Legal action

Bringing a claim in (clinical) medical negligence in England

This guide explains what to do if you have been injured because of negligent medical treatment. It looks at what you need to prove to bring a successful legal action in medical negligence. The terms medical negligence and clinical negligence mean the same thing. In this leaflet we will use the term medical negligence, but it can also be read as clinical negligence.

Note: the law in Scotland, Northern Ireland and Wales is different. Please refer to our separate guides on legal action in Scotland, Northern Ireland and Wales.

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Contact Julie Marsh Partner in the Medical Negligence team on **0118 952 7219**

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visit our website www.boyesturnerclaims.com

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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Adverse incident or medical negligence?

If you have suffered an injury because 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 it is possible that your injury could have been avoided by better quality care or safety measures, that on its own may not be enough to satisfy the legal test for negligence.

You will only be able to bring a legal claim in medical negligence if you can show that the treatment you received was negligent.

Negligence has a very specific meaning in law and there are certain tests that must be applied and satisfied to assess whether the treatment provided might be considered negligent in the legal sense. More information on the tests is provided below. In very broad terms, to succeed in a legal claim, you must show that:

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

Invariably you will need independent advice from an appropriate medical expert to understand if the treatment you received was negligent, and whether you have suffered injury because of that negligence as opposed to some other reason, for example, a progression of your original condition.

Should I take legal action?

This is a very personal decision and there is no right or wrong answer. It is about doing what is right for you. Even if you have been injured as result of medical negligence, you may not want to bring a claim. Litigation is usually very time consuming and stressful; it is not for everyone and you are not obliged to take legal action.

We do not recommend you bring a claim with a view to having a 'day in court' to confront those involved in the medical accident. Neither will litigation provide you access to treatment you want or believe you need and it will not speed up your access to treatment.

People usually take legal action if they want or need compensation (also known as damages). If a serious injury occurs because of medical negligence, and that injury prevents you working and living your usual lifestyle and/or supporting/contributing towards your family, then you may feel you have no choice but to seek compensation.

Some people feel angry that the negligence occurred at all and bring proceedings to ensure accountability.

Sometimes people feel driven to litigation to find out the truth about their treatment or to make sure lessons are learned. This can often happen when someone believes that the healthcare provider is deliberately not giving them answers to their questions.

It is perfectly understandable for you to want to find answers to questions you have about your care, or an apology, or both. There are alternatives to litigation which may provide answers, or at least some additional information, for example:

- The Duty of Candour
  www.avma.org.uk/wp-content/uploads/Duty-of-candour.pdf
- The Complaints Procedure
  NHS **www.avma.org.uk/wp-content/uploads/Complaints-England.pdf**
  Private **www.avma.org.uk/wp-content/uploads/Private-healthcare.pdf**
- Serious Incident Reports
  www.avma.org.uk/wp-content/uploads/Serious-incident-reports.pdf

What can litigation achieve?

If you do bring legal action, you will be able to identify whether the care you received was of an acceptable standard.

If your case is successful, you will be entitled to an award of damages (compensation). The amount that you receive will depend on several factors, for example: the type and seriousness of your injury; whether you are likely to make a full recovery or not; whether the nature of your injury is such that you have ongoing care needs and/or require special adaptations to your home or perhaps even require a new home. For more information on compensation (damages) please see our leaflet "Medical negligence: What compensation can I claim?" (**www.avma.org.uk/wp-content/uploads/Compensation.pdf**).

A judge does not have the power to order an apology or to force the healthcare provider to make changes so that the incident never occurs again.

However, sometimes, during the course of litigation, the parties can agree to a 'Mediation' which offers scope to achieve not just financial compensation, but additional non-monetary remedies such as an apology or an undertaking to review practices and procedures. See our guide "Alternative Dispute Resolution (ADR)/Alternatives to litigation" (**www.avma.org.uk/wp-content/uploads/ADR-alternatives-to-litigation.pdf**).

Choosing a solicitor

AvMA recommends that you instruct a solicitor to help you investigate and bring a claim. You should only use a solicitor who is accredited in medical negligence work - look for an AvMA accredited solicitor. Our accredited solicitors are listed on our Find a Solicitor section of the website: **www.avma.org.uk/find-a-solicitor**.

Please read our leaflet on things to consider when choosing a solicitor: **www.avma.org.uk/wp-content/uploads/Choosing-a-solicitor.pdf**

How do I know if I have grounds to bring a legal claim for medical negligence?

