Clinical negligence claims: litigants in person

A person conducting their own claim without legal representation is a 'litigant in person' (this is sometimes abbreviated to LiP). This guide aims to provide you with more information about how to pursue a claim yourself, the legal procedure and the risks involved.

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AvMA is the charity for patient safety and justice. We provide specialist advice and support to people when things go wrong in healthcare and campaign to improve patient safety and justice.

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We strongly recommend that claimants are represented by a solicitor who specialises in clinical negligence. Clinical negligence claims are legally, evidentially and procedurally complex. As a litigant in person you run the same risks of having to pay the other sides' legal costs, as if you were represented, you should not rely on the courts being lenient with you because you do not have the benefit of representation. If you do have to pay the other side's costs, perhaps because an adverse costs order has been made against you, those costs can be considerable.

You should always consider seeking legal advice from a clinical negligence solicitor before acting for yourself. If the solicitor advises that the claim has poor or limited chances of success, you need to carefully consider any decision to start a claim yourself in light of the time and potential costs involved.

You can search for a specialist clinical negligence solicitor at www.avma.org.uk/find-a-solicitor.

First steps

Before pursuing any legal action, you should familiarise yourself with the legal tests for a clinical negligence claim. You will find it helpful to read our leaflets *Legal action: bringing a claim in clinical negligence* and *Clinical Negligence – What compensation can I claim?* The first leaflet gives a detailed explanation of the legal test for negligence and what you need to prove to bring a successful clinical negligence claim and the second gives some help on how to value a clinical negligence claim.

Links to these leaflets and others referred to in this information sheet are provided at the end.

Pre-action resolution of clinical disputes

Bringing a claim for clinical negligence without legal representation is complex and you must comply with the same rules and procedures as a solicitor would on your behalf.

You should read and familiarise yourself with the Pre-action Protocol for Resolution of Clinical Disputes, which you can download here: www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd

The Pre-Action Protocol makes it clear that litigation should be considered the last resort, our leaflet on *Alternative Dispute Resolution (ADR)/Alternatives to litigation* may be helpful as this explains other ways in which your dispute might be resolved, without having to attend court.

Preparing your case for court

Medical records

You will need to obtain a full set of relevant medical records, including records from your GP.

Please refer to section 3.2 of the pre-action protocol (above) and also to the AvMA leaflet on access to health records, there are also template letters to help you request the medical records at www.avma.org.uk/help-advice/guides/#medical-records.

Once you have received the medical records you should organise and index the medical documents, you should check they are complete and that none of the records are missing. There are specialist medical record paginating agencies who can assist with this but you will have to pay for their services, it is worth bearing in mind that in the long run it will be far cheaper for the medical record paginating company to do this for you than if the medical expert has to do it. In many cases, medical experts will reject instructions if the medical records are not sorted.

Medical experts

It is for the courts to decide whether there has been negligence, and if there has whether this has caused you an injury and what is the appropriate level of compensation. Judges are not medical experts and invariably will need to hear from independent medical experts on some or all the issues alleged by you to have been negligent.

In practice, litigants in person often find it difficult to instruct independent medical experts themselves as experts do not like accepting instructions directly from members of the public and rarely do so. Generally, medical experts will only accept instructions from solicitors.

Experts are professionals and their fees are often expensive. You can expect the cost of an expert report on clinical liability to start at approximately £1,500; this will vary from case to case. It will be your responsibility to establish the cost of the report with the expert, you should do this in advance of instructing them. You will be expected to have an agreement with them for the payment of their fees and pay them on time, this is usually in writing and found in their terms of business. Some experts may ask to be paid in advance.

Unfortunately, AvMA cannot assist with introducing members of the public to experts or get involved with any arrangements about terms of business such as the hourly rate, cost of the report, turnaround time etc.

Selecting an expert

You will need to select an expert who specialises in the same field as the doctor you believe has been negligent. If you have been treated by a number of different doctors in a number of fields, it may be difficult to identify the appropriate specialist area of medicine and you may need more than one medical expert. You may be able to speak to one of AvMA's helpline volunteers but as they will not have read your medical or file notes, they can only advise based on the information you give them. If you instruct the wrong expert you will not be able to get your money back and that will be an expensive mistake.

If you choose to use the hospital's complaint procedure, you may be guided by the specialism of the doctor or surgical specialist the hospital or Parliamentary Health Service Ombudsman (PHSO) asked to review your care. If you rely on the specialist appointed by the hospital/PHSO you should be aware that you do this at your own risk as the hospital will instruct someone they think is appropriate to provide an opinion.

If you do find an expert who is willing to accept your instructions you should ensure they were in practice at the time of the alleged negligence, this is because the treating healthcare professional will be judged by the standard considered acceptable at the time you were treated. They will not be judged by more recent standards. It can be the case that medical experts who retire quickly lose touch with how care and standards are developing and progressing.

It is also important that you check that the expert you intend to instruct does not have a conflict of interest – such as a personal friendship with any of the doctors who treated you and who you believe have been negligent. There is more information on the role of the medico-legal expert in our leaflet Legal Action: bringing a claim in clinical negligence.

How many expert reports do I need?

Each case will be different, it will depend on the facts and what is being alleged. It may be possible in some cases to instruct only one expert. For example, if the healthcare provider accepts that the care provided did fall below an acceptable standard and was negligent but say the negligent treatment did not cause you any injury (causation). In that case you may only need to instruct a causation expert/s to give their opinion on whether the negligence did in fact cause you injury, or not.

