Time limits for bringing a clinical negligence claim (limitation)

This self-help guide contains useful information on the time limits that apply when taking legal action after avoidable harm in healthcare. The time limits are important, it is unlikely that you will be able to bring a claim if you issue proceedings outside of the time limits. Unless you have a solicitor who has agreed to act for you in bringing your claim it is your responsibility to issue your claim within the limitation period.

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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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Introduction

AvMA advises you

If you want to take legal action to claim compensation for a personal injury, including that arising from clinical or medical negligence, you will need to get advice from a solicitor specialising in these types of cases.

This must be done as soon as possible as there are strict time limits on taking legal action.

There is a statutory limitation period of three years on the time in which legal action for a personal injury caused by negligence should be started. This means that court proceedings must be commenced by issuing a claim form at court and paying the relevant fee within 3 years. This three-year period is known as the 'limitation period' and it begins on the day after the cause of action (the incident causing the patient harm) arose – so if the allegedly negligent event occurred on 6 April 2019, the limitation period would start on 7 April 2019 and expire on 6 April 2022.

When should I seek legal advice?

Solicitors need sufficient time to investigate a case, such as obtaining all the relevant medical records and obtaining medical expert reports, for which there may be waiting lists. This stage can take up to year. We recommend that you seek legal advice as quickly as possible and no later than the second anniversary of the incident or the date of knowledge if this is clearly a later date.

Please note that the fact that you are attempting to resolve your concerns by an NHS complaint does not stop the three-year period from running.

Even if technically your case is still within the three-year period when you seek legal advice, you may find it difficult to secure legal representation if there is insufficient time for a solicitor to investigate a case. Please note, many solicitors will not take cases where there is only 12 months or so before the limitation period expires, this is because solicitors need sufficient time to investigate cases properly.

If you wish to seek advice from a solicitor please see our find a solicitor service at www.avma.org.uk/find-a-solicitor.

When does the three-year period start to run?

The three-year period runs either from the date of the incident or from what is termed the 'date of knowledge'. This is the date when the person could first reasonably have been expected to have known that the injury was significant and that it could be attributable to the treatment (or lack of treatment) involved.

The date of knowledge is defined by s14(1) of the Limitation Act 1980 (www.legislation.gov.uk/ukpga/1980/58/section/14) as the first date on which the claimant has knowledge of the following facts:

a. That the injury in question was significant; and

b. That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

c. The identity of the defendant.

It is not necessary for you to know that the injury has been caused by negligence, only that it is attributable to the act or omission. You cannot usually say, for instance, that you only knew that there was negligence and therefore that the three-year period runs from when you received a medical report.

Example of the date of knowledge

A patient undergoes an operation and a swab is left behind. This would clearly be negligent. In this example the patient does not find out about the retained swab until four years later when it is discovered at a further operation. The date of knowledge would be when the patient was told about this and the harm this has caused.

Constructive knowledge

Section 14 (3) of the Limitation Act 1980 imposes what is known as constructive knowledge which *"... includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him; or ... ascertainable by him with the help of medical or other appropriate expert advice ..."*. The Act does, however, go on to state that *"a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice"*.

Example of constructive knowledge

A man has a long period of circulatory problems in his leg. He undergoes surgery but this is not successful and he requires an amputation. This injury has a substantial impact on him as he cannot return to his manual employment. He knows he has suffered a significant injury which may have been due to the way surgery was performed. Ten years later he instructs a solicitor to look at whether he has a potential claim. It is likely that a court would expect a reasonable person to take expert advice and a claim may therefore be statute barred on the basis of constructive knowledge.

Where constructive knowledge may not be applicable

You have asked your doctors about the cause of your illness or condition. For example, you have lost hearing and asked about the cause of this and been given an explanation that this is age-related hearing loss. It subsequently transpires that this was caused by a drug you had been given. In this case, it is unlikely that a court would consider that constructive knowledge applies.

Can the three-year period be extended?

Technically the parties to the action (the claimant and defendant) cannot extend the limitation period but the defendant may agree not to raise limitation as a defence if proceedings are issued by a certain date.

