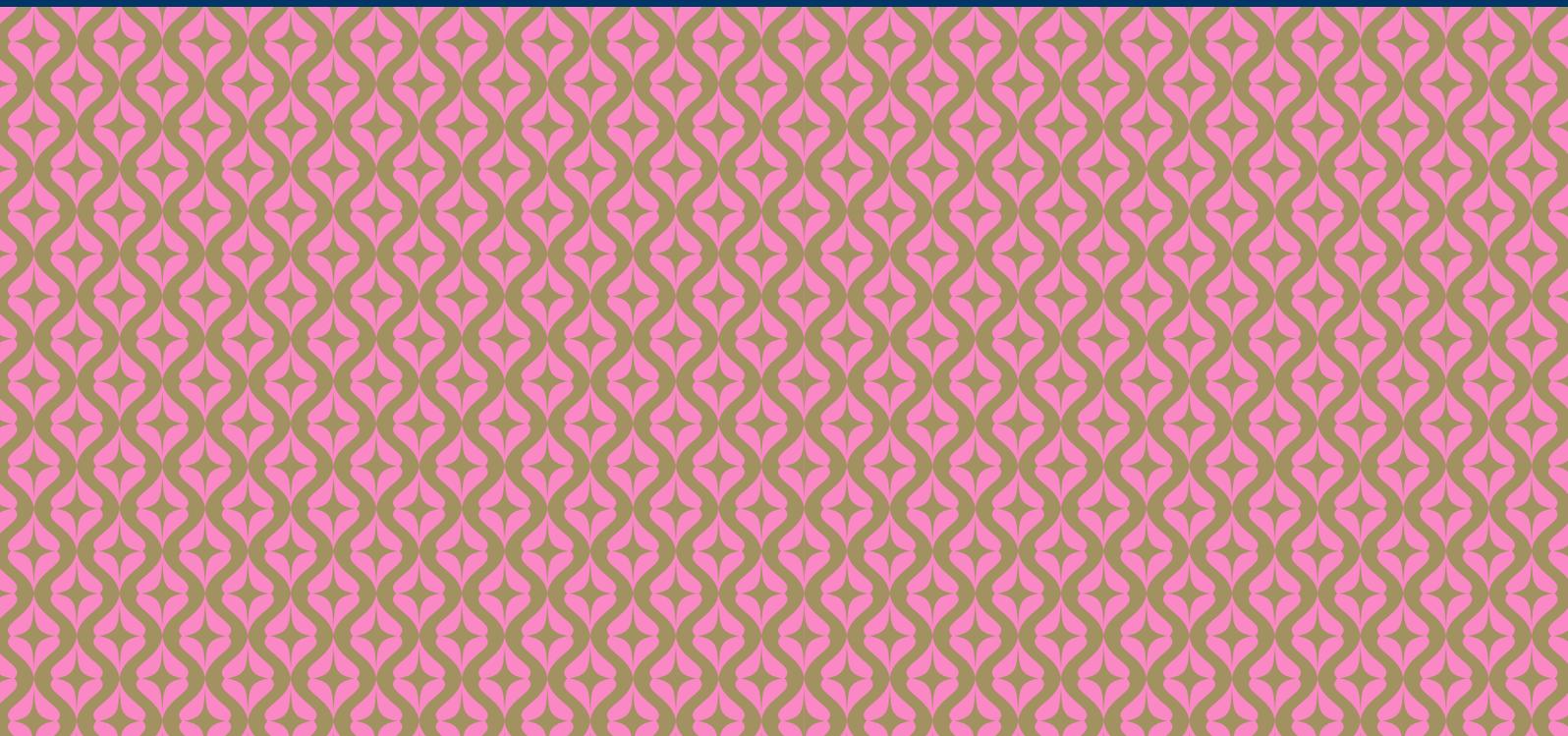


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A GUIDE TO CARE HOME NEGLIGENCE



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THE AIM OF THIS BOOKLET IS TO PROVIDE SOME ASSISTANCE IN THE FIELD OF CARE HOME NEGLIGENCE.

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INTRODUCTION

WHILST WE ACCEPT THAT, OVERALL, PEOPLE RECEIVE A GOOD STANDARD OF NURSING AND RESIDENTIAL CARE, UNFORTUNATELY THERE CONTINUE TO BE FAR TOO MANY INCIDENTS INVOLVING RESIDENTS RECEIVING CARE THAT FALLS BELOW THE REASONABLE STANDARD THAT THEY ARE ENTITLED TO EXPECT.

