

Claiming compensation after brain injury



the brain injury association

This publication is part of Headway's *Legal issues* series. To browse through our publications on a range of issues relating to brain injury and download these free-of-charge, visit www.headway.org.uk/information-library.

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Introduction

In the UK, approximately 1 million people per year attend Emergency Departments as a result of head injury in England and Wales alone. Of these, approximately 200,000 are admitted to hospital due to the severity of their injury. Many of these people sustain traumatic brain injuries, which cause a variety of long-term physical, behavioural and cognitive problems.

This publication has kindly been sponsored by Irwin Mitchell

Understanding support is more than just compensation

Brain Injury - If you have suffered a head or brain injury, we realise just how much of an impact it will have, not only on your lives but also on the lives of your whole family. At Irwin Mitchell Solicitors we will support you and your family to help you get the best possible medical care and rehabilitation ... because compensation is only part of the story. To see how we can help you, call us now. **Irwin Mitchell, standing by you.**

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A brain injury can permanently change a person's life, and legal action may be necessary in cases where another party has some responsibility for the injury. This publication can help you to claim the compensation you may be entitled to in order to maintain your independence and improve your quality of life.

Substantial numbers of people fail to claim compensation simply because they are not aware of their legal rights. This publication aims to answer questions which often arise when a person is thinking of making a claim for compensation.

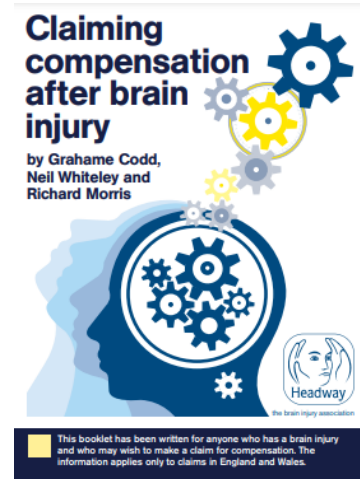
If you are already pursuing a claim, but have concerns about how your case is being dealt with, you can usually obtain a free second opinion from another solicitor. You have a right to choose your legal representative and to change your solicitor at any time.

The information in this publication does not replace legal guidance from relevant professionals. You should always seek advice from a solicitor for help with managing compensation cases.

This publication is also available as a printed booklet*. For more information or to order, contact 0115 924 0800 or visit <https://shop.headway.org.uk/publications-9-c.asp>.

People directly affected by brain injury can receive limited free copies of Headway print booklets by contacting the helpline on 0808 800 2244.

*print copy may contain minor differences due to revision of content



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Jurisdiction

Please note that this guide applies to compensation claims governed by the laws of England and Wales. If you have been injured in another country, including Scotland or Northern Ireland, you will need to obtain specialist legal advice as to the country in which you will be able to pursue your claim, i.e. the correct jurisdiction for the claim.

There are circumstances in which there may be a choice of jurisdiction. For example, if you were injured in England as a result of the negligence of an employee of an American company, it might be possible to pursue a claim in the US. However, there will often be no choice and you will have to make your claim in a foreign jurisdiction.

Legal systems vary enormously from country to country. The time limits for making claims vary considerably, liability issues are different and levels of compensation are usually lower abroad than they are in England and Wales. The funding of litigation in foreign jurisdictions is also very different. It is important when selecting your lawyer that you choose someone who has experience of successfully handling brain injury compensation claims in the country in which you have to bring your claim.

[Headway's Head Injury Solicitors Directory](#) provides basic details of the firms' areas of expertise, including their experience of litigation in foreign jurisdictions.

Legal advice

Will I be able to claim compensation?

Yes - if you can show that another person was at least partly at fault for causing your injuries. It is important for you to understand that even if the injury was partly your own fault this will not prevent you from making a claim for compensation, although it might reduce the amount of damages you recover.

For example, a young child who is knocked down whilst crossing the road, who may be criticised by the motorist, is unlikely to be 100% to blame - a thorough analysis of the facts will often result in a successful claim for that child. Similarly,

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if you were hurt in a road traffic collision you will not lose your right to compensation because you were not wearing a seatbelt; although the amount of damages awarded to you could be reduced by up to 25%, this would still leave you with at least 75% of your full damages.

So, never assume that you will not be entitled to compensation. The law is often complex and you should always seek legal advice from a solicitor.

Choosing the right solicitor

This is the most important decision that you will have to make. The effects of brain injury are often complicated. It is important that your solicitor understands the complexities of your injury and how it impacts upon your ability to work and to enjoy your home life and leisure activities. It is more important to instruct a solicitor who specialises in brain injury cases, wherever his or her office is based, rather than choose a solicitor purely because he/ she is local to where you live. Choosing the wrong solicitor could result in undervaluation of your claim.

The firms on Headway's Head Injury Solicitor's Directory have all agreed to work within the Headway Personal Injury Lawyers Code of Conduct. It is advised that you contact at least three different solicitors before coming to a decision. You can find further information, including a list of questions to ask your solicitor on the '[Legal advice](#)' section of the Headway website.

Other legal service providers

You will see many organisations advertising your accident claims. Due to changes in how legal services are regulated, many different types of business may now offer those services, not just traditional law firms. Some, like claims management companies, may simply be marketing arrangements for the referral of customers to other businesses. Solicitors are regulated by the Solicitors Regulation Authority (SRA), whereas other businesses may have different regulation, or none at all.