If more than three years have passed since the date of the incident the defence are unlikely to make such an agreement as this would be to deprive them of the limitation defence which it may be reasonable for them to use.

Such an agreement needs to be made in writing with an agreed date. We would suggest at least a six-month extension but the longer the better. In approaching the potential defendants to ask for such an extension, you should mention that by agreeing to this both sides are spared unnecessary costs.

You cannot compel a defendant to agree to such an extension and if the defence are aware that your case has been under investigation for some time (such as you have previously had a solicitor), they may not agree to extend the time for issuing the claim.

Is it possible to bring a claim outside these time periods?

The courts do have discretionary powers to allow claims which are already outside the three-year limitation period to proceed but that discretion is rarely exercised.

Section 33 of the Limitation Act 1980 (www.legislation.gov.uk/ukpga/1980/58/section/33) lays down guidelines for the exercise of this power:

a. The length of and reasons for the claimant's delay;

   The court will look at the subjective reasons why you have not brought a claim before, such as ill health, and how this would have impacted your ability to seek advice.

b. The extent to which the cogency of evidence adduced by either party might be affected by the delay;

   The court will examine how long it has been since the alleged negligent event occurred. The factors to be taken into account include whether the delay has led to documentary evidence being destroyed or lost and the ability of witnesses to recall the incident and how this goes to the possibility of there being a fair trial.

c. The defendant's conduct after the cause of action arose, including his response to requests by the claimant for information or inspection for the purpose of ascertaining relevant facts;

d. The duration of a disability of the claimant after the cause of action arose;

This applies to mental disability which arises after the cause of action accrued.

e. The extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the defendant might be capable of giving rise to an action for damages; and

f. The steps taken by the claimant to obtain expert advice and the nature of the advice he received.

The burden is on the claimant to prove that an exercise of discretion is appropriate and fair.

Although there is no cut-off date after which cases are no longer considered under s33, the longer the time that has passed, the less prospect there is of a court granting leave to bring a late claim. The courts will only usually allow a claim to proceed where the period of delay is relatively short and the delay has not adversely affected the availability of evidence or would not prejudice a fair trial.

If the defence raises a limitation defence, there would be a preliminary trial on the issue, which would add to the costs of the case. There is a risk that you would not be successful in such a trial and therefore a solicitor may be reluctant to take on the risk of these additional costs where there is a possibility that, in addition to not being able to prove negligence and causation, you would lose any trial on limitation.

Concealment or fraud

The only other exception to the three-year period is if the material facts of the action amounting to negligence have been concealed by the defendant by fraud or mistake. The three-year period begins to run when the claimant has discovered the concealment (fraud or mistake) or could, with reasonable diligence, have discovered it.

Mental incapacity

The time limit does not run when someone has a mental incapacity at the time of the incident alleged to be a breach of the duty of care.

Mental health problems (even those which require compulsory admission to hospital) are not in themselves proof of mental incapacity. Identifying whether someone has capacity or not is very complicated, mental capacity can fluctuate.

The issue of capacity is now covered by the Mental Capacity Act 2005 (www.legislation.gov.uk/ukpga/2005/9/contents) under which there is an assumption of capacity and the decision as to whether someone lacks capacity is task and time specific. Therefore, even if you have impairment or disturbance of the functioning of your brain, to be under a disability for the purposes of the Limitation Act 1980 this would have to affect your ability to make specific decisions about legal action.

If or when mental capacity returns the limitation period will start to run from the time the mental capacity returns.

Children

Children cannot bring a claim themselves and require a 'litigation friend', who is typically a parent or close relative, to bring a claim on their behalf. The limitation period does not start until the child reaches the age of 18. This means that the limitation period expires on the child's 21st birthday.

The only exception to this is where the child lacks mental capacity at the time the negligence occurred, for example, where a child sustains a brain injury at birth in which case the time limit does not apply, they can issue proceedings at any age providing that mental incapacity is continuous and ongoing.

It is advisable, however, to try to start a claim for a child as soon as possible as memories fade and documents can be lost.

