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Briefing Note: Personal Injury – Funding Options & Preliminary Matters

Introduction

This note provides a summary of the different funding options available to fund civil litigation in the context of a contemplated personal injury claim, including a claim due to injury caused by clinical negligence. It also deals with other relevant, preliminary matters.

When a new client contacts our personal injury department, our first concern will be to establish whether there are adequate grounds for bringing a claim.

The next step is to identify the most suitable method of funding the claim. There are a number of different ways of funding a personal injury claim and these are set out below.

This guide should not be relied upon as legal advice and we will discuss your specific circumstances with you to determine the most suitable funding arrangement for your claim. The remainder of this briefing note is set out under the following headings:

- Assessing a Proposed Claim
- Funding Options
- Other Preliminary Matters
- Overview of the Litigation Process

Briefing Note

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Summary:
A short summary on the various funding options available to a prospective Claimant in a contemplated personal injury claim, including other preliminary matters to be considered.

For detailed advice on all personal injury matters including clinical negligence please contact:

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Assessing a Proposed Claim

Establishing Liability – Is Someone Else to Blame?

Bringing a successful claim for compensation for personal injury is dependent on establishing that the other party was at fault. In order to determine whether this will be possible, it is crucial that we obtain sufficient information from you about the circumstances of your accident or the medical treatment which you received. We will also establish whether you have already obtained an admission of liability.

Quantum – How Much Might the Claim Be Worth?

Once we are satisfied that there are good prospects of establishing that the other party is liable, or that an admission of liability has already been obtained, we have to investigate and assess the amount of damages which you may be entitled to. This is often referred to as the "quantum" of the claim. There are two distinct categories of damages:

- **General Damages**

  General damages means the amount of money awarded by a judge (or agreed by your opponents) to compensate you for the pain and suffering you have experienced and continue to experience. It also reflects any resulting physical or mental disability and the restrictions that this imposes on your way of life. At the appropriate time we will obtain medical evidence to establish the nature of your injuries and their effects on you. Once we have the medical evidence we need, we will set about assessing what we consider to be the value of your claim for general damages. There are no set figures for general damages but they are assessed by reference to guidelines released by a panel of judges and to previous court awards in cases of injuries and future restrictions similar to your own.

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- **Financial Losses (sometimes referred to as 'Special Damages')**

  You may be entitled to recover the out of pocket expenses and financial losses that you have incurred so far and may incur in the future. Often the most valuable items of claim are for lost earnings, damages to reimburse you for care and assistance (you may be able to be compensated even if this has been provided by a friend or relative at no cost to you) and medical expenses.

  Other examples of typical items which can be claimed for include damaged clothing or other property, prescription charges and travelling expenses. It is important for you to appreciate when you incur any expense that you will only be entitled to recover reimbursement for expenses which are reasonably and properly incurred, supported (where appropriate) by medical evidence and are necessary as a result of your injury. You should keep a careful note of all out of pocket expenses and you should keep all your receipts and invoices in a safe place, so as to help us prove these claims later on.

  You should be aware also that you have a duty to "mitigate your loss", which means that you must take reasonable steps to keep your losses to a minimum. A good example is that where your injury has prevented you from working, you will be expected to take reasonable steps to resume your pre-accident employment or to obtain suitable alternative employment when your condition allows and as soon as reasonably possible.

  Most state benefits received as a result of your injury are repayable to the Department for Work and Pensions. The regulations for recovery of benefits are complex and will be explained to you as the need arises.

Funding Options

There are a number of different ways of funding a personal injury or clinical negligence claim and details of these are set out below. We will discuss your specific circumstances with you to determine the most suitable funding arrangement for your proposed claim.

Pay as you go

You may instruct us on the same basis as any other litigation client, paying our charges at agreed hourly rates. The amount that you will be charged will be determined by the number of hours spent working on your case. We are likely to ask you to pay us money on account of our charges during the course of the claim and to pay for any disbursements before they are incurred. Under this arrangement you pay only for the time we spend on your case. There will be no success fee to pay if you win your case, and you will still have to pay if you lose.

Pre-Existing Legal Expenses Insurance

We have asked you to check whether you have the benefit of legal expenses cover under an existing policy such as Before the Event legal expenses insurance through your home, contents, motor or other insurance policies and have requested that you provide copies of existing policies of insurance for us to check through. If you do, this could cover the cost of bringing your claim.

