Funding options in clinical negligence claims

Once you have or are about to appoint a lawyer (hopefully, someone who is accredited by AvMA) 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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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.

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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.

Legal aid

Up until April 2013, legal aid was available for a range of potential clinical negligence claims. Legal aid was granted where clients were able to show that their claim appeared to have reasonable prospects of success and that they satisfied the legal aid financial 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, legal aid is now only available for claims involving babies who have sustained brain injury at birth. The requirements are:

- There is a neurological injury resulting in a physical and/or mental disability.
- The injury must have been caused by clinical negligence
- ***The negligence must have occurred whilst the individual was in the womb or during their birth or within eight weeks after their birth.***
- 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 instructing an AvMA accredited solicitor who is able to offer legal aid 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. That is an important consideration as it means the damages awarded are preserved and can be applied to the cost of caring and providing for the injured person for the rest of their life.

However, even if you can obtain legal aid, it can be difficult for lawyers to run your case because the Legal Aid Agency (LAA) 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 trust involved in the claim or private hospital and/or obstetrician 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, although not all solicitors do take a success fee so shop around. Any non-recoverable part of the ATE policy will also be deducted from your damages. This must be weighed against the benefit of having the freedom to choose the best available medico legal experts, which may in turn maximise the chances of your case succeeding.

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

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. 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 (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. See solicitors' guideline hourly rates below.

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 chances of succeeding are unclear. Once a solicitor has decided they will take the case on, they will usually invite you to enter into a Conditional Fee Agreement (CFA) with them – see below for more information.

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 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, 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 cover the cost of some further investigations to enable the solicitor to identify the prospects of the case succeeding, this may include obtaining a preliminary expert report. Once these additional investigations are complete you can expect the lawyer to decide whether they are prepared to do the work on a CFA.

How does a CFA work?

A CFA is 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 a contract. Like any contract, there are terms and conditions that need to be observed, so it is important that ***you read the CFA carefully***.

What does the agreement deal with?

Typically, the CFA will set out the terms of business agreed between you and your solicitor. You should read the agreement before you sign it. The terms of business include information such as the solicitor's basic charges, this will include the hourly rate charged by the solicitor, the success fee to be claimed and whether the solicitor is prepared to offer a cap on your overall costs (see *"Understanding legal costs – the principles"* and the section on *How much will be deducted from my damages?* (**www.avma.org.uk/wp-content/uploads/Costs-principles.pdf**).

The Law Society model CFA agreement is about twelve pages long, including a glossary of terms and three schedules, try not to be put off by this. You should pay particular attention to the following:

- **Schedule 1 – the success fee:** This schedule sets out what percentage will be charged by way of a success fee. The success fee is only payable if the solicitor resolves your claim either by way of settlement (before or after proceedings) or where you succeed at trial.

  The success fee is capped which means the amount of money that can be taken for the success fee is limited. The important bit to understand is that the success fee can never take more than 25% of compensation awarded for general damages (pain and suffering) and past losses. Note, not 25% of the total award of damages.

  The success fee includes any success fee payable to the barrister.
- **Schedule 2 – solicitors basic charges:** This schedule confirms the hourly rate you have agreed with your solicitor. The hourly rate may be reviewed at regular intervals and may increase from time to time, you will be notified of any increases.

  This section is important as it will also set out any cap for your overall liability to costs – please see *"Understanding legal costs – the principles"* and the section H*ow much will be deducted from my damages?* Remember, not all solicitors will include a cap on the overall liability to costs so look carefully for this information and if it is not included you can ask the solicitor to cap the costs, if they do not agree you can shop around and see what other firms may offer.
- **Schedule 3 – deals with your right to cancel the CFA.** This only applies in limited circumstance.

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.

Appeals:

If you decide to appeal a judgment then you will need to enter a new CFA with your solicitor. The appeal is a different action (not a clinical negligence claim) and as such the protection of a 25% cap on the success fee does not apply.

If you enter a CFA with your solicitor, you can expect to be advised to take out an After the Event (ATE) insurance policy. See below for more information.

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 with your solicitor, you will routinely be asked to take out ATE insurance. Since 2013, the ATE insurance will cover the cost of your liability and causation 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 payable for the experts report is recoverable from the other side, if you win your claim.

Prior to 2013, a claimant who lost their case against the opposing party or parties would be liable to pay their costs. However, in 2013, Qualified one-way cost shifting (QOCS) was introduced which protects the claimant 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 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, generally you are well advised to take out ATE insurance to cover the cost of your own liability and causation expert fees 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 Part 36 offer – see our leaflet *"Settling a clinical negligence claim"* and the section entitled *Part 36 offers to settle a claim*.

Who pays the ATE insurance premium?

If you take out an ATE insurance policy, you will be responsible for the cost of the insurance premium. If your claim is successful, then the opposing party will be responsible for paying the part of the premium that relates to cover for the liability and causation experts' fees – this is sometimes referred to as Part A of the policy.

The premium that relates to any additional benefits available under the ATE policy will not be payable by the other side. So, the part of the insurance premium which relates to adverse costs and part 36 penalties will be deducted from your damages. These additional policy benefits are sometimes referred to as Part B.

Damages based agreements (DBA)

Damages based agreements have been included for the sake of completeness, but they are rarely, if ever used in clinical negligence claims.

DBAs were introduced by the government in April 2013 but proved to be unsuited for use in clinical negligence claims. Recommendations have been made to the government to change the rules around DBAs so they become a more useful funding option but so far no significant changes have been made.

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.

Fixed recoverable costs (FRC)

This section has been included for information currently there is no fixed recoverable costs (FRC) regime for clinical negligence claims. However, the government has been considering this option for some years, we do not know if this will be introduced and if it is, exactly how it will work in practice.

If fixed costs are introduced, it will undoubtedly have an impact on you. A FRC regime will mean that your solicitor will no longer recover reasonable costs towards their hourly rate, instead they will only receive the rates fixed by the government. The fixed costs rates are expected to be much lower than the reasonable rates currently allowed.

The FRC regime will sit alongside the CFA agreement (it will not replace it). This means that you will still enter a CFA with your solicitor and agree an hourly rate as discussed above, however the lower rates of pay allowed under the FRC regime will mean the short fall between the contractual hourly rate and the fixed costs rate will increase and more money will be payable out of your award of damages to make up the difference. See our leaflet *"Understanding legal costs – the principles"* for more information on reasonable costs.

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