

Clinical Negligence: Investigating Your Claim



About Us

From protecting your family legacy to securing your business' future, we work tirelessly to get the right outcome for you. When you work with us, you have an award-winning, full-service law firm with you every step of the way.

We remain committed to supporting our local communities and have built a national reputation in a number of specialist areas. We act without judgement or prejudice, forging lasting relationships with businesses, families and individuals looking to defend their position, protect their interests and secure their futures.



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Our Clinical Negligence team

Our team is one of the leading clinical negligence practices in the North West of England, also covering North Wales and assisting clients throughout England and Wales.

Clinical negligence claims form a specialised area of personal injury litigation requiring a particular expertise and skill. Our Clinical Negligence department aims to provide an efficient, caring service to distressed and injured patients.

It is our objective to ensure that our client does not get a raw deal from the legal as well as the medical profession. Client care, quality of service and regular updating are given top priority. We also have both male and female solicitors available.

We have developed our expertise over more than 25 years of clinical negligence practice. We have close contacts with Action against Medical Accidents (AvMA), a charity devoted to the interests of those who have suffered as a result of medical malpractice. It provides a support service to solicitors engaged in clinical negligence work. We also have links to the Association of Personal Injury Lawyers (APIL), who can also provide support to clinical negligence lawyers.

Although the department is based at our Birkenhead office, clients can be seen, in appropriate cases, at their homes or at any of our offices in Wirral (Birkenhead, Heswall or West Kirby), Liverpool or Manchester.

We conduct cases under Legal Aid (we hold a Legal Aid Agency contract for clinical negligence) and, where appropriate, Conditional Fee Agreements or legal expenses insurance.

What is a clinical negligence claim?

It is a claim, potentially through a civil court, for damages (compensation in money) for personal injuries and/or unnecessary suffering (eg, delayed recovery), following negligence by medical/clinical professionals.

We know that there are many and varied reasons why people seek solicitors' advice following medical accidents. They include:

- finding out what really happened
- preventing the same thing happening to someone else
- obtaining an apology
- making someone accountable
- having the offending person disciplined
- venting feelings of anger and disillusion
- seeking compensation

But remember

It is important not to forget that the ultimate objective of a clinical negligence action is to recover financial compensation. In the course of investigating a claim, we will usually find out what happened, but even if your claim is successful, it is unlikely in itself to result in an apology or disciplinary action.

At the outset, consideration should always be given as to whether use of the NHS Complaints Procedure or a complaint to the General Medical Council is likely to meet some or all of your objectives.

Because of the high levels of legal costs in these cases, however the legal costs are to be paid for, we must at all times consider the **viability** of the claim – whether the chance of success and likely damages justify the likely costs.

Q What do we have to do to recover damages?

The injured patient who is claiming compensation is called the Claimant; the person or body being sued is known as the Defendant.

The Claimant must prove three elements:

Breach of duty of care → Causation → Damage

Breach of the doctor's duty of care

A doctor (or other health professional) obviously has a duty to treat you properly (his/her **duty of care**). In law you are entitled to expect him/her to give the care to the standard which a **reasonably competent doctor** acting in his/her field would give. A doctor is not required to provide 'gold standard' treatment.

To prove that the Defendant has been negligent, the Claimant has to prove that no reasonably competent doctor would have acted in the way complained of.

Even if the Claimant can prove this **breach of duty of care**, he/she must also prove causation and damage.

In cases of private medical treatment, a claim may also be made for breach of contract.

Damage - the injury or unnecessary suffering

The Claimant has to prove damage. It may be an injury (physical or mental) directly caused by negligent treatment, or avoidable suffering due to a delayed diagnosis. Compensation for this suffering and any lasting disability is known as ‘general damages’.

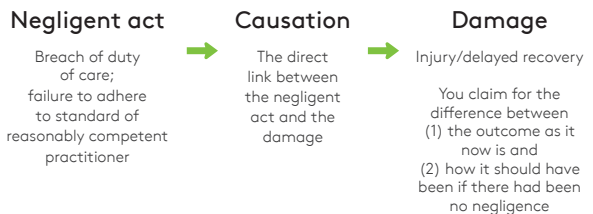
Often the injury leads to loss of earnings or individual items of expenditure, such as travelling expenses or nursing care costs, which can also be claimed - the compensation here is called ‘special damages’.

Please note:

Keep receipts for any expenditure that you think you might be able to include in your claim. Without receipts it is sometimes difficult to prove the expenditure. Please also keep a running list of expenses for which there are no receipts, eg, travelling expenses.

