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How do I take legal
action against the
hospital where I
gave birth?



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Introduction

- If your birth has resulted in physical or psychological injury to you or your baby, you may want to consider taking legal action. This FAQ document explains how to do that
- We'll explain first how things work in England, Wales and Northern Ireland, and then go on to Scotland, where the legal system works a little differently
- Proving medical negligence is hard, and a legal action can take years. The amount of money you are likely to receive might be thousands of pounds, or, in very serious cases, tens of thousands of pounds. The really big payouts of several million pounds about are only awarded in cases where a baby has suffered severe brain damage and is in need of lifelong care. The awards are high in order to cover the costs of that care
- So only pursue a medical negligence action if:
 - a) you are prepared for it to take up large amounts of your time for the next few years
 - b) you understand that, even if you think you have a very strong case, there is no guarantee that you will win



Time limits

There's a time limit for medical negligence actions in England, Wales and Northern Ireland:

- Court proceedings must be issued within three years of the date the alleged negligence occurred, or the date you realised that you had an injury as a result of potential negligence. If the case is for a child under the age of 18, that three years runs from the date of their 18th birthday and expires on the eve of their 21st birthday
- If court proceedings are not issued before the three years expires, it is likely you will be prevented from proceeding further with a case. Always err on the side of caution
- The sooner you seek professional advice, the better

Getting started

- You'll need to start by finding a medical negligence solicitor – you can google, but it's also a good idea to ask for recommendations
- Try to find one who specialises in obstetric negligence
- They don't have to be local – most solicitors will work with people from all over the country
- The charity Action against Medical Accidents (AvMA) offers free legal advice on medical negligence cases. Their website is www.avma.org.uk and they can also recommend suitable solicitors
- Most solicitors will give you an initial consultation for free, so you can talk to more than one before deciding on one you think is suitable. At that initial consultation, the solicitor will tell you whether they think you have a strong case or not

How much will it cost?

In England and Wales:

- Medical negligence solicitors charge on a no-win, no-fee basis, so they will only take on cases that they think have a strong chance of winning. They will take a share of your compensation if you win as part of their costs. This is called a success fee and can be up to 25%. Different solicitors may also have different conditions in relation to payment of their costs, so always ask and make sure you're clear and understand your position
- Some house insurance policies cover legal action for medical negligence, so it's worth checking yours. A solicitor will check this with you and will speak to your insurer on your behalf
- Legal aid is not available, except for babies who have suffered a brain injury at birth
- If you pay your own legal fees, it could cost as much as £200k. No-win, no-fee is the usual way to fund clinical negligence cases, however



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How much will it cost?

In Northern Ireland:

- There is no provision for no-win, no-fee cases, which means that most cases are funded by legal aid
- If you're claiming on behalf of your child, legal aid is likely to be available
- If you're claiming on your own behalf, you're unlikely to receive legal aid unless you're on a very low income. Legal action will be very expensive. Some law firms offer legal expenses insurance, which will cover the costs of an unsuccessful action

What do I need to do to win?

To win a medical negligence case, you have to prove two things:

- **Breach of duty.** That means you have to prove that the care you received was so poor that the doctors or midwives acted in a way that no similar professional would have done.
- **Causation.** You must prove that as a result of that poor care, you suffered significant harm or injury, which would not have occurred had you received the correct level of medical care. This is decided on the balance of probability – that is, the poor care was more than 50% likely to have been the cause of the harm

These tests are very hard to prove:

- Maybe a clinician made what turned out to be a poor decision in your case but felt reasonable at the time
- Maybe you suffered an injury, but you can't show for certain that it was a result of the poor decision-making

If the lawyer takes on my case, what happens next?

