Understanding legal costs for medical negligence claims

The aim of this leaflet is to offer some guidance on how solicitors are paid and the most usual funding options available to you.

The issue of funding and the cost of litigation can be complicated – this leaflet will provide you with some useful information and guidance before you enter into a funding arrangement with your solicitor.

This leaflet should be used as general guidance only.

Contents

If you need legal advice about making a clinical negligence claim, you can find a wide selection of solicitors accredited for AvMA's specialist clinical negligence panel at www.avma.org.uk/find-a-solicitor or call our helpline.

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Choosing your solicitor

Once you have decided to seek legal advice about your possible clinical negligence claim, you will need to think about how your lawyer is going to be paid for the work done on your behalf.

This can be a difficult area, as there are a number of possible funding options. You should feel free to ask your solicitor about each of the options available. It may also be worth shopping around to see if another solicitor will offer you a more favourable arrangement.

Use an accredited lawyer

Television and radio are full of adverts featuring solicitors who say they do clinical negligence work, but not all of them can demonstrate that they have recognised experience and expertise in this highly specialised area of law. Where possible, you should only use a solicitor who is accredited as having experience in clinical negligence matters; look for the AvMA accredited logo which is a mark of excellence:

Further information

For more information on finding a solicitor please visit our website: www.avma.org.uk/find-a-solicitor

What to expect when you first visit a solicitor

The solicitor may have asked you to send in some documents in advance of meeting with you. Typically the solicitor may ask you to send in medical records and any complaint correspondence or incident reports.

If your claim concerns the death of a loved one and you have had an inquest, they may also ask you to send in any statements or documents relied upon by the coroner during the inquest hearing.

Solicitors are running a business and, like any business, they are entitled to charge for their service. However, in practice many solicitors do not charge for the first meeting. You should always check in advance whether payment is expected and, if so, how much it will cost you.

When you visit a solicitor, they will consider your potential claim with a view to identifying the likelihood of your case succeeding either by way of an early settlement and/or if it proceeds to court. Generally, the more relevant documents you are able to send to the solicitor in advance of the meeting, the better the chances of the solicitor accurately assessing the prospects of your case succeeding.

We suggest that you put together a list of the documents in your possession and send this to your solicitor. You can then ask your solicitor what they want before you send in any documents – don't be afraid to discuss this with the solicitor before you meet.

If your case has good prospects of success, then it is more likely to be taken on by a solicitor. If your case is unclear, the solicitor may be less willing to take the case on because of the risk of losing.

Risk assessment

The process by which solicitors look at the facts of your case and the available evidence and form a view on whether or not your case is likely to succeed is often referred to as the risk assessment. You may also have a telephone discussion with the solicitor or the solicitor's assistant; the information given during this phone call may form part of the initial risk assessment process.

You should be aware of two important points:

i. Solicitors are not obliged to take cases on.

ii. Where cases are taken on, they are subject to ongoing risk assessment. This means that each time new evidence on a case is received, the solicitor will review the claim. Typical examples of this would be:
    - Where medical notes are subsequently received and reviewed (these may not have been available prior to your first meeting)
    - When a medical report prepared by an independent medical expert is received
    - Following a conference (meeting) with counsel (a barrister)
    - Receipt of counsel's advice or opinion.

What is a retainer?

This is a written agreement which sets out the terms of the solicitor/client relationship. It should contain essential information such as the hourly rate to be charged and how the solicitor is to be paid.

Once a solicitor has agreed to take your case on, they **must** explain how they are going to charge their costs and when they become payable. This information needs to be provided in a clear and accesible form appropriate to your needs. Usually, the solicitor will write to you setting out the arrangement.

There are different ways in which a solicitor can agree to be paid. Some of the most common ones are set out later in this guide.

Funding options

There are a number of different arrangements which can be entered into as a means of ensuring solicitors receive payment for their services. The different ways of funding a claim are referred to as the funding options.

Paying privately

This method of funding means the solicitor charges an hourly rate for the work undertaken on your behalf. You will be expected to pay the solicitor's fees in advance of any work being done.

You are responsible for the solicitor's costs whether you win or lose your claim, although if your claim is successful you will be able to recover some or all of these costs from the opponent(s).

