

## **Medical negligence (Making a complaint)**

Most people receive good care from healthcare professionals. Sometimes, people receive poor care. If this happens, they may wish to make a complaint. If sub-standard care has led to avoidable harm, they may also wish to make a claim for compensation for medical negligence.

### **Raising concerns about care**

Most people, when they become unwell, are treated with very good care and are happy with their treatment. However, sometimes things can go wrong, and bad outcomes can happen; diagnoses might be missed or delayed, or treatment may not work. Sometimes, this happens despite care being very good; treatments are not always effective, and some diagnoses can be difficult to make. However, In other cases, medical care can be below the acceptable standard, and lead to harm.

People who have had poor experiences with healthcare can:

- Make an complaint, either informally, or formally in writing.
- Consider making a legal claim for medical negligence, if they have been harmed by poor care.

This leaflet will discuss these different options in more detail.

### **How can you make a complaint about your treatment?**

There are several different options for making complaints about care:

- Making an 'informal complaint' can be a good first step, as this often resolves the problem more quickly than the formal complaint process. This could involve speaking to a member of staff; for example, speaking to the ward manager or clinic manager in a hospital, or speaking to a GP or the practice manager in a GP surgery. They should be able to explore your concerns and explain what happened.
- Another option is to make a 'formal complaint', by following the complaints procedure of the hospital, clinic, or GP surgery that provided the treatment. This requires making a complaint in writing. It triggers a process where the organisation must acknowledge and properly look into the concerns raised.
- Complaints advocates can give advice and support throughout the complaints process. Examples of organisations offering this include Healthwatch (in England), Community Health Councils (in Wales), the Patient Advice & Support Service (in Scotland), and the Patient & Client Council in Northern Ireland.
- If you are unhappy with the way the complaint has been dealt with locally, you can complaint to the relevant ombudsman.
- For serious professional concerns – such as concerns that a healthcare professional is not fit to practise – you can make a complaint to their regulatory body.

You should make your complaint as soon as possible. Complaints should normally be made within 12 months of the date of the event that you're complaining about, or as soon as you find out about the problem. The time limit for making a medical claim can sometimes be extended but only if it's still possible to investigate the complaint. The time limit can be extended if it is clear that you were unable to make the complaint at an earlier time.

### **Parliamentary and Health Service Ombudsman**

The Ombudsman is independent and can make final decisions on complaints that have not been resolved by the Health Service. You can complain to the Ombudsman if you believe there has been injustice or hardship because the Health Service:

- Has not acted properly.
- Has not acted fairly.

- Has given you a poor service and not put things right.

There is a separate Health Service Ombudsman for England, Scotland, Wales and Northern Ireland.

## **Governing bodies for health professionals**

Healthcare professionals are regulated by governing bodies, which have the power to prevent them from practising if they are unfit to do so.

In the UK, the governing bodies are:

- The General Medical Council (GMC), for doctors.
- The General Dental Council (GDC), for dentists, dental nurses, dental technicians, dental hygienists, dental therapists and orthodontic therapists.
- The Nursing and Midwifery Council (NMC), for nurses and midwives.
- The General Pharmaceutical Council (GPhC), for pharmacists and pharmacy technicians. (In Northern Ireland, pharmacists are regulated by the Pharmaceutical Society of Northern Ireland).
- The Health and Care Professions Council (HCPC), for art therapists, biomedical scientists, chiropodists and podiatrists, clinical scientists, dieticians, hearing aid dispensers, occupational therapists, operating department practitioners, orthoptists, paramedics, physiotherapists, psychologists, prosthetists and orthotists, radiographers, and speech and language therapists.

Healthcare professionals in the roles above must, by law, be registered and in good standing with their relevant regulatory body. Some other groups are currently not regulated by law, but have a voluntary register, such as physician associates and audiologists.

