Medical negligence – what compensation can I claim?

This leaflet aims to explain how lawyers and the courts work out how much money should be given to you to compensate you for injury and loss arising from negligent medical care.

This leaflet will not go into detail about how to bring a legal claim; more detailed information on the legal test for negligence can be found in our leaflet: Legal Action: bringing a claim in medical (clinical) negligence.

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If you need legal advice about making a clinical negligence claim, you can find a wide selection of solicitors accredited for AvMA's specialist clinical negligence panel at www.avma.org.uk/find-a-solicitor.

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Medical negligence is the same as clinical negligence, although the terms can be used interchangeably. We use the term medical negligence throughout this leaflet. At the end of this leaflet there is a Glossary of Commonly Used Words and Phrases that are used throughout.

You will only receive money for your injuries and any loss if you can show that the medical treatment you received was negligent. Negligence has a specific meaning in law, but the test for showing that medical treatment was negligent is a difficult one to pass.

The legal test for medical negligence

In very broad terms, to succeed in a legal claim, you must show that:

1. the healthcare provider owed you a duty of care;
2. the care provided fell below an acceptable standard, and that
3. this negligence caused you injury and damage (financial, mental and/or physical).

For more detailed information on the legal test, please see the Legal Action: bringing a claim in medical (clinical) negligence leaflet.

What is compensation intended to do?

In almost every case, no amount of compensation can make up for what happened, however, it is all a court can order.

In so far as money can do, financial compensation awarded in a claim for negligence is intended to put the claimant back in the position they would have been in had the negligence never occurred. It is very important to realise that **compensation is not awarded to punish the healthcare provider** for what they have or have not done.

When can I claim compensation?

If your medical negligence case is successful, you can claim compensation (damages).

You need to have evidence, which is usually in the form of medical reports from an appropriate, independent medical expert to show:

1. what would have happened if the negligence had not occurred, and
2. what has happened because of the negligence (causation), and
3. what, if any, long term consequences there are and when, and if, your injuries will improve or make a complete recovery.

   This is usually referred to as a Condition and Prognosis evidence.

For more information on the role of the independent medical expert please see the section on experts in the leaflet Legal Action: bringing a claim in medical (clinical) negligence.

You are only entitled to claim damages for the additional or avoidable injury caused by the negligence. In addition to identifying what injury has been caused because of the negligence, the medical expert's role is to consider your original medical condition and any other underlying conditions you may have had before the negligence happened. The medical expert will be expected to advise on the extent to which, if at all, your original condition would, in any case, have impacted you as well as your ability to undertake work and/or leisure activities. For example, if the nature of your original condition was such that you would not have been able to work in any case, then you will not be able to claim loss of earnings.

What do I get compensation for?

Compensation is calculated by reference to:

General damages (pain and suffering) and loss of amenity ('PSLA')

This is a sum of money which is paid to reflect:

- the pain, physical harm, suffering and disability which has occurred because of the negligence. Generally, the more seriously injured you are, the higher the amount of compensation.
- how the injuries have affected your loss of enjoyment of life. This means that consideration will be given to how your injuries affect your daily activities socially, domestically, at work or leisure.

Can you claim for mental harm? This is a commonly asked question, and the short answer is yes. To bring a successful claim for mental harm you will have to show that you have suffered psychiatric harm and mental distress because of the negligent treatment. Some types of psychiatric harm require you to show that you meet very specific circumstances; for example, secondary victim claims are very difficult to prove. Please see our Damages (compensation) for mental harm leaflet.

There is no precise formula for valuing PSLA. The assessment of this sum is done on an individual basis, and the amount to be awarded will vary from person to person. Your lawyer may estimate this themselves at the outset, although with more serious injuries it is not unusual for them to work with a barrister to try and identify the most appropriate amount of money for you to receive.

