

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

Medical Negligence and Personal Injury

A Guide to Making a Claim

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Our guide to making a clinical negligence claim

At Kingsley Napley, our guiding principle is to provide you with a dedicated client service and we aim to make the claims process painless for you. We take seriously the fact that you have placed your trust in us and we will:

- Listen to you
- Treat you with sensitivity and respect
- Explain the legal process to you and support you through that process
- Give you clear and straight forward advice
- Fight hard to achieve the best possible result for your case

We win most of the cases that we take on and most of those cases settle without the need for a trial. Nonetheless, this guide takes you through the whole process and, of course, just ask us if you have any questions.

Time limits for bringing your claim

Do get in touch as soon as you think you may have a claim. All we really need to know at the outset is what happened to you – regardless of whether you have already made a formal complaint or gathered documentation of your own.

The reason for getting in touch quickly is that there are time limits for bringing clinical negligence claims. Generally, you must start formal legal proceedings within three years of the date of the injury or of the date you realised that a mistake occurred.

In claims involving fatal accidents, the time limit is generally three years from the date of the death, although there can be some exceptions to this. In claims involving an injury to a child, the claim must be brought before the child's 21st birthday.

Special rules apply to people who do not have the capacity to conduct their own affairs.

The general rule is that, while they do not have that capacity, there is no time limit for bringing a claim.

Time limits are a complex area of law. It is sometimes possible to bring legal proceedings after a three year time limit has applied – talk to us and we can tell you if this may apply to you.

Funding your claim

There is no charge for our initial discussion. When we meet, we will discuss the options for funding the claim, which are:

Public funding

In the main, public funding ("Legal Aid") is only available if the claim relates to a child injured neurologically in the course of pregnancy or during the first eight weeks of life.

Historically we held a contract with the Legal Aid Agency to allow us to conduct medical negligence cases on a Legal Aid basis. However, in August 2024 we decided not to renew our Legal Aid contract for administrative reasons and due to the limits imposed on expert fees.

Notwithstanding this decision, we are able to offer special terms to clients who would be eligible for Legal Aid which essentially match the benefits of Legal Aid and at the same time allow more freedom in the way that cases can be run.

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.

Conditional Fee Agreement (CFA)

We may be able to take on your claim under a funding agreement known as a Conditional Fee Agreement (CFA). We will explain the detailed rules surrounding CFAs but the basics are:

- If you lose your case, you do not pay for our time. If you take out appropriate insurance (and we will explore this with you), that insurance is to cover other liabilities that result from losing – for example experts' fees and Court fees. Mostly, even if you lose, you will not be liable for the Defendant's costs or for any insurance premium that you have taken out, except for unusual circumstances (such as if you behave unreasonably or dishonestly in the Litigation).
- If you win, you are liable for your legal costs but you can claim most of your basic costs back from the Defendant.

We are sometimes able to agree that NO costs are deducted from your compensation but it is still important to know the principles that govern what you MAY need to pay from your compensation, which are:

- A success fee – a percentage uplift on our basic costs to compensate us for the risk of not being paid at all. This is limited to 25% of certain aspects of your compensation (general damages and past losses – both of which are explained later in this booklet);
- Part of any insurance premium that you have taken out. This covers the expenses you are liable for if you lose. It also covers the Defendant's costs in certain circumstances, such as if they offer to settle the case along the way and, ultimately, the claim settles for that sum (or less);
- Any shortfall in the costs that have been claimed from the Defendant.

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.

Damages Based Agreement (DBA)

Like a CFA, these agreements mean that our fees will only be paid in the event of success. Our fees, in that scenario, are calculated as a percentage of the compensation – subject to important statutory limits imposed on the percentage. At Kingsley Napley, we rarely offer DBAs because they often do not work in our clients' financial interests.

What happens at the start of a claim?