Causation - the link

The Claimant must prove that the injury is a direct result of, or was materially contributed to, by the breach of the duty of care. This is often the most difficult part of the case.



An example regarding damage; if there was a delay in diagnosing a fracture to the ankle and the Claimant subsequently suffered from a limp, the Claimant must show that the limp was the result of the delay in treatment, and not of the original injury. If the Claimant would have had a limp even if the fracture had been diagnosed immediately and treated, then the delay has not caused the limp.

How do I prove the case?

As a matter of law, the court must have evidence:

1. of what was reasonably competent medical practice at the time of the treatment and
2. that the care actually given fell below that standard.

The Claimant must also prove that the injury was caused by the Defendant's substandard care.

The Claimant must therefore bring forward experts in the relevant field of medicine to give that evidence, initially in the form of reports and ultimately, if necessary, to trial.

But will one doctor testify against another?

Yes, many senior practitioners feel that it is their responsibility to help maintain standards in medicine by providing opinions in these circumstances.

Over the years we have built up a database of experts in different fields of medicine who are prepared to assist by providing reports and who are willing, if necessary, to testify against other doctors in court.

In the few cases in which we do not have an appropriate expert on our database, we will turn to the Lawyers Resource Service of AvMA, the database of the Association of Personal Injury Lawyers or other sources.

To whom is the expert responsible?

Regardless of which side instructs and pays their fees, all experts - for both sides - must sign a declaration that they understand that their primary responsibility is to the court and that they must provide an impartial opinion.

Do I have to prove my case beyond reasonable doubt?

No this is not a criminal prosecution: it is a **civil claim**. We have to prove the case (and each part of it) **on the balance of probabilities** - which simply means 'probably' or 'more likely than not'.

How long will it take to investigate the case?

It takes on average 18 months to complete the initial investigation. We will work as quickly as we can but at certain stages we are in the hands of others – eg, the Legal Aid Agency if you are applying for Legal Aid, or the medical record holders, or the experts - whom we can remind, but not force, to respond, and who may have long waiting lists.

Q How do we go about investigating a claim?

If your claim is taken on by us, we follow careful and thorough procedures to look into your case.

First we go through an investigation stage to see whether your claim is viable – that is, that it has reasonable prospects of success and that the likely value of the claim makes it worth pursuing.

This involves getting the evidence of the facts of what happened and then getting the initial expert reports, following these steps:

- taking a preliminary statement from you;
- notifying the defendant doctor / hospital / NHS Trust that a claim is being considered and asking for copies of the medical records (very occasionally, this may require an application to the court);
- obtaining copies of the relevant case records held by any other doctor or hospital;
- sorting out all the case records and summarising them in a chronology (this can take many hours);
- going through the case history with you;
- finding and instructing consultants in the relevant medical fields to prepare a report and provide their opinion of the care that you have received and/or the effect of the substandard care (usually more than one opinion is required);
- going through the experts' reports with you;
- obtaining counsel's opinion (ie the advice of a specialist barrister) if appropriate.

At this point, we should be able to form a good idea of what the fundamental issues are, the strengths and weaknesses of your claim and whether the claim has prospects of success.



What will it cost to investigate the case?

Experience shows that it normally costs £30,000 - £50,000 plus VAT to investigate a case up to the stage of deciding whether or not to issue proceedings. This would include our fees, perhaps some court fees, and the fees of the independent medical expert (s) and costs of obtaining the various medical records. The total cost depends on how much work we have to undertake - in particular how many experts we need. Experts tend to charge £1,000 - £2,000 plus VAT for a medico-legal report and sometimes more. Counsel will normally charge about £750 or so plus VAT for advice.

Of course, if the case goes to court, the costs will be much greater - usually over £100,000 plus VAT.

You will be informed as to the amount of costs incurred together with anticipated costs every six months throughout your case.

Q Who will pay the cost of investigating the case?

There are a number of ways of funding litigation:

Legal Aid (Public Funding)

The Legal Aid Fund is paid for by the Government and is run by the Legal Aid Agency, which is part of the Ministry of Justice.

Since **April 2013**, Legal Aid is usually only available in clinical negligence cases for claims in which it is alleged that the Claimant was injured at the time of birth or up to eight weeks of age, and where the Claimant has suffered from a neurological injury, such that they have been severely disabled as a result.

