

RISK ASSESSMENT FOR CLINICAL NEGLIGENCE CLAIMS: A PRACTICAL GUIDE FOR SOLICITORS

RISK MANAGEMENT



1) Introduction

Key points

- Clinical negligence claims remain a high-value and high-risk area of litigation
- Risk assessments are central to both the solicitor's case preparation and the ATE insurer's decision-making process
- This guide provides practical advice to help solicitors produce risk assessments that are structured, realistic and aligned with what an ATE insurer needs to see
- Updated to reflect observations since Temple's April 2021 guide, including changing case complexity and increased costs scrutiny

Clinical negligence claims continue to present a high degree of legal and financial risk, particularly where significant damages and complex medical evidence are involved. In this context, the risk assessment carried out by a solicitor at an early stage is central to the viability of the claim and the decision-making process of any after-the-event (ATE) insurer.

This guide is designed to support clinical negligence practitioners in England and Wales. It offers practical observations on preparing risk assessments that are well-structured, evidence-based and aligned with the expectations of ATE insurers such as Temple Legal Protection. It also reflects developments since Temple's previous guide in 2021, including increased scrutiny of claims, higher disbursement costs, and the ongoing implications of COVID-related care pressures.

By following the principles set out here, solicitors can prepare assessments that help identify the strengths and weaknesses of a claim, support applications for ATE insurance, and reduce the likelihood of queries or delays.

2) Why a robust risk assessment matters

A carefully prepared risk assessment supports the solicitor's decision to proceed under a conditional fee agreement and assists the insurer in assessing the claim's merits and likely financial exposure.

ATE insurers must be confident that a claim has a reasoned basis and that key issues have been properly considered. This is especially important where the insurer may be liable for substantial adverse costs or disbursements if the case does not succeed.

Since 2021, the need for structured assessments has increased due to several factors:

- **Post-pandemic clinical contexts:** Some claims now involve alleged negligence during periods of unusual pressure on healthcare providers. These cases require more careful consideration of the standard of care and how it was affected by the circumstances at the time.
- **Rising costs:** The increasing cost of expert evidence, inflation in disbursement fees and greater emphasis on proportionality mean that insurers need clear justification for pursuing a claim, particularly where cost-to-benefit margins are tight.
- **Delegated authority schemes:** Where firms operate under delegated authority, there is a continuing need to demonstrate consistency and diligence in how cases are assessed and presented.

A sound risk assessment improves communication between solicitor and insurer, helps avoid misunderstandings, and creates a clearer pathway for claims that are ultimately brought to trial or settlement. It is not simply a formality but an active step in protecting both the client's interests and the viability of the case.

Your trusted insurance partner

3) Key areas to address in a clinical negligence risk assessment

A clear, well-reasoned risk assessment helps identify which cases are suitable for ATE insurance. It also demonstrates to the insurer that the solicitor has considered the key elements of liability, causation, quantum and cost. The following points should be addressed as a minimum:

- **Breach of duty and causation:** Set out the core facts of the alleged negligence and explain how breach and causation will be established. Where the treatment occurred during or following pandemic-related pressures, note whether and how those pressures may affect the standard of care or legal test to be applied.
- **Limitation:** Confirm that the claim is within time or, if limitation is approaching, provide your view on any relevant extensions or arguments under the Limitation Act 1980.
- **Witness evidence and records:** Summarise the claimant's position and indicate whether key witnesses have been identified. Confirm that relevant medical records and documentation have been obtained and reviewed.
- **Consent and capacity issues:** Explain whether informed consent is a factor in the case and, if so, how it is being addressed. If there are issues around the claimant's capacity to litigate, set out how these are being managed.
- **Expert evidence:** List which disciplines will be required, whether any expert opinion or screening report has been obtained, and what it concludes. Where this is not yet available, give a reasoned explanation and a timeframe for obtaining it.
- **Likely defence argument:** Consider what position the defendant may take and how this might affect the prospects of success.
- **Assessment of prospects:** Offer a balanced summary of your current view on liability and causation. Avoid generic statements - instead, support your assessment with reference to evidence and legal reasoning.
- **Cost considerations:** Provide an initial view on likely disbursements and legal costs. Highlight any high-cost elements (e.g. multiple experts) and whether these are proportionate in relation to the value of the claim.

4) Common mistakes to avoid

Some recurring issues lead to delays or refusals when a case is referred to an ATE insurer. These include:

- **Overgeneralised assessments:** Statements such as "good prospects" or "standard breach and causation issues" without explanation are not sufficient. A brief but focused analysis is far more helpful.
- **Failure to address weaknesses:** No case is without risk. If there are limitations in the evidence or particular legal hurdles, these should be identified, along with a plan to address them.
- **Incomplete documentation:** Missing medical records, witness statements, or expert opinions can prevent an insurer from making a fair assessment. If a document is pending, provide a clear explanation.
- **No reference to context:** Where treatment occurred under unusual or time-pressured conditions, this context should be acknowledged. It may be relevant to the assessment of breach and must be factored in.
- **No indication of precedent:** If you or your firm have handled similar cases before, it may help to reference these. This can demonstrate experience with the relevant issues and procedures.

5) What Temple needs to see if your matter has to be referred into us

When a matter falls outside delegated authority and must be referred into Temple, the following will assist us in reviewing the case:

- A clear, structured summary of the case and any supporting documents
- Where relevant, details of how COVID-related factors or delays impact breach or causation
- Expert evidence or screening opinion, if available or if it is too early, your own professional judgement
- Counsel's advice where available, or internal legal opinion
- Indications of cost exposure - and how disbursements are being monitored
- Thoughtful commentary on any complications and how they will be addressed

The aim is not to present a perfect case, but to demonstrate that the risks have been considered carefully

6) Working effectively with your ATE insurer

ATE insurance is a form of partnership. While the solicitor and insurer have different roles, both are working to assess and manage legal and financial risk in a clinical negligence case. The following points support a constructive relationship:

- The insurer is a partner in risk - clarity and honesty are essential: Presenting the facts as they are, including any uncertainties, allows for informed underwriting decisions and strengthens trust between parties.
- Firms working under delegated authority schemes must maintain consistent standards in documentation: Whether the case falls within a delegated scheme or is referred into the insurer, the risk assessment must be clear, accurate and well-supported.
- Understand that queries or requests for further information are part of sound underwriting practice: These should not be seen as objections but as part of a careful assessment process. Responses that are timely and thorough can help move the case forward.
- If unsure about prospects, early dialogue with the insurer can help avoid delay or rejection: Raising concerns or discussing uncertainties in advance is often more productive than submitting a case that lacks sufficient analysis.

7) Summary

A clear and well-prepared risk assessment is not only a key part of case strategy, but also a practical step towards securing ATE insurance.

- A good risk assessment should be thorough, balanced and tailored to the case
- This benefits both parties and supports better outcomes for clients
- Clear documentation, realistic expectations and transparency are key
- Whether the case is straightforward or complex, the insurer needs to understand how you have reached your view on prospects and what steps you are taking to address any challenges.

8) Contact and further guidance

If you can confidently say that all the risk assessment best practice from this guide is happening, you should be seeing healthy wins statistics and few claims. If not, please call 01483 577877 or email matthew.best@temple-legal.co.uk. We are only too happy to work with you to create a more robust process.

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Matt, with Temple since 2011, oversees personal injury and clinical negligence underwriting. Now Director of ATE Partnerships, he is respected for building strong industry relationships and driving team success.

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John, with 19+ years in legal expenses and 17 in ATE insurance, leads the development of Temple's clinical negligence and personal injury offerings and is known for his approachable style.

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