

FUNDING THE CLAIM

This is an important issue because we know that many people are understandably very worried about incurring legal costs. But there is no need to worry about costs.

Because of changes in the law that have been made over the last few years, solicitors are now able to be extremely flexible in offering clients a number of different options for funding their claims so that it is now possible for anybody, whatever their financial circumstances, to pursue a claim through the courts without taking any financial risk. Therefore, we can promise that we will find a way for you to pursue your claim, which will not require you to pay any money to anybody.

We are in fact willing to consider three methods of funding your claim:

- Public funding through the Community Legal Service (previously known as legal aid) where the State agrees to cover your risk of incurring legal costs.
- Conditional Fee Agreements (sometimes called no win no fee agreements) where we cover your risk of incurring legal costs.

Legal Expenses Insurance where your legal expenses are covered by an existing insurance policy that you may already have taken out (many people do not realise that they have this insurance).

A more detailed explanation of each of these options is given below. We will discuss all of them at our initial meeting with you and tell you which one is the best for you. It makes little difference to us whatever option you chose and if you choose a conditional fee arrangement you can be sure that whatever happens, you will never have to pay any more to anybody and you will receive 100% of your compensation.

Whatever else you decide, you should not ever be put off from pursuing your claim because of any worry about legal costs.

Public funding through the Community Legal Service (Legal Aid)

Depending upon your financial circumstances you may be eligible for public funding through the Community Legal Service (previously known as legal aid) in which event the Legal Services Commission will be responsible for all of our fees and expenses although you may be required to make a contribution, depending upon your financial circumstances. You will also largely be protected against any liability for the Defendants' legal fees and expenses should you lose the case.

In order to be eligible for public funding your financial circumstances (and in particular your income and your savings) must fall within certain set limits. These limits are not particularly generous and therefore most people who are not in receipt of Social Security benefits are not eligible.

If you are married or living with someone as a couple, the income and savings of your husband, wife or partner are taken into account by the Legal Services Commission when assessing your eligibility for Community Legal Service funding.

Children are assessed for Community Legal Service funding by reference to their own financial resources without regard to their parents' finances. This means that most children are within the financial limits for Community Legal Service funding.

You can check your eligibility for Community Legal Service funding by completing the self assessment questionnaire that is set out in Appendix 1 to this Guide.

If you are eligible for Community Legal Service funding and you choose to adopt that method of funding, we will prepare the necessary application forms for you to approve and sign. There will be one form that sets out details of your case and another that sets out details of your financial circumstances.

The Legal Services Commission will need to be satisfied from the information provided to them that your claim has reasonable prospects of success and that the likely costs are at least equal to the likely compensation that you will recover. If your potential claim relates to NHS treatment, they will also insist that you first pursue a complaint under the NHS Complaints Procedure before submitting an application for public funding.

The Legal Services Commission will also make an assessment of your means and they will then tell you the amount (if any) that they will require you to contribute towards the costs of the case. If you are on a low income with little savings you may qualify for free funding. If you are better off but still within the set limits for income and savings you may be required to pay a contribution towards the costs.

The Legal Services Commission may assess you as being required to pay a contribution towards the costs either because of the amount of your income or because of the amount of your savings. If the contribution is required because of your income you will be asked to pay a monthly sum, which you will have to continue to pay whilst you continue to receive Community Legal Services funding. If the contribution is required because of your savings you will be asked to pay it in one instalment right at the outset and before we will be allowed to start work on your case. If you fail to pay any contribution the Community Legal Service funding may be cancelled.

Once you have been granted Community Legal Service funding you will have a duty to disclose any change in your circumstance, including a change of address or financial means. If there is any increase in your financial means during the time that you are in receipt of Community Legal Service funding this may affect your entitlement to funding or the amount of any contribution you may have to pay towards the costs. Therefore, if there is any change in your circumstances, you will need to inform us so that we can tell the Legal Services Commission.

If you win your claim you will be awarded compensation that will be paid by the Defendants, who will also pay all of the legal fees and expenses. The Legal Services Commission will also repay to you any money that they may have required you to pay to them as a condition of receiving Community Legal Service funding. Therefore, you will pay nothing and receive 100% of your compensation.

