Understanding legal costs: the principles

This leaflet should be read as general guidance only. The issue of funding and the cost of litigation can be complicated. The aim of this leaflet is to help you understand how legal costs work. This guide is aimed at helping you understand how solicitors are paid and introducing you to some of the terms you will come across when discussing legal costs.

This leaflet will *not* explain the funding options, that information is in another leaflet called *"Legal costs: funding options in clinical negligence claims"* available at www.avma.org.uk/wp-content/uploads/Funding-options.pdf.

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How do costs work?

Understandably, many people worry about being left with a large legal bill to pay at the end of their case, knowing how legal costs work will help you understand any potential liability you may have. This leaflet gives an overview of what happens when you win your case and what happens if you lose your case.

Frequently asked questions:

Before we look at how costs work in more detail there are some commonly asked questions which we can deal with here:

How do solicitors charge for their time?

Invariably solicitors will charge for their time based on how long it takes them to do the work and their agreed hourly rate. Every time your solicitor makes a phone call or writes a letter on your behalf they will record the amount of time it has taken them to do so.

When you agree to a solicitor acting for you, they should at the outset advise you of what their hourly rate is. If your solicitor is acting for you on a Conditional Fee Agreement (CFA), then details of their hourly rate will be found at Schedule 2 of the CFA. If they are not acting for you on a CFA then details should be in their retainer letter. For more information on CFAs and retainer letters see Legal costs – funding options leaflet referred to above.

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 is owed to 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.

What are disbursements?

A disbursement is any sum of money paid on your behalf by your solicitor to a third party. Unless otherwise agreed the solicitor will look to the client to repay the amount spent. In the context of clinical negligence litigation, this is usually things like the cost of obtaining relevant medical records, experts' reports and sometimes counsel's fees (barristers).

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

Disbursement costs should include any VAT payable.

If you have taken out After the Event Insurance (ATE) then the policy should cover any expert reports on liability and causation. However, ATE policies do not tend to cover condition and prognosis reports.

If your solicitor obtains an expert report which you do not rely on – perhaps the report is not supportive of your claim – you may have to cover the cost of the negative report yourself. If this happens it is quite usual for this sort of cost to be paid out of your award of damages.

If you have not entered into a CFA with your solicitor, it is quite usual for you to have to pay any disbursements up front, before the third party is instructed.

What are reasonable costs?

What is reasonable varies according to how complicated the case is. Other relevant facts include who carried out most of the work on your case? Was it a partner or someone more junior? What hourly rate is being claimed? How long did it take to conclude the matter?

It is not unusual for the losing party to argue about what is reasonable. Often your lawyer and the lawyer for the other side will try and negotiate this. If the parties cannot agree, then a costs judge will be asked to give their views at a process known as ***summary assessment***; this is where the costs judge looks at the papers and set out what they think is fair.

If the parties do not agree with the judge's findings from the summary assessment they can go to a full oral hearing before a costs judge, known as ***detailed assessment***. The assessment process is time-consuming and lacks certainty which is why lawyers will try and settle their bills if possible.

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 were reasonably and proportionately incurred. Costs which are disproportionate may be disallowed or reduced, even if it was necessary for your lawyer to incur them. See below for more information on proportionality.

What is proportionality?

In very general terms, proportionality is the relationship between the amount of damages likely to be or actually recovered and the cost of achieving that outcome. For example, it would be difficult to justify spending £50,000 to recover £5,000 in damages, the costs are disproportionate. This is explored in more detail in our leaflet "How to approach a lawyer for the first time" (www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf).

When a case undergoes assessment before a costs judge (see above) there are several factors the judge will look at when assessing whether the costs are reasonable. Certainly, one important factor, if not the most important factor is how much your solicitor recovered by way of damages compared to how much it cost to achieve that outcome. It does not matter if it was necessary to spend the time or expense, the main focus will still be on the relationship between costs and damages.

There are other matters the costs judge will take into account including:

- **The value of any non-monetary relief in issue in the proceedings.** There is no precise definition of what this means but it will likely include things like obtaining an apology, or securing a change in working practices to prevent the same thing happening again.
- **The complexity of the litigation:** It is generally accepted that clinical negligence claims are complex and difficult. Low value claims can be complex, that is what makes them difficult to run.
- **Any additional work generated by the conduct of the paying party:** This will probably include considering whether the claim should have been resolved early on or avoided litigation altogether.
- **Any wider factors** involved in the proceedings, such as reputation or public importance.

The retainer letter

Once a solicitor has agreed to take your case on, they must explain how they are going to charge for their costs and when they become payable. This information needs to be provided in a clear and accessible form appropriate to your needs. The solicitor will write to you setting out the arrangement and this letter is known as the retainer letter.

