

MEDICAL NEGLIGENCE – METHODS OF FUNDING

Qualified One Way Costs Shifting

Before we explain about the various methods of funding it is important to set out the basics on qualified one way cost shifting (QOCS).

Since 1st April 2013 a cost protection regime was introduced for personal injury and clinical negligence claims. This provides protection to the claimant by limiting the costs that a claimant might have to pay to their opponent. This regime is called QOCS. QOCS only affects the costs that a claimant might have to pay to a defendant. A losing defendant remains liable for the claimant's costs in the usual way.

The effect of QOCS is that a losing claimant will not pay any costs to the defendant. It is however possible that a successful claimant may end up with a costs order made against them in certain circumstances (for example where the claimant does not accept and then fails to beat the defendant's Part 36 offer to settle or where the claimant is successful at trial on some issues but loses on others).

Where a claimant has recovered damages it is possible that those costs can be set off against any damages received by the claimant so that their damages will be reduced to the extent of the cost order made against them, leaving the claimant with nothing.

QOCS protection will be lost altogether if the claim is struck out or is found to be fundamentally dishonest. Where QOCS protection is lost the Defendant can ask that the claimant pay their legal costs and disbursements.

Before the Event Insurance & Trade Union Funding

Before the Event Insurance policies often cover legal expenses for funding cases such as this. They can be stand-alone policies but more typically are an add-on usually to household contents or other insurance policies. If you already have insurance in place this may negate the requirement for you to take out a "no win, no fee" agreement with insurance for which you will be responsible for part of the cost of that insurance and a success fee. LEI insurers usually however have panel solicitors whom they regularly instruct and they will not necessarily be local to you. You may not be allowed to choose your own solicitors unless legal proceedings need to be issued at Court. If you believe you may have the benefit of LEI you will need to contact the provider directly in order to confirm whether they are willing to fund your case.

You will need to make enquiries with your insurance provider. Please discuss this with us if you have any queries.

Most Trade Unions offer a legal assistance scheme to their members.

Conditional Fee Agreements (No Win, No Fee)

What Is No Win, No Fee?

A No Win, No Fee Agreement, otherwise known as a Conditional Fee Agreement is a method by which you can fund your claim for compensation if we consider that you have a higher than 51% chance of succeeding with your claim.

How much will it cost me?

If you win your case then, whilst you are responsible for our legal costs, we expect to recover those costs from your opponent. We will charge you a success fee if your claim is

successful. This will be assessed based on the overall level of risk. The success fee will be set with reference to a percentage of our base costs but this will be limited to not more than 25% of the amount of damages you recover in respect of your injury and past losses. We generally recommend that you take out a policy of insurance to cover the cost of your own disbursements (for which you are always responsible) and to protect you against the risk of having to pay your opponents costs in certain limited circumstances. You will be required to pay a contribution towards the total cost of the insurance premium in the event that your claim is **successful**. See the paragraph below on insurance.

What if I lose my case?

If you lose your claim you will not be required to pay our legal costs. You will, however, be responsible for payment of your own disbursements and in certain limited circumstances your opponents costs which is why we normally recommend you take out a policy of insurance.

After the Event Insurance

If we do take your case on a no win, no fee basis we would normally recommend that you take out a policy of insurance to cover your own disbursements. It also provides cover if a costs order is made against you (for example failing to beat a Defendant's offer to settle your claim or if an interim Costs Order is made against you). The policy will not cover you if the claim is struck out by the Court for being fundamentally dishonest or it is struck out for some other reason.

You will be responsible for payment of that element of the insurance premium that does not relate to the cost of obtaining medical reports (the Defendants pay this part of the premium and this is the most costly part).

The insurance will only be payable if your claim is successful. The policy is self-insured and no payment is required upfront. The payment will not be required in the event that you lose your claim.

Legal Aid

We do not hold a legal aid franchise in relation to clinical negligence but in any event public funding is now largely restricted to birth related neurological injury claims.

Private client

You would be liable to pay our costs win or lose. If your claim was successful we are likely to recover those costs from your opponent. If your claim is unsuccessful you would be liable to pay those costs and disbursements. You would therefore have to be able to afford to lose should you elect to pursue your claim as a private fee paying client. If successful, however, there would be no deductions from your damages (as compared to the no win, no fee agreements). This may be a funding option for a client with a very strong case and with sufficient funds to pay if the case was unsuccessful or in the event that a Cost Order was made (despite a win).

Damages Based Agreements (DBA's)

This is a form of contingency fee. The lawyer will deduct a percentage of your damages upon the successful conclusion of your claim. Your legal fees will only become payable if your case is successful.

The legal costs that are recovered from an opponent will belong to you. These costs will be off-set against the agreed contingency fee between the Solicitors and the client.

The contingent fee cannot be more than 25% of the amount recovered for your injury and the past losses.

We as a firm do not offer DBA's to clients. There is no obligation upon us to do so but other firms may offer that choice. We believe that DBA's are disadvantageous to clients that are likely to recover a large amount in damages, particularly if the claim is settled at an early stage as the fee bears no reference to the amount of work done.

They are disadvantageous to Solicitors in low value claims where a lot of work has been done to secure a settlement.

It would also be likely that you would have to take out a policy of insurance under a DBA agreement to protect you against the cost risk. I cannot advise you on how this insurance operates.