

# What is my claim worth?

**This is probably the most common and important question asked by a Claimant pursuing a personal injury claim. At the end of the day, it is the recovery of compensation for the injury and financial loss that is the purpose of such claim.**

Firstly, it is important to note that there is no automatic entitlement to compensation in the event of an accident. No matter how serious the injury suffered or how significant the financial loss, unless it can be established that a 3rd party is liable for the damage then the claim is worth nothing. For the purpose of this article, it is presumed that liability is not an issue.

Secondly, the value of a claim is not determined by what the Claimant personally feels their case is worth. Ultimately, a claim is only worth what the Defendant will pay or what a Judge will award at trial. There is no point a Claimant rejecting a settlement offer and going “gung ho” to trial if a Judge is going to award them less.

In the circumstances, it is important that a Claimant understands the basis on which compensation is calculated and the process followed to make an assessment. This article aims to provide such guidance.

Compensation is split into the following two broad categories:

1. General Damages (pain, suffering and loss of amenity caused by the injury)
2. Special Damages (past and future financial loss)



## General Damages

Causation is an important principle in any assessment of damages. A Claimant will only recover compensation in respect of an injury they can prove was caused by the event(s) for which the Defendant is liable. In this regard, expert medical evidence is essential.

A medical expert will be instructed to examine the Claimant, review the medical records and produce a report detailing the accident-related injuries. Any expert instructed, whether by the Claimant or Defendant, has a duty to the court to provide an independent and honest opinion.

In most cases, medical evidence will be limited to an expert instructed by the Claimant, although the Defendant will be entitled to submit questions to the expert. However, in higher value or complex cases, the Defendant may be granted permission to rely upon the evidence of a separate expert. If there is a difference of opinion between the experts that cannot be resolved and the parties cannot reach an agreement, then it will be for a Judge to decide. It can often be difficult to predict which expert a judge will favour and this may massively affect the potential level of damages awarded.

In such circumstances, this presents a very real and significant litigation risk to both Claimants and Defendants. It is no exaggeration to say that, in some cases, a Judge preferring the Defendant's expert evidence over that of the Claimant could halve the damages or worse.

It is the best and worst case scenario and assessment of the risk that a legal representative must take into account when advising their client.

## So, how does a Judge place a value on an injury?

By its very nature, placing a value on pain and suffering is a very subjective exercise. If one were to take a survey of the public asking what value they would place on a broken leg or a facial scar there would be a very wide spectrum of figures given. Similarly, claimants will have varying beliefs of what they feel their injuries are worth and in some cases, particularly those involving very serious injuries, a claimant may justifiably say that no amount of compensation would suffice. However, in a personal injury claim the value a claimant places on their own injury does not determine the amount they will receive. Whilst it may seem dispassionate to state, any injury is only really worth what a judge is likely to award. There is no point a claimant holding out for x amount of money when there is no way this will be awarded. This is where the professional advice of a solicitor comes in.

The process by which a Judge assesses damages for an injury is designed to reduce the subjective element, allowing a reasonable prediction of what is likely to be awarded and consequently increase the likelihood of the parties agreeing a settlement figure. That said, the subjective element and uncertainty cannot be removed entirely, which still leaves significant scope for dispute.

The starting point when assessing general damages is the Judicial College Guidelines (JC Guidelines). This sets out brackets of compensation for almost any injury imaginable, ranging from minor injuries where there is complete recovery within 7 days (a few hundred pounds to £550) to life changing catastrophic injuries such as very severe brain damage (£227,975 to £326,700), total blindness and deafness (in the region of £326,700) and Tetraplegia/Quadriplegia (£262,350 to £326,700).

We all know the term: "It cost me an arm and a leg". According to the JC Guidelines, this is not less than £110,800 for the loss of one arm (amputated at shoulder) plus £84,700 to £111,100 for the loss of one leg (above knee amputation).

Once a Judge has determined which of the JC Guideline brackets an injury falls into they may then "fine tune" their assessment by reference to previously decided case law involving similar injuries.

