PI focus

JANUARY 2023

THE ASSOCIATION OF PERSONAL INJURY LAWYERS

How to lead the green agenda in your law firm

COUNTDOWN TO ZERO

Finding fault
Are product liability claims too hard to win?

Growing pains
The unique needs of teenagers with TBI

In need of repair
The Defective Premises Act is badly drafted

Special focus: legal costs
Dealing with retainer disputes

COMMENT

Bereavement damages: time for a debate

It was a great pleasure to be a representative at APIL's parliamentary reception in late November which focused on our #Fairness4Families campaign for reform of the archaic law on bereavement damages in England, Wales and Northern Ireland. This is one of our primary proactive campaigns.

The event follows the Bereavement Damages: a Dis-United Kingdom report published in April 2021. Even since then, many bereaved people from close families have been denied meaningful compensation due to an outdated law that has not been updated significantly for over forty years, and fails miserably to meet the needs of today's society and the modern family.

It is a postcode lottery, and in Scotland they have got it right; claims for compensation following a bereavement are considered on a case-by-case basis where the relationships and personal circumstances are taken into account. The law has evolved over the years so that it recognises the closeness between many different family members.

Not so for England and Wales, because a rigid and discriminatory regime means only the spouse or civil partner, parents of children under the age of 18, or a cohabitee of at least two years can make a claim - and then only for a fixed sum of just over £15,000. Barely enough for a small new car, let alone to acknowledge an unnecessary death and hold the wrongdoer to account.

MPs got to meet Sabiha Ozseker, who was not eligible for bereavement damages after the death of her father due to clinical negligence while undergoing dialysis. She was his carer and cleaner, despite working full time for an insurance company. The compensation for the family covered mainly funeral costs, as Sabiha and her siblings were not eligible. She feels insulted and is working to help APIL change the law.

We also told MPs about Amelia Gladstone, who lost her partner Jordan in a car crash. She was denied bereavement damages even though they had lived together for eighteen months and she was pregnant with his child. That is clearly not right.

The government has previously brushed off our calls for action, despite evidence that reform is widely supported by the British public. For example, 73% of British adults think the amount of compensation for grief and trauma should vary according to the circumstances of each case, and a majority believe the statutory amount is too low.

The Ministry of Justice told us that bereavement damages were just a 'token award'. How can that even begin to be justifiable, especially given the approach north of the border?

Because our society has changed so much over the last forty years and the legislation is hopelessly out of date, we need a formal debate in Parliament. Each of the attending MPs were asked to support this by requesting a debate as the first step to reform.

Our reception helped build parliamentary support and brought us one step closer to reform. You can help with the next step by asking your MP to call for a debate. See #Fairness4Families or email our campaigns team at sam.ellis@apil.org.uk.

Mike Benner

Chief executive

> **The government has previously brushed off our calls for action, despite evidence that reform is widely supported by the British public**

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IN THIS ISSUE

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WELCOME

Practising personal injury law should be all about fighting for the injured person. But since legal aid was replaced with conditional fee agreements (CFAs) in 2000, PI lawyers now find themselves spending far too much time in battles over legal costs.

In this edition, we examine the most pressing costs issues facing PI lawyers – including the rise in disputes by former clients; changes coming up in relation to 'QOCS' costs protection; and the future of costs budgeting.

Meanwhile in our cover feature, we look at what PI lawyers can do to drive forward a carbon neutral agenda within their law firm. The key message is, don't let being a lawyer hold you back. You do not need to be a master of every technical detail before you can start taking action.

We also look at the important area of product liability claims. With defective medical products causing pain and misery to so many patients, why do so few of these cases succeed? We ask whether the law is working in this area, and offer tips for a more successful approach.

And finally – to err is human. So I would urge all homo sapien readers to turn to page 31 for some amusing insights from solicitor Richard Barr on the many things that can go wrong for the PI lawyer, what to do when disaster strikes, and – as Richard puts it – how to keep yourself out of Cockup Corner.

Rachel Rothwell
Editor, PI Focus

NEW ALLIANCE BROADENS CAMPAIGN REACH

APIL has been working with a group of like-minded charities to help broaden the reach of campaign work and support for injured people.

The Alliance for Injured People (AIP) is a collaboration of not-for-profit organisations dedicated to supporting injured people who are facing adversity; supporting bereaved families; and advancing their interests to policymakers.

The group, which is facilitated by APIL, currently comprises RoadPeace, Mesothelioma UK, Patient Safety Learning, the Limbless Association, and the Back Up Trust.

'This is a mutually supportive group which meets to share ideas and which we hope will eventually grow into a wider network,' said APIL chief executive Mike Benner.

'In terms of campaigning on behalf of injured people, there is always strength in numbers and diversity, as well as the generation of creative ideas for reform. Our hope is for this group to grow organically and become a powerful force for change.'

One campaign issue firmly in the AIP's sights is reform of the scheme that allows the NHS to recover the cost of treating people who have been injured by the negligence of others.

The operation of a cap means the NHS is unable to recover the full cost of treatment. Removal of the cap would increase funding for hard-pressed NHS services to the benefit of injured people, as well as ensuring that the wrongdoer is held fully accountable for causing needless injury - rather than expecting the State to pick up the tab. A campaign plan is currently being drawn up.

Find out more about the charities involved in the AIP in the March issue of PI Focus.

REVAMP FOR HELP HUB

APIL's online resource which directs families to help in times of crisis is undergoing a review and revamp for 2023.

The Severe Injury Help Hub provides invaluable support for victims of negligence and their families who do not know where to turn after injury and bereavement.

It was created following conversations with the wife of a man who was catastrophically injured in a road traffic collision. She said that, in the initial hours following the crash, she was desperate for some practical guidance and turned to the internet for answers.

This was around the time that advertising of legal services was banned in hospitals, leaving a resourcing gap for families looking for urgent information in desperate times.

The Severe Injury Help Hub covers a wide range of queries including how people can pay bills when the household's key earner is incapacitated; who has authority to make medical decisions; and how to help children understand what has happened. It also directs people to where they can find an accredited, specialist personal injury lawyer if they need one.

A planned programme of promotional activity will start after the review and update is compete. The plan includes social media content, a fresh 'look', and physical wallet-sized cards for people to keep and pass on to others who might need it.

The key aim is to spread awareness of the Severe Injury Help Hub and also to help APIL build and consolidate its valuable links with charities and other providers of support for injured people and their families.

KEEP UP TO DATE

Members can keep up to date on all APIL news and campaigns through our Weekly News email update, which goes out every Thursday

BROAD REMIT FOR SCOTLAND'S PATIENT SAFETY COMMISSIONER

Legislation before the Scottish Parliament will establish a new Patient Safety Commissioner for Scotland.

Provisions in the Patient Safety Commissioner for Scotland Bill confirm that the commissioner's remit will cover all areas of patient safety - an approach for which APIL has argued.

Originally, ministers in Edinburgh had proposed that the commissioner's remit would initially be limited to the area of medicines and medical devices. In response to a Scottish government consultation on the proposals last year, however, APIL urged ministers to go further from the outset; arguing that while issues relating to medicines and medical devices are important, there is a systemic failure in the healthcare sector to listen when things go wrong.

The legislation provides that the patient safety commissioner will now be an independent champion for patients, although it is not yet clear when the appointment will be made, as the Bill is only at the start of its legislative journey. Scrutiny by politicians begins with an examination of the Bill by the Scottish Parliament's Health, Social Care and Sport Committee.

As the Bill goes through the parliamentary process, APIL will maintain pressure for the commissioner to have a wide patient safety remit.

The approach taken by the Scottish government is in stark contrast to that taken by Westminster's Department of Health and Social Care, where the new Patient Safety Commissioner's remit is restricted to the area of medicines and medical devices.

Dr Henrietta Hughes was appointed as the first ever Patient Safety Commissioner for England in September last year. Dr Hughes is now being approached for an introductory meeting to discuss APIL's work, and the association's views on how patient safety can be improved in the NHS.

GET INVOLVED – SERIOUS INJURY GUIDE WORKSHOP FEBRUARY 2023

Following the success of the Serious Injury Guide stakeholder workshop in 2018, the Serious Injury Guide steering committee will host another event for participants and those who are interested in, or support, the guide.

