

Funding options in clinical negligence claims - Scotland only



AvMA thanks Darren Deary at Irwin Mitchell LLP in Scotland for approving this self help guide for us.

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.

Once you have or are about to appoint a lawyer (If you are instructing a solicitor based in Scotland we urge you to ensure the firm is a member of AvMA's Lawyer Service, which means they will have signed our Code of Conduct. The Code is confirmation of the firm's commitment to providing a quality service). You will need to discuss how your lawyer is going to be paid for the work done on your behalf.

The issue of funding and the cost of litigation can be complicated. The aim of this leaflet is to offer some guidance on the most usual funding options available to you.

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The charity for patient safety and justice

AvMA is the charity for patient safety and justice. We provide specialist advice and support to people when things go wrong in healthcare and campaign to improve patient safety and justice.

For advice and information visit
www.avma.org.uk

Or call our helpline
10am-3.30pm Monday-Friday
(03 calls cost no more than calls to geographic numbers (01 or 02) and must be included in inclusive minutes or there can be a cost per minute)

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Before you start thinking about your funding options, we strongly suggest that you read our leaflet "*Understanding legal costs – the principles*" (www.avma.org.uk/wp-content/uploads/Costs-principles.pdf). If you have not yet found a solicitor to act for you also read our leaflet "*How to approach a lawyer for the first time*" (www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf).

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 particularly about terms of the Conditional Fee Agreement (CFA), (more information below).

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 (LEI) cover. The details will be contained within the policy, some household and car insurance policies include LEI cover as an incidental benefit of the policy without you being aware of it. If you discover you do have LEI, then make sure it covers clinical negligence claims, it could save you money if it does.

BTE policies vary, and some are more generous than others, you may find that you have insurance cover 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 your disbursements as well as some or all of the legal costs of investigating your claim.

However, a potential problem with BTE cover is that insurers often only cover you to see a lawyer who is on their panel. It is quite common for insurers to put together a panel of lawyers based not on their expertise and skill in this area of work, but rather their hourly rate. If you are appointed a solicitor by your insurer you should ask whether the solicitor is accredited in clinical negligence work (see the section on choosing your solicitor and accreditation contained in our leaflet "*How to approach a lawyer for the first time*" (www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf)).

If your BTE insurer says that they will not fund the solicitor 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 you are member of a trade union it is worth checking the terms of your membership as you may be covered for legal advice.

BTE insurance is not as common as it once was, but it is still worth checking your policies and or memberships.

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

It may be that you qualify for legal aid to investigate and pursue your potential clinical negligence claim. In Scotland, legal aid remains available for all types of clinical negligence cases but will only be granted if you are able to show that your claim appears to have reasonable prospects of success and that you satisfy the legal aid financial means test.

As a result of the means test, many clients do not qualify financially (particularly as parents' resources are taken into consideration when applying for children). Not all firms will offer legal aid (preferring the No Win / No Fee approach) and so it might be difficult to get legal aid but an AvMA approved Scottish solicitor who has signed the AvMA Code of Conduct should be able to explain when legal aid might be the best option for you.

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 but the legal aid board might require an initial financial contribution from you and there can also be claw-back (from any award) at the conclusion of the case.

If you can obtain legal aid, it can be difficult for lawyers to run your case because the Legal Aid Board has restricted the amount of money your lawyer can spend on expert's fees. In practice, the fees are so low that many medico-legal experts will not undertake work at legal aid rates. Given the importance of the expert's opinion and the fact that your claim will largely stand, or fall based on the strength and quality of your medical expert opinion this is a significant factor. You also need to bear in mind, that the NHS hospital board involved in the claim or private hospital and/or doctor is unlikely to be faced with the same restrictions on funding.

Please carefully read the information on Conditional Fee Agreements (CFA) and After the Event Insurance policies (ATE) below. You will note that if you do opt for a CFA funding arrangement instead of legal aid, the solicitor is entitled to ask for a success fee which will be payable out of the award of damages but the success fee is tapered and capped to ensure you still receive the majority (at least 80% but often more) of any award. The ATE policy can also be deducted from your damages although some firms will meet this cost for you and so you should shop around. It is important to weigh any success fee against the benefit of having access to and the freedom to choose the very best available medico legal experts, because without succeeding the value becomes irrelevant and the best experts may in turn also increase the value of your claim.

Paying privately

For many years this was the usual way lawyers were paid. This method of funding means the solicitor charges an hourly rate for the work undertaken on your behalf. Usually, the lawyer will give an overall best estimate of the total likely costs to carry out the work but will break this down by setting out what work will be done initially and give you a cost estimate for that bit of work. You will be expected to pay money to the solicitor first, before any work starts, this is known as money on account of costs.

If you pay for the work privately, you will be responsible for the solicitor's costs whether you win or lose your claim. If your claim is successful, you will be able to recover the reasonable costs from the losing party (unlikely to be the full amount). This is dealt with in our leaflet "Understanding legal costs – the principles" (www.avma.org.uk/wp-content/uploads/Costs-principles.pdf).

A solicitor's hourly rate will vary from one firm to the next. The hourly rate will reflect where the practice is located and 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.

Clients are not usually asked to fund the entire clinical negligence case privately. However, you may still be asked to pay privately to fund the initial investigation stage of your claim, especially if the initial information available is limited and so it is difficult to assess the chances of success at that time. Once a solicitor has decided they will take the case on (that the chances of success are good), they will usually invite you to enter into a conditional fee agreement (CFA) with them.