Second example: The allegation is that a GP failed to take any or sufficient account of presenting symptoms and delayed referring the patient. The patient says that because of the delay their diagnosis of cancer is now at a more advanced stage than it would otherwise have been. In this scenario, the patient will most likely need at least two independent medico legal expert opinions. First, a GP expert to advise on whether the GP's management of the case did fall below an acceptable standard. If it did, a second independent expert oncologist opinion would most likely be required to say how much more advanced the cancer is because of that delay.

Experts have a duty to the court to only comment on matters within their own expertise.

Approaching and instructing the expert

A good starting point is to write to the expert giving a brief outline of the case along with the details of the doctors or surgeons and hospitals involved in your case. This will help to identify whether the expert can assist you and/or whether there are any conflicts of interest. When you write to the expert you should also give the expert an indication of the amount of documentation in the case (such as how many pages or folders of medical notes there are), this will help the expert to provide you with a time and cost estimate for the report. You may have to wait several months for a report especially in oversubscribed areas of medical expertise, such as obstetrics. You should **not** send the medical records to the expert at this stage.

If, after your first letter of approach the expert agrees to provide you with a report, you will then need to supply them with a careful letter of instruction which should:

- Summarise the relevant law (the basic tests) and facts;
- Identify the issues in the case;
- Clearly say what you want the expert to do;
- Clearly say what the deadline for serving the report on the court and the defence;
- Explain how you will rely on the report; and
- Raise any particular points you want help with.

If you have any other evidence , such as a statement you have written describing what happened or have any complaints correspondence or investigation reports such as a Serious Incident Report, then you can pass this on to the expert. However, you should bear in mind that the more work the expert has to do, the more the report will cost.

Please note that even though you are paying the expert, this does not mean that they will support your case. The expert's first duty is to assist the court on matters within their expertise. If the expert provides you with an unsupportive opinion, you may be advised to accept it, rather than seek an alternative expert who you hope will find in your favour – this approach is likely to result in you incurring additional expense without progressing your case. However, you should not be afraid to ask your expert to explain why they have arrived at the decision they have done.

Next steps

It may help to understand that if you are bringing a claim against an NHS Hospital or GP, that you are likely to come across reference to National Health Service Resolution (NHS Resolution). NHS Resolution is essentially the insurance body for NHS hospital trusts and GPs that fall under their scheme. They are also responsible for organising legal representation for the hospitals and healthcare staff (they do not represent patients). NHS Resolution may deal with legal issues in house or send the case out to one of their specialist panel of defendant lawyers.

It is important to appreciate at the earliest stage that the burden of proving the allegation of negligence rests with the person making the claim. That means that if you say your medical treatment was negligent, it is your responsibility to prove that the care was negligent.

Letter of notification

A letter of notification can be sent at an early stage of the investigation of any case. You might serve the letter on the defence once you have obtained the medical records or have been provided with an expert opinion. You can find a template letter at Annex C1 of the pre-action protocol (see link at the end of this leaflet).

It has been AvMA's experience that when NHS Resolution receives a letter of notification, this often acts as a trigger for them to start investigations, this may result in them trying to resolve the matter at an early stage without legal proceedings , they may even invite you to attend mediation. Please see AvMA's leaflet on Alternative Dispute Resolution (ADR)/Alternatives to Litigation especially the section on mediation.

If you do have independent medical expert reports on your case, we advise that you do **not** send copies of those reports to the healthcare provider and/or NHS Resolution or any legal firm who is on their panel of defendant lawyers at this stage.

On receipt of the letter of notification, the defendant should:

1. Acknowledge receipt within 14 days;
2. Identify who will be dealing with the matter and to whom any letter of claim should be sent;
3. Consider whether they wish to commence investigations and/or obtain factual and expert evidence;
4. Consider whether any information could be passed to the claimant which might narrow the issues in dispute or lead to an early resolution of the claim; and
5. Forward a copy of the letter of notification to NHS Resolution or other relevant medical defence organisation/indemnity provider.

Letter of claim

You will need to use your medical records and expert report to prepare a formal letter of claim to notify the defendant why you believe they acted negligently and explain the mental and/or physical harm you allege this has caused. You should also indicate the compensation you are seeking.

There is a template letter of claim and information on what to include in the letter in the pre-action protocol (see link to protocol below).

You can make an offer to the defendant to settle your case out of court at this early stage. You should make sure that any offer to settle is realistic and reflects the true value of your injury and losses, this can be very difficult to assess. Our leaflet *Clinical Negligence – what compensation can I claim?* provides an explanation of how compensation (damages) are calculated. See below for more information and our leaflet *Settling a clinical negligence claim*.

If you do make an offer to settle you must understand that unless you say otherwise the general impression is that any offers are made in full and final settlement (see compensation leaflet).

Letter of response

The defence should acknowledge your Letter of Claim within 14 days and provide a response to it within four months. If the defendant does not admit that there has been negligence and/or caused you harm, and does not offer another form of resolution such as mediation (see end for link to Alternative Dispute Resolution (ADR) leaflet), you must then decide whether you wish to embark on a case in court. You may wish to seek legal advice at this stage and should fully consider the costs implications if you lose your case (see end of this leaflet for more information on costs).

You are able to write to the defendant and suggest Alternative Dispute Resolution, including mediation should you wish to.

