Ashtons LEGAL

medical injury a claimant's guide

The legal claims process is not a simple one and clinical negligence claims are amongst the most complex. We have over three decades of experience representing patients and recovering hundreds of millions of pounds of compensation in this field, and we will be there at every step of the way to advise you.

We are confident that our experience and communication skills will ensure that we can help minimise any anxiety you may have about bringing a claim. We are committed to ensuring that you recover fair compensation for your injuries.

Even at this early stage we would like to give you an overview and attempt to demystify the process. Most cases follow a pattern of steps. There will, of course be variations, each case requires a unique evidential, tactical and procedural approach, but this outline should go some way to prepare you for the further explanations we will give you. It is also very important that you understand from the outset the costs of making a claim.

We do everything we can to resolve claims swiftly but you need to be prepared for a relatively long investigation. Your input and prompt response are key to a successful conclusion.

Please read this guide and keep it handy so you can refer back to it throughout the case.

Key things you must know about a medical injury claim

Parties to the Claim

You are the Claimant. The hospital or GP against whom the claim is made is called the Defendant. There are two main legal issues in most claims. These are responsibility for injury (lawyers call this liability) and the amount of compensation or damages (which lawyers call quantum).

Liability

As the Claimant, the burden is on you to prove:

Breach of Duty
You have to prove your treatment has fallen below the standard of the reasonably competent practitioner in that field of medicine, and at that time. Courts have decided that they need guidance in establishing this standard from an independent doctor practicing in the same field of medicine and at the time in question.

Causation
It is not enough to say that the doctor made a mistake and you suffered an injury. You have to prove that the mistake caused the injury. Again this issue must be proved by a doctor, who is an expert in the relevant field.

Proportionality

Since April 2013 a new test has been introduced to assess how much your opponent should contribute to your legal costs if you win your case.

In order to recover a contribution from the other side, we have to show that:

1. Each element of your bill of costs (reflecting the work undertaken) was reasonably and necessarily incurred in order to advance your case
2. That the overall costs claimed are proportionate.

The question of what is or is not a proportionate overall bill or contribution to your legal costs will depend upon whether your costs bear a reasonable relationship to:

a) The extent to which the value of your claim is in dispute
b) The complexity involved

c) Any additional work caused by the conduct of the Defendant
d) Any wider factors involved such as reputation or public importance.

There is currently no guidance from the Courts on how these guidelines will be interpreted in clinical negligence claims. We are simply told that the question will be decided on a case by case basis. What they reinforce, however, is the need for us to work together with you as efficiently as possible and to avoid incurring costs wherever possible. We will also have to consider whether even though a particular task or report, for example, will assist with a particular element of your case it is really worth obtaining. This may be because the Defendants have already made substantial admissions concerning a particular element of the claim and the cost of arguing over the remainder is likely to exceed the value of what is involved.

The tests are obviously not intended to be entirely based on the financial value of your claim but as you see can be affected by complexity and how the other side conduct themselves. If they create work for us by delaying or being unreasonable then we should be able to persuade the Court that you should not pay the penalty in relation to any resulting disproportion in costs. This test will apply equally if you become liable for the other side's costs for any reason, most obviously because we have failed to beat a Part 36 offer (see below). That is if our (your own and our) conduct is regarded by the Court as having unreasonably increased costs, the other side may be able to justify their own otherwise 'disproportionate' claim for costs against you to be deducted from your compensation.

Costs which have already been incurred and which are then considered by the Court to be disproportionate may not be payable by the Defendant and therefore may be deducted from your compensation.

Costs Budgeting

This is something else that is new since April 2013. It remains to be seen how it will work in practice.

If proceedings are issued, the Court will require both parties to prepare and exchange a Costs Budget. This will set out the costs already spent and the costs each party needs to spend to completion, including our fees, expert fees and Barrister's fees. If the Court considers the costs are not proportionate, the budget can be cut and this will affect the work we can do on your claim. We will first send the Costs Budget to you to agree, as this will affect the amount you will have to contribute towards your costs. You must respond with your agreement or comments promptly as, if the Court does not receive the Costs Budget on time, the Defendant will not be ordered to pay your

costs (apart from court fees).