It is important to know who is going to provide the legal service, so always ask

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the question: who will deal with my claim and will they be a solicitor? It is unlikely that businesses like claims management companies will be able to offer suitable services for someone with a brain injury. Instead you should always seek advice from a solicitor on the Headway list.

When should I contact a solicitor?

You should contact a solicitor as soon as possible. It is helpful to the solicitor if he/ she is instructed quickly so that the legal processes can be set in motion. The solicitor will want to witness events whilst they are still fresh in their minds and to obtain photographs and plans of the incident scene. He/ she may also need to obtain an expert's report before vital evidence disappears.

Is there a time limit?

There are strict time limits for pursuing personal injury compensation claims. Court proceedings must be started within **three years** from the date of the incident otherwise the Court can stop the case proceeding because the claim is out of time. However, this three year rule does not apply if the injured person is under 18 year old at the time of the injury, in which case the time limit is extended until that person's 21st birthday.

Importantly, this time limit does not apply to someone who is not able to manage their own affairs under the criteria of the Mental Capacity Act 2005 whilst ever they lack capacity. For this reason, someone who has suffered a brain injury may be able to bring a claim many years later, although this is not a reason to delay making a claim.

If you have been the victim of a criminal assault you have the right to seek compensation from the [Criminal Injuries Compensation Authority \(CICA\)](#). There is a **two year** time limit for making an application to the CICA. However, in special circumstances, the CICA can apply discretion to permit cases to be considered outside this time period.

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Who should I claim against?

Your claim should be made against the person who is to blame (wholly or partly) for your injury - he/ she is called 'the defendant'. In practical terms the defendant's insurers will deal with and settle your claim. Here are some examples of defendants in different kinds of incidents:

- **Road traffic collisions**

The claim is usually made against the driver of the car that injured you, whose insurers will deal with your claim. If the driver was not insured, or if you were injured in a hit and run incident, the [Motor Insurers Bureau](#) will appoint insurers to deal with your claim and you will recover compensation in the normal way.

It is important to know that people injured in a road traffic incident can claim against the driver even if they are a member of the same family. For example, a wife can claim against her husband, and claims can be made on behalf of children injured in a collision caused by a parent. In such cases, the driver's insurers will settle the passenger's claims. It is also important to be aware that bringing a claim for damages does not depend on whether or not the driver is charged with an offence.

- **Workplace incidents**

Claims are made against employers, or sometimes independent contractors. Even if the incident was caused by a fellow employee, the employer will have to accept responsibility for the actions of that employee and the employer's insurers will deal with the claim.

- **Public liability claims**

Commonly, tripping and slipping accidents in the street result in claims against local authorities. A claim can also be made against the owners or occupiers of the premises where the injury occurred. The public liability insurers of those premises will deal with the compensation claim.

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- **Medical errors**

In the scope of this publication it is not possible to give full details about claims for medical errors, often called 'medical negligence'. These claims are usually pursued against the NHS Trust responsible for the hospital where the medical error occurred. It is essential that you take specialist legal advice from a solicitor who is a member of one of the recognised panels maintained by [The Law Society](#) or by [Action against Medical Accidents \(AvMA\)](#).

- **Criminal injuries**

Many brain injuries are caused by assaults. Compensation for such injuries should be pursued by application to the [Criminal Injuries Compensation Authority \(CICA\)](#). Help in preparing your application and evidence to support your claim should be obtained from a solicitor experienced in such cases.

Legal costs and insurance protection

Never decide against making a claim through fear of legal costs. You should always be able to obtain free initial legal advice. Legal aid from the state is not available for personal injury claims, although it may be available for a limited range of medical negligence claims for infants sustaining a brain injury during pregnancy, birth or within eight weeks of birth.

Apart from legal aid there are several funding options open to you. The main options are:

- **Legal expenses insurance cover**

You may have a legal expenses protection section in your motor insurance, household insurance, credit card or travel insurance policies. This may give you cover for the risk of paying your opponent's legal costs, and your solicitor's own expenses or disbursements, up to a set financial limit. The insurers issuing this kind of insurance usually require you to use a solicitor from their own panel and will usually not agree to you using your own. However, when you are likely to issue court proceedings they may be required to provide cover for you if you do choose to appoint your own solicitor.

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- **Trade union member**

If you are a member of a trade union you will probably have legal costs cover for workplace incidents under the terms of your union's scheme. This will also include protection against any award of costs in favour of your opponent if you lose your claim.

- **Conditional Fee Agreements ('No win - no fee' agreements)**

This is often the best option for most people to pursue a personal injury claim. If you do not have the benefit of legal expenses insurance cover and you are not a trade union member, you will almost certainly be advised by your solicitor to pursue your case under a Conditional Fee Agreement (CFA). When you sign a CFA, you should be advised to take out an After-the-Event (ATE) insurance policy to protect you against having to pay for your opponent's legal costs in certain circumstances and possibly cover for your solicitor's expenses or disbursements.

Conditional Fee Agreements - how do they work?

