

Claim Guide – Wales

What is a claim?

A clinical negligence claim is a legal action for compensation arising from the alleged harm or loss to a patient as the result of substandard medical care. For a negligence claim to succeed, the claimant must prove the following three elements:

1. There is a duty of care owed by the clinician to the patient
2. The duty has been breached (in terms of the test outlined below) and
3. The breach in the duty has caused harm to the patient (and the harm was reasonably foreseeable). This is referred to as 'causation'.

In most cases of clinical negligence, the first requirement is easily met. The second and third are those which usually require detailed investigation and analysis.

The standard of proof in these claims is "on the balance of probability", or in other words the chance that something happened is more than 50 per cent.

Breach of duty

It is well established in law in Wales that a clinician is not negligent if they have acted in accordance with the practice of a reasonable, responsible and logical body of professional opinion at the relevant time. To be negligent the doctor must have acted in a way in which no reasonable doctor acting in the same circumstances would have acted (the 'Bolam standard').

Causation

Causation considers whether the breach of duty caused (or materially contributed to) the harm or loss complained of.

It is sometimes the case, even where breach of duty can be established, that the claimant has either not suffered any loss, or would have suffered the same losses, in any event, even if there had been no negligence. In this situation a claimant cannot succeed with their claim.

Time limits

There are strict time limits within which a patient must raise a claim for negligence. If these are not met, the right to bring a claim will be lost. In certain circumstances, the court may allow a claim to proceed despite the fact that the time limit has passed, if it is considered equitable to do so.

The time limit is usually three years from the date of the alleged negligence, or from the date on which the patient became aware (or ought reasonably to have been aware), or in other words "the date of knowledge", that they have suffered a loss, which may have been connected to the care provided. The time limit may

be different for children and adults who lack mental capacity. In cases where the alleged negligence has caused death, the three years runs from the date of death.

Indemnity arrangements

MDDUS members should seek the assistance of [NHS Wales Shared Services Partnership](#) about any claim for compensation brought against them in relation to their clinical care of NHS patients.

MDDUS members may seek the assistance of MDDUS for any claims in relation to their clinical care of other patients. MDDUS provides assistance to members in accordance with the [Member Guide](#) and the Membership Information Sheets.

The information provided below is on the basis that MDDUS is involved in the legal process, but the same principles apply if the claim is being overseen by a different indemnifier or insurer.

Investigation of a claim

In order to bring an action for clinical negligence, a claimant should obtain expert evidence from a clinician of the same specialism as the defendant, commenting on the standard of care provided. They may also seek expert evidence on causation, to determine what caused the loss and what would have happened in the absence of any negligence.

On receipt of a claim for negligence in which MDDUS is assisting, we will obtain our own expert evidence to establish whether a defence to the claim is available.

Often the clinician involved will have no knowledge of the fact that a claim is to be made until some years after the event. In this situation, it can be difficult to remember the precise details of the relevant consultations. A clinician subject to a claim may therefore have to rely on the clinical records made at the relevant time and on their usual practice in such circumstances. This underlines the importance of accurate, contemporaneous record keeping.

Procedure

There are strict timescales when dealing with claims and it is important to alert MDDUS to correspondence intimating a claim as soon as you receive it.

Claims are usually intimated well in advance of court proceedings to allow adequate investigation and the possibility of an agreed outcome, without recourse to court. The investigation of a claim for negligence can take several years.

The early stage of the claim

The statutory 'Pre-Action Protocol' for the Resolution of Clinical Disputes aims to resolve these cases without the need for court proceedings. The protocol sets out a clear process for recovery of healthcare records and notification of a claim. The claimant is required to send a letter of claim, which includes a summary of the facts, allegations of negligence, injuries suffered, and any other financial losses incurred. A formal response must then be sent by the defendant within four

months. If this process does not result in settlement of the claim, court proceedings can be commenced. There may be penalties in costs for a claimant who commences proceedings without first following the protocol steps.

Hearings

Ultimately, even if court proceedings are commenced, the vast majority of claims will still be abandoned or settled long before a hearing of evidence is required. If such a resolution is not achievable, a formal hearing known as a trial will be held. Factual and expert evidence will be led by both parties, following which a judge (or in some limited circumstances, a civil jury) will reach a decision on the case.

In the event that such a hearing is required, MDDUS will work closely with our members to ensure that they are prepared to give evidence and have a clear understanding of the claims process.

Compensation

Compensation in a clinical negligence case is intended to return the claimant, as far as possible, to the position they would have been in, but for the negligence. The amount agreed by the parties or fixed by the court will reflect the level of pain and suffering, the type of injury (more serious injuries attract greater awards) and financial losses which include loss of potential earnings/pension, disadvantage on the labour market, the cost of any necessary remedial treatment and payments needed for extra care and assistance.

Once MDDUS has obtained the necessary expert evidence on breach of duty and causation and any further evidence necessary to quantify the claim, we will be in a position to assess the merits of the case and to advise members further in relation to the prospects of a successful defence or, where appropriate, offering an out of court settlement.