Attendees will hear presentations on a range of topics including the benefits and principles of the guide; case studies to demonstrate use of the guide where liability is admitted and where it is not; and the escalation process.

There will also be a session on the future of the Serious Injury Guide in light of ongoing work by both the Civil Procedure Rule Committee and the Civil Justice Council. Attendees will be invited to participate in breakout sessions, providing an opportunity to discuss the features of the guide that work well, and what could be improved. Views will also be sought on the ongoing pilot for a lower threshold for entry to the process.

The workshop will take place from 2pm – 5pm on Thursday 2 February 2023 in London. Anyone interested in attending who would like further details should contact Alice Taylor: alice.taylor@apil.org.uk.

APIL FUTURE LEADERS COMMUNITY APPOINTS ITS FIRST CHAIR

The new APIL Future Leaders Community (AFLC) has appointed its inaugural chair.

APIL member Mark Thomason of Clear Law (pictured) will be joined by a steering group of 10 members with specific roles and responsibilities, who will help to shape the AFLC and develop its action plan.

Thomason said he was keen to embark on the new role, 'looking to the future and how best to safeguard and prepare our profession for the coming years.'

The AFLC will take a long-term view, assessing the big issues facing the PI sector to 2032 and beyond.

Mark Thomason
Clear Law

APIL's head of business development Paul Fleming said: 'I'm delighted that we have been able to appoint a focused and dedicated steering group for the AFLC with Mark at the helm.

'This is an exciting opportunity for APIL members to get involved with the AFLC networking opportunities, developing the community and contributing to the horizon scanning activities and work streams associated with the AFLC'.

More information on how to join the AFLC will be published through APIL social media channels over the coming weeks.

BE THE MENTOR YOU WISH YOU'D HAD

We are delighted to report that early adopters have already completed their initial mentoring journey on the APIL Mentoring Hub.

Here is a sneak preview of some experiences from both mentors and mentees:

Easy to navigate – strongly agree

Resources were helpful – strongly agree

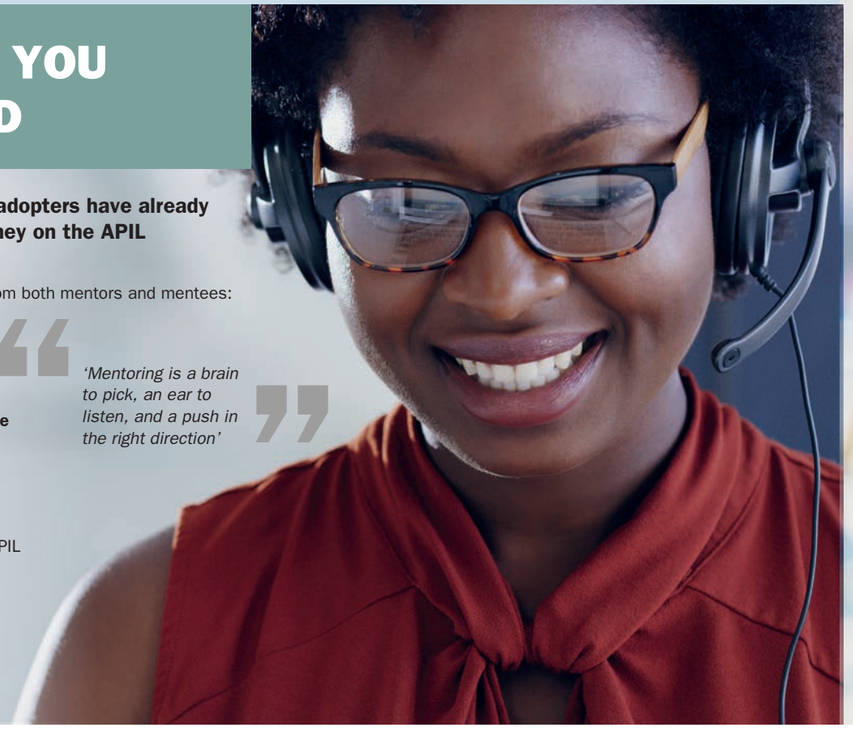
Connected with a mentor easily – strongly agree

My mentor relationship was a good match – strongly agree

'Mentoring is a brain to pick, an ear to listen, and a push in the right direction'

This exciting member benefit is available to all APIL members at no cost, and could deliver a career-enhancing return.

Visit the APIL website for further information: https://www.apil.org.uk/mentoring



MAKING CONNECTIONS

APIL'S NEW-LOOK JOB'S BOARD WILL HELP CONNECT THE RIGHT PEOPLE TO THE RIGHT JOBS

The APIL Jobs Board has been re-designed to provide an enhanced recruitment solution for firms specialising in personal injury law. This has been achieved in part with APIL entering into a partnership agreement with Daniel Lewis Law (specialist PI law recruitment services provider).

The APIL jobs board enables APIL to offer a profitable recruitment solution for our members and prospective job seekers.

APIL's Jobs Board is a cost effective and efficient way to advertise jobs. Our aim is to connect the right people to the right jobs.

The Jobs Board offers two levels of service:

Level 1

Level 1: £100 + VAT

Offers the customer the facility to host a job on the APIL website for three weeks, with social media exposure.

Level 2

Level 2: £300 + VAT

This is APIL`s premium jobs board service. The job is hosted on the APIL website for up to three months.

The job is also hosted on the Law Society Gazette website as well as the Daniel Lewis Law website, facilitating maximum exposure for advertised jobs.

All jobs posted on the APIL Jobs Board will benefit from exposure generated from multiple APIL communication channels, including PI Focus. See www.apil.org.uk/jobs.

JEMMA MACFADYEN EXPLAINS HOW PI LAWYERS CAN TAKE ACTION ON CLIMATE CHANGE

Calls to action from clients around sustainability can no longer be ignored - meaning that rapidly increasing concerns about environmental, social and governance (ESG) issues are now critical considerations for law firms.

We know that there are challenges for lawyers on many fronts. The vastness of the topic can make it daunting for the inexperienced to know where to start. However, the risks of doing nothing are far greater. The key messages are to embrace the bigger picture, accept that it is impossible to know everything before you begin, and to just get started.

This article sets out practical tips to help you make a start and help you progress; from taking those initial first steps through to assuming a position of environmental leadership both internally and externally.

Pressure for climate action is intensifying

Businesses are under increasing legislative, regulatory and market pressure worldwide to demonstrate their sustainability credentials and avoid climate litigation. The Paris Agreement and COP27 set legal targets for countries to achieve net zero by 2050, and many organisations are setting their own targets to decarbonise ahead of this date – showing a commitment to limiting their emissions more quickly. In October 2021 the UK became the first G20 country to make it mandatory for Britain's largest businesses (both public and private) to disclose their climate-related risks and opportunities.

As well as these mandated measures, pressure has long been building from increasingly socially conscious and ethical consumers, investors, NGOs, clients and employees. A spotlight is now shining on business ethics and sustainability credentials like never before. Climate action is not just expected – but demanded.

Advice for getting started

1. Just get started – do not wait to become an expert

The first piece of advice is very simply to make a start somewhere – do not wait until you have all the knowledge. You do not need to know and understand everything before you get going. Step away from self-identification as a technical expert.

2. Engage externally

Focusing on targeted education and knowledge building while simultaneously growing your network of like-minded professionals are great ways to improve knowledge and understand what works. Get engaged with people and organisations externally; attend webinars and training courses; and join external groups.

3. Collaborate internally

'Roll your sleeves up' and get involved. Internally this may mean volunteering for or establishing working / steering groups and committees, or expanding the remit of an existing team, such as corporate and social responsibility (CSR), ESG or sustainability. Create online or in-person forums and use in-house collaboration and communication tools. If you are able to foster a collaborative mindset, it is possible to work across the law firm to create knowledge and effect change across all corners of the firm.

4. Find allies and prepare for the journey

The team driving change needs to be persistent – it is a journey. It may take time to generate momentum. Success comes when environmental practice is a recognised part of the operating rhythm of the team and the law firm. This cannot happen overnight. It is key to find your allies in the firm, to understand who has influence and get sustainability on the radar.

Challenges you may experience

One of the challenges can be an initial lack of confidence with the subject. Lawyers have highly developed technical skills. They are accustomed to having detailed understanding and expertise, possessing all (or at least most) of the answers, and having a high degree of certainty around risks.

