

Introduction

A wealth of law exists to provide compensation to people who have suffered injuries, both physical and psychological, following an accident. This fact sheet provides a very brief guide to claiming compensation.

Who can claim compensation?

In order to recover damages in England and Wales, the Claimant (the injured party) must prove, on the balance of probabilities, that another party is at least in part to blame for the injuries they have sustained.

A compensation claim will be successful if the Claimant can prove, on the balance of probabilities, that the wrongdoer (the Defendant) has been negligent or that they have breached a statutory duty, for example, the Occupiers Liability Act 1957 which sets out duties for those who own or manage property.

In order to prove 'negligence' the Claimant must establish the following:

1. Identify the Defendant

The first step is to identify someone who may be to blame for the accident, a potential Defendant. In some circumstances there may be more than one potential Defendant and the Court may decide that only one of them is to blame or may apportion blame amongst them. Normally, if the identity of a Defendant is unknown then it will preclude a claim. However there are some exceptions, for example, the Motor Insurers Bureau, will in some circumstances pay compensation to those who have suffered injury in a road traffic accident in which the Defendant driver cannot be traced.

2. That the Defendant owed the Claimant a duty of care

In some cases there is well established law that the Defendant owed a duty of care to the Claimant. For example, a driver owes a duty of care to pedestrians and other road users, teachers owe a duty of care to their pupils, and doctors owe a duty of care to their patients.

3. That the Defendant breached that duty of care

The test is whether the Claimant was exposed to a foreseeable risk of injury that could have reasonably been avoided. The court will examine all the circumstances of the accident in order to establish whether the Defendant breached their duty of care. For example, in a road traffic accident, the court will examine whether the Defendant driver failed to exercise the level of skill and care that can be and should be expected of a competent driver.

4. That the breach of the duty of care caused the accident

The Claimant has to demonstrate on the balance of probabilities that the Defendant's breach of duty or failure to exercise reasonable skill and care caused the accident and the Claimant's injuries.

Statutory Duties

A duty of care can also be imposed by statute law (law contained within specific acts of parliament). For example, the Occupiers Liability Act 1957 sets out the duties of those who own or manage property to ensure the property is reasonably safe for visitors. The Consumer Protection Act 1987 provides the potential liability of manufacturers and producers of defective products.

Contributory Negligence

Although a court may find that the Defendant was primarily responsible for an accident and injuries suffered by a Claimant, it may also find that the Claimant was also partly to blame. In such circumstance the amount of compensation the Claimant receives is reduced by a certain percentage to reflect the Claimant's own contribution to the accident or his injuries.

For example, a Claimant, who was not wearing his seatbelt, sustains injuries in a road traffic accident could have his damages reduced by 25% because it is likely that the Defendant will be able to demonstrate that the Claimant's injuries would have been substantially less severe had he been wearing a seatbelt.

Some Common Accident Scenarios

Road Traffic Accidents - It is often clear who is to blame in a road traffic accident. The claim would usually be brought against the Defendant driver(s), however, it is actually the Defendant driver's insurer who conducts the defence of the claim as they indemnify the Defendant driver and ultimately pay compensation to the Claimant. If the Defendant driver is untraced or uninsured then a body called the Motor Insurers Bureau (MIB) will in some circumstances pay compensation to the Claimant. In some circumstances the Highways Authority may be to blame for an accident, for example if they have failed to maintain the road in breach of the duties imposed upon them by Highways Act 1980.

Accidents at Work - An employer owes its employees a duty of care and a claim can be brought alleging that the employer was negligent. In addition, there are various statutory regulations which impose duties on employers to safeguard the health and safety of their employees. For example the Provision and Use of Work Equipment Regulations impose a duty on employers to ensure that equipment provided at work is safe, suitable and in a good state of repair. Employers can also be vicariously responsible for the acts or omissions of their employees whilst acting in the course of their employment (e.g. if, during the course of his employment, an employee causes injury to a fellow employee, then the employer could be liable for the acts of his employee).

Occupier's Liability - The Occupiers Liability Act 1957 sets out an occupier's duty of care to his lawful visitors. Under the Occupiers Liability Act 1984 an occupier can in certain situations owe a duty of care to trespassers.

Product Liability - Manufacturers, distributors, suppliers and retailers can be liable for injury caused by their defective products.

Holiday Accidents – Compensation for injuries received on holiday will be awarded if fault can be established. The Package Travel, Package Holidays and Package Tour Regulations 1992 provide that package tour operators will be liable for the negligent acts and omissions of those who provide each part of the holiday. For example, the package tour operator could be held responsible for the negligence of the hotel owner in the foreign destination.

Sporting Accidents – A Claimant may be able to pursue a claim for compensation if he can prove that someone should be held responsible for their injuries. Defendants will often argue that the Claimant has taken on or consented to the risk of the injury.

Clinical Negligence – A clinical negligence claim could be pursued if a Claimant sustains an injury as a result of the negligent treatment of a medical professional. For a claim to succeed, the Claimant needs to prove, on the balance of probabilities, that the standard of care provided by the medical professional fell below the standard of care which is generally accepted as being reasonable within that area of medicine.

Claims for Assault - The Criminal Injuries Compensation Authority (CICA) is a Government run body which compensates those which have suffered injury as a result of a violent crime. To be eligible for an award an Applicant must have been:

- Physically or mentally injured as a direct result of a violent crime;
- In Great Britain when injured;
- Injured seriously enough to qualify for at least the minimum award under the scheme.

When assessing a claim, the CICA will take into account the following which could result in a refusal of an award or a reduced award:

- The Applicant's behaviour before, during or after the incident in which he was injured;
- The Applicant's criminal record;
- The Applicant's failure to co-operate with the police.

