
Clinical Negligence:

A guide to making a claim



At Kingsley Napley, the first thing we do is listen to your account of the events or treatment that caused your injury. We will then advise you on what we think is the best course of action for your particular claim.

Where should you start?

Many patients who are unhappy with the treatment they receive start by making a formal complaint to the doctor or hospital concerned. We can advise you on this process and it is usually straightforward. The purpose of the complaints process is not to provide compensation but to help provide an understanding of what has gone wrong and why.

Time limits for bringing your claim

Generally, you must start legal proceedings for clinical negligence within three years of the date of the injury or of when you had knowledge that the mistake occurred. In exceptional circumstances, it may be possible to issue your claim outside the three year limit and we will advise if this exception applies to you.

In claims involving fatal accidents, the time limit is generally three years from the date of the death. There are exceptions to this, and we will advise if this applies in your case.

If you are pursuing a claim on behalf of a child, the claim must be brought before their 21st birthday.

Special rules also apply to people who do not have the capacity to conduct their own affairs but the general rule is, that while they do not have that capacity, there is no time limit for bringing a claim.

Funding your claim

There are several ways in which a claim can be paid for. We will discuss your options in more detail at your initial meeting but the main forms of funding are:

Public funding

Public funding, formerly known as “Legal Aid”, is available in limited financial circumstances (for example if you have a low income and few savings) and is also dependant on the strength of your claim and its likely outcome. Even if you qualify for public funding, you may still have to make a contribution towards your legal costs.

Legal expenses insurance

You may have legal expenses cover as part of your home, car or other insurance that will pay for all, or part, of the legal costs. We will need details of all the relevant insurance policies you held at the time of your injury, as well as any current policies, to enable us to check whether the policy provides cover to investigate a clinical negligence claim.

Trade union funding

If you are a member of a trade union, you may be eligible for trade union funding. We will need details of your membership so we can find out whether funding will be available for your claim.

Private funding

If you fund the claim yourself, we will ask you for some money on account at the beginning of the claim and invoice you periodically. You will be charged for the time we spend working on your claim, based on an hourly rate that will be fixed at the beginning of your claim and reviewed annually. You will also incur a number of expenses, known as disbursements, such as experts' and barristers' fees.

Funding through a Conditional Fee Agreement

We may be able to take on your claim under a funding agreement known as a Conditional Fee Agreement. This can also be called a “No Win No Fee” agreement. Before offering such an agreement, we need to understand the facts behind your claim and its strength and you may be asked to pay for some early investigative work.

Who will handle your claim?

Your claim will be handled by a team of specialist clinical negligence lawyers. Usually this team is made up of a partner, a senior associate and a more junior solicitor. You will be provided with their names and contact details so there will always someone for you to talk to about your claim. In our experience having a team working on your claim means that it will progress as quickly as possible.

Investigating your claim

Before going to Court, we need to establish the strength of your claim and whether it is likely to succeed. The first section of the claim, which will take a number of months (sometimes a year or more), focuses on gathering evidence and obtaining the professional opinions of independent experts and, where appropriate, a barrister.

Proving your claim

Three factors must be proved before a claim can be established:

- A “breach of duty” by the healthcare provider(s) caring for you, which is when the treatment or care you received fell below an acceptable standard;
- An injury or a worse than expected outcome; and
- The injury or outcome was caused by the breach of duty (this is called “causation”).

A “breach of duty” may include:

- Failure or delay in diagnosis;
- Failure or delay in instituting appropriate investigation/care;
- Failure to take proper account of investigations/test results;
- Failure to take account of a previous medical history;
- Failure to take appropriate care when operating;
- Failure or delay in communication between clinicians and/or between clinicians and patients;
- Premature discharge from hospital; and/or
- Failure to obtain a patient’s consent.

You must also prove that the negligence has also caused harm. Simply establishing that a breach of duty has occurred is not enough for a claim to succeed.

You also have to prove that, on the balance of probabilities, the breach of duty has affected either your condition and/or your prognosis.

Gathering evidence

To assist with establishing your claim, we will:

- Prepare witness statements based on your recollection of events;
- Gather the relevant medical records from your GP, and any hospitals and private doctors that you have attended; and
- Obtain opinion(s) on your claim from independent medical expert(s) to assess whether the treatment or care received fell below an acceptable standard. If the treatment was unacceptable, we will ask the expert(s) to consider whether the unacceptable treatment caused or worsened your condition.

Deciding to go ahead

Once the evidence has been gathered, and if the expert reports are favourable, we will then arrange a “case conference” meeting with you, which will include the experts and barristers, to assess the merits of your claim and to reach a decision about whether your claim should proceed.

We will advise you at this stage if we think that your claim has a good chance of success.

Pre-action protocol

Typically, at the end of the investigative period and before commencing formal Court proceedings, a number of things, collectively known as the “pre-action protocol”, need to happen.