Therefore, if you have not already done so, please do conduct a careful search for all your insurance policies and send them to us for checking. If your injury arose while you were a passenger in a motor vehicle please also check with the driver whether their motor insurance included legal expenses cover. If you have identified such cover, please notify us immediately.

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Trade Unions or Other Funders

Some organisations such as trade unions include in the benefits they provide to members cover for the legal fees involved in bringing personal injury claims. If you are a member of a trade union or other similar organisation you should provide us with the details of your membership so that we can contact the organisation and request that they provide you with an indemnity in relation to the legal fees for your claim.

Conditional Fee Agreement (CFA)

Conditional Fee Agreements, often referred to as CFAs, are also commonly known as "No Win, No Fee" agreements. Under a CFA you are likely to pay nothing up front and nothing at all if you lose your case. If we act for you under a CFA, our charges are based on a case management fee and then the amount of work done under our standard hourly rates, but we are also entitled to a success fee (where your claim is successful) to reflect the various risks associated with this type of funding.

The CFA which we offer conforms with regulations enacted by the government relating to this type of agreement. Under these regulations, we are obliged to explain how the CFA works and how it affects you before you decide to enter into it.

The CFA is an agreement between you and this firm which covers your proposed claim against your opponent in respect of a personal injury which you suffered, whether as a result of a specific accident or clinical negligence which occurred when you were receiving medical treatment from a medical professional.

We will provide you with an opportunity to read our CFA carefully to ensure that you fully understand all aspects of it before deciding to enter into it, and we will be happy to answer any questions you may have in relation to the CFA.

- **Paying us under a CFA**

  If you win your claim, you will pay our basic charges, our expenses and disbursements and the success fee. It is likely that you will be able to recover part of these costs from your opponent. We will seek to recover as much of your costs as possible from your opponent but your opponent is not responsible for the payment of our success fee nor, save in some limited circumstances, the premium of any After the Event legal expenses insurance policy you take out. Our success fee, inclusive of VAT, is capped, and by law cannot exceed 25% of your compensation (excluding any award for future financial expenses). You 'win' your case and become liable to pay our success fee when you get a final court decision or reach an agreement with your opponent for the payment of damages to you.

  Please note that in certain types of cases, the fees that we can recover from your opponent towards our basic charges are fixed. This means that the amount you will be required to pay towards our basic charges will be higher than in cases where the recoverable fees are not fixed. Further, we will settle the balance of our basic charges (i.e. the amount we do not recover from your opponent) from your compensation. This is in addition to our success fee. In fixed fee cases where Sections IV, V and VIII of Part 45 of the Civil Procedure Rules apply, we apply an overall cap on the amount we will take from your compensation of 35%. We will tell you if this applies to your case.

  If you lose your claim, you will only be liable to pay us for the disbursements which we have incurred on your behalf. In view of this risk, we will require you to take out an insurance policy in your name which adequately insures you against this risk and which, subject to compliance with the terms of the

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relevant insurance policy, will mean that your liability to pay the disbursements will be met by the insurers.

- **Opponent's legal charges**

In most litigation, if you lose your claim, you are likely to be made liable for your opponent's charges and disbursements. However, in cases arising from accidents or medical negligence, even if you lose your claim you will not have to pay any costs to your opponent except in specific circumstances. We will advise you of any such circumstances which may apply but broadly they are:

(i) you win your claim, but your claim includes an unsuccessful non personal injury element, and there is an order for costs against you of that unsuccessful element;
(ii) your claim, or an element of it, is made for the financial benefit of someone other than yourself;
(iii) your claim is found to be fundamentally dishonest by the court, or it is struck out by the court for some other reason;
(iv) you have not accepted a formal offer (known as a Part 36 Offer) made by the defendant to settle your claim and you then fail to better that offer at trial.

Where any of the above apply, and in some other limited circumstances, you could be liable to pay some or all of your opponent's legal costs and disbursements. In view of this risk, the insurance policy we will require you to take out in your name will mean that, subject to compliance with the policy terms, your liability to pay will be met by the insurers.

- **Ending the CFA**

You may end the CFA at any time. If you do end the CFA before the conclusion of the claim you are liable to pay our basic charges and disbursements. In such circumstances, we have the right to defer our charges to the end of the case and if your case succeeds we will be entitled to our success fee as well.

