

# Making a Claim for Compensation as a Result of Medical Negligence

## 1. Basic Principles

In our legal system, the injured party (the claimant) must prove his or her case by producing appropriate evidence before the Court to substantiate each fact and matter. Although the vast majority of medical negligence claims are settled before trial and increasingly before court proceedings are even commenced, it is always wise to work on the basis that the claim may have to proceed to a trial. At a trial the claimant will be expected to produce evidence to support each and every fact that they want the court to find in support of their claim.

The task of preparing the claimant's evidence is best tackled right at the outset of the claim. The earlier they start preparing their evidence, the better; whilst their own memory and those of their witnesses are still vivid. A court is likely to give greater weight to a witness statement made close to the events it concerns than one prepared months or even years later.

It is necessary to prove the claimant's case "on the balance of probabilities" (in other words, to show that what they allege is more likely to be the case than not).

## 2. The Stages

There are 3 main stages in preparing a medical negligence claim.

First, there is the initial fact gathering. The solicitor will ask the claimant to provide some initial written details. They should then interview the claimant to clarify their instructions and to ascertain the basic facts and issues concerning the claim.

Secondly, it is necessary to collect all the evidence needed to support the facts that the solicitor wants the court to find in the claimant's favour, to prove their case. This usually includes interviewing witnesses; preparing statements; obtaining medical, employment and other records; and instructing medical and other experts whose specialist opinion the claimant needs to support their claim.

Thirdly, it will be necessary to exchange the claimant's evidence to their opponent (ie the hospital or doctor at fault) if the claimant is to encourage a settlement or to pursue their claim to a hearing. This can either involve single exchange of all relevant evidence with the opponent, or a series of mutual exchanges of different categories of evidence. If proceedings have been commenced then this stage is usually regulated by a timetable that the court imposes on the parties.

Under the court rules, the claimant is required to open a dialogue with the opponent much earlier, in order to encourage negotiations to settle their claim and to ensure that both

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parties are better prepared, should it become necessary to commence proceedings. In particular, a protocol has been established which requires the claimant to set out their claim in as much detail as possible and for the opponent to reply to it fully before proceedings are commenced.

## 3. Preparing the evidence on liability (fault)

Generally speaking, if the claimant wishes to succeed in recovering compensation for personal injury and/or loss arising out of a medical accident, it is necessary to establish the following:

- that a common law or statutory duty of care was owed to them at the material time, and
- that the opponent, or someone for whom they are responsible, failed in that duty to them, and
- that this breach of duty caused them injury and loss
- that the injury or loss was of a kind that the ordinary man would consider to be the reasonably foreseeable result of such a breach of duty

Proving the above facts usually involves the following:

### (i) The Evidence of Witnesses

This involves preparing a detailed statement for the claimant and any other witnesses who can support their case. It is necessary to prepare written statements of this evidence, since this will eventually be disclosed to the opponents and read by the judge should the case proceed to a trial. It is important that these statements should be prepared as quickly as possible since they tend to carry greater weight if prepared closer to the events that they concern.

### (ii) Documentary Evidence

In a medical accident, this will always include medical records from the GP and any hospital where the claimant has been treated and may include any other records of a medical nature that may exist, e.g. notes held by a physiotherapist, chiropractor or osteopath.

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## **(iii) Expert Evidence**

All medical negligence claims must be supported by medical evidence to prove that the medical accident not only represented a breach of duty of care but also caused the injury or symptoms complained of. It is for the court to decide what happened at the time of the medical accident by hearing the parties involved, listening to the expert witnesses and considering the other material evidence before it.

## **(iv) Photographic Evidence**

It is sometimes necessary to obtain a set of photographs (eg. if the claimant has suffered scarring or a disfigurement).

## **4. Preparing evidence on quantum (valuing the claim)**

It is very easy to lose track of expenditure incurred following an injury and accordingly it is important for the claimant to keep thorough records of all these expenses. It is just as easy to forget how long it took to recover and the exact sequence of events following the accident. Such details are vitally important in litigation; inaccuracies can affect not only the amount of the claimant's claim but also their credibility as a reliable witness.

### **(i) The injury**

The claimant should keep a chronological record of their symptoms; their nature, duration and extent. They should log the effect of their injuries on their social, domestic, work and recreational activities and on their enjoyment of life generally.

The claimant should be very careful to ensure that they log any significant time spent by their family and friends helping them to do things that they would otherwise have coped with themselves, but for the injury.

The solicitor will need to obtain copies of the general practitioner notes as well as the claimant's hospital treatment notes and records.

The claim will need to be supported by a medical report, usually from a consultant, identifying the claimant's injury and its consequences and giving an opinion on the outlook of their recovery. Obtaining a final report can delay

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settlement of the claim. This is because it is often necessary to wait to see whether, and if so when, an injury is likely to resolve, before valuing a claim; this may take months or even years.

It is sometimes necessary to obtain reports from more than one consultant to deal with different aspects of the claimant's injuries.

If the claimant has suffered a severe psychological reaction to the events surrounding their medical accident and/or the claimant's injuries, it is likely to be necessary to obtain a report from a psychiatrist to prove that aspect of the claim.

The solicitor will have to arrange for the claimant to visit the various medical experts in their consulting rooms to enable them to carry out an examination before they can prepare their reports. These examinations will normally require the claimant to travel some distance to see an expert outside of the geographical area where they were treated. It is inevitable that the claimant will be involved in some time and expense in attending these examinations.

## (ii) The Claimant's Losses

If liability can be established, it will be necessary to determine the amount payable by way of compensation, which is also referred to as "quantum", and to prove the extent of the injuries, losses and expenses suffered as a result of the opponent's negligence. Compensation (termed "Damages") in cases of this kind falls under two broad heads, which are:

### *General Damages*

These are claims that cannot readily be quantified in monetary terms and cover such matters as pain suffering, inconvenience and general effects of the injuries on various aspects of life. This part of the claim will usually be established by medical evidence.

### *Special Damages*

These are claims that can be quantified precisely, being financial losses, such as, lost earnings, provision of care, equipment costs, transport costs and adaptations to the home.

It is important that the claimant keeps receipts for all items of expenditure

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incurred in order to prove their out of pocket expenses.

The solicitor will need to obtain a detailed statement from the claimant summarising the effect the injury has had on them. The solicitor may also need to interview family and friends and in particular anybody who has been providing the claimant with paid or unpaid help or care during the claimant's recovery.

It is sometimes necessary to obtain other expert reports, such as a care expert, a rehabilitation expert and/or an architect in more complex cases.

## Start your Claim

Contact our specialist medical negligence claims team at Boyce Hatton for honest, expert advice. Contact us online or call **01803 403403** for a free and confidential consultation.