First, a Letter of Claim is sent to the Defendant (the doctor or NHS Trust against whom the claim is being made) setting out details of the allegations of negligence and the harm the negligence caused. Within four months, the Defendant must provide a Letter of Response setting out details of its reply to the allegations. The Letter of Response may give a full or partial admission of liability, or it may simply set out the Defendant’s response to the claim without making any admission. A final decision about whether to commence formal Court proceedings is then made in light of the Letter of Response.

Being a “Litigation Friend” or a “Personal Representative”

If the Claimant is a minor or lacks capacity to manage their own affairs, a family member may conduct the proceedings on their behalf. This person will be known as a “Litigation Friend” and we will advise you about what is involved.

In a fatal accident claim, you may bring a claim on behalf of the deceased’s estate as their “Personal Representative”. Again, we will advise you about the responsibilities involved.

Court action

The Court process in clinical negligence claims is relatively straightforward. A claim is commenced (“issued”) in either the High Court or the County Court by issuing a document called a Claim Form. This usually provides only the broadest outline details of the claim. Generally speaking, where claims are worth in excess of £50,000 or are particularly complex, they are begun in the High Court.

Once issued, the Claim Form must be served on the Defendant within four months, together with a document called the Particulars of Claim setting out the detailed allegations of negligence. This is accompanied by a medical report from a suitably qualified doctor identifying your injuries, and a preliminary Schedule of Loss and Damage that sets out the Claimant’s view of the likely value of the claim. Once these papers have been served on the Defendant, the Defendant then has 28 days within which to either serve a Defence or to admit liability for the claim. Assuming a Defence is served, a form called an Allocation Questionnaire is completed by both sides and returned to Court.

The Court then provides a date for an appointment (called a “Case Management Conference”) before a procedural Judge at Court (called a Master) when the “Master” will set a timetable for service of evidence by both sides. Evidence takes the form of witness statements and expert reports, as well as other relevant documents. Witness statements are exchanged with the Defendant first, followed by the exchange of expert evidence. The timetable includes a date by which the Claimant must serve the final Schedule of Loss and Damage setting out their valuation of the claim and the date by which the Defendant must serve a Counter-Schedule setting out the Defendant’s valuation of the claim.

In complex and/or high value claims, or where the Claimant is too young for compensation to be properly assessed, the value of the claim may be dealt with separately at a later stage. This is called a “split trial”.

There is also provision for the various experts to meet to discuss the case and to determine the extent of any agreement between the experts instructed on both sides. This is an attempt to narrow the issues that may need to be decided at trial.

The timetable allows for a period of negotiation between the parties, although this may happen at any point during the proceedings. The final stage of the timetable is the Court trial.

Progressing towards trial

Generally the trial is scheduled to take place within 12-18 months of the Claim Form being issued at Court. A lot of detailed preparation work is done during this period, including reviewing the defence, gathering and listing relevant documents, finalising and serving witness and expert evidence, arranging meetings of experts, and calculating the full value of your claim.

Valuing your claim (“quantum”)

The purpose of compensation or “damages” is to return the Claimant, as far as possible, to the position they would have been in but for the negligence.

If your claim is successful, you will receive compensation for your:

- Pain, suffering and loss of enjoyment of life (known as “general damages”);
- Past losses e.g. earnings, care you have required, travel and medical expenses (sometimes called “special damages”); and
- Future losses e.g. care that you will need in the future, changes to your accommodation, aids and equipment.

If your claim arises because of a death, you may be entitled to pursue compensation for loss of financial or other dependency on the deceased (e.g. childcare).

In addition to receiving compensation for your injuries, the Defendant will be required to pay a contribution towards the legal costs of your claim. We will advise you further about this.

General damages

General damages are an amount of money to cover pain, suffering and loss of amenity caused by an injury. General damages apply to both physical and psychological injuries or injuries that are a combination of the two. General damages can usually only be assessed accurately once your condition is stable and your prognosis for the future is known.

General damages are assessed by looking at what damages have been awarded for a similar type of injury in previous claims. Historically, relatively low sums have been awarded for general damages in this country. The multi-million pound claims that you may read about are made up almost entirely of compensation for future losses. At present the maximum awarded for general damages in an injury involving the most serious type of injury, such as major brain damage or tetraplegia, is in the region of £260,000.

Past losses

Past losses are the financial losses which have been incurred as the result of an injury caused by someone else's negligence. Past losses are sometimes called "special damages" and are calculated from the date of injury up until an actual or notional date of trial.

Examples of past losses include:

- Loss of earnings;
- Additional travel costs;
- Equipment costs, aids and appliances; and
- The cost of care and assistance provided to the Claimant, (assessed by considering either the actual cost of the care or a notional sum to reflect the value of care given by family and friends).