Medical negligence claims are often complex cases and it can be very difficult to know if you have grounds to bring a legal claim, as these cases almost always require investigation. This will include obtaining copies of medical records and an independent expert opinion.

What is medical negligence?

To succeed in a claim for medical negligence, there are three key considerations:

1. Was there a duty of care?

Whenever a healthcare provider or hospital treats a patient, a legal duty of care is owed.

2. Was there a breach of the duty of care?

When it comes to healthcare, a doctor's duty is to exercise skill and care according to the ordinary and reasonable standards of those who practice in that specialist area of medicine at the time the treatment took place.

There will often be a range of medical opinion. One doctor may adopt one surgical technique – another, another. Provided that both are recognised to conform with accepted practice and withstand logical analysis, a doctor choosing one technique over another will not be found to be negligent.

3. Did the breach of duty cause you injury and damage?

The law only enables you to recover compensation if it can be shown that, *on the balance of probabilities*, you suffered injury and damage (monetary, physical or emotional) as a result of the negligence.

On the balance of probabilities means that there is a greater than 50% chance that the negligence caused the injury and damage or to put it another way, it is more likely than not that the outcome was caused by the alleged negligent act(s).

Examples of medical negligence

This is not intended to be an exhaustive list but the sort of care that can result in negligence include:

- Failing to diagnose a condition or making the wrong diagnosis
- Making a mistake during a procedure or operation
- Giving the wrong drug
- Failing to warn a patient about the risks of a particular treatment
- Failing to provide adequate treatment
- Failing to obtain consent to treatment

Example 1: Patient X attends her GP surgery and is prescribed incorrect medication for her condition. The pharmacist identifies that the medication is incorrect and X does not take the medication. The GP owed patient X a duty of care; the GP breached that duty of care, but a legal case would fail as patient X did not take the medication and therefore did not suffer any Injury or Damage.

Example 2: Patient Y attends A & E after a fall, injuring her wrist. She is examined and an x-ray is ordered. She is reassured that all is fine and is sent home. The injury does not improve and Patient Y returns after 3 months. She is told that, in fact, she suffered a fracture, the Xray was misreported; that the fracture should have been immobilised with a plaster cast and that the fracture is now displaced and requires surgery. The hospital owed patient Y a duty of care; an expert confirms that the fracture should have been detected on initial presentation and that as a result of the failure to do so, patient Y now requires surgery, and a longer recovery. A legal case would succeed.

Advice and informed consent

The law around advice and informed consent to treatment has evolved considerably in recent years, recognising patient autonomy and their right to expect an active role in decision-making. The Courts have confirmed that patients must be given the necessary information to enable them to make an informed choice about their healthcare and this includes not just warnings about the material risks of any proposed treatment (from the perspective of that individual patient), but also the alternatives (including doing nothing).

The role of the medico-legal expert

The medical experts, sometimes referred to as medico-legal experts, are in many ways the most important part of any legal claim in medical negligence. It is very likely that you will need more than one medical expert: one to give their opinion on the standard of care and whether the treatment provided was negligent (liability expert) and another one to give their opinion on whether your injuries are the result of negligent treatment (the causation expert). You may need more than one expert on causation; for example, if you are claiming for mental harm, you will need an expert psychiatrist, and another causation expert to explain what physical injury you have suffered because of the negligence.

It is very important that the medical expert is independent; this means that he or she does not know the treating clinician or have any affiliation to the healthcare providers. This ensures that the expert's opinion is impartial, free of bias and given honestly and freely.

A solicitor instructing a medico-legal expert should make reasonable enquiry of the expert at the outset to ensure that no actual or potential conflict can arise by instructing them. For example, if the independent expert works with the doctor you are alleging negligence against, then a conflict is more likely to arise. If there is a possible or actual conflict, then it is important that the solicitor is aware of this at the outset so they can consider whether it is appropriate to instruct that particular medical expert.

If there is a potential conflict of interest, it does not mean the solicitor cannot use that expert, but they should make you aware of this fact. There are some areas of medicine where there are very few independent medical experts practising and it may be necessary to instruct an expert even though an apparent conflict exists. In this case, the solicitor will be expected to manage that conflict and they may discuss it with the barrister even before they instruct the expert.

It is also crucially important that the medical expert invited to give their opinion is of the same medical discipline as the medical professional alleged to have been negligent.

