

Legal Factsheet – Medical Negligence

2009

This Factsheet provides information about bringing a claim for compensation as a result of medical negligence. Many people feel apprehensive about contacting a solicitor and this document may help you decide whether you wish to do so or not. It is intended to provide an overview rather than a comprehensive statement of legal processes, and covers the following questions you may have:

1. Introduction
2. Have I got a claim for compensation?
3. Do I need a specialist solicitor?
4. What are the time limits for bringing a claim?
5. What are the steps involved in bringing a claim?
6. How will I pay my legal fees?
7. Should I follow the Complaints Procedure?

This Factsheet does not attempt to provide a full analysis of the issue of Medical Negligence, and is provided for general information purposes only. It is not intended to constitute legal advice and should not be treated as a substitute for legal advice. It has been prepared in the context of the law in England and Wales.

Whilst comments have been provided highlighting differences in the handling of Scottish cases, if you live in Scotland or Northern Ireland please note that the detail of the process may vary from the general guidance set out here, and a local solicitor will be able to advise you accordingly. *Changing Faces* accepts no responsibility for any loss that may arise from reliance on the information in this Factsheet. The copyright in this Factsheet is owned by *Changing Faces*, with thanks to Edwina Rawson of Charles Russell for her advice on its preparation.

1. Introduction

Being the victim of a medical “accident” can have a devastating impact on a patient’s life, and their family. We must all, at some time, put our trust in the hands of the medical profession to provide us with the most suitable treatment safely. When mistakes or negligence occur it can be so hard to accept. Sometimes the physical consequences are irreversible.

Not all treatment that has an unexpected outcome will result in the payment of compensation. This is because sometimes an unexpected outcome is due to a known but unfortunate risk associated with the treatment or due to a mistake that any reasonable doctor would have made in the circumstances. Compensation will only be paid in cases where the mistake is such that no reasonable doctor could have made it. The elements for bringing a claim are explained below.

Whilst compensation cannot undo the wrong that has been done, it can enable some people to deal with the consequences more easily on a day-to-day basis, or pay for further medical treatment privately. It may also enable you to feel that you have received some recognition of the wrong you have suffered. You may also feel that bringing the failings to the doctor’s attention will prevent these happening to other people. Indeed, sometimes new hospital procedures are introduced after a medical negligence claim or a doctor may change his or her practice for the better.

The kinds of medical mistakes that can result in a payment of compensation include:

- Surgical errors or performing inappropriate operations
- Failures to diagnose a medical problem
- Incorrect interpretations of x-rays and films
- Failures in relation to childbirth
- Anaesthetic errors

2. Have I got a claim for compensation?

Bringing a claim for compensation can seem daunting and over-whelming. This is understandable bearing in mind that you probably have not been involved in a legal process before so everything, including the terminology, is unfamiliar and the subject-matter is extremely personal. You should ensure that you use a specialist solicitor (see below) and he or she will explain and guide you through the process. Many patients say they feel much better after the initial meeting with their solicitor.

There are three elements that must be met to bring a claim for medical negligence:

1 Negligence (sometimes known as 'breach of duty')

As mentioned above, not all mistakes are sufficiently serious to justify making a claim for compensation. In law, a doctor owes his or her patients what is known as a 'duty of care'. If he or she does not meet the appropriate level of care, then he or she is said to have 'breached' that duty of care or to have been 'negligent.' The legal test that is applied is whether he or she has provided 'reasonable' care.

To assess whether the treatment was 'reasonable' will require independent medical expert opinion, which your solicitor will obtain on your behalf. The doctor will not have been negligent if the actions taken (or not taken) would also have been taken (or not taken) by a responsible body of doctors. If the doctor does not admit negligence, he or she will obtain an independent medical expert opinion to support the actions taken (or not taken).

2 Causation

If the doctor has been negligent, you also have to show that this caused you injury or materially contributed to your injury. Again, an independent medical opinion obtained by your solicitor will assist with this.

Negligence and causation together are known as 'liability'.

3 Loss

You have to be able to show that you have suffered 'loss' as a result of the injury. This is known in law as 'quantum'. You can claim for what are known as General Damages, which compensate for your pain and suffering and loss of amenity. In Scotland this element is known as "solatium" or "pain and suffering". An element of this will relate to any change in your facial or bodily appearance. In our country, unlike the US, patients often feel that the payment does not adequately reflect the extent to which they have suffered.

