Clinical Negligence: Following Investigation

Jackson Lees

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.

Introduction

This booklet follows on from our booklet: 'Investigating your Claim' - please re-read that booklet as much of it applies throughout the case (eg, as to the principles of the law of negligence, role of expert witnesses and the damages to be claimed).

Once we have investigated your case and established through obtaining independent expert medical evidence that there are reasonable prospects of being able to prove that:

- the treatment you received was 'negligent', ie, fell below the standard you are entitled to expect from reasonably competent doctors or other health professionals; and
- you have suffered damage as a result of that negligence (causation)

We will then be able to send a **Letter of Claim** to the Defendant as part of the Pre-Action Protocol. Unless there are exceptional circumstances, we are required to follow the Pre-Action Protocol, otherwise the court may penalise you in costs for starting court proceedings prematurely.

Q What is the Pre-Action Protocol and what is its purpose?

At the completion of the investigation, we will have sorted out exactly which allegations will be supported by our experts. The allegations will probably be more detailed than those you gave us when you first saw us. We should also have a clearer idea of the value of the claim.

Under the Pre-Action Protocol, we will normally be expected to send a detailed Letter of Claim, setting out these detailed allegations and as much information as we can as to the items/losses claimed for. We then have to wait for up to four months to allow the Defendant to come up with a detailed and reasoned response. If possible, we will aim to settle your case without having to start court proceedings.

If it's not possible to resolve your case at this stage, and, provided we consider that your case remains viable, we will look to start court proceedings ('issue proceedings').

Q What do we need to issue the proceedings in court?

We must prepare various documents:

1. The **Claim Form** - this contains only a very brief outline of the case. The lodging of this document (with the appropriate fee) actually initiates the claim in court.
2. We will usually ask a barrister (counsel) to draft the **Particulars of Claim** which is the document which sets out:

- a brief factual history of your treatment
- the allegations of negligence
- a summary of the injuries you have suffered

This document will be approved by our experts and you before it is lodged with the court. In some cases we will prepare this document ourselves. You must sign a Statement of Truth to confirm that you believe that the contents of this document are true, and will have been warned about the strict consequences that may apply if the court find that you have been fundamentally dishonest.

3. **Schedule of Losses** - a list of the past and future losses/ expenses you have incurred as a result of the negligence eg, loss of earnings, cost of care, travelling expenses, and anticipated future losses. You must sign this document to confirm the truth of its contents, and again, must bear in mind the court rules relating to fundamental dishonesty.
4. We will have one of the medical experts prepare a **condition and prognosis report**, which also has to be lodged with the court. This will set out the injuries you have suffered as a result of the negligent treatment and your future prospects for recovery. It will not deal with the allegations of negligence, which are dealt with in a separate report.
5. **Details of Funding** – this confirms how your claim is funded, such as by Legal Aid, CFA and After-The-Event Insurance.

Q In which court will my case be started?

This depends on the value of your claim. As a general rule if the total value of your case is likely to exceed £50,000, your case will be started in the high court. If less than £50,000, it will be started in the county court.

The procedural rules in these courts are more or less identical.

Q What does 'Issuing Proceedings' mean?

It simply means lodging the Claim Form - with the appropriate fee - at court. The Claim Form is the document which initiates the case but is very brief.

When we lodge the Claim Form at the court office, the court registers the case.

The Claim Form and the other documents must be served on the Defendant within four months, unless the court orders otherwise.

Q What happens after the papers have been lodged with the court?

They will be sent to (**served on**) the Defendant or the solicitors acting for the Defendant.

Under the rules of the court, the Defendant's solicitors are required to lodge with the court and serve on us a Defence within 28 days of receiving our papers. In practice they may request an extension of time to take this step. We will sometimes agree to a reasonable extension but this will depend on whether we think that if the Defendant were to ask the court to grant an extension, the court would do so.

Q What happens when the Defence is served?

It depends on what the Defendant says in its Defence.

If the Defendant admits liability but says that it still wants to argue the value of the case (quantum), we can ask the court to enter judgment and set a timetable leading to a trial called **Assessment of Damages**.

If the Defence contests both liability and quantum, the procedure set out below will apply.

Often the Defendant will send us some questions to try to pin down our case. These are called **Requests for Further Information** (Civil Procedure Rules, Part 18). Depending on what they are, we may need to answer them.

Similarly we may want to send a Request for Further Information to the Defendant to make it clarify the Defence – particularly to compel the Defendant to make clear what it is saying about causation.