The retainer letter 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, how the solicitor is to be paid and the work your solicitor will carry out on your behalf. You can expect the retainer letter to be reviewed from time to time particularly the scope of the work to be carried out by the solicitor.

There are different ways in which a solicitor can agree to be paid, please see our leaflet "Funding options in clinical negligence claims" (www.avma.org.uk/wp-content/uploads/Funding-options.pdf).

The Conditional Fee Agreement

This is dealt with in our leaflet on "Funding options in clinical negligence claims" (above).

The Conditional Fee Agreement sets out the contractual terms agreed between the solicitor and client. It will confirm the solicitors' basic charges including the hourly rate payable and other terms. There is a standard model conditional fee agreement but solicitors often change the terms of this agreement so you must read the CFA carefully, do not assume anything.

What is the indemnity principle?

The indemnity principle is 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.

The clearest way for your solicitor to show what you had agreed to pay is by putting this essential information in writing. The details will be contained in your retainer letter and/or your Conditional Fee Agreement (CFA). It is quite usual for CFA's to have 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 to be charged to the client.

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

The losing party will be expected to pay your solicitor's ***reasonable costs*** (see above). Under the indemnity principle, your solicitor must give you credit for the costs they receive from the losing party. For example, if you have agreed with your lawyer that their hourly rate is £350 and a "reasonable" rate is £300, your lawyer must give you credit (under the indemnity principle) for the £300. You remain responsible for paying the shortfall which in this example is £50 per hour (£350 - £300 =£50). This will be deducted from your award of damages.

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

If my case is successful, do I have to worry about costs?

Yes, you do.

We looked at how solicitors charge for their time in the above paragraph, especially the terms agreed between you and the lawyer either in the retainer letter and/or the CFA.

In the above example there is a shortfall of £50 per hour. You and your lawyer still have an agreement that the hourly rate should be £350 per hour so your lawyer would be entitled to look to you to pay the £50 per hour difference out of your damages.

Who will pay my costs if I win my case?

The normal rule is that the loser must pay the winner's costs. If you bring an action in clinical negligence and the other side agree that the treatment was negligent, caused you injury and damages (compensation) is payable, then you will have effectively won your action, this is the case whether your claim settles or is successful at trial. In these circumstances you can expect the losing party to pay your solicitor's basic costs.

There are two important things you need to know about the defendant's obligation to pay your solicitor's costs: -

1. **The defendant will only be expected to pay costs which you yourself (the client) would be liable to pay.** This is the indemnity principle referred to above.

   It is for this reason, your lawyer provides you with a lot of information about their terms of business, including their hourly rate, any charges you will be expected to pay, including disbursements and the scope of the work they have agreed to carry out. This information will be found in both the retainer letter and the terms of any Conditional Fee Agreement (CFA) you may enter into.

2. **The defendant will only usually be expected to pay your lawyer's reasonable costs.** There are some exceptions to this rule, for example, if you beat a Part 36 offer, in which case you will be awarded indemnity costs (see below) For more information on Part 36 offers, see our leaflet, *"Settling a legal claim"* (**www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf**). Please see above for information on what reasonable costs are.

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 *"Settling a legal claim"* **www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf**).

Other than 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.

Indemnity costs need to be reasonable, but they do not have to be necessary. By contrast, costs on the standard basis need to be both reasonable and necessary.

Even 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 happens if I lose my case? Qualified one-way costs shifting (QOCS)

Qualified one-way costs shifting (referred to as QOCS) was first introduced in April 2013 and offers a unique protection to claimants who lose their case from having to pay the "winner" or opposing party's costs. This principle only works for claimants, a losing defendant, for example an NHS trust, does not benefit from QOCS and must pay the winning party's costs.

Costs includes fees, charges, disbursements, and expenses.

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.

However, QOCS does not protect a claimant from having to pay their own disbursements, typically disbursements will include the cost of the After the Event (ATE) insurance premium although some ATE policies do insure against the cost of losing. In a successful claim, the part of the ATE premium that covers you for the cost of your liability and causation expert fees will be recoverable from the other side, any additional premium charged for say adverse costs orders will not be recoverable.

Can I ever lose my QOCS protection?

Yes, 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 and that offer is rejected but subsequently the claimant settles or is awarded less money than offered in that Part 36 offer. For more information on part 36 offers to settle a claim please see our leaflet *"Settling a clinical negligence claim"* (**www.avma.org.uk/wp-content/uploads/Settling-a-claim.pdf**).

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. More information on fundamental dishonesty can be found in our leaflet *"Clinical negligence – what compensation can I claim?"* (**www.avma.org.uk/wp-content/uploads/Compensation.pdf**).

How much will be deducted from my damages?