Although this method of funding cases is not used as widely as it once was in clinical negligence cases, you may still be asked to pay privately to fund the initial investigation stage of your claim, especially if the chances of succeeding are initially unclear.

A solicitor's hourly rate will vary from one firm to the next. The hourly rate will reflect where the practice is located (for example, a solicitor's firm based in the centre of London is likely to charge a higher hourly rate than a firm outside London). The rate may also be influenced by how experienced the solicitor is.

Solicitors are allowed to set their own hourly rate. Although the court may offer some guidance on what rates are considered reasonable, this is not binding.

If you have agreed to pay privately, the solicitor will usually ask for a payment on account of their costs before they undertake any substantial work.

Solicitors' guideline hourly rates

Guideline figures, listed by pay band and grade for different parts of the country, are available at **www.gov.uk/guidance/solicitors-guideline-hourly-rates**

It is important to realise that the guideline rates have not been updated since 2010 and as a result are often treated as no more than an approximation of what the average rate is.

Conditional fee agreements (CFA)

This is a common variation on the traditional private fee paying arrangement. The rules around CFAs changed considerably in April 2013. Prior to this date this type of funding was often referred to as a "no win, no fee" arrangement – this expression is extremely misleading!

A CFA works on the basis that the parties enter into a contract. Like any contract, there are terms and conditions that need to be observed, so it is really important that you read the CFA carefully.

Typically the CFA will set out what is covered in the agreement between you and your solicitor. To really understand a CFA, you need to know how costs work.

In particular, you need to understand the indemnity principle (see "What is the indemnity principle?" on page 6). As a result of the indemnity principle, the client must be deemed to be responsible for paying:

- The instructing solicitor's basic charges – the CFA will state what their hourly rate is in schedule 2 of the Law Society's standard CFA
- Any disbursements
- Any expenses
- Any success fee.

If you win your case: if your solicitor succeeds in proving your claim and your case settles, or if it goes to trial and the judge finds in your favour, then the other side will be expected to pay your solicitor's reasonable costs and disbursements reasonably incurred. Since April 2013, the other side will **not** pay your solicitor's success fee; this is payable out of your award of damages (see "Success fees and global offers" on page 8).

If you lose your case: you should expect to pay your solicitor's disbursements and expenses (unless you have come to an alternative arrangement) but you will not be expected to pay your solicitor's basic costs. You will not usually be expected to pay the winning party's costs either (see "Qualified oneway costs shifting (QOCS)" on page 9). However, your solicitor's disbursements may be covered by an after the event insurance (ATE) policy (see "What is ATE insurance?" on page 9).

Law Society model CFA

The Law Society has prepared a model CFA for use in clinical negligence cases, but solicitors are not bound to use this model and can make such changes as they feel are necessary. The Model CFA is currently under review and so the previous model is not currently available. Please check their website for any updates: www.lawsociety.org.uk/en/topics/civil-litigation/model-conditional-fee-agreement.

Before the event insurance (BTE)

If you have decided to take legal advice, you should always check your insurance policies to see if you have legal expense insurance cover. Many household or car insurance policies will add in legal expense cover without you being aware of it – check your policies to see if you have legal expense cover; it may save you money!

BTE policies vary and some are more generous than others, but often you are covered for legal costs up to £20,000, sometimes more.

If you have the benefit of legal expenses cover, then it may cover the cost of some or all of your disbursements as well as some or all of the legal costs of investigating your claim.

One of the problems with BTE cover is that insurers will often only cover you to see a lawyer who is on their panel. However, note the insurer's panel does not always demand accreditation which is a mark of experience in dealing with medical negligence work (see "Use an accredited lawyer" on page 2).

If your BTE insurer says that they will not fund the solicitors of your choice and that you have to use one of their panel firms, you should seek advice from your preferred solicitors, as they may be able to persuade the insurer to change their mind.

If there is legal expenses cover, you should check the policy terms in relation to time limits for making a claim to the insurers. If there is a time limit, you should submit details to the insurers within this period to avoid a refusal of cover at a later stage. If the period for making a claim is not clear, then you should speak to the insurance provider.

