



# Medical Negligence

A client's guide



This note is intended to give you a broad outline about medical negligence (sometimes called clinical negligence) cases. It is not a substitute for specific advice about your case. Please do not hesitate to ask the lawyer dealing with your case for advice on any aspect of your claim and keep this note for further reference.

## What is medical negligence?

There are three essential elements necessary to prove medical negligence:

### Duty of care

It is clear that all doctors and other health professionals owe a duty to their patients to exercise reasonable care in carrying out their professional skills. In most medical negligence cases, establishing a duty of care is unlikely to be a problem.

### Breach of duty of care (negligence)

The second element is for us to establish a breach of duty of care, i.e. showing that the doctor has been negligent.

In the case of *Bolam v Friern Hospital Management Committee* (1957) the test for establishing medical negligence was set out.

A doctor is required to exercise the ordinary skill of a competent doctor in his or her field. He or she must exercise this skill in accordance with a **responsible body of medical opinion skilled in that area of medicine**.

A doctor is not negligent if there is another responsible body of medical opinion who would have acted in the same way as the treating clinician. Errors of judgment or mistakes are not necessarily negligent.

The judge at trial will assess what a responsible body of medical opinion is by listening to the medical experts on each side. In *Bolitho v City and Hackney Health Authority* (1997), the House of Lords held that where the body of expert opinion cannot be logically supported, the judge can reject the evidence on the grounds that it is not reasonable.

It is important to understand that there may be more than one “responsible” method of carrying out the treatment, and standards across the UK vary considerably. For these reasons, it is often difficult to establish a breach of the duty of care.

### Causation of injury

If it can be proved that the doctor was negligent, the next step is to show that the negligence caused you some harm.

Often, establishing causation can be problematic in medical negligence cases because you will have been receiving treatment in any event.

This means that where an injury occurred from another cause, e.g., a non-negligent aspect of the treatment or the initial injury or illness itself, it will not be possible to proceed with the claim. We have to show that some significant loss or damage would not have occurred but for the defendant’s breach of duty.

## What are we going to do?

In many cases, we cannot say whether or not it is likely that there has been some medical negligence at your first appointment. But we will indicate if we consider your case warrants further investigation.

### Obtaining your medical notes

We will take an initial statement/instructions in the case. The next step is for us to obtain copies of **all** your medical records from the places you received treatment or care. We will ask you to sign forms authorising the release of your notes to us.

It can take some time for all of these to be collected, organised and read by us. Until then, it is usually impossible for us to begin to properly assess the prospects of success.

Occasionally, hospitals or doctors involved are unwilling to disclose records, and that may mean applying to the court to obtain an order for disclosure.

## Obtaining an expert opinion

The courts determine the standard of care by reference to independent medical opinion. An independent medical expert will be instructed to review your medical records to consider whether or not the care that you received was negligent.

Similarly, medical experts will be asked whether the mistake (if any) in your treatment actually caused or contributed to your injury or whether the injury would have occurred in any event.

Often, we have to consult additional experts to consider this issue. It is possible that the medical expert will wish to examine you in order to complete the report.

Only when the notes are complete, will we be in a position to instruct a medical expert to consider your case. It may be that your case requires an opinion from more than one expert, particularly if there are overlapping areas of medicine to consider.

**A warning:** some experts have extremely long waiting lists and it may take many months before a report is available.

## After receiving the medical opinion

At this stage we will consider the case carefully with you and the medical experts to advise you whether or not you have a case worth pursuing. We may seek the advice of an experienced barrister to give you a detailed opinion on the merits of your claim.

## Notifying the other side

Once we have established that you have a claim worth pursuing, we must notify the other side of the claim and of the amount of compensation which you seek.

This notification is termed a “letter of claim”. It provides the other side (the defendant) with an opportunity to investigate your case and the possibility of avoiding the issue of court proceedings by either agreeing they are liable for your injuries or by offering you compensation to settle your claim.

The defendant has three months to respond to this letter of claim before we can generally issue court proceedings.