As stated above, whilst the JC Guidelines and case law remove a large part of the subjective element, this cannot be removed altogether. The following factors make it impossible to predict the amount that will be awarded with absolute certainty:

1. The relevant JC Guideline bracket may be broad and the parties may dispute whereabouts in the bracket the injury falls.
2. There may be disagreement as to which of the JC Guideline brackets is appropriate (e.g. severe or moderate).
3. The amount awarded for seemingly similar injuries in previously decided case law can vary significantly as they may represent the upper or lower end of a scale.
4. No two injuries or combination of injuries are exactly the same.
5. The impact of an injury can vary depending upon the individual and their lifestyle.

In the circumstances, it is only possible to make a reasonable prediction of the likely bracket of damages and then try to anticipate whereabouts within this spectrum a Judge will award.

In the vast majority of cases, the parties will broadly agree on the bracket within which a Judge is likely to award, albeit not the exact figure, and will settle somewhere in this bracket. However, the remaining element of uncertainty can still allow significant disagreement to occur and is the reason why some cases end up before a Judge for assessment. Whilst both parties may be confident of beating the offer made by the other, one of them must be wrong and will come out worse off.

It should be noted that greater scope for disagreement arises where each party has their own medical evidence and there is a significant difference of opinion between the experts. For example, the damages based on the Claimant's medical evidence may be X but based on the Defendant's medical evidence are Y.

When deciding whether to accept an offer or take a chance at trial, both parties will be making the same assessment. What are the chances of beating the offer, how much do they have to gain and how much do they have to lose?

Take the following example:

The Defendant has made an offer of £50,000. Your solicitor advises you that there is a very good chance a Judge will award you more than this but probably no more than £60,000 and a slim risk that you could be awarded as little as £20,000 on a worst case scenario. Do you risk losing £30,000 to get an additional £10,000?

It is important for a Claimant to realise that when their solicitor says they consider the amount offered for an injury to be "reasonable", they are not expressing a personal opinion but merely saying the amount offered falls within the bracket one can reasonably expect a Judge to award based upon the evidence and above mentioned criteria.

## Special Damages

More often than not, the cost of suffering an injury is more than the pain and suffering as the injury will usually cause financial loss. This quantifiable financial loss is called "special damages".

For example, we have already seen "the cost of an arm and a leg" in terms of "general damages" but the true cost to the individual will include all the resultant financial loss over the course of their lifetime (e.g. lost earnings, medical treatment, prosthetics care, adaptations to accommodation, professional care etc.)

In many cases, the value of special damages will exceed the general damages and, in serious injury cases, will be by far the most significant element of the claim. As set out above, the absolute maximum amount a person can be awarded for general damages, even for the worst type of injury, is around £326,700 but the total value of such a claim is likely to run into the millions of pounds when financial loss is taken into account. In the circumstances, it is the special damages that lead to the headline type of settlement figures.

The founding principle of special damages is that the Claimant should be placed back in the financial position they would have been in but for the accident. If the calculation is accurate, the Claimant should be no better off and no worse off than they would have been had the accident not occurred.

It is often tempting for the public to read a settlement figure in the media and assume the Claimant has struck gold. However, this is not the case. They are merely being reimbursed for the expenses they incur and losses suffered. There is no real financial gain.

When assessing the likely value of special damages, the same basic question applied to general damages should be asked. That is, what is a Judge likely to award the Claimant based upon the available evidence?

The test used by a Judge when assessing special damages is as follows:

1. Has the Claimant proved that the loss was incurred or is likely to occur in the future?
2. Has the Claimant proved that this loss has been caused directly by the accident or accident-related injuries?
3. Is the loss reasonably incurred?
4. Has the Claimant done all they reasonably can to mitigate (limit) the loss?

Subject to the above test, working out special damages is a mathematical equation.

Special damages are usually split into past losses and future losses.

Working out past loss should be a straightforward calculation. It is the actual loss incurred. Subject to proof, the Defendant cannot really dispute that such loss has been suffered. They can merely argue that it was not directly caused by the accident, was not reasonably incurred or that the Claimant failed to mitigate.