These governing bodies can intervene in serious cases where it appears that a healthcare professional may not be fit to practise, or may otherwise be a danger to patients. They have a range of powers, including issuing warnings, applying conditions to a healthcare professional's work, suspending them from working for a time, and permanently removing them from their register.

You can complain to the relevant regulatory body if you have serious concerns about a healthcare professional. They will generally only investigate major professional issues, such as:

- Serious or repeated mistakes in clinical practice.
- Fraud or dishonesty.
- Serious breaches of patient confidentiality.
- Having committed a serious criminal offence (this should also be reported to the police).

They may decline to investigate less serious concerns. They will typically advise that these are investigated locally through formal complaints processes.

The regulators only deal with the fitness to practise of the healthcare professional. They do not deal with clinical negligence claims, and do not provide any financial compensation to complainants.

See the Further Reading section below for links to more information about your options.

## **What is medical negligence?**

Medical negligence (also called clinical negligence) is when a clinician fails to provide a patient with adequate and appropriate care, leading to avoidable harm.

Medical negligence exists as a concept in society and in the law because people are sometimes harmed by inappropriate or sub-standard care. Medical negligence claims allow them to be compensated for the harm they have experienced.

Someone who has been harmed by sub-standard care can sue a healthcare professional or organisation for medical negligence. The person making the claim is called the 'claimant', and the person or organisation they are suing is called the 'defendant'.

Most medical negligence claims do not make it to court. Some are dropped; for example, if the solicitors for the plaintiff feel there is no realistic possibility of winning in court. Others are settled by an out-of-court agreement between the claimant and the defendant; for example, if the defendant's legal team feel that they have no realistic possibility of successfully defending the claim. Alternatively, both sides might reach an out-of-court settlement to achieve a quick resolution, without running up large legal costs from a court battle.

The law around medical negligence is complicated, but, broadly-speaking, if a case does go to court, to succeed, the claimant must demonstrate to the judge that:

- A duty of care existed from the defendant to the claimant, and;
- The defendant breached their duty of care, and;
- The claimant was harmed, and;
- The breach of duty of care caused this harm.

The two areas that are usually the most difficult to prove are that the healthcare professional breached their duty of care, and that the breach of duty of care was the clear cause of harm.

For example, operations can have complications, even when performed properly. If someone suffers a complication from an operation, but the surgeon had performed the operation to an acceptable standard, they would not be able to make a successful negligence claim.

A legal test called the Bolam test is used to assess whether or not a healthcare professional has failed in their duty of care. If a medical professional can show that other competent medical professionals would have acted in the same way as they did, they can use this to demonstrate that they did not breach their duty of care. For example, if a GP is defending a clinical negligence case, and can demonstrate that other competent GPs would have acted in the same way that they did, they can successfully argue that they have not acted negligently.

Examples of situations where people might make medical negligence claims may include:

- Failure to diagnose a condition or making the wrong diagnosis.
- Making a mistake during a procedure or operation.
- Prescribing the wrong medicine or the wrong dose of a medicine.
- Not providing correct and sufficient information to be properly informed of the possible side-effects of a medicine or the risks of a surgical operation.

You can also take legal action for compensation if you are the closest relative (next of kin) of someone:

- Who has died because of negligent medical treatment.
- Who can't take legal action themselves - eg, if they have dementia.

If you're the parent of a child aged under 16 years, you can make a complaint for them if the child is unable to make the complaint themselves. Even if the child can make the complaint, you can still make the complaint for them as long as the child gives you permission.

If you are thinking about taking legal action about medical negligence, you should obtain specialist legal advice as soon as possible (see below).

## **How to claim for medical negligence**

If you are considering making a legal claim for compensation, then you should contact a solicitor to discuss your case and the chances of making a successful claim. You should see a solicitor who specialises in medical negligence cases. There are two recognised panels of specialist medical negligence solicitors. One is run by Action against Medical Accidents and the other is run by The Law Society.