The Legal Aid Fund will pay legal costs (at a reduced rate) and expenses (including experts' fees) provided:

- there appears to be a case worthy of investigation; and
- the claim has sufficient likely value in comparison with the likely legal costs; (the Legal Aid Agency usually applies a **costs/benefits formula**); and
- the Claimant qualifies financially.

In cases in which the Claimant is a child, financial eligibility for Legal Aid will depend on the child's own income and capital - not the parents'.

Depending on your or your child's financial circumstances, you or your child may have to pay a monthly contribution throughout your case and/or a contribution from capital. A change in your financial circumstances can result in an increase or decrease in your contribution, or, ineligibility if such takes you above the qualifying limit/s.

We will discuss Legal Aid with you at the outset of your case and help you to apply for a Legal Aid Certificate if appropriate.

Private paying clients

Under the conventional privately-paying system, the client pays a sum up front (payment on account) and interim bills from time to time. Please see our Terms of Business for further information.

Legal expenses insurance / trade union funding

You should check whether you have insurance to cover legal fees. Some employers provide such cover or it may be included as part of your household insurance policy.

If you are a member of a trade union, you may have access to funding, and if private medical treatment has been paid for by credit card, there may be funding available. This method of funding is now rare in clinical negligence claims.

Conditional Fee Agreements – often know as no-win, no-fee

In many cases, we are willing to offer a Conditional Fee Agreement (CFA). This is an agreement whereby you will pay our fees only if your case is successful. We will only offer such an agreement if we think the claim has reasonable prospects of success and has sufficient value.

Due to changes in the rules about CFAs brought in on 1 April 2013, you will have to pay a 'success fee' to us out of your damages if you are successful; that success fee is capped by the rules.

Don't forget that if you start proceedings and lose, even if you are on a CFA, you may be liable to pay the other side's costs and you will be liable to pay your own expenses such as experts' and court fees and possibly barrister's fees.

It is possible to insure against the risk of losing, which is advisable in most cases. This is called **After the Event (ATE)** insurance. You will have to pay the premium out of your damages other than the premium which relates solely to the cost of expert fees for the initial reports on liability, which the Defendant is liable to pay.

What happens after the investigation?

We will consider the viability of your claim and whether to go ahead and will talk to you carefully about the cost of doing so.

Before we can issue proceedings in the county court or high court, it will probably be necessary to give full details of your allegations to the Defendant(s) in a **Letter of Claim** and then give them four months within which to make a full, reasoned reply in their **Letter of Response**.

This is a requirement of the **Pre-Action Protocol**. If we do not follow the Protocol, the court may penalise you in costs.

The procedure from that point to trial will be carefully explained to you. We have a second booklet to explain – ‘Following Investigation’.

Even if in the light of the evidence we advise you not to proceed further, you will hopefully have achieved a better understanding of what happened to you and why.

Who pays the compensation if we win?

NHS Trusts are responsible for the actions of their employees and will pay any damages awarded in accordance with agreements with the Department of Health.

For private health treatment, doctors are generally members of medical defence organisations or personally insured. General Practitioners (GPs) or dentists or opticians are also usually covered by their medical defence organisation.

Individual doctors or nurses are, therefore, most unlikely to pay damages or costs out of their own pockets if you win your case.

Q Will the other side see my medical records?

Yes, as you are making a claim relating to your health, the other side (including their solicitors, barristers and experts) will be entitled to see all your medical records, probably including all your GP records - as will the court if your claim goes to trial.

Q Do I have to go for a medical examination?

Yes, you will probably have to be examined by an expert whom we instruct (possibly more than one). This is an essential part of building your case.

If the case goes to court, or even if it does not get quite that far, it is very likely that the Defendant's solicitors will ask you to be examined by their medical expert(s) as well.

If we allege that you have suffered psychological damage, both sides may require a psychological or psychiatric assessment.

Sometimes in order to try to save costs, the court will order that a **single joint expert** be instructed by solicitors for both sides to report on your injuries or some aspect of them.

Please note:

If you are asked to travel to see the other side's doctor, the Defendant's solicitors will pay your travelling expenses. However, when we send you for a medical examination, you will probably have to pay your own expenses, even if you are legally aided.

Q Should I use the NHS Complaints Procedure?

It is often advisable to use the NHS Complaints Procedure before or at the same time as investigating a claim.

You must start a complaint within six months of the event complained of or the date when you found out about it (up to a maximum of 12 months from the date of the event), although there may be some discretion to make a complaint out of time in certain circumstances such as ill health.

