

## AvMA's SIMPLE GUIDE TO...

### **Conditional Fee Agreement (CFA)**

Often called “no win, no fee” agreement.

If you win your case, you are liable for your solicitor's costs plus a success fee (see below). This is on the whole paid by the losing opponent, with any shortfall made up by you, although you will usually recover them from the losing opponent. At present the fee for the ATE policy is also recoverable from the losing opponent.

If you do not win your case and you have followed the terms of the agreement you do not have to pay your solicitor's fees.

However, you will be liable for your opponent's costs. This is why you must take out a policy of insurance alongside the agreement to cover this possibility. This policy is known as After the Event Insurance (ATE), see below, because it is taken out after the alleged negligence has occurred.

### **Success Fee**

This is calculated as a percentage of the solicitor's basic fee and can be anything up to 100%. It is used to offset the risk of the solicitor not being paid anything should you lose your case. It is only payable if you win your case and will usually be paid by the losing opponent together with the rest of your costs, as above.

The rules on CFAs are currently under review and there maybe some major changes (see later).

### **Legal Aid / Public Funding**

Not everyone qualifies for legal aid and is subject to a financial means and merits of case test.

At present it is available for Clinical Negligence cases.

You cannot obtain legal aid for Personal Injury cases, as a rule.

Legal Aid will fund a case, both in respect of your solicitor's fees and other costs of litigation involved, for example expert reports. There are limits however on how much is available to spend on these.

It is important to remember that **Legal Aid is a loan not a gift.**

If you win your case the losing opponent will pay your costs as part of the settlement. Your solicitor will arrange for repayment of the legal aid funding you have received. If there is a shortfall between the costs recovered from the losing opponent and owed to the Legal Services Commission, who authorise Legal Aid work, it may be deducted from your damages, this is

what is known as the statutory charge.

If you lose your case as a rule you will not be liable for any costs.

Only certain firms are able to offer Legal Aid as they must meet stringent criteria to do so.

This is an area of funding that the government has proposed to remove from Clinical Negligence claims, so if the proposals go through as they stand today, it will no longer be available for such litigation.

### **Legal Expense Insurance**

Sometimes known as Before the Event Insurance (BTE), because it is purchased and is in existence at the time of / before the alleged negligence has occurred. It is often attached to another insurance policy, like motor, house or travel insurance.

Each policy will have its own terms.

As a rule, if you lose your case the insurance will usually cover the costs you will be liable for to the winning opponent as well as your solicitor's fees and the costs of your case, which need to be agreed with the insurer along the way. The amount of cover for costs is usually limited to typically £50,000. Your solicitor should keep a close eye on costs throughout the case and arrange for a top up from the insurer if necessary.

If you win, the general rule will be that the losing opponent will be liable for your solicitor's costs but any shortfall may need to be made up by you.

Often the insurance provider will have a list of its own approved solicitors that it will request you instruct. You do not have to do so, but bear in mind that the provider may not allow you to use the policy if you choose to instruct a solicitor not on its list.

### **After the Event Insurance (ATE)**

This is an insurance policy to cover your costs and your opponents' costs in the event you lose your case. This insurance policy is set up after the alleged clinical negligence has occurred and usually runs along side a CFA (see above). Your solicitor will arrange for you to obtain a policy and explain it in detail.

### **Trade Union funding**

This is fairly rare now. Some Trade Unions have approved solicitors from whom you can obtain Clinical Negligence advice.

The Trade Union may then choose to fund your whole case, so you do not have to pay your solicitor's fees or costs connected with the case.

If you lose your case, the Trade Union may also offer insurance to ensure that you are not liable for your winning opponent's costs.

Often the Trade Union will have its approved solicitors that it will request you instruct. You do not have to do so, but bear in mind that the Union may not cover you if you choose to instruct a solicitor of your own.

### **Private Funding**

You can fund the case yourself, meaning you are liable for all your solicitor's fees and costs associated with the case.

If you lose, you will not only be liable for your solicitor's fees and costs, you will also be liable for your winning opponent's costs also. It would be recommended that you take out an ATE policy to cover this possibility (see above).

If you win, the losing opponent should be liable to pay your solicitor's fees and costs but any deficit will be made up by you.

This is a rare form of funding in Clinical Negligence as the costs associated with this litigation are high.

## **REFORMING THE ABOVE METHODS OF FUNDING**

The two areas that are subject to government reform are the most frequent ways of funding a case:

1. CFA (incorporating ATE)
2. Legal Aid

The changes proposed could result in deductions from your damages. Damages are divided into three broad categories:

### **1. General Damages**

The part of your damages that compensates for the pain and suffering endured as a result of the negligence.

### **2. Special Damages – Past Losses**

The part of your claim that compensates for the expenses you have already spent.

### **3. Special Damages – Future Losses**

The estimated future costs of items such as care and assistance, physiotherapy and specialist equipment.

