Headway
the brain injury association

Personal injury trusts

This publication provides an overview of the rules relating to personal injury trusts in England, Wales Scotland and Northern Ireland. Laws differ in the Channel Islands, so if you live there you will need to consult a specialist local solicitor.

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Introduction

Following a brain injury, a person may receive substantial sums of money. This may be from a personal injury claim, personal accident insurance, charitable gifts, or other sources. The money may be awarded for specific purposes, such as to compensate for lost future income and to cover the costs of rehabilitation and home adaptations. It isn't necessarily intended to be spent as the person wishes.

The person may be unable to work and their family members may have to give up jobs to provide care. They will continue to have their regular living costs to meet, including providing maintenance costs for their children or other dependent relatives. All these requirements mean that the person may still need to access means-tested benefits and funding for care services. Therefore, it is important to consider whether a personal injury trust could be used to ensure the following.

- That the person is able to claim all of the state benefits and care funding that they may be entitled to, both now and in the future;

- That the person has a suitable structure in place to manage their funds in the future.

This publication provides an overview of the rules relating to personal injury trusts in England, Wales Scotland and Northern Ireland. Laws differ in the Channel Islands, so if you live there you will need to consult a specialist local solicitor.

The information in this publication does not replace legal guidance from medical professionals.

What is a personal injury trust?

A personal injury trust is a legally binding arrangement for holding and managing funds received as a consequence of an injury. The trust must be managed according to specific rules. It is important that the right kind of trust is used, suitable for the person's circumstances.

A personal injury trust will be managed by two or more trustees or a trust corporation. The trustees should make decisions together about the management of the funds, including any payments made out of them.

The benefits of a personal injury trust

There are several benefits to having a personal injury trust in place, including the following:

- Funds held in the trust are disregarded when assessing eligibility for some means tested state benefits and services. Therefore, a person (and their partner if they

claim benefits together) can continue to receive these benefits in the future. A trust will also protect entitlement to local authority funding for the costs of living in a residential care home and, depending on the local authority, care provided in a person's own home.

- A personal injury trust can protect the interests of very young, old, disabled or otherwise vulnerable people. The trustees must each authorise all transactions within the trust, providing protection against inappropriate use of funds.

- A person can benefit from the knowledge and experience of their trustees. Appropriate trustees can provide valuable advice and support when making important decisions. This can ensure that the funds are managed appropriately to protect the person's long-term interests.

- A personal injury trust helps to define and 'ring fence' the funds that have arisen from a personal injury, keeping them separate from other assets. This can help if a person's circumstances change and they become entitled to means tested benefits and care services in the future.

What funds can go into a personal injury trust?

The benefits rules allow funds to be disregarded from affecting means tested benefits if they arise 'as a consequence of a personal injury'.

This means that personal injury trusts can be used to protect:

- A personal injury award;
- Compensation received from the Criminal Injuries Compensation Authority (CICA) for injuries caused by an assault;

- Compensation from the Motor Insurers' Bureau for injuries caused by an uninsured motorist;
- An Armed Forces Compensation Scheme award;
- Payments from other government compensation schemes;
- Charitable or public donations following an accident;
- Payments from accident or travel insurance;
- Payments from a professional negligence claim paid to compensate for a previously undervalued personal injury claim.

Setting up a personal injury trust

It is necessary to appoint trustees. There should be at least two trustees, and no more than four. They must each be over 18 years of age and mentally capable of fulfilling their responsibilities. The trustees should set up a bank or building society account to hold the trust funds, which must be kept separate from all other personal finances. All cheques and transactions will be signed and authorised by the trustees.

It is important to choose the right trustees, as they will have full control over the personal injury trust and the funds held within it. The trustees chosen must be able to work well together and act in the best interests of the person for whom the funds are held. It is often appropriate to appoint a professional trustee, such as a specialist solicitor, to handle trust funds with a large amount of compensation money.

It is important that a person receives legal advice from a specialist solicitor about the right kind of trust to put in place. The simplest type of trust is called a 'bare trust' and this is often the most appropriate for personal injury funds. In this type of trust, the money still belongs to the person with the injury and they can close the trust at any time if they wish.

However, other types of trust may be appropriate so the person's specific circumstances should be considered. For example, the type of trust may affect the distribution of the person's estate when they pass away, so provisions for their family in the future should be taken into account.

Once the necessary decisions are made, a trust deed, setting out all rules and obligations, will need to be prepared by a specialist solicitor. It will need to be signed, witnessed, and dated. The personal injury trust will usually have a title, such as the 'Josephine Anne Bloggs Trust'.

It is important to look into the costs involved in setting up the trust. These can sometimes be included in a compensation settlement, but often people will have to pay the costs themselves. Also, if a professional trustee, such as a specialist solicitor, is appointed to manage the fund then they will usually charge an annual fee.

