

What Compensation can be Claimed?

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A victim of medical negligence is entitled to claim damages (“compensation”) for any injuries or losses that they can prove were the direct result of the healthcare provider’s negligence

Damages paid or awarded will fall into two distinct parts:

General damages for pain, suffering and loss of amenity

Special damage to compensate for actual financial losses both past and future.

General damages

The level of compensation awarded for general damage for the pain, suffering and loss of amenity caused by the injury itself is always difficult to assess. Generally the parties (and indeed the court) will be assisted by independent expert medical evidence. This will take the form of a medical report obtained in the litigation process detailing your present condition and prognosis and the effects of the medical accident or injury. Once the extent of your injury and the extent to which it will continue is known, it will be possible to estimate in broad terms the level of compensation that may be awarded. It has to be said that English courts are not thought to be particularly generous in their assessment. They are assisted in their determination of levels of compensation by the Judicial Studies Board Guidelines and relevant case law to include the levels of previous awards.

Special damages – past losses

In addition to general damages, you will be entitled to claim for any financial expenses that you have incurred as a result of the negligence. This could include travelling expenses incurred attending hospital appointments, prescription charges, additional heating costs or loss of earnings just to give a few examples. You are strongly advised to keep a record of all expenses that you feel may have been incurred and retain receipts or other documentary evidence if at all possible.

Special damages — future losses

You will be entitled to claim for any future financial losses that you are likely to incur as a result of the medical accident or negligence. This could include future loss of earnings or pension rights, care costs, physiotherapy treatment, accommodation expenses to name a few. In many cases it will be necessary to instruct experts to assess your needs and assist in the quantification of these expenses.

Where the claim arises from a fatal accident, the compensation is calculated differently and is therefore dealt with elsewhere in this guide.

If the future losses are likely to be significant it is likely the court will insist that future losses should be paid in the form of annual or other periodic payments rather than a single lump sum, particularly where there is a future care claim.

Deductions from your compensation

You should be aware that if compensation is recovered in connection with a medical negligence claim, the amount received must be disclosed to the Department for Work and Pensions. Generally, you will then lose any further entitlement to benefits that are means tested (see Special Needs Trusts pages 14/15). If you receive any welfare benefits due to your injuries, such as income support or incapacity benefit, these may be deducted from the amount of damages awarded and paid to a DSS department called the Compensation Recovery Unit at the end of your case. All recoverable benefits received up to five years from the accident or date of settlement of claim, whichever is the earlier, are deducted. The reason for this is to ensure that you are not compensated twice for the same loss.

General damages (see page 13) are protected from deduction and therefore benefits cannot be taken from this part of the award. The Department for Work

and Pensions will only recover benefits from the corresponding compensation award. If, for example, you recover compensation for loss of earnings and have been in receipt of incapacity benefit, then the amount of incapacity benefit received for the relevant period will have to be paid back to the Department for Work and Pensions. In addition, if you have been receiving attendance allowance on behalf of a relative who has been looking after you, this will be recovered from any care costs awarded.

The benefits that are deducted are those received up until the date when the claim is resolved or five years from the date of injury, whichever is the earlier.

The following is a list of benefits which will be recovered from any compensation that you may receive for loss of earnings during the relevant period:-

- Disablement pension payments
- Incapacity benefit
- Income support
- Invalidity pension and allowance
- Jobseekers allowance
- Reduced earnings allowance
- Severe disablement allowance
- Sickness benefit
- Statutory Sick Pay
- Unemployment supplement
- Unemployment benefit

The following benefits will be deducted from any compensation that you receive for the cost of care incurred during the relevant period:-

- Attendance allowance
- The care component of Disability Living Allowance
- Disablement pension.

The following benefits will be recovered from any compensation that you receive for loss of mobility, i.e. transport and travel costs, during the relevant period:-

- Mobility allowance
- Mobility component of Disability Living Allowance.

You will only have to pay back benefits limited to the level of compensation awarded for that at the relevant head of claim. You will not have to pay back any money from your compensation for general damages.

Investing your compensation/ Special Needs Trusts

If you are awarded compensation, you may wish to consider investing your money. There are certain trusts set up specifically for clinical negligence awards called Personal Injury Trusts.

This is simply a way of re-arranging assets so they do not belong to the people who benefit from them. The legal owners of the trust are called the 'trustees', and they have the power to give out the trust assets or income to the people who can benefit i.e. the 'beneficiaries'. There must be at least two beneficiaries, which will include the person who was awarded the damages. The other person could be a family member or a charity for example.

The main advantage of a personal injury trust is that any capital paid out of the trust to a beneficiary cannot be taken into account by the Benefits Agency. If you were in receipt of means tested state benefits, the amount of benefits you receive would not be altered as a result of the damages you had been awarded.

However, when money or assets are put into a trust, the person who received the damages award loses control of how the money is used. The beneficiary can request money from the trustees, but cannot make them do so. Therefore it is important to choose your trustees carefully. Further disadvantages to this type of settlement are the numerous tax implications, although these are complex and apply differently depending on your financial circumstances.

Our Private Client Department is able to assist you here.