be incurred include:

- Care – if the claimant requires care as a result of his/her injury. For example, this could be for help with their personal care, help to access the community, gardening, DIY and maintenance costs. If the claimant has children but their injury means that they can no longer look after them this could include the costs of nannies or child-minders.

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- Loss of Earnings – if a claimant is no longer able to work or has to take a lower paid job as a result of the injury (he/she will be entitled to claim the difference in what they would have earned 'but for' the injury).
- Travel and transport – any travel expenses incurred as a result of the injury, including having to purchase a specially adapted car or expenses incurred in travelling to medical appointments required due to the injury.
- Aids and equipment – any aids and equipment the client now requires as a result of their injury. For example, someone who is no longer able to walk will require a wheelchair.
- Household expenses – for example, if the claimant now spends a lot more time at home and as a result their heating bills have increased then the difference in cost can be claimed.
- Therapies – if the claimant requires any therapies as a result of their injury, for example, physiotherapy, occupational therapy, hydrotherapy etc. the cost of the therapies can be claimed on a private basis.
- Medical treatment – if the claimant requires medical treatment as a result of the injury, for example surgery or regular reviews with the doctor, the cost of the medical treatment can be claimed on a private basis.
- Accommodation – the costs of adapting accommodation to make it suitable for the injured claimant is fully recoverable. An example would be the cost of building an extension or ramps. If a new and larger property needs to be purchased to accommodate the claimant's needs or to house their carers then this is subject to complex calculations, which have been set by case-law.

### Burden of Proof

The burden of proving the case is on the claimant. The standard of proof is what lawyers call the "balance of probabilities". Thus a claimant has to prove that it is more likely than not (that there is better than 50% chance) that the negligent care caused the injury.

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### Evidence

In order to prove breach of duty and causation, lawyers will instruct medical experts to prepare medico-legal reports on the care the claimant received. The experts will review the claimant's medical records and form a view as to whether the health care professional breached their duty of care to the claimant and, if so, whether the breach of duty of care resulted in the claimant's injury.

Experts will be instructed in the same specialist field as the claimant's treating doctor (potential defendant). For example, if it is alleged that a claimant should have been referred by her GP to the hospital with suspected cancer, then we would instruct a GP expert to comment on the care she received from her GP and whether the GP breached their duty of care by failing to refer her. In terms of causation, in order to determine whether earlier referral by the GP would have made a difference to the claimant, we would instruct an oncologist to comment upon whether earlier diagnosis and treatment of the claimant's cancer would have made a difference to her outcome i.e. would she have made a full recovery from cancer or had a better prognosis.

We also obtain expert evidence when determining the value of the claim (quantum stage). For example, if a claimant requires care as a result of their injury then a care expert would be instructed to examine the claimant and report on the claimant's care needs until their date of death. The care expert will set out the frequency and the cost of the care required. If the claimant also required on-going physiotherapy an expert would be instructed to examine the claimant and report on their physiotherapy needs until their date of death. The physiotherapy expert would set out in their report the frequency and type of physiotherapy the claimant required and the associated cost.

### Examples of areas covered by this area of law

- Birth related injuries
- Surgical errors
- Late diagnosis of illnesses
- Incorrect treatment of illnesses
- Inadequate nursing care
- Failure to obtain consent

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### What skills does a good clinical negligence lawyer need?

1. Ability to take on new information and learn quickly – the array of medical situations a clinical negligence lawyer is likely to come across is vast. These often cover new areas of expertise and are almost always complex. To a certain extent, a clinical negligence lawyer has to become a medical expert as well as legal expert.
2. Attention to detail – like most areas of law, clinical negligence involves studying lengthy and complex documents. It also involves reviewing and drafting very detailed and multi-faceted written arguments and statements, so good attention to detail and clear and concise drafting is crucial.
3. Empathy – whether acting for the claimant or defendant, clinical negligence claims regularly involve very traumatic, personal and sensitive situations. Therefore it is essential that a clinical negligence lawyer is adept at dealing with the needs and emotions involved in such situations, whether that is dealing with a traumatised client or effectively understanding the desires of the claimant whilst acting for the defendant.

*Please note: The materials on the resources pages are in no way purporting to be a comprehensive analysis of any of the areas of law they cover. They provide a high level overview of various legal concepts which the students will be tested on for the purposes of the Legal Apprentice competition.*