A lack of technical and scientific expertise on climate change and decarbonisation can place lawyers in the uncomfortable and somewhat unfamiliar position of feeling like a generalist, without any depth of knowledge or understanding. This can be a difficult hurdle to overcome. While some education is helpful, the desire to know and understand everything can preclude lawyers from acting.

Hand-in-hand with a lack of knowledge is the potential for information overload. It can be difficult getting to grips with the mountains of information available across such a vast topic area. There is a deluge of content out there, and a shortage of practical guidance, which makes it difficult to know where to start.

This uncertainty also overlaps with the feeling of a lack of authority or ability to make any changes. Lawyers can feel disengaged from the issues, that sustainability does not form part of their core role and responsibilities, or that they are powerless to effect change.

A lack of accurate internal data can be a challenge – getting the right data from the business to feel confident and to enable accurate reporting, assessment, measurement and decision-making.

What does success look like?

- Board level leadership makes a difference – setting the tone and driving change
- Create a sense of agency
- Ensure that environmental practices are not added on, but are embedded into business as usual - including team and individual performance goals
- Foster a culture of learning
- Set company-wide sustainability targets, robust plans and strategy – holding yourselves to account
- Have a small sustainability team at the centre of the business, but the effort is across the organisation
- Ensure transparent tracking and reporting of environmental indicators

A spotlight is now shining on business ethics and sustainability credentials like never before. Climate action is not just expected – but demanded

You do not need to know and understand everything before you get going

Conclusion

Acting now means you are getting ahead of the curve and playing a pivotal role in the environmental issues that will affect all areas of the economy and society. Do not let perfect get in the way of good - and do not wait for permission to get started.

A practical resource: The Chancery Lane Project (TCLP)

This is a non-profit global collaboration of legal professionals.

Their Net Zero Toolkit offers climate- and net zero-aligned clauses that are ready for any lawyer to incorporate into legal precedents and commercial agreements free of charge.

Jemma Macfadyen is director, Spinnaker Consulting & Research

• Spinnaker Research is a legal research consultancy specialising in B2B qualitative market research for regulators and legal information providers in the UK legal sector (spinnakerbusiness.co.uk). APIL members can commission bespoke research from Spinnaker at a discounted rate. For details contact john.mcglade@apil.org.uk.

Lawyers can feel disengaged from the issues, that sustainability does not form part of their core role and responsibilities

APIL SIG updates

SIGS & REGIONAL GROUPS

ACCOMMODATION CLAIMS:

THE PROBLEM OF SHORT LIFE EXPECTANCY

Bilal Hussain
Irwin Mitchell

Laura Swaine
Osbornes Law

REPORT BY BILAL HUSSAIN, SOLICITOR AT IRWIN MITCHELL AND LAURA SWAINE, ASSOCIATE AT OSBORNES LAW; JOINT CO-ORDINATORS OF APIL'S DAMAGES SIG

In a Damages SIG meeting on 6 October 2022, our guest speaker Winston Hunter KC of Byrom Street Chambers discussed the problem of accommodation claims in cases of short life expectancy; and how practitioners have sought to address this issue since the Court of Appeal decision in *Swift v Carpenter* [2020] EWCA Civ 1295.

The original problem

The original problem when calculating accommodation claims is that a claimant with a proven need for different accommodation due to their disability is not able to recover the full cost of the accommodation, or even the full additional cost. This arises directly from the compensatory principle of 'full compensation' and not a penny more.

The damages awarded are expected to meet all the claimant's reasonable needs during their lifetime only, ensuring there will be no 'windfall'. This was the basis for the Court of Appeal's decision in *Roberts v Johnstone* [1989] Q.B. 878, which came at a time where high mortgage interest rates and appreciating house prices had persuaded the court that claimants were being overcompensated, and some method of redressing the balance must be devised.

More than thirty years on, in *Swift v Carpenter* the Court of Appeal had to revisit the *Roberts v Johnstone* formula in light of a negative discount rate which meant claimants were left with hardly any compensation for the increased costs to purchase the required accommodation, when offset against their pre-accident accommodation.

Swift v Carpenter

Mr Hunter made a number of observations from *Swift* that are essential to the issues posed by short life expectancy cases, and the possible solutions:

1. The Court of Appeal held it was not bound by the decision in *Roberts v Johnstone.*

2. The *R v J* formula no longer achieves fair and reasonable compensation for an injured claimant and should not be followed.

3. A fair and reasonable approach was to provide the claimant with the additional capital cost of the property, less the value of the reversionary interest in the property. This was on the basis that the claimant (or their estate), by retaining a financial stake in the form of the reversionary interest, could choose to dispose of that interest - thus releasing additional capital with which to fund the purchase.

4. The Court of Appeal decided the correct approach to valuing the reversionary interest was to use the *market value* of reversionary interests. This was appropriate despite accepting that any market was small. A reasonably 'cautious' assumed rate of return - reflecting both the size of the market and uncertainties as to life expectancy - of 5% was adopted.

Shortened life expectancy cases

When applying *Swift,* practitioners will realise that a shorter life expectancy means a greater reversionary interest. The life expectancy of a claimant may be short for a variety of reasons (age, other co-morbidities) with some having nothing to do with the actions of the tortfeasors. Because of the operation of the *Swift* formula, which focuses on the remaining lifetime of the claimant, the impact of the short life expectancy operates in the same way in all these cases.

Mr Hunter gave the following examples to identify the potential issues that arise in short life expectancy cases:

Remaining life expectancy	Value life interest
60	94.6%
50	91.3%
40	85.7%
30	76.9%
20	62.3%
10	38.6%
5	21.7%

Therefore under *Swift,* once life expectancy falls below 20 years, claimants will need to find close to 40% of the required capital value. With life expectancy of 14 years the claimant must find 50% of the required capital value. With a shortened life expectancy there is a significant shortfall that undermines the assumption in *Swift.*

Short life expectancy: solutions

The Court of Appeal recognised that the guidance should not be regarded as a straitjacket to be applied rigidly and universally. It agreed that the underlying principle would continue to create difficult cases.

In the opinion of Irwin LJ:

'If it were to prove impossible here to award a claimant full compensation for injury without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence.'

On revisiting the decision in *Swift v Carpenter* some two years on, it is clear that very obvious challenges remain in cases of short life expectancy. To our knowledge, no court has been invited to address this particular problem.

This would suggest that practitioners are finding solutions that are acceptable to the parties, and to the Court in cases involving children and protected parties.

Mr Hunter considers the following possible solutions:

- Adopting from a claimant's perspective the annual cost of rental where

(i) the claimant had previously been in rental accommodation; and

(ii) the post-accident property does not need any significant alteration or adaptation.

- Adopting a rental option and claiming in addition the cost of significant alterations every few years is not a realistic approach, and one that the Court of Protection would not sanction.

- An insurer may be persuaded but cannot be compelled to purchase a property and to grant to the claimant a life interest. This could be a workable solution where there is no spouse or dependant.

- The settlement between the parties may 'recognise' the need to provide a lump sum of sufficient size to purchase a suitable property, and this may be released by way of an interim payment, especially where:

(i) This is the only means by which the claimant can be brought out of residential placement;

(ii) the parties have reached some understanding or accord as to a mutual interest in seeking the continued receipt of statutory funding.

A final thought

In conclusion, Mr Hunter said: *'Swift* was not intended to and has not solved all of the problems that arise in the law of compensatory damages.

'Other jurisdictions have adopted a less strict application to the issue of over-compensation and allowed the recovery of the full additional purchase price costs. It is unlikely that the Court of Appeal will permit this as a simple matter of principle, and will require it to be shown that this is the only way that a claimant can reasonably recover their loss.'

We certainly endorse this sentiment.

The Damages SIG will hold a hybrid event in London on traumatic brain injury litigation on 27 January.

To suggest ideas for future meetings, contact Bilal.Hussain@IrwinMitchell.com and laura.swaine@osborneslaw.com.

NEW AND RE-APPOINTED JOINT CO-ORDINATORS ACROSS THE APIL GROUPS

A number of joint co-ordinators have been elected and appointed throughout APIL's special interest and regional groups.

Laura Swaine of Osbornes Law has been appointed joint co-ordinator of the Damages group, and James Gibson of Hugh James has been appointed joint co-ordinator of the Multi-Party Actions group.

