

Limitation including extension requests

Members will often receive requests from claimant solicitors to voluntarily agree an extension of limitation to allow investigations to be completed. This guidance sets out the relevant law and provides some practical tips for all such requests.

November 2024



The basics

Claims for damages arising from clinical negligence are started by issuing a claim form within three years of either the date the cause of action arose (such as the date of the operation during which complications occurred) or a later date of knowledge. The limitation period begins on the day after the cause of action accrued – so if the negligent event occurred on 6th September 2022, the limitation period would start on 7th September 2022 and the three year period would end on 6th September 2025.

Patients have three years from the date of the incident or the date of knowledge to make a claim.

The Act requires the following facts to be known to, not merely suspected by, the claimant before ‘time can run’:

- The injury was significant - in other words, a reasonable person would consider that the injury was sufficiently serious to justify commencing legal proceedings;
- the injury was attributable in whole or in part to the acts or omissions of the defendant; and
- the identity of the defendant – including the scope of responsibility for others. This may have particular implications where services are contracted out to independent treatment providers.

Knowledge can be actual or it can be constructive – i.e. from facts the claimant would reasonably have been expected to know or discover had they taken reasonable steps to investigate. The claimant is not required to know that the care was negligent, simply that as a matter of fact they have sustained a serious injury following an act or omission by the trust or others who were responsible.

The three year period is modified in a number of circumstances:

- Children – the primary three year limitation period starts to run when they reach 18; and
- The person is incapable of managing and administering property and affairs by reason of a mental disability. Time starts to run when the individual recovers capacity – which, for individuals suffering from a brain injury, may mean the limitation period does not start;
- death of the patient – the deceased’s estate has three years from either the date of death or later date of knowledge of the personal representative or dependant (providing that the patient died within three years of the cause of action accruing or later date of knowledge); and
- Human Rights Act claims – the limitation period is one year from the date of the breach.

Section 33 discretion

If the statutory limitation period has expired, claimants can apply to the Court for discretion to allow the claim to proceed. Such an application will look at the balance of prejudice caused to the claimant by barring the claim compared to the prejudice caused to the defendant by allowing the claim to proceed. The Limitation Act 1980 specifies a number of factors, including the length of and reason for the delay in starting proceedings, the effect on the strength of the evidence and the parties' conduct.

In circumstances where the claimant is likely to make such an application, members should identify evidence of a disadvantage due to the lapse of time. It is not enough to simply assert that memories may have faded. For example, please consider:

- Whether records have since gone missing or been destroyed, and if so when they were last in your possession;
- whether staff involved in the incident are still employed and, if not, whether they have retired, moved to different employment or have died;
- if staff have moved on, whether it is possible to obtain up-to-date contact details and whether those investigations have been successful;
- whether existing staff have recalled the incident or standard practice at the time;
- whether there was any earlier complaint and therefore whether any earlier statements or information would be available; and
- whether there are any available protocols or policies from the relevant time which may help to identify what standard practice would have been.

The court has discretion to permit expired claims to proceed.

The Clinical Negligence Claims Agreement 2024

With effect from 27 August 2024, this agreement replaces the successful COVID-19 Clinical Negligence Protocol established in 2020 and aims to further improve claims management practices. This agreement has been developed in collaboration with key stakeholders, including the Society of Clinical Injury Lawyers (SCIL), NHS Resolution and the patient safety charity Action against Medical Accidents (AvMA).

The intention of the agreement is to encourage positive behaviours from claimant and defendant organisations, as well as consistency of approach in practices across England. It should reduce the risk of costs being spent unnecessarily on formal proceedings.

The agreement can be found on the NHS Resolution website by following the below link:

<https://resolution.nhs.uk/resources/clinical-negligence-claims-management-agreement-2024/>

Limitation extensions – Some practical tips

- Carefully check the date the cause of action arose and/or any later date of knowledge. If the three year period has expired, members should under no circumstances agree to waive that statutory defence.
- There may be merit in agreeing an extension where a claimant has only just started an investigation or where the member's own investigations are still outstanding. Extensions should be of a reasonably limited duration – i.e. no longer than six months.
- All extensions should be agreed on a moratorium basis using the following wording:

“[Member name] agrees that in any subsequent issue about limitation, we will not rely upon any period of time that elapses between the date of this correspondence and

Either: “..... our giving you notice that the extension is at an end”

Or: “..... the x December 2017”

This approach allows members to preserve existing limitation arguments while allowing the claimant to finalise investigations in a cost-effective manner.

Costs will be incurred by forcing a claimant to issue legal proceedings, especially in a case where investigations suggest that the claim should be settled.

Likewise, be sensitive to the fact that an unreasonable refusal to extend time may be construed adversely affect the way in which we are able to manage the claim going forward e.g. it could affect our chances of obtaining extensions of time. It will also be open to the claimant to argue that the costs of issuing and serving proceedings could were incurred only as a result of our conduct.

If you receive a limitation extension request regarding a potential secondary victim claim, please refer this to NHS Resolution for advice before responding, whether the claim has been reported in previously or not.

Please contact your nominated NHS Resolution Operational Team Leader or your Panel solicitor if you wish to discuss anything arising from this guidance note.
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