

# When is compensation due?

A practitioner's guide to the legal rules that apply in claims for clinical negligence

Clinical negligence is complex and finding out that a patient is bringing a claim against you can be stressful and confusing, it also can sometimes seem unclear as to whether something you have done or failed to do as a practitioner means that a patient will be entitled to compensation.

NHS Resolution will only pay compensation on your behalf on legitimate claims that meet the relevant legal tests. We will call on the very best expert and legal advice in investigating any claim which is brought against you.

This guidance explains the legal tests that apply in these cases. If you hear that a claim is being brought against you however, you should not hesitate to contact NHS Resolution so that we can assist you with the particular circumstances of your case.

## **What is clinical negligence?**

Clinical negligence is a breach of your duty of care to the patient which on the balance of probabilities has caused them injury. The patient can then claim compensation for their pain and suffering and any current or ongoing financial expenses they will incur as a consequence of that injury (such as the costs of care).

The constituent parts are set out below:

### **Breach of duty**

The question of whether you breached your duty of care to the patient will be decided in accordance with what is known as the “Bolam test”. This states that there is no breach if what the clinician did, or failed to do, would have been supported by a responsible body of medical opinion practising in that field at the time.

We will generally establish this with reference to expert advice from a medical professional working in your field. In short, would an expert (who is obliged to report in an independent way) support what you did at the time?

What you did must also be capable of withstanding logical analysis. This is known as the ‘Bolitho’ test.

### **Causation**

Whether a breach of duty caused the patient’s injury is a question of fact. Causation in the majority of cases will be decided according to the following question:

**But for the alleged breach of duty, would the patient have been injured in the same way?**

If the answer to that question is **no**, then a court is likely to conclude that the breach of duty **caused** the injury and the claim will succeed.

If the answer to that question is **yes**, then the claim will fail. In other words the patient's outcome would have been the same irrespective of the alleged negligence.

## **The standard of proof**

In claims for clinical negligence, the standard of proof is the **balance of probabilities**. This means if it is “more likely than not” (i.e. more than 50%) that something happened, or that an act or omission caused an outcome. This contrasts with the standard in criminal cases which is higher – “beyond reasonable doubt”.

## **Compensation**

Compensation is due to the patient to put them into the position they would have been in, had the incident not occurred, in so far as money can achieve this. This is known as the ‘100% compensation principle’.

Compensation is split into two categories: “general damages” and “special damages”.

General damages are designed to reflect the “pain, suffering and loss of amenity” experienced by the claimant. Published guidelines set out the range of damages likely to be awarded for any given injury, taking account of past court awards in similar cases. For example, general damages for the loss of a thumb will range from £31,140 to £48,080, depending on the particular consequences for the patient.

Special damages reflect the patient's financial losses, such as taxi fares to attend further medical appointments, lost earnings and the purchase of an adapted vehicle. These may extend for a long period into the future - so for example, if the patient is unlikely to return to work for several years as a consequence of the negligence, damages will be awarded to cover that period of loss.

## **What if the claim is not from a patient?**

Other people, such as family members are sometimes able to bring claims even if they are not the patient. For example, where the patient has died the family can claim for bereavement and funeral expenses or for the cost of looking after dependents. In some circumstances a claim can be made for psychiatric injury suffered by a close family member.

## **Should I apologise to the patient if I think that something has gone wrong with their care?**

Yes and as soon as possible. It is critical that you be entirely transparent with patients. The compensation process is not about blame and it is our job on your behalf to make sure that the patient receives any compensation they are entitled to as quickly as possible if they decide to bring a claim. Patients often just want an apology and to understand what happened and are less likely to pursue a claim if they receive an honest and compassionate early response.

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