In the Occupational Health group, Kevin Johnson of Leigh Day has been elected, and Ian Bailey has been re-elected.

In the Spinal Cord Injury group, Jessica Bowles and Jodee Mayer of Irwin Mitchell have both been elected as joint co-ordinators, while Alex Dabek of Bolt Burden Kemp has been re-elected.

David McClenaghan at Bolt Burden Kemp and Richard Sweetman at Irwin Mitchell have both been reappointed as joint co-ordinators of the Child Abuse group.

In the regional groups, Tara Byrne of Boyes Turner and David Hughes of RWK Goodman have been appointed as joint co-ordinators of the Central England group.

In the Yorkshire group, Ewan Bain of Switalskis and Kelly Linguard of Irwin Mitchell have been appointed as joint co-ordinators.

James Edmondson of Clarke Willmott has been appointed joint co-ordinator of the South West group; while Rebecca Maddock of Irwin Mitchell and Paul Morpeth of Thompsons were both re-appointed as joint co-ordinators in the North East group.

Richard Biggs has been appointed joint coordinator of the North West group.

JUNIOR LITIGATORS SIG

SIGS & REGIONAL GROUPS

COSTS Q&A

REPORT BY NIKKI EALEY, ASSOCIATE AT NOCKOLDS, AND PHILIPPA WHEELER, ASSOCIATE AT LEIGH DAY, JOINT CO-ORDINATORS OF THE JUNIOR LITIGATORS GROUP

Nikki Ealey
Nockolds

Phillippa Wheeler
Leigh Day

On 11 October the Junior Litigators group was joined by Estelle Ford of Excel Legal Costs for a question and answer session on all things costs.

Members were encouraged to send in questions in advance of the session, as well as during it.

Estelle shared her knowledge from 24 years of working in costs. She covered four main costs topics, taking the group through the full life cycle of costs in a case. The main discussion topics are set out below:

At the start of a case: retainer steps and advice

The starting point when considering any issues of solicitor-client costs must always be the SRA Code of Conduct for solicitors, RELs and RFLs.

It is not enough to offer vague estimates of costs in initial client care letters. Clients should always be provided with details of the level of fee-earners undertaking the work, and their hourly rates. If there are any changes to these rates during the life of the case, the client should be informed of this.

If you are likely to charge a shortfall of costs, you need to be specific that this is the position.

During the case: time recording and budgeting

Estelle advised that her main rule is to time record properly. In a budgeted matter, it is important to ensure that the right phase is used. This avoids costs lawyers having to substantially reallocate work into different phases, and can be used as a costs update to your client.

A costs lawyer will need around one month to prepare a costs budget. When instructing a costs lawyer, useful information includes quotes from counsel and experts, incurred costs, up-to-date disbursements, proposed directions and the directions questionnaire.

It is important to note assumptions in the budget phase, to justify any reasons to depart from the budget. It is always preferable to seek to adjust or vary your budget by way of Precedent T, if 'significant developments' have altered the course of the claim. The bar is high for a significant development, but it is harder to justify a significant overspend after the event.

It is also important to keep an eye on incurred costs on your time recording system during the life of a case, and especially after a budget has been agreed.

After a case: bills and detailed assessment

Costs lawyers will need all correspondence, emails, retainers, disbursements and pleadings to prepare a bill.

While it is rare to go to detailed assessment, around 1 in 20 bills prepared do go all the way to a hearing. Solicitors need to be prepared for the fact that the bill might be taken to detailed assessment.

The future of costs: fixed costs on the horizon

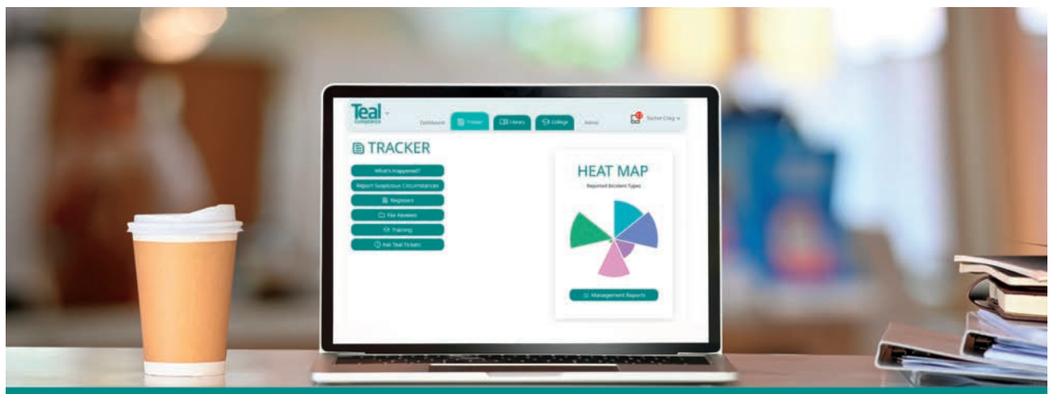
Estelle warned of proposals to increase the fixed costs regime to include cases up to £100,000 where trial is less than three days. The fixed costs regime would apply prospectively from the date of issue.

The consultation states that this will exclude mesothelioma claims and clinical negligence claims. But there is also a proposed low value clinical negligence claim fixed costs regime, for cases under £25,000, which is proposed to be retrospective back to the letter of claim. For more information, see: *www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/costs/*

Finally, Estelle provided her one piece of advice for junior litigators: Get your retainer right!

We would like to thank Estelle for her time preparing for the Q&A and for sharing her knowledge with the Junior Litigators Group.

If you would like to join the Junior Litigators Group or are an existing member with ideas about future content, please contact the group coordinators Nikki Ealey (Nealey@nockolds.co.uk) or Philippa Wheeler (pwheeler@leighday.co.uk).
We would also love you to join our Junior Litigators LinkedIn Group. Please contact Anthony Lord if you would like to be added (Anthony.lord@apil.org.uk).



DEVON AND CORNWALL GROUP

SIGS & REGIONAL GROUPS

REPORT BY RACHEL PEARCE, PARTNER AT COODES AND CLAIRE LESLIE, MANAGING ASSOCIATE AT ENABLE LAW; JOINT CO-ORDINATORS OF APIL'S DEVON AND CORNWALL REGIONAL GROUP

Claire Leslie
Enable Law

Rachel Pearce
Coodes

Personal injury trusts and pension loss

New group co-ordinators Rachel and Claire hosted their first regional group meeting on 15 November 2022, inviting Stephen Farnfield of Frenkel Topping to speak about personal injury trusts and pension loss.

The meeting was very well attended, and Stephen gave a fantastic refresher and update on these two topics with some top tips to watch out for, particularly in this current financial climate. Key learning points from the session are as follows:

Personal injury trusts

- It is almost always advisable to set up a personal injury trust on receipt of compensation from a personal injury award, as it is unclear what the client's future situation and needs might be.
- For example, while they may not be in receipt of any means tested benefits at the time of the payment, a PI trust will almost always ringfence PI damages for the purposes of community care funding that may well be needed in the future and is assessed by the local authority.
- It is important to explain at the outset of the case what a PI trust is. This takes away any surprise for clients on receipt of an interim payment or at the conclusion of the case.
- Some 99% of trusts are bare trusts, so the client is not giving away control. It is a vehicle to manage assets, ensuring that sensible financial decisions are being made; plus a mechanism to support the individual with decision making.
- It can be useful for young adults who might be pressured by friends to give away money, and act as a further layer of protection against financial abuse.
- It is strongly recommended that a trust is created if:
  - The client is below pensionable age and receives means-tested benefits
  - The client is any age and receives community care support
- If the client is over pensionable age, PI payments are disregarded as capital when assessing entitlement to means-tested benefits. This may mean that pensioners do not necessarily need to set up a PI trust to prevent their benefits reducing or stopping. However, the payment should ideally be kept separate to the pensioner's other finances, so it is clear which sums are to be disregarded.
- It is also important to be aware of the deprivation of capital rule, if money is spent unreasonably to try and retain access to benefits.
- The 52-week disregard rule means that the first payment received in respect of the personal injury will be disregarded for up to 52 weeks. This could also include money received by the injured person from other means, such as a payment from a third party from fundraising or for medical expenses. Any second or further payments do not have the use of the disregard rule.
- A PI trust can be set up at any point so long as the money is clearly identifiable as PI money and has not been mixed in any way.
- Trustees:
  - Minimum of two trustees – the client can be one
  - The client must then choose someone they trust, as they will have a say in their financial decisions
  - They need to be able to sign cheques and paperwork
  - They will need to be a party to the trust bank account and so will need to pass credit checks
- Solicitors have a duty to signpost clients who may need a PI Trust.