It is important that you understand the essential features of such an agreement which can be briefly summarised as follows:

- In return for investing his/ her time and sharing the risk of failure with you, a solicitor is entitled to charge a success fee if he/ she wins your case. This is calculated as an extra percentage on top of the solicitor's normal basic costs, not as a percentage of your damages. Any success fee charged may not, under current regulations, amount to more than 25% of the total of the damages you recover for your injuries plus expenses incurred to the date of settlement.
- In some circumstances you might have to cover some of your opponent's costs, for example if you refuse a settlement offer which proves higher than the final award. To protect you against having to pay the opponent's costs; you should be advised to take out an After-the-Event (ATE) insurance policy. There are a number of insurers offering this type of cover and your solicitor

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will be able to advise you and take out the insurance for you. Usually the premium will only become payable if you win your case.

- If you win your claim, you should recover most of your basic legal costs from your opponent's insurance company, but not the solicitor's success fee and the premium payable for the ATE insurance policy. There are some different rules for medical negligence claims which allow for part of the insurance premium to be recovered from the opponent.
- If you do not proceed with your claim, then, provide that Court proceedings have not been issued, you will have no responsibility for your opponent's costs. You may have to pay your solicitor for his out of pocket expenses (called 'disbursements'), though these may be paid by the ATE insurer; alternatively, some solicitors will write off any disbursements incurred.
- The Court now has the power to set a budget for claims. This has the effect of fixing a limit on the costs that can be recovered from your opponent.

In addition to the most common arrangements outlined above it is possible for solicitors to suggest other funding agreements. For example, a 'damages based agreement' in which you are charged a percentage of the damages recovered for your injuries and past losses (limited to 25%). It is important that you discuss the options for funding your legal costs with your solicitor and enter into the arrangement which is most suitable for you.

Claims in which legal costs cannot be recovered

Please note that in claims arising from hit-and-run incidents, where the motorist cannot be traced, or in criminal injuries compensation claims, legal costs cannot be fully recovered. Your disbursements may be recovered but you will have to fund most and possibly all of your own solicitor's legal fees out of your damages. This should not prevent you from pursuing your claim. You should ensure that the solicitor sets out clearly what the charges will be if you win or if you lose. You could insist that charges should be limited to a percentage of damages.

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Key questions

Whatever type of funding option you choose, you need to be satisfied by the answers given in relation to the following key questions:

- What legal costs will you have to pay out of your damages if you win your case?
- Are you protected by insurance against having to pay any of your opponent's legal costs in all circumstances?
- What legal costs and disbursements will you be responsible for if you do not proceed with your claim or if you lose?
- Who will pay your solicitor's disbursements while your case is proceeding?
- What interest or charges will your solicitor seek from you?
- Will you have to pay any costs initially or at any time before your case is concluded?

Action taken by your solicitor

Investigating the facts

Your solicitor should arrange to interview all relevant witnesses and obtain signed statements from them. In a road traffic collision case, a copy of the police report should be obtained, although some police forces may not permit access to this until after they have completed their investigations and any prosecution, or without a Court order.

The police may have prepared a plan and photographs. The police report may also include notes of interviews conducted by the police officers with the driver of the vehicle, and also statements taken very shortly after the incident from witnesses. In a serious case, the Police Collision Investigation Branch will have prepared its own report comprising a mathematical analysis of the crash, which must be obtained.

If the incident occurred at work, your solicitor may need to arrange for an inspection of the scene to see and understand precisely what happened. The

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Health and Safety Executive should be involved in investigating the incident and your solicitor can obtain copies of the documents on their file by application to the Court. It may be necessary to instruct an engineer to prepare a report, particularly if the incident involved working machinery. Photographic evidence is important, so if you have taken photographs of the scene or any equipment involved, give them to your solicitor.

When your solicitor has completed all relevant investigations, he will be able to advise you about the prospects of succeeding with your claim.

Submitting the claim

The solicitor will submit a letter of claim to the defendant(s) and will then enter into correspondence with their insurers. In personal injury cases, full details of the case will have to be submitted to the insurance company in accordance with protocols. The insurance company will have to say whether they will accept the claim or whether they intend to contest liability. If the insurers are not prepared to admit liability, your solicitor will then take steps to issue Court proceedings on your behalf. The Court expects that parties to legal disputes do all that they can to co-operate and exchange information in order to keep costs in proportion and reduce delay. They must also consider any rehabilitation needs which you have.

Negotiating rehabilitation

Increasingly, insurance companies are prepared to provide financial help to assist you with your rehabilitation. Protocols are in place that require your rehabilitation needs to be considered at an early point after your opponent is first informed of the claim. It is important that your solicitor deals with rehabilitation in the right way (see section on Rehabilitation).

Obtaining medical evidence

Your solicitor will instruct medical experts to prepare reports which describe your injuries, the history of your treatment, your present medical condition and how

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you will be affected in the future. The medical consultant preparing a report for the purpose of your claim may not necessarily have been involved with your medical treatment.

Your solicitor will liaise with the insurance company in order to try to agree upon the choice of medical experts to be used. If no agreement is reached then you will have to see medical experts instructed by the insurance company, as well as those chosen by your solicitor.

The medical assessment process

It is vitally important that you are able to explain to the medical consultant as much as you can about the problems that you have had since the injury. For this purpose it is desirable or necessary for you to take a close friend or relative along with you, so you have someone there who can speak on your behalf and give information to the doctor about the way in which your life has been affected by your injuries. It is often helpful to make a list of your problems in advance of the medical appointment and to provide this to the consultant.

If you have to attend a medical examination by an expert instructed by the insurance company, you should cooperate fully and provide the doctor with as much information as you can about your injuries and the effect they have had upon you. In these cases, it is vitally important that you are accompanied by a relative or close friend who can speak on your behalf.

