

JMW tops the rankings (Chambers 2009)

The Clinical Negligence department at JMW Solicitors has been given the highest possible ranking in the 2009 edition of the Chambers and Partners Guide to the Legal Profession.

According to this leading directory of solicitors firms:

"You get the best of everything at JMW Solicitors," declare impressed clients. Although this firm's clinical negligence department is smaller in size than many of its regional competitors, peers agree that *"it more than holds its own as a smaller group: it undertakes the same work as the bigger firms, but with a more personal approach."* Ten *"extremely committed and hands-on lawyers"* handle clinical negligence exclusively, providing *"efficient, informative and thorough service."* Highlight work has included winning a settlement of £4.2 million for a boy who developed cerebral palsy at birth.

The *"upfront and down-to-earth"* **Eddie Jones** heads the department. He is prized for being *"able to get to the heart of a case very easily"* and for his strong relationships with medical experts.

Olivia Scates *"is a dab hand, and among the best in her field,"* interviewees agree. Praised for keeping her clients well informed, she is also *"clear, precise and incredibly hard-working. She leaves no stone unturned."*

Sally Leonards has recently returned to the firm from maternity leave and already *"has a lot of good cases on the go."* Clients affirm: *"You can rely on her as a safe pair of hands."*

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NEWSLETTER CLINICAL NEGLIGENCE

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Wrongful Birth

Welcome to the Winter edition of the JMW Clinical Negligence newsletter.

In the past there have been a small number of claims for wrongful life when an individual has asserted that his life is so dreadful it is not worth living and that he would be better off not having been born. Such claims are based on the contention that the pregnancy could have been terminated once it was realised that the fetus was severely disabled, and the unwanted life thus avoided. These cases have failed, primarily because it is quite impossible to compare suffering with non-existence. (*McKay v Essex Area Health Authority*)

Wrongful birth is somewhat different in that it is not necessary to prove that a life is not worth living in order to bring a successful claim. (In fact many disabled people lead rich and fulfilling lives). In claims for wrongful birth the claimant is almost always the parent, whereas in claims for wrongful life the claimant will always be the disabled individual.

To bring a successful claim for wrongful birth it must be proven that an opportunity to terminate the pregnancy was lost because of some kind of negligent action (or inaction) such as:-

- Lack of proper counselling (including genetic)
- Inaccurate interpretation of scan and/or blood results
- Omission to screen for fetal abnormalities
- Failure to inform parents of actual or possible fetal abnormalities
- Misinterpretation of clinical signs during pregnancy

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Manchester Office: No 1 Byrom Place, Spinningfields,
Manchester M3 3HG. t. 0845 402 0001 f. 0161 828 1827
dx. 14372 MCR 1 e. enquiries@jmw.co.uk
www.jmw.co.uk

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The belief that in such cases parents have a legitimate claim to financial assistance for the extra expense involved in bringing up a disabled child does not go uncontested, and there is a view that awards for wrongful birth encourage the perception that disabled children are always burdensome, unwanted or unbearable to their parents.

Undetected spina bifida

K is his mother's second child. He was born in March 2002 after what appeared to be a normal pregnancy and labour.

At birth it was noted that K had a cystic swelling over the lower spine which was immediately diagnosed as a neural tube defect (spina bifida). This was surgically repaired soon after birth.

During her pregnancy K's mother had 3 ultra sound scans, including the fetal abnormality scan at 20 weeks, but at no time was any abnormality detected.

Although K is only moderately affected by spina bifida, with no paralysis, his mother asserted that had she known of the diagnosis during her pregnancy she would have chosen to undergo a termination.

The ultrasound machine used in this case was 9 years old (recommended maximum 5 years) but the defendant hospital denied that it was in any way sub-standard. They also denied that the scans had been undertaken in a negligent manner claiming that the 2 radiographers involved were fully trained and experienced.

They also cited the results of a recent report into ultra sound screening for spina bifida giving an overall detection rate of approximately 90% and, accordingly, a detection failure rate of 10%.

In many respects K's development has been normal and he is not intellectually impaired. However, his bladder and bowels are affected by the defect in the spinal cord and he requires catheterisation 4 times a day and is often incontinent in between. He also requires frequent enemas. In the future he may require reconstruction of the bladder but will probably have to continue to self catheterise.

K's mother, (not K) is the claimant and she claimed damages for personal injuries and financial losses arising from the negligent antenatal care she received. She gave up work to look after K who required a higher level of care than a normal baby.

The expert view was that using ultrasound equipment that exceeded the 5 year limit may have had an adverse effect on its ability to detect fetal abnormalities and the case was settled for £120,000.

Wrongful birth case 2

Mrs T already had 3 normal children when her 4th child (S) was born in 1988 with a number of genetic abnormalities including a hare lip and curvature of the spine. She died at 3 weeks old.

An abnormality on chromosome 15 was identified and Mrs T and her husband received genetic counselling. They were told that the disorder was rare and that any future children had no more than a 1 in 200 chance of being affected. No mention was made at the time of spinal muscular atrophy (SMA).

Over the next 11 years Mrs T had 3 further children. All were tested for abnormalities on chromosome 15, which proved negative, although one of them died soon after birth from an unrelated cardiac disorder.

Mrs T's 8th and final child (C) was born in 2003 following negative tests for chromosomal 15 disorders. He was a small baby but otherwise appeared quite normal.

After about 6 months it became apparent that C was not thriving and on a couple of occasions he was admitted to hospital with apnoeic attacks.

In March 2005 C's condition deteriorated and he was admitted to hospital for tests. These revealed that he was suffering from spinal muscular atrophy. He was discharged home, as no treatment could be offered, and died 2 weeks later aged 20 months.

An investigation was undertaken by the hospital following C's death and it became apparent that S had also died of SMA, but this information had never been passed on to her parents. It would appear that the pathologist involved at the time believed that SMA was directly related to the disorder on chromosome 15 rather than a separate condition, and this is why the risks were estimated as being low. In fact SMA is due to a disorder on chromosome 5.

Mr and Mrs T claimed that had they been aware that S had died of SMA, and that any subsequent children had a 1 in 4 risk of also having the condition, they would either have availed themselves of antenatal screening specifically for SMA and a possible termination, or decided to have no further children.

The defendant accepted liability for the wrongful birth of C but not his death and made an offer of £15,000. This was refused but a subsequent offer of £22,000 was accepted.