Where someone has died

Law Reform (Miscellaneous Provisions) Act 1934

(www.legislation.gov.uk/ukpga/Geo5/24-25/41/contents)

If the injured person dies before the expiry of the three-year period, the limitation period applicable to an action on behalf of his estate is three years from the date of death or from the date of the personal representative's knowledge, whichever is later.

Fatal Accidents Act 1976

(www.legislation.gov.uk/ukpga/1976/30/contents)

The time limit for bringing an action on behalf of dependants under the Fatal Accidents Act 1976 is three years from the date of death or from the date of knowledge of the person for whose benefit the action is brought, whichever is later. Dependants who acquired the necessary knowledge on different dates are therefore subject to different time limits.

Other jurisdictions: Scotland

You must commence your legal claim within three years from when the incident occurred or when you first realised you had suffered an injury. In rare circumstances, when raising a personal injury claim (which is what a medical negligence case is) in court, the court could overlook the fact that the timeframe has expired. However, this will only be permitted in special circumstances, where there is just cause to allow the claim to be heard. The courts are reluctant to allow claims to be heard beyond the limitation period.

Incapacity

Where an individual is incapax (i.e. without the legal capacity to understand or determine their own affairs) the time-bar rules do not apply to them at all during the period of their incapacity.

Children

The three-year time limit begins to run on the child's 16th birthday and therefore they have until their 19th birthday to bring a claim.

Other claims

Human Rights Act 1998

(www.legislation.gov.uk/ukpga/1998/42/contents)

Sometimes where there is a clinical negligence claim, it may also be possible to claim for breach of human rights such as:

- **Article 2** requires the state to refrain from taking a life intentionally and to take steps to safeguard life.
- **Article 3** confirms that there is a right against inhumane treatment, which in relation to the NHS can include failure to provide or withdrawing medical treatment from people with a serious illness or failure to provide basic care.

The time limit for such a claim is that it must be brought to court within a year of the incident giving rise to the alleged breach of your human rights. Therefore if the incident took place on 15th August 2019, you would have until 14th August 2020 to bring a claim.

The court can allow you to bring proceedings after a longer period if it thinks this is fair, but this is rare and should not be relied on.

Actions based on the Human Rights Act are often included as part of the overall civil claim for clinical negligence. The best way to preserve limitation for your Human Rights Act claim is to issue those proceedings and then ask the court to extend time for service – the courts have quite wide discretion to allow this. It may also worth writing to the opposing party and asking them to agree to extend time. The opposing party will often agree to extend time for a defined period for example until 3months after the full inquest hearing and conclusion has been delivered.

Equality Act 2010

(www.legislation.gov.uk/ukpga/2010/15/contents)

In some rare cases as part of a clinical negligence claim it may be possible under the Equality Act 2010 to make a claim for discrimination, for instance if you or a relative have been denied treatment due to age or disability or if you have been treated less favourably because of such a characteristic (a recent case example was where elderly patients only received surgery at the end of a surgical list). In such cases the case needs to be brought to court as quickly as possible as there is only a six-month period within which to pursue a claim.

How can AvMA help me?

Typically AvMA may be able to:

- Help you to understand the legal time limits for a claim
- Refer you to an accredited clinical negligence solicitor who can advise you further on whether you are within the legal time limits.

How to contact us

- If you would like to talk to someone about your concern, please call our helpline on **0845 123 2352**. Lines are open Monday to Friday from 10am to 3.30pm and calls cost 0-7p per minute plus your phone company's access charge.
- The helpline can get very busy and you may need to request a call back if you are having problems getting through to an adviser. Please listen to the recorded message for details. You may want to explore whether the information you are looking for is available on our website.

Important things to know about AvMA

- AvMA is an independent patient safety charity.
- AvMA's services are available to the public without charge or obligation. If you telephone us, calls cost 0-7p per minute plus your phone company's access charge. **See our website for details of call charges**.
- Our helpline advisers are specially trained volunteers who are medical and legal professionals. Our caseworkers are all qualified doctors or lawyers (some are qualified as both) who are all employed by AvMA. They will be able to provide you with independent, impartial advice about your options and potential rights.
- Your enquiry will be treated in confidence.
- We are self-funding and do not receive any money from NHS Resolution, government bodies or from litigation.

www.avma.org.uk/friends

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