

One day, a whisper

*A diminishing number of clinical negligence lawyers can mount an effective claim today compared to 30 years ago, as **Richard Barr** illustrates*



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Adequate recompense is essential but the case does not end when litigation finishes

The date: June 1989.
Katie was lying in a hospital bed. Unconscious. Just four years old, she was not expected to live.

A few days earlier she had been so badly neglected by another hospital that an expert later described it as the worst case of negligence he'd ever seen. Minor concussion following a fall had turned into a catastrophic injury – all because the first hospital failed to scan her for a day and a half. And when the doctors eventually found a subdural haematoma – a bleed on the brain – they tried to manage it themselves, making things ten times worse.

Katie was in a coma for several weeks but her mother never gave up hope. She never left Katie's side and continued to talk to her, even though she appeared completely unresponsive. She was, her mother was told, in a persistent vegetative state.

Then one day Katie started to whisper – and so began the long journey of rehabilitation.

Initially she was blind, doubly incontinent and incapable of coherent speech. There followed a prolonged period of rehabilitation spanning many years, mainly carried out by her mother. Katie gradually recovered many of her faculties.

She's now in her thirties and, though having made a remarkable recovery in many ways, she has nonetheless been left severely disabled – both mentally and physically.

Years later, a settlement hearing took place in the High Court. The hospital admitted that had it treated her properly she would have made a complete recovery. It apologised for the first and only time.

No amount of money can compensate for the level of damage and the long-term effects on every member of the family, even those who were children at the time of the incident. Adequate recompense is essential but the case does not end when litigation finishes.

In a sense, that was just the beginning. Katie's mother has endured decades of battling for education, support, treatment and benefits – battles that will continue for the rest of Katie's life.


Back then, legal aid was available for all children and there was no means test. Her solicitors were able to obtain the necessary medical reports, fund the issue of proceedings, instruct counsel and bring the case to a successful conclusion. And the entire case did not cost the state penny, as all outgoings were reimbursed by the hospital trust at the end of the case.

But what if this had happened in 2019? Many solicitors would have had great difficulty mounting an effective claim. The hardening attitude of those representing the NHS would undoubtedly have meant Katie's mother fighting every inch of the way; and her solicitor having to pay thousands of pounds up front (or raising a loan) for the necessary reports.

Funding is now a nightmare for the big cases. It's putting members of the legal profession at personal financial risk, compounded by the outrageous hike in court fees for big claims (up by 500 per cent). Fee remission is means tested and the current £10,000 fee for issuing a maximum damages claim is more than the stamp duty payable on a respectably-sized house.

This means a diminishing number of clinical negligence lawyers can mount an effective claim. This is not through lack of ability or a lack of merit in the case, but simply because the financial burden has become intolerable. Clients are undoubtedly losing out. Access to justice has relentlessly become harder over the past 30 years, largely thanks to deliberate government action.

It would cost little to reinstate legal aid for clinical negligence cases, particularly if it was a disbursement funding only scheme. Most solicitors are willing to take cases under a conditional fee agreement, so why not set up legal aid funding for disbursements only; means test free for children and means tested for adults?

Access to justice is just as important as access to health, so why do successive governments make it so difficult? 

*For more from the pen of Richard Barr read his book of SJ reminiscence *The Savage Poodle* available at £7.99 + P&P from Amazon UK or direct from Richard: Richard.barr@paston.co.uk*

