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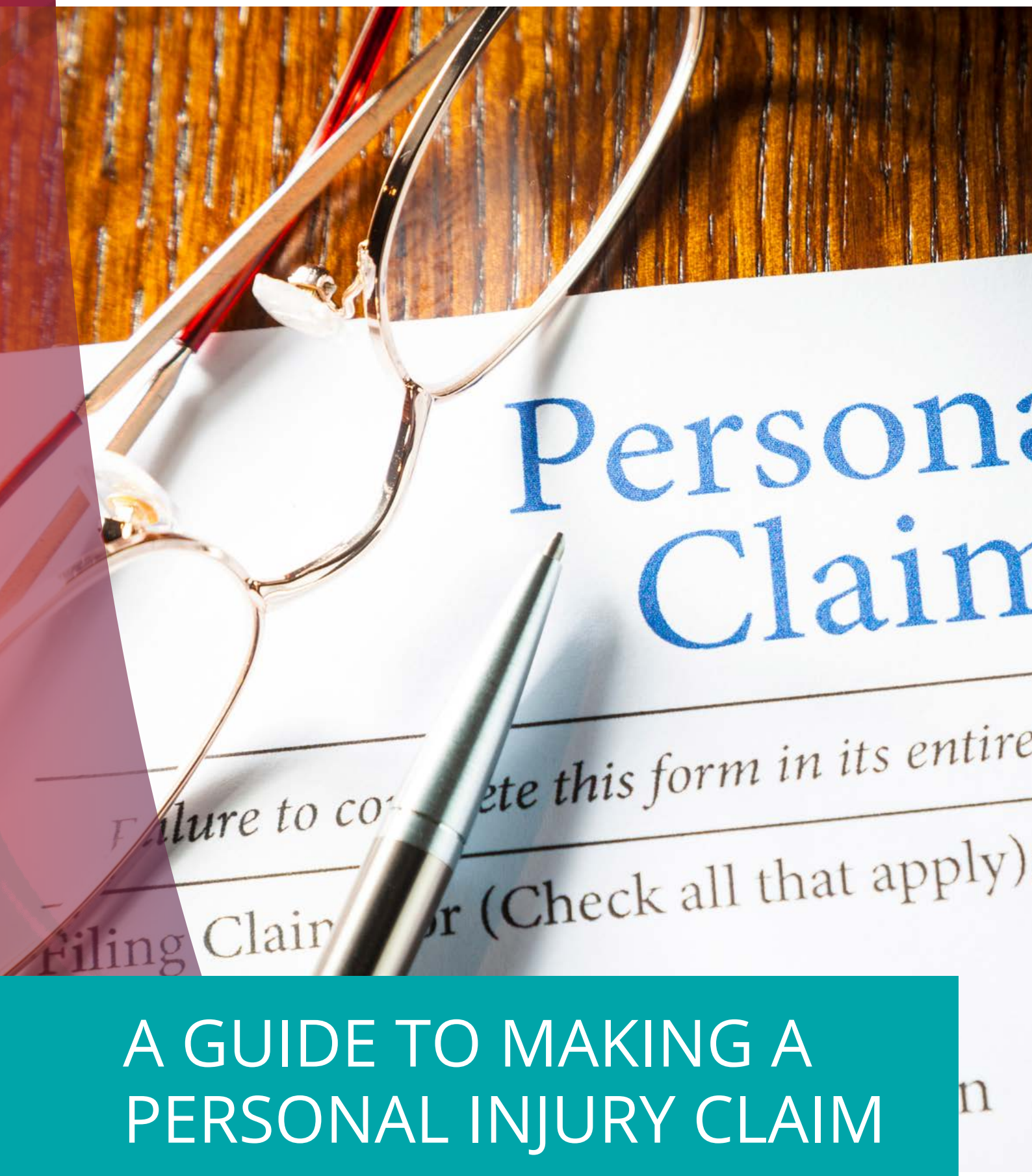

A GUIDE TO MAKING A PERSONAL INJURY CLAIM

The author of this guide is Penny Langdon, an extremely experienced Personal Injury and Medical Negligence Solicitor at Wellers Law Group LLP.