Remember, whatever your problems are it is important that they are explained in as much detail as possible and that you do not play down or minimise the consequences of the injury. You may be experiencing cognitive problems, such as with your memory and concentration, and these can have just as much bearing on the settlement as physical disabilities.

If you have suffered a head injury it is likely that several medical experts will be instructed by your solicitor, in particular:

- A neurosurgeon or neurologist, who can report upon the X-rays and other scans and advise about the significance of post-traumatic amnesia and other measures of injury severity. They may also give an opinion about the

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clinical consequences of the injury and a prognosis for the future.

- A clinical neuropsychologist, who will be able to carry out tests to analyse the ways in which your injury has affected your cognitive functions, particularly memory and concentration, your personality and behaviour, and your ability to cope with the tasks of daily life and work. The neuropsychologist's evidence will usually be vitally important in most head injury cases.
- A rehabilitation consultant, who can advise about your needs for rehabilitation, including all forms of therapeutic treatment, and can provide a medical overview in relation to reports from therapists. The consultant will also be able to give an opinion as to your ability to work and to manage at home in the short, medium and long term.

Neuroimaging evidence

Sometimes your solicitor may advise that you attend for further scans, especially if you did not have them in hospital when you were treated. CT scans, or more detailed MRI scans, can often show the extent of any injury to the brain, which may help the neurologist when preparing the medical report. However, it is important to note that the scans cannot show damage at a microscopic level and some injuries can cause severe difficulties without being evident on scans.

Obtaining expert evidence in relation to your personal care needs

Many people who have suffered a brain injury are much more dependent upon members of their family for help and support in many areas of their lives. Sometimes a family member may give up work to provide the essential support required. Your solicitor will need to obtain witness statements from family members and from any professional carers or helpers in order to provide detailed evidence as to what day-to-day problems exist and what help is being provided.

Your solicitor will instruct an independent expert, probably an occupational

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therapist or case manager, experienced in assessing the needs of clients with brain injury.

The expert's report will need to look at your personal needs not only in the short term, when your family may be able to provide essential help, but also in the long term. For example, a young person in his/ her early twenties would probably wish to live independently of his/ her parents in the long term; the cost of providing essential care and support will therefore increase substantially at that point in the future.

Sometimes it is possible to agree that a single expert can prepare a report needed by the Court. If not, two experts will be involved, one for each side. This is a complex area which requires skilled handling by your solicitor. If there are two experts, the Court will order them to talk to each other and try to reach agreement about your needs.

Calculating and scheduling your claim for damages

Your initial financial losses need to be added up and properly presented in a schedule to the insurance company together with all supporting documents. The expenses that you and your family incur after the injury will be included. Most importantly, calculations relating to your loss of earnings and the value of the care and help provided by your family and friends will be incorporated.

When the case reaches an advanced stage and all expert reports are available, an updated and final schedule will be prepared setting out all of your financial losses both past and future. The future loss projections will be based upon mathematical models and it is important that your solicitor has a good understanding of the mathematical principles involved in the calculations. In cases where the loss of future earnings claim is complicated, or if you were involved in a business, a partnership or company, your solicitor might need to instruct a specialist accountant experienced in legal cases to prepare a report for the Court.

The schedule of damages prepared by your solicitor will eventually form the agenda for the negotiation and settlement of your claim or for the trial of the

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case at Court.

Conducting Court proceedings

Most routine personal injury claims are settled without the need for Court proceedings. However, claims for brain injuries usually involve larger amounts of damages and the claim may well, for perfectly valid reasons, run beyond the three year time limit. It is therefore essential that your solicitor prepares your case with a view to issuing Court proceedings on your behalf. Your solicitor will be responsible for conducting Court proceedings through all the procedural stages.

For further information see 'Court proceedings'.

Securing interim payments of damages

If you have a good case there is no reason why you should wait until the end of the case for your damages. You may be suffering considerable financial hardship, particularly if you are unable to work. You should ask your solicitor to apply for interim payments to help you and your family to continue to pay your essential bills.

Interim payments can also be useful to pay for specialist medical, therapeutic or residential treatment or care. With financial support from interim payments your solicitor can employ a case manager and enabling help and in very serious cases, interim payments can be used to purchase suitable housing, wheelchairs, disability aids, equipment and transport. Most insurance companies now see the benefits of making interim payments to help injured people.

It is your solicitor's responsibility to make claims for your financial losses and needs at various stages and to obtain interim payments of damages for you from the insurance company. There is no limit to the number of interim payment applications that can be made.

Sometimes an insurance company will agree an interim payment without difficulty, usually after fault has been admitted. If a large payment is requested, or fault has not been admitted, it can be more difficult to agree an interim payment with the

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insurance company and in such circumstances an application may need to be made to the Court.

Employing a case manager

With agreement from your NHS consultant and the rehabilitation team, it may be appropriate for your solicitor to appoint a private case manager to help you. The case manager must be experienced in organising rehabilitation, care support and enabling help for clients with brain injury. It will usually be your solicitor's job to obtain funding through interim payment and to deal with all contractual aspects of case management on your behalf.

In many brain injury claims properly qualified case managers play a vital role in optimising independence and quality of life, organising support and helping claimants to understand the legal process. There are specialist associations, such as the British Association of Brain Injury Case Managers (BABICM) who can provide further information and a list of case managers.