## **WHAT DOES THIS MEAN TO ME?**

### **CFA**

The main changes proposed to this way of funding claims are as follows:

1. If you win your case, the success fee as charged by your solicitor will no longer be paid for by the losing opponent. Instead it will come out of your general damages (see below).
2. If you win your case, the full cost of the ATE policy will not be paid by the losing opponent. Instead the losing opponent will only be liable to pay the part that attaches to the costs of litigation (not the solicitor's fees). This means you will have to pay the remainder.
3. To offset this, the government proposes to increase general damages by 10%.
4. Further, the proposals state that a success fee cannot be charged at more than 25% of your damages. This will not include future losses which are protected from the deduction.
5. The introduction of Qualified One way Cost Shifting. This means that if you lose your case you will probably not have to pay the losing opponent's costs. However it is not entirely clear when this will apply as there is no definition provided as to what will count as qualified.

The deduction of the success fee from your damages could mean a significant reduction in your overall damages. For example, if your claim consists almost entirely of general damages and past losses then you could lose up to a quarter of your damages.

Further if your claim includes a significant proportion of past losses which are owed to a friend or relative who provided that care, these damages do not belong to you and therefore cannot be deducted from. This means the deduction will have to come from your damages and with this deduction made, may eat into the money needed for future care.

With the removal of Legal Aid funding in Clinical Negligence claims, CFAs will be on the increase.

### **Legal Aid / Public Funding**

As stated it is proposed that this be removed from Clinical Negligence as a whole, so no funding will be available this way, except in special circumstances.

One of the major concerns for you and indeed solicitors, is the non-funding of the costs associated with your litigation, such as medical reports. With Legal Aid gone, it will fall upon solicitor firms to fund costs of investigation which will be unworkable for many firms meaning legitimate cases may be rejected.

Alternatively, you will be expected to fund these significant costs. Clearly this is not an option for those who would be entitled to Legal Aid in the current system and the threat is that *genuine* cases will go unheard.

A straw-poll of solicitor firms showed that they would only have taken on 44% of their existing Legal Aid case load if they had to use alternative funding for the cases.

This means a staggering 56% of potential claims would fall through the net. Using this figure against the number of LSC certificates notified to the NHSLA for the current period, means around 2,128 Claimants could have been denied access to justice.

Smaller solicitor firms are likely to be unable to run cases of lesser value or those of high risk requiring significant upfront disbursements. This could lead to no access to legal advice in large areas of the country for Claimants, as the work is concentrated in fewer but larger firms.

Legal Aid has also brought about quality control of Clinical Negligence professionals, Solicitors who wish to secure a Legal Aid contract must demonstrate that they have a quality mark with ongoing supervision ensuring high standards of work within the industry. These checks and balances are in danger of slipping if Legal Aid goes, with Claimants potentially suffering the consequences.

### **WHAT CAN YOU DO?**

Write to your MPs (use template to be provided) expressing your concern about removing the fundamental right to access justice that the reforms will take.

You can also request a meeting in person with your MP or indeed attend a clinic with them whereby you raise issues you want your MP to address in parliament and lobby on your behalf.

This will raise awareness that the voting public are not in agreement with the suggested reforms and hopefully cause further debate and initiate changes to ensure the government listens to its electorate.

If you have been unfortunate enough to have suffered a medical accident and taken it through

litigation using Legal Aid or CFA funding, speak to the media about your experiences and comment on whether you think it would have been possible to bring such a case without that funding.

You could even agree to do this through your solicitor who may also be lobbying to stop the changes proposed.

We also welcome your stories as we are often in contact with the media and they are always looking for people to interview.

## **WHAT IS AvMA DOING TO UPHOLD ACCESS FOR JUSTICE FOR ALL**

AvMA is active in campaigning against these changes to funding in Clinical Negligence. While we recognise that in the current financial situation, our government has to look to where it may make savings the proposed changes will disproportionately affect the disabled, the elderly and those on benefits. The loss of Legal Aid coupled with the changes to the recoverability of legal costs in CFAs will affect the most seriously injured and vulnerable in our society, all in the interest of the government saving £17 million. In terms of government spending this is a very small amount of money, practically only cheese paring, yet to an individual injured person the legal aid they currently receive is priceless.

As a result of campaigning so far by many organisations that represent vulnerable claimants, the proposals to reform CFAs cost arrangements have been modified slightly to enable claimants to recover the cost of part of their insurance premium. No other concessions have been made so far but AvMA continues to press for a re-think.

AvMA's Chief Executive, Peter Walsh, has regular meetings with Ministers and Shadow Ministers, also MPs who share our concern. Our aim is to ensure that our message gets across and that we brief politicians on the effects of these proposed changes on the people we help. We are also in regular contact with the news media and through the assistance of our member solicitors are able to talk about successful cases where but for Legal Aid claimants would not have had access to justice and compensation for their injuries.

We support the following organisations in our joint campaign to retain access to justice for injured people:

Sound of For Justice

Consumer Justice Alliance

Access to Justice Alliance

Spinal Injuries Association

## **CONTACT US**

Action Against Medical Accidents (AvMA), the independent charity which promotes better patient safety and justice for people affected by a medical accident.

You can visit us at <http://www.avma.org.uk/>

Call us on 020 8688 9555 (8.30am-5.00pm)

Or if you need advice about a medical accident you may have suffered, call our helpline on 0845 123 2352 (10.00am-5.00pm)

For day-to-day information on our campaigning activities please follow us on [Twitter](#), [Facebook](#) or [LinkedIn](#) and check in regularly at our [Blog](#).

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