There are various resources available to lawyers to help them when valuing PSLA, including:

1. the "Judicial College Guidelines for the Assessment of General Damages" which sets out tariff levels for injury. The Guidelines are updated every few years. Currently the most up to date version is the 15th Edition which was published in 2019.

   By way of example, the current guidelines say that a back injury causing chronic, permanent symptoms will attract damages of between £30,910 to £55,590 and that awards for psychiatric damage range from £1,220 for less severe injury to £92,240 at the most severe end of the scale.

   Where a claimant falls within these scales will depend on what the medical evidence says.
2. reported cases where the judge has decided on the sum to be awarded; and
3. their experience of previous cases similar to yours;

In some cases, the negligence may have caused several different injuries. In these cases the approach taken is to identify an amount of money that reflects the effect of all the injuries taken together. Calculating an award of general damages is not an exact science and it is important to be aware that no two cases are identical and there may be cases where people receive more or less compensation.

The amount claimed is likely to be a subject for discussion and negotiation between the claimant and defendant lawyers.

Past special damages

This is a claim for any reasonable financial losses and 'out of pocket' expenses, money that has already had to be spent as a direct result of the injury caused by the negligent treatment. This includes, for example:

- ***Loss of earnings***

The claimant will need to prove any loss of earnings claimed. For someone who is employed, this is often by way of Payslips, P60s, etc. Sometimes, a claimant will not have suffered a loss of earnings as their employer has paid them throughout their absence. However, the employer may have a 'right of subrogation' to 'piggy back' onto the claimant's claim to recoup the amount paid in Occupational Sick Pay.

For someone who is self-employed, the business documentation will need to be interrogated and further investigation may be needed to prove the impact of the claimant's absence.

- ***Paid care and support***

If a claimant has reasonably paid for care, domestic support, gardening etc.as a direct result of the injury caused by the negligent treatment, the claimant will be entitled to recover the costs from the Defendant. Receipts or proof of payment should be collated and provided.

- ***Gratuitous care and support***

In most cases, a claimant has not paid someone for care and support, but has relied on the help of friends or family. Where a family member or friend provides care or helps the injured person with household or other tasks, a claim for this unpaid care can be made.

The amount allowed for gratuitous care depends on the type and intensity of the care provided; whether provided during the daytime, night time, or weekends; and the year the care was provided. In practice, the rate allowed is not as high as a professional care rate. Often this rate is discounted by between 25% and 33% to allow for the fact that the recipient is receiving the money net of tax and National Insurance.

Family members and friends providing care should keep a careful note or diary of the amount of time they spend helping you, whether this is getting your shopping, doing housework, changing dressings, giving you medication, preparing meals or any other job that they take up on your behalf because you are no longer able to do it due to your injury.

The claimant makes a claim on behalf of the person providing the care (the person providing the gratuitous care cannot bring a claim in their own right). Where an amount is allowed for gratuitous care, the money does not belong to the injured person but to the person who provided the care and it should be held on trust for them.

If the person providing gratuitous care has had to give up work to provide the care, only in extremely rare circumstances will they be able to make a claim for loss of earnings instead of care.

- ***Other financial losses***

There may be many other expenses incurred, e.g. prescription charges, treatment costs, travelling expenses, and things that you have bought to help you in daily living such as equipment. You and/or your carers should try to keep careful notes of your expenses and keep receipts.

- ***Interest***

You can claim Interest on all past losses. The rate is set by the Court.

Future special damages

This is a claim for future financial losses and expenditure that might reasonably be incurred. Where very high levels of award are reported in the papers for things like brain injury, most of the award is attributable to future losses. Future losses include claims for:

- ***Loss of earnings and loss of pension***

If you are unable to work in the future, you can claim for your future loss of earnings. This may include not just base income, but loss of benefits (e.g. health insurance, pension contributions etc) and loss of promotion prospects. An inability to work (or working at a lower salary) may have an impact on your future pension and, if so, this pension loss can be assessed and claimed.