Settling your claim

After all of the evidence has been obtained and your claim has been quantified, the insurers should make proposals for settlement. Your solicitor will advise you whether their offer is reasonable and whether it should be accepted or rejected. The factors that will need to be taken into account include:

- What would be the total value of your claim if you were to win completely?
- What are the chances of succeeding and the risks of losing?
- Should any reduction be conceded for any fault on your part (called 'contributory negligence') and, if so, what percentage?
- Should there be any reduction from the scheduled value of your claim due to the medical and other evidence submitted by the insurance company or their solicitors?
- Are any deductions likely to be made from your claim if the case goes to

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Court and a judge hears the evidence?

Your solicitor may instruct a barrister to advise you in relation to these issues. It is often helpful to have a meeting or conference with your solicitor and barrister at this stage. However, the final decision is yours and your solicitor and barrister should not accept any sum of damages without your prior approval and consent. If you cannot manage your own affairs, your solicitor must also advise the Court of Protection about any settlement and obtain their approval.

In cases where the person injured is under 18 years of age, or if the injured person is unable to manage his/ her own affairs, then any settlement must be approved by a judge in the Court otherwise it will have no legal validity. The judge will ensure that the settlement represents fair and proper compensation.

Court proceedings

Pre-action protocols

These are protocols which apply to personal injury claims and are designed to ensure that there is an early exchange of information and advice. They provide a time scale for the insurance company to make a decision about liability and to state whether or not they intend to compensate you. They also ensure that the insurance company is informed about your injuries and the extent of your claim so that they can budget for your claim, therefore not being taken by surprise in future negotiations.

During this stage of the compensation process, your solicitor may be able to agree the choice of experts who will be involved in preparing reports for the purpose of your claim. This can reduced the number of times you have to see a medical consultant.

Issuing and serving Court proceedings

Brain injury cases will normally take at least three years to conclude and your solicitor will almost certainly need to issue Court proceedings. A claim form filed at Court will include a document called the 'Particulars of Claim', which sets out the

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essential facts and legal basis of your claim and provides a summary of your injuries and of the financial losses which you are seeking to recover, usually set out in a schedule. These Court documents are served upon the defendant or the solicitors appointed by their insurers, who will then prepare a defence stating whether liability will be admitted or contested.

Any documents used for the Court case have to be certified by you with a 'statement of truth' to verify the accuracy of its contents.

Court management of the case

Once the initial documents are complete the Court will arrange a date for a procedural hearing at which the judge will give instructions for the exchange of evidence in order to progress the case. If liability is disputed by the defendant, the judge will almost certainly order a split trial; in other words, a preliminary trial of the liability issues only. This will normally mean that the Court will be able to hear the evidence relating to liability within a few months.

If liability is agreed before the hearing, or if you win the case in Court, the judge will then go on to give a timetable for the exchange of medical evidence and reports from other experts dealing with 'quantum' i.e. the valuation of your claim. It is essential that Court timetables are complied with, as the Judge may not allow evidence or documents that are delivered after the deadlines set out in the Court orders.

The Court is likely to set a budget for the legal costs that can be incurred in the case. Once ordered, both sides must comply with the budget and can only be deviate from it with prior permission from the Court. This is intended to limit the work that can be done to that which the Court considers to be necessary and proportionate. You can spend more than the budget provides for, but it is unlikely that such extra costs would be recovered from your opponent.

If reports have been obtained by each side from their own experts whose opinions differ, the Court is likely to order the experts to confer and to produce a joint statement setting out what is agreed and what is disputed. The Court will then decide which experts can be called to give oral evidence at trial.

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The Court will also order both sides to exchange evidence from those witnesses of fact who they wish to call to give evidence. It may be possible for some witness statements to be produced as evidence to the Court without the need for the witness to attend Court: for example, a statement from an employer setting out your employment history, job prospects and salary information. Similarly, a therapist or your GP may be able to provide some factual information to help the Court.

The Civil Procedure Rules are designed to bring both sides together to try to reach agreement as far as possible and to narrow the range of issues which are disputed. Even the most complicated personal injury cases which have to go to trial should now be capable of being dealt with in a shorter timescale than before.

The emphasis of these Rules is upon a 'cards on the table' approach. Both parties in the case should know the case for, and against, on every issue. As a result, the solicitor acting for you, as the claimant, and the solicitor acting for the defendant and his insurers, should be in a better position to be able to settle the claim before the case comes up for trial.

Joint Settlement Meetings (JSMs)

In some Courts the procedural judges will routinely order the legal representatives for both sides to hold a Joint Settlement Meeting (JSM), usually with clients present, in order to do the best they can to settle the claim. This is a very successful way of settling many cases without a former trial in Court.

Trial

If it is not possible to settle the claim and the case has to go to Court for trial, also referred to as the 'final hearing', your solicitor will explain to you what is being involved in giving evidence. Remember, your case will be heard by a judge in a civil court and you, your family and your other witnesses can only be expected to tell your story honestly, with help from any diary notes that may have been kept. In many brain injury cases it is not necessary for the injured person to give evidence personally, as the Court will be happy to hear from members of the

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family, medical experts and other professionals.

