Clinical negligence

Clinical negligence occurs when the care or treatment the Claimant received from a health service provider was below the standard that is expected. This test was established in the famous Bolam case. Negligence can result from actions of an individual health professional such as a surgeon, GP, psychiatrist or by a healthcare service, such as the treatment provided by a mental health team. The healthcare professionals include nurses, therapists, laboratory workers, physiotherapists, mental health teams and the ambulance service.

Example of clinical negligence cases include:

1. A delay in diagnosis or treatment
2. Ignorance of important symptoms
3. Incorrect diagnosis
4. Incorrect treatment
5. Failure of medical device

If you have suffered ILLNESS or INJURY as a result of clinical negligence you may be entitled to claim compensation. You can make a clinical negligence claim about both NHS and private treatment. In private healthcare a Claimant may have a contract with a doctor who guarantees a particular result. The doctor may be in breach of contract even if s/he has not been negligent.

Grounds

To bring a clinical negligence claim the Claimant has to prove the following elements:

1. DUTY OF CARE: the doctor or other healthcare professional owes a duty to take care of the Claimant and not to cause injury. There is generally little difficulty proving that the doctor or medical team owed the Claimant a duty to take care of him/her.
2. BREACH: the practitioner or the medical team breached that duty to take care. The Claimant must show that the medical practitioner failed to meet the standard of a reasonable body of other practitioners in the field. Where a body of medical opinion is relied to show the practitioner was not negligent the medical opinion must be logical and reasonable. The breach applies to treatment, diagnosis and advice.
3. CAUSATION: the breach of duty by medical practitioner or medical team has caused harm to the Claimant. The Claimant must show the doctor’s failure to meet the relevant standard of care caused the injuries or significantly contributed to them.
4. DAMAGE: there must be a link between the breach of duty and damage. Damage and other losses have resulted from that harm. Damages include physical and psychiatric injury. It must be a recognised psychiatric injury, such as post-traumatic stress disorder, anxiety or adjustment disorder. Mere emotional upset is not enough.
Elements of compensation

The only outcome for a Claimant that brings a successful clinical negligence claim is an award of damages. Compensation consists of general and special damages. Compensation for general damages includes any psychiatric or physical injury. It includes an award for the pain and suffering and “loss of amenity” (or the benefit or enjoyment of life). Compensation for special damages, i.e. any financial losses flowing from the act of clinical negligence includes any past and future loss of earnings, the costs of care, aids and equipment.

In some cases the award for special damages exceeds the level of general damages.

Balance of probabilities

The Claimant must show is it more likely than not that the Defendant was negligent?

Timeline

Records
The Claimant may want to obtain his/her records prior to contacting a lawyer. The copy records should be provided within 40 days of the request and for a cost not exceeding the charges permissible under the Access to Health Records Act 1990.

If the healthcare provider fails to provide the health records within 40 days, the Claimant’s lawyer can apply to the court for an order for pre-action disclosure.

Letter of claim
If your lawyer says you have grounds for a claim then s/he will send a letter of claim to the NHS Trust or Independent Sector Treatment Provider as well as the NHS Litigation Authority.

This letter should contain a clear summary of the facts on which the claim is based, including the alleged adverse outcome, and the main allegations of negligence. It should also describe the Claimant’s injuries, and present condition and prognosis. The financial loss incurred by the Claimant should be outlined with an indication of the heads of damage to be claimed and the scale of the loss.

In more complex cases a chronology of the relevant events should be provided, particularly if the patient has been treated by a number of different healthcare providers. The letter of claim should refer to any relevant documents including health records and if possible include copies of those records e.g. any relevant GP records if the Claimant’s claim is against a hospital. Sufficient information must be given to enable the healthcare provider to commence investigations and to put an initial valuation on the claim.

The healthcare provider should acknowledge the receipt of this letter within 14 days. They are expected to provide a reasoned answer within 4 months.
**Proceedings**
Proceedings should not be issued until after four months from the letter of claim, unless there is a limitation issue.

**Human rights**

Every human being has human rights. These might be compromised where an injury has occurred as a result of clinical negligence.

Art 2 protects the right to life. This may be relevant when patients have received below-standard care, have been refused expensive drugs or have not been fed. Art 2 demands that any untoward or unexpected deaths must be investigated through an inquest.

Art 3 forbids inhuman or degrading treatment. This is relevant when patient did not give proper consent for treatment. It can also support cases where vulnerable people such as elderly or mental health patients, did not receive adequate treatment.

Art 8 states that there must be respect for private and family life and it can be relevant in cases where confidential medical information has been disclosed.

Art 14 bans discrimination of any kind and can be relevant in cases where age-based decision of healthcare providers have taken place or patients have been discriminated against in any way.

**Limitation**

Any claims brought under the Human Rights Act must be started within one year of an incident occurring.

Normally adults must make a claim within 3 years of the date they knew or suspected that they were injured as a result of medical negligence.

For injury to children, proceedings have to be started before the 21st birthday.

Time does not run out while a person is mentally incapable.
**Inquest**

If the patient dies whilst receiving medical treatment it is vital to seek legal advice before an inquest takes place. The lawyer will obtain medical records and other documents from the coroner before the court hearing. They will also be able to put forward questions to the witnesses because inquests are public hearings. You may be able to claim for bereavement and economic dependency arising from the patient’s death.

**Funding**

At Sheratons you can fund your claim through:

No win no fee agreement: the arrangements for no win no fee cases have changed. There are 2 types of no win no fee cases: conditional fee agreements (CFAs) and damages based agreements (DBAs sometimes called contingency fees). For both types of no win no fee cases, the lawyer’s payment is conditional on the case being successful. If the case is lost, the lawyer is not paid. Under a DBA, lawyers are not paid if they lose a case but may take a percentage of the damages recovered from their client as their fee if the case is successful.

A client is not required to disclose to an opponent the existence or details of any DBA entered into with his/her lawyer.

Legal Expenses Insurance:

LEI can be taken out on a Before the Event basis, which is a traditional way of purchasing insurance by way of providing financial legal costs protection in case a legal dispute happens. LEI is usually sold as an add-on to car or house insurance, generally for a small extra premium (around £25 is common). Occasionally it's included free.

There is always a limit to how much can be claimed under the policy – usually £50,000 or £100,000.

Alternatively, LEI can be taken out ‘After the Event’, where financial protection is needed against the risk of losing a legal action, where the Claimant would then be liable for paying the legal fees of the other side.

After 1 April 2013 the ATE premium is now payable by the successful Claimant. With the exception of clinical negligence expert reports, ATE insurance premiums are not recoverable if the insurance is taken out after 1 April 2013. In clinical negligence cases, expert reports may be obtained through ATE insurance, the premiums for which are payable by the Defendant. It means that the Claimant do not have to pay upfront for the costs of reports relating to causation and liability.
Public Funding

It is only available to children who suffer a severe disability as a result of neurological injury caused by clinical negligence which occurred during pregnancy birth or the postnatal period up to 8 weeks after birth.

What do legal costs consist of?

1. Your own lawyer’s fees. Lawyers charge at an hourly rate for the time spent on the case to which is added VAT.
2. Disbursements. These are expenses incurred by the lawyer on your claim. These include obtaining copy of medical records, Xrays, fees for experts’ reports, court fees, travelling expenses.
3. Counsel’s fees. If the claim to be pursued by court proceedings it may be necessary to use barrister (Counsel) to advise, draft Particulars of Claim or to appear in court. Counsel usually charges at an hourly rate plus VAT.