- They will request your medical notes and records from the hospital
- If your case involved a serious injury, death, or near miss, the hospital is obliged to investigate and produce a serious untoward incident report. Your lawyer will ask for a copy
- The lawyer will then instruct an independent health professional, such as an obstetrician or midwife, to look at the notes and give a written view on what they think caused the injury
- If the health professional thinks you have a case, the lawyer will then write a letter of claim to the hospital trust setting out the allegations and what they think went wrong



The hospital's response

- The trust has four months in which to prepare a letter of response setting out their position and whether they admit or deny liability
- Sometimes a hospital will admit fault at this early stage, which can substantially shorten the period of litigation
- If the hospital denies liability, it is likely a barrister will become involved with your case and draft a document called the particulars of claim – a formal document outlining your case
- Your lawyer will issue court proceedings and serve the particulars of claim. The hospital trust then has 28 days to say whether they want to defend the case



If the hospital decides to defend the case

- If the hospital decides to defend the case, the court will provide a timeline for when certain steps in the case need to be completed, all the way up to trial
- You will have to provide a witness statement
- Experts on both sides will prepare reports. If you cannot agree a resolution, the court will order a meeting of experts to set out the areas of disagreement before proceeding to trial
- Your lawyers are able to drop your case at any stage if they think your chance of winning is low. This can be devastating after you've put a lot of effort into it. Ideally, your lawyers should make you aware of any difficulties

How much will I be awarded if I win?

The judge will calculate damages on the basis of two considerations:

- **General damages.** This is compensation for the pain and suffering caused by the medical error.
- **Special damages.** This is actual financial loss you have experienced as a result of the injury. It includes loss of earnings because you can't work, childcare costs or care costs for both the mother and child – especially if a child has suffered very severe injuries and will need care for the rest of their life

Special damages are broken down into past financial loss and future financial loss:

- If your birth injury has stopped you working, for example, that would be counted as past financial loss. The damages you win are likely to be higher if you were in a high-earning job than if you were in a low-earning one
- Future financial loss includes all future care costs, future medical treatment costs, future loss of earnings and any other loss which may be ongoing into the future because of the injury suffered

Taking action against a hospital board in Scotland

- In Scotland, it is hard to sue successfully on your own behalf – there are a lot of evidential hurdles to overcome
- A claim can be made for an injury that you sustain yourself during labour, such as an tear
- A claim can also be made if your baby is injured or dies during birth
- A claim can also be made by close relatives if a mother dies during childbirth. Spouses (even if not married) can claim for their grief and sorrow, as well as children, parents, grandparents and siblings. A claim can also be made for a loss of financial support. The position is very different in England so it is essential that you seek specialist Scottish legal advice
- If you do successfully sue for an injury to yourself, compensation is usually not high. Most litigation relating to birth concern the death or injury of the baby, not injury to the mother



Funding your case in Scotland

No-win, no-fee arrangements are unusual in Scotland for clinical negligence cases. There are three main options for funding your case:

- Legal aid is available for adults and children in Scotland. To qualify for this, you need to have less than a certain amount of disposable income and capital within your household
- A pre-existing legal expense insurance policy, such as from a car or home insurance policy
- An “after-the-event” insurance policy. Some insurance companies will allow you to take out an insurance policy after the injury to fund your case, though the premium is likely to be high

Solicitors have a duty to keep the funder aware of the prospects of the case as the case proceeds, so if an unsupportive report is received then the funder will be informed and they may discontinue funding

Time limits for taking legal action in Scotland

In Scotland, the time limits are:

- Three years from the birth – or the date that you realised that there may have been negligence – if you are claiming for a birth injury to yourself or for the death of your baby
- Nineteen years if you are claiming for an injury to your child

Making a complaint to the health board or Scottish Public Services Ombudsman (SPSO) does not interrupt this time limit.

