The Pre-action Protocol for the Resolution of Clinical Disputes

Clinical negligence cases are governed by the Pre-action protocol for the resolution of clinical disputes.

Lord Woolf within his Access to Justice Report dated July 1996 concluded that major causes of costs and delays in medical negligence litigation occur at the pre-action stage. He recommended that patients and their advisers and healthcare providers should work more closely together to try to resolve disputes co-operatively, rather than proceed to litigation. Lord Wolf specifically recommended a pre-action protocol for medical negligence cases. The general aims of the protocol are to maintain and restore the patient and healthcare provider relationship and also to resolve as many disputes as possible without litigation.

The Duty & Standard of Care

The test to establish negligence was set out in the important case of Bolam v Friern Barnet Hospital Management Committee 1957 WLR 582 QBD.

The test is the standard of the ordinary skilled man (or clinician). If they conform to one or more proper standards, then they are not negligent. The question posed is whether a respected medical opinion would have acted in the same manner? A personal belief that a particular technique is best is not a defence, unless it is based on reasonable grounds. It is useful to consider Article 8 of the European Convention on Human Rights. If a patient is not given sufficient information about risks to their health, there could be a breach of the Human Rights Act 1998. There is no reason why the principles involved could not be applied to clinical negligence cases [Guerra v Italy 1998 26 EHRR 357].

Bolitho v City & Hackney HA 1998 UKHL 46 is a famous case showing the application of the Bolam principle. This effectively extended the principle laid out in Bolam. Before the case of Bolitho, all a defendant had to do was to show that there was a sound body of medical opinion which they followed to succeed in defeating a claim. Now this is no longer enough. The court has to be satisfied that the body of opinion relied upon by the defendant has a logical basis. In effect, by introducing the element of logic Bolitho narrows the Bolam principle.

Causation

The issue of causation is important and has two elements. Firstly, Factual
causation which is a matter for the medical expert to deal with within their report compiled in support of any claim, better known as expert evidence. **Secondly**, legal causation which is a matter for your solicitor or barrister to consider. There are two tests applicable in this area. The *but for* test and the *material contribution* test.

**THE ‘BUT FOR’ TEST**

The patient would not have suffered injury *but for* the negligence of the clinician.

**THE MATERIAL CONTRIBUTION TEST**

This is useful and applicable if there is potentially more than one cause of the injury. The claimant does not have to prove that the breach of duty was the sole or even the main cause in order to succeed.

**EXPERTS**

The choice of expert is at the very heart of clinical negligence cases. The expert must not only be highly experienced in their field of expertise but also familiar with clinical negligence work and their own obligations under Part 35 of the Civil Procedure Rules. The injury or loss suffered must also be foreseeable. In our view, the more serious the case, the more senior the expert instructed should be. Anything less than consultant level is rarely likely to be appropriate. The expert instructed must report on the following key issues:

- liability (whether there is a positive case to pursue)
- breach of duty (applying the tests set out in Bolam and Bolitho)
  - Causation
  - current condition
  - prognosis for recovery

Once positive expert evidence has been obtained and a viable claim has been identified, it is time to send a letter of claim to the negligent body. They have 14 days to acknowledge receipt of the letter and the protocol allows them 4 months to investigate and confirm a position on liability. Our clinical negligence claimants keep **100%** of their compensation award. We will not take anything from the compensation awarded to you. Our costs will be paid for.

Call our office on **0800 7 74 74 74** and speak with a member of the Clinical Negligence team.