Legal aid

Up until April 2013, legal aid for clinical negligence cases was fairly widely available, subject to clients being able to show that their claim did appear to have reasonable prospects of success and that they satisfied the legal aid means test. However, this all changed in April 2013 and now only certain types of clinical negligence cases may be eligible for legal aid.

Essentially, to be considered for legal aid now, you must be able to show that a person has suffered a neurological injury resulting in a physical and/or mental disability. The injury must have been caused by clinical negligence and that negligence must have occurred whilst the individual was in the womb or during their birth or within eight weeks after their birth. To be eligible, the person must show that they were born during or after the 37th week of their mother's pregnancy.

As a result of these changes, it is very difficult to get legal aid, although you should consider this form of funding if you wish to investigate a claim for complex injuries such as cerebral palsy.

If you do obtain legal aid and your case is run using this method of funding, you do not pay a success fee out of your damages. However, even if you can obtain legal aid, there may be problems running cases owing to the fact that the Legal Aid Agency (LAA) has placed restrictions on the amount you can spend on your expert's fees.

For more details, please see a solicitor who holds a legal aid franchise and is able to offer legal aid funding in clinical negligence cases.

Damages based agreements (DBA)

These were introduced in April 2013 but are rarely, if ever, used in clinical negligence cases. The government has been asked to change the rules around DBAs so they become a more useful funding option but so far they have not done so.

DBAs work on a contingency fee basis – this is a little like the American system of funding. With a DBA the solicitor and client can agree that the solicitor's payment will be limited to a percentage of the client's damages, however the client's damages are protected to the extent that the solicitor can never take more than 25% of a client's damages. This 25% includes the solicitor's costs, VAT and counsel's fees.

How do costs work?

How do solicitors charge for their time?

Whether solicitors agree a private hourly rate or enter into a conditional fee agreement with you, they will all charge for the amount of time they take to resolve the issue. The only exception would be if you entered into a DBA with your solicitor, but as these are rarely, if ever used in clinical negligence cases, this is unlikely to apply.

If you agree to a solicitor acting for you, they should at the outset advise you of what their hourly rate is. At the end of the case, the solicitor will add up the number of hours spent on your claim and use their hourly rate to work out how much you owe them.

The work done and the time taken to do it is then set out in a bill of costs. The bill of costs will also identify the disbursements and expenses incurred by your solicitor.

Challenging your solicitors costs

If you are unhappy with the bill of costs (for example, you believe the solicitor's charges are unreasonable) you are able to challenge the bill.

This is known as asking for a detailed assessment. You should ask for a detailed assessment between one month and a year of getting your bill and before you have paid it.

More information can be found at:
www.sra.org.uk/consumers/using-solicitor/costs-legal-aid.page

You may also find the information at the Senior Courts Cost Office (SCCO) helpful: www.gov.uk/courts-tribunals/senior-courts-costs-office

Who will pay my costs if I win my case?

The normal rule is that the loser has to pay the winner's costs. If you bring an action in clinical negligence and the other side agree that the treatment was negligent and caused you injury, then you will have effectively won your action. In these circumstances you can expect the losing party to pay your basic costs.

However, it is important that you understand two key things about the defendant's obligation to pay costs:

- The defendant will only be expected to pay costs which you yourself would be liable to pay. This is why schedule 2 of the standard CFA model refers to the hourly rate chargeable and says that if you win, you will be responsible for paying the basic charges, expenses and disbursements.
- The defendant will only usually be expected to pay reasonable costs, although there are some exceptions to this.

What are disbursements?

A disbursement is any sum which a solicitor is going to spend on your behalf. In the context of clinical negligence litigation, this is usually things like the cost of obtaining relevant medical records, counsel's fees (barristers) and experts' reports.

Counsel's fees (barristers) may be included as a disbursement, although they may also enter into a CFA with you. Your solicitor will advise you of the arrangement.

Disbursement costs should include any VAT payable.

Things to be aware of

If your solicitor obtains an expert report which you do not rely on – perhaps the report is not supportive of your claim – you will not be able to recover this cost from the losing party. The cost of such reports will be payable out of your award of damages.