As you might imagine, standards are continuously evolving especially as the list of available medical treatments increase, along with improved medical knowledge. Sometimes practises are embedded in leading teaching hospitals long before they reach regional hospitals where there is often a period of catch up. This is one reason why an expert for the patient may have a different opinion from an expert who is instructed by the healthcare provider.

In practice, it is often the case that the independent experts will eventually find some middle ground to agree on and this makes it more likely the case will settle without the need to go to trial. However, where the experts continue to hold very different views, the case is more likely to end up in court where the judge, having heard the respective expert's views, will decide which opinion they prefer and decide (give judgment) based on that.

Terminology

If you do decide to bring a legal claim you will be known as the Claimant and the healthcare provider you are suing will be known as the Defendant. If your claim is against more than one defendant - for example, you might be suing your GP and a hospital - then both the name of the GP (or the GP practice) and the hospital's name will appear on the court documents.

The court documents include the Claim Form, the Particulars of Claim – also referred to as the pleadings, and the defence if and when that is filed with the court.

Limitation (time limits)

Please read our guide on time limits for bringing a legal claim for compensation: **www.avma.org.uk/wp-content/uploads/Legal-time-limits.pdf**

Generally speaking, you must commence your claim within **three years** from the date when the incident occurred or when you first realised you had suffered an injury. The time limits may seem straightforward, and they often are, but problems can arise especially if you did not realise that you had suffered an injury until sometime after it occurred.

There are special rules for calculating when the three-year time period runs in the case of children and people experiencing mental capacity problems. Please read the leaflet on time limits carefully.

If your claim is going to rely on the European Convention on Human Rights (ECHR), you have 12 months to bring your claim.

The time limits are important and it is unlikely that you will be able to bring a claim if you issue proceedings outside of the time limits.

It is advisable to take specialist legal advice as soon as possible and, in any event, preferably before the final year of the limitation period starts. This is because solicitors often have a lot of investigatory work to do, such as obtaining independent medical expert evidence prior to serving any letter of claim/ commencing legal proceedings . It can take more than twelve months to get this necessary information together. Solicitors are increasingly reluctant to take cases if they think they may not be able to complete their investigations prior to expiry of the three-year limitation period.

What are my options for funding my legal claim?

For details, please see our guides "How will I pay my legal costs?" (**www.avma.org.uk/wp-content/uploads/Legal-costs.pdf**) and "Understanding legal costs for medical negligence claims" (**www.avma.org.uk/wp-content/uploads/Understanding-legal-costs.pdf**).

If there has been negligence and you have suffered an injury, but the injury is minor and the amount of compensation (damages) to be awarded is expected to be very low, the cost of bringing proceedings is likely to far outweigh the amount to be recovered ('de minimis'). Lawyers may advise that in these circumstances the cost of pursuing the claim is 'disproportionate' to the compensation that would be achieved and that litigation cannot therefore be justified.

Do medical negligence cases always end up in court?

Medical negligence claims very rarely end up with a trial in court.

Many cases are settled after all the investigations are completed and before legal proceedings are issued.

Where proceedings are issued, providing the case has good supportive medical evidence, the majority of cases do settle without the need for a trial.

The courts do encourage both sides to settle the matter quickly where possible and to avoid incurring extra costs.

Even though most cases settle long before trial, you should be prepared for the matter to go to trial so a judge, having heard all the evidence, can decide whether the treatment was negligent or not.

How do I calculate compensation (damages)?

No amount of money can change what has happened. Compensation (money) will, however, be awarded to put you back in the position you would have been in if the negligence had never occurred.

For details please see our leaflet Medical Negligence: "What compensation can I claim?" (**www.avma.org.uk/wp-content/uploads/Compensation.pdf**).

What if I am pursuing a claim on behalf of someone who has died as a result of medical negligence?

Please see our leaflet "Compensation when someone has died?" (**www.avma.org.uk/wp-content/uploads/Compensation-death.pdf**)

How AvMA can help

The decision to take legal action should not be taken lightly. It can be costly, lengthy, very stressful and there are no guarantees of success. You will be required to go over what happened to you many times which you may find traumatic and upsetting. The process is complicated and you may find it helpful to discuss your options with one of AvMA's specially trained helpline advisors. The helpline advice service is provided free of charge although you will have to pay your phone providers charges – more information about the helpline can be found at **www.avma.org.uk/help-advice/helpline**.

www.avma.org.uk/friends

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