Rehabilitation - alongside the compensation process

If you suffer a brain injury, then it is likely that you will receive inpatient hospital care. Once your medical condition is stable, you should be referred for rehabilitation, either as an in-patient or an out-patient. However, brain injuries can often go undiagnosed, particularly in patients who suffer serious orthopaedic injuries, and many people never receive appropriate rehabilitation treatment.

The level of specialist brain injury rehabilitation across the UK is variable, and unfortunately many people cannot access appropriate services. If you do get referred to an NHS rehabilitation unit, then your solicitor should take an active role in working with your rehabilitation team, and should provide clear information about the possible extra resources that can be made available through the compensation process. Your solicitor should work with the rehabilitation experts within the NHS to ensure continuity of care as far as possible.

If you are not referred to appropriate rehabilitation services through the NHS, your solicitor should seek expert advice as to how best to help you, probably by accessing rehabilitation services in the private or voluntary sector. It is vital that you receive the right kind of help in order to maximise your potential for independence. As your claim for compensation progresses, it is important to ensure that your personal needs are met. These might include: therapy, re-education, re-training, housing, transport, disability aids/ equipment, care support and enabling help.

Best practice guidelines for rehabilitation

The Rehabilitation Code now imposes positive duties on solicitors acting for claimants, defendants and insurers to consider whether it is likely that the claimant will benefit from medical help, rehabilitation or early intervention. It is important that your solicitor plays a proactive role in helping you to access appropriate help in order to lead a life that is as fulfilling and independent as

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possible.

If these matters have not already been dealt with by the treating professionals or by appointed medical experts, the Code makes it clear that there should be an independent assessment outside the litigation process which should identify your needs and the costs involved in meeting those needs. The insurers then have a duty to consider making funding available by way of interim payments to pay for medical treatment or rehabilitation.

Arranging rehabilitation

Whenever possible your solicitor should press the insurance company for interim payments to fund the provision of essential services. Also, while your rehabilitation progresses, it is important that your solicitor continues to seek interim payments in order to ensure that your household bills are paid, particularly if you are the main breadwinner in the household.

You may not need nursing or hands-on care. It is more likely that you will need someone to help you to organise things, to ensure your safety and to enable you to live as independently as possible. Enabling help and support can take a variety of forms and should be assessed as part of your compensation claim.

In consultation with your NHS rehabilitation team, and with your agreement, your solicitor can employ an independent case manager who will organise the support and care you need. A case manager can recruit support workers who will visit you as often as necessary to provide essential support and enabling help. The [British Society of Physical and Rehabilitation Medicine](#) has produced a code of best practice regarding the inter-relationship of private support and NHS support when NHS input is still ongoing, and your solicitor should be familiar with this.

If it is difficult to establish liability, it may not be possible to secure interim payments. In these circumstances, your solicitor should seek to ensure that, wherever possible, you get help from statutory bodies. This may include helping you with applications to the local authority for housing adaptations, applications to special educational needs services or community care and seeking provision of therapeutic services from the NHS. It may be necessary for your solicitor to use

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the law in order to enforce your rights to services from public bodies with a statutory obligation to help you.

Quantum - how much compensation?

If your claim is successful, you will be awarded compensation for your injuries and financial losses. This will be calculated with the intention of putting you in the same financial position in which you would have been had your injury not occurred and of making proper financial provision for your needs.

The three broad categories under which your compensation will be assessed are:

- Damages for pain, suffering and loss of amenity ('general damages')
- Damages for financial losses incurred prior to the date of settlement of your claim ('special damages')
- Damages for future losses and expenses

Damages for pain, suffering and loss of amenity (general damages)

These damages are awarded to compensate you for the actual injuries you sustained. The amount of compensation you receive will depend upon the nature and extent of your injuries, the effect that your injuries have had upon your daily enjoyment of life, and upon your ability to take part in family life and recreational activities. These damages will largely be based upon figures from the Judicial College publication *Guidelines for the Assessment of General Damages in Personal Injury Cases*.

Damages for financial losses incurred prior to the date of settlement of your claim (special damages)

This part of your compensation is intended to recompense you for all financial losses which you have suffered as a result of your injury and expenses that have been incurred on your behalf to date.

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Special damages will include:

- Loss of earnings (net after tax and national insurance)
- Any private medical or therapeutic expenses (e.g. physiotherapy)
- The value of help and support provided by your partner, family or friends (including their loss of earnings)
- The cost of any professional care which has been provided
- The cost of any aids and equipment which have been purchased for you
- The cost of any adaptations to your home
- Travelling expenses incurred by you and your family
- Items damaged in the incident

It is important that you keep a note of all the expenses you have incurred and retain receipts for any large items purchased. This will help your solicitor to prove that you have suffered these losses as a result of your injuries.

Damages for future losses and expenses

Many people who have sustained a brain injury will suffer long-term losses and expenses as a direct result of their injury. Calculation of the actual sums involved is complicated and involves the use of mathematical tables.

Your compensation will take into account some, or all, of the following on going annual costs or financial losses:

- Future loss of earnings, including the loss of any promotion prospects
- Loss of pension rights if your ability to work has been compromised
- The cost of providing personal care and support required in the future, including the value of the help that a relative may provide on a voluntary basis and the cost of employing all professional care workers
- The cost of employing a case manager, if appropriate

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- The cost of any special accommodation which may be required, although the formula for the calculation of the costs for this is complex
- The cost of extra domestic expenses, such as increased heating costs
- The cost of specialist therapeutic services (e.g. physiotherapy, speech and language therapy, occupational therapy)
- The cost of any special aids and equipment including annual maintenance and replacement costs
- Extra transport costs, particularly if a specially adapted vehicle is necessary, including annual maintenance and running costs
- The cost of managing your financial affairs on a professional basis

Claiming compensation for care and housing needs: Who pays?