You may end up paying any shortfall in the basic hourly rate as well as non-recoverable disbursements out of any award of damages – these costs are not ring-fenced. Your success fee is also payable out of your damages although this is ring-fenced to 25% of your general damages and past losses.

General damages are the compensation awarded for the pain, suffering and loss of amenity suffered as a result of the negligent injury.

What is the indemnity principle?

Where a solicitor succeeds in winning their client's case, they will look to receive payment for the work done.

In the first instance the solicitor can expect the losing party to pay the costs. In most cases the losing party will be expected to pay the reasonable costs due, subject to the rules around proportionality (see "What is proportionality?" on page 7).

The indemnity principle is the principle that the losing party will **never** be obliged to pay more costs than the successful client would have been liable to pay to their solicitor under the terms of the agreement.

It is for this reason that the CFA usually has words to the effect that *"if you win your claim, you pay our basic charges, our expenses and disbursements... you are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements"*. It is also why the CFA stipulates the hourly rate which will be charged to the client.

The indemnity principle means that your solicitor has to give you credit for the costs they receive from the losing party. For example, if your retainer (this might be your CFA agreement or private costs agreement) states that the hourly rate for basic costs is £500 per hour but the costs judge decides that it is only reasonable to allow £300 per hour, your solicitor must give you credit for the £300 per hour he or she has received.

However, your contract states that the rate payable is £500 per hour, which means that the solicitor can look to you for the difference. In this example this will be £200 per hour (£500 - £300 = £200). This shortfall will be payable out of your award of damages.

You should note that the indemnity principle is not the same as indemnity costs (see "What are indemnity costs?" on page 7).

What are reasonable costs?

What is reasonable varies according to how complicated the issues were, who did the work, what the hourly rate is and how long it took the solicitor to do the work.

It is not unusual for the losing party to argue about what is reasonable. Often the parties will try and work this out between themselves and your solicitor may negotiate over how much they are prepared to accept.

If the parties cannot agree, then a costs judge will assess the fees according to what he or she thinks is fair by looking at the papers. The parties can appeal this paper assessment (known as summary assessment) and go to a full oral hearing before a costs judge (known as detailed assessment) – this can take time to settle.

Where a costs judge assesses the fees payable, they will usually do so on what is known as the standard basis. Where the court assesses costs on the standard basis, it will only allow costs which are proportionate to the matters in issue.

Costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred.

When costs are assessed on the standard basis, the court will also decide whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

Things to be aware of

If there is an argument over reasonable costs and a costs judge considers that the hourly rate set out in the CFA for basic costs is too high, then you are still bound to pay the rate stipulated in the CFA – remember, this is a contract between you and your solicitor, however you may be able to negotiate the costs with your solicitor so do discuss it.

What is proportionality?

There is no formal definition of proportionality, however there are some benchmarks that help identify whether costs are proportionate. Some of the key benchmarks are set out below: for costs to be proportionate they must bear a reasonable relationship to:

- The sums in issue in the proceedings
    - This means that the cost of bringing the proceedings will be looked at in the context of how much you recovered by way of damages. For example, the courts are unlikely to consider a costs bill of £30,000 to recover £3,000 in damages to be proportionate
- The value of any non-monetary relief in issue in the proceedings
- The complexity of the litigation
- Any additional work generated by the conduct of the paying party
- Any wider factors involved in the proceedings, such as reputation or public importance.

What are indemnity costs?

Indemnity costs tend to be awarded in exceptional circumstances, or where they are prescribed under the civil procedure rules (CPR), such as a penalty for a party failing to beat a part 36 offer (see "What is a part 36 offer?" on page 10).

Other than with part 36 offers, there is currently no formal definition of when indemnity costs might be awarded. However it is possible that such costs would be awarded in circumstances where one of the litigating parties or their witnesses has behaved unreasonably. It should be noted that the court is likely to require a high degree of unreasonableness before making an order for indemnity costs.

Where the court finds that costs should be payable on the indemnity basis it will still not allow costs which have been unreasonably incurred or are unreasonable in amount. However, the receiving party gets the benefit of the doubt rather than the paying party.

What are success fees?