No Win / No Fee - Conditional fee agreements (CFA) and Success fee agreements (SFA)

This is by far the most common way of funding a clinical negligence claim. However, a solicitor is not obliged to enter into this type of agreement with you – see our leaflet *"How to approach a lawyer for the first time"* and the section entitled *"What happens if the solicitor agrees to take my case on?"* (www.avma.org.uk/wp-content/uploads/Approaching-a-lawyer.pdf).

Our *How to approach a lawyer* leaflet explains, there is no guarantee the solicitor will take your case on a CFA/SFA, the solicitor will consider the merits of the case and the prospects of the claim succeeding. They also want to know that the costs of bringing the claim are going to be proportionate to the amount of money likely to be recovered.

You may be asked to start by taking some initial steps (such as lodging a formal written complaint in respect of the care) to enable the solicitor to identify the prospects of the case succeeding or to pay a restricted cost for some initial investigations such as obtaining a preliminary expert report. Once the initial investigations are complete you can expect the lawyer to decide whether they are prepared to do the work on a CFA/SFA basis going forward. Most of the time, the lawyer will be able to assess whether they are prepared to act for you on that basis from the outset without asking you to incur any expense at all.

How does a CFA and SFA work?

A CFA is often referred to as a "no win, no fee" arrangement and is a contract entered into between you and the law firm you instruct. Like any contract, there are terms and conditions that need to be observed, so it is important that **you read the CFA carefully**.

When acting on a "no win, no fee" basis it is likely that you will also be issued with a separate "Success Fee Agreement" [SFA] which is again a contract and should be read carefully. The success fee and SFA (to reflect the risks and costs involved in complex claims of this nature) will set out the maximum deduction from any award. In Scotland, the success fee is tapered and capped so that you will receive at least 80% of any award/damages for claims up to £100,000 and an even greater percentage for claims above that level - with the percentage dropping to 10% from £100,000 to £500,000 and then 2.5% from over £500,000.

In order to enter a SFA with you the instructed lawyer/firm must agree to fund the cost of your claim, which can be very expensive, and should also put in place ATE to ensure you are protected. The cost of ATE can also be deducted from your damages but some firms will meet this cost for you. Detailed guidance can be found on the Law Society of Scotland's website ([Style Success Fee Agreement Guidance | Law Society of Scotland](#))

After the event (ATE) insurance

If you have signed a CFA it is very likely that your solicitor will recommend you take out ATE insurance as well.

What is ATE insurance?

As the name suggests, it is insurance taken out after the clinical negligence has occurred. If you have entered a CFA/SFA with your solicitor, it is likely they will recommend you take out ATE insurance. The ATE insurance will cover the cost of your expert reports, these reports can be expensive and generally ATE insurance is the most effective way of covering the cost of these reports. The premium is only payable in the event of success and is not recoverable from the other side, even if you win your claim. It is acceptable to deduct the premium from your damages in addition to the success fee but some firms will offer to meet the cost of the premium for you. Qualified one-way cost shifting (QOCS) has now been introduced for personal injury (including clinical negligence) claims in Scotland which protects the pursuer (you) from paying the opposing parties costs even if they lose. For more information on QOCS please refer to our leaflet "*Understanding legal costs – the principles*" and the section entitled *What happens if I lose my case? Qualified one-way cost shifting (QOCS)*.

Do I need ATE insurance?

The introduction of QOCS means that the risk of losing and having to pay the winning party's costs has been significantly reduced but not completely removed (for example should you require to abandon your action). However, generally it is well advised to take out ATE insurance to cover the cost of your own expert fees and outlays as well as protecting you from any adverse costs orders made against you or any cost penalties you may incur as a result of failing to beat a Tender (the Scottish equivalent to a Part 36 offer in England) – see our leaflet "*Settling a clinical negligence claim*" and the section entitled *Part 36 offers to settle a claim*.

Be part of the movement for better patient safety and justice

Support AvMA's work today

You can help make healthcare safer and fairer for all

Our vision is a simple: **People who suffer avoidable medical harm get the support and the outcomes they need.**

This vision is underpinned by four objectives, we believe, will transform trust in the NHS and healthcare generally and significantly cut the cost – financial and human – which is incurred annually in settling legal claims as well as dealing with the human costs associated with traumatic medical injuries and death. Our four key objectives are:

- To expand the range of communities we serve and so enabling more people experiencing avoidable harm to access services from us that meet their needs
- To empower more people to secure the outcomes they need following an incident of medical harm, whilst providing caring and compassionate support
- To eliminate compounded harm following avoidable medical harm
- To have the necessary diversity of sustainable resources and capacities to deliver

Ongoing donation from as little as £5 a month could go a long way:

£5/month could provide vital advice to patients and families via our helpline

£10/month could help train a volunteer helpline advisor

£50/month could help support a family through an inquest hearing

Your help could make a real difference to patient safety in the UK

Please donate today at www.avma.org.uk/donate



AvMA is the charity for patient safety and justice. We provide specialist advice and support to people when things go wrong in healthcare and campaign to improve patient safety and justice.

For advice and information visit

www.avma.org.uk

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10am-3.30pm Monday-Friday
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