In England and Wales, every citizen who suffers an injury, illness or disability has the legal right to an assessment of their social care needs by social services. Similarly, any citizen in need of medical treatment has a right to free NHS treatment subject to certain limited exceptions and charges. Often, personal injury claimants benefit from these arrangements before they move onto private therapy and support.

Sometimes a defendant may argue that the availability of these services should be taken into account when calculating damages paid, especially for care or housing needs. This can be a complex area of law, and if the argument is raised, your solicitor will have to be well prepared to ensure that you get the damages that you need and that your care is secured whatever route is chosen. Normally, privately funded support is to be preferred if only to avoid relying upon changes in future social services and NHS budgets over which you have no control.

Settlement: Lump sum or periodical payment?

Full and final settlement

Traditionally, damages have always been awarded in the form of a lump sum

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stated to be 'in full and final settlement' and normally payable within 14 days. A lump sum is designed to compensate for the injuries suffered and for all past and future financial losses. It is normally not possible to reopen a case after settlement, although special rules (provisional damages) do allow certain cases to be reopened in rare circumstances.

Provisional damages

Provisional damages can enable a claimant to return to Court at a later stage. However, this only applies if medical experts advise that there is a chance of a serious deterioration of the claimant's condition at a later date, for example, the development of late post-traumatic epilepsy. It is only possible to re-open a case if the Court made an order for provisional damages at the time of the settlement.

Periodical Payment Orders (PPOs) and structured settlements

Since 2006, the Courts have had the power, in cases where there are claims for future financial losses, to order that all or part of those claims should be paid by tax-free periodical payments on a monthly, quarterly or annual basis. Typically, this will be considered where there are claims for loss of future earnings or for the future cost of care support. Such an order can be made even if the claimant prefers a lump sum, if the Court decides that it is in the claimant's best interests to receive periodical payments.

The calculations are complicated and because this requires expert mathematical analysis, it is essential that your solicitor obtains specialist advice in order to guide you. The Court may order an expert report be obtained from an independent financial adviser to assist the judge to reach the right decision.

It is vitally important that periodical payments are automatically recalculated (or 'indexed') so as to increase annually in order to meet your future needs. Expert evidence is needed to advise upon the choice of the correct index, as there are many from which to choose. The wrong choice can have major financial implications. This is a very technical area and demands a high level of expertise to ensure the right outcome. Your solicitor will need to engage the right expert to

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tackle this issue. If handled well, the result in terms of the benefits of a PPO can considerably outweigh those of a conventional lump sum approach.

Structured settlements were popular in high-value claims several years ago, before the Courts had the power to order PPOs. They are similar to PPOs and this type of settlement is still feasible, although rare, even after the introduction of PPOs.

Overall financial planning

Your settlement could comprise a combination of lump sum, PPO and structured settlement. Whatever form it takes it is vitally important that all options are considered in order to provide the best possible financial planning for your future. Expert financial and legal advice is absolutely essential in this area.

Financial affairs - after settlement of the claim

State benefits

When compensation is paid, the defendant should pay back to the government any state benefits which you have received due to the injury. This applies to all work related and disability benefits received up to five years after the injury or up to the date of settlement, whichever is sooner.

The defendant will usually be able to deduct this amount from your compensation. For example, if you received £10,000 of Disability Living Allowance and have claimed £30,000 for past care costs, the defendant would take one from the other and you would receive £20,000. Normally, this will leave you no worse off as you have still had the same amount in total, just from different sources.

When compensation is paid, you will need to take advice on what will happen to your state benefits. You should continue receiving non-means tested benefits for as long as you are entitled to them. However, you may no longer be able to claim means-tested benefits unless you take advice on setting up a personal injury trust.

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Payment to family carers

The award of compensation will include the value of care provided by family members and expenses incurred by them on your behalf. When the case is settled, there should be an agreed Court order providing for reimbursement of those sums to family carers.

If the damages claim has been reduced or compromised because of contributory negligence, the amount which will be available to be paid to family carers will also be reduced by a similar percentage.

If a family member is in receipt of means-tested state benefits, the payment of a lump sum out of the compensation may result in the termination of those benefits.

Tax

Damages for personal injury and financial losses are paid tax-free. However, you may in future have to pay income tax upon any interest or income earned from the fund of damages, and capital gains tax in relation to any gains upon investment. Expert advice must be obtained.

Investment advice

The needs of each individual vary considerably. You may have a need for a very high level of income from your fund of damages. On the other hand, your need for income now might be lower, but you might need more income in the future to pay for increased care support. It is vitally important to seek professional advice in order to balance the need for income and for capital growth.

Advice can be gained from investment advisers who are authorised by the Financial Conduct Authority to give such advice. It is vitally important to make sure of the independence of the adviser. It is also important to find out whether the adviser will charge an annual fee or will be paid on a commission basis.

If your damages are held by the Court of Protection, the position relating to investment advice can be more complicated (see The Court of Protection).

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Wills

If you die without making a will, the laws of intestacy will apply and your assets may be transferred to members of your family in a way which is contrary to your wishes. Higher sums may also be payable in Inheritance Tax. It is therefore important that you make a will and you should consult your solicitor to do this.