Pension Loss

- The pensions landscape is very complicated with multiple schemes.
- As employers are under a legal requirement to make a pension scheme available, in almost all cases where there is a loss of earnings claim, there will be an associated pension loss worth claiming (even if the client is a child).
- Pension loss claims can be very large, even if there is a reduced life expectancy.
- It is important to consider all other workplace benefits in kind, such as private medical insurance, death in service, critical illness, income protection, discount cards, gym memberships and so forth.
- There are different schemes across the private and public sector, and so this needs to be carefully considered.

Speaker Stephen Farnfield can be reached on contactus@frenkeltopping.co.uk

The group's next meeting is on 14 February 2023 from 1pm – 2pm with a guest speaker from Trust Mediation, who will talk about preparing for and attending mediation.
We are always looking for speakers and topics, so if you have any specific topic ideas, contact rachel.pearce@coodes.co.uk and Claire.Leslie@enablelaw.co.uk

REDEFINING HOW THERAPY CAN BE DELIVERED WITH THE CLIENT AT THE FOREFRONT

Dr Zoe Mawby
Clinical Lead

THROUGH BUILDING A TRUSTED, HIGHLY QUALIFIED, EXTENSIVE CLINICAL CAPACITY, THINK CBT HAVE CREATED AN OPTIMUM THERAPY EXPERIENCE FOR CLIENTS WITH INCREDIBLE RESULTS

As we begin 2023, it is disappointing to feel that an individual requiring therapy may still feel unable to talk openly about this due to stigma, and may be unsure of where to turn to get help. Whilst the therapy options available have improved in recent years there can still be barriers for those who need to ask for help.

In collaboration with medical experts, industry leaders and most importantly, the individuals who are having therapy, Think CBT has revolutionised the way we provide therapy and conduct our business. We understand that there is a need to ensure that the client receives support and immediate action at their time of need. It is imperative to the client that they know who they are going to be treated by in terms of both the individual clinician and the business. Trust is pivotal in a successful therapeutic relationship and therefore key to a successful clinical pathway to recovery.

By having a 'client focussed' approach to providing therapy and removing all obstacles, we have created an ultra efficient therapy platform for solicitors to be able to refer their clients to, ensuring that they receive the optimum level of support, swift access to a clinician and ultimately the most effective treatment. The supported client journey along with quick access to the first appointment has been shown to reduce clients' anxiety and ensure increased rates of attendance for both digital and face-to-face therapy offerings.

Clinical lead, Dr Zoe Mawby has drawn on her experience across a variety of sectors to make sure that therapists are providing high quality support both digitally and face-to-face. Zoe works with our appointment coordinators to ensure that the client experience is smooth and supportive from the point of first reaching out for help to completing therapy.

"Our recovery results and fantastic client feedback provides evidence that our patient-centric, flexible approach allows individuals to access therapy that is effective for them, regardless of the sector. We feel that the inclusivity of our offering and high availability of appointments is a huge step in enabling access for those needing support."

Dr Zoe Mawby

Instructions:

Think CBT accept instructions directly from solicitors, insurers, case managers, medico-legal agencies and directly from the public. They can provide all types of psychological services but with speciality in CBT & EMDR, both can be delivered digitally and in a face to face environment all across the UK.

All APIL members will receive a discount on their therapy rates reducing the per session rate from £125 to £100 until the end of 2023.

POLITICAL CONTEXT

WISE WORDS

APIL'S COMMUNICATIONS EXPERT LORRAINE GWINNUTT EXPLAINS THE POWER OF LANGUAGE

Lorraine Gwinnutt
head of public affairs at APIL

Whoever first said 'sticks and stones may break my bones but words will never hurt me' clearly didn't have a clue about the power of language.

In campaign work, as in the practise of law itself, words are our stock-in-trade. But trying to translate complex ideas into language non-lawyers can understand can be an uphill struggle, especially when you consider that - with a few obvious exceptions - most journalists write for people with a reading age of 12.

Combine that with shrinking modern attention spans, and it is easy to see why it can be difficult to gain traction or empathy when describing injured people. Effectively, we are talking about people who have been injured needlessly, through no fault of their own, but as a result of another person's negligence.

You see the problem.

That is why we have started to use the expression 'victims of negligence'.

We are doubling our efforts to create greater understanding of what injured people have to endure, and the work of the lawyers who help them, through our Rebuilding Shattered Lives campaign. The time is now right to revisit and refresh APIL's lexicon with language that has simplicity and power; and is likely to generate empathy for, and relatability to, injured people.

Of course, we know that the word 'victim' must not be used indiscriminately. We understand the sensitivities here and, while consistent repetition of powerful and effective language is a standard technique for the professional communicator, it must be done with care, flexibility and a great deal of thought.

And the language review cannot stop there. There is a real risk that the power of 'victims of negligence' could be diluted by the general ongoing use of the word 'accident' interchangeably with 'negligence'.

The term 'accident' is a banned word in APIL's press and political work because we do not want to encourage the public, and opinion-formers, to think that compensation can be claimed for tripping over your own wheelbarrow. Many people do, in fact, think a claim can be made for any old unforeseeable mishap, and this feeds the idea that claiming for personal injury is wrong, greedy and, at worst, immoral.

This is not just inaccurate. It is incredibly confusing and damaging, at a time when we are working hard to increase understanding about a field of law that has long been too often misrepresented, sometimes deliberately so.

We are not alone in this. In the context of injuries and death on the roads, the charity RoadPeace is campaigning to replace 'accident' with 'crash' or 'collision' (see November's PI Focus, page 42).

These ideas will gather momentum much faster with your help, so I hope you will support us where you can. If you'd like to discuss it, please contact me at lorraine.gwinnutt@apil.org.uk. I'd love to hear from you!

> **The term 'accident' is a banned word in APIL's press and political work**

> **Many people think a claim can be made for any old unforeseeable mishap, which feeds the idea that claiming for personal injury is greedy**

SCOTLAND UPDATE

GORDON DALYELL AND CATHERINE HART REPORT ON DEVELOPMENTS IN SCOTLAND

Pre-action protocol

In Scotland there are several pre-action protocols for different types of cases, including professional negligence and disease. But only the personal injury pre-action protocol is compulsory. This was introduced in 2016 and forms part of the court rules.

Parties are expected to cooperate with each other in complying with the protocol's aims, and the court can look at their behaviour when deciding on the appropriate award of expenses (costs). In assessing parties' conduct, the sheriff must consider the extent to which that conduct is consistent with the aims of the protocol, which seeks to help parties avoid or at least mitigate the need for litigation by encouraging good practice, including the early disclosure of information and the prompt investigation of claims.

In *Young v Aviva Insurance Limited* and *Axa Insurance UK Plc* [2022] SAC (Civ) 32, the Sheriff Appeal Court was asked to consider the sheriff's approach to the question of expenses in light of the behaviour of one of the parties.

The pursuer (claimant) had been sitting in the passenger seat of a parked car. The driver had opened the car door, which had then been struck by a passing van. The jolt caused injury to the pursuer, who intimated a claim against the van driver's insurers under the protocol. No response was received, which meant that the protocol had been breached, and an action was then raised.

The defender produced only very basic defences, simply denying liability. Fourteen months after intimation of the claim, the defender changed their pleadings to blame the driver of the car in which the pursuer had been sitting. That was the first time that this position had been advanced, and the pursuer then brought the driver's insurers into the action as a second defender. The second defender agreed to settle the claim.

The question that arose was which party was responsible for the first defender's expenses. The pursuer argued that the second defender was responsible, but the sheriff preferred the first defender's argument that, as the pursuer had brought the second defender into the action, she should meet their expenses.

The pursuer appealed, arguing that the sheriff had failed to acknowledge the importance of the terms and aims of the protocol regarding the need for early disclosure of relevant information, expeditious resolution of claims and avoiding unnecessary litigation. The first defender's lack of engagement, and its conduct both before and after the action was raised, had led to the second defender being introduced into the action at a late stage. Having concluded that the first defender's conduct amounted to a failure to comply with the protocol's requirements, the sheriff was obliged in terms of the relevant rule to consider what sanction should be imposed, and he had erred in omitting to do so.