## Commencing proceedings

It is therefore only after considerable and detailed investigations have been completed that we can advise you on whether or not you should commence proceedings. With a complex medical negligence action it may well take 12 to 18 months before court proceedings can be started.

Time is taken up with obtaining the medical records, instructing experts and considering their reports with you and your barrister, and awaiting the response of the defendant to your claim.

Once a decision has been taken by you to issue proceedings, we will consider whether the case should be issued in the High Court, where the claim must be worth at least £50,000, or, for claims worth less than this, in the County Court.

Whatever the venue, we will (usually with the help of a barrister and always medical experts), draw up the following documents:

- A statement of your claim (called “Particulars of Claim”) - this will set out the facts upon which your claim is based and the allegations of negligence which we intend to pursue in court on your behalf.
- A schedule of damages - this will set out the calculable financial losses which have been incurred to date as a result of the alleged negligence. It will also include a broad outline of the likely future losses.
- A medical report on your present condition and prognosis.

It is usual for both the schedule of damages and the medical report to be updated as your case proceeds towards trial.

All these documents will be approved by us and you before we send them to the other side.

It is important that you check the accuracy of these documents carefully, since you will be asked to sign the Particulars of Claim to confirm you believe in the truth of the facts it contains.

## Timetable of events

As the first step in managing your case, a timetable of events is set up in order to progress your case to trial. During the timetable, the defendant may try to delay matters.

However, it is our job to keep this to a minimum because we understand that any delay can be frustrating to you.

Any defence is technically due 14 days after the Particulars of Claim is served or 28 days when the defendant files an acknowledgement of service

in accordance with the court rules. In many medical negligence cases the defendant will apply to the court to extend this limit.

After the case is filed, the court sends out questionnaires to all parties (Allocation Questionnaires).

Once these have been filed at court there will be a Case Management Conference. This involves a short hearing when the court will help us to impose a timetable for all steps up to and including trial.

As soon as possible after the Case Management Conference is heard, we will arrange for a trial date to be given.

We will draw up statements (from you and your witnesses) and exchange these for statements from the medical staff (including doctors) responsible for your care. This will happen about three months after the defence has been served.

About three months later, we will exchange the expert medical reports with the defendants.

At about this stage, there may be a further short hearing to ensure that the timetable has been adhered to and to try and narrow the issues prior to trial.

There is usually at least one meeting with the barrister, solicitors, experts and yourself which is intended to discuss various aspects of the case and the best way to proceed.

The case may either be settled because the defendants no longer feel they are in a position to defend the case or proceed to trial.

The trial length varies depending on the complexity of the case. Some cases are split so that one hearing deals with liability and another deals with the amount of damages.

## The court's overriding objective

Once proceedings have been served, the court becomes involved in managing your claim. The court has an overriding objective to ensure your case is managed "justly" and we have a duty to assist in this. This involves the court making orders which:

- ensure that the parties are on an equal footing
- save expense
- deal with the case in ways which are proportionate:
  - to the amount of money involved
  - to the importance of the case
  - to the complexity of the issues
  - to the financial position of each party
- ensure that it is dealt with expeditiously and fairly
- allot to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

## Funding the case

### Public funding

If you are likely to qualify for public funding (legal aid) we will assist you in making an application for it from the Legal Services Commission (LSC). An application usually takes the LSC about 4-6 weeks to process, during which time there is little we can do.

Public funding will be granted to those who qualify on financial and merits grounds. To qualify on merits, there must, as a matter of law, be reasonable grounds for taking or defending proceedings and the likely costs should not outweigh the benefits to be obtained in the proceedings.

The LSC accepts that in medical negligence cases it is difficult to form a clear view on prospects of success when funding is being applied for. It still insists that applicants must show that there are reasonable grounds for taking the proceedings (not just the investigation).

In small cases worth less than £20,000, the LSC may require more by way of evidence of negligence at the outset. With smaller claims in particular, the LSC may require an applicant, before funding is granted, to pursue any available complaints procedure.

Those on income support automatically qualify financially for public funding free of contribution.

