ANNEX 2: Experience Portfolio

Instructions:

- You must provide 3 portfolios which cover a range of matters you have handled from your caseload.
- These portfolios should demonstrate your experience in the relevant area of practice.

(If you have completed portfolios at **Annex 1** you do not need to complete this section).

Date you were instructed in the case: 9 June 2020

Example 1 of 3

Provide an outline of the facts of the case.

This was a clinical negligence claim that arose from treatment provided to the Claimant at my client's hospital on 8 December 2015 during the delivery of her daughter. She alleged that pre-birth obstetric care, the birth and a subsequent post-birth tear repair were improperly managed, and alleged that she suffered a 3b perineal tear rather than a 3a perineal tear. The claim was resisted and it was my client's case that the treatment provided was of a good standard and the Claimant suffered only a 3a tear, which was less severe, and was appropriately repaired. The Claimant alleged that as a result of substandard care, she suffered injuries of faecal incontinence symptoms, a deficient perineum and posterior vaginal wall and Post Traumatic Stress Disorder and major depression of moderate severity.

When I took over conduct of the case on 9 June 2020, a Letter of Claim had been received and a Letter of Response denying liability in full had been served. The Claimant issued proceedings on 11 February 2020 and served the Claim Form on 2 June 2020. An extension of time for service of the Claimant's Particulars of Claim was agreed between the parties and approved by the court to 4 September 2020 and the Claimant served proceedings on 2 September 2020. In the Particulars of Claim, it was clear that the Claimant no longer wished to pursue allegations in respect of the pre-birth obstetric care and the allegations contained within the Particulars of Claim served focused on the delivery and post-birth perineal tear.

Supportive expert evidence o behalf of my client in respect of breach of duty and causation was obtained from experts in obstetrics, colorectal surgery and urogynaecology. Joint expert evidence was also obtained from a Professor of Gastrointestinal Radiology.

The matter progressed through litigation and settled during a round table meeting following service of expert joint statements.

ANNEX 2: Experience Portfolio *continued*

Provide an explanation of the law arising in the case and how the law applies to the facts of the case.

The Claimant brought their claim under the common law of Tort. The legal test that must be satisfied in order for a claim of this nature to be successful is firstly, that it must be proven that the Claimant was owed a duty of care and that there was a breach of that duty of care. Further, it must be established that as a result of that breach of duty of care, the Claimant suffered injury or loss.

In this example, whether a duty of care was owed to the Claimant was straight forward in that the clinicians at my client's hospital owed a duty of care to their patients in the service they provided. The first part of the legal test was therefore established and no further investigation into this part of the legal test was carried out.

In respect of breach of duty, the Claimant alleged that there was a failure to rotate manually the fetal head prior to positioning the forceps putting the Claimant at significant risk of damage to the perineum and surrounding soft tissues. In order to establish breach of duty in a clinical negligence claim, the test for breach of duty must be established. Specifically, that the care provided fell below that of a reasonable standard expected of a reasonably competent doctor. The legal test was confirmed in the case of Bolam v Friern Hospital Management Committee [1957]. In this case, it was established that a clinician will not be negligent if they have acted in accordance with a practice accepted as proper by a responsible body of medical opinion in the same field. If this is established, it does not matter if there are other medical professionals who disagree with that practice and it does not have to conform with the majority opinion. However, courts must exercise reasonableness in accordance with the case of Bolitho v City & Hackney Health Authority [1998]. If breach of duty is established, a Claimant must then satisfy the legal test for causation. This is known as the ‘but for test’ as was established in the case of Barnett v Chelsea & Kensington Hospital Management Committee [1968]. A Claimant must prove that but for the alleged breaches of duty, they would not have suffered injury or loss. This is considered on the balance of probabilities and the burden of proof is on the Claimant to prove that on the balance of probabilities, they suffered injury or loss.

In order to investigate breach of duty and causation in respect of the delivery of the Claimant's baby, an expert report was obtained from a Consultant Obstetrician. The expert was asked to consider specifically whether the care provided by the obstetrician during the Claimant's delivery of her daughter fell below a reasonable standard of care. Further, if the level of care did fall below a reasonable standard, whether this led to the Claimant suffering a 3a tear or a 3b tear. Expert evidence was also obtained from a Colorectal Surgeon, Urogynaecologist and Psychiatrist to establish the causation that flowed from the Claimant's alleged breach of duty. Specifically, whether the Claimant did indeed suffer from a deficient perineum and

Provide an outline of any procedural and process matters that arose in the case and how they were dealt with.