Liability Experts

In some cases it is necessary for the parties to instruct expert witnesses to assist the court in deciding upon liability issues. For example, in road accident cases it can necessary to instruct an accident reconstruction expert or an engineer to explain to the court how the accident occurred.

Compensation

Under English law the courts attempt to put the Claimant, so far as is possible, in the position that he would have been in had the accident not occurred. Clearly, the only way the court can do this is to make an award of damages. Therefore, the Claimant is able to recover those sums which he has lost as a result of his injury and those sums that he will now have to spend as a result of his injuries.

Compensation can be broken down into the following areas:

1. General Damages

These are damages that are awarded for non financial losses such as damages for pain, suffering and loss of amenity. The size of the award will depend upon a number of factors including the Claimant's condition and prognosis, age, occupation and life expectancy.

2. Past Losses and Expenses ('Special Damages')

The Claimant is able recover expenses incurred as a result of the accident and can include the following:

- Lost earnings;
- The cost of care (both paid care and care provided by a relative or friend);
- Additional accommodation expenses (e.g. the cost of adapting a property to enable wheelchair access);
- The cost of special aids and equipment purchased;
- Additional travel and transport costs incurred (e.g. the travel costs incurred by the family visiting the Claimant in hospital, the cost of an adapted vehicle);
- Additional holiday costs (e.g. the Claimant may now require a carer to travel with him);
- Additional costs of medical treatment and therapies (e.g. the cost of physiotherapy treatment);
- Court of Protection and related costs.

3. Future Losses and Expenses

The Claimant is able to recover damages for losses and expenses that he will incur in the future as a result of his injury. The types of claim that can be made are similar to those claimed as past losses. However, whereas the Claimant can produce invoices and receipts to document his past loss, the claim for future loss needs to be supported by expert evidence and the evidence of the Claimant and/or his family.

Expert Evidence

In a complex case, a team of expert witnesses will be instructed by a solicitor to build a picture of the Claimant's future losses and needs.

Interim Payments

If liability appears reasonably straightforward and damages are likely to be recovered, the Defendant's insurance company may agree to make substantial interim payments (payments made in advance of the final award of damages) on a voluntary basis. In the event that the insurance company refuses to provide an interim payment, an application can be made to the Court. Interim payments can be used to replace earnings lost as a result of the accident but can also be used purchase adapted housing, private care, equipment, adapted vehicles and fund ongoing rehabilitation.

Form of Award - Lump Sum against Periodical Payments

Traditionally, Claimants received their damages by way of a one-off lump sum payment made by the Defendant or Defendant's insurance company at the conclusion of the case. There are many advantages attached to such payments. The Claimant has complete freedom as to how to spend and invest the damages. There is no need for any further contact with the Defendant. In the event that the Claimant dies earlier than expected, the Claimant's estate will receive the remainder of the damages which may in turn benefit the family, for example, the Claimant's children. However, there are certain disadvantages attached to the damages being paid in a lump sum. The Claimant is required to manage and invest his damages and produce a return that will ensure that sufficient funds remain to meet the Claimants need for life. If the Claimant lives much longer than anticipated, there is a risk that funds will run out.

The law has recently changed so as to allow the Defendant's insurance company to pay damages to Claimants by way of Periodical Payments (annual payments). This would ordinarily mean the Claimant receives a smaller lump sum comprising some of the damages, with the balance being paid by the insurance company on an annual basis for the remainder of the Claimant's life.

Periodical Payments are available as an alternative to receiving damages by way of a lump sum. They will suit some Claimants and not others. Periodical Payments are tax free, index linked and will be paid for life.

Time Limits

A claim for damages for personal injuries must be commenced (i.e. the Claim Form issued in either the High Court or the County Court) within 3 years from the date of the accident. A clinical negligence claim must be commenced within 3 years of the negligence or within 3 years of the date of knowledge of the negligence. If the Claimant was under 18 when the accident occurred then they have until their 21st birthday to issue proceedings. For Claimants who do not have the mental capacity to manage their property and financial affairs ('Protected Parties'), the 3 year limitation period will not start to run until the Claimant regains capacity. An application to the Criminal Injuries Compensation Association must be lodged within 2 years of the incident.

Funding the Case

Legal Aid was withdrawn for most personal injury claims in 1999. There are now two main methods for funding claims: Legal Expenses Insurance and Conditional Fee Agreements.

(a) Legal expenses insurance

Legal Expenses Insurance is often attached to motor insurance policies, home insurance, credit cards, travel insurance and certain bank accounts. Legal expense insurance will provide for payment of the legal costs. The policies are usually limited to a specific amount of damages which may be insufficient in more serious personal injury cases. Some policies also exclude claims for certain types of accident.

(b) Conditional Fee Agreements

Often called “no win-no fee agreements”, this method of funding allows a Claimant to pursue his case in the knowledge that, if the case fails, he will not be responsible for his solicitors’ fees. If a Conditional Fee Agreement is agreed the costs of the Claimant’s own legal team are not payable in the event of an unsuccessful outcome. However, if the Claimant is unsuccessful then the Defendant will seek the costs of successfully defending the claim and therefore when the Conditional Fee Agreement is made a policy of insurance (called After the Event Insurance) will be arranged for the Claimant so that he is fully indemnified against any adverse costs order made against him.

In the event that the Claimant wins, then he will recover damages and the Defendant will be required to pay his reasonable legal costs including a success fee to reflect the risk of non payment of fees in the event that the claim is unsuccessful.

About Stewarts Law

Stewarts Law is the leading personal injury law firm in the United Kingdom with expertise in claims for compensation following spinal injury, brain injury and other serious injuries. Stewarts Law is ranked number one by the two key independent guides to the legal profession, the Legal 500 and Chambers and Partners.

www.stewartslaw.com

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