

Legal action

Bringing a claim in (clinical) medical negligence in Scotland

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 Scottish 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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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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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 risks of the treatment and not necessarily the result of a mistake by the practitioner treating you. The term practitioner can include doctors, nurses and dentists.

If on the other hand a mistake or error in your treatment has occurred as a result of negligence on the part of the practitioner, this is referred to as ‘medical negligence’ (or often ‘clinical negligence’). This means that the treatment you received was below the standard of care that should have been provided. It may not mean that the practitioner was incompetent. It may mean that an error occurred that shouldn’t have during your treatment.

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 a victim of a medical accident?

If you have been injured during 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 able to seek compensation by taking legal action if there is medical negligence involved. 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 our caseworkers or a solicitor.

You may then wish to seek a full explanation and an apology and seek assurances that this mistake will not happen to someone else. If this is the case, the complaints procedure is better designed to achieve this than legal action, which is just about compensation.

NHS complaints

If you decide to make a formal complaint, this is done through the NHS Complaints Procedure (see NHS Complaints Scotland). This allows you to make some enquiries into what happened to you and may influence your decision on what to do next including whether to proceed to make a legal claim.

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
- Hospital changing its practices

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 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 Scotland who are members of AvMA’s Lawyers’ Resource Service and are signed up to AvMA’s code of conduct.

Limitation (time limits)

You must commence your legal claim by raising of court proceedings within three years from when the incident occurred or when you first realised you had suffered an injury.

In the case of children, the three year time limit does not apply until their sixteenth birthday. In other words, they have until the date of their nineteenth birthday before commencing a legal claim in Scotland. A parent acting as the guardian or a court approved guardian would act as pursuer.

If a claim involves a patient who is not running their own affairs because of a mental disability, the three year limitation period does not apply until (and unless) they get over their disability. The normal limitation may apply however if someone is acting under a Power of Attorney or is appointed Guardian or Judicial Factor.

Instructing a solicitor

You should always be able to obtain free initial advice from a solicitor. 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. 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. 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.

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. 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 might include legal expenses which can cover legal work for a medical negligence claim. Often there is a set limit on the legal costs and you may be expected to instruct a solicitor on the insurer's list rather than necessarily the solicitor you have already contacted. You can appeal to try to ensure your solicitor is sufficiently specialised however.

Written speculative fee agreements

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. If considering such an agreement, it is essential to agree you're your solicitor, and to set out in writing, who will be responsible for the outlays in the case and who will pay the costs of the other side if the claim is unsuccessful. Because of the complexity of a medical 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 itself may cost a considerable amount (sometimes up to several thousand pounds), although different solicitors may have access to more attractive funding packages to cover such costs. You should also be advised to take out insurance (after-the-event insurance) to protect you from the possibility of having to pay the other side's costs if you lose the case. These are complex agreements and your solicitor will advise you on this.

How do I prove that I have ground 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; negligence and causation. You must succeed in both:

Negligence:

Whether the clinician has been proved guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.

Causation:

The breach of duty or negligence of the clinician 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 or that the treatment was of poor quality. 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.

The award

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 employment and support allowance) 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
- Services 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

Do medical negligence cases always end up in court?

Medical negligence cases often end up in court but many are resolved before evidence is heard. In fact the majority of cases are settled before the proof (trial). Both sides are encouraged to settle the matter quickly to avoid incurring extra costs.

Summary of main stages of court procedure in Scottish medical negligence cases

The following is a summary of the principal stages which a medical negligence case would normally reach once it has been raised in court. It is intended to give you an idea of the main steps involved but your solicitor will be able to explain the procedure in detail both before a case is raised in court 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 raise the action in the court of session in Edinburgh. As of September 2015, all cases with a value of up to £100,000 will require to be raised in the sherriff court. This leaflet deals with the procedural stages of a court of session action, however, the procedures in the sherriff court are similar.

The action is raised by means of a document known as a summons. The court authorises the summons and there is a period of notice lasting 21 days. The doctor and/ or hospital you are suing is known as the defender. The defender has 3 days to advise the court that he intends to defend. The defender then has a further 7 days to lodge defences. This is the document which sets out the other side's case.

There is then a period of about 8 weeks known as the adjustment period during which each side considers their case and the other side's case with their experts and counsel. If your legal advisers think it necessary your case may be altered in light of the contents of the defences.

This stage of the case can take longer as either party can ask for a further 8 week extension and even additional extensions. The court has to authorise these extensions but it's worth pointing out that if the defender asks for such an extension in a medical negligence case the court normally allows the request.

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The case, as set out in your summons and in the defender's defences is known as the open record and when the adjustment period is completed it becomes a closed record. Your solicitor, as the pursuer, is responsible for putting this closed record together. You would normally expect to have a meeting with your advocate after the defences are received during the open record stage. You would also normally have a meeting after the record has closed as you then know the extent of the defender's case. These meetings are known as consultations. They commonly take place in Edinburgh but if travelling is a problem your solicitor should be able to offer more convenient alternatives including meetings at your home if necessary.

The case now reaches the stage where a decision has to be made as to whether or not the case can proceed straight to a full court hearing. This is known as a proof before answer (known as a trial in England and Wales).

At this stage the court will fix a hearing before a judge who will manage the court action. He or she will require parties to confirm what issues are capable of agreement or remain in dispute, which experts are instructed, how much time will be required for their evidence etc. The judge will fix a timetable for steps to be taken by the parties before the case reaches the final hearing.

Occasionally the defender wants to debate a legal point first of all. An example of this is challenging the detail of the allegations made in your case. Your legal team will consider whether or not this is justified. It can often be used as a delaying tactic by the defender and often the pursuer will amend the case to deal with the objection and the case can then proceed straight to a proof before answer (PBA) without the need for a debate.

The PBA is a full hearing before a single judge on the evidence and law. The other option is a proof as opposed to a PBA. This is very rarely used as there is no right to legal argument.

It normally takes about one to two years from the closing of the record until the actual hearing date is reached when the proof before answer takes place. This can depend upon the number of court days required in the interim your solicitors will be taking steps to prepare your case and further meetings with you may be necessary.

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- 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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