INTRODUCTION

Making a claim for personal injury compensation can seem a daunting proposition for the uninitiated. Cold calling and streams of text messages from claims management companies about accidents that you haven't even had, together with a constant barrage of often ill-informed news stories about the so called "compensation culture" have created the impression of a minefield.

We appreciate that people who have just suffered a traumatic experience are often in pain and at one of the most vulnerable points in their lives. They are also wary about who to approach to obtain objective information about what is involved in the process of making a claim, without committing themselves.

We have prepared this guide to give you an idea of how to start, what to consider when choosing a solicitor, how the funding of a claim typically works, what to expect in terms of the process and the possible pitfalls to avoid. This is a general guide and so it cannot take into account your own particular circumstances. Obviously every accident and set of injuries are different and so will be the level of compensation. This guide is simply intended to provide general information on how the process works and what, if anything, it is likely to cost you. Our experienced personal injury lawyers can of course provide individual advice where needed.

The General areas to be covered in this guide will include:

- **Legal expenses - how to fund your legal expenses and "no win no fee" agreements**
- **Insurance**
- **Factors to consider when choosing your solicitor**
- **Liability**
- **How is the amount of compensation calculated**
- **Negotiating a settlement**
- **Litigation and how long will it take?**

LEGAL EXPENSES

Funding your legal expenses – "No win no fee" agreements

It might seem back-to-front to consider how your claim is to be funded before choosing a solicitor but actually the funding issue is likely to influence or even dictate your choice of solicitor. In our experience, this is many people's prime concern.

Basically, your legal expenses for making a claim will fall into 3 categories:

(i) Your own solicitor's professional fees

Your solicitor's fees will vary hugely according to the value and complexity of the claim. For a simple uncontested whiplash claim, your solicitor's fees are likely to be in the region of £1-2,000 plus VAT. For more complex and high value claims, which are eventually resolved in Court, fees are correspondingly higher and could be as much as £50-100,000 plus VAT.

Obviously, most Claimants are unable to pay any such fees and so law firms and claims management companies offer what are known as "no win no fee" agreements, more properly known as Conditional Fee Agreements (CFA). Under these agreements, the law firm agrees to pursue your claim without asking you to pay your fees as you go along. If the claim is not successful, you will not be asked to pay any fees to your solicitor at all (no win no fee!). Basically, the law firm is taking a risk on your claim being successful. Generally speaking though, and this is the part which is not commonly understood, the reverse is also true and if you win your claim you do have to pay your solicitor. Having said that, for all practical purposes at the end of the claim the Defendants or their insurers will usually pay your solicitor's basic fees directly to them as well as paying your damages.

However, you need to be aware that not all of these basic fees may be recovered from the Defendant. The rules on recovery of legal costs are complex but, generally speaking, Defendants will only be obliged to pay costs which are reasonable and proportionate (to the damages recovered). Therefore, it is important to appreciate that a no win no fee agreement is not a green light for endless phone calls, emails or meetings. You may find it reassuring at the time to have your lawyer on speed dial, but beware, if a judge later deems this to have been unnecessary, the costs will not be recovered from the Defendant, and your agreement is likely to entitle your lawyer to deduct these fees from your damages instead.

If your claim is successful the CFA will also entitle your lawyer to charge a success fee which is payable by you out of your damages. This fee is intended to balance the risk of the claim failing and the lawyer being paid nothing. The success fee charged can be up to 100% of the basic fees, depending on the level of risk, but is always capped at 25% of your damages. That is damages for past loss alone, which does not include, for example, damages for the future cost of care or for future loss of earnings. So, for example, if your total damages were £60,000 but £40,000 of that were in respect of loss of future pay, then the success fee would be at most £5,000 (25% of £20,000) rather than £15,000 (25% of £60,000). 25% is the cap set by the government and the standard charged industry-wide. However, it is possible to find some claims management companies or solicitors who are offering a lower fee.

