



Legal Support Service Scotland

Support for life after childhood brain
and other serious injuries

www.childbraininjurytrust.org.uk

Hello and welcome to the Legal Support Services booklet for Scotland

You may not know this, but every 30 minutes, a child or young person will acquire a brain injury. It might be the result of an illness or an accident, such as a road traffic collision. If you're reading this booklet, you're doing so because you and your loved ones have been affected by a child or young person's acquired brain injury.

The Child Brain Injury Trust supports children and young people who have suffered an acquired brain injury and their families, helping them to understand and cope with what the future holds. The Legal Support Service ensures that all the children, young people and families that we work with get the right legal support as soon as possible. This can cover a wide range of topics, from assisting with pursuing a claim for welfare benefits or compensation to understanding what your employment rights are if you need to take time off work to care for your child.

Digby Brown Solicitors – Family matters....

For many, many years Digby Brown Solicitors have helped families in Scotland after a serious accident has caused a loved one to sustain a brain injury. As a firm we are personal injury specialists but that doesn't really tell the story. For over 40 years, the firm has been actively involved in the brain injury community; the experience built up over this time truly allows us to call ourselves experts in our field.

Digby Brown Solicitors has worked closely with the Child Brain Injury Trust for many years supporting the vital work the charity does to prepare families for the future ahead.

As a parent or guardian of a child who has an acquired brain injury you will have many questions. We understand this, we have helped many other families in the same position, over time, come to terms with the situation and deal with the issues, whatever they are. As daunting as it might seem, taking that first step and contacting a law firm, is an important one. Many of us are, Mums and Dads who want the very best for our children and will do everything necessary to help.

So we are here to help. Not just with the obvious, pursuing a claim against a negligent party, our experience can help on many fronts from active welfare and benefits guidance and representation, through employment issues to financial guardianships and trusts.

This booklet sets out to give you a flavour of Digby Brown Solicitors and give some answers to your initial concerns. We are always happy to help, please do not hesitate to get in touch.

In the first instance call Chris Stewart on 0141 566 9541
or email chris.stewart@digbybrown.co.uk

When should I talk to a solicitor?

We understand your priority and focus will always be the immediate medical needs of your child and speaking to a solicitor can be furthest from your thoughts. This is entirely appropriate and understandable; however, there are many reasons why speaking as soon as possible to a solicitor can be of huge benefit for your child's long term welfare.

Talk to us

A simple conversation, in the first instance, can tell us a lot, describing what happened and where. We can come to you, you can come to us, do not be concerned about being charged – we will not expect any payment for the initial advice we give.

Why is it so important to do this as soon as possible?

Whether your child is injured in a road traffic accident, criminal assault or some other type of accident we will need to interview all witnesses and get statements from them.

Ideally we want to speak to witnesses whilst events are still fresh in their minds or may want to obtain an expert's report before vital evidence disappears.

Perhaps more importantly, the sooner you consult the right solicitor the sooner early intervention through the Rehabilitation Code can begin.

The Rehabilitation Code*

Digby Brown subscribes to the rehabilitation code. This is a simple document which, although not mandatory, sets out a framework in which both claimant's solicitor (Digby Brown) and compensator (likely to be Insurer) agree to a pre-determined framework which puts the needs of the injured party (your child) central to everything they do. In short it allows for an Immediate Needs Assessment, where your child is seen by an independent care and rehabilitation specialist and from their recommendations funds can often be obtained for a raft of services which can help in the short and long term rehabilitation process.

The sooner you speak to us and we agree we can help, the quicker we can start taking steps to helping your child and your family's future.

* In cases of Clinical Negligence – the National Health Service does not subscribe and therefore this code cannot apply.

Funding the case

The cost of a legal action can seem daunting. The cost and the stress of the process are just two barriers people consider for not taking steps to make a compensation claim.

At Digby Brown we understand these issues and always discuss on first meeting each step which will be taken in the process. We find knowing what will happen does remove the daunting barriers and concerns that you may have.

Good legal advice

Funding a legal claim yourself is just not an option for 99% of people, we understand that. Nobody should be prohibited from pursuing a claim on behalf of a brain injured child because they are concerned about the costs. At Digby Brown we do this by using our funding solution "Compensate". Compensate is a no risk funding scheme which ensures all costs in the legal process are underwritten. So as long as you follow the legal advice given, you are completely protected if the case is unsuccessful. In short, there is no risk to you and you will never be asked to pay for anything during the legal process.

Beware of the "No win No fee" traps

Many firms in Scotland offer "No win No fee" but it doesn't always mean the same thing if you don't win the case. In many cases it will mean that if you are unsuccessful the solicitor will not charge a fee but they will expect you to pay for the medical and other reports as the case progresses as well as the defenders costs. You should avoid any arrangement where the terms of business do not clearly set out what will happen if you are not successful, as there is a risk that it will leave you with a large bill to pay.

We believe that access to funding and protection against the case being lost are crucial to recovering fair and prompt compensation.