Future losses

For some of the more serious or complex injuries, future losses can make up the most valuable part of the claim. Losses under this category are calculated from the actual or notional date of trial up until the end of the Claimant's life. Examples of future losses are:

- The cost of additional care and case management;
- Loss of earnings and pension;
- The cost of physiotherapy, speech and language therapy, occupational therapy and other therapy needs;
- The cost of aids and equipment needs;
- The cost of accommodation needs; and
- The cost of medical treatment.

In cases of serious injury, especially where there are specific therapeutic and care needs, it is usual for your solicitor to obtain reports from various "quantum experts" to assess the extent of a particular need and to value the cost of providing for it. They are typically experts in nursing, speech and language therapy, occupational therapy, physiotherapy and accommodation.

Ultimately the final value of the claim is decided by a Judge following a trial. More common, these days, is that a settlement is agreed between the parties before the trial takes place. Where a Claimant is a minor or someone who lacks the capacity to manage their own affairs, the Court must "approve" any negotiated agreement.

Compensation is paid either as a single lump sum or as an annual payment (sometimes referred to as a "periodical payment"), or more usually as a combination of the two.

Interim payments

It may be possible to obtain an interim payment of damages from the Defendant to help you purchase specific items, such as a wheelchair or a car (or, if appropriate, a house) but generally only if the Defendant has accepted responsibility for your claim.

Provisional damages

There are some cases where a claim is made for a provisional award of damages. Provisional damages are relatively rare, but can apply where there is a chance in the future of either a serious disease developing or there being a serious deterioration. Provisional damages therefore allow a Claimant to apply for further damages at a later date.

Settling your claim

Claims may be settled by agreement between the parties at any stage up until trial. Alternatively the parties may not reach agreement and a trial is required.

Settlement out of Court

Most claims settle before they reach trial. The Court encourages parties to do this by way of written settlement offers, mediation and round table meetings.

We will guide you as to whether we think an offer made by a Defendant is reasonable. A settlement offer must be considered carefully because, if you refuse it and then recover the same amount or less at trial, a Judge can order costs penalties against you.

It may be appropriate for you to make an offer to the Defendant to settle your claim and we will advise you what a reasonable settlement would be. Your offer may attract costs penalties for the Defendant if a higher award is made at trial than the offer you made so they too will carefully consider any offer made.

The Court must approve any settlement for children, or those who lack capacity to manage their own affairs.

Trial

Where parties cannot reach agreement, the claim will be decided by a Judge at trial. The trial Judge then decides who should win, on what grounds, and if the Claimant is successful, the Judge will decide how much compensation should be paid.

State benefits

If your claim is successful, the compensation will affect any state benefits you currently receive.

If the compensation covers the same loss, (for example payment of carer's allowance) as your state benefits some of this will have to be repaid to the government. You must also consider whether your compensation affects your eligibility for state benefits and whether your compensation should be "ring fenced" by being in a Personal Injury Trust.

Court of protection and deputyship

We work closely with our Private Client team to provide a specialist yet comprehensive service for our clients who lack mental capacity to handle their own financial affairs or make decisions regarding their own welfare. Their needs can range from the basic (i.e. ensuring bills are paid) to specialist (i.e. recruiting care teams, purchasing and adapting property and specialist equipment, and producing annual accounts and tax returns for the Office of the Public Guardian).

We can arrange for these needs to be met but we can also provide expert assistance if you are the person appointed by the Court to do this.

You may need a Personal Trust for your compensation.

You may also want to consider powers of attorneys, including issues relating to medical treatment, Advance Decisions and Directives, as well as statutory Wills.

What you can do now

There are simple steps you can take now that can help your claim run smoothly.

Write everything down

It is best to write down your recollection of the events surrounding your treatment or injury while it is fresh in your memory. Your written account will be important evidence and will help us prepare your witness statement. Family and friends might also have important recollections which could be helpful so ask them to write their memories down as well.

You should also write down the effects that your injury has had and continues to have on you, whether this impacts on your ability to carry out your day-to-day activities and if there are any changes to your condition.

Keep us informed

It is important to keep your solicitor informed about changes in your health and your ongoing medical treatment. Also, tell us if your income and/or overall financial circumstances change because this may affect the way your claim is funded.

Preserving documents

Please keep all documents that relate to your claim safe. Even if you think the documents may be used against you, it will probably be necessary to show ("disclose") these to the Defendant during the course of the claim. Please note that "documents" include materials stored on computers and other electronic media.

Record your expenses

Keep records, for example receipts and invoices, for all the additional costs that arise as a result of the injury you are claiming for. For example:

- Extra journeys you have to make;
- The cost of paid care;
- Your medical costs including appointments, prescriptions and therapies;
- Special aids or appliances; and
- Domestic bills which may have increased as a result of your injury.