Another rarely used type of funding arrangement is the Damages Based Agreement. Basically this is another type of contingency agreement in which you agree to share the damages with your solicitor if you win. These agreements are rare and so we will not go into detail here but you may wish to ask your solicitor about them.

(ii) Your Disbursements

These are expenses that your law firm agrees to pay on your behalf such as fees for accident reports, Counsel's fees, medical reports and Court fees. For a straightforward uncontested claim, disbursements would normally be in the region of £500 - £1,000, but running potentially to £30-40,000 or more for a litigated or more complex case.

It is worth noting that huge increases have recently been made by the government to fees for issuing claims in Court. For claims worth in excess of £15,000, the fee for issue is now 5% of damages with an overall cap of £10,000. There is remission of fees available for those with very low levels of savings and income or those in receipt of certain benefits such as job seekers allowance, but this hike has added considerably to the cost of most claims and even if you may not have to pay it yourself, it has increased the cost of premiums for insurance policies which you will need to cover the claim (see the next section of the guide).

(iii) Defendant's legal fees and disbursements

In general terms, if your case were to fail completely and you recovered no damages, you would have no liability to pay the Defendant's costs provided your claim was determined not to be fundamentally dishonest.

However, there are circumstances in which you can be ordered to pay the Defendant's costs even if you do successfully recover compensation. Where the Defendant makes an offer (usually called a Part 36 offer) to settle your case which you reject as being too low and subsequently you don't go on to beat that offer, the Court could order you to pay at least some of the Defendant's legal costs. That failure could result in you losing your entire award of damages to your opponent in legal costs. However, your solicitor can best advise you if such an offer is received.

INSURANCE

You can be protected under an insurance policy against any possible liability for your own or the Defendant's fees and disbursements. There are two types of policy:

Before the event (BTE) legal expenses insurance

BTE cover is a legal expenses policy that is issued to people, usually with their car or home insurance, or sometimes comes as a benefit of union membership. Many people don't even know they have it. If you already hold such a policy, your insurer may agree to pay the legal fees and disbursements for your claim but the downside is that they are very likely to try to insist you use their panel solicitors and would prefer you not to choose your own representation.

For most people this is a big disadvantage. If you have been seriously injured, you will want to establish a personal relationship of trust and confidence in your lawyer who you may be dealing with for sometimes as long as two to three years. You may wish to choose a specialist in the field or go to someone recommended by a trusted friend. If you are likely to need regular meetings in person, you may wish to choose a local firm, or one which offers home visits. If you agree to follow your BTE insurer, you are relying on them to choose your lawyer. Their panel firms may be based hundreds of miles from where you live and you may never get to meet your solicitor. Your case might not even be assigned to a solicitor, but to a paralegal under supervision. If it is a large "factory type" firm, it is more likely that there may be a faster turnover of staff, meaning that your case may be handed over to someone new. It is possible that none of the above will happen or that, even if they do, none of it will affect the end result, but even if that does not happen, it is likely to make the process much more difficult and stressful for you.

In the event that the BTE insurer does agree to let you choose your own solicitor, the reporting requirements imposed on that solicitor are onerous (and therefore expensive in terms of costs) which needs to be borne in mind. Your choice of solicitor may not be prepared to work with the BTE insurers.

Notwithstanding the above, there is one advantage of staying with a BTE insurer and panel solicitor. Primarily, because these policies usually provide that the lawyer will be paid even if the case fails, most BTE insurers do not charge a success fee for winning which you have to pay out of your damages. We say "most" because there are reports of some BTE insurers still charging a success fee of 25% or even disguising this as an "excess" on the policy. If you are considering using your BTE, we recommend that the first thing you do is find out what, if anything, will be charged from damages.

