

Brain Injury & Cerebral Palsy Podcast transcript

James Bell:

I am the head of the CN department at KN and I am here with my colleague LS to discuss brain injuries from a medical negligence perspective, primarily those leading to cerebral palsy. We will look at the ways clinical negligence claims arise and then talk through what is involved with bringing a negligence claim - the complaints process, evidence required and the involvement of experts. We hope this will be interesting and helpful.

Laura Sylvester:

I am a Partner in the team who specialises in cerebral palsy cases.

What is cerebral palsy and what causes it?

Cerebral palsy is the name for a group of lifelong conditions that affect movement and coordination. It is caused by a problem with the brain that develops before, during or soon after birth and can lead to a range of issues including limb weakness, uncontrolled movements, learning difficulties and problems with feeding, speaking and vision.

Cerebral palsy can result from a hypoxic brain injury during birth where the brain does not get enough oxygen, also known as asphyxiation.

It can also be caused by an acquired brain injury after birth, for example as a result of infection.

Another possible cause can be problems with a baby's brain during pregnancy such as PVL – periventricular leukomalacia.

How do claims for negligence commonly arise?

During pregnancy there can be failures to pick up problems with a baby's development or failures to provide correct advice. For example, I had a case which settled last year for more than 20 million pounds which related to a mother not receiving the proper advice during pregnancy. She was not told that unprotected intercourse with her partner - who had herpes - could lead to her being infected and then the baby during birth. The child had spastic quadriplegic cerebral palsy which meant that all 4 limbs were affected.

Claims can also arise from a failure to diagnose and treat an infection following birth such as meningitis (an inflammation around the brain and spinal cord) or encephalitis (a swelling of the brain). They can also stem from a failure to treat jaundice in the child which can then develop into a condition called Kernicterus, often leading to brain damage and the development of cerebral palsy.

However, the leading area for cerebral palsy claims are those where the brain injury is caused during birth itself. Sometimes it is because of failures in monitoring the baby's heartbeat and not recognising signs of distress, or a failure to respond to the umbilical cord being wrapped around the baby's neck. In a number of cases, a caesarean section should have been offered because of evident risk factors, such as the size of the baby.

Will the hospital investigate when a baby has cerebral palsy?

You can make a complaint directly to the hospital if you are concerned about the treatment you or your baby received. The hospital and its doctors and nurses have a legal duty of candour to be clear and honest about when things went wrong.

There is now a dedicated scheme called the Early Notification Scheme (known as the ENS) whereby, if a baby sustains a brain injury during or shortly after birth, then there must be an internal investigation. If it is found that errors were made, the family will be informed and compensation may be offered. The scheme is run by NHS Resolution, the body dealing with claims against the NHS, which instruct its own solicitors to investigate.

Can you have your own solicitor if your child's case is being investigated as part of the Early Notification Scheme?

I have written an article about this recently. If your child's case is being considered as part of the ENS, this does not stop you from instructing your own solicitor. In fact, I would advise that you always get your own legal advice. If admissions of fault are made under the ENS then you need specialist advice about how much your child's claim could be worth. We are going to talk about how cases are valued in a minute, but it is very important to stress that, without your own solicitor, you are not on a level playing field with NHS Resolution. Also, as I say in my article, even if the ENS does not make any admissions, this does not necessarily mean there is no legal claim. You should always consult a solicitor.

How do you bring a successful legal claim?

The test which has to be proven is whether the standard of care was below a reasonable level and that, but for this, cerebral palsy would not have been suffered, or that it would have been less severe. Both components of the test, which we call liability, have to be proved for a case to be successful.

In order to prove liability, expert evidence is required. As regards the standard of care, the experts needed will depend upon who is alleged to have made an error – i.e. a midwife or an obstetrician. In terms of proving the cause of the injury, several experts may be involved. Input is often required from a paediatric neurologist. The process of obtaining reports from liability experts can take some considerable time. 1- 2 years is not unusual depending on the number of experts involved. Sometimes we have to get the reports sequentially which of course takes longer.

Both components of liability can be very complicated and can be hotly contested. For example, it may be that it is accepted by a defendant hospital trust that a baby should have been delivered sooner. However, it may deny that the delay caused the brain injury.

What happens once you have established that you have a strong case?

