Legal action

Bringing a claim in (clinical) medical negligence in Northern Ireland

This guide explains your legal rights if you have been injured as a result of medical treatment and the steps involved in seeking compensation through the Northern Irish courts in a medical negligence action. It is intended as a rough guide only.

For further information contact AvMA or one of the solicitors who specialise in medical negligence and are signed up to AvMA's code of conduct.

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avma
action *against* medical accidents

The **charity** for
patient safety and **justice**

AvMA is the charity for patient safety and justice. We provide specialist advice and support to people when things go wrong in healthcare and campaign to improve patient safety and justice.

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www.avma.org.uk

Or call our helpline
10am-3.30pm Monday-Friday
(03 calls cost no more than calls to geographic numbers (01 or 02) and must be included in inclusive minutes or there can be a cost per minute)
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What is a 'medical accident' or 'medical negligence'?

If you have suffered an injury as a result of medical treatment, this is referred to as a 'medical accident' or 'adverse incident'. If there have been complications as a result of your treatment, this may not necessarily mean there is someone to blame. In some cases, complications can occur as a result of the inherent risk of treatment and not necessarily be the result of a mistake by the practitioner treating you. The term 'practitioner' includes a wide variety of healthcare professionals encompassing, but not limited to, surgeons, general practitioners, nurses and dentists.

On the other hand, a mistake or error in your care which occurs due to an act or omission on the part of a practitioner may be attributable to negligence. Negligence in this context involves three elements: the duty of care, breach of the duty of care and damage as a consequence.

In simple terms, if the care which you received fell below the standard which you were entitled to expect as a patient, and if you came to harm as a consequence, then there is a possibility that there was negligence in your care.

Some examples of medical 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 have been the victim of a medical accident?

If you have been injured during the course of medical treatment, your first priority will be to get further treatment to correct the injury. This may involve seeking a second opinion or getting a referral to another hospital.

It may be that you are entitled to seek compensation by taking legal action if there has been medical negligence. Whilst this information sheet explains the process to some extent, you will probably find it helpful to discuss the possibilities of this with one of our caseworkers or a solicitor.

You may then wish to seek a full explanation together with an apology and seek assurances that this mistake will not happen to somebody else. If this is the case, then the complaints procedure is better designed to achieve this than legal action, which is about compensation. Should you intend to progress a claim for compensation, then very often it is helpful to proceed by way of a complaint to seek information in relation to your injury, and to assist further in the investigation of a claim.

NHS complaints

If you decide to make a complaint, then this can be done through a variety of means depending upon the identity of the person whom you allege has been at fault in relation to your injury. If the injury occurred whilst receiving NHS care from the local health & social care trusts, then a complaint may be raised in accordance with the complaint procedures operated by the said trusts. The complaint procedures are available online and facilitate a complaint being made in a way that best suits you, including telephone, letter or email.

You should try to provide the complainant with details of how to contact you, who or what you are complaining about, where and when the event that caused your complaint happened, and, where possible, what action you would like the organisation to take.

If your complaint relates to treatment received from your general practitioner or a private healthcare practitioner, then you should request a copy of the complaints procedure from the relevant practitioner in the event that you are dissatisfied with the care furnished. Once again, when raising a complaint, the information referred to should be provided.

Separate from your right to raise a complaint in relation to your care, it should also be noted that various health and social care organisations, including local trusts and agencies, are under an obligation to conduct an investigation in relation to an 'adverse incident' when it occurs.

An adverse incident is defined as 'any event or circumstances that could have or did lead to harm, loss or damage to people, property, environment or reputation'.

Whilst the level of the review/investigation depends upon the seriousness of the event, the principle requires that the healthcare provider initiates a review of such an adverse event even without the necessity of a complaint being raised by the injured party. There is detailed guidance available, and you will probably find it helpful to discuss the possibilities of this with one of our caseworkers or a solicitor.

Legal claim

It is important to note that if you decide to make a legal claim, this will only lead to compensation and is not designed to deliver:

- An apology
- The staff involved disciplined
- The healthcare provider changing its practices

The decision to take a legal action should not be taken lightly. Legal proceedings can be costly, lengthy and stressful to the individual concerned. In such circumstances you will require the services of a specialist medical negligence solicitor, as a medical negligence claim is nearly always complicated.