A CARE QUALITY COMMISSION REPORT SHOWED THAT IN THE YEAR 2013/2014 “ONE IN FIVE NURSING HOMES ACROSS THE UK WERE FOUND TO NOT HAVE ENOUGH STAFF ON DUTY TO ENSURE RESIDENTS RECEIVED GOOD, SAFE CARE.”

ACCORDINGLY, CARE HOMES HAVE COME UNDER INTENSE SCRUTINY RECENTLY AND THIS HAS REVEALED CARE WORKER STANDARDS TO BE NEGLIGENT IN A NUMBER OF DIFFERENT CASES.

CARE HOME NEGLIGENCE

There are predominantly two different types of care home in the UK;

RESIDENTIAL CARE HOMES

- Vary in size from very small homes with few beds to large-scale facilities.
- Offer care and support, day and night.
- Staff assist residents with washing, dressing and with using the bathroom.

NURSING HOMES

- Normally offer the same type of care as residential homes
- With the addition of 24-hour medical care from a qualified nurse.

Making the decision to place a relative or family member into a care home is an extremely difficult and sensitive one, particularly in cases where you are making the decision on their behalf.

Your relative has put their trust and confidence in you to choose a home which will provide them with a good standard of care and support. If this does not materialise, it can put a huge amount of stress and anxiety on the whole family.

At Collingbourne Henna Ltd, we are here to challenge the level of care received and to bear the burden for you. We will provide a voice to ensure your complaint is heard and, in some cases, obtain legal compensation for the injury or harm suffered.

EXAMPLES OF CARE HOME NEGLIGENCE

Care home negligence predominantly falls into the following categories:

- **Emotional or social neglect**
- **Medical neglect**
- **Basic needs neglect**
- **Personal hygiene neglect**

Failures within these categories can include:

- **Inadequate assistance with or lack of regular bathing, washing and cleaning**
- **Inadequate food or water provision leading to dehydration and malnutrition**
- **Inadequate lifting aids, which can cause injury and harm**
- **Incorrect/failure to provide medication or medical care when required**
- **Not providing clean bedding and clothing**
- **Preventing pressure sores or pressure ulcers from developing or failing to treat any which are already in existence**
- **Preventing falls, which can cause a fracture or injury to the head and back**

CAUSE FOR CONCERN

As we have already mentioned, many care homes provide excellent levels of care. However, the fact remains that there are still too many which provide care that is sub-standard.

Many clients have advised us in the past that they had an inner suspicion something wasn't quite right but others remained completely unaware until their family member showed physical signs of neglect.

There are a number of issues that may be a cause for concern, including:

- **Unusual changes in behaviour** – we all have our own character traits, any sudden changes, such as your family member becoming withdrawn may be a reason to raise concern.
- **Health related problems** – particularly the presence of bed or pressure sores and loss of weight.
- **Poor personal hygiene** – a strong smell of urine can be an indication that basic needs are not being met.
- **Dehydration** – there is a correlation between lack of fluids and recurring urinary tract infections (UTI). Carers need to ensure enough liquids are being taken and make them available to residents. Failures such as these are unacceptable.
- **Medication** – certain medicines need to be taken at the same time each day. Do the medical charts/records show this is adhered to? Are residents actually receiving their medication? Any changes in conditions could be caused by an overdose or failure to receive medication.
- **Secure Access** – there may be a risk that vulnerable residents wander away from the premises and suffer harm. Lack of security on entrance/exit points increases the chances of this happening.
- **Accidents** – can and do happen in residential care homes. They may occur as a result of poor lighting, slippery floors or unsafe furniture but they can also be caused by carelessness or poor training on the part of the care home staff.
- **Injuries** – the sudden appearance of bruising, cuts, grazes, which look unlikely to be the result of a fall or an accident are the most obvious signs of physical abuse.

WHO IS THE CORRECT DEFENDANT?

In many circumstances the care home will be the defendant. However, in cases where the resident has been placed in the home by the Local Authority, they may also be liable.

If a resident is funding the care home place privately there may be additional contractual obligations with which the care home must comply.

Accordingly, in situations such as these the resident may be entitled to claim damages not only in tort for a personal injury, but also for breach of contract.