Where a solicitor and client enter into a conditional fee agreement (see "Conditional fee agreements (CFA)" on page 4) then the solicitor only gets paid if he or she wins the case on behalf of the client. This means that if the solicitor loses the case they get nothing.

Clinical negligence cases are particularly difficult to prove; sometimes a solicitor will work on a case for a long time, perhaps several years, before it becomes apparent that the case will not succeed. Sometimes, a solicitor might consider that a case has reasonable prospects of succeeding but then lose at trial.

In such cases many years of work is lost. To make up for this situation, in cases where the solicitor has been successful, they are able to take a percentage of a client's damages; this is known as the success fee.

A success fee can be calculated as 100% of your base costs. However, in clinical negligence cases the success fee is capped at 25% of the client's general damages (these are the damages awarded for pain, suffering and loss of amenity) and past losses.

Before April 2013, solicitors were able to receive payment for the success fee from the losing party; this is no longer the case and success fees are payable out of any award of damages.

Success fees and global offers

In practice, complications can arise with claiming success fees where a case has been settled on the basis of a global offer.

A global offer is where the defendant makes an offer to settle by putting forward one figure that includes the award of damages as well as the sum payable by way of costs.

The difficulty with global offers is that they are not broken down into the sum allowed for past losses or future losses. This can make it difficult for a solicitor to determine what element relates to past losses and general damages. In turn, this makes it difficult to identify what part of the award of damages is subject to the 25% cap on success fees.

Things to be aware of

Since April 2013, the defendant is no longer responsible for paying the success fee. The success fee is payable out of your damages.

You should note that the success fee is only ring fenced to 25% in personal injury (including clinical negligence) cases. If you decide to appeal an award of damages, the appeal is subject to another CFA. The appeal is a different cause of action and the 25% protection does not apply.

Fixed recoverable costs (FRC)

The government is currently considering whether to introduce a fixed recoverable costs regime in clinical negligence cases. It is difficult to give advice on this as we don't have any real detail about how this will work in practice.

It is possible that FRC will impact on your overall bill of costs, even though it has not yet been introduced. The effect of the government introducing FRC may be severe and may mean that your solicitor can only recover a set amount of money by way of fees for the work they have done.

The problem with this approach is that it does not take into account the fact that some clinical negligence cases are complicated and difficult to prove - these sorts of cases are often expensive even though the award of damages is low.

What will FRC mean for me?

If a FRC regime is introduced you may find that you become responsible for paying the difference between what the solicitor can recover by way of the set fee and the amount it actually costs to bring the case. If this happens, the difference may be taken from your award of damages.

As part of the FRC regime, the government has also suggested that it may introduce a cap on expert's fees. If this is introduced, this will mean that you will only receive a certain amount towards the cost of your experts' fees.

For example: if your expert fees come to a total of £3,000 but the government puts a cap of, say, £1,500 on the amount the losing party is obliged to pay, then you will have to pay the difference – in this example you may find yourself having to pay £1,500 out of your damages.

After the event (ATE) insurance

What is ATE insurance?

Prior to April 2013 the rule was that the loser paid the winner's costs. That meant that if a claimant brought an action in clinical negligence and lost at trial or withdrew from the proceedings before the case settled, then they would be considered the loser and would be required to pay the winner's costs.

This was very risky for ordinary members of the public and meant that if they lost their case there was a risk that they would lose their savings and if they owned their own house, their homes were at risk of being sold to pay the winning party's legal fees.

This situation meant that people were understandably reluctant to bring clinical negligence actions. ATE insurance was introduced to enable members of the public to insure against the risk of losing their legal action and thereby avoid the risk of losing their homes and/or their savings and other valuables.

ATE insurance meant that if you brought a claim and lost, the insurers would pay the successful party's costs so you didn't have to. Typically the premiums payable for this type of insurance were very expensive; however, if you won your clinical negligence action you would also be able to recover the cost of the insurance premium from the losing party.

In April 2013 the government introduced a new scheme known as qualified oneway costs shifting or QOCS. QOCS applies to clinical negligence cases and means that generally a losing claimant no longer has to pay the winning defendant's costs. QOCS gives a claimant protection from having to pay the wining defendant's costs, and so ATE insurance is largely no longer as necessary as it once was. However, there are exceptions to QOCS.