AvMA can put you in contact with specialist medical negligence solicitors in Northern Ireland who are members of the AvMA specialist clinical negligence panel and are signed up to AvMA's code of conduct.

Limitation (time limits)

You are obliged to commence your legal claim by issuing formal legal proceedings within three years from when the incident occurred or when you realised you had suffered an injury.

In the case of children, the three-year time limit does not apply until their 18th birthday. In other words they have until the eve of their 21st birthday to make a decision concerning the commencement of a legal claim in Northern Ireland. If proceedings are commenced on behalf of a child under the age of 18 years, the action is taken by a parent acting as a 'next friend' on behalf of the child.

If the claim involves a patient who is not capable of manging their own affairs because of disability, the three-year time limit does not apply until (and unless) they overcome the disability. The normal limitation period may apply, however, if someone is acting under a power of attorney or is appointed as a controller.

Instructing a solicitor

You should always be able to obtain free advice from a solicitor. In Northern Ireland every solicitor is required to advise you, in writing, of the basis upon which you will be charged, and it is important to check that the document reflects your understanding of who will be responsible for legal fees and outlays.

The solicitor will need to make an assessment of your situation 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. The solicitor will often recommend that you initiate a complaint via the complaints procedure in order to obtain useful information and to gain access, for example, to the relevant treatment records.

When information has been gathered in relation to the circumstances of the query, the solicitor will decide if your case has a reasonable chance of success and will provide you with advices in relation to the progression of the claim.

Whilst it is difficult to generalise, it should be noted that it is normally necessary to obtain a report from an independent medical expert in relation to the disputed care. As noted above, medical negligence involves the failure on the part of an individual healthcare practitioner to provide a reasonable standard of care.

In assessing whether or not the medical practitioner in question has provided appropriate care, that judgement is best made by a similarly qualified independent expert. In practical terms, that means that an independent report from an expert will be necessary to determine if the care in your case came up to a reasonable standard.

If an independent expert identifies substandard care, then it is likely that further medical evidence will be necessary to determine the nature of the damage sustained by you by virtue of the poor care. You will be advised by your solicitor in association with this.

Funding options

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 or benefits. Your solicitor will help assess whether you are eligible.

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 may provide legal expenses insurance which can cover legal work for a medical negligence claim. Often there is a set limit on the legal costs and you would be expected to instruct a solicitor on the insurer's list rather than necessarily the solicitor that you have already contacted.

In addition to the legal expenses insurance, there are certain insurance companies which provide what is known as 'after the event' insurance. This insurance can be obtained, during the course of legal proceedings, in order to indemnify you in relation to the potential costs of a legal action.

Such insurance is normally provided in cases where there are good prospects of success and detailed investigation has already taken place. You will probably find it helpful to discuss the availability of this type of insurance with your solicitor at the time of initial consultation.

No win no fee

No win no fee agreements in Northern Ireland are unlawful. It is a requirement of legal practice in Northern Ireland that if you seek to recover your costs from the party at fault in relation to a successful medical negligence claim, that you must first have agreed, at the outset of the action, that you will be responsible for the said costs irrespective of the success or otherwise of the actions.

In other words, you are only entitled to recover costs in the event that you are responsible for them. This is known as the 'indemnity principle'.

It is important, therefore, as noted above, that when you agree to proceed with legal action in Northern Ireland, that the terms of your agreement with your solicitor are fully and accurately recorded in a 'letter of retainer'. You should ask your solicitor for such terms in the event that you agree to proceed with legal action.

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

Medical negligence claims are often complex cases. For you to be successful in your legal claim, there are two strands of the case. You must prove both 'breach of duty' and 'damage'.

Breach of duty

To establish breach of duty you must prove that the healthcare practitioner has failed to act in accordance with a practice accepted as reasonable by a responsible body of medical men or women skilled in that particular are of practice. In other words, you must show that the medical practitioner in respect of whom you complain, has acted in a manner inconsistent with the reasonable practice of his or her peers.