You can of course elect to ignore your BTE insurer and choose your own solicitor. It is as well to consider that many solicitors may be willing to negotiate the level of their usual success fee in order to make themselves competitive with your BTE panel solicitor.

After the Event (ATE) legal expenses insurance

If you do not have BTE, you will still need insurance to cover the costs risk. Another option is an ATE policy. Most law firms will be able to arrange this sort of cover for you. Many will have tie in's with certain insurers. We recommend that you check that any policy that is recommended to you is competitively priced and go elsewhere to find your own policy if it is not.

Unlike BTE insurance, an ATE policy premium must be paid by the Claimant out of damages. It can be substantial. The good news is that it is standard for payment to be deferred until the conclusion of the claim. You generally only pay the premium if you win the case and receive damages. The cost of the policies varies considerably according to the stage at which the claim is determined or settled and the amount of damages agreed or awarded by the Court.

Some policies charge a one-off premium which covers the whole case from beginning to end and others are staged so that you only pay for the risks as they are incurred, thereby possibly saving on the premium if your case settles early.

FACTORS TO CONSIDER WHEN CHOOSING YOUR SOLICITOR

Solicitor or claims management company

There are many often competing, factors to consider in making this choice, several of which we have already discussed. For example, you may feel comfortable instructing a firm or individual solicitor that you or your family have dealt with before. It is of course important to deal with someone you are comfortable with. However, it is equally important to assure yourself that your solicitor has the relevant expertise and experience to deal with your particular claim. For example if you have suffered a severe brain injury we recommend you find a solicitor experienced in that particular kind of claim. Although most solicitors these days are specialists, there are still some lawyers out there who practice in several areas of law. We recommend you choose a specialist even if your solicitor did do a great job with your grandmother's Will! Even a dedicated personal

injury lawyer may not have the particular expertise you require. A good place to start is the Law Society. Their website will be able to direct you to a specialist in your area. We would also recommend you have a look at the APIL (Association of Personal Injury Lawyers) website. They too should be able to direct you to member and accredited firms in your local area.

Location is another issue. If you have suffered severe physical injury, travel may be an issue for you. You may want to select a firm local to you and particularly one which will offer home visits.

Cost is likely to be an issue. If you search online for a personal injury lawyer, many of the search results which are thrown up are not for genuine solicitor's firms but instead are claims management companies. These are the sort of companies which are more likely to be offering success fees capped at less than 25%. Quite understandably you may be tempted by this, but in our experience the same sort of difficulties which arise with BTE panel insurers are also likely to arise with these companies. You will have no input in the choice of your solicitor, no control over the level of expertise and experience, the level of service provided or the location.

As a general point we must emphasise that claims management companies are purely intermediaries who will pass you on to a firm of solicitors. They add no great value to the process, and potentially create an unnecessary layer of administration. They exist solely to make a profit from your claim. We would suggest that if such firms offer reduced fees when we know there is an additional level of administration, then the money must be coming from somewhere. It seems likely that this will be paid for by you. Not necessarily in the form of fees, but more probably in the level of service that you are likely to experience. Claims management companies typically work with large "factory type" claimant firms, many of which are often located in lower cost areas of the UK, dealing mostly with low value claims. Their business model relies on economies of scale, high volume of claims and fast turnover. This is all very well for straightforward uncomplicated claims but if your claim does not fit the model there is, in our view, an increased likelihood of complications being overlooked and claims being under-settled. In our experience, straightforward uncomplicated claims are quite rare. Even with lower value claims there are often complications with either liability or the scale of the claim.

In summary, we recommend you avoid claims management companies and find your own solicitor!

LIABILITY

The first thing to establish is who is to blame for the accident. It's important to remember that sometimes an accident is nobody's fault. It is just one of those things. If that is the case, unfortunately, there will be no claim.