CAN I MAKE A CLAIM?

If the care home has treated your relative badly you will not automatically be entitled to claim for damages/compensation. In order to bring a successful claim you will first have to satisfy two tests.

First you will need to establish that the care received fell below a standard that one was reasonably entitled to expect. This is called the "Bolam Test". The way the care provider treated you fell below that of a reasonable body of opinion acting in those circumstances at that time.

Once this has been established there must be a causal link which shows that, as a result of the negligence, the claimant has suffered loss.

It is often the case that even if negligence can be shown, the outcome would have been the same irrespective of whether the negligence had occurred. In circumstances such as these there would be no loss and consequently no claim.

This is an area of law that has developed 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.

In order to prove material contribution, 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 claimant must still prove 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 a 51% chance that the treating healthcare 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 care home negligence, the necessity to show a causal link but sometimes even more importantly to understand the principals 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, if you are aware, for instance, that your claim happened on the 1st January 2016, then you would have until the 01st January 2019 to pursue the claim. Failing this, 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 they required the knowledge. Limitation can often be confusing. If the victim of a 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 a 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 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.

Your solicitor shall identify the correct Defendant and suitable course of action. If the claim involves medical treatment provided in a nursing home, the claim shall proceed in accordance with the Pre-Action Protocol for the Resolution for Clinical Disputes. However, if the events giving rise to claim do not concern any type of medical care and/or took place in a residential home, this shall be governed by the Pre-Action Protocol for Personal Injury Claim.

For the purpose of this guide, information provided is in respect of claims pursued under the Pre-Action Protocol for the The Resolution for Clinical Disputes. Should your concerns involve incidents that took place in a nursing home, we have specialists in this area and further information may be obtained on request but shall none-the-less be provided at the outset of the claim.

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

During the course of the initial meeting with your Solicitor, they will discuss the concerns that you have, the treatment that was provided and, any losses that have been suffered as a result. Your Solicitor, whilst not necessarily being a qualified nursing expert, 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 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 relative's medical records from the relevant healthcare providers and also, on some occasions, historic medical records from care providers like your relative's General Practitioner.

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 healthcare provider must release the records within 40 days of such payment being made. If they fail to do so, an application to the Court can be made which can force to the healthcare provider to disclose the records and pay costs occasioned 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. This may assist any Expert instructed in your case in identifying treatment that was provided which was negligent.

Once the medical records have been received, 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/she is not entitled to give medical evidence on the level of care that was provided to you. Therefore an independent Expert, usually in the same field as the healthcare provider that has wronged you, will be instructed to prepare a report.

It is often the case that 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.

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THE DEFENDANT HAS DENIED MY CLAIM

This can sometimes cause problems, particularly in respect of historic claims. 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: first of all 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 healthcare provider is alleged to be at fault and, the remedy that you seek.

Once the letter of claim has been sent to the treating healthcare 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.

If any party fails to adhere to either the Civil Procedure rules or the protocol, serious cost consequences can be incurred. 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 has been 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.

In many cases the Defendants deny claims for a whole plethora of reasons, 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 will be 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.

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 and served 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

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 Solicitors 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 significant funds available to them to fund any claim of this nature.

CONDITIONAL FEE AGREEMENT

Many people know such Conditional Fee Agreements known under the common vernacular 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 which 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 in which to fund 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

Unbeknown to many members of the public, they have what is known as a policy of before the event insurance. This means that, in an existing policy of insurance, such as home insurance, attached is a policy covering them for legal expenses. Many people take out such 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 of insurance policies which may have legal expenses attached are: car insurance; breakdown cover insurance; credit card insurance and, indeed, some bank accounts.

Ordinarily, such policy of insurance would suggest the use of Solicitors appointed by your insurance company but again your Solicitors 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 Solicitors 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 2012"), 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 Defendants costs if you were to lose. There are certain circumstances that this protection can be lost and again your Solicitor can discuss this with you but, the general principal is that the losing party pays the winning party's costs subject to the caveat above as to the 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 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, because of course, 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

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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.

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 has changed and most, if not all, victims of clinical negligence will not qualify.

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



COLLINGBOURNE
HENNAHLAW
EST 1887

Collingbourne Hennah Ltd
13 Clytha Park Road
Newport
NP20 4PB

T: 01633 262 848
F: 01633 267 847
E: hello@ch-law.co.uk
ch-law.co.uk