Getting started in Scotland

- Approach a medical negligence solicitor. There are only a small number in Scotland and it is important you approach a specialist. The Law Society of Scotland will be able to direct you to specialists in this area
- The solicitor will obtain your medical records
- The solicitor will ask for an assessment by an independent expert or experts of the behaviour of the health professional or professionals in your case

The expert(s) will assess two things:

- **Liability.** Did the health professional behave in a way that no ordinarily competent practitioner would have done? This is a high hurdle to overcome
- **Causation.** Was it the health professional's mistake that caused the harm on the balance of probabilities?
- Further experts may then be instructed to comment on the likely value of your claim, known as 'quantum'

Finding an independent expert or experts

- Finding an independent expert in Scotland can take a long time, because there are fewer experts, and many may refuse because of a conflict of interest – they may know the health professionals involved in your case
- The time taken while your solicitor finds an expert and waits for their report will eat into the three-year time limit for making a claim, so the sooner you contact a solicitor to start the process of making the claim, the better



How is compensation calculated in Scotland?

There are different elements to the value of a claim for injury in Scotland and the value of each claim can vary.

A lot of material online about damages relates to English law, which is different. The elements in Scotland are:

- Solatium – pain and suffering. This is calculated based on past court cases and Judicial College guidelines
- Past costs – such as for specialist equipment, therapy, travel and accommodation costs needed for treatment or for lost earnings. Make sure to keep any and all receipts
- Future costs – such as for future care needs, accommodation or lost earnings or lost pension
- Services – this refers to help and support received from loved ones, such as help around the house or with childcare or personal care



Moving to litigation

- If the expert writes a report supportive of your case, then you can formally notify the health board of the claim against them
- The claim will go to the NHS Central Legal Office (CLO), which provides legal representation for all the Scottish health boards
- The health board or hospital may wish to investigate the claim and, depending on what their own expert says, they may negotiate to settle out of court
- If this doesn't happen, you will need to lodge your case in court using a writ or summons, depending on which court you proceed in, and the defenders will lodge their defences with the court. Your solicitor or an independent advocate will prepare the court papers
- Each side has an eight-week period to adjust their case. In practice, each side can ask for more time, and there are likely to be further eight-week periods for adjusting the case



How is the claim valued in the case of a death?

This is very different from valuing an injury.

The different components are:

- **Transmissible solatium.** An award for the deceased's pain and suffering, which transfers to their executor
- **Loss of society.** This is to recognise the grief and sorrow caused to relatives following the deceased's death
- Loss of financial support from the deceased

Close family can claim for loss of society:

- This includes: spouses (even if unmarried); siblings (full, half, step and adopted); parents (full or step); children (full, half, step and adopted); grandparents



Court procedure

- Once the claim has been raised in court and the adjustment period has ended, the court will issue a timetable containing various steps that require to be taken in advance of the final hearing, known as the proof
- These steps include: disclosing expert reports; lodging a valuation of the claim; lodging all productions in the case; lodging a list of witnesses; holding a pre-trial meeting
- The pre-trial meeting is an opportunity for the legal teams to meet to discuss the case and to see if settlement is possible
- If settlement is not possible, then the case proceeds to proof
- Most cases are settled out of court
- It is important to highlight that cases can settle without the health board ever formally admitting liability for what happened

Taking the case to a debate

- The defenders may decide to take the case to an intermediary stage known as a “debate”
- Lawyers for both sides debate the legal arguments in front of a judge, but without referring to the facts or evidence. Points for a debate include whether a claim is time barred or if the written case does not contain enough detail
- The defenders try to make the case that there are good legal reasons why the case should not proceed to proof (trial)
- There isn't always a debate stage
- The case can be settled out of court at any time



Proceeding to proof (trial)

- If the two parties do not reach an agreement during the debate, the case will proceed to proof. This can take as long as two years
- The vast majority of medical negligence claims will be heard in the Court of Session
- If your claim is successful, and it is for a child with a severe brain injury, you will receive a financial settlement for:
 - Care of the child
 - The child's loss of future earnings
 - Pain, distress and suffering to the child
- You can agree with the health board that the award will be received on a periodical basis (i.e. a payment is received every year). The court cannot order this



After the proof/settlement

- If you or your child receive a significant sum in damages, it can affect your eligibility for state benefits
- You might wish to protect the funds by placing them in a personal injury trust
- It is essential to obtain specialist advice on this from a solicitor experienced in setting up such trusts