Some common concerns

Every accident's circumstances is unique and depends on a multitude of factors. We would never try and categorise types of scenario however we have compiled below some frequently asked questions which parents have posed as to whether there is a prospect of taking legal recourse. We would stress the best course of action is always to ask, even if it is just to put to rest a doubt you may have.

My child was a passenger in a car and it was the drivers fault.

Anyone travelling in a vehicle is under the care of the driver and therefore in this case would have the right to make a claim. This applies even if the driver was a family member.

My child was a passenger in a vehicle who was hit by an uninsured driver.

In the event of an accident where the other vehicle driver is uninsured, or in the case of a hit and run, an organisation called the Motor Insurance Bureau (MIB) would take the place of the other party's insurer.

My child was a pedestrian when they were injured.

If the incident happened as a result of negligence then you are entitled to make claim.

They ran out onto the road.

Such cases are very much dependent upon the circumstances. It is the driver's duty to be driving with due care and attention to allow sufficient time to brake and avoid an accident. Even in circumstances where the child unexpectedly ran out onto the road you may be able to make a claim.

It happened at school or when playing sport.

All children should be able to take part in sporting activities without being hurt or seriously injured. Those organising such events have health and safety responsibilities. Any activity resulting in a child sustaining a serious injury when participating should be fully investigated.

It happened on a trampoline or bouncy castle.

Once again, it is the responsibility of those in control of these pieces of equipment to ensure adequate risk assessments are made and that proper supervision is present at all times.

My child's brain injury occurred at birth.

It is possible that during the birthing process the baby is starved of oxygen leading to a range of brain injuries. It is essential that you seek advice if you have any concerns.

Making a clinical or medical negligence claim

If your child's brain injury has been caused by poor care from medical treatment it may be possible to seek compensation from the provider of the treatment. In most cases this will be the National Health Service.

What steps should I take?

The first step in finding out answers is to make a complaint. A formal complaint can be helpful if you are seeking an explanation for some aspect of the treatment or an apology. If you already know that the treatment has been below an acceptable standard and has caused loss or injury, then it is time to speak to a specialist solicitor.

Why is a specialist needed?

Clinical negligence cases are generally very complex. For this reason, Digby Brown have a dedicated team who deal only with such cases. It is a big step to embark on a claim against a health professional and before you do, it is essential to speak to an expert in this field. Our clinical negligence team specialise in severe or catastrophic medical injuries claims and are expert at handling birth injury claims, securing compensation totalling many millions of pounds for our clients every year.

Criminal injuries

If your child has been injured as a result of a criminal assault, the compensation process is governed by the Criminal Injuries Compensation Authority (CICA), a government fund to compensate victims of violent crimes.

As solicitors, Digby Brown has many years of experience applying to the Authority on behalf of families and although it is possible to make an application as an individual it is highly recommended that you seek legal representation.

A parent or person with parental responsibility for a child may apply on behalf of a child. Alternatively, a child may wait until they reach adulthood before applying on their own behalf. There is a financial cap on awards. This means that the maximum an applicant can receive is £500,000. The 2012 Scheme also restricts the circumstances in which financial losses can be applied for. If the Authority's decision is not accepted then the applicant has a right of appeal to an independent Tribunal.

As with most injury claims, there are time limits. The general rule is that the application must be made as soon as possible to the Authority and must be made within 2 years of the incident. There are exceptions relative to children which extend the time limit.

Managing damages in Scotland

In Scotland, when compensation is awarded to a child, the management of the compensation is subject to the Children (Scotland) Act 1995. In most cases, the child's parents will be expected to manage the award. It is therefore important that a parent managing an award of damages for their child takes professional advice on how best to proceed.

Investment advice

It is important to seek professional investment advice to get the best from your child's compensation. At the conclusion of the claim, you may need to have funds available to pay, for example, your child's care regime or to purchase more suitable accommodation. You may wish to invest a proportion of the damages, which will provide future capital and income for your child. Advice can be taken from solicitors who are independent financial advisers (authorised by the Law Society of Scotland). It is important to ask the financial adviser to confirm that he is independent, and whether he charges an annual fee or is paid on a commission basis.

Financial Guardianship or Trust?

In Scotland, a person becomes an adult on their 16th birthday. If, on reaching 16 years of age, a child is considered to have the mental capacity to handle their own financial affairs, the damages should be paid over from the parents to the child. However, very few parents would wish their teenage child to have access to, or to manage, the damages which have been obtained to safeguard their future. It may therefore be possible to place your child's compensation in a private trust. The Trustees will assume control of the funds. The trust cannot be revoked by the child when they become an adult. The trust can protect your child from exploitation, and it can also protect the child's rights to means-tested benefits.

If, on reaching 16 years of age, a child is not considered to have the mental capacity to handle their own financial affairs, a Financial Guardian may have to be appointed. The Financial Guardian is appointed by the Court. The Financial Guardian will look after the day to day finances and make decisions about investments and tax. Any person can be appointed as a Financial Guardian. However, where there is a large sum of money involved, it is advisable that a professional person like a solicitor is appointed. The Financial Guardian is supervised by the Office of the Public Guardian. Annual accounts must be submitted to the Office of Public Guardian. The consent of the Office of Public Guardian must be obtained when making investments and when making substantial purchases, such as buying a house.