Your claim will be looked after on a daily basis by one of our specialist qualified clinical negligence solicitors, supervised by a Partner. Alternatively, and depending upon how complicated your claim is, we may have a team of solicitors working on it, including a partner, an associate, a junior solicitor and a paralegal. You will be provided with their names and contact details so there will always be someone for you to talk to about your claim who knows the detail. In our experience, having a team working on your claim means that it will progress quickly. However, it is important to be aware that clinical negligence and personal injury claims often take several years to resolve.

Investigating your claim

Before going to Court, we need to establish the strength of your claim and whether it is likely to succeed. The early tasks, which will take a number of months (sometimes a year or more), focus 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 your healthcare provider(s); in legal terms, Claimants must prove that they received care that "no reasonably competent" clinician would have given;
- An injury or a worse than expected outcome; and
- A link between the injury and the breach of duty. Claimants must prove that the breach of duty has probably caused the injury. (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. Simply establishing that a breach of duty has occurred is not enough for a claim to succeed. You must also prove that the negligence has caused harm. You have to prove that, on the balance of probabilities, the breach of duty has made things worse by affecting your condition and/or your prognosis.

Gathering evidence

To assist with establishing your claim, we will:

- Prepare a witness statement based on your recollection of events;
- Gather the relevant medical records from your GP, and any hospitals and private doctors that you 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.

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.

At this stage we will also begin to look into the financial losses that you have suffered as a result of your injury, and begin to prepare the financial or "quantum" part of your claim (see page 8).

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". You may also be able to bring a claim as a dependent of the deceased and on behalf of other dependants. Again, we will advise you about the responsibilities involved.

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", 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 an outline of 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.

Court Action

If the claim does not resolve at the informal Pre-Action phase, formal Court litigation will follow.

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 of high value or are particularly complex, they are started 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 the relevant 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 a Directions Questionnaire is completed by both sides and returned to Court. The Court then provides a date for an appointment (called a "Costs Case Management Conference") before a procedural Judge at Court who will set a timetable for the steps that will take the case to trial. In most cases, at this early stage of the formal litigation, the judge will also fix a budget for the costs of the case based on the issues that are involved in the litigation and the overall value of the claim. Legal teams must conduct litigation in a way that is proportionate to the value of the claim and the costs are increasingly controlled by the Court in the course of the litigation.

The timetable fixed by the Judge provides, first, for the parties to exchange lists of all the documents they hold which are relevant to the issues in the litigation. This will include medical records but also any documents relating to the value of the claim – equipment and therapy receipts; lost earnings documentation etc.

The next step is witness statements to be exchanged with the Defendant. These are statements from factual witnesses (typically, you and family members for the Claimant and key members of the clinical team for the Defendant) who can give direct evidence about an issue in the litigation; perhaps the circumstances of the treatment itself or evidence about the aftermath of the treatment and its impact on your day to day life.

Once the parties have seen each other's factual evidence, expert evidence can be finalised and exchanged between

the parties.

Usually, we will have completed a detailed work up on the quantum side of your claim whilst finalising and exchanging factual and expert evidence. In other words, we may need factual and expert evidence to deal with quantum issues, not just liability.

The timetable will usually include a date by which the Claimant must serve a 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. That said, 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 – for both sides – to meet to discuss the case and to determine the extent of any agreement between the experts instructed. 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, at which the Judge will decide whether or not your claim succeeds and on what grounds. If the Claimant is successful, the Judge will decide how much compensation should be paid.

It is important to note that legal costs are generally negotiated after the settlement or trial and that aspect can take some months to resolve.

Valuing your claim (“quantum”)

The legal aim 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 may 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 the deceased’s earnings or their help with domestic costs, such as 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 but it is important to remember that costs are separate to compensation.

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 often assessed by looking at what compensation has 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 multimillion pound claims that you may read about are often made up almost entirely of compensation for future losses.

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 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 may be calculated from the 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. Typically, they can include experts in nursing, speech and language therapy, occupational therapy, physiotherapy and accommodation.

Ultimately the final value of the claim may be decided by a Judge following a trial. More common, 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 still 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 as a combination of the two.

Interim payments

As the claim proceeds 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 in your condition. Provisional damages therefore allow a Claimant to apply for further damages at a later date.