On the other hand, if you lose your claim the Legal Services Commission will retain any money that they may have required you to pay to them as a contribution of receiving Community Legal Services funding. You may also be required to make a payment towards the Defendants' costs but your liability for those costs will be limited to what the court considers to be a reasonable amount for you to pay taking all the circumstances into account, including the means of all the parties and their conduct in connection with the dispute. In this respect, Community Legal Services funding is less attractive as a funding option than a conditional fee agreement (see below) because with conditional fee funding you will never have anything to pay to anybody, whether you succeed in your claim or not.

Conditional fee agreements

Under a conditional fee agreement solicitors agree to take on a claim on the understanding that if the claim is lost they will not charge any fee for the work that they have carried out. In exchange the client agrees that if the claim is successful the solicitors will be paid a success fee on top of their normal fee to compensate for the risk that they have run for not being paid any fee at all. That success fee is calculated as a percentage of the solicitors' normal fee (not as a percentage of the compensation that is awarded) and the level at which the success fee is set should reflect the risk involved. However, it is important to note that the client does not in fact pay the success fee because it is paid by the Defendants if the case is successful and it is not paid at all if the case does not succeed.

These agreements are sometimes described as "no win no fee" agreements and whilst that is correct it is important to recognise that the no fee element relates only to the solicitors' fees and does not cover the ancillary expenses of the claim (sometimes called disbursements) such as the court fees, the medical experts' fees and the barristers' fees. They still have to be paid even if the claim is lost and the client is also liable for the Defendants' solicitors' fees and expenses if the claim is lost. However, the risk of losing the claim and becoming liable for the client's own solicitors' expenses and the Defendants' solicitors fees and expenses can in fact be covered by insurance so that the client can avoid taking on any financial risk at all.

This all means that if you enter into a conditional fee agreement with us in conjunction with an insurance policy we will be able to promise you that whatever happens you will never have to pay us any money, you will never have to pay anybody else any money and you will receive 100% of your compensation.

The way the scheme works in detail is as follows:-

We have negotiated an exclusive arrangement with a specialist insurance company namely Temple Legal Protection Limited.



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If we take on your claim on a conditional fee basis they will provide insurance cover for you in order to protect you against any liability for both our expenses and the Defendants' solicitors fees and expenses should the claim fail. You do not need to insure against any liability for our fees because we will not charge any if your claim does not succeed. Similarly, Temple Legal Protection Limited will not pay out under the policy if you win because in that event you will be able to claim our fees (including the success fee) and our expenses from the Defendants.

A specimen copy of the policy document is set out in Appendix 2 to this Guide.

The initial indemnity limit under the insurance policy will be £100,000 for which obviously there will be a premium but you will not need to pay it because Temple Legal Protection Limited will not require the premium to be paid until the claim has finished. If the claim is then successful the premium will be paid by the Defendants and if it is unsuccessful it will not be paid at all because Temple Legal Protection Limited will treat it as one of the expenses that you will have incurred in connection with the claim and will therefore treat it as having been covered by their insurance. Clients often ask us how in that event can the insurer make a profit. The answer is that they will do so from the claims that succeed.

As the claim proceeds we will pay the various expenses that will need to be incurred in order to progress the claim. These can be quite considerable amounting to as much as £30,000 (or possibly more) should the claim have to go to a full court trial. We will not make any charge to you for doing this and will not require repayment until the conclusion of the claim when if unsuccessful Temple Legal Protection Limited will repay us and if successful the Defendants will repay us. Therefore, whether your win or lose you will not have to repay us.

If, having completed our investigation of your claim and having obtained expert reports we have to advise you that you do not have reasonable grounds for pursuing it through the courts, we will cancel the conditional fee agreement and not charge any fee for the work that we will have carried out for you. Temple Legal Protection Limited will repay us the expenses that we will have incurred and they will also treat the insurance premium as having been one of the expenses that were covered by their insurance policy. Consequently you will have nothing to pay.

If on the other hand we advise you following completion of our investigation that you have a good claim we will write a letter of claim to the Defendants in the hope that they will admit liability. If they do we will be able to negotiate a settlement of your claim under which the Defendants will agree to pay an appropriate sum for compensation together with your legal fees and expenses including the success fee and the insurance premium. You will have nothing to pay and will receive 100% of your compensation.

If the Defendants refuse to admit liability following receipt of the letter of claim it will be necessary to issue and serve court proceedings in order to pursue your claim. It is only from that point that you will begin to be potentially liable for the Defendants' legal costs of the case if you fail to win but if that happens your liability for those costs will be covered by the insurance.

