Settling a clinical negligence claim

You may find it helpful to also read our leaflet *Clinical negligence – what compensation can I claim?*, available at www.avma.org.uk/wp-content/uploads/Compensation.pdf

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Whether you are being represented by a solicitor or are acting as a Litigant in Person, when you decide to bring a legal claim you will have to comply with the rules of court. There are rules that apply to some types of settlement. Most of the rules are set out in the Civil Procedure Rules which can be found here: **www.justice.gov.uk/courts/procedure-rules/civil/rules**.

Once you bring a claim there is no guarantee that your case will settle although statistically a clinical negligence claim with reasonable prospects of success is more likely to settle than be decided at trial. If a case is going to settle it can be very difficult to know when settlement will be reached. There are several tactical steps that can be taken to encourage a claim to settle sooner rather than later but again these are not guaranteed to work.

Some cases settle in the early stages without the need for proceedings to be issued, others settle very late either immediately before the trial or once the trial has started. The only time you are unable to settle is once the judge has given their decision (handed down judgment), once that happens, the judge's views are final.

Tactical steps

In practice a lot of litigation is about tactics and how your lawyer uses the Civil Procedure Rules. Most sensible and prudent lawyers will properly investigate a case at the beginning of the claim, the investigations will tell the lawyer a lot of things about your case, here are some important points:

How strong your legal case is

Independent expert evidence should identify exactly what aspect of the medical care provided fell below an acceptable standard and was negligent and the injury caused by the negligence.

Sometimes, there is more than one negligent issue. In other cases, the expert may say that the care was substandard but not be very clear in explaining why they have reached that conclusion. Your causation experts may also be less than 100% certain if the negligence caused the injury, this can be because many medical conditions (regardless of whether there was any negligence) carry a range of outcomes and to that extent the expert may have to exercise some caution.

To succeed in a clinical negligence claim you need only show that on a balance of probability the injury was caused by the negligence. This means that it was more likely than not or to put this another way, that there was a greater than 50% chance. However, there is a difference between an expert who can say that they are 51% certain that the negligence caused the injury and one who is 99% certain.

The prospects of your case succeeding at trial

How strong or weak your legal case is will inform you and your lawyer of the prospects of your case succeeding. Your medical evidence will enable your lawyers to identify the weaknesses in your case. No case carries a guarantee of success.

The level of confidence your expert has in their opinion is likely to affect the chances of your case failing or succeeding at trial, this may prove to be a good reason why your lawyer will try and promote settlement sooner rather than later. It may also explain why your lawyer suggest that you settle your claim for less than the amount shown on the schedule of loss and damage.

The likely value of your claim

For more information on compensation please see our leaflet Clinical Negligence – What compensation can I claim? referred to above. Valuing a claim is not an exact science and it can be difficult to do, your lawyer will need to be able to identify what impact your injury has had on your future – will your injury get better or stay the same? will you be able to work again? will you have to take a lower paid job? have you lost promotion/career prospects? will you need care and if so, for how long? There is an endless list of questions which your lawyer will need to try and answer as best they can.

Some of the answers to these questions will be based on your lawyer's best guess. When putting forward figures to settle, it is likely that your lawyer will start with your best case, there is often discussion and negotiation around the figures.

Identifying the value of your claim is important to make sure the level of damages to be awarded is correct and that you have sufficient funds to provide for any services or therapies etc you may need in the future. Your lawyer may need to obtain reports from other experts such as care experts, speech and language therapists and so forth to make sure that those costs are included as part of your claim for damages. Once the value of your claim can be identified your lawyer can begin to make offers to settle.

How will my lawyer bring about settlement?

Much will depend on how willing the opposing party is to come to the table to settle and whether they accept that the care provided to you was partly or wholly negligent. There are several ways a claim may settle, one party may invite the other to attend alternative dispute resolution (ADR) such as mediation or early neutral evaluation (ENE), for more information on ADR please see our leaflet *Alternative Dispute Resolution (ADR) / Alternatives to litigation*, available at **www.avma.org.uk/wp-content/uploads/ADR-Alternatives-to-litigation.pdf**.

Settlement might be brought about through lawyers meeting together telephone discussions or written offers such as part 36 offers.

Part 36 offers to settle a claim

Under the Civil Procedure Rules (CPR) referred to above, either party may make what is known as a Part 36 offer. This is where you put forward a figure saying what you would accept by way of full and final settlement. Full and final settlement means you cannot go back and reopen the claim after the sum offered has been accepted (see below for more information on full and final settlement).

Part 36 offers must be in writing, generally you will have 21 days from the date the offer is made to accept or reject the offer. If you are silent and do not confirm one way or another then following the expiry of the 21-day period, there is an assumption the offer is rejected.