In addition, you can claim for what are known as Special Damages, which compensate for your financial losses, expenses, and any care that has been provided. In Scotland the term "Special Damages" is not used, however the

sa
 me types of claims can be made. The types of claims that are typically made are loss of earnings as result of the injury, the costs of corrective and future private medical treatment, travel expenses, and future therapy or care needs. You are under a duty to mitigate your loss, which means that you must act reasonably to keep your losses to a minimum. For example, unless it can be justified, it would not be reasonable to claim for taking taxis everywhere and to buy the most expensive top-of-the-range products that you may need. You should also keep receipts.

So, if the three elements of negligence, causation and loss are met, you can bring a claim for compensation. In some cases, negligence, causation, and loss will be admitted by the doctor and you are then entitled to compensation.

It is worth remembering that only a tiny minority of claims actually reach the Courts, and the vast majority are settled out of Court.

3. Do I need a specialist solicitor?

Yes. Medical negligence is a specialised and complex area of law and it is important that you have a solicitor with the appropriate skill and experience.

The Law Society can recommend a suitable firm of solicitors or you can refer to the specialist publications, notably *Chambers & Partners* and *The Legal 500*. These list specialist legal practices by practice area and by geographical area. The whole of the UK is covered by these Guides and they will enable you to obtain quite a lot of detail on the firms that specialise in the areas of practice that you need.

Please see Annex 1 for further details.

4. What are the time limits for bringing a claim?

There are strict legal rules governing the deadline by which claims for compensation have to be made, and if you intend to bring a claim you should contact a solicitor promptly for advice. It is also beneficial to get the claim started early.

A brief overview of the time limitation periods is set out below, but you need to discuss the position with your solicitor:

Adult: You have 3 years from the date of the injury to start Court proceedings. In Scotland you must not only have lodged your case with the court within this time but must also have effectively served court proceedings on the person or body on whom they are being raised. If you did not know about the injury or that it was due to treatment you received, then the 3 years will not start to run until the date you acquire this knowledge.

Child: If the injury is to a child, Court proceedings must have been started by, at the latest, 3 years of the child reaching aged 18. Therefore, a child has until age 21 to bring a claim. However, claims may be made by the parents on behalf of the child before he or she reaches 18. Claims in Scotland must be made within three years of the child reaching the age of 16, ie by their 19th birthday at the latest. If the claim has resulted from a fatality of the claimant then the time period is three years from the date of death.

Mental incapacity: If a person is mentally unable to manage his or her own affairs before the injury or as a result of the injury, there is no time limit provided that the

mental incapacity remains. If he or she gains capacity to manage his or her own affairs, then the 3 years will start to run from that date.

The Court has discretion to extend the 3 year limitation period, but only in exceptional circumstances.

5. What are the steps involved in bringing a claim?

There are strict legal rules governing the deadline by which claims for compensation have to be made, and if you intend to bring a claim you should contact a solicitor promptly for advice. It is also beneficial to get the claim started early.

The basic steps involved in deciding whether you can bring a claim for medical negligence are the same in all cases. These are as follows:

Meeting your Solicitor

You should have an initial meeting with your solicitor, during which he or she will take the details of the treatment you received, explain the process for bringing a compensation claim, and discuss how your legal fees will be paid.

After the meeting

After the initial meeting, your solicitor will do the following:

- Prepare your Witness Statement based upon the information you provided and consider whether any other Witness Statements should be obtained, for example from other family members.
- Make arrangements in relation to funding your claim, such as applying for public funding.
- Obtain copies of your medical records from the hospitals where you have been treated and from your GP.
- Arrange for the medical records to be sorted and paginated.
- Preliminary work in relation to quantum (i.e. assessing the amount of compensation).

In Scotland the last two of these steps are unlikely to be taken until later in the legal process.

The doctors and hospitals have an obligation in law to provide you or your solicitor with a copy of your medical records, including x-rays and other films. They have 40 days in which to provide these, although in reality it may take longer than this.

To complete the steps above usually takes between 2-3 months, although this will vary from case to case, and often takes longer under the Scottish procedures.

Obtaining an expert opinion on liability

Your solicitor will give careful consideration to the treatment you received and the consequences, and identify the appropriate independent medical expert opinion that will be required. Sometimes more than one expert opinion is required. Your solicitor should have a database of doctors who are sympathetic to your situation and are willing to make criticisms of the treatment you received, if appropriate.

When the appropriate medical experts have been identified, your solicitor will prepare a formal letter of instruction to the expert. This will provide the background to your treatment and ask the expert specific questions relating to negligence and/or causation. The expert will also be provided with copies of your Witness Statement and medical records. The expert will prepare a Report on your treatment.

After the expert's Report has been obtained, your solicitor will be able to advise whether, on the basis of the report(s), you have a claim for medical negligence, and provide you with a copy of the Report. Even in cases that do not go any further because the expert concludes that there has not been negligence, patients can find this process helpful as the expert's Report will provide details of the treatment provided and a commentary.

