IHCAS
Independent Health Complaints Advocacy Service

healthwatch West Sussex

Clinical Negligence Litigation

An Introduction for Patients

What Can Litigation Achieve?

The litigation process might provide answers which you might not otherwise have found - What went wrong? Who was responsible? It might even produce an apology for errors made. But the goal of litigation is financial: to obtain compensation ("damages") for an avoidable injury or death.

Accordingly, the resolution of a claim for compensation will involve financial considerations. How much will it cost to pursue the claim, what is the likely level of compensation if it is successful? What are the chances of the claim succeeding? Of those claims that are pursued through litigation, many are compromised before reaching trial. For a case to "settle" each side involved in the litigation, typically a patient and the NHS, will have to make concessions and agree upon an appropriate sum of money to be paid to the patient to stop the claim being pursued further.

Litigation does not guarantee that those individuals responsible for an avoidable injury or death will be held personally accountable. You may very well never see them give evidence at court and be questioned about what they did. It is not a disciplinary process. For the patient bringing a claim ("the claimant") success is represented by the payment of a sum of money. That can be a cause of dissatisfaction even to the successful claimant.

What Does a Claimant Need To Prove?

To succeed, a claimant needs to prove both that the care and treatment he was given was negligent and that he has suffered injury as a result of that negligence. If those elements are proved then the court will assess the compensation appropriate for the injury caused and the losses and expenses consequent upon that injury.

The claimant has the burden of proof. The defendant does not have to prove anything. Clinical negligence litigation is not an inquiry into what went wrong. It is an adversarial process.

The claimant brings the claim, setting out allegations. The claimant has to prove those allegations. Negligence is not established merely by proving that different treatment could have been given, nor even by proving that a doctor's management should have been better.

A doctor or nurse is negligent only if their care, management or treatment of a patient fell below an acceptable level such that no responsible body of medical or nursing opinion, as the case may be, would condone it.

Proving negligence is not sufficient to win a case. There are many negligent errors made which do not cause harm, or which cannot be proved to have caused harm. A claim can only succeed if the claimant can prove that on the balance of probabilities the negligence caused injury or death.
The usual test is whether "but for" the negligence, the injury or death would not have occurred. If, absent

the negligence, the patient would have suffered the same outcome from their treatment then there is no "causation" and the claim will fail.

Causation is difficult to prove in clinical negligence cases when the negligent treatment is for a patient who is, in most cases, already ill or injured. It involves a comparison of the likely outcome without negligence, and the actual outcome after negligence has occurred. The difference between the two outcomes is "the injury".

AvMA - Action for Victims of Medial Accidents

If you are confused or have any further questions about what a claim for medical negligence involves then you may wish to contact AvMA. AvMA also provide a pro-bono Inquest service and may be able to find you a solicitor to help you with your case.

AvMA can be contacted on 0845 123 2352 or visit www.avma.org.uk

How is the Claim Proved?

Claims are proved by three kinds of evidence:

- Documentary evidence, usually comprising the medical records and any relevant hospital protocols or national guidance
- Lay witness evidence from the patient, their family, and the doctors and nurses involved in the events giving rise to the claim
- Expert witness evidence: subject to the permission of the court each party to the claim is allowed to rely on expert opinion evidence. So, if injury has been caused to a baby due to poor management of their birth, expert evidence may be required from an obstetrician and a midwife to tell the court whether the standard of care of the hospital staff was acceptable.

Expert evidence may then be required from the same experts but also from a neonatologist, a neuro-radiologist and/or a paediatrician as to when and how the injury was caused and what the outcome would have been in the absence of the negligent acts or omissions. So, several expert witnesses may have to look through the documentary and lay witness evidence, and may have to examine the claimant or visit them at home. For every expert the claimant "instructs" the defendant will usually instruct a corresponding expert. They too will need access to the evidence and may need to examine the claimant or visit them at home. The corresponding experts might very well give differing opinions on negligence, causation and the level of money needed properly to compensate the claimant. Where there are differences that cannot be resolved by the parties' and their lawyers, a Judge will have to make decisions about whether the case is proved and what the level of compensation should be. This is done at a trial at court which might take several days.

Of claims that solicitors investigate, only a very small percentage reach trial. Some will not be pursued after initial investigations. Some will be investigated fully but after full consideration, it is decided there are insufficient prospects of the claim succeeding to justify proceeding further. Others will be pursued and will settle for an agreed sum of money. Fewer than 5% will go to trial.

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