Damage

If you prove a breach of duty on the part of the healthcare practitioner, you must then go on to show that the damage which you have suffered is as a consequence of that breach of duty. If, for example, the damage would have occurred in any event, even had the breach of duty not occurred, then you will not succeed in proving damage in your case. It is not enough to prove that somebody breached a duty of care. You must also prove that injury flowed as a consequence of that act or omission.

As above, the investigation conducted by your solicitor will focus on determining whether or not there has been a breach of duty in your care and, if so, whether you came to harm as a consequence. Independent expert evidence will be obtained. The independent expert will base the opinion on the documentary evidence (medical records and other written information) and your instructions. Needless to say, if a supportive report cannot be obtained, then your action will not succeed.

Damages/compensation

Following the 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 employment and support allowance) because this could affect how much compensation you will receive.

You can claim compensation for any injuries or losses suffered which were the direct result of the negligent care. These can include:

- Pain and suffering
- Service claims – services injured party would have given to other family members or receive from them
- Ongoing treatment
- If you cannot carry out certain activities/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
- The cost of therapies, including physiotherapy and occupational therapy

Do medical negligence cases always end up in court?

Medical negligence cases can end up in court, however, many are resolved before evidence is heard. In fact the majority of cases are resolved before trial. Both sides are encouraged to settle the matter quickly to avoid incurring extra costs. It goes without saying, however, that for a case to settle, the case must have merits.

Pre-action protocol for clinical negligence actions in Northern Ireland

There exists in Northern Ireland a protocol for clinical negligence actions, designed to encourage early communication between patients and healthcare providers of any perceived problems, concerns or dissatisfactions about treatments.

The protocol seeks to improve the development by healthcare providers of early reporting and investigation systems. It seeks to secure disclosure of sufficient information so as to enable patients and healthcare providers to understand the issues and encourage the early resolution of disputes.

It requires the early provision of relevant medical records by healthcare providers to patients and their legal representatives. By doing so the protocol serves to place the parties in a position where they may be able to resolve cases fairly and early without litigation together with the promotion of mediation and/or other appropriate forms of alternative dispute resolution.

The protocol has been designed to promote an overall 'cards on the table' approach to litigation in the interests of keeping the amount invested by the participants in terms of money, time, anxiety and stress, to a minimum, consistent with the requirement that the issues be resolved in accordance with the accepted standards of fairness and justice.

Where litigation is appropriate, the requirement is that it should be conducted economically, efficiently and in accordance with a realistic and flexible timetable set by the court. The protocol acknowledges that clinical negligence litigation frequently involves complex and technical issues that require time consuming and detailed investigation with the assistance of specialist expert opinion. It has the potential to be particularly stressful and emotionally demanding upon the parties.

That being so, the protocol sets out a procedure which must be observed, in advance of the issue of proceedings, to ensure that both plaintiff and defendant receive and provide sufficient information to allow each party to determine the merits of the action before proceedings are issued and costs are incurred.

In essence, the plaintiff is required, after proper investigation of the merits of the action, to notify the defendant of the basis of the claim. The defendant, after receiving notification must, within a period of four months, provide a detailed response either admitting the allegations or, if liability is being rebutted, setting out clearly the reasons for same.

By doing so the parties are able to make an informed assessment of the likely prospects of success before they are required to resort to the issue of proceedings. This protocol has proved useful, where applied, in Northern Ireland. It should be noted, however, that the protocol is still voluntary and there are no costs sanctions for a simple breach.

Summary of the main stages of court procedure in Northern Ireland medical negligence cases

The following is a summary of the principle stages which a medical negligence case would normally reach when proceedings have been issued. It is intended to give you an idea of the main procedural steps involved, but your solicitor will be able to explain the procedure in detail both before a case is issued and throughout the duration of the court process.

If court action is necessary in your case, and the case is deemed to be of sufficient monetary value or complexity, your solicitor will arrange to issue proceedings in the High Court in Belfast. As of November 2017, all cases with a value of above £30,000 will be required to be issued in the High Court. If a case has a value of less than £30,000 then it may be issued in the County Court.