If following the issue and service of court proceedings the Defendants continue to refuse to make a satisfactory offer of settlement and provided we remain of the view that you have reasonable prospects of success we will take your case to a full trial so that your claim can be decided by a Judge. If it becomes necessary to have a trial the insurance cover may need to be increased beyond £100,000 and in that event an additional premium will become payable but, as previously, Temple Legal Protection Limited will defer payment until the claim has been concluded so that you will not have to pay it.

Should it become necessary to abandon your claim after proceedings have been issued and served on the Defendants (which rarely happens) or should the claim go to a trial and lose (which does not happen very often) you will owe nothing. Temple Legal Protection Limited will meet any liability that you may have to the Defendants in respect of their legal fees and expenses and they will also repay us the expenses that we will have incurred. They will also treat the insurance premiums as having been one of the expenses that were covered by their insurance policy. Therefore, you will have nothing to pay.

If, on the other hand, your case is successful, either because the Defendants eventually agree to settle or you win at trial, you will be awarded compensation to be paid by the Defendants who will also be ordered to pay your legal fees and expenses including the success fee and the insurance premium. You will have nothing to pay and will receive 100% of your compensation.

Therefore, we can promise you that whether you win or lose, if your claim is funded by a conditional fee agreement backed by an insurance policy from Temple Legal Protection Limited:-

- You will never have to pay us any money.
- You will never have to pay anybody else any money.
- You will receive 100% of any compensation that you are awarded, without any deductions whatsoever.

Appendix 3 to this Guide sets out a specimen of the Agreement that we will ask you to sign if we agree to take on your claim under a conditional fee agreement.

Legal expenses insurance

It is not uncommon for people to have legal expenses insurance either as a stand alone policy or more commonly as an extension to a motor insurance policy, a home buildings and/or contents policy or a professional or trade indemnity policy. If you have insurance of this nature, your legal expenses insurers may agree to meet our fees and expenses and those of the Defendants up to an indemnity limit, which is usually £10,000, £25,000 or £50,000.

You should therefore check all of your existing household, buildings, contents, motor and other insurance policies (and those of your immediate family who are living with you) because it often happens that our clients do not realise that they have this insurance cover until we suggest that they check. Please then bring them all to your initial meeting with us so that we can check whether or not any of them include legal expenses insurance cover and if so whether that cover will be appropriate and sufficient for your claim. It is important that we make this check for you at the outset because the law does not permit us to apply for legal aid or offer you a conditional fee agreement until we have done so.

If you have a legal expenses insurance policy, the insurance company will cover both your own legal costs and those of your opponent but there are a number of restrictions and other disadvantages with these policies that you need to be aware of, because they may mean that this will not necessarily be the most appropriate way for you to fund your claim.

Firstly, whatever form of funding you choose, you need to be sure from the very outset that you have sufficient funding to take the claim through to a full court hearing if necessary, but that can be a problem with legal expenses insurance funding because these policies were never designed to fund clinical negligence cases. They are really intended to cover more straightforward personal injury and non accident claims. Because of this they always have “an indemnity limit”, which stipulates the maximum sum that the insurers will be willing to pay out under the policy and although different policies have different indemnity limits we are not aware of any policy that provides an indemnity limit in excess of £50,000. However, that is insufficient to take a clinical negligence case to a full court hearing because the total of both your own legal costs and those of your opponent if the claim should lose could easily be £130,000 or even more. Therefore, if a clinical negligence claim is pursued relying on legal expenses insurance funding, the solicitor will have to arrange some other form of “top up” funding should the Defendants resist the claim and it becomes necessary to take it to a court hearing. The problem with this is that it may not then be possible to arrange alternative funding at that late stage. For example, even if the solicitor is willing to switch to a conditional fee arrangement (and not all solicitors will be willing to do that) there is no certainty that an insurance company will be willing to support it with insurance cover. That is not a theoretical possibility but something that actually happens. Unfortunately, when it does happen the client is forced to abandon the claim even though it may still have the support of medical experts and the client’s solicitor and barrister still believe that it can succeed.

Another disadvantage of using legal expenses insurance is that the insurer will wish to control the way in which the claim is investigated and pursued. For example, permission will have to be obtained before the insurance company will agree to the solicitor instructing experts and they sometimes restrict the number and type of experts who can be used. This is because the insurers want to limit their financial outlay as much as possible.