- ***Future case management and care***

The cost of any future care which is provided privately can be claimed. Usually, your lawyer will obtain a report from an independent care expert. The care expert will consider your medical evidence and, using the information in those reports, will provide an estimate of your current care needs as well as how your needs are likely to decrease or increase in the future. If your needs are complex, a Case Manager may be recommended to assist with, amongst other things, recruitment of appropriate carers, identifying and co-ordinating appropriate therapies and house-moving etc

- ***Medical treatment and therapies***

If you have an ongoing need for medical treatment and therapies, it is reasonable to seek to claim the cost of these to be provided on a private basis.

- ***Aids and equipment***

Where these are required the costs can be recovered. Items may include equipment to help around the home, equipment to assist with personal care (e.g. grab rails in the bathroom); equipment to improve mobility (e.g. wheelchairs, prosthesis).

- ***Accommodation costs***

The cost of new accommodation and any adaptations required, or adaptations to existing accommodation to enable you to continue to live as independently as possible, can be claimed. An accommodation expert will be asked to provide a report if these costs are to be claimed.

- ***Gardening / DIY***

If your injuries prevent you from undertaking household tasks, such as DIY, housework, childcare or gardening, then a claim can be made for employing people to carry out those tasks.

- ***Deputyship costs***

If the claimant lacks capacity to manage their affairs, the Court will require a Deputy to be appointed. The costs of the appointment and managing the Deputyship can be recovered in the litigation.

Quantum experts: The calculation of future losses needs very careful assessment, and your lawyer may need to get reports from a range of experts on things like your care needs and employment (what work you were undertaking, what you are doing now and what you may be able to do at some point in the future). Experts who are asked to provide their opinion on matters relating to the likely costs to be incurred are sometimes referred to as quantum experts.

Death: There is a different approach to calculating compensation in a Fatal case - Please see our leaflet for details which explains about compensation where someone has died.

The schedule of loss and damage

Details of the amount you are claiming by way of compensation are set out in a document called a schedule of loss and damage. The schedule of loss and damage is sometimes also referred to as the schedule of loss, or schedule of damage.

As your past special damages have already been incurred, these tend to be quite easy to identify.

Future losses are more difficult to work out as there is inevitably an element of 'crystal ball gazing'. Your lawyer will gather available documentary and factual evidence, but will also be very dependant on the Condition and Prognosis and Quantum experts when assessing what your future needs are likely to be; how these will be best met and what the costs involved will be.

The lawyer and/or barrister will use the costs set out in your quantum expert reports to work out what the future annual cost (the **multiplicand**) will be for each head of loss. The number and type of heads of loss will vary from case to case, but may include loss of earnings, loss of pension, Case Management, Care, Equipment, Medical Treatment, Therapies (e.g. physiotherapy, occupational therapy, speech and language therapy), Accommodation, Deputyship Costs.

The experts will advise when the loss is likely to be incurred and for how long the loss is likely to be incurred. This can be relatively straight forward (e.g. the annual cost of care is likely to be £30,000 per annum for life) but is often more complex (e.g. the Claimant is likely to need a wheelchair in two years' time, at a cost of £500, with a fitting fee of £100, annual servicing costs of £50 and replacement every five years).

Once the multiplicand has been calculated, the lawyer then needs to think how long the loss is likely to persist for and apply the appropriate **multiplier** with the correct **discount rate** to ensure that the benefit of accelerated receipt (see glossary) is recognised and the claimant is not over-compensated.

In some cases the need may be lifelong. Government produced average life expectancy tables will help assess what the average life expectancy is, but your lawyers will also look at your medical evidence to see if the nature of your injury is such that your life expectancy may be reduced. If it is, an adjustment will be made to take that into account.

In other cases, the need will be for a different period of time, or the loss deferred for some years. For example, when claiming loss of earnings, consideration will need to be given to when the claimant is likely to have retired but for the negligently caused injury to calculate the correct multiplier. Likewise, for a loss of pension claim, the same information will be required.