It should, however, be noted that the recent Civil Justice Review recommended raising the jurisdiction of the County Court to £60,000. Nevertheless, clinical negligence litigation will usually, by reason of complexity and/or value, proceed in the High Court. The authors of the Civil Justice Review considered that, given the complexity of such cases, County Court judges should usually refer such cases up to the High Court, save in those few cases where they are considered straightforward and without the usual accompanying complexity.

This guide deals with the procedural stages of a High Court action, however, the procedures in the County Court are similar.

The action is raised by means of a document known as a 'writ of summons'. When issued, the writ of summons maintains its validity for a period of one year and must be served within that period. After service, the defendant, the respondent to the claim, must submit a 'memorandum of appearance' within 14 days.

After entry of the memorandum of appearance, the plaintiff, the party pursuing the action, has a period of six weeks in which to serve a 'statement of claim'. The statement of claim sets out the case which the plaintiff makes against the defendant. It provides details of the claim, to include allegations of negligence, details of the personal injuries, and the various heads of loss sustained.

After service of the statement of claim, the defendant must serve a 'defence'. That document, which sets out the basis upon which the defendant responds to the claim, must be served within a period of six weeks after service of the statement of claim. In a case of medical negligence, the defendant is expected to set out the basis upon which the claim is being resisted, if indeed liability for the accident is repudiated.

After the formal pleading of the action, the parties will then engage in a process which involves the exchange of further information, be it in the form of answers to specific questions (by way of notices for particulars and interrogatories), or by the exchange of documentary evidence (a process known as 'discovery').

In Northern Ireland, as soon as an action has been issued which is identified as a claim for clinical negligence, it will automatically be listed for review before an officer of the High Court, the Master of the Queen's Bench Division, for review. That review will take place approximately one year after the date of the issue of the writ of summons.

At that point the Master will enquire in respect of readiness of the action, and if matters are outstanding, which require to be attended to before the action can be heard, the Master will give directions in association with the case. Those directions may concern the completion of medical evidence, the provision of discovery or other information. The Master may review the case more than once, and in clinical negligence claims, he normally would review the case up to three times.

After the formal pleading of the case has been completed, the High Court rules now provide for the exchange of medical evidence on liability and on damage. Medical evidence on liability will be exchanged simultaneously between the representatives of the plaintiff and the defendant. Medical evidence on damage will be exchanged sequentially, with the plaintiff's representatives providing their evidence in the first instance, and the defendant providing their evidence thereafter, as directed by the court.

The exchange of medical evidence, both liability and quantum, will promote expert discussion, pursuant to an agreed agenda, which will serve to either resolve the matters in dispute between the parties or, at worst, clearly delineate the nature of the dispute for the purposes of the court hearing.

At the same time as exchange is taking place in relation to medical evidence, it is customary that evidence will be exchanged in relation to the nature and extent of the loss sustained by the plaintiff. This may include evidence on injury, loss of earnings, care, occupational therapy, etc.

When the case has been fully pleaded, the medical evidence has been exchanged, the experts have met and discussed the case, and evidence has been exchanged in respect of loss, then the case will be ready for hearing. At that point the case may be set down, and a date fixed either by allocation of the court or by agreement of the parties.

In Northern Ireland the usual time period for the prosecution of a clinical negligence case is between three and five years from the date of the initial enquiry. The actual time taken depends upon the complexity of the case, the number of expert reports and the nature of the damage sustained by the plaintiff. It is of course possible to have the case heard much more quickly in cases where urgency is required, for example ill health on the part of the plaintiff.

The hearing of the case, if required, will take place at the Royal Courts of Justice, Chichester Street, Belfast. The case will be listed before the High Court judge, and a period will be set for the hearing of the action.

Where liability remains in dispute, it is likely that the case will take at least three to four days to be heard but in complex actions, such as birth trauma, listings can be for a period of three or four weeks. Hearings commence at 10.15 am on the first day of trial, and on that date the trial judge will be allocated

The vast majority of clinical negligence cases settle without the need for a trial before the court. Only a very small percentage of meritorious claims proceed to hearing because of a dispute on the facts, the law or on quantum.

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You can help make healthcare safer and fairer for all

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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