The insurance company will also retain the right to withdraw cover at any time if they form their own opinion that the claim no longer has reasonable prospects of success. They can take this view and withdraw cover even though the client may want to continue with the claim and the solicitor, barrister and medical experts all still believe that it may succeed.

There are also concerns that the use of these policies can jeopardise the independence of the solicitor and create conflicts of interest between the solicitor and the client. This is because legal expenses insurers have panels of solicitors firms who they encourage clients to use.



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In fact they often try to insist that the client uses a solicitor from their panel rather than a solicitor of the client's own choice, although there is some uncertainty as to whether they have the legal right to do that. Many people assume that the insurance companies appoint solicitors to their panel because of the quality of their work. That is not the case. They choose solicitors with whom they have negotiated low rates of pay so that they can save money. There are also persistent rumours, which have not been denied, that some legal expenses insurance companies "sell" claims to solicitors, who pay for each one that is referred to them. This means that the insurer chooses the solicitors who will give them the best financial deal rather than the solicitors with the highest quality standards. For this reason you should never use a legal expenses insurance policy to fund your claim unless the insurance company gives you a free choice of solicitor.

Even if the insurance company will let you use a solicitor of your choice, there may still be a potential conflict of interest between your own interests and those of the solicitor if the solicitor has an ongoing relationship with that insurance company under which they send them new clients. This is because the solicitor will not want to upset the insurers and jeopardise that relationship. Under Law Society rules you are entitled to know if your solicitor has any sort of relationship with the insurer who is funding your claim and you should therefore ask the solicitors if they ever have work of any description (not just clinical negligence cases) referred to them by that insurer.

We value our independence and are not willing to risk compromising it by accepting cases that are referred to us by an insurance company. We are most certainly not willing to permit any insurance company to tell us how we should run our cases for our clients and therefore we do not accept clients or cases that are referred to us by any insurance company.

APPENDIX

FINANCIAL ASSESSMENT QUESTIONNAIRE FOR COMMUNITY LEGAL SERVICE FUNDING FOR CLINICAL NEGLIGENCE CASES

The following calculation should give you a rough idea as to whether you qualify financially for Community Legal Service Funding. By following the steps below you can see if both your income and savings qualify you financially.

INCOME: DO I QUALIFY?

Step 1: Do you have a partner whose means should be included in the assessment?

If you are married or living with someone as a couple, your partner's capital and income will be included unless you live apart because your relationship is over.

Step 2: Are you receiving income support or income-based jobseeker's allowance?

If you are in receipt (either directly or indirectly) of income support, income-based jobseeker's allowance, income based employment and support allowance or guarantee credit you are eligible on income for all levels of service. If you are not in receipt of one of these benefits, move on to step 3. Other types of benefit, such as Working Tax Credit and Child Tax Credit, do not give automatic entitlement.

Step 3: Work out monthly gross income

Add together your monthly gross income (i.e. before tax) and that of your partner if appropriate.

Income includes:

- earnings or profits from business
- maintenance payments
- pensions
- all welfare benefits (excluding council tax benefit and housing benefit)
- income from savings and investments
- dividends from shares
- money received from friends and relatives
- student grants and loans

Gross monthly income

£ _____

Normally you will not qualify for funding if your gross income is more than £2,657. However, if you have more than four dependent children, for each extra child you are allowed £222 more gross income. So if you have six children, your gross income can be $£2,657 + £222 + £222 = £3,101$.

Step 4: Work out deductible allowances and expenses

Deduct the following from your monthly income:

- Income tax
- National Insurance contributions
- Maintenance payments made by you
- £45 for you and/or partner in respect of salary or wage
- child care expenses incurred because of work
- housing costs:
 - rent or mortgage repayments (less any housing benefit), although the amount allowed if you have no dependents is limited to £545
 - endowment policy premiums (if paid in connection with a mortgage)
 - actual costs of accommodation if you are neither a tenant nor an owner-occupier

- fixed amounts for each dependent relative (adult and child) living with you. The monthly amounts of allowances for dependants are:
 - £159.25 for a partner
 - £243.81 for each child aged 15 or under
 - £243.81 for each child aged 16 or over

- the full amount of any of the following welfare benefits: attendance allowance, disability living allowance, constant attendance allowance, invalid care allowance, severe disablement allowance, exceptionally severe disablement allowance, war and war widows pensions, independent living fund payments, fostering allowance (to the extent it exceeds the relevant dependent's allowance), back to work bonus under section 26 of the Job Seeker's Act 1995, payments made under the Earnings Top-up Scheme and Payments under the Community Care Direct Payment Scheme.