If circumstances change following the submission of the Budget we can apply to vary it. It will be important to do so if we expect an increase in costs which was not previously anticipated.

Costs of Your Claim (unless you are publically funded)

We have written to you about how your claim is funded and how we will assist in recovering costs from the Defendant if you win your claim. You should please bear in mind that there will be a deduction from your final damages as a contribution to your costs and there will be a delay in us releasing a proportion of your damages to you until costs are agreed or ordered by the court.

Steps to be taken in a medical injury claim

The way a claim is conducted and the steps taken will depend on the nature of the claim and to some extent its value (see proportionality). We will explain the steps to you at the appropriate stage and we encourage you to ask if there is anything you do not understand. We have set out below how a 'typical' claim may proceed. However, there may be additional stages required by the particular issues in a case or work may have to be limited in order to remain proportionate.

The two issues of liability and quantum may or may not be dealt with at the same time. In appropriate cases, the issue of liability will be dealt with before any detailed work is done on the valuation of the claim. We deal with them separately in this guide. The steps in the liability phase may be cut short if the Defendant accepts liability. The same applies to the quantum phase if an acceptable offer is made.

1 Your Statement

You will have told us something about what happened to you and at an early stage we will usually prepare your words into a statement. This will later be shown to medical experts on both

injury compensation alongside rehabilitation

sides and to the Defendant after any necessary amendment. Remember that it is your statement and so although we will have prepared it, you can and should personalise it: make it your own by adding and changing words where necessary.

The Court Rules require certain documents to be certified with a statement of truth. We will ask you to sign these important statements from time to time and in doing so you are confirming the information they contain are true. If you give false information, you could be committing perjury, which is a serious offence and it is therefore critical that you review each document very carefully.

2 Medical records request(s)

Your medical records will probably be the most important factual evidence in your case. We may need the records from anyone who has treated you, so you need to tell us everywhere you have been treated, whether it seems the record holders may be to blame or not. Record keepers are still often slow in supplying records and omit sections so the process can be slow. Naturally, these records are treated with the same level of confidentiality as the rest of your case. Please note, however, that as we progress your claim, the Defendant's solicitors and medical experts are entitled to see copies of these records, but they too must keep them confidential.

3 Examination of medical records

Once we think we have a complete collection of your medical records, we will have them grouped into particular categories of record, put in date order and given page numbers. This may be done by one of our professional contacts to whom we outsource this task. They will treat all information confidentially, but if you have any concerns about this please let us know straight away.

The records contain a description of your medical treatment. We consider them in detail to identify the issues relating to liability to which we will want to direct the medical expert(s).It might be necessary at this stage to revise your statement in response to reflect the medical records or correct what you consider to be inaccuracies.

4 Liability experts

It is important to understand that, although we can advise that there are aspects of your treatment that warrant further investigation, we cannot, as lawyers and non-medics, advise whether your claim will succeed. The success or failure of your case stands and falls on the evidence of the medical experts we instruct on your behalf.

In some cases one medical expert can deal with both issues of breach of duty and causation. In other, more complex cases two or more experts are needed. We carefully select and then instruct these experts with a detailed letter which we will show you beforehand. We also send them the medical records and your statement.

Although we use the word your to distinguish between the Claimant's and the Defendant's experts, the duty of all experts is to give their honest, independent opinion to the court. Please note that there can be variable delays in preparing these reports. The doctors we use are usually current busy practitioners. We will tell you about their predicted waiting time.