The court will send out a Directions Questionnaire to ask the parties into which **track** of the civil procedure system the case should be placed. Most clinical negligence cases will be in the **Multi-track** – ie, will not be subject to automatic procedural rules but must be considered by a judge at a **Case Management Conference** and given a procedural timetable specific to that case.

At the Case Management Conference, the judge will consider all aspects of the case and - often with the agreement of the solicitors on both sides - will set a timetable within which certain steps must be taken. He/she will particularly want to identify the areas of dispute between the parties (and the areas of agreement) and to make orders about what expert witness evidence may be given. This timetabling order is known as **Directions**.

You should be aware that sometimes it becomes impossible for either or both parties to comply with these timescales. The courts have become increasingly likely to impose a penalty in costs on the party which does not comply so it is **imperative** that you respond promptly to any requests from your solicitor to deal with any documents or to provide any information. If there is a persistent or unreasonable delay, the court can make more drastic orders which can affect the outcome of your claim.

The judge will also want to make an order about **Costs Budgeting**. The court will set a budget within which it expects your claim to be brought to trial. We will tell you about that at the time.

What are the usual directions?

Exchange of lists of documents

Usually within 14-21 days of the Case Management Conference, each party (through their solicitors) must supply to the other a list of all documents they have in their possession which are relevant to the case, whether or not they are helpful to that party. This is called **Disclosure**.

It will include such documents as medical records (including your GP records, even if it isn't a claim against your GP) and also any documents which prove any financial losses you have sustained as a result of your injuries eg, payslips or letters from your employers (if you are claiming lost earnings); or receipts for equipment, adaptations of your house (if this expenditure has been necessary because of your injuries) or other expenses in respect of which you are claiming.

We will have asked you before we sent the Letter of Claim to provide us with all documents you have in your possession which you think may be relevant to your case in any way. We will then decide whether the document needs to be included in our list and shown to the other side.

You are not allowed to hide or destroy relevant documents which you think might harm your case. You may be required to sign a statement confirming that you have made full disclosure.

Your duty of disclosure remains throughout the life of your case, so for example, if any document comes to light later on down the line which might be relevant to your case, you must tell us straight away.

Documents include information recorded in any way such as film footage, audio recordings, text messages and emails.

Exchange of witness statements

The next stage involves the parties exchanging the statements of those witnesses who will give evidence of a factual nature (ie, what actually happened and what effect this has had). This is called **Exchange of Factual Evidence**.

We will prepare with you a written statement of your evidence about what happened and how it has affected you. We may also take statements from relevant family members or friends who can confirm what happened and/or the effect it has had.

You and your witnesses will have the opportunity to check and amend the statements. The statements must contain a **Statement of Truth** by which a witness confirms that he/she believes the contents to be true. If a witness knowingly makes a false statement he/she may be guilty of contempt of court or a criminal offence, or both, and drastic penalties may be imposed including, at worst, imprisonment.

If the case goes to trial, the judge will see your statement which will stand as your main evidence. You will be cross-examined by the other side's barrister on its contents, and possibly by the judge.

It is important to get the statements right. The court will probably refuse to allow evidence not in the statements to be admitted at trial.

In exchange for your statement(s), the Defendant must provide to us copies of the statements of their witnesses. These statements will usually be the evidence from the doctors and nurses who provided your treatment, stating their version as to what happened. They may also state why they did what they did.

Exchange of expert evidence

After we have exchanged witness statements we will send copies of the Defendant's statements to you for your comments and to our expert witnesses.

Our experts will be asked to finalise their reports, having seen what the Defendant's witnesses have to say about what happened. Sometimes it is appropriate to have a meeting (often called a conference) with our experts and perhaps our barrister at this stage.

The finalised reports are then exchanged for the Defendant's expert reports.

Please note:

Before we reach this stage the Defendant will probably have asked to have you examined by their medical expert. This is a request which you cannot refuse without a very good reason. The Defendant must pay your travel expenses.

Q Experts' meetings and joint reports

In the majority of cases, the court will direct a meeting of the opposing experts of the same specialty and require them to produce a joint report in which they identify those areas where they agree and those where they disagree (and their reasons for disagreement). This is so as to reduce the court time required for the trial and to save costs.

Q Will my case be reviewed / re-appraised at this stage?