Children are assessed on their own means (not their parents') and almost always qualify for public funding.

Depending on your means, you may be required to pay a contribution to your public funding.

## Conditional fees

Since July 1995, lawyers have been allowed to conduct medical negligence cases on a conditional fee basis. This is essentially a 'no win no fee system' in respect of the claimant's lawyer's fees.

If we think your case is suitable for this then we will discuss this with you in detail and give you our publication "*A guide to: No win, no fee agreements*".

We will also advise you about the availability of insurance to cover your disbursements and the other side's costs if you lose the case.

## Legal expenses insurance

We act for a number of legal expenses insurers. We always advise our clients to check their household, motor or other insurance policies to see if this cover is available.

If so, your insurer will be responsible for your legal costs and disbursements, together with the defendant's costs up to the level of indemnity.

## Funding the case yourself

Litigation is often expensive and we keep our clients informed of fees likely to be incurred. Our fees are competitive and are charged in accordance with the time spent on the case.

We will give you an estimate of how much the legal costs are likely to be at the beginning of the case. However, this will be subject to review as the case proceeds.

Often we will give you an estimate of our costs in conducting the preliminary investigation (obtaining your notes and an expert's opinion).

It is always difficult to estimate the final costs because much depends on how the case develops and how the other side responds to what we do. Usually, if you win your case, the court will order that you be awarded costs. That award will not be a full indemnity.

If they cannot be agreed, the costs will be assessed by the court. The likely amount the opponent will be asked to pay will be the large majority, but not necessarily all of the full costs.

It is our normal policy to ask for money on account of our costs and disbursements. We will send you regular bills, with a report on your case so that you are aware of what is happening.

## Other Considerations

### Limitation

There is a statutory limitation period of three years in which legal action should be commenced. The three year period runs either from the date of the negligence or from your "date of knowledge" of the injury and that it is attributable to the negligence, whichever is the later.

Except where the date of knowledge is clearly identifiable, it is safer to assume that the three years run from the date of the incident. The court has discretionary power to override this three year limitation period.

With children and persons under a disability (i.e. those who are incapable of managing their own affairs), the rules are different. The three year period does not start to run until the child's 18th birthday or until the person ceases to be under a disability. That said, it is still very important to see a solicitor as soon after the event as possible, whilst memories are fresh.

We will give you advice, if we think that limitation is likely to present a problem, and we will take action immediately to protect your position as far as possible.

## Quantum of damages

As well as investigating whether you have a claim for medical negligence, we will also consider the likely amount of damages which a court would award. In order to justify taking proceedings, we must be able to show that some (legally quantifiable) harm has occurred.

In many cases, we will not fully investigate quantum of damages until the preliminary medical issues have been considered. However, we will always be able to provide you with a broad outline, giving you the 'heads of damage' at the beginning of the case.

The investigation into the amount of compensation may take as much time and involve as many experts as establishing liability. You may be entitled to damages for pain, suffering and loss of amenity as well as for the financial losses, both past and future.

## Other avenues of complaint

Sometimes, it is not appropriate to initiate legal action because financial compensation is not what you want. More important to you may be an explanation of what went wrong, an apology and/or reassurance that the mistake will not happen again.

We may advise you to make a complaint through the NHS Complaints Procedure. NHS Hospitals and GP practices are now required to have a complaints procedure and to publish details of that procedure.

Any complaint should normally be made to the Complaints Manager within six months of the incident and should be responded to quickly. If you are not satisfied with the outcome of the initial investigation, you can apply to have your complaint reviewed by an Independent Review Panel which is chaired by a lay person appointed by the Secretary of State for Health.

If you remain dissatisfied after this stage, you can refer the matter to the Health Service Ombudsman who also investigates complaints of maladministration in the provision of health services within the NHS.

Where there has been serious professional misconduct, the matter should be reported to the General Medical Council or the Nursing and Midwifery Council. Dentists are regulated by the General Dental Council.