Mediation

You could consider inviting the opponent/s to mediation although they are not obliged to agree to this. For more information please see end for link to leaflet *Alternative Dispute Resolution (ADR)/Alternatives to Litigation* especially the section on mediation.

If mediation is not successful in resolving the dispute, litigation can still be pursued in court (subject to this option being available).

Issuing proceedings: first considerations

The limitation period - Am I within time to issue proceedings?

This is a crucially important question. The time limits are important, it is unlikely that you will be able to bring a claim if you issue proceedings outside of the time limits.

It is your responsibility to issue your claim within the limitation period. If you do issue outside of the limitation period it is likely that you will lose your court fee.

You must commence your claim within **three years** from the date when the negligent incident occurred or when you first realised you had suffered an injury. The time limits may seem straightforward, and they often are, but problems can arise especially if you did not realise that you had suffered an injury until sometime after the event occurred.

Children: There are special rules for calculating when the three-year time period runs in the case of children. Where a child has experienced injury as a result of clinical negligence or personal injury the three-year limitation period does not begin to run until they are 18 years of age. This means that they need to issue proceedings before they reach 21 years of age. The only exception is where the child lacks mental capacity at the time the negligence occurred, for example the child sustains a brain injury at birth, in which case the limitation period does not apply, they can issue proceedings at any age.

Mental incapacity: For any adult that has a claim and was under a mental incapacity at the time the injury occurred the limitation period does not begin to run until after the period of incapacity.

Mental incapacity is defined by reference to the Mental Incapacity Act 2005. Identifying whether someone has capacity or not can be very complicated, in many cases mental capacity will fluctuate. If or when capacity returns the limitation period will start to run from the time the mental capacity returned.

It is important to appreciate that if the claimant or potential claimant lost mental incapacity **after** the negligence (cause of action) occurred the limitation period continues to run.

Human Rights Act cases: If your claim is going to rely on the European Convention on Human Rights (ECHR), you have 12 months to bring your claim. The 12 months begins to run from the date the act complained of took place

Actions based on the ECHR are often included as part of the overall civil claim for clinical negligence brought under domestic law. The best way to preserve limitation for the ECHR part of the claim is to issue those proceedings and then ask the court to extend time for service – the courts have quite wide discretion to allow this. It is also worth writing to the opposing party and asking them to agree to extend time. The opposing party will often agree to extend time for a defined period for example until after the full inquest hearing and conclusion has been delivered.

What can I do if I am out of time? If you have missed the three-year limitation period, then you can make an application to the court under Section 33 Limitation Act 1980 and ask the court to use their discretion to extend time in your case. Although the court does have discretion to extend the limitation period, they rarely exercise this discretion.

Section 33 Limitation Act requires the court to consider various factors. In the case of the claimant the court will look at the extent to which allowing the extension or not will prejudice them. They will then consider the extent to which any additional time will prejudice the defendant.

The court also looks at all the circumstances of the case including:

- how far out of time the claimant is and the reasons for the delay.
- the extent to which the delay will affect the cogency of the evidence, things like whether witnesses can still be traced, if documentation is still available and so forth will be considered.

- the court will look to the defendant's conduct including whether they have provided relevant information in a timely way and enabled the claimant to progress the case.
- The nature of the claimant's injuries and extent of any disability they may have suffered after the negligence (cause of action) arose.
- The court will consider whether the claimant acted promptly once they knew they had an action against the defendant including whether they have taken and/or are in receipt of any medical, legal, or other expert advice.

AvMA's advice: It is advisable to take specialist legal advice as soon as possible. The rules on limitation look straightforward but do cause problems in practice.

For actions brought under domestic law (as opposed to ECHR) where the three-year rule is applied we urge you to seek independent legal advice as soon as possible and, in any event, preferably before the final year of the limitation period starts. This is because solicitors often have a lot of investigatory work to do, such as obtaining independent medical expert evidence prior to serving any letter of claim/commencing legal proceedings. It can take more than twelve months to get this necessary information together. Solicitors are increasingly reluctant to take cases if they think they may not be able to complete their investigations prior to expiry of the three-year limitation period.

Should I issue clinical negligence proceedings in the High Court or County Court?

Where the claim for your physical and/or mental injury alone is likely to exceed £50,000 you should issue proceedings in the High Court. If your claim for your injuries and financial losses together are expected to be more than £100,000 then you should issue proceedings in the High Court. For more information on issuing proceedings in the High Court please see: **www.gov.uk/guidance/queens-bench-division-bring-a-case-to-the-court#cases-dealt-with-by-the-court**.

Clinical negligence claims which are valued at less than £50,000 can be issued in the County Court. However, it is generally accepted that clinical negligence claims are complex - the value of the claim does not necessarily reflect the complexity of it - you should consider issuing proceedings in the High Court even if the overall value of the claim is less than £50,000.

You should note however that the estimated value of the claim will affect the amount you have to pay to issue the proceedings. The higher the estimated value of the damages, the more expensive the court fee.

If you issue proceedings in the High Court, the proceedings should be issued in the Queens Bench Division of the court.

What track does my case belong in?

Litigants in Person often become confused by what "track" their case belongs in. If you issue proceedings in the High Court, your case will be allocated to the multi-track which is designed for complex and/or high value claims.