There is a skill in making a Part 36 offer, lawyers will often only begin to make offers once they are confident about the likely value of your claim. If the right settlement figure is put forward these offers can be very persuasive. Your lawyer is unlikely to put forward your bottom-line figure, but the skill is in identifying a figure that is (a) attractive enough to the opposing party that they want to accept it (b) is likely to be awarded by the court (c) provides the claimant with fair and reasonable compensation to enable them to meet any future needs they may have.

Part 36 offers should be very carefully considered, there are severe cost consequences for rejecting a reasonable offer of settlement. For example: If the defendants put forward a part 36 offer to settle your claim for £10,000 and you reject this and go to trial then you must "beat" the part 36 offer to avoid the cost consequences. This means the judge must award you more than £10,000 for you to succeed.

It is not unusual for parties to make several Part 36 offers over the course of the litigation. Sometimes, defendant organisations put in an early Part 36 offer, before your lawyer has had the opportunity to fully investigate the value of the claim.

If you do not beat the part 36 offer you will be faced with cost penalties which are payable out of your award of damages. Those penalties include the person who failed to beat the Part 36 offer becoming liable to pay more in interest and costs than they would have been if no Part 36 offer had been made.

Round Table Meetings (RTM)/Joint settlement meeting

A round table meetings or RTM as they are often referred to, is the same as a joint settlement meeting but we will use the expression RTM in the following paragraphs.

A RTM will not take place in every clinical negligence case, they tend to be expensive. Depending on the complexity of the case, your experts may also attend the meeting or be available on the phone to advise. RTMs often take place in high value, complex cases.

A RTM can take place anywhere but they often take place at a law firm or a barrister's chambers. It is quite usual for each party to have a barrister involved in the RTM discussion in fact they will usually lead the discussion for their party. The claimant is expected to attend the RTM so they can be part of the discussions for settlement and be aware of any offers that are being made or are made by the opposing party with a view to trying to settle the claim.

The fact the parties have gone to a RTM is not a guarantee that the case will settle but frank discussions about the strengths of the case and the value of the claim often lead to settlement either on the day of the meeting or shortly afterwards.

Consent Orders

Most clinical negligence claims settle without the need for a full trial and the judge making an order. The basis upon which you reach settlement is known as the terms of settlement.

Where a case has been issued, that is, court proceedings have started, and parties agree terms of settlement those terms must be set out in a document called a Consent Order. The agreement may have been reached through correspondence between solicitors or by way of a telephone discussion.

The consent order sets out what the parties have agreed between them, it will state how much the case is to settle for, when the money is to be paid by and anything else the parties agree on, such as any costs that may be payable.

One very important term that goes in the consent order is that the agreement is in full and final settlement. For more information on what this means, please see below.

Once the parties have agreed the wording of the consent order, it must be signed and sent to the court so it can be sealed. Once the consent order is sealed it has official approval from the court. A copy of the consent order goes on the court file and the court file is then ready to be closed.

Not all forms of agreement need a consent order, for example cases that settle because a Part 36 offer has been accepted do not need to be set out in a consent order.

Consent orders are used to formalise other types of agreements between the parties, not just settlement. For example, they can also be used if the parties agree to stay or suspend proceedings (this effectively means the proceedings are frozen).

Periodic Payment Orders (PPO)

Periodic payments are not made in every case, they tend to be used in high value claims where there is an ongoing need for regular funds for things like care, equipment costs, therapies (speech and language, physiotherapy etc) to be paid in the future.

PPOs have benefits for both parties, for the claimant it ensures that payments can be made on a regular basis as and when they are needed so there is always money to pay bills as they arise. For healthcare providers it means that they do not have to find a lump sum of money to pay out for all the future costs in one go. If the parties agree to PPO's being paid the amount and frequency of the payments will be included in the Consent Order. However, the court does have the power to order PPOs where it considers it appropriate.

When considering PPO's the court will consider whether this form of award best suits the claimant's needs, the amount of the annual payments to be made by the opposing party, the preference of each party and whether the claimant has received any independent financial advice on the pros and cons of receiving a PPO as against a lump sum payment.

Payments received by way of PPO are exempt of income tax and are disregarded for the purposes of assessing income means tested benefits.

Provisional damages

A claim for provisional damages may be made in circumstances where the medical opinion is such that there is a risk that a claimant will develop a condition later. An example might be where someone has sustained a head injury and is at risk of developing epilepsy later in life. If the event does occur, then the claimant can go back to the court and ask for an additional sum of money by way of compensation to cover the fact that this risk has materialised.

If you or your lawyer intends to make a claim for provisional damages, then it must be requested (pleaded) in your particulars of claim. You must be able to specify the disease or type of deterioration which if it occurs triggers the entitlement to an award of damages at a later date. The court will expect you or your lawyer to estimate a period of time over which the disease or deterioration is likely to happen. The time period can be extended but you or your lawyer will need to apply to the court for this extension.

