

Clinical negligence claims | frequently asked questions



What is clinical negligence?

Clinical negligence can result from any healthcare professional doing the wrong thing or failing to do what he or she should have done. For example, a brain injury might have occurred if a patient was deprived of oxygen, or if a patient's symptoms weren't diagnosed and acted upon quickly enough; there could have been clinical negligence in both these cases.

Medical negligence is an alternative term more correctly used to describe an error or omission made by a doctor.

Who can make a claim?

If someone has suffered a brain injury due to poor clinical care, they may be able to make a claim for compensation. However, making a claim for clinical negligence is usually very complex; to find out if a claim is possible, they should speak to a specialist solicitor.

What needs to be proven for there to be a claim?

Not all injuries suffered in a hospital or other care setting are caused by clinical negligence and trying to determine whether negligence has occurred is not always straightforward. For there to be a claim, it's necessary to prove that:

- treatment fell below an acceptable level of competence; and
- the patient has suffered an injury; and
- it is more likely than not that the injury would have been avoided, or less severe, with proper treatment

Most people who suffer a brain injury in a hospital were there because they required treatment for another pre-existing condition. Whether the brain injury was caused by an underlying condition or a particular course (or lack) of treatment might not be obvious, and it's often very difficult to identify the difference that an alternative approach or treatment might have made to the outcome.

Are there time limits to make a claim?

A claim should be made within three years from the date of injury but it can be longer in specific circumstances, for example if the person injured is a child, or an adult who lacks capacity. Ideally it's best to seek legal advice as soon as possible and long before the end of the three year period to allow the solicitor time to investigate the potential claim, prepare the case, and ensure that it does not become time-barred.

Who would a claim be made against?

Clinical negligence can occur in the NHS, in privately funded or charitable hospitals, and in any other locations that provide healthcare. All healthcare professionals may be directly liable for their own negligent treatment; in addition, their employers may be vicariously liable for the negligence of their staff. An organisation can also be held responsible for poor management which results in an injury to a patient - for example, by failing to ensure staff are adequately supervised or for allowing hygiene standards to fall below an acceptable level. Clinical negligence also covers defective medical products such as implants and medication.

Doctors and other healthcare professional employed by an NHS organisation are covered by NHS Indemnity which means that their employer is responsible for any clinical negligence claims. A

private hospital or clinic will have its own insurance, but in most cases the medical staff using the facility will be independent contractors and any claim should be made against them. The General Medical Council and other professional bodies require that their members have insurance. A solicitor be able to advise who to make a claim against.

What about the NHS complaints procedure?

The NHS complaints procedure doesn't have to be followed before starting legal action but it may be a helpful way to find out more about what has happened and to enable a more informed decision about whether to pursue a clinical negligence claim to be made. The NHS complaints procedure can also be helpful if a person does not want financial compensation but is seeking some other form of redress such as an apology.

What are the advantages of making a claim?

A clinical negligence claim is about claiming financial compensation. A court cannot:

- discipline a healthcare professional
- force a hospital or individual healthcare professional to change how they work
- make a healthcare professional say sorry
- guarantee that the same mistake will not happen to anyone else

However, making a claim may help to highlight what has happened and could, for example, lead to a change in clinical practice.

How is a claim funded?

Legal Aid is only available for certain personal injury cases involving children, for example children who have suffered a birth injury. However there are various mechanisms, such as a conditional fee arrangement and legal expenses insurance, which could fund a claim; a solicitor will be able to advise on the options available.

How long will it take to resolve a claim?

Claims can take years to resolve, especially where a brain injury is involved because of the need for the long-term prognosis to stabilise to enable the claim to be properly valued. In some cases where liability for the injury is accepted, interim payments may be made as the claim progresses.

Will the claimant have to go to court?

Probably not; the vast majority of clinical negligence claims are settled either by negotiation or mediation.

How are damages calculated?

There are two elements to an award of damages:

- General damages - recognise the pain, suffering and loss of amenity caused by the injury
- Special damages - wholly related to the financial losses and extra expenses caused by the injury – for example, loss of income and future care

To see examples of brain injury that might result from clinical negligence, see FastFacts 009 — Brain injury caused by clinical negligence

This note is for information only and does not constitute legal advice.

The Brain Injury Group is a national network of legal and other professionals supporting individuals and families affected by brain injury. www.braininjurygroup.co.uk