If you issue proceedings in the county court, then the court will decide which track the case belongs to. When making this decision the court will have particular regard to the financial value of the claim; the nature of the remedy sought; the likely complexity of the facts, law or evidence; the number of parties or likely parties; the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it; the amount of oral evidence which may be required; the importance of the claim to persons who are not parties to the proceedings; the views expressed by the parties; and the circumstances of the parties.

It is most likely the county court will assign clinical negligence claims to the multi-track. However, they do have the option of considering the fast-track even though this track is generally considered unsuitable for clinical negligence claims because they are complex.

The **fast track** is usually chosen for those cases that have a financial value of between £10,000 and £25,000. The court will issue directions (a timetable of things to be done and when) and will allocate a trial date. Generally, **fast-track** trials will take no more than one day. For more information on fast-track cases see: **www.justice.gov.uk/courts/procedure-rules/civil/rules/part28**.

My claim is low value, can I issue in the small claims court?

If the negligence occurred on or after 31 May 2021 and you have estimated the value of your financial losses and damages for pain, suffering and loss of amenity for the injury at no more than £1,000 and the overall claim, including out of pocket expenses is not expected to be more than £10,000 you can issue in the small claims court. However, this is not the ideal court for complex cases. The small claims court is aimed at low value claims where the issues are straightforward.

Some of the things you should consider when issuing in the small claims court include the restrictions on availability of expert evidence which can be relied upon. You will only be allowed one expert in any expert field and expert evidence in two expert fields. Given that your independent medical expert evidence is the most important evidence before the court you need to be sure that you will not need to rely on more than two experts.

You should also be sure that all the issues can be dealt with at a one day trial.

The small claims court restricts the amount of costs you can recover. However, it will also restrict your exposure to costs should an adverse costs order be made against you, although this is unlikely in the small claims court.

Clinical negligence is a very specialised area of law, the issues are rarely, if ever straightforward. Small claims court judges are unlikely to have any real experience of deciding clinical negligence claims.

For these reasons we do not recommend anyone bringing a clinical negligence claim to issue proceedings in the small claims court. For more information on the small claims court please refer to the Civil Procedure Rules (CPR), the relevant section is here: **www.justice.gov.uk/courts/procedure-rules/civil/rules/part27**.

The cost of court fees: Issuing proceedings is expensive. The court fees payable vary according to how much your claim is worth, for up to date details of the cost of the court fee please check the government website: **www.gov.uk/make-court-claim-for-money/court-fees**.

The court fee costs are on a sliding scale according to the value of your claim. At the time of drafting this information leaflet (July 2021) court fees for issuing proceedings start at £205 (£185 if issued online) for a claim worth £3,000-5,000. The fee is £10,000 for a claim worth £200,000 or over.

As you go through the court process you may have to pay other fees, for example if you need to make an application to court (such as for a stay or extension of time for service of documents) the cost is currently £100 if the other party/parties agree to the application, or £255 if it is not agreed.

Court fees are expensive but if you are in receipt if certain benefits you can claim these back. You can find information on this at **www.gov.uk/get-help-with-court-fees**.

The court fee must be paid upfront and is not recoverable from the court if the case does not proceed. It is now possible to complete the claim form and send the fee online which may save you time and money. If you do not use the online form then you should ensure that you send the documents by special delivery to the court. You are no longer able to hand deliver the documents to court.

Issuing proceedings: Important information

The Claimant: The person who initiates a claim is referred to as the 'claimant'. To start a claim, the claimant must complete a claim form and submit it to the court. Your local Citizens Advice (**www.citizensadvice.org.uk**) or Law Centre (**www.lawcentres.org.uk**) might be able to provide you with general guidance on how the court system works, which forms to use and with completing the court forms. They will not be able to provide detailed legal advice.

Litigation Friend: If you are bringing an action on behalf of a child (that is, someone under the age of 18 years) or for someone who is lacks capacity under the Mental Capacity Act 2005 (also referred to as a protected party), then you must bring those proceedings as a Litigation Friend. Details of the rules around this can be found at part 21 of the Civil Procedure Rules (CPR): **www.justice.gov.uk/courts/procedure-rules/civil/rules/part21**.

The court can make an order appointing a litigation friend. If nobody has been appointed by the court or, in the case of a protected party has been appointed as a deputy, a person may act as a litigation friend if he or she:

- can fairly and competently conduct proceedings on behalf of the child or protected party;
- has no interest adverse to that of the child or protected party; and
- where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right they may have to be repaid from the assets of the child or protected party.

Anyone seeking to be recognised as a Litigation Friend in proceedings must file a certificate of suitability stating that they satisfy the conditions specified.

Identifying the correct defendant or defendants: It is crucial to identify the correct legal identities of each of your defendants in your claim form. Failure to do this might result in the wrong defendant being sued and you having to pay their costs. It can be difficult to know if you have identified the right defendant but it is worth taking the time to make sure you have got this right so your action can proceed as well as saving you money.

GPs should usually be sued individually but not always. In a case involving a doctor in an NHS hospital, the hospital trust should be sued.

Check the correct name of the treating hospital. It is easy to make a mistake, for example, you may have been treated at St Thomas' Hospital but the correct name is Guy's and St Thomas' NHS Foundation Trust. If you are unsure you can ask the healthcare provider to confirm their name for the purposes of issuing proceedings. For more information on the importance of correctly identifying the defendant/s name see Paragraph 2.6 of Practice Direction 16: www.justice.gov.uk/courts/procedure-rules/civil/rules/part16/pd_part16.