Naturally we will send you a copy of the report once received. At this point we will have a somewhat clearer idea of the likely outcome. The report:

- May be fairly clearly in your favour in which case we can move straight onto the next step. Beware here of some mixed feelings. If you have a case, this means the injury was avoidable and this truth may hurt.
- May be unclear even after some attempt at clarification. This may mean that further information is needed such as medical records that nobody had anticipated, or a different type of expert or a longer detailed discussion with this expert.
- May reject the idea that your doctor was in breach of his duty and/or that there was any connection between a mistake and your injury. This may be the end of the claim.

In appropriate cases, at this stage we may suggest instructing a barrister and have a meeting (conference) with the barrister and experts to clarify the precise medical issues. A barrister is a lawyer who specialises in appearances in court. He/she will specialise in clinical negligence cases. The conference may be by telephone or in person, probably in London. We will ask you attend with us.

5 The 'Pre-Action Protocol' - Letter of Claim and Letter of Response

If the expert evidence is supportive of your claim, and when we are clear about the liability issues in your case, we will send a Letter of Claim to the Defendant. This sets out the history of your treatment and our allegations of breach of duty and causation based on the expert report(s). This is an important stage designed to avoid unnecessary Court action. If admissions are to be made by the Defendant, they should be made at this stage although this does not always happen.

The Defendant has four months to respond in writing to the particular points made and explain their position. Sometimes we agree to an extension of this period. The response given can amount to an admission or set out why they consider treatment was appropriate and/or did not cause the problems you have suffered.

Proceedings should not normally be issued until the Letter of Claim has been sent and the detailed response given.

6 Issue and service of legal proceedings

If the case is to be defended, around this time the barrister is asked to prepare the 'Particulars of Claim', a formal document which sets out the precise legal and factual details of your claim. We will show you and the expert(s) the document and ask for your input and for any further details which might be necessary. Again you are normally required to sign this to certify its truth.

Proceedings must normally be issued within three years of the date of the negligence (there are exceptions which we will explain if they apply to your case).

Once the time for the Defendant's Letter of Response has expired, or if liability is denied, a Claim Form will be issued in appropriate cases. That form along with the Particulars of Claim, a medical report about your injury and a summary of the likely valuation of the claim (the schedule of loss) must be **served** on the Defendant within four months of issue.

7 Defence

The **Defence** is the Defendant's formal reply to the Particulars of Claim, required to be served within 28 days (although an extension is often reasonable and agreed). It may admit liability but will not deal with the amount of the claim. Often it merely denies everything.

8 Costs Budget

We have explained how the Costs Budget works. This must be filed with the Court within 28 days of service of the Defence, or you will not recover any of your costs from the Defendant (apart from Court fees).

9 Case Management Conference and Order for Directions/Costs Management Hearing

Once the Defence is served, there is a Court hearing that will produce an Order for Directions which sets out which experts are permitted and the timetable for your case in terms of most of the issues set out in the steps below. The Court may also consider and set the Costs Budget for your case at this hearing. You are not normally required to attend these hearings.

10 List of Documents

Just as the doctors had a legal duty to provide you with your medical records, so you must provide their solicitors with any documents which might be relevant. These may include medical records from other treating doctors but also documents about your earnings or others relating to any monetary claim.

Each party to the claim must prepare a list identifying the documents upon which they intend to rely at trial so that there are no surprises. This duty of disclosure is ongoing and you must send to us any relevant documents as you receive them. You are required to sign the list to certify that you have disclosed all relevant documents in your possession. This is another Certificate of Truth (see above).

11 Exchange of factual witness statements

This is probably the last chance for you, safely, to make additions or alterations to your Statement. You may want to rely on the recollections of friends or family members to support your case. Their statement(s) must also be served now.

Your statement is exchanged for the statements of any witnesses

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that the Defendants wish to call, including those of your treating doctors. These are sometimes revealing and explain things in the Defence which were not previously apparent. We will ask for your comments on these statements as you may be able to contradict something the doctor says.

We send these statements to our experts who may well want to comment on something said by the doctor(s) in their reports. This is the last opportunity for the expert reports to be finalised.

