

Erb's Palsy Claims – Fact Sheet

Medical Negligence

How is an Erb's Palsy claim investigated?

1. The complaints process is wholly separate from a legal claim and solicitors cannot be involved directly with the complaints process, although you can run a civil claim alongside making a complaint should you wish to do so.
2. Once you have decided to consult your chosen solicitor to pursue a claim for damages for yourself or your child, the first step will be to arrange funding for the case. In all claims for children who suffer a neurological injury (which includes a brachial plexus nerve injury) during birth Legal Aid via the Legal Aid Agency is still available. This is commonly called "public funding" as the government agency will fund the costs on investigating and pursuing the case, so long as there are reasonable grounds on which to do so. There has to be evidence that, on the fact of it, there was a medical error causing a neurological injury.
3. We will apply for a Legal Aid Certificate on your behalf; if granted the first stage of the case is to obtain all medical records for the mother and also the injured child/adult. These records will then be independently sorted by a nurse so that they are indexed, paginated and a chronology prepared.
4. It is best to pursue a claim for negligence as soon as possible, this is particularly important for young adults as the hospital will be entitled to destroy paediatric medical records once the child reaches 21 years of age. In addition, witness statement evidence on the circumstances of the birth can be very important, so having a fresh recollection of events can assist a lot.
5. Once the sorted medical records are with us we will arrange to see you to review them together and to take a detailed witness statement on what you believe went wrong with the birth. This will always require the input of the mother, even if the Claimant is now an adult bringing the claim themselves.
6. In the meantime we will make enquiries of suitable independent medical experts who could report in the case. The expert will review the medical records and your statement and provide a report on the documents available, including any internal investigation reports or complaints correspondence. The medical expert will not in any way be linked to the Defendant trust and we always ensure they are leaders in their field.
7. In order to prove a case you need to establish 2 key legal tests; the first that there was a breach in the duty of care owed to you by the medical staff caring for you, i.e. that you received negligent medical care; secondly that the identified negligence caused or materially contributed to the brain injury, this is commonly known as "causation".
8. We will instruct an obstetrician and/or midwife to comment on breach of duty of care. If those reports are supportive of a case in negligence we will then we may also instruct a "causation" expert, an orthopaedic surgeon, to look at whether it is linked to the nerve injury.
9. In an Erb's Palsy case we will look in the first instance as to whether we can argue there should have been a caesarean section, which would have avoided the shoulder dystocia occurring at all. This test applies when there were maternal risk factors which meant that the mother should have been advised on the risks of proceeding to a vaginal birth. The mother will then need to explain why she would have opted for a caesarean birth, rather than routine vaginal delivery.
10. In the alternative we will look at whether the delivery itself was negligent managed or not once the shoulder dystocia was diagnosed. This is a medical emergency and requires swift action by way of steps and manoeuvres to deliver the baby; we will look carefully at whether: a) all appropriate steps such as the application of supra-pubic pressure and the use of the McRoberts position or undertaking an episiotomy were applied and/or b) whether the person delivering the fetal head applied too much traction (pulled too hard on the head) to try to deliver the baby. These are complex issues and require careful review by the medical experts instructed.
11. We are helped in proving that a Doctor or Midwife applied too much traction on the baby's head if we can demonstrate that:
 - The affected shoulder was anterior at the time of birth (that is the affected shoulder was impacted against the mother's pubic bone)

- The medic involved did not have regular and up to date training at the time of the delivery
 - The shoulder affected has a significant and permanent injury, usually affecting a number of the cervical vertebrae
 - We have witness statement evidence to state that there was excessive pulling on the fetal head after it was delivered
 - There were poor medical notes taken
12. Once we have obtained all expert evidence we then usually have a meeting with a barrister. The barrister will take each expert through their evidence and test their opinion and the strength of their views, this way we know the case is as robust as possible.
 13. The burden of proof is on the Claimant to establish their case on the balance of probabilities and therefore it's important that we are clear on what our arguments are and that if the case went to trial our experts will stand by their views.
 14. After this meeting the barrister will prepare a document entitled "Particulars of Claim", this is a legal document which summarises the circumstances of the case and sets out the allegations of breach of duty of care and causation, inviting the Defendant to prepare their Defence in response.
 15. We work under the "Clinical Negligence Protocol for the Resolution of Clinical Disputes." This is a system both parties work to in an effort to avoid having to litigate the case through the Court system, as once we issue proceedings in Court the costs in the case become extremely expensive. Under the Protocol the Defendant Hospital Trust will have 4 months to provide their response, although this is often extended to 6 months or longer in very complex cases.
 16. Once we have the Defence from the Hospital we will be in a position to advise you on the next steps in the case. The Trust may admit liability in full, or deny it in full or partially. Dependent upon their response we will advise you on the next step in the case.
 17. If liability is admitted we will issue Court proceedings and obtain Judgment that the Defendant is liable to pay compensation for the injuries caused. We will then value the case.
 18. If liability is denied then we may need to issue and serve Court proceedings to fight the case through the Court system; the stages are complex and we will advise you on those in much further detail at that stage.
 19. The length of a case is dependant on the complexity of the investigation needed, how long the Defendant takes to respond and whether they admit liability early or not; most cases do take some time to resolve, but Royds Withy King work in teams to ensure your case is progressed as quickly as it can be.
 20. Once a case is hopefully valued and settled the damages will either be paid out (if the Claimant is over 18 years of age) or invested if the Claimant is still a child at the time of settlement. If the damages require investment then this will be done either through the Court Funds Office or privately, quite often through a personal injury Trust fund. The options are complex and we will provide full advice at the time of settlement.
 21. Royds Withy King can offer a bespoke service from beginning to end and will do all in our power to fight for a positive outcome in the case and to continue to look after our clients thereafter if required.