More than one claimant or defendant: Where there is more than one claimant or defendant, they should be identified in the title with reference to what number defendant they are, for example Joe Bloggs (1), Jane Doe (2). See Practice Direction 16 referred to above for more information.

Issuing proceedings: The detail

The Claim Form: Formal court proceedings start when a claimant issues proceedings at court. The process involves completing a claim form (usually Form N1 but you should check this with the court before you start), and preparing particulars of claim (if applicable). You should send these documents to the relevant court (County Court or High Court, depending on where you are issuing) with the relevant number of copies and pay the correct issue fee to the court before the limitation period expires. You should be able to complete this process online if you prefer.

The claim form and every other statement of case must be headed with the title of the proceedings (claimant name and defendant name, eg Jane Doe Claimant and The ABC Hospital Trust Defendant. If you are acting as a next friend or as the personal representative of someone who has died, you need to state this on the claim form and particulars of claim). The court will provide you with a case number when you issue the proceedings, the case number should then appear on every court document you prepare. You must state the court or division in which you are proceeding (for example High Court, Queens Bench Division); the full name of each party; each party's status in the proceedings (i.e. claimant/defendant).

It is very important you identify each defendant correctly (see above). There are notes accompanying the claim form, we recommend you read the notes as they are helpful.

The Particulars of Claim: You will need to draft particulars of claim, we recommend that owing to the complexity of clinical negligence cases you draft a separate document called "Particulars of Claim" setting out details of your case. It is possible to set out the details of your case on the Claim Form, but the complex nature clinical negligence claims means that there is usually insufficient space for you to provide the detail you need to include, and we do not recommend this approach.

You can issue your claim form without particulars of claim attached but if you do this, you need to state on the Claim Form words to the effect that *"the particulars of claim are to follow"*.

If you issue your claim form together with separate particulars of claim the claim form should state words to the effect that *"the particulars of claim are attached"*.

Whether you draft the particulars of claim as a separate document from the claim form or endorse the claim form with the particulars there are some essential details you should include. You do need to make sure that the particulars of claim are carefully prepared, as if the court recognises flaws in your documents, you risk the claim getting struck out and a costs order made against you. In either case, you will need to:

- *Provide your/the claimant's date of birth.*
- *Provide details of all the relevant facts which you are relying upon.* The facts need to show why you are bringing a claim in clinical negligence and demonstrate you can satisfy the legal test for bringing a clinical negligence claim.

You may find it helpful to read or re-read our leaflet on *Legal Action: Bringing a claim in clinical (medical negligence)* where at page 3 under the heading *"What is medical negligence"* we explain the three key points you need to prove in order to succeed in a claim for clinical negligence. These are (i) that a duty of care was owed to you (ii) there was a breach of that duty of care (iii) that breach of duty caused you injury.

Your particulars of claim should address these three points and set out as clearly as possible what aspects of your care were substandard and why you say that. The particulars should also make it clear why you believe the subsequent injury was caused by the breach of duty and not some other factor, such as your original medical condition. See link to our leaflet legal action at the end.

- *Value your claim:* Please read our leaflet *What compensation can I claim?* (link at the end)

  This can be difficult especially as there is a lot of skill and experience involved in valuing the pain, suffering and loss of amenity (PSLA) element of any likely award and calculating future losses.

  You should set out any financial losses (out of pocket expenses) already incurred, and any future costs you expect to incur because of ongoing problems caused by the negligence. If there are a lot of expenses you may wish to set these out in a Schedule of Loss as discussed in our compensation leaflet

  When valuing your claim you should exclude the value of any claim for interest. You should try and give your best and most realistic estimate of the value of the claim.

  The value of your claim determines the amount you will have to pay by way of court issue fee (see above for information on court issue fees).

- *You should make a claim for interest.* You will need to specify the percentage rate at which you are claiming interest; the date from when it is claimed; the date to which you have calculated the interest (this cannot be later than the date on which the claim form is issued)
- *You will need to specify the total amount of interest being claimed* as at the date of calculation and the daily rate of interest claimed after that date.
- *Provisional damages:* If you intend to claim provisional damages you need to state this in your particulars of claim (for more information on provisional damages see our leaflet: *Clinical Negligence: What compensation can I claim?*). You need to say that you are seeking an award of provisional damages under section **32A of the Senior Courts Act 1981** (if you are issuing in the High Court) or **section 51 of the County Courts Act 1984** (if you are issuing in the County Court). You must explain that there is a chance that at some future time the claimant will develop some serious disease or suffer some serious deterioration. You are expected to specify the disease or type of deterioration which may occur and in respect of which an application may be made at a future date. In due course you will be expected to demonstrate that there is evidence that there is a real prospect of the disease or deterioration occurring. You should not claim provisional damages on a speculative basis.
- *Statement of truth:* Your pleadings should be verified by a statement of truth. The declaration for the statement of trust is found in Practice Direction 22, full details of which can be found here: **www.justice.gov.uk/courts/procedure-rules/civil/rules/part22/pd_part22#2.1**. The current form for the statement of truth is *"I believe that the facts stated in this [name document being verified] are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth".*

Expert medical evidence: Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with their particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim. In clinical negligence claims we recommend this include a supportive breach of duty report or a condition and prognosis report. If possible, you should avoid serving all of your medical evidence too soon.

An opportunity to seek legal advice

If you are willing and able to pay for legal advice at certain points in your claim, now would be a good time to get help.