Note that no other deductions may be made

Total deductions £ _____

Step 5: Work out monthly disposable income

Monthly gross income (see step 3) £ _____

Minus
Deductions (see step 4) £ _____

To give
Monthly disposable income £ _____

Step 6: Does your monthly disposable income qualify you for funding?

You will not get funding if your disposable income exceeds £733 per month.

If your disposable income is below this limit then you qualify for funding but you may have to pay a contribution from income (see step 10 below).

Step 7: Work out your capital

Add together all your capital and that of your partner, if appropriate.

Capital includes:

- all land and buildings other than your home, including interests in timeshares, and the market value of your home in excess of £100,000 after allowing for any outstanding mortgage but only up to £100,000. A maximum of £100,000 is allowed in respect of all mortgages on all your properties
- money in the bank, Building Society, premium bonds, Post Office, National Savings certificates, etc. investments, stocks and shares
- money that can be borrowed against the surrender value of insurance policies
- money value of valuable items, for example, boat, caravan, antiques, jewellery(but not wedding or engagement rings or usually your car)
- money owing to you;
- money due from an estate or Trust Fund;
- money that can be borrowed against business assets;

Do not include:

- loans or grants from the Social Fund
- back to work bonus under section 26 of the Job Seekers Act 1995;
- home contents, for example (unless exceptionally valuable) furniture and household effects
- personal clothing
- personal tools and equipment of trade
- payments under the Community Care Direct Payment scheme
- savings, valuable items or property the ownership of which is the specific subject of the court case; for example, a holiday cottage would normally count but not if it was under attack as part of a disputed divorce settlement.

Total disposable Capital £ _____

Step 8: Does your disposable capital qualify you for funding?

You will not get funding if your disposable capital exceeds £8,000 unless the Commission considers the probable costs would exceed the contribution payable (see step 9).

If your disposable capital is below these limits then you may qualify for funding but you must have your income assessed (see steps 3 - 5 above). You may also have to pay a contribution from capital (see step 9 below).

Step 9: Work out the size of your likely capital contribution

If your disposable capital is £3,000 or below you will pay no capital contribution for any level of service.

If your disposable capital exceeds £3,000 you will have to pay a capital contribution as follows:

| | |
|---------------------------------------|-------------|
| Total disposable Capital (see step 7) | £ _____ |
| Deduct | £3,000.00 |
| To give | |
| Capital contribution | £ _____ |

Pensioners on low incomes are allowed capital disregards for some forms of Legal Representation.

| Monthly disposable income (excluding net income derived from capital) | Amount of capital disregarded |
|---|-------------------------------|
| up to £25 | £100,000 |
| £26 - £50 | £90,000 |
| £51 - £75 | £80,000 |
| £76 - £100 | £70,000 |
| £101 - £125 | £60,000 |
| £126 - £150 | £50,000 |
| £151 - £175 | £40,000 |
| £176 - £200 | £30,000 |
| £201 - £225 | £20,000 |
| £226 - £272 | £10,000 |
| Over £272 | nil |

Step 10: Work out amount of contribution from income

If your disposable income is £315 per month or less you will pay no income contribution for any level of service. If your disposable income exceeds £316 per month you will have to pay a monthly contribution from income. Such contributions will be assessed in accordance with the following bands depending on the level of assessed income:

| Band | Monthly Disposable Income | Monthly Contribution |
|------|---------------------------|--|
| A | £316 to £465 | 1/4 of income in excess of £311 |
| B | £466 to £616 | £38.50 + 1/3 of income in excess of £465 |
| C | £617 to £733 | £88.85 + 1/2 of income in excess of £616 |

So if disposable income was £351 per month, the contribution would be in band A, the excess income would be £40 (£351 - £311) and therefore the monthly contribution would be £10 per month.

If the disposable income was £480 per month, the contribution would be in band B, the excess income would be £15 (£480 - £465), and the monthly contribution would therefore be £43.50 i.e. £38.50 + £5.

If the disposable income was £636 per month, the contribution would be in band C, the excess income would be £20 (£636 - £616), and the monthly contribution would therefore be £98.85 i.e. £88.85 + £10.

Step 11: Work out total initial contribution

Add together:

Monthly Contribution (see step 10) £ _____

and Capital Contribution (see step 9) £ _____

To give

Total Initial Contribution £ _____