Your statement(s) will similarly be scrutinized by the Defendant's team (lawyers and medical experts).

12 Exchange of expert liability medical reports

We send your medical expert reports to the Defence Solicitors and they do likewise with the medical expert reports they have obtained to support their case.

We send copies of the Defence reports to you and your experts for comments.

This is a key moment. This exchange of expert evidence presents an opportunity for medical experts and lawyers on each side to stand back and assess the strengths and weaknesses of their evidence on paper.

Admissions may follow from the Defendants. If on the other hand your case looks weak as a result of something unexpected raised by the defence experts we will have to either redress the weaknesses or consider discontinuing the claim. If both parties remain sure of their case, the claim proceeds.

13 Meeting of medical experts

In appropriate cases, a meeting may be arranged for the liability experts on each side to discuss the issues in the case and to clarify the extent to which there is agreement and disagreement between them. An agenda is prepared for their meeting with input from the experts. Lawyers are normally not allowed to attend these meetings.

This meeting can damage either side's case unexpectedly and can occasionally lead to the case being discontinued by you or settled by the Defendant.

14 Dispute Resolution (ADR) - Round Table Meetings

We always ask Defendants to mediate cases. Both parties have a duty to consider ADR and must have a good reason not to participate. ADR meetings can be held at any time but more often will be held after exchange of experts' reports or experts' meetings. Normally they will involve both sides getting round a table and discussing possible settlement.

15 Conference with barrister, you, your solicitor and your medical experts

At this late stage the likelihood is increasing that the case will be tried by a Judge to a conclusion although there remain a number of opportunities for settlement.

To prepare for the possibility of trial there may be another meeting with your experts so that we and your barrister can ask detailed questions of the experts on the medical issues as they have been refined.

16 Offers to Settle or **Part 36 Offers**

The Court likes Claimants and Defendants to make offers to settle cases, known as Part 36 offers, in order to save the expense and court time involved in prolonging litigation unnecessarily. Offers to settle are mostly confidential. The judge can't be told about them until after his decision.

There are serious cost consequences for parties who fail to accept offers which are later judged to have been reasonable in the light of the Judge's subsequent decision at trial. You may be ordered to pay your own and the Defence costs incurred after the offer was made and declined from the remainder of your compensation.

Defendants can be ordered to pay up to £75,000 for failing to do better (from their perspective) than an offer made by you, depending on the value of the claim.

Offers can be of money or a fixed percentage of the final sum that is awarded. Such an offer is made to discount the risk that you might lose, and can be made at any time. We will advise you in detail at the appropriate time.

17 Trial

Trials of Clinical Negligence cases are rare because most cases are settled or discontinued. A trial is possible however.

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We will always prepare for this eventuality in appropriate cases.

In any trial you are likely to have to give evidence. This will usually be limited to narrow issues and will not generally take long. The treating doctors and the medical experts will also give their evidence. The barristers ask the questions and will explain and summarise their cases to the judge.

There is no jury. A judge decides but usually delivers his or her decision in writing a few weeks after the trial.

Compensation – what is the claim worth?

If you establish liability, you will be entitled to compensation or damages, calculated in two parts – General damages to represent your Pain, Suffering and Loss of Amenity (PSLA) and past losses and expenses, and Special damages consisting of any future losses and expenses.

PSLA

- As the name implies, these damages are intended to address the losses you have sustained which aren't financial. They are the unquantifiable aspect of what you have suffered and perhaps continue to suffer including e.g. loss of enjoyment of the activities you used to engage in.
- These damages are assessed largely by reference to medical evidence (obtained in the form of reports from doctors) and case law. Reference is often made to a set of guidelines prepared (from past cases) by the Judicial Studies Board.
- Once we have the relevant medical evidence, we can assess how the Courts are currently valuing your type of injury by comparing it to recently reported cases of a similar nature. This can be tricky as no two cases are ever the same.