You may want to speak to a lawyer to see if you can pay them to prepare the particulars of claim for you. If you instruct a lawyer to draft your particulars of claim, the lawyer will most probably charge you an hourly rate for the time taken to prepare the work. You should expect the lawyer's charges to include the time they need to spend reading through the documents as well as drafting the particulars of claim.

You may find a solicitor who will charge a fixed fee for the work. However, you should be prepared to shop-around as many solicitors will not be prepared to accept instructions in a clinical negligence matter in this way.

We strongly recommend that you only take advice from a solicitor who is accredited in clinical negligence work. The AvMA accreditation scheme is the longest running scheme and is recognised in England and Wales. You will be able to find an AvMA accredited solicitor by searching our website: **www.avma.org.uk/find-a-solicitor**. The Law Society also lists solictiors accredited by them see: **https://solicitors.lawsociety.org.uk**.

When you take advice, you should remember to ask the lawyer for advice on what parts of your medical evidence should be served with your claim form and particulars of claim.

You may want to approach a barrister instead of a solicitor to help you with the drafting, the bar operates a direct access scheme details of which can be found here: **www.barcouncil.org.uk/bar-council-services/for-the-public/direct-access-portal.html**.

The direct access scheme enables you to go straight to a barrister, you do not need a solicitor to do this for you. However, not all barristers are part of the bar direct access scheme so do check the direct access list.

How do I issue proceedings?

Now you have decided which court you are going to issue in, prepared your claim form, drafted your particulars of claim and schedule of loss and have medical evidence in support, together with the required number of copies for service you are ready to issue proceedings.

Sufficient copies of documents: You will need to make sure there is a copy of the claim form, particulars of claim, any schedule of loss and medical evidence to serve (send) to each defendant, a copy for yourself and a copy for the court record.

Once you have sent the documents to the court (or submitted the documents on line) and paid your fee, the court will then seal the forms ready for service on the other party or parties. Sealing the claim form means the court puts its circular stamp on the documents.

You can arrange for the court to serve the documents on the defendants or you can do this yourself.

Serving the claim form

The claim form remains valid for **four months** from the date it is issued by the court. The Claim Form must be served within this time or the proceedings will lapse and you will experience difficulty with pursuing the claim.

Serving the documents means that a sealed copy of all of the relevant documents is sent to each of the defendants. Part 6 of the Civil Procedure Rules deals with service of the claim form and accompanying documents: **www.justice.gov.uk/courts/procedure-rules/civil/rules/part06**

The court will usually serve the claim form except where a rule or practice direction provides that the claimant must serve it; the claimant notifies the court that the claimant wishes to serve it; or the court orders or directs otherwise.

If you decide you want to serve the documents yourself, perhaps because you have not finished drafting the particulars of claim, this can be done in person (usually by a process server) or you can send the documents to each of the defendants by post. Please do check the rules on personal service especially during times of social distancing associated with coronavirus disease. Sometimes, defendants have more than one office, in which case you should ask them to confirm the address for service of proceedings.

If you are sending the documents by post, you should make sure they are sent by recorded delivery so you can show that they have been properly served.

Many organisations will **not** accept service electronically so it is very important you check this first and do not assume you can serve court documents by email or Documentary Exchange (DX).

Extending time for service of the claim form

If you think you will need longer than four months to take the necessary steps to prepare the claim for service of the court documents, you will need to make an application to court to either 'stay' (pause) the proceedings or to extend the time limit for serving the remaining court documents.

Subsequent steps

Once the claim form has been served the next step is to wait for the defence.

The defence

This is the response to the claim. The defendant will usually have 28 days from receipt of the court papers to send out their defence.

The defence can:

- **Deny liability**, such as claiming there has not been any negligence and/or this has not caused harm and you have therefore not satisfied the legal tests.
- **Plead a defence to your case**, such as that you are out of time to bring a claim (a limitation defence). You may wish to seek legal advice at this stage on the merits of your claim in light of these denials and to assess the strength of the potential defence from a specialist solicitor or direct access barrister.
- **Admit liability**, in which case you will need to gather evidence on the compensation you wish to claim.

The defendant may also make a formal request for further information about your case (a 'Part 18 request'). You will need to answer these questions within a reasonable timeframe.

Rules of court

There are lots of rules governing the court process, those rules apply to you as well as the defendant or defendants if you are suing more than one person. It is likely the defendant/s will be legally represented, their lawyers will be unable to offer you any real help as you are not their client, although you can expect them to be respectful and polite to you. The judge and court staff will do what they can to assist you, although judges need to remain neutral and impartial while hearing the evidence so any assistance they can give will be limited, try not to worry about this too much. As a general rule, you can take your lead from the judge who will invite you to speak when he or she is ready to hear from you.

There are various ranks of judges and they will be addressed differently according to their rank. Again, try not to worry too much about how you address the judge but this link is useful for litigants in person and practitioners alike: www.judiciary.uk/you-and-the-judiciary/what-do-i-call-judge.

Allocation and case management directions

The claim form, particulars of claim and the defence are often referred to as the pleadings. Once the defence is in, the court will ask each party to complete and file a ***'directions questionnaire'*** to assist it with managing your case effectively. The court will be particularly concerned to ensure that the matter is dealt with as quickly as possible and proportionately (this means that the cost of bringing the proceedings does not outweigh the amount you are likely to recover by way of damages if you are successful). A case management hearing will be held and you will be expected to attend and explain why you have asked the court to manage your case in a particular way. The court can make directions that any specific issue be dealt with first because this sometimes helps in resolving the whole case.