The Court of Protection

Capacity

Many people who have suffered a brain injury and are entitled to damages may not have the necessary capacity in law to be able to deal with their own financial affairs. This is one of the common consequences of brain injury. In such circumstances it is essential that the Court of Protection is involved.

Role of the Court of Protection

The Court of Protection has a responsibility to protect the financial interests of those who are incapable of handling their own affairs. The Court of Protection will manage the overall situation but will appoint a Deputy to manage day-to-day finances. The Court of Protection must be consulted for all larger transactions (e.g. a house purchase) but will agree a budget with the Deputy for all routine expenditure. The Deputy will operate a bank account for paying all regular outgoings and expenses, into which money will be transferred on a regular basis from the Court of Protection.

In some cases, the Court of Protection may also have the power to make decisions about your welfare, such as your choice of accommodation or medical treatment. The Court will always carefully consider its powers and your ability to make decisions before doing this and in reality these circumstances are very rare.

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Deputies

In straightforward cases, the Deputy can be a family member. In more complicated cases, where there are larger sums of money, where there is a need to manage care regimes or where specialist accommodation is needed, it is recommended that a professional person such as a solicitor or accountant be appointed as the Deputy. The professional Deputy is better equipped to deal with the Court of Protection and to make the right decisions with regard to investments and tax.

State benefits under the Court of Protection

Even if you do receive an award, you should still be able to receive means-tested benefits provided that the fund of damages is administered by the Court of Protection and certain rules are followed. For further information as to how this can be achieved you should seek help from your solicitor.

Statutory Will

Once compensation has been awarded it is essential that a will is made. However, in instances where someone has lost the capacity to manage their own affairs, it is quite possible that they will have also lost the capacity to be able to make a will. In such circumstances, a will should be made using the Statutory Will procedure through the Court of Protection. It is essential to seek advice and help from a solicitor with regard to the procedure.

Investments

The Court of Protection has a duty to supervise the investment of damages for people who are unable to manage their own affairs. The Deputy can seek the approval of the Court in relation to the choice of investment advisers, provided they meet criteria set down by the Court of Protection. Those criteria will relate to their fees and charges, their experience, and their holding of appropriate professional indemnity insurance. This is a specialist field and advice should be

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sought from an experienced solicitor or from the Court of Protection itself as to how best to proceed. The solicitor who has handled your compensation claim may refer you at this point to another solicitor who is a specialist in Court of Protection matters.

For further information on this topic, see our publication [*Mental capacity: supporting decision making after brain injury*](#).

Private trusts

Personal injury trusts (also referred to as special needs trusts)

When a person receives a damages payment (whether an interim payment or a final settlement) any means-tested state benefits, such as income support, could be affected depending upon the amount of the damages. Unless advice is taken about the options, benefits such as income support, housing benefit and council tax benefit (as well as others) could no longer be available, due to you having access to your damages fund.

It may be possible to place your personal injury damages into a personal injury trust in such a way that you can continue to receive means-tested benefits. Under current law, the sums paid into the trust can be disregarded by the government when calculating your entitlement to state benefits. Only payments from a personal injury claim should normally be paid into the trust, not funds from other sources like other savings or pensions. You may not need a personal injury trust, for example, if you don't intend to claim means-tested benefits, or if the amount of compensation isn't substantial enough.

Setting up a personal injury trust involves appointing a minimum of two trustees to look after your compensation payment. If you have the mental capacity, you may choose to be one of those trustees. It is usual to open a separate bank account just for the trust and investments and property can also be held there so that they are also disregarded for benefits entitlement.

This is an area where a solicitor's advice and expertise is essential, and it is important to take legal advice before the compensation payment is received so that a trust can be set up ready to use. There are also special rules applying

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only to the first interim payment which must be taken into account.

You will need to check whether the cost of setting up the trust can be included within your claim, or whether you will have to pay the legal costs yourself using some of your funds. The legal costs are normally payable just for setting up the trust, but if you wish to appoint a professional trustee such as a solicitor or accountant to manage your fund in the future, it is important to ask about any annual fees.

For further information on this topic, see our publication [Personal injury trusts after brain injury](#).

Children's trusts

When damages are awarded to a person under 18 years of age, the money will be retained by the Court and placed in a deposit account until investment decisions have been made. If the sum is substantial it may be sensible to consider setting up a private trust which can be maintained on an ongoing basis after the claimant turns 18. This proposal would have to be submitted to the Court for approval and the Courts are normally content to enable children's trusts to be established if appropriate criteria can be met. Usually there should be a professional trustee, e.g. a solicitor or accountant. Advice must be obtained from a specialist solicitor experienced in dealing with this type of trust.

Summary

If you or a member of your family has suffered a brain injury, it is absolutely essential that you take legal advice from a solicitor with expertise in dealing with similar cases. Take care over your choice of solicitor and make sure they are on [Headway's Head Injury Solicitors Directory](#).

Initial advice will be free of charge and if you have a reasonably good case it is unlikely to cost you anything to pursue your claim. Do not accept advice from anyone who is not legally qualified as a solicitor.

If you choose the right solicitor, many of the problems you and your family face

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can be tackled confidently. You should receive a great deal of support from your solicitor as you work positively through rehabilitation and aim towards achieving the best possible quality of life.

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