In terms of proof, it is up to the claimant to keep a record of the financial loss incurred and to retain any available documentary evidence.

In terms of causation, the medical evidence will often be vital. For example, if the Claimant is claiming 6 months' loss of earnings this will only be recovered if the expert agrees that such time off was reasonably required as a consequence of the accident-related injury.

The question of mitigation is also likely to arise in respect of a long term loss of earnings claim. For example, if the Claimant is unable to return to their pre accident work as a consequence of the injury but unreasonably refuses the offer of an alternative role at reduced pay, it is only likely that they will recover the net difference in pay between the old job and the new job the claimant refused.

As an extreme example of unreasonably incurred loss and failure to mitigate, the Claimant may have receipts proving that they have incurred £2,000 costs travelling by limousine to medical appointments. This is actual loss suffered but if the Claimant could quite reasonably have used public transport or taxis at a cost of £200 they will only recover the latter.

Therefore, in terms of past loss it is a case of calculating the actual loss incurred and predicting how much of this a Judge is likely to allow.

The assessment of future loss is very similar but involves a certain amount of clairvoyance. Based upon the available evidence, a Judge needs to see into the future to predict what financial loss the Claimant is likely to incur. Obviously, it is impossible to be certain about events that have not yet unfolded and the best any Judge can do is to make an assessment of this based upon the "balance of probabilities": what is more likely than not?

This can work both ways. A settlement may have allowed the Claimant the cost of future medical treatment but this may end up not being required, in which case the Claimant will have been overcompensated. Alternatively, unanticipated or disallowed losses may actually occur, meaning that the Claimant has been undercompensated. By the very nature of a future loss calculation, this cannot be avoided.

Once it has been determined that a future loss is likely to occur, then a set mathematical formula will be used taking into account the following:

1. The amount.
2. If it is a continuing loss, such as ongoing lost earnings, the duration of this.

3. If it is a one-off cost, such as future surgery, when this will occur.
4. Various risk factors and uncertainties.
5. Ability to invest the damages received.

These formulas are set out in what is called the “Ogden Tables”.

For example, if it is determined that the claimant will have an ongoing net loss of earnings of £20,000 per year from the age of 40 until 65, the natural assumption would be to calculate  $£20,000 \times 25 \text{ years} = £500,000$  but this would be wrong. The relevant Ogden Table tells us that the calculation is  $£20,000 \times 15.19 = £303,800$ . There is clearly a significant monetary difference between the two.

Similarly, if the Claimant is likely to require surgery in 10 years' time at a cost of £15,000, the calculation will be  $£15,000 \times 0.7812 = £11,718$ . Largely, this is to take into account the fact that the Claimant is receiving the money in advance of the actual loss and has the opportunity to invest.

Whilst not exhaustive, the following is a list of some commonly seen special damages:

1. Loss of earnings
2. Medical treatment
3. Care and assistance provided by family and friends
4. Professional care
5. Adaptations to accommodation
6. Medical equipment
7. Travel to medical appointments
8. Damage to property

Basically, any genuine financial loss the Claimant has suffered or may suffer as a result of the accident can be considered. It may not necessarily be awarded but it is best to claim and be refused than not claim at all.

It is perhaps worth elaborating on care and assistance provided by family and friends. It may seem strange that voluntary care and assistance provided by family and friends can be included as part of the financial loss. However, in principle, the court awards an amount to the Claimant to be held on trust for those who have provided the care. This is on the basis that the time spent by such individuals has a value. The care provided must be over and above the norm and is subject to the usual tests of causation and reasonableness. The hourly rate allowed can vary but the total can add up to be a very substantial part of the special damages if care is required over a prolonged period of time and can sometimes eclipse many of the other special damages in terms of value.

## Conclusion

The calculation of general damages and special damages is mainly a scientific exercise based upon the evidence and formulas set down but it is not an exact science. Basically, if you have the necessary evidence and follow the correct method, you can be reasonably confident of the outcome but never certain.

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