Qualified oneway costs shifting (QOCS)

Since April 2013 a claimant who brings a clinical negligence action and loses no longer has to pay the wining party's costs. However, a losing defendant, for example an NHS trust, will have to pay the winning party's costs.

Costs includes fees, charges, disbursements and expenses.

Although this might appear harsh on a defendant who wins their case, in practice this has been a sensible trade-off for clinical negligence defendants, as it means they no longer have to pay the very expensive premiums being charged by ATE insurance companies. This saves the defendants money in the long run.

QOCS only applies to cases which include a claim for damages arising from either:

- Personal injuries (including clinical negligence)
- Fatal accidents
- Claims brought on behalf of a deceased's estate.

As a result of QOCS, the claimant is no longer liable to pay the winning party's costs and disbursements. The claimant will still have to pay their own disbursements, although currently ATE insurance is available to protect them against having to pay their own liability (breach of duty and causation) expert fees if they lose the case.

As a small concession, the government has said that the losing defendant party must pay the ATE premiums payable by the claimant for ATE insurance for their own liability expert fees.

Can I ever lose my QOCS protection?

A claimant can lose their QOCS protection. The most usual way of losing QOCS protection is when a defendant makes a part 36 offer to settle the case which is rejected by the claimant. If subsequently the claimant then fails to settle or be awarded a sum which is more than the amount originally offered they will lose QOCS protection and become liable to pay indemnity costs (see "What is a part 36 offer?" on page 10).

A claimant will also lose QOCS protection where it is shown that they have been fundamentally dishonest, or where the court considers there were no reasonable grounds for bringing the proceedings.

Do I need ATE insurance?

The introduction of QOCS means that it is no longer necessary for potential claimants to take out insurance to cover the risk that they may lose and end up having to pay the winning party's costs. However, you may be advised to take out ATE insurance to cover the cost of your own disbursements and any part 36 risk.

Expert reports are disbursements and these reports can be expensive. The cost of an expert report will vary according to the type of expert and how detailed the report is, but can often cost in excess of £1,000 each. If you bring a claim and lose or withdraw from proceedings, the expert still needs to be paid. The cost of expert reports can mount up very quickly; ATE insurance is available to cover the cost of your liability experts' reports in the event that you lose.

Your solicitor may advise you to take out ATE insurance, but you should discuss this with them.

The government is currently proposing that the cost of ATE premiums for claimant expert reports and part 36 risks should no longer be payable by the losing defendant party. However, the current situation is that in principle ATE premiums are payable by the losing defendant party, although this may change in the near future.

What is a part 36 offer?

The courts are keen to encourage parties to try and settle disputes rather than litigate. One way of encouraging settlement is by way of a part 36 offer.

A part 36 offer may be made in respect of the whole, or part of your claim; however, in order for it to be an effective part 36 offer it must meet the requirements set out in rule 36 civil procedure rules. Details of rule 36 can be found at www.justice.gov.uk/courts/procedure-rules/civil/rules/part36

A part 36 offer can be put forward by either side and provides an opportunity for either party to set out what they would be prepared to settle the case for. The skill in making a part 36 offer is to suggest a figure for settlement that is attractive to the other side whilst reflecting the value of the claim.

Part 36 offers have tactical advantages. If one party makes a part 36 offer which is then rejected by the other side, the party rejecting has to be confident that they will beat the offer which is on the table. If they don't beat the offer, then they will suffer a costs penalty by way of paying indemnity costs from the date the offer expired (21 days after the offer is made).

Where a claimant rejects a part 36 offer but then fails to secure a settlement or an award of damages that is greater than the amount made in the part 36 offer, they no longer have the benefit of QOCS protection. In these circumstances the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of subsequent settlement or judgment.

Part 36 offers and costs are complicated and should always be discussed with your solicitor. However, you should be prepared for the possibility that your instructing solicitor may advise you to take out ATE insurance to cover your own disbursement costs as well as any part 36 risk.

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- To eliminate compounded harm following avoidable medical harm
- To have the necessary diversity of sustainable resources and capacities to deliver

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