The appeal court agreed that the sheriff had been wrong in his approach to the question of expenses, and that allowed the appeal court to consider this afresh. In doing so, the court looked at what had happened in two parts - before the action was raised up until the defender changed their pleadings to blame the second defender, and then the period after that.

The action had been raised because the first defender did not engage with the protocol, both by failing to respond to intimation of the claim and by producing brief defences. The procedure up to the point where the first defender blamed the driver of the car was effectively 'wasted' procedure, which defeated the aims of the protocol. On that basis, the appeal court made no award of expenses to the first defender for the period up to and including the amendment procedure. For the expenses incurred after that point, the appeal court left the sheriff's decision undisturbed.

Appeals over decisions on expenses are actively discouraged, as an award of expenses is largely a matter for the court's discretion and will only be interfered with if there has been an error in law. The fact that the appeal court in this case concluded that the sheriff had erred in law by failing to give enough prominence to the protocol in reaching a decision on expenses, shows the importance that should be placed on compliance with the protocol requirements.

> **Appeals over decisions on expenses are actively discouraged, as an award of expenses is largely a matter for the court's discretion**

> **The appeal court concluded the sheriff had erred in law by failing to give enough prominence to the protocol**

> **During the dive, the pain caused the pursuer to panic and he attempted a rapid ascent, during which he drowned**

> **The defender changed their pleadings to blame the driver of the car in which the pursuer had been sitting**

State immunity

Another recent appeal considered the question of state immunity; unusual in a PI context. The pursuer in *Morrison v Mapfre Middlesea Insurance Plc and City Sightseeing Malta Limited and Awtorità Ghat-Transport F'malta (Transport for Malta)* [2022] CSIH 45 was injured when the tour bus on which he had been a passenger was involved in a road traffic collision in Malta.

He claimed damages against the bus operator's insurers, who argued that they were not liable and brought the Authority for Transport in Malta (TfM) in as a third party, on the basis that they were entitled to claim relief and / or apportionment against them. TfM maintained that the court had no jurisdiction to determine any claims made by the defender against them as, under the State Immunity Act 1978 Pt I s.14(1) and s.14(2), they were immune from jurisdiction because the proceedings related to something done by TfM in the exercise of sovereign authority.

Following a proof (trial) on this preliminary point, the judge sustained the plea of no jurisdiction and dismissed the action against TfM. The defenders appealed. The appeal court considered the basis on which the Maltese government had established TfM through the Authority for Transport in Malta Act 2009, with the main purpose of promoting and developing the transport sector in Malta.

The appeal court considered both the rationale for the principle of state immunity from suit in a foreign jurisdiction, and the practice of recognising the distinction between acts involving commercial or private rights and those arising from the exercise of sovereign power. It concluded that the judge had been right to sustain a plea of no jurisdiction. He had applied the correct test in the full context in which the claim had been made against the third party, and had considered the connection between the proceedings and the third party.

In essence, the allegation against the third party was that it had breached its responsibility to ensure the constant safety, upkeep, maintenance and security of certain types of road in Malta, including that on which the accident occurred. The defenders had also referred to TfM's function as the licensing body for those operating the route on which the accident occurred.

The judge had been correct to conclude that the acts or omissions alleged by the defenders were not concerned with trading or commercial activities, but instead with a public duty to maintain the safety of distributor roads throughout Malta. This fell into the sphere of governmental or sovereign activity, and the third party's plea of no jurisdiction based on sovereign immunity had been correctly sustained.

Standard of care

The recent case of *Warner v Scapa Flow Charters* [2022] CSIH 25 raises interesting questions about the appropriate standard of care.

The pursuer sought damages on behalf of her son following her husband's death during a diving expedition in 2012. After a proof (trial), the court held the defenders responsible for his death ([2021] CSOH 92).

The pursuer's husband was part of a group of experienced technical divers who had chartered the defenders' vessel to take them to the site of a wreck. 'Scapa Flow Charters' was the trading name of an individual, Andrew Cuthbertson.

Before entering the water, Mr Warner had walked across the vessel's deck towards the exit point in heavy diving gear. He was wearing fins, and tripped and fell. The fall caused a serious internal injury, which Mr Warner was unaware of at the time. During the dive, the pain from this injury caused him to panic and he attempted a rapid ascent, during which he drowned.

The pursuer's case succeeded on two grounds of fault: that the defenders had failed to carry out a suitable risk assessment, particularly in respect of persons walking on deck in diving equipment; and that they should have had a system that directed divers not to walk across the deck when wearing fins. The argument that there were insufficient handrails to assist the deceased when moving across the deck failed.

The court found the defenders guilty of fault and neglect under Article 3 of the Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). The defenders appealed and the Inner House concluded that, while the judge's opinion was carefully reasoned, it was wrong in law. The key question related to the standard of care and, in essence, whether the defenders' duty to those on board extended to prescribing, monitoring and controlling how divers put on their equipment and made their way to the exit point. Even if it did, was it enough that they had provided a safe means of reaching the exit point, even although Mr Warner had chosen not to use this?

The appeal court concluded that it was sufficient for the defenders to have provided a safe means to allow the deceased to move from his seat to the exit point by way of a non-slip and unobstructed deck, handrails and a deckhand. They did not have the necessary knowledge or experience to dictate how the divers geared up or whether Mr Warner should have been allowed to move about the deck while wearing fins and carrying heavy diving gear. This had been his choice in the context of a leisure pursuit that he was taking part in voluntarily, and in which he was skilled and experienced, whereas the defenders were not. Reference was made to Lord Hoffman's comments in *Tomlinson v Congleton BC* [2004] 1 AC 46.

The appeal was allowed. Leave to appeal to the Supreme Court was refused by the Inner House, but there is a further option to seek leave from the Supreme Court directly; though it may be some time before that court considers the pursuer's application.

Discount rate

As many readers will be aware, the Ministry of Justice had announced that, in anticipation of a call for evidence relating to the review of the Discount Rate, it intends to hold a series of information events focusing on the idea of potentially introducing a dual rate. While this is primarily intended for practitioners in England and Wales, there are clearly relevant issues for those practising in the rest of the UK.

The method of calculating the rate is different in Scotland. The procedure is clearly set out within the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, with the rate set by the Government Actuary in accordance with the prescribed return from the notional portfolio, as adjusted by the standard adjustment factors. There is provision for more than one rate, but that would require regulations to be enacted by the Scottish Ministers.

We will be keeping a close eye on this but, as always, case studies and practitioner experiences will be crucial in assisting the formulation of APIL's response to the review process.

Gordon Dalyell is partner at Digby Brown and is APIL's executive committee member for Scotland; Catherine Hart is partner – professional support lawyer at Digby Brown

CHARITY SPOTLIGHT

MAKING HEADWAY

Luke Griggs
Headway
chief executive

PI FOCUS'S RACHEL ROTHWELL TALKS TO LUKE GRIGGS, CHIEF EXECUTIVE OF HEADWAY

Brain injury can affect every aspect of a person's life – how they move, think and feel – and its impact can be severe and permanent. Around 350,000 people are admitted to hospital with an acquired brain injury every year; one every 90 seconds.

Headway is a UK-wide charity that works to improve life after brain injury. PI Focus speaks to the charity's interim chief executive Luke Griggs, who has been involved with Headway for 15 years.

What special problems do people with brain injury face?

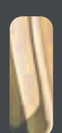
'Our brains control absolutely everything – how we walk and talk, but also our behaviour, emotions, personalities. Around 74% of brain injury survivors think of themselves as a new person after their brain injury. Some even mark the anniversary of their injury as a "second birthday"; although for others it's a more sombre occasion.

'Once people get to a stage where they can accept [that they have changed], and mourn for their old life, that is a breakthrough. They can then reach a turning point, no longer chasing the things that they once had, and start to make this new life.

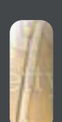
'But it's not just about the effect brain injury has on the individual. There is also an impact on partners, families, relationships, friends – the whole social circle. At Headway people regularly say to us, "The person I love, the person I married didn't come home from that hospital - and I'm caring for them every day, but it's a new person, it's a new relationship we are having to rebuild".