At the point in which I took over conduct of this case, court proceedings had been issued in the Royal Courts of Justice and at that time the 'Queen's Bench Division'. I was therefore required to progress the matter through the litigation process in accordance with the Civil Procedure Rules. Specifically, the first procedural issue I was required to consider was whether the Claimant had issued and served proceedings correctly in accordance with Part 7. Rule 7.2 states that in order to begin proceedings, the court issues a Claim Form at the request of the Claimant using Form N1. Also, Rule 7.5(1) which states that the Claimant must follow the rules of service contained within the table of Rule 7.5(1) to include service of the Claim Form. I was required to consider Part 6, Rule 6.14 which considers the timescale for service of documents and deemed service on the second business day after completion of the relevant step in Rule 7.5(1).

The Claimant had complied with both of the above rules in serving the Claim Form by electronic method serving the Claim Form by email. I also considered whether my client had effectively acknowledged service of proceedings. An Acknowledgment of Service was filed within 14 days of service of proceedings on 3 September 2020 via the RCJ e-filing portal.

A further procedural issue that arose was the listing of an application hearing by the Royal Courts of Justice. Following review of joint expert evidence of a Gastrointestinal & Abdominal Radiologist obtained by the parties confirming that the Claimant did not in fact suffer from a deficient perineum. The evidence was supportive of my client's case in that he considered the tear to be a 3a tear, which was properly repaired. I obtained counsel's advice and advised my client to make an application to strike out the Claimant's case [exhibit LD1.1].

Following research into the procedure of making such an application, I filed an Application Notice Form N244 with draft Order using the RCJ e-filing portal signed by a solicitor within my team [exhibit LD1.2 and exhibit LD1.3] and served a copy on the Claimant [exhibit LD1.4].

ANNEX 2: Experience Portfolio *continued*

Provide an outline of the evidential issues that arose in the case and how they were dealt with.

The Claimant was granted permission to rely upon amended Particulars of Claim including an additional allegation that an ultrasound scan dated 22 February 2017 was reported incorrectly. The parties sought permission from the court at the costs and case management hearing to rely upon joint expert evidence of a Gastrointestinal & Abdominal Radiologist, this was granted and a report was obtained. As stated above, following receipt of such evidence, I advised my client to make a strike out application or in the alternative for summary judgment to be entered.

Following service of the strike out/summary judgment application, the parties agreed to exchange witness evidence in order to progress the matter. The expert evidence obtained from the Gastrointestinal & Abdominal Radiologist reviewed against the Claimant's witness evidence suggested that the Claimant was exaggerating her claim. Further, during a conference with counsel and the experts, the urogynaecologist expert highlighted that during her examination of the Claimant, she felt suspicious regarding her claim that she was unable to work due to her alleged incontinence symptoms. Based on my client expert view and the Claimant witness statement, I conducted a search on Companies House and discovered that the Claimant had her own dental practice. This raised suspicion further and following consideration with counsel, I advised my client to obtain a Open Source Intelligence Surveillance report in order to consider if the injuries the Claimant was suffering from were to the extent claimed [exhibit LD1.5]. Such evidence is not obtained lightly and I was satisfied that the evidence discovered from Companies House and the Claimant's witness evidence called into question whether her injuries were as severe as claimed.

Provide an outline of any ethical or conduct issues that arose in the case and how they were dealt with.

As stated above, I filed a strike out/summary judgment application at court following receipt of expert evidence from the joint Gastrointestinal & Abdominal Radiologist. As the hearing for the court to consider the application was listed in October 2022, the parties agreed to proceed to exchange expert evidence in order to progress the matter. Unfortunately, following service of the Claimant's expert evidence, it was clear that the prospects of success of the strike out/summary judgment application being successful had decreased. It became apparent that the strike out/summary judgment application may have been made prematurely and I therefore had to reconsider my conduct of the case and whether to pursue such an application following review of this further evidence.

I therefore sought updated advice from counsel in respect of the prospects of success of the strike out/summary judgment application [exhibit LD1.6]. As suspected, counsel advised that the prospects of success had decreased and advised that despite his earlier advice relating to the supportive expert evidence of the Gastrointestinal & Abdominal Radiologist and the surveillance report, prospects of success of the strike out/summary judgment application had decreased and the strike out/summary judgment application should be withdrawn. I therefore sought instructions from my client to withdraw the application to strike out [exhibit LD1.7].

ANNEX 2: Experience Portfolio *continued*

Provide an outline of any funding issues that arose in the case and how they were dealt with.