The schedule may need to be amended as the case proceeds, for example, if your health improves or deteriorates, in which case the experts update their reports (if appropriate).

There is a lot of skill and care required in picking out the correct tables and putting together your schedule of loss and damage. You should always use a lawyer who is accredited with AvMA or one of the other accrediting bodies and who specialises in medical negligence work. For more information on accreditation please see our leaflet "*How to approach a lawyer for the first time*" (**www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf**)

Fundamental dishonesty

The schedule of loss and damage is a court document and, like all court documents, it is expected to be a truthful document.

You will be expected to sign a statement of truth at the end of important evidential documents like your witness statement and your schedule of loss and damage. Once you have signed a statement of truth, you are saying that the contents of the document are accurate to the best of your knowledge and belief. The generally accepted wording for a statement of truth reads:

> *"I believe that the facts stated are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."*

The rule on fundamental dishonesty is not intended to trap claimants who genuinely believe the loss to be true. However, if you deliberately mislead your medical expert and your witness statement is inaccurate, or if you exaggerate the extent of your injuries for financial gain, then there is a very real risk that the courts will find your claim to be a work of 'fiction' and 'fundamentally dishonest'.

If the courts make a finding of fundamental dishonesty, they can impose a penalty including dismissing the claim altogether. The court will do this even if there was some truth in the claim. The claimant will also lose their costs protection and become liable for the defendant's costs – this could leave them owing a great deal of money.

It has been known for the opposing party to instruct private investigators to secretly film claimants to demonstrate that their disabilities are not as severe as alleged. The honest claimant has little to fear, but gross exaggeration of the extent and level of loss is unlikely to be tolerated by the courts.

Interim payments

In some cases, you may receive what are known as Interim Payments before the case is finally settled or comes to court. This is where the healthcare provider has admitted or agreed that they are liable to compensate you, but the exact amount has not yet been agreed.

Interim payments are usually made where advance payments can help a claimant to recover from their injuries, or where the payment is necessary for things like accommodation adaptations or to provide equipment until the full claim is settled.

The claimant's lawyer can request a voluntary interim payment from the Defendant at any stage but the Defendant will only consider such a request if they agree that they are liable to compensate you and that the sum requested is not likely to be more than the total value of the claim.

If the Defendant does not agree to make a voluntary interim payment, an application can be made to the Court but the Court will need to be satisfied that certain criteria can be met. For example, the Court needs to be satisfied that the only issue between you and the defendants is about the amount of money to be paid to you by way of compensation and you have obtained judgment against the defendant on liability. The Court will also need to be satisfied that the amount you are asking for by way of interim payment is not going to exceed the total compensation you are likely to receive.

Any interim payments made will be treated as a payment on account and will be deducted from the final sum of compensation payable to you.

Full and final settlement

Most medical 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 consent order sets out what the parties have agreed between them, it will state how much the case is to settle for 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 to settle is in full and final settlement. This means that you cannot bring another claim in relation to the same negligent treatment ever again. You will also not be able to go back and reopen proceedings or start them again because you have run out of money awarded by way of damages. 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 medical 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 (see below).

There are some exceptions to when you will need a consent order, for example, if your case settles by way of Part 36 offer. For more information on settling a claim please see our leaflet: Settling a clinical negligence claim, available at www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf.

Provisional damages

There may be cases where there is a risk (but not certainty or even likelihood) of a serious deterioration in your health, or that you will develop a disease or condition as a result of the negligent care. A common example is the risk of epilepsy for a claimant who has suffered a brain injury.

This risk can be managed by parties agreeing to settle the claim on the basis that if the person does in fact develop epilepsy, they can go back to court and ask for further compensation.

An agreement to provide compensation in the event a risk does materialise is called an agreement for provisional damages. You must have a court order for a Provisional Damages Award and cannot reach an agreement with the defence for such an award.