If a Trust has been set up there may be no need to appoint a Financial Guardian when the child becomes 16 years of age.

The cost of the Financial Guardianship or administration of the Trust can be included in the damages claim.

Judicial Factors

If concerns are brought to the attention of the Court about the suitability or the ability of a parent to manage the compensation, an order can be made for the appointment of a judicial factor. Alternatively, the Court will approve the settlement of the compensation into a trust fund. Where the compensation is settled into a trust fund, the Court will appoint the Trustees. A judicial factor is appointed by the Accountant of Court, which is an office of the Supreme Court. The judicial factor has to obtain the approval of the Accountant of Court when investing the damages on behalf of the child, or when making decisions about how to spend the damages.

A professional judicial factor's costs can be included as part of the damages claim.

Additional Support for Learning Needs

Children who have an acquired brain injury face the biggest barriers to learning. The Education (Additional Support for Learning) (Scotland) Act 2004 as amended by the 2009 Act introduced the concept of "additional support needs". This concept is broader than the phrase "special educational needs" which was used in the law which applied before the 2004 Act.

The Act provides that a child has additional support needs where the child is unable without the provision of additional support to benefit from school education which is provided.

The Act says that "additional support" is provision which is additional to, or otherwise different from, the educational provision made generally for children of the same age in schools under the management of the education authority for the area to which the child attends school. The first step in obtaining additional support for learning is to request a Co-ordinated Support Plan (CSP).

CSPs are prepared for children with additional support needs:

- arising from complex or multiple factors;
- requiring a range of support from different services; and
- enduring for one year or more

It is essential that additional support must be required from education as well as at least one of the following:

- social work (or another, non-education, council function) services;
- a Health Board; and/or
- another local authority

How do you go about getting a CSP?

This can happen one of two ways:

- a written request by a parent or young person; or
- the education authority acting on the basis of their own observations (e.g. a class teacher notices a child having difficulty reading).

Time Limits

Where a written request for an assessment takes place then the local authority must decide whether a child needs a CSP and should do that within 4 weeks.

After informing the parents or child the authority has 16 weeks to:

- give a copy of the plan to the parent(s) or young person; or
- inform the parent(s) or young person as to the reasons for the decision that the child or young person does not require a plan

The CSP must be reviewed every 12 months.

What if there is a dispute?

All education authorities provide an independent mediation service free of charge to parents of children and young people with additional support needs in their area. The aim of mediation is to promote dialogue between parents and the school or education authority to help reach agreement. It is voluntary and will not affect any right to appeal, nor the outcome of that appeal.

Matters affecting the education of a child with a brain injury are of the utmost importance and you should consult a solicitor familiar with these issues.



Key individuals



Chris Stewart

Chris is a Partner and heads up our Serious Injury Department. He qualified as a solicitor and notary public in 2000 and became a solicitor advocate (civil) in 2006. He has extended Rights of Audience in the Court of Session, House of Lords and Privy Council. Chris has considerable experience in Personal Injury in both the Sheriff Court and Court of Session. He has gained expertise in Freedom of Information and Data Protection; is a member of the Association of Personal Injury Lawyers (APIL); and of the Society of Solicitor Advocates and is responsible for the firm's in-house advocacy training.

Direct Dial: 0141 566 9541
chris.stewart@digbybrown.co.uk



Moira Kay

Moira is a Partner and works in Digby Brown's Serious Injury Department. She has a specialist interest in cases involving brain and spinal injury. Moira provides a legal counselling service for Spinal Injuries Scotland and at Huntercombe Neurodisability. She is co-author of the publication entitled "Claiming Compensation after Head Injury in Scotland" for Headway. Moira is an accredited Senior Litigator of the Association of Personal Injury Lawyers and has been involved in pursuing claims for damages, not only in Scotland, but also in Europe and in North America.

Direct Dial: 0141 566 9547
moira.kay@digbybrown.co.uk



Sue Grant

Sue is a Partner and heads up the Clinical Negligence Department. She has more than 20 years' experience in personal injury and clinical negligence litigation and is a Law Society of Scotland and APIL accredited specialist in these fields. Legal 500 2014 note that Sue is "vastly experienced" with "specialist experience in cerebral palsy cases". Chambers Guide to the UK Legal Profession ranks Sue as a band one "Leader in their Field" under Clinical Negligence.

In addition, Sue specialises in adoption and is Chair of BAAF Scottish Legal Group and legal adviser to the Scottish Adoption Association.

Direct Dial: 0131 319 8118
sue.grant@digbybrown.co.uk

Notes

Design: Frisbee Creative

In the first instance
call Chris Stewart on
0141 566 9541



Unit 1, The Great Barn, Baynards Green Farm
Nr. Bicester, Oxfordshire OX27 7SG

T: 01869 341075 E: info@cbituk.org
www.childbraininjurytrust.org.uk



Follow @cbituk



facebook.com/childbraininjurytrust