Financial Losses

These are split into:

- Past losses – these are the losses up to settlement. If you are funded under a CFA, these losses when added to your PSLA will be taken into account when calculating the Success Fee Cap
- Future losses – these are the losses which you are likely to suffer after settlement as a result of your injuries.

Any financial losses which flow as a direct consequence of the accident can be claimed. We will give you a questionnaire designed to highlight these and it is important that you keep a running list of expenses and losses together with receipts if possible. If you don't tell us about your losses, we can't include them within the claim.

Following an accident, you are under a general duty to keep

your financial losses to a reasonable minimum. This means that just because someone else may be footing the bill one obviously cannot over-egg the expense. By the same token don't underdo it. You are also required to mitigate your losses, that is to make them good, within reason. For example, if a Claimant cannot do his previous job but can do some work he is expected to seek employment and thereby reduce his financial losses. If in doubt, please ask us.

If you have needed care as a result of your medical injury, the value of that care (professional or family) can be claimed if the care was reasonably necessary. If you have used a professional carer, then we will need an invoice, but even if you were looked after by a relative, we should be able to include a claim for this. The claim will usually be for a notional hourly rate for the help given but can, in some circumstances, be for lost earnings or part of them if they took time off work. It is very useful for your claim if you keep a running 'diary' of your expenses and the ways in which your injury is affecting your daily life, including a note of the things you can no longer do and how long it takes for others to help you. It is much easier to note these things as they happen rather than some months or years down the line.

If part of your claim for financial losses includes the cost of past, present or future care or you have purchased items to cope with a disability, we will need to be able to justify these expenses to the Defendant. The best way of doing so is to obtain a report from a nursing consultant or occupational therapist who will cost out these items for us.

The Court is anxious to reduce the cost and time taken in cases where each party relies upon and calls its own expert evidence. In Clinical Negligence cases each side will generally be allowed to have their own experts on all liability issues (covering breach of duty and causation issues) and will usually be allowed to have at least some of their own experts on large or controversial quantum issues (for example the value of care needed).

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On some quantum issues, however, parties are now required, where possible, to agree upon the joint instruction of one independent single joint expert for each specialist area. If you refuse to see the Defendant's expert, they can apply to the Court to have the proceedings put on hold or stopped.

When we have all the relevant information, we will draw up a schedule of damages setting out all of your past and future losses for your approval, which may require updating as the case progresses. This will be served on the other side who, in appropriate cases, will serve their own counter-schedule or may write and say why they disagree with the claims.

If your claim is funded by a CFA, when an acceptable offer of settlement is made, we will agree with you the amount of the settlement that relates to PSLA and past financial losses, so that the success fee cap can be calculated. This will usually be by reference to the figures in the Schedule and Counter Schedule but may also include Counsel's Advice.

Compensation Recovery Unit – The CRU deduction

- If you or your family on your behalf have received state benefits as a direct consequence of your accident and you go on to recover damages, the Compensation Recovery Unit (CRU), an agency of the Department of Works and Pensions, will claw back from your compensation an amount equivalent to those benefits so that you are not paid these monies twice. It is the Defendant's responsibility to pay these amounts back to CRU so they will deduct them from your settlement. This claw back only affects benefits paid out for a period of up to five years after the initial injury. We will send you a copy of any certificate of benefits issued by the CRU which you should check carefully.

How long will my claim take?

This will vary from case to case. We are dependent on experts and it can take a long time to obtain all the expert evidence essential for liability issues to be addressed.

Once our own investigations are complete then the speed of final resolution is likely to be dependant on how the Defendants decide to react. We can give you an estimate once we know more about your particular case. However, as a general guide, it may take between 6 – 12 months to get the first expert's report, a further six months for the pre-action protocol and then from issue of proceedings to trial a further 12 – 18 months. This timetable will obviously lengthen the more expert reports are needed, and will be affected by whether liability issues are dealt with first, separately from quantum.

