Legal Aid in Clinical Negligence Cases - a brief guide to when legal aid funding might be available

To determine whether legal aid (also known as public funding) might be available to you, there are 2 key questions. Firstly, is your case within a category of legal cases that legal aid is available; and secondly, are you financially eligible? If we consider the answer to both questions is Yes, and if we have the expertise to assist you, we will assist you to make an application for legal aid. The Legal Aid Agency then decides (usually in around 4-6 weeks) whether to grant you legal aid. If successful you will receive a legal aid certificate that will limit the work we can do. Once we reach that limit, we apply on your behalf to extend the limit. At each stage the Legal Aid Agency will only grant the extension of the answers to both questions remain yes. Once you have a Legal Aid certificate, you have a duty to inform the Legal Aid Agency of any changes to your financial situation.

Is my case for clinical negligence eligible for legal aid?

The law sets out the types of legal cases for which legal aid is eligible. Since April 2013, Legal Aid for claims for damages for clinical negligence has been reduced to only one category of claimants; children who have suffered severe disability due to a neurological injury sustained during the mother’s pregnancy, the child’s birth or the first eight weeks of the child’s life.

The criteria that needs to be met is as follows:-

1. Clinical negligence caused a “neurological injury” to the child and as a result the child is severely disabled (meaning physical or mental disability);
2. The clinical negligence occurred:-
   a. while the child was in his or her mother’s womb; or
   b. during or after the child’s birth; and
      i. If the child was born before the beginning of the 37th week of pregnancy, the period of eight weeks beginning with the first day of what would have been that week; or
      ii. If the child was born during or after the 37th week of pregnancy, the period of eight weeks beginning with the day of the child’s birth.

If your child’s legal case is within an eligible category, this does not mean legal aid will cover all the costs will be granted. Only those cases which meet the merits criteria will be granted a legal aid certificate.

The merits criteria usually include looking at:
- Whether the case is likely to win
- Whether the likely outcome is proportionate to the cost of bringing the case.

Your Solicitor will only be able to apply for legal aid if they believe your child’s case is in an eligible category and will meet the merits criteria and your child is financially eligible.

Is your child financially eligible?

To satisfy the financial test, known as the means test your child must usually have:
- less than £2657 gross income
- Less than £733 disposable income
- Less than £8000 capital

In calculating their means the Legal Aid Agency will take into account any income or capital belonging to your child. The parents’ means are usually excluded and only the child’s money is taken into account. If you are seeking legal advice and representation on behalf of a vulnerable adult (whose case satisfies the clinical negligence criteria), usually only the person’s means who you are helping will be considered.

The information below is only for guidance; the full rules are set out in a guide over 300 pages long!

The income test

If your child has no regular income and no capital, they will automatically pass the income test. However, if your child receives a regular income, such as, for example, Disability Living Allowance, that income will need to be declared to the Legal Aid Agency, but it will be disregarded.

If your child has other sources of regular income and their disposable income is between £315 and the upper limit of £733, you are likely to have to pay a contribution on their behalf out of their income. If your child’s disposable income is less than £315 per month, this will not apply (although you may still have to pay a capital contribution).

The capital test

As well as satisfying the income test, a capital test applies. **Capital** includes everything from savings and investments, to valuable items, such as cars worth over £15,000. It is only the child’s capital that is taken into account. If an applicant for Legal Aid owns their house, any equity they have in it over £100,000 is also included.

To pass the capital test, you child must be assessed as having less than £8000 capital. If they have more than £3000 capital (but less than £8000 capital), you may have to pay a contribution on their behalf to legal aid.

Other legal aid eligibility

In truly exceptional cases, there is some scope for adults to be eligible for Legal Aid. Your solicitor will discuss with you whether this funding option is available for your particular case and if not, the other potential funding options that may be available.

More information on legal aid availability can be found on the Citizen Advice Bureau website:

Please do contact us to discuss whether we can assist you and whether your case qualifies for Legal Aid: Tel 0207 650 1200; Email: postbox@leighday.co.uk