If someone seems to be to blame, your solicitor will send a letter of claim to the proposed Defendant and attempt to settle the claim without resort to the Courts. The pre-litigation stage of the claim is governed by the Personal Injury Pre Action Protocol which is part of the Civil Procedure Rules. Under the protocol the Defendant has nearly four months to investigate and then either admit or deny liability for the accident. Whether or not the Defendant is liable for the accident will be decided by reference to a multitude of statute and case or common law relevant to the particular type of claim and too numerous to go into here. If the Defendant denies liability they should disclose any evidence in support of their position. If, based on this disclosure, your solicitor still considers you have a good case, it will be necessary to start legal proceedings in Court. This is known as issuing the claim. If, on the other hand, liability is admitted your solicitor will move on to assess the value or quantum of the claim and try to reach a negotiated settlement with the Defendant.

Contributory negligence

Sometimes, at this stage, the Defendant may admit that they are mostly responsible for the accident but make allegations of contributory negligence against the Claimant. A typical example of this would be a car driver not having worn a seatbelt, which, although not causing the accident, is likely to have led to more serious injuries than the Defendant's negligence alone. If it is agreed that a Claimant was, say, 10% responsible for causing the accident or injury, the damages will be reduced by 10%. If the level of contributory negligence cannot be agreed between the parties it may still be necessary to issue the claim in Court.

Portal claims and fixed costs

In recent years, the government has introduced an online portal system intended to fast-track the resolution of claims valued at less than £25,000 and reduce the legal cost of the claims process. The legal costs recoverable from the Defendant for such cases are fixed (at what most personal injury lawyers would consider an unrealistically low level) and bear no relation to the actual amount of work which might be necessary on your claim. This means that it will be very important from the outset to determine whether your claim is going to be worth more or less than £25,000, because if it is submitted via the portal, your solicitor is going to receive limited costs, even if the case subsequently turns out to be worth more than £25,000. In reality, this means that the amount of work that your solicitor will be able to do on your case will be correspondingly limited. This is another good reason to be wary of those law firms or claims management firms who promise you fast results. It is usually more sensible to exercise some caution and wait a little while to see what the full extent of your injury is likely to be before deciding to submit your claim via the portal.

The rehabilitation protocol and interim payments

After liability has been admitted, the claim enters the "rehabilitation protocol". This protocol is intended, in the interests of both Claimant and Defendant, to mitigate or reduce the eventual losses. This is accomplished

by the Defendant paying for various forms of rehabilitation services as soon as possible so as to reduce the impact of your injuries. For example, if you have a whiplash injury, instead of waiting (possibly quite a while) for the NHS to provide therapy, the Defendant will pay for private physiotherapy to begin immediately with the objective of getting you back to work more quickly and reducing any claim for loss of earnings. In more serious and complex cases, the Defendant may provide and pay for all sorts of assistance, including, for example, psychotherapy and occupational therapy. They may also instruct an independent rehabilitation agency to coordinate your treatment and recovery in the most efficient way.

For the same reasons, if liability has been admitted, the Defendant may be willing to make an interim payment of damages to reduce the impact of any loss of earnings or other costs you might have incurred as a result of the accident and to tide you over until a final settlement can be agreed. Your solicitor should explain to you whether this is possible or appropriate in your case and if so what level of payment might be suitable. You should be aware that your funding agreement is likely to allow your solicitor to make deductions from any interim damages payment to pay disbursements.

HOW IS THE AMOUNT OF COMPENSATION CALCULATED?

Compensation is made up of two parts, General and Special Damages:

General damages

This part of the compensation is for the pain and suffering caused by the injury and for what is called "loss of amenity". For example, if you were a ballet dancer and because of your injury you will never be able to dance again. It does not compensate for any financial loss - just the not being able to dance. Another example would be, if for reason of the accident you were unable to care for a new born baby, permanently affecting the bonding process with the child.

The amount of general damages will depend upon medico-legal evidence. You will be sent by your solicitor to be examined by a doctor in the relevant field. Sometimes you may need to see more than one expert. If for example you have suffered serious physical injuries and post-traumatic stress disorder as a result of the trauma you may need to see an orthopaedic expert and a psychiatrist. The expert will produce a report commenting on the diagnosis and prognosis, i.e. how badly and how long you will be expected to be affected by the injury, whether you will be able to return to work and any increased care and support you may need in the home along with similar issues.