It is important to ask your solicitor this question before you enter any funding arrangement. However, it is a difficult question for your lawyer to answer especially at the beginning of the case when further investigations may need to be undertaken, and they do not know how quickly your case may be resolved.

It is also difficult to know what hourly rate will be considered "reasonable" (see above) and therefore what the difference (if any) might be between the rate you and your solicitor agree and what is allowed as reasonable. The solicitor is entitled to deduct the difference (also referred to as the shortfall) between the two rates from your damages.

CFAs and Success Fees: The success fee payable on the Conditional Fee Agreement (CFA), is also deducted from your damages. Success fees and CFAs are discussed in more detail in our leaflet "legal costs? - Funding options in clinical negligence claims".

An important feature of the success fee claimed under the CFA, is the amount that can be deducted from your damages is limited by law to 25% of past losses and general damages. This is often referred to a cap on the success fee.

By contrast, there is ***no*** law capping (limiting) the amount of money solicitors can take from a client's damages where there is a shortfall in costs. The Law Society have produced a model CFA agreement which does recommend an overall cap for your liability to costs but many solicitors will vary that term.

Capping costs: While there is no guarantee that a solicitor will offer a cap on your overall costs, many (***but not all***) solicitors will offer this. A cap is used to limit the amount of money that will be deducted from damages. The benefit of the cap is that you know what your exposure to costs might be at the outset, although at that stage you do not know what your case will settle for.

The Law Society Model CFA: The Law Society model CFA agreement suggests limiting the total amounts to be deducted from your damages including any part of the ATE premium payable by you, solicitors charges, and disbursements to a maximum of 25% of your total award of damages. To put this another way, you will receive 75% of any damages agreed.

Please note: Firms can and do vary the terms of the Law Society CFA. ***You must always read the terms of any CFA which is sent to you.*** At the time of writing this leaflet, the Law Society model agreement is under review, check their website for details: **www.lawsociety.org.uk/en/topics/civil-litigation/model-conditional-fee-agreement**.

Cases involving children: There are some solicitors who will avoid making any deductions for costs from damages awarded to children (that is, someone under the age of 18 years). However, this does vary from firm to firm including accredited firms. You should read the CFA carefully and check this with your solicitor before you enter into any agreement.

You may also find it helpful to read our leaflet *"Clinical Negligence – What compensation can I claim?"* (www.avma.org.uk/wp-content/uploads/Compensation.pdf).

What costs do I have to pay if I have changed solicitors?

This can be a difficult area to advise on and we can only outline the key points in this paragraph. Sometimes a solicitor (solicitor 1) enters a CFA with a client and having undertaken some investigations then decides that the client's case is not likely to succeed and turns the case down (CFAs usually have a clause that allows solicitors to do this). Does the client have to pay Solicitor 1 any costs? The answer is in the terms of the CFA. Some CFAs say that the client will not have to pay anything in these circumstances, in which case that is the end of it and no costs are payable.

However, there are times when the CFA says the client will have to pay the solicitors expenses and disbursement. In these cases where the client then goes on and finds another solicitor (solicitor 2) to act for them. Solicitor 2 may have to give an undertaking to Solicitor 1, that they will look to recover solicitor 1 costs and disbursements in the event the client's claim is successful.

It is often the case that solicitor 1 will not release the client's papers and reports to solicitor 2, until such time as that undertaking is given. If the CFA says that the client has to pay solicitor 1 costs and disbursements, then solicitor 1 has what is called a "lien" over the papers.

Where solicitor 2 is subsequently successful in concluding the client's case, solicitor 2 can then look to have her costs paid for by the defendants. However, where solicitor 2 has given an undertaking as to the costs of solicitor 1, solicitor 2 must enable solicitor 1 to recover their costs and disbursement for the work they did on the case too.

This can be very complicated in practice. We have tried to explain some basic principles here but were this to happen in practice it is quite likely that a barrister will have to advise

Challenging your solicitor's costs

If you are unhappy with the bill of costs (for example, you believe the solicitor's charges are unreasonable) you can challenge the bill. To do this you should first write to your solicitors explaining what aspect of the bill you dispute and why, solicitors will often try and resolve any differences with their clients. If the issues are not resolved to your satisfaction, you can use the firm's complaints process, you should expect your complaint to be reviewed by someone in the firm who did not have conduct of your case.

If you are unhappy with the outcome of the complaints process, you are able to ask an independent costs judge to review your bill by going through the detailed assessment process.

Time limits: there are time limits for requesting a ***detailed assessment*** of your bill of costs. 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 on the following websites:

www.sra.org.uk/consumers/using-solicitor/costs-legal-aid.page

www.gov.uk/challenge-solicitors-bill

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

www.avma.org.uk/donate

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