We are able to assist you with your complaint but you can also get help through your local Community Health Council (CHC) in Wales or local Complaints Advocacy Service office in England (for your local service go to www.healthwatch.co.uk). We can put you in touch with your local CHC or Complaints Advocacy Service, or help you through the process ourselves.



Limitation – the three year rule



What are the time limits for making a claim?

There is a rule in all personal injury claims that, if it is not settled, a claim must be issued in court within three years of **either**:

- the date of the accident or negligent act, or if later
- the date when the Claimant became aware or should have been aware of all the following three facts:
 - the identity of the potential Defendant
 - the Claimant has suffered a significant injury
 - the injury is attributable to the act or omission of the Defendant

If proceedings are not started within this three-year period, the Defendant may argue that your claim is **statute-barred** and cannot be pursued through the court. There are certain limited exceptions to this rule – the court has discretion to allow the claim in certain circumstances, but this is rare.

Where the Claimant is a **minor**, the three-year period does not start until s/he reaches 18; thus proceedings must be issued in court before his/her 21st birthday.

The rules relating to persons under a **mental disability** are different and more complex.

Where the claim is about a person's **death**, the proceedings must usually be started no later than three years from the date of the death.

Q What should you do while the claim is being investigated?

- Keep in touch with your solicitor: respond as soon as you can to his/her requests for information;
- Please quote our reference on anything you send in to our office;
- Keep safe in a folder any documents that might be relevant to your claim, such as letters, receipts, bills, invoices, payslips and P60s;
- Tell us of any change of address, telephone numbers or email addresses;
- Keep us informed of any ongoing treatment that you are having;
- If you have a Legal Aid certificate, tell the Legal Aid Agency of any change of address or financial circumstances;



You and your case team

There are a number of factors which make clinical negligence claims one of the most difficult forms of litigation.

We, your solicitors, will do our part as quickly as possible but some things are out of our direct control - defendants can be obstructive, the medical records may be incomplete, experts may take a long time to respond and so on.

Even a relatively straightforward case will take at least two years to get to trial. There will be ups and downs as we go along and the process may appear frustratingly slow. It is only fair to tell you, at this stage, what will be involved.

The success of your claim will depend upon the combined efforts of your claim team consisting of you, your solicitors, medical and other experts and counsel. Later on, other professionals (eg, an accountant, occupational therapist, nursing expert etc) may be added to the team.

As your solicitors, we know that our reputation is on the line in every case we take on.

Our job is to pull together that team and make it work effectively to achieve the optimum result.



But remember...

Because of the high levels of legal costs in these cases and however the case is to be paid for, we must at all times consider the viability of the claim - whether the chance of success and likely damages justify the likely costs.



Conclusion

From reading this brochure you will have appreciated that clinical negligence litigation is complex and lengthy.

We will do everything we can to make the process as easy as possible for you but we do understand that it can be emotionally taxing.

There will be times when you do not hear from us for weeks at a time because we are waiting, for example, for an expert to provide his report. We will however keep you informed of all developments in your case.

There will be times when we need your input eg, in providing information, approving documents or confirming you will attend a medical appointment. We would ask for your co-operation in responding to these requests as quickly as possible.

Our methods have been developed over more than two decades and have resulted in successful outcomes for very many of our clients. We will build that strong team to win your case - you, counsel, our experts, and us, your solicitors.

By working together, we will create the best prospect of success.

Disclaimer

This guide is provided for information purposes only. We have done our best to ensure that the information contained in this guide is correct as of 01.07.2017. It applies only to England and Wales. However, the guide has no legal force and the information may become inaccurate over time, due to changes in the law. It is not possible to cover every situation or point in this type of guide and some of the information is over-simplified. The information in this guide does not constitute legal advice and we will not be liable to you if you rely on this information. Before you take any action, you should find out how the law applies to you and your particular situation by taking legal advice as soon as possible (to avoid any deadlines that may apply). Please get in touch as we offer a range of affordable services and options.

Any questions?


We pride ourselves on keeping our clients in the picture.

If you **phone** and the person you want is not available when you telephone, please leave a message and phone number, or alternatively, speak to a member of their team.

If you prefer to **call in**, please first ring for an appointment, otherwise the person you want may be out or tied up.

If you **write**, please address your letter to the person dealing with your transaction and quote the address of the property plus the reference from our most recent letter to you.


If you **email**, please quote the property address in the subject line.


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