The expert will also report on "causation". This is often the most disputed area of the report by the Defendant. The question will be what was caused by the accident and what has arisen as a result of other causes? If the Defendant does not accept the report's conclusions they will usually be entitled by the Court to obtain their own reports and then you will need to be seen by another set of doctors. If those experts disagree and no compromise can be reached, they will eventually be required to produce a joint report for the Court and the Court will decide which evidence it prefers.

The level of general damages is decided by reference to various sources. There is a general guide to damages (the Judicial College Guidelines) which breaks down injuries to various parts of body and mind into classes of severity and giving a range of values for each type of injury. The level of damages can also be arrived at through comparison with previously decided cases, although this is difficult because no single or combination of injuries is ever exactly the same.

Assessing the quantum for general damages is sometimes more of an art than a precise science, leaving a great deal of room for difference between the Defendant's and the Claimant's assessments. In more complex or high value claims it is common, at this stage, for the solicitor to seek advice from a barrister and this is often required by the Claimant's insurer. Most barristers will also agree to act on a no win no fee basis.

Special damages

This part of the damages is composed of readily quantifiable financial losses. It is divided into past losses (up to the date of settlement or judgement) and future losses. Typical categories include loss of earnings, the cost of care, cost of medical treatment, travel expenses, property damaged in the accident, the costs of aids and adaptations etc. Just as the general damages are supported by the evidence of the medical reports any claims in this category must be supported by evidence. It will do little good asserting losses for which there is no evidence. The Defendant will simply not agree to pay them. So, make sure to keep all of your receipts. Sometimes the "evidence" will take the form of a witness statement. For example, it may be that your spouse has looked after you for months while you were bed or house bound. S/he may not have had a job so there is no loss of earnings but the time can nevertheless be claimed supported by a witness statement. We would advise anyone thinking of making a claim to start a diary as soon as possible after the accident, to record steps in the recovery, care provided and all items of expenditure. This might seem like a chore at the time but it will pay off in the long run in making sure that expenses are not overlooked or forgotten thereby maximising the claim.

NEGOTIATING A SETTLEMENT

Even if liability is not admitted and the litigation process has begun, your solicitor will still attempt to settle the claim before it is necessary to go to a final hearing because the costs of doing so are considerable to both parties and those costs will not always be recovered. The Civil Procedure Rules require that claims are settled where possible to save the Court time and money. In particular part 36 of the CPR is designed to encourage this by providing incentives and penalties for both parties in terms of costs. The rule is complicated but in general terms it works like this. If a Claimant makes an offer to settle which the Defendant does not accept and the Claimant goes on to meet or beat that offer at trial, the court can order the Defendant to pay indemnity costs (a harsher costs regime) and also interest on costs and damages.

Similarly, if the Defendant makes an offer which the Claimant does not accept and the Claimant then fails to beat that offer at trial, the Court will order the Claimant to pay the Defendant's costs from the time of the offer (capped at the amount of damages awarded). This is one of the biggest risks for the Claimant's ATE insurers. Often it is at the point that this sort of offer is made by the Defendant that for all practical purposes the decision to accept or not is taken out of the Claimant's hands. The insurance company will assess the risk, usually under advice from a barrister and if it is considered that the offer poses a risk under part 36 they will decline further cover, leaving the Claimant no option other than to accept the offer unless they are personally prepared to carry the risk of having to pay the Defendant's costs. The upside to this is that an offer must be a reasonable one in order to pose such a risk.

Personal Injury Trusts

If you or your family are at the time of the accident claiming any means tested state benefits, or intend to do so in the future, then receipt of a large compensation payment is likely to adversely affect your entitlement to any such benefits. A good way to avoid this is by setting up a Personal Injury Trust.