'A brain injury can completely alter a person's personality. It can have subtle emotional effects that often go misunderstood by carers or family if they don't get that help and support.

'For example, a brain injury can lead to lack of empathy; disinhibition which leads to people finding it hard to control anger and emotion; or lack of insight in terms of their own condition. This can be a huge problem in the early stages, as people say, "There's nothing wrong with me. I'm perfectly recovered. It's your problem not mine. I'm behaving perfectly rationally and as I was." That makes it very difficult and the impact on partners and family members can be huge.'



My grandmother was very intelligent and yet she couldn't get the words out. You could feel her inner turmoil



Every government department needs a thorough understanding of brain injury

Headway
the brain injury association

What lies behind your passion for supporting people with brain injury?

'One of my driving passions over the 15 years that I've been with Headway is the desire to make sure no families go without understanding what has happened, without getting help - and feeling like it's their fault, or that there is no support.

'My own family had that situation. When I joined Headway, I was able to identify my grandmother's brain injury – though sadly she had already passed away by then. She suffered a traumatic brain injury in her mid-twenties when she was knocked off a push bike, in the 1950s. She was never diagnosed, but she had what I could now say were classic traumatic brain injury effects: aphasia, mobility issues, memory problems; her personality changed.

'Back in those days there was no diagnosis available - there was no understanding of brain injury. My grandfather lost his wife, although she lived to be 65.

'My grandfather was always incredibly frustrated and angry – "why can't you do this, why do you need all this support?" My grandmother was a very intelligent woman, and yet was struggling with word finding skills. She couldn't get the words out; you could feel her inner turmoil, and we couldn't help her. Two brothers suffered from not having a "normal" mum like the rest of their friends, and they didn't ever understand why.'

'So at Headway, I have always tried to raise awareness and understanding of brain injury.

'I know from the work of our helpline that when people get that understanding that, okay, it could be a brain injury and there is help and support available - not to fix it, not to cure it necessarily - but to actually help you to manage it, and to know that it's not your fault. That releases so much weight off people's shoulders.

'It gives them that courage and confidence to understand how to move forward. And my driving focus is to make sure no families face that journey alone.'

When was Headway first set up, and why?

'The first meeting took place in 1979, when a small number of families got together because they were struggling. In the 1970s there were a lot more cars on the roads, many more road traffic collisions, and big advances in neurosurgical techniques. People who wouldn't previously have been saved, were suddenly having their life saved. The life worth saving has to be a life worth living. And there was an issue where people would be discharged with severe brain injuries and the family would say, "well now what do we do, how do we cope?".

'So families got together to say, is anybody else in this situation? Let's explore some ways to give mutual support. Some neurological experts joined the meeting as well. And it grew from there; with the first Headway House on a local level, and the national charity springing up from there. Some 43-odd years later, here we are.

What are the different ways that Headway helps people?

'Headway is there for people right from the start. If you imagine that 3am phone call, the rush to the hospital to be by the bedside of a loved one in a coma, machines bleeping. That's an incredibly scary time. We are there for people straight away, for example with our nurse-led helpline which includes nurses with critical care experience, so they can talk people through what's happening, what the hospital process will be, the emergency care process, and the rehabilitation from there. It gives them someone to talk to and offload to.

'Our website is probably the most comprehensive source of information about brain injury on the internet. That includes information about what's happening, what questions to ask clinical teams, where you can turn to.

'We also have an emergency fund with grants for people on limited income to enable them to be by that hospital bedside. Major trauma centres can be 40 miles away from someone's home. We've heard stories of people sleeping in their cars for weeks on end because they can't afford the petrol. We don't think that's right, so we provide grants to help people with their travel costs.

'We also have another website called "I'm calling about Chris" (callingabout.org.uk), which is another service for people at the very acute stage. If you imagine the scenario where you're at the hospital bedside for 15 hours, then you get home at night and you've got 15 phone calls waiting for you from loved ones wanting to know what is happening. Our website is a personalised platform where people can post live updates for friends and family from the hospital bedside, and people can give feedback and make offers of help – for example, shall I get some shopping in or walk the dog for you?

'Then there is our Brain Injury Identity Card, which was officially launched by Prince Harry in July 2017. We call it a simple solution to a tricky conversation. Each card is personalised, helping the card holder to explain the effects of their brain injury and ask for help. The card is free of charge, and [the brain injury] must be verified by a GP, clinical professional or a Headway group or branch.'

What do the Headway groups and branches do?

'Our network of around 120 Headway groups and branches across the UK are a key aspect of what we do. Around two-thirds are Headway groups, which are autonomous charities with their own charity number and their own board of trustees, and they are affiliated to Headway UK. They provide rehabilitation and social support programs commissioned by local authorities. They help people to relearn those life skills, regain that independence.

'These groups play a crucial role, yet they are under unprecedented pressure on several fronts, including the recruitment and retention of staff - because the charities cannot afford to raise salaries by 11% to meet inflation. Then you've got the increased energy costs; and all at a time when demand for services is only increasing.

'Meanwhile local authorities themselves are under increasing pressure to balance the books… So for Headway group charities to go out and ask an uplift from their local authorities is very challenging. But if they don't, they simply won't be able to continue to fund their services and vulnerable people will be cut adrift.

'Then we also have the Headway branches, which are volunteer led under Headway UK's [charitable] number. These tend to provide more social support, giving people an outlet and respite, and reducing social isolation.'

What is Headway's vision for the future?

'There's an opportunity for us to use lessons we've learned from the pandemic by introducing more digital services, to be more effective but also more efficient in how we use our charitable resources. I think we could do so much more by looking to those digital services, as well as increasing the visibility and connectivity we have with other organisations and charities, to make brain injury more widely understood - both by the public and within government agencies and departments.

'We're contributing to the government's ABI strategy, to hopefully make tangible differences. Brain injury affects every aspect of life… so whether that's sport, education, welfare - every government department needs a thorough understanding of brain injury, to make sure those affected are supported in the individual strategies and policies of those departments.

'And we will continue to champion the cause of brain injury, both for individuals, and for the autonomous Headway charities across the UK that are doing such incredible work at a local level - despite the unprecedented pressures that they are facing.'

Rachel Rothwell is editor of PI Focus

Finding Fault

ELOISE POWER ON WHY PRODUCT LIABILTY CLAIMS CAN BE HARD TO HANDLE

Claimant lawyers working in the field of product liability could be forgiven for feeling somewhat discouraged after the last few years of high-profile defeats.

At first glance, the recent Supreme Court case of *Hastings v Finsbury Orthopaedics Limited and another* [2022] UKSC 19 stands as the culmination of a long line of well-publicised failures including the Pinnacle metal-on-metal hip litigation, the Seroxat antidepressant litigation and the stand-alone case of *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB).

From the viewpoint of claimant lawyers, the stakes are invariably high: medical device litigation requires complex expert evidence in multiple disciplines, management of large groups of claimants and the administration of significant volumes of disclosure.

Where cases are brought at all, they tend to be hard fought by deep-pocketed corporate defendants. Where things go wrong, the consequences can be disastrous: following the failure of the Seroxat litigation, the claimants were ordered to make a £4.5 million payment on account of costs, a significant proportion of which was on the indemnity basis (*Bailey and others v GlaxoSmithKline UK Limited* [2020] EWHC 1766 (QB). By contrast, successful cases tend to resolve in private, often behind confidentiality agreements.

It follows that it is well worth giving careful thought to strategy at an early stage in order to improve claimants' prospects of success.

It is important not to lose sight of the real human suffering experienced by people who have received failed medical devices

The law

The modern law of product liability derives from the Product Liability Directive 85/374/EEC, incorporated into domestic law by the Consumer Protection Act of 1987. The preamble to the Directive recognises that 'liability without fault on the part of the producer is the sole means of adequately solving the problem - peculiar to our age of increasing technicality - of a fair apportionment of the risks inherent in modern technological production.'

Section 2(1) CPA provides that subject to other provisions, producers and certain other parties shall be liable 'where any damage is caused wholly or partly by a defect in a product'.

According to Section 3(1), 'there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect…'

Section 3(2) provides that in determining what persons generally are entitled to expect, 'all the circumstances shall be taken into account'. This expressly includes 'the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product'. It also includes 'what might reasonably be expected to be done with or in relation to the product' and 'the time when the product was supplied by its producer to another'. The CPA expressly provides that 'nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question'.