The links to various standard orders for directions can be found here: **www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/list-of-cases-of-common-occurance**. The purpose of these directions are threefold:

1. It is important that everyone knows which parts of the case are disputed and which are not;
2. The court must make the right arrangements for the hearing, such as allowing enough time and selecting an appropriate judge; and
3. It enables the parties to have a full understanding of each other's case.

Documentary disclosure

This is an important stage of the case which involves the preparation of a formal list of documents. The list should describe all the relevant documents in your case which you have in your possession. Each side usually sends copies of the documents to each other. Some documents attract what is known as privilege, this means they do not need to be sent to the other side.

Exchanging witness statements

The witness statement sets out in writing the precise evidence you want the court to consider and hear at trial. You should have a witness statement for each witness you want to call. Each statement must comply with the Civil Procedure Rules 1998 part 32 (**www.justice.gov.uk/courts/procedure-rules/civil/rules/part32**), and a failure to do so might result in the court refusing to admit the statement as evidence or to refuse costs.

The court will generally stipulate that parties exchange witness statements on the same day and time, so that no party has the advantage of seeing the other's statements first. It is important that the witness statements contain all the relevant detail you wish to rely on, it is unlikely that your witnesses will be able to add significant extra details after their statement has been served.

You should obtain witness statements from anyone who you think may be able to support your claim and explain to the judge what happened. Witnesses are only useful to the court if they can give factual evidence about what they saw happen or heard said.

Each witness should have their own statement. The witness statement should set out the witness's name and address. It helps to number each paragraph to the witness statement.

Each witness statement needs to be dated and should conclude with a declaration which reads:

"I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

Exchange of expert evidence

The court's permission is required for any party to rely on any expert evidence at trial and this is one of the matters the court will deal with when giving case management directions. This will occur after the time when witness statements are exchanged. The court will have set the date for this and it may be that you are required to send the defendant your expert evidence before they send you their reports.

Once all reports have been served, each side's experts will meet to discuss their respective opinions, this is known as the Expert Meeting or without prejudice meeting of experts. You will be expected to have agreed a reasonable agenda (which has been approved by your experts) with the defendants before the meetings occur. The experts will then send you and the defence an agreed note of their discussions which will be used at trial.

Pre-trial review

A court hearing called the pre-trial review occurs after these stages have been dealt with. The purpose is to ensure that your case is ready for trial. At the pre-trial review, the court can give any further directions that may be appropriate to ensure the case reaches a just conclusion as soon as possible.

The trial

The trial is likely to last several days and you will need to carefully prepare for this and be ready to present your case, cross-examine the defendant's experts and make representations to the judge. It is possible that you will be able to engage a barrister via the direct access scheme (**www.barcouncil.org.uk/bar-council-services/for-the-public/direct-access-portal.html**) to act for you. However, many barristers usually prefer to have been involved in a clinical negligence case from an early stage (i.e. before court proceedings were issued). At the end of the trial, the judge will make his or her decision.

An increasing number of hearings and trials have been taking place remotely because of the Covid-19 pandemic. The court will inform you ahead of your hearing whether it will take place in person or remotely. If the hearing takes place remotely you will be sent instructions for joining the online hearing platform. A computer or phone with a video camera is essential for participating in remote hearings as the court must be able to physically see everyone taking part. If you do not own this equipment yourself, consider asking a friend or family member for assistance and make sure the court is aware of this fact.

Costs risks

Please see our leaflets on costs on our website – a link can be found at the end.

There are no special rules for litigants in person. A litigant in person does not get special protection from costs. Costs orders can be awarded against either party in the following circumstances:

- if they lose the case;
- if they fail to adhere to court directions;
- if they make applications breaching the Civil Procedure Rules 1998;
- if they fail to follow court orders or conduct themselves in an unreasonable manner.
- If any part or the whole of the claim is considered to be fundamentally dishonest
- If the court considers the litigation to be frivolous or vexatious or showing no cause of action (this means there is no legal case for negligence)

If you are unsuccessful in your clinical negligence claim, you can expect the rules on Qualified One-Way Costs Shifting [QOCS] to apply, very simply this means that a defendant cannot recover their full costs against you even if they successfully defend your claim.

However, the courts do have the power to strike out dishonest claims and compel dishonest claimants to pay a defendant's costs. 'Fundamental dishonesty' has not been clearly defined but the courts have decided that it must go to the root of either the whole of the claim or a substantial part of it. Examples of where the court has found there to be 'fundamental dishonesty' include where the claimant lied about the occurrence of a road accident; forging garden services invoices to support a claim for a broken arm; misleading the medical expert by exaggerating the injuries and associated disability.

Where a claim is dismissed because the claimant has been dishonest, the court must first deduct the sum of damages which would have been awarded to the claimant from the assessed costs.

If you win

If you win you should get the majority of your costs back, subject to them being 'proportionate' to the amount in dispute and overall importance of the case, and 'reasonably' incurred. These terms are defined by the court rules but, in general, the low hourly rate (£19) applied to litigants in person should prevent this being a problem.

An important exception is where you have failed to beat a reasonable settlement offer (Part 36 offer) from a defendant. In this case, you can find yourself liable for that defendant's costs from the date that offer expired, there are other penalties associated with not beating a Part 36 offer, see our leaflet on settling a legal claim (link at end) and CPR 36 for more detail: www.justice.gov.uk/courts/procedure-rules/civil/rules/part36.