The rules are too complicated to go into here but in summary, in order to protect your entitlement to benefits, your compensation may need to be paid into such a trust within one year of receiving any part of it. This is particularly important to remember if you receive an early interim payment. Depending on the final amount of damages, the clock may start running from the point of the interim payment. Your solicitor will be able to advise on whether such a trust is necessary in your particular circumstances.

LITIGATION

All personal injury claims must be brought within three years of the date of the accident. After that if the claim has not been settled or issued in court there will be no claim. In some claims, for example clinical negligence claims, there is often no obvious date and so limitation is instead calculated as three years from the "date of knowledge" (that there was a claim and who that claim is against).

If the Defendant denies liability or if they admit liability but the level of damages cannot be agreed, it will be necessary to issue the claim in Court.

The Civil Procedure Rules are voluminous and complex but very basically the claim is issued (or created) in Court by submitting a claim form to the Court with the Issue fee. The claim is then served on the Defendant who usually has up to 28 days to file a defence. After that the Court will generally set out a series of steps with deadlines, called Directions, to prepare the claim for trial. There are penalties for not completing the

directions in time which can include the claim being struck out. Directions typically include a further process of disclosure of documents, exchange of witness statements and the exchange of expert reports etc. Often the Court will order a case management conference at which the judge will decide on the timetable for trial but the Claimant is not required to attend these hearings. It is however rare that a Claimant will not be asked to appear at a final hearing.

The timetable from issue to final hearing can easily take one to two years, given the pressures on court time.

Usually, at the same time that the parties are following the directions set down by the judge, they continue to attempt a negotiated settlement and actually very few cases get as far as a final hearing, with many cases settling within days of the trial.

Overall, a personal injury claim could take anything from a few months for a simple uncontested whiplash claim to five years from the date of the accident for a complex, high value litigated claim which runs all the way to a final hearing.

The following checklist should help you to avoid some of the pitfalls we have mentioned:

1. **When you have an accident, if you are able, take the names and contact details of any witnesses at the scene. If you are not able to, ask someone else to do so**

2. **Take a note of anything said at the scene by the Defendant**

3. **Take photographs if you can on the day of the accident or return as soon after as possible to take them. Or ask someone else to do it**

4. **As soon as possible request that any CCTV footage is preserved as this is usually not kept for very long. Of course this may well be done by your solicitor but you may still be deciding on a solicitor or even whether or not you are going to be making a claim**

5. **Check with your insurers whether you have before the event (BTE) insurance for making a personal injury claim**

6. **If you have BTE insurance, check whether your provider or the panel solicitor will charge you anything from damages**

7. **Check out any panel solicitor assigned to you. If you are not happy, ask your insurer if you can chose your own solicitor and if so under what terms**

8. **If you don't have BTE insurance and/or you choose your own solicitor. Check that you are choosing the correct firm and solicitor:**

- Will they come to your home to meet you?
- Do their offices have wheelchair access if needed?
- Are they close enough to you geographically?
- Have you had an initial first meeting with the proposed solicitor? This should be free of charge.
- Does the proposed solicitor have sufficient experience and expertise in your type of claim?
- Do you like them?
- Has the funding of the claim been sufficiently explained to you?

9. **If you have BTE insurance and are debating whether to use it, approach any preferred solicitor to ask whether they would be prepared to negotiate on the success fee to make this more attractive for you**

10. **Keep a diary or ask a family member to keep a diary from the time of the accident to record the progress of your recovery, what assistance you have required, your expenses and loss of earnings and other such information**

11. **Remember to keep all receipts**

And finally remember that if you are not happy with your solicitor you can go elsewhere!

12.

We hope this guide has been of some assistance as a basic introduction.
We are of course happy to discuss your individual needs should you choose.

Please call our personal injury department on 020 8290 7958.

CONTACT US

Please call us on **020 8290 7958** or email **penny.langdon@wellerslawgroup.com** to arrange a consultation.

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