



Legal Action / Claiming Compensation

This help sheet explains your legal rights if you have been injured as a result of medical treatment and steps involved in seeking compensation through a legal 'Clinical Negligence' action. Note: the law in Scotland is different. Please refer to our separate leaflet on legal action in Scotland.

What is 'clinical negligence'?

If you have suffered an injury as a result of medical treatment, this may be referred to as a 'medical accident', 'adverse incident', or 'patient safety incident'. This does not mean that the treatment was necessarily 'negligent'. Whilst better quality of care or safety measures could have prevented your injury, it may be that the incident itself could not have been avoided. The law only provides for you to recover compensation if it can be shown 'on the balance of probability' that your treatment was carried out negligently **and** that this directly caused your injury. In legal jargon these tests are called 'liability' and 'causation'. They are difficult criteria to fulfill and require expert opinion from relevant health professionals to establish whether your claim will succeed.

Some examples of clinical negligence may include:

Failing to diagnose your condition or making the wrong diagnosis..

Making a mistake during a procedure or operation.

Giving the wrong drug.

Failing to obtain consent to treatment.

Failing to warn about the risks of a particular treatment.

What action can I take if I suspect I have been injured by negligent treatment?

The very least you should be able to expect is a full explanation of what has gone on, an apology where appropriate, and assurances that any problems that might affect other patients have been addressed. Sometimes this is achieved informally. The use of formal complaints procedures (see separate leaflets) provide a useful way of eliciting further information which may also inform any decision as to what to do next. It may be that you are able to seek compensation by taking legal action if it appears there is clinical negligence involved. However, the legal process is only concerned with establishing what compensation, if any, you should be entitled to. Whilst this information sheet explains this process to some extent, you will probably find it helpful to discuss the possibilities of this with one of the Advice and Information Workers.

The decision to take legal action should not be taken lightly. It can be costly, lengthy and very stressful to the individual. You will be required to go over what happened to you many times which you may find traumatic and upsetting. You will normally require the services of a specialist clinical negligence solicitor, as a clinical negligence claim is nearly always complicated. AvMA has a panel of clinical negligence solicitors and we can help choose the right solicitor for your case and monitor progress.

Limitation (Time Limits)

You must commence your legal claim within three years from when the incident occurred or when you first realised you had suffered an injury. It is advisable to take specialist advice as soon as possible. Do not leave it to within a year of limitation applying if at all possible.

In the case of children the three year limit does not apply until their eighteenth birthday, in other words they have until they are twenty-one before commencing a legal claim.

If the claim involves a patient who is not running their own affairs because of a mental disability, the three year does not apply until (and unless) they get over their disability.

In both of these cases a parent or other person close to them can make a claim on their behalf (acting as their 'litigation friend')

Instructing a Solicitor

The solicitor will need to make an assessment of your case to decide if you have a strong enough case for them to take on. They will need as much information as possible to do this, you can provide this by keeping a record of everything that is relevant to your treatment and any correspondence you may have if you have been through the complaints procedure. Also, keep a record of any costs or loss of earnings you may have incurred. The solicitor will decide if your case has a reasonable chance of success and should be able to give you an idea how much your case may be worth.

What are my options for funding my legal claim?

Your solicitor will discuss the best way to fund your legal claim. There are a number of options available to you:

Private Funding

You may be able to fund the legal claim yourself; your solicitor will be able to advise you about the cost of bringing a claim.

Public Funding ('Legal Aid')

You may be eligible for public funding if you are on a low income. You will be assessed for public funding by the Community Legal Service on a number of criteria. This involves having your assets and income assessed and it will have to be shown that you are experiencing severe financial hardship in order to qualify for public funding. The merits of your case will also be assessed, you must show that your case will have a reasonable chance of success and finally if the compensation you are likely to receive is less than £10,000 you may not be able to justify the cost of pursuing a legal claim. A clinical negligence case can be very expensive to investigate.

Trade Union Help

If you are a member of a trade union you may be eligible for help with the costs of a legal claim from them.

Legal Expenses Insurance

Your solicitor might ask you about insurance policies you have, as it is possible that they might include legal expenses cover which could be used to finance a clinical negligence claim. Even if you are considering making a complaint, it is worth checking all your insurance policies and if there is legal expenses cover, check the policy terms in relation to time limits for making a claim

to the insurers. If there is a time limit, you should submit details to the insurers within this period to avoid a refusal of cover at a later stage. If the period for making a claim is not clear, then you should speak to the insurance provider. Often there is a set limit on the legal costs and you may be expected to instruct a solicitor on the insurers' own list. However, you should always ask to be referred to a clinical negligence specialist (for example a solicitor on AvMA's specialist panel).

Conditional Fee Agreements ('No-Win-No-Fee')

These agreements are often referred to as 'no-win no-fee' agreements and mean that you won't have to pay your solicitor's fees if you don't win the case. Because of the complexity of a clinical negligence case your solicitor may require you to pay for some initial investigations to assess how strong your case is before entering into an agreement. This may cost several thousand pounds. You may also be advised to take out insurance ('after-the-event' insurance) to protect you from the possibility of having to pay the other sides costs if you should lose the case. These are complex agreements and your solicitor will advise you on this.

How do I prove that I have grounds for a legal claim?

Clinical negligence claims are often complex cases, for you to be successful in your legal claim there are two strands of the case, negligence and causation, and you must succeed in both:

- Negligence: that the care you received fell below medically acceptable standards (note: care which is less than best practice may still be 'acceptable' in the legal definition and not 'negligent'), and
- Causation: The breach of duty or negligence of the clinician directly resulted in an injury to you.

As stated you must succeed on both, it is not enough that you succeed in proving that someone did something wrong when treating you, you must also prove you suffered an injury as a result of that incident.

As part of the initial investigations, your solicitor will require a supportive opinion from an independent medical expert on your case. They will base their opinion on:

your medical records

your statement about what has happened to you

any other documents supporting your case

If your solicitor cannot obtain a supportive report from an independent expert, then your case will not succeed.

Following an assessment of your case your solicitor will be able to give you a rough idea about the level of compensation you might expect if your case is successful. They will take into account certain social security benefits you get because of your injury (such as Income Support) because this could affect how much compensation you will get.

You can claim compensation for any injuries or losses suffered which were a direct result of the negligent treatment you received. This can include:

Pain and suffering

Ongoing treatment

If you cannot carry out certain activities or hobbies

Loss of earnings

The cost of any extra care or equipment you may require

The cost of adapting your home

Psychiatric or psychological injury

What if I am pursuing a claim in relation to my loved one who has died as a result of clinical negligence?

If the case relates to someone who has died because of clinical negligence, you can claim:

'Bereavement damages' of £10,000 if your husband or wife, or your child if they were under 18, died;

Loss of dependency if you were financially dependent on the person who died; or

A claim on behalf of a deceased patient's estate.

Do clinical negligence cases always end up in court?

Clinical negligence claims rarely end up with a trial in court. Many cases are settled after all the investigations are completed and before legal proceedings are issued, and the majority before a trial commences. Both sides are encouraged to settle the matter quickly and to avoid incurring extra costs.

If you have any questions about the information in this leaflet, please write to the Advice and Information Department at AvMA or contact our Helpline on 0845 123 2352 during the hours of 10am-5pm Monday to Friday. This number enables you to access the service at the cost of a local rate call.

AvMA 11/07