I am an in house lawyer and therefore, I am not instructed on any form of funding. However, I am required to advise my client in respect of the funding position of the Claimant and the likely costs that my client may incur if the Claimant were to be successful in the claim. In my advice letter to the client seeking instructions to attempt to settle the whole of the claim at the round table meeting, I advised the client that the Claimant's claim was funded by way of Conditional Fee Agreement and that she had the benefit of After The Event Insurance [exhibit LD1.8]. Further, I have advised my client in respect of the likely costs that have been incurred by the Claimant and of a reserve for financial purposes.

Provide an outline of the advice provided to the client and the outcome of the matter.

Throughout my conduct of this matter, I have provided advice to my client. As detailed in exhibit LD1.1 (advice to my client to make a strike out/summary judgment application), LD1.5 (advice to my client in respect of evidence and obtaining a surveillance report) and LD1.7 (strategic advice to my client in withdrawing the strike out/summary judgment application). I have demonstrated that advice has been provided to my client in respect of witness and expert evidence, obtaining a surveillance report and strategic advice in withdrawing the strike out/summary judgment application. Each advice has been provided in accordance with the progression of the matter through litigation and as prospects of success changed.

Further, I have provided a full comprehensive advice to the client as exhibited in LD1.8 seeking my client's instructions to settle the claim on a commercial basis in the form of alternative dispute resolution at the round table meeting. This was following review of the expert joint statements and at the stage of litigation where I was required to consider whether, based on the prospects of success, to advise my client to proceed to trial.

I advised my client that following receipt of the Claimant’s evidence and the joint expert statements in respect of liability, the merits of the claim in proceeding to trial had changed and it would be beneficial to my client to attempt to settle the matter on a commercial basis. My advice was supported by counsel's advice. Following review of the expert joint statements, counsel had provided his advice that the Claimant had done better in respect of the joint statements on the critical issues both on breach of duty and causation. I highlighted to my client the areas of the expert evidence which would be put under scrutiny at cross-examination if the matter were to proceed to trial. Specifically in relation to the witness evidence relating to the obstetric care and the photographs of the Claimant's baby which showed markings as to the positioning of the forceps on the baby's head during delivery. Each of these areas were weaknesses in my client's case and the court would likely prefer the Claimant's evidence in this regard. Ultimately, my advice was that there were considerable risks for both parties in this litigation and that based on the risks highlighted, my client should seek to reach a reasonable commercial settlement.

I advised my client that settling the matter at that stage would save a large sum in respect of both payments of damages and costs. I sought my client's instructions to settle the matter in respect of the Claimant's damages up to the sum of £700,000. This was the top end of the level of damages and offers were made during the round table meeting from £230,000 up to £585,000. The Claimant accepted my client's offer in the sum of £585,000. Therefore, my client achieved a saving of £115,000 in respect of damages and the matter settled prior to trial.

ANNEX 2: Experience Portfolio *continued*

Provide an outline of the decisions that you had to make in the case and whether you had to take any strategic decisions in the case.

Firstly, I made the decision to seek instructions to make the strike out/summary judgment application as evidenced in my advice to the client and exhibited at LD1.1. An application of this nature is not made lightly but based on counsel's advice, it was the correct decision and step to take at the time. This was based on the supportive opinion of the Gastrointestinal & Abdominal Radiologist and the surveillance report obtained further supporting my client's case that there were no reasonable grounds for the Claimant to bring the proceedings or that there were no reasonable prospects of success.

As stated above and exhibited at LD1.7, I was required to make a strategic decision to withdraw my client's application of strike out/summary judgment. This was a difficult decision to make as this would inevitably have a negative effect on the strength of my client's case and the Claimant would consider that their case was more favourable by the court. Despite this being a difficult decision, I was satisfied that this was the correct step to take in this case and in the best interests of my client. If the application hearing had gone ahead, and the court made an order in favour of the Claimant, as counsel stated in exhibit LD1.6, there was the risk that the Claimant would obtain an 'early win' in this case which may have negatively impacted the case for my client.

Further, as demonstrated in my advice to the client and exhibited at LD1.8, I made the strategic decision to advise my client to attempt to settle the matter on a commercial basis. This strategic decision was appropriate based on the risks to my client and was made with consideration to the potential sum that my client could be liable to pay if the matter were to proceed to trial. I am satisfied that this was the correct decision as my client made a large saving in the damages paid to the Claimant.

Provide a description of any training or development needs you have identified as a result of having dealt with the case.

I have identified one area of training and development following conduct of this case surrounding a large part of this claim, namely, the strike out/summary judgment application.

This is training in respect of the witness statement to accompany a strike out/summary judgment application. During my conduct of this case, I required the assistance of counsel to draft the witness statement in support. In the future, I would like to draft such a witness statement with very little support and be confident in submitting such evidence to court.