Settling your claim

Please see our leaflet on Settling your claim, available at www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf. This includes information on what deductions might typically be made from your award of damages and deductions for certain state benefits.

How is compensation paid?

Usually this will be in a single payment known as a lump sum.

In cases where a person is very severely injured, there may be a lump sum and payments made over a period of time (known as Periodical Payments) to meet, for example, Case Management and Care needs.

Is compensation taxable?

Generally speaking, compensation for an injury and associated losses caused by negligent medical treatment is exempt from tax in the UK. One exception to this is interest on damages which may be taxable.

If you choose to invest your compensation, you may have to pay tax on this, and you should seek professional financial advice on this from an adviser who has expertise in working with clients who have received compensation as a result of a personal injury or medical negligence claim. This is because they will understand that the compensation needs to meet your future needs and be best placed to advise on investment options to meet those needs.

Will compensation affect my benefits?

Your entitlement to receive certain means-tested state benefits will be affected if the compensation you receive brings the value of your savings or other capital assets to above the financial threshold in place at the time.

It may be possible for you to preserve your entitlement to receive benefits by setting up a Personal Injury Trust and paying your compensation into the Trust. Trustees can then make payments to you below the savings limit. Your lawyer should advise you about this.

Benefits which may be affected include: Universal Credit, Income Support, Job Seeker's Allowance, Employment and Support Allowance and Housing Benefit.

Other benefits may be affected such as: free prescriptions, eyesight tests, dental treatment and state-funded care either at your home or in a residential/nursing home.

Glossary: Commonly used words and phrases

Sometimes lawyers have their own way of talking about compensation, to help you understand this we have set out below some commonly used words and expressions and their general meaning.

Quantum: The value of the claim: Lawyers sometimes refer to how much a claim might be worth, or the value of the claim, as "quantum".

Damages/compensation: This is the money that is awarded to cover you for the injuries and losses you have experienced because of negligent treatment. You may hear this being referred to as an award of damages, it is sometimes also called compensation. The money is only provided (awarded) if you can show negligence.

De minimis: This is where the amount of money you may receive for your injury is so low that it is not worthwhile bringing a claim. This is referred to a "de minimis". Awards less than £1,000 are often considered to be de minimis although some lawyers consider the de minimis threshold to be even higher than £1,000.

Proportionality: Although, in strict legal terms there are many factors which are taken into consideration when considering whether a case is 'proportionate', this word is most commonly used to describe the relationship between how much money (compensation or damages) you are likely to receive against how much money it will cost to bring the claim.

Regardless of value, medical negligence cases are usually complex, difficult to prove and expensive to investigate, the cost of investigation can quickly exceed the sum to be recovered and this is to be avoided. Where the cost of bringing the claim far exceeds the amount of compensation you can expect to receive, it will usually be "disproportionate". As an example, if a case costs £50,000 to pursue, but only £5,000 compensation is recovered, it is highly likely that the Court will decide that the costs are 'disproportionate.

The court expects claimants and their lawyers to be very mindful of proportionality issues and there can be penalties where the costs are disproportionate to the value. The most severe penalty is that only a proportion of the costs incurred by your solicitor are paid by the Defendant, leading to a significant shortfall in costs (see below).

Shortfall in costs: The difference in the legal fees incurred by your solicitor to settle the claim and the costs paid (recovered) from the other side is often referred to as a shortfall in costs. Where the other side does not pay all your legal fees your lawyer is left with a difficult decision, either they do not get paid which means they have worked for free, or they look to your damages (compensation) to make up the shortfall in costs. Making deductions from compensation in a low value claim can severely reduce or even wipe out the award. In this situation, the outcome, even if technically successful, is most unsatisfactory for both the lawyer and the client. For this reason, lawyers often refuse to take on low value claims.