Once we have our expert evidence, we will usually draft what is called a Letter of Claim to the Defendant and ask them to admit liability. It is worth mentioning that sometimes we will not have to undertake liability investigations at all. For example, if admissions have already been made as part of the ENS or within a Serious Incident Report.

If liability is admitted, or even if it is not, so long as we have a strong case then we will look to assess how much a claim is likely to be worth. This will generally require a large number of experts to work out what a CP sufferer needs for the future. An accommodation expert is usually required to assess the child's needs going forward, as well as reports from experts in care and occupational therapy, to detail aids, equipment and therapies. We will often also require reports concerning physiotherapy, speech and language therapy and neurology.

We will look to claim all therapies that will assist a child's development and quality of life, including hydro therapy, equine therapy and other therapies not available on the NHS where possible.

An expert case manager is almost always needed.

What is a case manager?

The primary role is to co-ordinate the services, treatment and rehabilitation that an individual needs. Case managers are usually a great source of support to parents of CP children and are heavily involved with the family. It is important that the case manager has a good relationship with the family and this is something we will always bear in mind when instructing an expert case manager.

Can you get an interim payment and how does this work?

An interim payment can usually be obtained once there is an admission of liability and it is a sum to enable some progress to be made for the CP sufferer while the case is ongoing. We usually look to get a large interim payment to enable suitable accommodation to be purchased. If there is no admission of liability, or if the Defendant has made some admissions but will not provide an interim payment, then we will generally start formal Court proceedings. Once the case is in proceedings we can apply to the Court directly for an order that the Defendant must make an interim payment. If liability remains in dispute we will push the case forward to a trial. We will usually ask the Court for what is called a split trial. This means that the trial deals with liability only in the first instance and not the value of the case, which we call 'quantum'. The reason for this is that quantum can take a very long time to investigate because the needs of a child may not be fully apparent until they are much older. Therefore, if we take the case to a liability trial and win we will be able to obtain interim payments while concluding our quantum investigations. If quantum can then not be agreed between the parties, there will be a further trial for a Judge to decide upon the award of damages.

Getting an interim payment is always a priority so that families can start to move forward.

How do you go about bringing a claim?

The best thing to do if you think your child may have a claim for a brain injury or cerebral palsy is to contact a solicitor as soon as possible. They will be able to advise you on the legal process. Time limits do apply to clinical negligence cases and the general rule is that you have 3 years from the date of the negligence to start formal court proceedings. However, for a child, that 3-year period does not start to run until they are 18. Further, if someone does not have mental capacity then the time limits will not apply unless and

until such time as they obtain capacity. Nonetheless, the best way to avoid a claim being out of time is always to contact a solicitor as soon as possible.

I have a lot of experience with these types of claims, as do the rest of the team here, and as a result I am acutely aware of the pressures on families of those with CP going through a legal claim. It is often extremely difficult for families to adjust and deal with the needs of the injured child in terms of care, nursery or schooling and so on. On top of that they are then facing the stress of a legal case. It is so important for solicitors to thoroughly guide and support parents through the process and this is something I like to think we do really well.

How much compensation can you get?

There is no set amount of compensation for cerebral palsy, the amount will depend upon the impact on the child's life. As we have discussed, what they need for the future will have to be looked at by experts. However, awards of compensation for CP are often many millions of pounds.

I would always advise using a specialist solicitor with experience of cerebral palsy claims as they will have the necessary expert knowledge to get the best award of damages. We understand for example that a CP sufferers' condition may worsen with time and this needs to be factored into their compensation.

Compensation may be awarded as a lump sum with periodical payments, which are an annual amount each year for life. This can work particularly well for CP sufferers as the lump sum can cover major expenses like accommodation and then the annual payments can cover the care and specialist equipment and treatments required for life.

What about managing the compensation for someone who does not have capacity?

Advice should be taken from a Court of Protection solicitor about the steps that can be taken to protect funds for someone without capacity to manage their affairs. Some firms, like ours, will have their own Court of Protection team.

Finally, how can a claim be funded?

I have previously done a separate podcast about how claims are funded which goes into more detail about the options but essentially, for most claims, we are able to offer a 'no win no fee agreement'. Some people will have insurance to cover a clinical negligence claim within a policy they already hold such as their house insurance, and this always needs to be checked in the first instance. Legal aid may be available for brain injuries caused at or within 8 weeks of birth and is therefore quite often a possibility for cerebral palsy cases. We have a legal aid contract and can advise about this.