The above steps may take a further 2-3 months, although much depends on the medical expert's waiting list. Obtaining such reports often takes longer in Scotland.

Pre-Action Protocol

The next stage, assuming the claim proceeds, is to comply with what is known as the Pre-Action Protocol. Your solicitor will prepare a Letter of Claim which will set out the factual background to your claim, the allegations of negligence based upon the expert's Report, and a preliminary estimate of the likely value of the claim. The Letter of Claim will be sent to the doctor's legal representative. They have 3 months in which to undertake their own investigations and provide a Letter of Response which should deal with the allegations of negligence that have been made and make it clear whether they are admitting liability. Admissions of liability at this stage are quite rare.

It should be noted that in Scotland the pre-action protocol is not obligatory but can be opted into where both parties consider it appropriate.

Conference with Barrister

In many cases, a meeting (known as a 'Conference') with a barrister will be arranged particularly if the Letter of Response denies liability. Your solicitor and the medical expert will attend, and so should you. You would find the meeting helpful, as it is an opportunity to consider the issues and strength of the claim, and to have a preliminary discussion of the level of compensation (quantum).

Calculating the amount of compensation

Calculating the compensation value of the claim requires skill and expertise. As mentioned above, you can claim for General Damages and Special Damages. It may be necessary to obtain expert evidence in relation to the quantification of the claim. This may be, for example, in relation to your future surgical requirements, care and therapy needs, or housing adaptation needs. Again, your solicitor will identify what is required and obtain the necessary Reports.

Your solicitor will also prepare a Schedule of Damage and Future Loss which will provide details of the claim and its total value. The calculation of the claim may take several months, depending on the complexity. The quantification of the claim will be an on-going process.

Court Proceedings

If the claim is sufficiently strong on liability, and liability has not been admitted, then Court proceedings will be commenced and copies of the relevant documents (which

will be prepared by the solicitor and barrister) will be sent to the doctor's legal representative.

The doctor's representative will usually have about 2-3 months to prepare a Defence, depending on the complexity of the case. In Scotland defences must usually be prepared within four weeks. During this time, your own solicitor will be continuing to work on your claim.

Timetable

After the Defence has been received, a timetable for the procedural steps will be set by the Court and will include dates for the following:

- Exchange of Witness Statements (i.e. your solicitor gives the doctor's legal representative your and any other Witness Statements, and they give your solicitor theirs).
- Exchange of Reports from the medical experts and, if appropriate, a meeting between the experts to discuss your treatment.
- To provide a Schedule of Special Damage and Future Loss, and supporting documents. The doctor's legal representatives will usually have 2-3 months to prepare a Counter-Schedule, which will comment upon the claims that you have made and give alternative calculations.

It should be noted that this timetable does not apply in the Scottish courts. A party may allow the other side's solicitor to take statements from their witnesses but is not obliged to do so and there is no exchange of witness statements. An exchange of expert reports sometimes occurs, however, it is more common for expert reports to be lodged with the court as productions a month prior to any proof (trial) and therefore only become available to the other party at that stage.

Further Conferences with Barrister

Depending on how the claim progresses, there may be further meetings with the barrister to finalise the experts' Reports before sending them to the doctor's legal representatives, and when the Schedule of Loss has been completed.

Settlement

At any time throughout the above timetable, the doctor's legal representative may admit liability and/or make an offer of compensation. Alternatively, when your solicitor has investigated the level of compensation, your solicitor can make an offer of settlement on your behalf. If a settlement sum can be reached that is agreeable to both sides, then you have won your case. Sometimes cases settle early in the above procedure, sometimes later. It may be necessary to have a Settlement Meeting to try to agree the amount of compensation. If your claim settles, the Court timetable is stopped. As mentioned, only a small number of cases reach trial (in Scotland this is called a "proof") as the vast majority settle outside of Court.

Timescale

It is difficult to gauge the timescale of a case at the outset. This is because in most cases it is difficult for your solicitor to second-guess the approach that will be taken by the doctor's legal representative. If liability is admitted at an early stage, the claim may be settled and compensation paid within a few months. If not, and in higher value claims that require more preparation, it may take up to a year to two years to reach settlement. It varies depending on the case. Childbirth injury claims on behalf of a brain injured child take longer, as do cases in the Scottish courts due to the different procedure used.

6. How will I pay my legal fees?

How your legal fees will be paid is something your solicitor will discuss with you at the first meeting or during your first telephone conversation. Before you contact a solicitor, you should check whether you have any insurance policies (housing, buildings and contents, car, credit cards etc) that include 'legal expenses insurance'. If you do, the policy may pay your legal fees for bringing a medical negligence claim, however the level of cover provided by such policies will be insufficient to cover the expense of raising and pursuing a court action to its conclusion.