Additional liabilities: If your case is funded by a Conditional Fee Agreement and you win your case, the lawyer will charge a '**Success Fee**' from compensation recovered. The Success Fee will be capped at 25% of the compensation you receive for your Pain and Suffering ('General Damages') and Loss of Amenity and any past losses attributable to the negligence. If you have an After the Event Insurance Policy ('ATE') and you win your case, you will need to pay part of the insurance premium (the 'non-recoverable premium'). The Success Fee and non-recoverable premium are often referred to as additional liabilities. For further details, see our leaflets: Understanding legal costs: the principles (www.avma.org.uk/wp-content/uploads/Costs-principles.pdf) and Funding options in clinical negligence claims (www.avma.org.uk/wp-content/uploads/Funding-options.pdf).

Deductions from damages: The contractual terms of the solicitor/client relationship almost always state that the lawyer's costs can be deducted from compensation. This can include the success fee, the non-recoverable ATE premium, any interest incurred on a disbursement funding loan and/or any draw down fees and any shortfall in costs. In addition to the cost deductions, compensation is usually agreed gross of any interim payments received and Compensation Recovery Unit (CRU) payments made. The CRU payments relate to repaying certain state benefits you may have been in receipt of.

Accelerated receipt: Is the term given to lump sum payments made in advance of when payment is due. The lump sum is often paid to cover future financial losses and expenses such as loss of earnings. The lump sum is made early and is discounted on the assumption that the ordinary claimant will invest it and receive interest on it. A discount is applied to take account of the potential interest that can be received and to prevent the claimant from gaining a financial advantage

Discount rate: The discount rate is a fixed rate which is periodically reviewed by government to try and ensure that the calculations for future losses (such as loss of earnings, any care costs etc.) are properly adjusted to reflect any interest returned on the lump sum so that a claimant is not in a better position than they would otherwise have been. It effectively reduces any lump sum payable by the amount of interest the claimant can be expected to receive if the money is invested prudently. In recent years, interest rates have been very low, and the lump sum has not produced enough interest to enable services and equipment required to be paid for.

Multiplicand: This is the annual loss for a particular head of loss. For example, if the claimant has lost net annual earnings of £50,000, the loss of earnings multiplicand will be £50,000. If the claimant requires £30,000 of professional care, the multiplicand for care will be £30,000.

Multiplier: The multiplier reflects the length of time the loss will last for and the ordinary, natural risks in life such as the risk of losing your job, risks associated with age, your employment status and sex (women are generally expected to live longer than men). Those adjustments are calculated by government actuaries and are found in a set of tables called the Ogden Tables.

The Ogden Tables: These are calculated by government actuaries who consider average life expectancy, the interest likely to be collected on a lump sum (see discount rate above) and other risks in everyday life. They arrive at a figure known as a multiplier which can be used to calculate compensation in personal injury and medical negligence claims. There are many different tables for calculating different situations, such as:

- where the loss is going to be for the rest of the claimant's lifetime, for example, care if that is required for the rest of the claimant's life.
- Loss of earnings from the claimant's age to retirement
- Pension loss.

The tables are updated every few years. They were most recently updated in July 2020 and the most up-to-date tables can be found in the eighth edition of the Ogden Tables, available at **www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death**.

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Our vision is a simple: **People who suffer avoidable medical harm get the support and the outcomes they need.** This vision is underpinned by four objectives, we believe, will transform trust in the NHS and healthcare generally and significantly cut the cost – financial and human – which is incurred annually in settling legal claims as well as dealing with the human costs associated with traumatic medical injuries and death. Our four key objectives are:

- To expand the range of communities we serve and so enabling more people experiencing avoidable harm to access services from us that meet their needs
- To empower more people to secure the outcomes they need following an incident of medical harm, whilst providing caring and compassionate support
- To eliminate compounded harm following avoidable medical harm
- To have the necessary diversity of sustainable resources and capacities to deliver

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