We may end the CFA if:

(i) you do not keep to your responsibilities, as set out in the CFA (and we can then ask you to pay our basic charges and disbursements or agree to defer them to the end of the claim);
(ii) we believe that you are no longer likely to win your claim (if so, you will only be responsible for our disbursements); or
(iii) you reject our opinion about making a settlement with your opponent.

- **Our basic charges**

Our basic charges are calculated in two ways, a case management fee at a set rate and then based on hourly rates. The details of these rates are set out in the CFA.

- **Success Fee**

The CFA contains a success fee. We are entitled to charge a success fee which is a percentage increase in the basic charges (excluding our case management fee). The success fee reflects the risks that we take, including the following:

(i) that if you lose we will not be paid at all;
(ii) that if you win we will not be paid our fees until the claim has been concluded;

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(iii) that we will usually fund the expenses or disbursements in your case until the end of the claim.

The success fee cannot be more than 100% of the basic charges in total and cannot legally exceed, inclusive of VAT, 25% of the total of that part of your compensation award which relates to pain, suffering and loss of amenity and your financial expenses other than future financial expenses. We will explain the basis of the success fee we propose to charge in your specific case before the case begins.

You are responsible for paying the success fee. You cannot recover this from your opponent. For clarity, the success fee is a percentage increase in our basic charges (excluding our case management fee) and is ***not*** a percentage of the compensation you are awarded.

Damages based agreements

A damages based agreement is an agreement whereby you do not pay us on an hourly rate but agree to pay us a percentage of your damages if you win your claim. The maximum amount that we can charge you, inclusive of VAT and Counsel's fees, is 25% of your damages. We would of course set against those charges any legal fees that we were able to recover on your behalf from the defendant. We do not currently offer representation on this basis, but include it in this Briefing Note for completeness and so that you may consider options which may be available to you with other solicitors.

Legal Aid

A claimant can obtain legal aid funding only by consulting a member of the Community Legal Service ("**CLS**"). We are not a member of the CLS, and therefore if you wish to establish whether you are able to fund your claim via legal aid you will need to instruct a firm with the relevant membership.

Legal Aid Agency guidance on the means and merits criteria which will be applied, and must be met, for an application for legal aid and exceptional funding is available at: www.gov.uk/work-out-who-qualifies-for-civil-legal-aid and www.gov.uk/civil-legal-aid-means-testing.

Other Preliminary Matters

Rehabilitation

Insurers and solicitors who deal with personal injury claims have a duty under the Rehabilitation Code to consider at an early stage whether you would benefit from medical treatment or rehabilitation. We will discuss this with you to establish whether you need any such assistance and we will seek to get the insurers to pay for it, if you need it. This could be something very simple, such as arranging for you to have physiotherapy more quickly than would be the case on the NHS, or, in a more serious case, could involve a comprehensive assessment of your needs and the provision of a full rehabilitation package funded by the third party insurers.

State Benefits and Personal Injury Trusts

Settlement of a personal injury claim by payment of a lump sum may affect entitlement to means-tested state benefits. At the conclusion of the claim, your settlement can be placed into a "Personal Injury Trust" which has the effect of "ring-fencing" the damages so that you do not lose means tested benefits. If you are in receipt of means tested benefits we will discuss with you whether a Personal Injury Trust would be appropriate in your case. If you decide that you want to use a Personal Injury Trust to protect your means-tested benefits, it must be set up before you receive your compensation. Please note that personal injury trusts cannot be set up for claims involving fatal accidents.

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Important Information after Road Traffic Accidents

- **Reporting to Police**

  If you have been driving a vehicle that has been involved in a road traffic accident, you may have had to report the accident to the police. You should keep a record of the report as you may need to produce this record if it transpires that the other driver did not have valid insurance.

- **Reporting to Your Insurers**

  You should report the accident to your own insurers as soon as possible. Even if your policy is third party, the accident should be reported in case the other party makes a claim against you.

- **Vehicle Damage**

  Any claim you have arising out of damage to your vehicle will normally be dealt with by your insurers and we recommend that you liaise with them in the first instance. We do not normally accept instructions in connection with vehicle damage and related losses. There are, however, some circumstances where we will do so, and we will discuss these with you if they apply in your case.