If you do not have legal expenses insurance, you may qualify for public funding, which you may know as 'legal aid'. If you do not qualify, you will need to discuss with your solicitor the possibility of entering into a 'no win no fee' agreement, or paying for the investigation yourself with a view to entering into a 'no win no fee' agreement after receipt of the expert's opinion. The expert's opinion will enable the solicitor to assess whether the claim is sufficiently strong to enter into such an agreement.

If your claim is successful, and you are therefore paid compensation, the doctor's insurers will also pay for the majority of the legal fees incurred by your solicitor, barrister and experts.

In Scotland where an award of expenses is made this often pays only in the region of 60% of the fees and outlays actually incurred by the party. There is a method available to increase that by an additional award of expenses from the court in these cases, and your solicitor will be able to advise you in relation to this.

7. Should I follow the Complaints Procedure?

It is open to you to follow the Complaints Procedure and complain direct to the NHS Trust (if NHS treatment) or the consultant or private hospital (if private treatment). This is appropriate if you simply want an apology or to raise concerns. However, you will not be awarded compensation as a result of the Complaints Procedure, except possibly a small ex-gratia payment. If treatment was on the NHS, you may wish to contact the Trust's Patient Advice and Liaison Service (PALS).

The complaint should be made usually within 6 months of the event complained of or within 6 months from the date when you realised you had a complaint. There is discretion to extend the time period, but it is advisable to act promptly.

If the NHS Trust, consultant, or private hospital becomes aware that you have formally instructed a solicitor to bring a claim for medical negligence, the Complaints

Procedure will be abandoned. However, this should not prevent you from contacting a solicitor for some preliminary advice.

Your letter of complaint should be addressed to the Chief Executive of the NHS Trust, the consultant or private hospital and should set out the factual background and your concerns. You may be invited to attend one or more meetings with representatives of the Trust and the treating staff concerned.

The NHS Trust, consultant, or hospital should provide you with a written response dealing with your concerns. It may be necessary to have further meetings. Alternatively, you can request an Independent Review (which you should do within 6 months of the written response) by the Healthcare Commission, although this may not be granted. If an Independent Review is granted, you and the treating staff will need to be interviewed. If you remain dissatisfied with the investigation after the Independent Review, you can complain to the Health Service Ombudsman within 12 months from the date of the decision letter from the Healthcare Commission.

Sometimes, the Complaints Procedure can result in thorough and helpful responses that admit failings in treatment. Having been through the Complaints Procedure, you can then ask a solicitor to bring a claim for compensation, and the letter may result in an early admission of liability.

In other cases, the Complaints Procedure can be unsatisfactory and disappointing, and the patient can feel that their concerns have not been addressed or they have been 'fobbed-off'. In addition, patients can understandably feel intimidated about meeting with the treating doctors and attending a meeting that is held in the hospital where they have been injured.

You may prefer to seek legal advice before you decide to make a formal complaint. Further details of the Complaints Procedure can be found at the Department of Health website at www.dh.gov.uk.

Changing Faces would welcome any comments on how helpful this Factsheet has been. If you would like to let us know, please send your comments in any of the following ways:

1. By post to:
Legal Factsheet Feedback
Changing Faces
The Squire Centre
33-37 University Street
London WC1E 6JN
2. By email to info@changingfaces.org.uk
3. By phone to 0845 4500 275

Thank you very much.

Annex 1

Law Firms: Medical Negligence

The following law firms have been recognised by both *Chambers & Partners* and *The Legal 500* as being leaders in the field of Medical Negligence:

Region/Country	Firm	Contact Telephone
East Anglia	Kester Cunningham John Thetford	01223 363111
London	Charles Russell LLP	020 7203 5000
	Field Fisher Waterhouse LLP	020 7861 4000
	Irwin Mitchell	0870 1500 100
	Kingsley Napley	020 7814 1200
	Leigh Day & Co	020 7650 1200
	Partlett Kent	020 7430 0712
Midlands	Freeth Cartwright LLP	0115 936 9369
	Irwin Mitchell	0870 1500 100
North / North East	Hay & Kilner	0191 232 8345
	Irwin Mitchell	0870 1500 100
North West	Irwin Mitchell	0870 1500 100
	Pannone	0161 909 3000
Northern Ireland	No firms cited specifically in this area	
Scotland	Anderson Strathern LLP	0131 270 7700
	Balfour & Manson LLP	0131 200 1200
South / South East	Boyes Turner	0118 959 7711
South West	Barcan Woodward	0117 925 8080
	Parlett Kent	020 7430 0712
Wales	Hugh James	029 2022 4871