The Consent Order must specifically state that the parties agree to provisional damages, if the court does not order this then the assumption will be in favour of the terms of settlement being in full and final settlement.

Full and final settlement

Full and final settlement means that you cannot bring another claim in relation to the same negligent treatment ever again. This applies even if you develop symptoms which you did not have at the time you agreed the consent order, but which developed later on and which are thought to be caused by the negligent treatment. The very final nature of a consent order is why experienced clinical negligence lawyers take every care to investigate your case properly before settling the claim.

If there is a risk that an injury might occur further down the line this can be dealt with by way of an award of provisional damages.

You will not be able to go back and reopen proceedings or start them again because you have run out of money.

Court approval

Where a settlement is reached on behalf of a child (someone under the age of 18 years) or someone who is mentally incapacitated the court must approve the terms of settlement, even if proceedings have not been issued. For the court to give their approval the claimant's lawyer will take out an Application asking for the court to give its approval to the terms of settlement.

The court will need to consider whether any agreement for periodic payment is appropriate. The court will also require that a barrister provides their opinion on the merits of the terms of settlement reached, including any case law in support of their opinion. The court approval will only be given once a district judge (County Court) or Master (High Court) is satisfied that the terms of settlement are appropriate. The court will want to know that the money awarded on behalf of the child or incapacitated person is protected for their future use and will be properly invested.

How much will my case settle for?

It is common for lawyers to have a bottom-line figure in mind for settlement – this is the lowest amount of money you ought to settle for, if the opposing party will not agree a figure around the level of your bottom line figure, then this is usually the point you have to consider whether you are prepared to go to trial.

Your lawyer will discuss the value of the claim with you, including any bottom-line figure, any offers to settle which may have been received and/or counter offers you may want to make. Your barrister is often involved in these discussions too, although it is not uncommon for your barrister to have provided a written advice on quantum which explores the value of the claim within the context of the strengths and weaknesses of your case.

You should never be afraid to ask your lawyer questions and you should be able to rely on your lawyer to negotiate with your best interests in mind.

Your lawyer will keep you informed and involved as negotiations proceed, they will not accept an offer to settle without you agreeing to the figure for damages (this is referred to as taking instructions from you). They should discuss the pros and cons of settlement with you including the risks and benefits of going to trial so you are able to make an informed decision on any offer made.

Your lawyer will frequently work with a barrister to arrive at the correct figure for settlement.

Will I get the full amount in the Schedule as compensation?

This is possible but in practice unlikely. As described above, a discount is often given for lots of reasons, encouraging settlement if your case is a bit weak and there are risks with it perhaps because your causation arguments are not as strong as you would like. Or, in recognition of litigation risk which is acknowledging there is certainty in having agreed a settlement and avoiding the risk of a judge making an unexpected decision.

Deductions may also be made for the following:

- *Any costs payable to your solicitor.* The longer a case goes on for, the more work the lawyers do on your behalf the more costs incurred. This is not necessarily a bad thing if the offers being made by the other side are derisory and do not reflect the true value of your claim. If your lawyers are forced to continue litigating on your behalf because the opposing party is not being realistic about settling your claim then you should be confident that you will recover any reasonable costs incurred but if there is a shortfall in the costs recovered then these may be deducted from your damages.
- Money due to the government to repay certain state benefits you may have been in receipt of (see below under Compensation Recovery Unit (CRU)).
- Set off for any interim payments received
- Money recovered on behalf of another person for gratuitous care

This is not an exhaustive list of the deductions that can be made, there may be others. See below under "Will I get the full amount of damages awarded or agreed?"

Will I get the full amount of damages awarded or agreed?

Although your claim may have been settled for an agreed sum of money, it is unlikely that you will receive the full amount of compensation. There are various deductions that may be made from your compensation (see above for some examples). Your solicitor should explain all of this to you before you agree to settle your claim so that you know how much compensation you will receive. The deductions may include the following:

- **Costs payable to your solicitor:** Please see our leaflets on costs, available at www.avma.org.uk/wp-content/uploads/Understanding-legal-costs.pdf

  If you have entered into a conditional fee agreement with your solicitor, then it is likely that a success fee and any shortfall in the hourly rate agreed between you will be deducted from your award of damages.

  You may also have to pay part of your insurance premium for your ATE insurance. These costs can add up and in some cases result in a sizeable deduction from your compensation award.

- **Compensation Recovery Unit (CRU):** If you have been in receipt of certain state benefits because of your negligent injury the state may be entitled to recover the benefits you have received from your compensation. This will be deducted from any award made for past losses. General damages and future losses are usually protected. This is done on a like for like basis-so for example, if you receive compensation for care costs, the benefits you have received since the injury for a care element such as Attendance Allowance or DLA may be recovered by the state.

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