Care diary

As part of the claim, we may recommend that you keep a care diary to record the amount of time relatives spend providing care to you as well as the activities undertaken.

Recording lost earnings

Please keep details of what you would have been paid in the period since the injury occurred, as well as the lost earnings of anyone who is providing care too.

Meet the Team



KATE ROHDE

Head of Clinical Negligence
& Personal Injury

Since qualifying Kate has specialised in clinical negligence, drawn to it by the combination of the challenge of the medical issues and the very human element of the cases. She has extensive experience and a varied caseload, which has an emphasis on complex paediatric claims. Kate is an active member of the Claimants Clinical Negligence Practitioners Group (CCNPG) working closely with practitioners from other firms to respond to Government proposals regarding the future of clinical negligence and Legal Services Commission funding.



ROSS BRAIN

Partner

Ross is recognised as having “vast experience” in the field of clinical negligence, and representing families at Inquests where the death is related to a medical accident/clinical negligence. He has specialised in this area of law since qualifying as a solicitor and joining Kingsley Napley in 1999. Ross was made a partner in the Clinical Negligence and Personal Injury Department in 2006 and is an appointed member of the AvMA Clinical Negligence Panel. Ross’ practice covers the full spectrum of clinical negligence work, whether the clinical mistake/error occurs in the NHS setting, the private sector or as a result of General Practitioner errors.



STEPHANIE CODE

Partner

Stephanie has been recognised as a leader in her field for many years. Her tenacious approach to cases, efficient, sensitive and skilled counsel, combined with her desire to fight hard for her clients’ interests is a seamless fit with the ethos of our department. Stephanie is a true specialist and her contemporaries and peers applaud her for her skills, eye for detail and ability to see the bigger picture.



VERITY DANZIGER

Partner

Verity acts for clients with serious injuries arising from all aspects of medical and surgical practice – against GPs, NHS hospital Trusts and doctors in private practice. She has a particular interest in cases arising from the delayed diagnosis of cancer and cases relating to complex neurological injuries. Verity acts for children who have suffered brain damage either at birth or shortly afterwards and also acts for several clients who have sustained long term neurological damage either following spinal surgery, or because of a failure to identify and treat signs of an impending stroke.

Verity’s background in defence practice has honed her tactical approach to litigating. She uses this experience to achieve the best results for her clients and she is known for her rigorous approach in identifying the issues that are at the heart of a claim and the evidence that will be required to succeed.

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TERRENCE DONOVAN
Partner

Terrence is a hugely experienced solicitor who specialises in clinical negligence and personal injury claims. He is an accredited panel member of both the AvMA and The Law Society's specialist clinical negligence panels. Terrence's caseload focuses on claims involving cerebral palsy, brain damage, and other forms of serious injury. He also deals with fatal accident claims, inquests, product liability claims, and foreign claims.

Terrence is the co-ordinator for the Association of Personal Injury Lawyers Clinical Negligence Special Interest Group.



DR. JOCK MACKENZIE
Partner

As a dual qualified doctor and lawyer, Jock has a broad clinical negligence practice encompassing cases ranging from maximum severity brain injury claims to those of a less severe nature. Due to his medical background, Jock has a particular interest in cases involving complex medicine, adult brain injury, non-surgical hospital treatment, private medicine and fatal injuries caused by medical treatment, including cases involving inquests.



ALISON MOORE
Partner

Known for being "bright, hardworking and brave" (Legal 500 UK, 2009), Alison is regarded as an expert in Claimant clinical negligence law. She has a particular interest in cerebral palsy, wrongful birth and other brain injury cases as well as claims on behalf of children and she also represents families at Inquest. Alison has achieved many high value settlements for her clients and has a reputation for achieving impressive results in the most complex cases.

Alison is an accredited member of the AvMA Specialist Clinical Negligence Panel. She joined Kingsley Napley in 1995 and became a partner in 2002.



PATRICIA HAWKINS
Deputyship Partner

Patricia has the unique background of having specialised in Claimant personal injury litigation for over ten years, and then for the past eight years having been recognised as a specialist and leader in the field of Court of Protection work, particularly in relation to clients with acquired brain injuries arising from road traffic accidents, assaults and clinical negligence. Patricia brings a sensitive yet efficient approach to her work on behalf of clients and their families both during the litigation process and long-term in respect of financial planning, house purchase and adaptations, and care and support needs and generally assists and advises on high value damages claims.

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Kingsley Napley is an internationally recognised law firm based in central London. Our wide range of expertise means that we can provide support for our clients in all areas of their business and private life. Many of our lawyers are leaders in their field and our practice areas are highly ranked by the legal directories.

We are known for combining creative solutions with pragmatism and a friendly, sensitive approach. The relationship between lawyer and client is key. We work hard to match clients with lawyers who have the right mix of skills, experience and approach in order to achieve the best possible outcome.