Yes in every case. This is the point at which we will probably have as much information as we are ever going to get, including the strength of the Defendant's case. We will therefore be able to assess the strengths and weaknesses of the case and advise you as to whether you still have a reasonable chance of winning if your case goes to a trial and whether the likely damages are proportionate to the costs of going ahead.

We do this in all cases but if you have the benefit of a Legal Aid Certificate the Legal Aid Agency will often require us at this stage to obtain the further opinion of counsel (the barrister) as to whether the case is sufficiently strong and has sufficient value taking it to trial.

When providing this advice counsel must take into account:-

- all the evidence of both sides
- the strengths and weaknesses on both sides
- the likely value of your case ie, what you would be likely to recover in compensation if you were to win
- how much it will cost to take your case to trial

The Legal Aid Agency will only fund the cost of taking the case to trial if it is economically viable according to its criteria. It will apply its **cost/benefit test** whereby the value of the claim and chances of success are weighed against the likely costs. If the costs will be more than the likely damages the Legal Aid Agency may well refuse to extend the legal aid to cover the trial.

Please note:

The Legal Aid Agency will apply this economic viability test throughout the case and will require us to regularly review the costs that are being incurred and tell it if the case is no longer economically viable.

Please note:

The court rules require the judge deciding on costs budgeting to consider the **proportionality** of likely costs against the likely level of damages. We must take that into account when we consider viability of your claim.

Q What if the other side want to settle out of court?

At any point during the case, the Defendant may make an offer to settle. It may be an informal (**without prejudice**) offer in a letter or over the telephone, or a more formal offer in the form of a **Part 36 Offer** ('Part 36' is one of the Civil Procedure Rules which govern court procedure).

The Defendant can make offers to settle at any point, even at the door of the court.

If the Defendant makes an offer, it is unlikely to be for the full value of your claim. We will have valued your case in terms of **special damages** ie, quantifiable past and future losses and expenses, and **general damages** ie, damages for your past and future pain, suffering and disability - both physical and psychological.

When making an offer, the Defendant will take into account the risks which it thinks that both sides face of losing at trial and may only offer a percentage of the claim's value to take into account that perceived risk. If, for example, it is a 50/50 case, the Defendant may offer 50% of the value knowing that you may prefer to accept 50% now - rather than going to trial and taking the risk of losing and coming away with nothing.

Bear in mind too that Defendants rarely value damages as high as Claimants. The Defendant's offer may be reduced on the basis that all the special damages may not be awarded if your case went to trial, eg, if you are unable to do your job because of your injuries, the Defendant may allege that you could do another type of job, so reducing your loss of earnings claim; or it may argue over the cost of care or equipment.

If the Defendant makes a Part 36 Offer, the offer must be considered very carefully because of the serious costs consequences. If you reject a Part 36 Offer, take the case to trial and win, but the judge doesn't award you more than the previous Part 36 Offer, you may have to pay out of your damages both your own legal costs and the other side's legal costs from the final date you had for accepting the Part 36 Offer (usually 21 days from receipt of the offer).

We will tell you when any offers are made and will advise whether an offer is one you ought to consider accepting. But we can only advise - you must make the decision.

If you have a Legal Aid Certificate, we must report any offers to the Legal Aid Agency along with our/counsel's opinion on them. The Legal Aid Agency can stop Legal Aid if it believes that you are refusing a reasonable offer.

If you are on a CFA and have insurance backing your claim, we must report any offer to the insurer. The insurer can stop cover if it believes that you are rejecting a reasonable offer. Similarly, we may have to terminate the CFA if the risk of failing to beat the Defendant's offer is too great as we won't get paid (for the work we do after the final date you had for accepting the Part 36 Offer - if you fail to beat it).

Q Can I put pressure on the Defendant to settle?

Yes we can make a Claimant's Offer to Settle. If we do so and the Defendant refuses it, but you get more than the amount of the offer later in the case or at Trial, the Defendant can be ordered to pay penalty interest on the damages awarded at up to 10% over base rate and an increase on your damages which, depending on the amount of the award, may be as much as 10%.

Q What happens if my case doesn't settle?

There will probably be a second procedural hearing when the court will fix a date for the trial (if a trial date has not already been arranged). The trial date will have to take into account the availability of the witnesses on both sides - particularly the expert witnesses.

Before the trial, we may need to have another meeting with counsel and our experts, depending on the complexity of the case.

The length of the trial will again depend on the complexity and number of witnesses. Most clinical negligence trials take at least three days and more complex cases can take several weeks at court.

