

# Claim Guide - Scotland

## 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 pursuer (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" i.e. the chance that something happened is more than 50 per cent.

## Breach of duty

It is well established in law in Scotland 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. The leading authority is the case of *Hunter v Hanley*. This provides that a pursuer must be able to prove that:

- there was an established practice
- the clinician has not adopted that practice and
- the course adopted was one which no other clinician (of the same discipline) of ordinary skill would have taken, had they been acting with ordinary care.

## 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 pursuer 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 pursuer 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 it has time-barred, if it is considered equitable to do so. However, this is rare.

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, i.e. "the date of knowledge") that they have suffered a loss, which may have been connected to the care provided. This is different in relation to children and adult patients who lack mental capacity. In cases where the alleged negligence has caused death, the three years runs from the date of death.

## **Investigation of a claim**

In order to bring an action for clinical negligence, a pursuer 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 expert 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 against an MDDUS member, 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 detail 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**

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.

There are strict timetables when dealing with claims and it is important to alert MDDUS to correspondence intimating a claim as soon as you receive it. The investigation of a claim for negligence can take several years.

### The early stage of the claim

There is currently no compulsory 'pre-action protocol' for clinical negligence cases, which exists in other jurisdictions and aims to resolve these cases without the need for court proceedings. In Scotland, pursuers can therefore choose to raise proceedings when they wish – although it is generally in the interests of both parties to explore and discuss the claim pre-litigation, with a view to minimising expenses on both sides, if settlement can be reached. This may involve service of a letter of claim by the pursuer, which includes a summary of their understanding of the fact, the allegations of negligence, any expert evidence they have obtained, an account of the injuries suffered and any other financial losses incurred. and the subsequent formal response. A formal response must then be sent by the defendant. MDDUS would provide the response on behalf of our members.

## Courts in Scotland

If settlement cannot be reached, a claimant can choose to raise court proceedings in their local Sheriff Court, or in the specialised All Scotland Personal Injury Court in Edinburgh or, if the case has a potential value of over £100,000, in the Court of Session in Edinburgh. The procedure in each court differs slightly but in all courts there is a period of many months for parties to carry out further investigations and finalise their written cases, before exchanging expert evidence and having a meeting to discuss the case to see if it can be resolved.

## Hearings

Ultimately, the vast majority of claims will 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 proof will be held. Factual and expert evidence will be led by both parties, following which a judge (or in very rare 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 process involved.

## **Compensation**

Compensation in a clinical negligence case is intended to return the pursuer, 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 would 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.