If these estimates are taken to indicate an overall time period of two to three years you could sensibly add another 12 – 18 months in some cases.

You must also bear in mind that after conclusion of both liability and quantum parts of your case the assessment and recovery of your costs has to be undertaken. It's only then that we will be able to finalise your account with us. On past performance the costs phase can itself take anywhere between 6 – 18 months depending on how large and how contentious our Bill is and whether a further hearing is necessary. It remains to be seen how the new costs budgeting process will affect this.

What can you do to help your case?

Most importantly, we need you to respond promptly to our letters and phone calls and give us prompt instructions. This will allow us to keep to court deadlines and keep up the momentum in your claim.

We see each case very much as a team effort and your input into the case is vital. We will ask you to comment on the important legal documents in the case including the medical and other experts' reports.

We rely upon you to provide us with details and as much documentary evidence as possible regarding your financial losses, both past, present and future. You also need to keep us regularly updated with your expenses so that we can include them within your claim. You will have to agree with us the Costs Budget for your case, and assist us to stick to it.

and finally... getting the most from your compensation

Having secured the best compensation settlement we possibly can for you, we'd also like to help ensure that the money works for you as effectively as possible in the future. Everyone's circumstances are different and so it is crucial that your financial needs are looked at on an individual basis.

lawyers who are always here to help

Periodical Payments – a regular income

In large cases part of your compensation could take the form of payments under **periodical payments** so that part of the money will come to you as annual payments paid by the Defendant. We will be discussing what is best for you throughout; much depends on the size of the settlement, the nature of your injury, and whether you are an adult or a child. Some of your needs to be considered may include:

- Moving to a property adapted for your needs, or making modifications to your existing home
- Arranging the payment of any carers or support workers employed to help you
- The appointment of a professional Deputy to handle your affairs
- The tax implications and preparing your tax return.

Lump sum payment

If you receive your compensation as a lump sum payment, it will essentially be yours to use however you wish. This added flexibility can be a big advantage if you invest and use the money wisely. However, if it is not used to best effect, you could find yourself with little or no money left in a few years' time, and a whole range of problems that could have been avoided.

The larger your settlement, the more is at stake and the more important it is that the right decisions are made, with the help of an appropriate Independent Financial Adviser.

Court of Protection team

If you have suffered a head injury, it may be that you do not have the capacity to manage your own financial affairs. If that is the case you will need a Deputy to be appointed under the Court of Protection. We have a dedicated Court of Protection team who can deal with the appointment of a Deputy, and the ongoing management of your finances for you.

Putting the money into a Trust

This means having two or more people looking after the money for you to protect your interests. As well as helping to ensure that the money is invested sensibly for your long term future, it may also be a necessary step to ensure that you are still eligible for means-tested benefits. Our Lifetime Planning team can advise you on whether a Trust is right for you.

Long-term issues

Whichever type of settlement you receive, you should review your Will or, if you don't yet have one, we should help you draft one. This will ensure that if anything happens to you, any property or investments that are funded by your settlement can be passed on to your family members or others who have helped to care for you, in the way that you wish.

Depending on the nature of your injury, and whether you are well enough to be taking care of your own financial affairs, you may also wish to think about a Lasting Power of Attorney (LPA) as part of your long term planning. There are different types of LPA, and we can explain the differences, but basically they are a way of giving someone else the power to deal with your financial affairs and/or make decisions about your medical treatment if you become unable to do so for yourself.

At Ashtons Legal we have specialists who can help you to deal with all of these issues, so that you can get on with your life without financial worries. Depending on your circumstances this could include someone from our Court of Protection team, our associated Independent Financial Advice Service, or a Lifetime Planning solicitor who specialises in Trusts.
The lawyer who is handling your claim will introduce you to the right person as your case progresses.

We hope you will refer back to this guide as your claim progresses, and ask us about any matters that are not clear to you. We will do our utmost to help you.

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