Usually more than half of the costs of a case are taken up with the costs of the trial itself.

Q How long will it take from issue of proceedings to trial?

This depends on various factors including the complexity of the case and the number of witnesses (particularly expert witnesses).

As a general rule, we would expect to resolve your case either through settlement or trial within about 2-3 years of issuing proceedings, but cases involving serious disabilities such as brain injuries or amputations are likely to take considerably longer.

Q What happens at the trial?

The case will be heard before a single judge (there is no jury). It is a public hearing and anyone is entitled to come into the courtroom to listen to the evidence.

You will be represented at trial by a barrister (often known as 'counsel'). Barristers are specifically trained in trial advocacy. A representative from our office will be at court throughout the trial.

The Defendant will also be represented by a barrister.

The trial will begin with each barrister making a speech summarising their side of the case.

Evidence will then be called on your behalf, including from yourself. Some evidence may be agreed and taken only in written form, but otherwise the witnesses, including expert witnesses, will be taken through their evidence by our barrister and then cross-examined by the Defendant's barrister, and perhaps by the judge.

The same procedure is followed in reverse in respect of the Defendant's witnesses.

At the end of all the evidence, each barrister will make a closing speech.

The judge will then consider the evidence and counsels' submissions, make a decision and deliver a judgment. It can sometimes take a judge several days or even weeks to give a decision, depending on the complexity of the case.

Please note:

Only about 2% of clinical negligence cases ever get as far as a trial. The vast majority will either have been settled or withdrawn before they get close to trial.

Q Can the court only make a single, lump sum award of damages?

No, although in most cases a lump sum award will still be appropriate, the Courts Act 2003 means that the court also has power to order periodical payments of damages. This usually means that a smaller lump sum is paid, together with regular payments every year of agreed amounts, usually for the rest of your life. This will be appropriate where the Claimant has a need for expensive care for many years to come.

Q If an offer to settle is made or if I win at trial, will there be any deductions from my damages?

Yes, possibly for three reasons:

First, if you have had any advance payments of damages from the Defendant (**interim payments**), they must be taken off the final settlement.

Second, there may be deductions because of the **Compensation Recovery Unit** (CRU) rules.

If, as a result of your injuries, you have received State benefits, the Defendant is obliged to pay back those benefits to the Department of Work and Pensions out of your damages.

These deductions will only affect certain parts of your damages. For example, if you are unable to work because of your injuries, we will claim loss of earnings on your behalf. If you have received a work-related benefit such as Incapacity Benefit, the amounts you have received by way of benefit will be deducted from the loss of earnings element of your claim.

Similarly if someone has had to care for you because of your injuries and we have put in a claim for the cost of that care, any care-related benefits such as the care component of Disability Living Allowance will be deducted.

Any sum you receive for general damages (for pain and suffering) will not be subject to deduction for the CRU.

Before your case is settled, we will have received a 'CRU Certificate' setting out all benefits which have to be repaid out of your compensation and will advise you on this in the context of any offers made.

Third, you may have to pay some legal costs out of your damages. If you have a Legal Aid Certificate, some costs may have to be paid back to the Legal Aid Agency under the Statutory Charge Rules (see below).

If we have been working under a Conditional Fee Agreement (CFA) which was put in place after 1 April 2013, you will have to pay our success fee and part of the insurance premium for the policy backing your CFA. We will have told you about this when you signed the CFA.

There are some, less likely, circumstances in which costs may have to be paid out of damages, for instance if the court has made an order against you in respect of an application during the case.

Who pays the costs of the case?

The usual rule for **cases started before 1 April 2013** is that the loser pays the winner's costs.

Therefore if you **win**, most of your costs will be paid by the Defendant. These are known as **between-parties (inter-partes) costs**.

In most cases, there will be some costs which the Defendant will not be required to pay eg, the cost of obtaining any reports we haven't actually used in the case, or setting up the funding arrangements – eg, in a legally aided case, any correspondence with or work we have to do solely for the benefit of the Legal Aid Agency. These costs will have to be paid by you out of your damages - and this applies even if you had a Legal Aid Certificate because of the **Statutory Charge** rules which will already have been explained to you.

If you **lose** the case, you will be ordered to pay the Defendant's costs if court proceedings have been served.