Overview of Litigation Process

Once you have formally instructed us to have conduct of your proposed claim, we have agreed that we can act in the matter, and the required amount of evidence, including medical evidence, has been gathered, we will send a detailed letter of claim to (i) the other party or parties which you believe were at fault, or (ii) to the relevant insurance companies. This letter of claim will set out why we believe that the other party or parties are to blame for your injuries.

Once notification of a claim has been given, we will await a response from the insurance company on the issue of liability in a timeframe dependent on the type of notification given. A response is not immediately required, and therefore you should expect a delay of several months during which the other parties prepare their formal response. If the relevant insurance company refuses to accept liability they should give reasons, with supporting documents where relevant. We will then advise you how to proceed in the circumstances.

Sometimes liability is 'split', where both you and the other party are found partly to blame. This does not mean that a claimant automatically loses the entitlement to damages. However, in those circumstances a claimant might receive only a percentage of his or her full damages.

Compliance with Court Rules and Orders

Although we will use our best efforts to reach a reasonable settlement of your claim without the need for court proceedings, it is often necessary for us to start such proceedings. It is therefore essential that you are fully aware of the court's requirements in terms of compliance with orders and, in particular, time limits.

The courts expect claimants to comply fully with all court rules and orders made by them. The courts apply extremely severe penalties against parties who break court rules of breach court orders. What this means is that if rules are broken or court orders breached it is quite possible that the court will strike out all or part of the claim meaning that no or reduced compensation will be recoverable, and that you may become liable to pay your opponent’s costs.

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The most obvious and common example of how a court order may be breached is by the failure to take a certain step or provide a certain document by the date the party was ordered to do so. To enable us, on your behalf, to comply with all court rules and court orders it is essential that you co-operate fully with us at all times, keep in regular contact and respond urgently to any requests that we make to provide instructions, information or documentation.

As referred to above, breaches of rules and orders often occur due to delay. The court will impose strict and tight deadlines on the time in which a claimant must take certain steps, such as providing a list of all relevant documents, serving witness statements and serving medical evidence. We depend on you, and being able to contact you promptly for instructions, to make sure that we are in a position to comply with the court's requirements. If you delay providing the necessary instructions, information or documents or do not co-operate with us or your opponent, for example, by failing to attend at medical appointments, resulting in a rule or order being breached, it is very likely that the court will strike out all or part of your claim. The Court may also order that you pay all or part of the defendant's legal fees and/or disallow your claim for payment of our legal fees from the defendant. You will be personally liable for such costs and if the reason for such a costs order being made is your delay or lack of co-operation then it is likely that if you have legal expenses insurance your insurers will refuse to indemnify you.

In some cases the court may stop short of striking the whole case out, but may make an order which has the effect of seriously reducing the value of your claim. An example of this would be the court refusing permission to rely on a medical report because of late service of the report.

This makes it essential that you co-operate fully throughout the course of your claim, but this is particularly important once your case is in court proceedings to enable us to manage it effectively and to bring it to a satisfactory conclusion as efficiently and quickly as possible.

Statements of Truth

Court rules require that a number of important court documents will need to be verified by you as true by your signing of a statement of truth.

Signing a statement of truth to verify any document is a serious matter and you must only sign the statement of truth when you have read through the contents of the document that you are signing very carefully to ensure that the contents of the whole of the document are true. If this is not the case then you must discuss the document with us before signing the statement of truth.

You should note that proceedings for contempt of court may be brought against a person who makes a false statement in a document verified by a statement of truth without an honest belief in its truth.

How long your case could take

Personal injury and clinical negligence claims can take a significant time to resolve. When we discuss your proposed claim with you, we will discuss our view of the likely timescales involved but please be aware that these will only act as a rough guide. We will try to resolve your case as quickly as possible, but please remember that there will often be many factors out of our control. How long your specific case might take is determined by factors such as:

- the seriousness of the injuries which you have sustained, and the length of time required for your level of recovery to be accurately determined;
- whether your opponent is disputing liability; and
- the level of cooperation and responsiveness which we encounter from other parties to the claim.

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Limitation

For your information, if court proceedings are necessary they must be issued by a certain date failing which the right to bring a claim may be lost. Normally, under English law this date is three years from the date of the accident. In some circumstances the period is two years. The limitation period does not begin to run where the Claimant is a child, until the child is 18, and there is no limitation period for a Claimant who does not have the requisite mental capacity.

If you would like to know more about this topic or our legal services, please contact Iona Smith on 01323 435986 or iona.smith@gabyhardwicke.co.uk.

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