The amount you recover for your own costs may not reflect the actual cost to you in terms of time spent. Litigants in person are entitled to claim an hourly rate of £19 unless you can show that you suffered actual financial loss in carrying out work on your case. You will also be able to recover your reasonable expenses incurred for travel to court, photocopying and any legal advice or expert assistance you have paid for. Accordingly, you should ensure you keep a record of all your work and time you spend on your case and hand this in with your expenses incurred to the judge hearing your case. The judge has a wide discretion to order the defendant to pay your costs.

If you lose

Successful defendants are entitled to ask the court to make you pay their costs. However, in most cases starting after 1st April 2013, the court will apply the 'qualified one-way costs shifting' (or 'QOCS') rules. In many cases this will result in the defendant(s) obtaining a court order saying that they are entitled to their costs but cannot enforce this without the permission of the court. This effectively prevents them from enforcing the costs order against you.

However, this protection is not absolute. It is likely to be lost where you have been found to have been 'fundamentally dishonest' or where your case has been 'struck out' for showing no reasonable cause of action'. If QOCS protection is lost, then you can find yourself liable for the defendant's legal costs. These are likely to be substantial in many cases.

If you fail to beat a defendant's formal settlement offer, other than a Part 36 offer, then it is likely that the court will allow QOCS protection to remain. However, if you have unsuccessfully sued several defendants, then the court will look at each defendant separately and may disapply QOCS against one or more of them.

You can find out more about legal costs in our self-help guides – links at the end.

General risks

You should be aware that bringing a claim as a litigant in person is a stressful process. You can expect some sympathy from the judge and the lawyer acting for the defendant(s) but you must remember that the judge is essentially neutral and the defendant's lawyer has a duty to put their client's interests first.

There are agencies such as Support Through Court [formerly the Personal Support Unit] who offer free services and support for those people involved in court proceedings without legal representation.

Sources of information

- **LawWorks**

  A potential source of support for litigants in person is the Solicitors Pro Bono Group, which supports the LawWorks Clinics Network of free legal advice sessions throughout the UK. You can find your nearest clinic at www.lawworks.org.uk/legal-advice-individuals/find-legal-advice-clinic-near-you
- **Support Through Court**

  Provide free practical support to litigants in person www.supportthroughcourt.org/get-help/how-we-help
- **AdviceNow**

  You can also visit the AdviceNow website which has very clear information and links to information such as court forms and information leaflets – see www.advicenow.org.uk/tags/legal-procedure.

More information on acting as a litigant in person

- **The Bar Council** has produced a guide for individuals representing themselves in court, and you can access this at www.barcouncil.org.uk/using-a-barrister/representing-yourself-in-court
- **The Judiciary** has also produced a handbook for litigants in person, which can be found at www.judiciary.uk/publications/handbook-litigants-person-civil-221013

We would suggest that you read these guides before embarking on a claim and also refer to them as the case progresses.

Barristers

- For details of barrister who provide direct access advice to the public visit www.barcouncil.org.uk/bar-council-services/for-the-public/direct-access-portal.html

Sources of medical experts and other expert details

- You can find details of experts online at www.expertwitness.co.uk
- You can register and search for experts at www.ewi.org.uk
- Your local main library may have a copy of Dr Chris Pamplin's UK Register of Expert Witnesses

Links to other leaflets referred to in this information sheet

Pre Action Protocol
www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd

Legal Action: bringing a claim in clinical negligence
www.avma.org.uk/wp-content/uploads/Legal-action-England.pdf

Clinical Negligence – What compensation can I claim?
www.avma.org.uk/wp-content/uploads/Compensation.pdf

Alternative Dispute Resolution (ADR)/alternatives to litigation
www.avma.org.uk/wp-content/uploads/ADR-Alternatives-to-litigation.pdf

Settling a Clinical Negligence Claim
www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf

Understanding legal costs: the priniciples
www.avma.org.uk/wp-content/uploads/Costs-principles.pdf

See all of our self-help guides at www.avma.org.uk/guides.

www.avma.org.uk/donate

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You can help make healthcare safer and fairer for all

Our vision is a simple: **People who suffer avoidable medical harm get the support and the outcomes they need.** This vision is underpinned by four objectives, we believe, will transform trust in the NHS and healthcare generally and significantly cut the cost – financial and human – which is incurred annually in settling legal claims as well as dealing with the human costs associated with traumatic medical injuries and death. Our four key objectives are:

- To expand the range of communities we serve and so enabling more people experiencing avoidable harm to access services from us that meet their needs
- To empower more people to secure the outcomes they need following an incident of medical harm, whilst providing caring and compassionate support
- To eliminate compounded harm following avoidable medical harm
- To have the necessary diversity of sustainable resources and capacities to deliver

Ongoing donation from as little as £5 a month could go a long way:

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The **charity** for **patient safety** and **justice**

AvMA is the charity for patient safety and justice. We provide specialist advice and support to people when things go wrong in healthcare and campaign to improve patient safety and justice.

For advice and information visit
www.avma.org.uk

Or call our helpline
10am-3.30pm Monday-Friday
(03 calls cost no more than calls to geographic numbers (01 or 02) and must be included in inclusive minutes or there can be a cost per minute)
0345 123 2352

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