Settling your claim out of court

Some cases are decided by a judge at trial but most claims that proceed settle without a trial and they can be settled at any stage. The Court encourages parties to enter negotiations – either by written offers or by mediation or “round table meetings” with all parties and the legal teams present.

We will guide you as to whether we think an offer made by a Defendant is reasonable. A formal 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. Indeed, although Claimants are generally no longer liable for Defendant’s costs, even in the event of losing their claim, one of the exceptions is if a Claimant rejects an offer to settle and fails to “beat” it. In these circumstances, the Court might order you to pay some of the Defendant’s costs and the Defendant will not pay all of your own costs. For these reasons it is important to consider all offers to settle.

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 penalties for the Defendant – both in terms of your receiving additional compensation and in terms of the costs of the case – if a higher award is made at trial than the offer you made so the Defendant will also carefully consider any offer made. The Court must approve any settlement for children, or those who lack capacity to manage their own affairs. So, in these cases, there will be a court hearing even in cases where the settlement has been previously agreed between the parties without formal litigation. This allows the court to scrutinise the settlement being agreed on behalf of vulnerable people.

State benefits

If your claim is successful and you receive an award of damages, you need to be aware that this may affect your entitlement to state means tested benefits that you currently claim or may wish to claim for in the future. It is possible to protect your right to claim means tested benefits by placing interim or final awards of damages into a Personal Injury Trust. This can ‘ring fence’ compensation in terms of benefits and also potentially from other issues such as divorce settlements or future care home fees. If you want further advice about Personal Injury Trusts then we can refer you to one of the solicitors in the Kingsley Napley Private Client Team. A Personal Injury Trust has to be set up promptly if compensation is awarded and certainly within 52 weeks of any compensation payment (be that a final payment at the end of the case or an interim payment).

If the compensation covers the same loss as your benefits, (for example, if a claim includes the costs of care to look after you and someone in your family also receives a carer’s allowance to look after you), some of your benefits will have to be deducted from your compensation by the Defendant and repaid to the government.

Court of Protection and deputyship

We work closely with our Private Client team to provide a comprehensive service for our clients who receive compensation awards. The Private Client team can help you with:

- Professional Deputyship and Court of Protection Services for clients who cannot manage their own affairs
- Personal Injury Trusts
- Power of Attorney and Statutory Wills

So, together with our Private Client team, we have huge experience in the many practical and legal challenges that can arise, such as the purchase and adaptation of homes; recruiting carers and therapists; tax advice; investment advice; setting up monthly and annual budgets, and the preparation of accounts for the Court of Protection.

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 a diary of the things which you need help with on a day to day basis (or ask the person who provides that help to keep a diary of what they do and how long it takes them).

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 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, mobile phones, and other electronic media.

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 or journeys that you need to make by taxi rather than car;
- The cost of paid care;
- Your medical costs including appointments, prescriptions and therapies;
- Special aids or appliances;
- Domestic bills which may have increased as a result of your injury;
- Details of your salary before and after the injury (as well as the same information for any friends or family who have taken time off work to look after you).

Remember

- Write everything down
- Keep Kingsley Napley informed
- Preserve all related documents

THE CLINICAL NEGLIGENCE TEAM IS PROUD TO SUPPORT:



Action against Medical Accidents (AvMA), is the UK charity for patient safety and justice. They provide free by medical accidents. AvMA is also the foremost patients' charity working to improve patient safety in the UK.
www.avma.org.uk



Back Up Spinal Cord Injury Charity, is a UK charity, dedicated to supporting people affected by spinal cord injury get the most out of life.
www.backuptrust.org.uk



Dame Vera Lynn Children's Charity (DVLCC), supports children under five with cerebral palsy and other motor learning impairments through a life-changing, intensive early intervention service.
www.dvlcc.org.uk

How we work with you

We get to know our clients and their families, listen carefully to what has happened to them, and find out their priorities and concerns. We support our clients throughout the life of the claim so that they are kept constantly involved. All important decisions are taken together.

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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.

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