Although a complaint should usually be made within 12 months, there is a three-year time limit (from the time you become aware of the medical negligence) to make a legal claim for compensation. However, if a person who has been affected by medical negligence is aged under 18 years at the time, the three-year limit starts on their 18th birthday. If a person has had a mental illness, they have three years from the time of their recovery from this mental illness to make a claim.

If you do make a claim for medical negligence it is very unlikely that you will need to go to court. Most cases are settled without going to court. Fewer than 2 in every 100 cases handled by the National Health Service (NHS) in England end up in court. The rest are settled out of court or dropped by the claimant.

You can claim compensation for any injuries or losses suffered which were a direct result of the negligent treatment you received. This may include:

- Compensation for pain and suffering.
- Payment for ongoing treatment.
- Compensation if you can't carry out certain activities or hobbies.
- Loss of earnings.
- The cost of any extra care or equipment you may need.
- The cost of adapting your home.
- Compensation for psychological damage.

### **How do you pay for a legal claim?**

There are different ways to fund your legal claim. It is essential for your solicitor to explain the different methods of funding so that you can decide what is best for you. Different firms of solicitors have different arrangements for their clients to pay for legal expenses, and insurance to protect you from costs if you lose your case.

Legal aid to cover medical negligence claims has not been available since April 2013. However, there is still limited public funding for some cases involving children. The different ways to fund a medical negligence claim include:

- Legal expenses insurance. There are some insurance policies (for example, house insurance policies) that include legal expenses cover which could be used to pay for a medical negligence claim.

- Conditional fee agreements ('no win no fee' medical negligence claims):
  - This means that you won't have to pay your solicitor's fees if you don't win the case.
  - However, if you win your case, the firm of solicitors will take off a percentage of your compensation as its success fee.
  - If you lose your case, you may have to pay the other side's legal costs.
- 'After-the-event' insurance. You may be advised to take out insurance to protect you from the possibility of having to pay the other side's costs if you lose the case.

These are all complicated agreements and you must read the terms and conditions carefully before you sign.

## **What are your rights and responsibilities as a patient?**

You have a number of rights and responsibilities as a patient. These are often provided in written information. For example, for the NHS in England:

- You have the right to register with a GP if you live within the GP's catchment area, even if you come from abroad.
- You are entitled to treatment from a GP at the surgery where you are registered. However, you have no automatic right to see your own GP.
- If you are violent or abusive to NHS staff, you may be refused NHS hospital treatment, or given a verbal or written warning before treatment is withheld or withdrawn.
- You cannot receive NHS hospital treatment without being referred by your GP, unless you are attending a special clinic (eg, a sexually transmitted infection clinic), or you need emergency medical attention.
- You have the right to choose a particular team headed by a named consultant for your first outpatient appointment, provided that the doctor referring you agrees that your choice is clinically appropriate.



- If you go into an A&E department, you should be assessed immediately. Staff will try to make sure you do not wait more than four hours before admission to hospital, treatment or discharge from A&E. However, this time limit is only a guideline.
- If something goes wrong during your treatment, which leads to significant physical or psychological harm or death, the NHS provider must do the following, and failure to do so might entitle you to make a formal complaint:
  - Tell you or your representative in person about the incident, as soon as possible after it happened.
  - Tell you what will be done to put things right.
  - Apologise to you.
  - Give you a written record of this information and keep records of further communication with you.
  - Provide any other support you may reasonably need.

For more information about patient rights and responsibilities, see the Further Reading links below.

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## Further reading

- [NHS healthcare](#); Citizens Advice
- [The Patients Association](#).
- [Health Service Ombudsman](#)
- [General Medical Council](#)
- [NHS complaints guidance](#); NHS Constitution for England
- [The NHS Constitution for England](#), updated October 2015

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Authored by:	Peer Reviewed by: Dr Hayley Willacy, FRCGP	
Originally Published: 19/11/2023	Next review date: 31/10/2023	Document ID: doc_29269

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