Often you will be advised to take up these extra legal rights in tandem with civil litigation. Sometimes we will advise that your best course lies within the NHS Complaints Procedure or with the relevant professional body.



**Paul McNeil,**  
**Head of Medical Negligence**  
e. [paul.mcneil@ffw.com](mailto:paul.mcneil@ffw.com)  
t. 020 7861 4019

As the head of the medical negligence department, Paul has more than 25 years experience acting for those injured through negligence in a wide variety of cases.



**Richard Vallance**  
**Partner, Medical Negligence**  
e. [richard.vallance@ffw.com](mailto:richard.vallance@ffw.com)  
t. 020 7861 4141

Richard has more than 30 years experience acting for those injured through negligence. His cases cover many areas including: birth injuries, obstetrics, necrotising fasciitis, delayed diagnosis of meningitis, cancer claims, deep vein thrombosis claims and general practice (GP) claims.



**Samantha Critchley,**  
**Partner, Medical Negligence**  
e. [samantha.critchley@ffw.com](mailto:samantha.critchley@ffw.com)  
t. 020 7861 4263

Samantha specialises in a wide range of clinical negligence claims including: fetal medicine (wrongful birth), obstetrics, paediatrics, neurology (acquired brain injury and tumours), gynaecology, cancer cases, ophthalmology, general surgery and orthopaedics. Samantha is on the AvMA specialist clinical negligence panel.



**Edwina Rawson,**  
**Partner, Medical Negligence**  
e. [edwina.rawson@ffw.com](mailto:edwina.rawson@ffw.com)  
t. 020 7861 4105

Edwina specialises in birth injury, antenatal and fetal medicine, neurology, paediatrics, general surgery, orthopaedic surgery, cancer and cosmetic surgery claims. She is on the Law Society's Medical Negligence Panel.



**Richard Earle,**  
**Senior Associate (Legal Executive), Medical Negligence**  
e. [richard.earle@ffw.com](mailto:richard.earle@ffw.com)  
t. 020 7861 4041

Richard's wide and varied practice covers medical negligence across the spectrum ranging from cases of maximum severity to oncology, ophthalmic, general and plastic surgery as well as claims against GPs.



**Chista Kermani,**  
**Senior Associate, Medical Negligence**  
e. [chista.kermani@ffw.com](mailto:chista.kermani@ffw.com)  
t. 020 7861 6706

Chista, a trained doctor, has over ten years experience acting for those injured through negligence or accidents. Chista's cases cover many areas including: obstetrics, gynaecology, paediatrics, general surgery, general medicine, cardiac claims, orthopaedic, plastic surgery and claims against GPs.



**Mark Bowman,**  
**Associate, Medical Negligence**  
e. [mark.bowman@ffw.com](mailto:mark.bowman@ffw.com)  
t. 020 7861 4043

Mark's medical negligence practice is wide ranging and includes birth injury cases, neurological cases, cancer cases, cardiac cases, plastic surgery cases and claims against GPs.



**Jonathan Zimmern,**  
**Associate, Medical Negligence**  
e. [jonathan.zimmern@ffw.com](mailto:jonathan.zimmern@ffw.com)  
t. 020 7861 4218

A barrister in our medical negligence department, Jonathan has more than 4 years experience acting for those injured through negligence. Jonathan's cases cover many areas, including birth injury, delayed diagnosis, spinal injury, general surgery, plastic surgery and inquests.



**Claire Howeson,**  
**Associate, Medical Negligence**  
e. [claire.howeson@ffw.com](mailto:claire.howeson@ffw.com)  
t. 020 7861 4741

Claire has been involved in a wide variety of cases, including birth injury, spinal injury, general surgery, obstetrics and gynaecology, delayed diagnosis, gastroenterology and general practice claims.

Field Fisher Waterhouse LLP 35 Vine Street London EC3N 2AA  
t. +44 (0)20 7861 4000 f. +44 (0)20 7488 0084 [personalinjury@ffw.com](mailto:personalinjury@ffw.com) [www.personalinjury.ffw.com](http://www.personalinjury.ffw.com)

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