When to set up a personal injury trust

It is important that, if at all possible, a personal injury trust is set up before a person receives their funds. This will ensure that the funds can be transferred in to the trust immediately and there will be no loss of benefits or care funding entitlement.

Some people may not be entitled to means tested benefits and services at the time they receive their funds, and so a personal injury trust may not seem immediately relevant. However, careful consideration should be given to the possibility that the situation may change in the future, for example:

- If they move out of the family home to live on their own;
- If they move to live in a care home;

- If they are discharged from hospital or a care home;
- If they divorce or separate from their partner;
- If they reach a significant age for benefits purposes; such as 16, 18 or the age when they qualify for retirement benefits;
- If they, or their partner, lose their job or retire;
- If they, or their partner, lose their entitlement to another benefit or source of income;
- If they, or their partner, find their health deteriorates and they become entitled to higher rates of disability benefits, which in turn have a knock-on effect for some means tested benefits.

It is possible to create a trust after funds have been received and held by a person for some time. However, this does not allow the person to retrospectively claim for any benefits that they have missed out on before the trust was set up. There is also a risk that the injury funds may get mixed up with their other money, which can cause some complications. Therefore, it is always advisable to set up the trust as soon as possible.

The 52 week rule for the first payment following an injury

The first payment received following a personal injury is disregarded for the first 52 weeks when assessing entitlement to means tested benefits and services.

This could be the first interim payment from a personal injury claim, a payment from an accident insurance policy, or even a capital payment from a charity. This disregard does not apply to any later payments. Note that the rules on the type of payment the disregard applies to can be unclear, so it is important to seek expert advice.

In brain injury cases, it is usually sensible to set up a personal injury trust as soon as possible, regardless of the 52 week rule. Compensation payments for brain injury will usually last longer than 52 weeks, so there is little benefit in delaying. This is because any money left over will be considered when assessing for means tested benefits and care services after the 52 week period comes to an end.

Personal injury trusts for children and people who are unable to make their own decisions

In most cases, the decision to set up a personal injury trust is one for the person to make for themselves, with advice from a specialist solicitor. However, if a person is unable to make their own decisions, it will be necessary to get approval to set up a trust for them.

Trusts for children

In cases involving a child, a High Court judge will need to approve the establishment of a personal injury trust to manage their funds until they reach 18 years of age. The court will need to be satisfied that a trust is suitable and is likely to be beneficial to the child, as well as approving the trustees and the type of trust that is to be used.

Trusts for people without mental capacity

Brain injury can impair decision making abilities. This can leave some people without the mental capacity to deal with their own financial affairs, under the criteria set out in the Mental Capacity Act 2005 (MCA). In order to make decisions for someone who lacks capacity, an application must be made to the Court of Protection (CoP). A CoP judge will then have to decide the most appropriate method for management of the person's financial affairs.

A deputy will usually be appointed in order to manage another's property and financial affairs. This is usually preferred to the establishment of a personal injury trust, because a deputy is required to report to the Office of the Public Guardian (OPG) in England and Wales, the Office of the Public Guardian (Scotland) in Scotland and the Office of Care and Protection in Northern Ireland. This requirement provides assurance that the person lacking capacity will have their best interests looked after. Funds held by a deputy will also be disregarded for means tested benefits and services, in the same way as funds held in a trust.

Children and incapable adults in Scotland

If a person in Scotland is unable to make their own decisions, it will be necessary to have a financial guardian appointed by the court. The Office of the Public Guardian (Scotland) will then need to approve any transactions.

It is possible for a guardian to be allowed to set up a personal injury trust. The courts and the OPG have authority to allow this, but are only likely to do so in exceptional circumstances. This is because funds held in a trust no longer have the protection of OPG supervision and an insurance policy.

In cases involving a person under the age of 16, a parent or guardian can establish a personal injury trust to manage their funds. No approval is required from a court and such a trust can be set up even if the child will be an incapable adult at the age of 16.

Conclusion

After a brain injury, some people are entitled to substantial sums of compensation. They may also receive money from insurance policies, charitable donations and other sources. However, thought must be given to how this money can be used wisely so as not to affect entitlement to benefits and care services. Establishing a personal injury trust can often be the best way to do this. Legal advice should always be sought. Members of Headway's solicitors list can be approached for help in this area and details are on our website. It is important to take legal advice before payments are received so that the trust can be set up ready to use.

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We hope that this has been a helpful resource. Please consider sharing your feedback with us by scanning the QR code or by visiting our publication feedback survey https://uk.surveymonkey.com/r/hwpublications.

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This information was last reviewed in 2023.

We're here to listen.

If you need support, or have a question about brain injury, contact our free nurse-led helpline:

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