If you have a Legal Aid Certificate the court may make an order that any costs order 'shall not be enforced without leave of the court'. This means that you will probably not have to pay those costs unless for some reason other money becomes available to you (eg, through inheritance) and the Defendant applies to enforce the costs order. (There are some other restrictions on enforcing costs against a legally aided Claimant).

If you do not have legal aid, you will probably be on a CFA and we will have arranged insurance to cover the other side's costs in the event of losing.

But the rules for cases started after 1 April 2013 are different: If your case is funded by Legal Aid or is on a CFA signed after 1 April 2013, **Qualified One-Way Costs Shifting** (QOCS) will apply to your claim. In certain circumstances, it will mean that if you lose your claim and recover no damages, you do not actually have to pay the other party's legal costs; or if you do get some damages, any payment that you do have to make is limited to the amount that you recover from the other party by way of damages.

For example, if the Defendant makes a Part 36 Offer to settle and you do not get more than the offer by the conclusion of your claim (either in negotiation or at trial), then there are likely to be costs consequences, such as being ordered to pay the Defendant's costs from the last date that the offer could have been accepted without incurring costs penalties (usually 21 days after the offer was made) - but the court would limit the requirement to pay those costs to the amount of damages that you are actually awarded.

We will advise you at the appropriate time if you are covered by QOCS and what its implications are for your case. The rules are set out in Part 44 Section II of the Civil Procedure Rules.

Under a CFA signed after 1 April 2013 if you win you will have to pay our **success fees** and perhaps that of counsel, and the **premium** for the insurance backing your CFA, out of your damages.

If you received Legal Aid after 1 April 2013, the Legal Aid Statutory Charge as explained above, in relation to your own costs will still apply, as will the costs protection in relation to your financial circumstances.

Q Who decides about the costs?

When one party is ordered to pay the other party's costs, we try to agree with the other side the amount to be paid. If we cannot agree, a detailed bill is put before the court and argued out at a hearing for a judge to decide. This is called **detailed assessment of costs**. The judge may also decide the costs issues on the basis of the papers provided, without holding a hearing, and this is known as **provisional assessment of costs**.

If you have Legal Aid, the court may have to approve costs to be deducted from damages under the Legal Aid Statutory Charge. Any contributions you made towards your Legal Aid are taken into account when payment of Legal Aid costs is made.

If you have won and are on a CFA started after 1 April 2013, we will talk to you about the amount of the success fee and the insurance premium to be deducted from your damages. If we cannot agree the amount of the success fee, we will go to an arbitrator or you can ask for an assessment by the court.

The costs assessment procedure is lengthy, often taking many months. We may have to hold part of your damages until it is sorted out.

Q Will you be able to assist me with the best use of my compensation?

Yes. We can put you in touch with an Independent Financial Adviser if you wish and we can give you a list of Independent Financial Advisers.

You are of course free to choose your own. We can also advise on making a Will.

How does it work?

As the settlement of your claim draws near, you should begin to give detailed consideration to your ongoing financial needs. This means establishing a financial plan that draws together issues such as:

- The need for long term income
- The requirement for capital growth
- The planning of your estate
- The protection of means-tested benefits
- The possibility of holding funds under trust
- Your tolerance for risk
- The need for immediate and future capital expenses

We will consider the appropriateness of a periodical payments order for more substantial claims as it may confer some tax advantages and certainty. If the claimant is a minor or in receipt of means-tested benefits, the creation of a trust may be also appropriate. A variety of types of trust is available, including Special Needs Trusts.

We will also provide detailed advice about the making of a Will, and in large cases, Inheritance Tax planning.

If you wish, an Independent Financial Adviser will put together an investment plan that will take all of the above into consideration. They will then work with you, whether Claimant or Trustee, to ensure that the plan is adapted and updated to take account of changing needs and circumstances.

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. We appreciate that cases such as yours can present something of an emotional roller-coaster for you.

There will be times when you do not hear from us for weeks at a time because we are waiting, for example, to exchange witness statements, or expert reports. 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 ask for your co-operation in responding to these requests as quickly as possible.

Our methods have been developed over a number of years and have resulted in successful outcomes for very many of our clients. We are looking to build up a strong team to win your case. That team is made up of you, counsel, our experts and us, your solicitors. By working together, we will have the best prospect of success.

But remember...

Because of the high levels of legal costs in these cases and however the case is to be paid for (whether by Legal Aid or otherwise), we must at all times consider the **viability** of the claim – whether the chance of success and likely damages justify the likely costs.

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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