Neuro Infections Charity Network Conference

23 May 2011

Neuro Infections – Legal Issues

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How can we help?

For the individual and family we can:

- Secure finances
- Obtain independent expert advice on future therapy / care issues
- Arrive at an independent analysis of what went wrong

Generally we like to think we:

Play a part in promoting improved practice

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This presentation touches on clinical negligence:

Law

Procedure

Funding

"Pathways through a medico-legal investigation"
www.encephalitis.info

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Law: What must be proved?

(a) A departure from proper standards of care ("breach of duty") e.g. delay in diagnosis and

(b) Consequential damage ("causation) i.e. the outcome is worse than it should have been and

(c) The financial implications of that ("quantum")

Law: Breach of Duty (1)

A clinician is:

> *"not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body … skilled in that particular art … Putting it the other way round, a [clinician] is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view".*

McNair J in Bolam v Friern Hospital Management Committee 1957

Law: Breach of Duty (2)

But:

> ***"the use of the adjective "responsible" shows the Court has to be satisfied the exponents of the body of opinion relied upon can demonstrate [their] opinion has a logical basis. In particular in cases involving … the weighing of risks against benefits, the Judge … will need to be satisfied that … the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion".***

Lord Browne-Wilkinson in Bolitho v City and Hackney Health Authority 1997

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Law: Breach of Duty (3)

And:

> ***"when the evidence shows that a [gap] in professional practice exists by which risks of grave danger are knowingly taken … the Court must anxiously examine that [gap] – particularly if the risk can be easily and inexpensively avoided. If the Court finds … there is no proper basis for the [gap] … its function is to state that fact and where necessary state that it constitutes negligence. In such a case, the practice will no doubt … be altered to the benefit of patients".***

Sachs L J in Hucks v Cole 1968

Law: Causation

"But for" the breach of duty is it more likely than not the injury would have happened anyway?

If the answer is "Yes", there is no claim

If the answer is "No", there is a valid claim

Law: Quantum

e.g. 40 year old man earning £30,000 p.a. unable to return to work and needing supervision constantly on hand

General damages		£225,000.00
Special damages		
Care: £60,000 p.a x 25.79 (for life)	£1,547,400	
Loss of earnings: £22,624 net p.a. x 18.01 (for retirement at 65)		£407,460
Total		£2,179,860 plus

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Procedure: The time limit for making a claim

Three years from the date of injury, except for:

- Children (21st birthday)
- Those who lack capacity – Mental Capacity Act 2005 (no limit)

Or where:

- There is a later *"date of knowledge"*
- The Court exercises its discretion

Procedure: The Mechanics

A Investigation
- Records
- Independent expert evidence
- Letters of Claim and Response

B Exchange of information
- Witness statements
- Independent expert evidence on breach of duty and causation
- Schedule
- Counter-schedule
- Experts' discussions

C Resolution
- Offer and counter-offer / settlement meeting / trial

Procedure: What the parties need to know

1. How much a Judge is likely to award at Trial if the Claimant wins

2. The chances of the Claimant winning

Funding: Options

1. Legal Aid
2. Before-the-event insurance
3. Conditional Fee Agreement
4. Privately

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"A child has special educational needs…if he has a learning difficulty which calls for special educational provision to be made for him"

Section 312 of the Education Act 1996

What is a learning difficulty?

- Greater difficulty in learning
- Disability which hinders a child's progress

Funding the Special Educational Needs of Children with Brain Injuries

- Within the school's own budget
- Local Authority exceptional funding
- Statutory assessment (but route is not fast or flexible)
- First Tier Tribunal (SEND) route

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Special Educational Needs Code of Practice

- Special Educational Needs Code of Practice
- The child is noted as a concern
- 3 stages prior to the Statement of Special Educational Needs
  - School Action
  - School Action Plus
  - Statutory Assessment

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Statutory Assessment

Request for Statutory Assessment

- From school or parents
- School reports usually requested
- Occasionally other expert reports obtained, Educational Psychologist if available

Decision to be issued within 6 weeks: the Local Authority will either:

- refuse to conduct a statutory assessment, or
- agree to conduct a statutory assessment

Contents of Statement of Special Educational Needs

- Part 1: Child's Details
- Part 2: Description of the child's special educational needs
  - Must be full and accurate
  - Ideally set out under headings
  - Includes strengths as well as difficulties
- Part 3: The provision to meet the child's special educational needs
  - Must meet all needs set out in Part 2
  - Must be specific, detailed and quantified

Part 4: The School Placement
Part 5: Non-educational needs
Part 6: Non-educational provision

Please note that Parts 2, 3 and 4 are enforceable. Part 5 and 6 are not enforceable.

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How can lawyers help a child with special educational needs with or without a Statement of Special Educational Needs?

- **School Action/School Action Plus**
  - Negotiation with school for additional provision?
  - Initiation of statutory assessment.
  - Support for parents to navigate the system.
  - Support for parents to challenge Local Authority refusals to statutory assess.
  - Scrutiny of proposed Statement of Special Educational Needs.
- **Statement of Special Educational Needs**
  - Support for parents to challenge the provision in the Statement of Special Educational Needs to the First Tier Tribunal.

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