Section 4 of the CPA provides for defences, including the well-known 'development risks defence' or 'discoverability defence': 'that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.'

From the viewpoint of many patients, the present system is not working

In practice

In theory, the Directive and section 2(1) of the CPA make provision for a strict (though not absolute) liability regime. In practice, winning cases under the Directive and CPA can be more challenging than proving fault. The crux of the difficulty lies in the definition of defect and the burden of proof, which lies with the claimant.

In recent years it has become increasingly clear that assessing the safety of a medical device involves consideration of its risks, burdens and benefits; and that it can be relevant to consider avoidability of risk.

Historically, claimants had relied on arguments based on Burton J's judgment in *A v National Blood Authority* [2001] EWHC 446 (QB) (the Hepatitis C litigation) to the effect that the benefit / utility of the product and the avoidability of risk were irrelevant considerations. But in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB), Hickinbottom J (as he was) held that 'safety is inherently and necessarily a relative concept'. This approach was upheld by Andrews J (as she was) in the DePuy Pinnacle Metal on Metal Hip Litigation, *Gee and others v DePuy International Limited* [2018] EWHC 1208 (QB): 'Considering benefits and / or avoidability in an appropriate case is not importing a product's fitness for use into the analysis or introducing a concept from the US system that the legislators rejected, as the claimants submitted; but rather, taking a holistic approach to the objective evaluation of safety…'

The approach in *Wilkes* was sanctioned by the Court of Appeal in *Bailey & Others v GlaxoSmithKline UK Limited* [2019] EWCA Civ 1924, which was a judgment on the scope of the Seroxat litigation. The summary of the relevant legal principles included the following guidance: 'assessment of whether the safety of a product is at an acceptable level requires a holistic approach... any assessment of its safety will necessarily require the risks involved in use of that product to be balanced against its potential benefits including its potential utility' and 'risk-benefit may lie at the heart of the question of appropriate level of safety of a medicinal product for the purposes of the Act.'

In the light of this line of cases, it is evident that lawyers acting for claimants would be well-advised to grapple with the concepts of risk-benefit and avoidability at an early stage in proceedings.

Hastings v Finsbury Orthopaedics

The recent Supreme Court case of *Hastings v Finsbury Orthopaedics Limited and another* [2022] UKSC 19 involved the failure of a MITCH-Accolade metal-on-metal prosthetic hip. The hip prosthesis had been withdrawn from the market in 2011 and issued an urgent Field Safety Notice on 26 April 2012 identifying potential issues with the product. The underlying legal principles were agreed by the parties and included the following (para 15):

'(ii) The test of whether a product is defective is whether the safety of the product is not such as persons generally are entitled to expect. The test is not what is expected but one of entitled expectation. The test is an objective one. The standard of safety is measured by what the public at large is entitled to expect.

'(iii) What persons generally are entitled to expect is assessed having regard to all the circumstances which are factually or legally relevant to the evaluation of safety, including the matters identified in section 3(2). This must be evaluated at the time when the product was supplied by its producer to another. The assessment of risks associated with a product, which might inform entitled expectations as to its safety, must be done at the time the product is supplied and not with the benefit of hindsight.'

Mr Hastings' team argued that it was open to him to prove his case by reference to evidence which established a prima facie case that the product did not meet the entitled expectation of the public at large. One of the submissions was that the appellant faced 'an impossible task, that of proving his case by statistics that are not available to him on account of the producer's actions in withdrawing the product from the market.' The submission was that this called for a benevolent application of the CPA and Directive, bearing in mind its underlying purpose.

Lord Lloyd-Jones, giving a unanimous judgment, upheld a finding that the withdrawal of the MITCH-Accolade product was brought about by 'commercial considerations'. He found that the prima facie evidence in the Field Safety Notice had been undermined by subsequent statistics. His conclusion was that 'The appellant failed to prove the existence of a defect. Ultimately, this appeal is no more than an attempt to appeal against the Lord Ordinary's findings of fact.'

Once again, the litigation ended in a high-profile defeat for the claimant team.

Continued on P27

Where next for product liability?

In a complicated and often dehumanising legal system, it is important not to lose sight of the real human suffering experienced by people who have received failed medical devices.

The report of Baroness Cumberlege on behalf of the Independent Medicines and Medical Devices Safety Review provides ample evidence of the human cost of damage caused by the medicines and medical devices within the scope of the Review (hormone pregnancy tests, sodium valproate and pelvic mesh). One patient described herself as 'an unsuspecting, unwilling participant in a cruel experiment that has gone wrong.' The IMMDS report included the following stark comment: 'In our view, litigation has not proved useful to the majority of the affected individuals we have heard from.'

Although litigation is still ongoing in respect of some of the devices within the scope of the Review, Baroness Cumberlege's comment speaks to a fundamental problem: from the viewpoint of many patients, the present system is not working.

On a policy level, there is a clear case for reform of the CPA. There is an enormous inequality of arms between ordinary patients and deep-pocketed, multinational companies.

Looking beyond the obvious disparity of resources, the corporate defendants are further advantaged by having access to in-house experts and internal access to witnesses with deep corporate knowledge about their products. One way of addressing these imbalances would be to reverse the burden of proof: where an individual suffers damage caused by a product, it would be for the manufacturer to prove that the product was not defective. It goes without saying that there are many other potential reforms that could be considered.

On a practical level, claimant lawyers will have to think sharply and tactically when opposing large-scale corporate defendants, aspiring to the style of Odysseus outwitting the Cyclops. Claimants will need to be nimble, particularly where they are entering the territory best known to defendants. The history of the metal-on-metal litigation stands as a warning to claimants against over-reliance on statistical arguments and arguments based on engineering evidence.

Arguments deriving from consent may well prove more fruitful for claimants. The crucial principles of autonomy and informed consent, laid down by the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 in the context of clinical negligence, have not as yet been actively considered by the courts in the context of medical device litigation. It will invariably be important for claimants to scrutinise the product information in any medical device case, and explore inaccuracies and unevidenced claims.

The IMMDS report made clear that failings in consent were a pivotal part of the suffering caused by the devices which were the subject of the review, although the report focuses on failings on the part of doctors, rather than the failings in the underlying information available to doctors from the manufacturers.

There is a case for looking upstream. If a manufacturer has painted an over-rosy picture of the benefits of their device and / or has downplayed the risks, it is open to claimants to argue that patients and clinicians ('learned intermediaries', in the arcane language of product liability) were prevented from engaging in a *Montgomery*-compliant consenting exercise, and hence that the information provided with the product rendered it defective for the purposes of section 3(2) CPA. It remains to be seen how such arguments will fare at court.

As well as the human suffering caused by failed medical devices, there is a significant cost to the public purse in dealing with the aftermath, which can include matters such as revision surgical procedures, ongoing pain conditions and mental health problems. Where appropriate, patients and NHS bodies should consider working together in cases against device manufacturers, particularly where consent arguments are at play, and where doctors and patients alike have been presented with incorrect information.

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Key points

- Modern product liability law stems from the Product Liability Directive 85/374/EEC, incorporated into domestic law by the Consumer Protection Act (CPA) 1987
- In theory the legislation provides for a strict (though not absolute) liability regime. But in practice, the definition of defect, and the burden of proof on the claimant, mean it is very hard to win claims
- Case law has shifted towards a 'risk-benefit' approach to assessing a product's safety, which includes considering the potential benefits of the product
- In future, claimants may have more success in focusing on consent issues, especially where a manufacturer has painted an over-optimistic picture of what the device can achieve

In practice, winning cases under the Directive and CPA can be more challenging than proving fault

Insight

SECOND CHANCE

SARAH PRAGER LOOKS AT CONTRIBUTORY NEGLIGENCE IN SECONDARY VICTIM CLAIMS

The law on secondary victim claims has been much debated recently. In *Paul v Royal Wolverhampton NHS Trust* [2022] EWCA Civ 12 the Supreme Court is due to reconsider the position of claimants whose psychiatric injury arises from witnessing a horrific event removed in time from the original causative negligence. It is to be hoped that the Court will give further guidance on an area of the law that has developed somewhat haphazardly since the seminal decision in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

In *Alcock,* the Supreme Court held that in order to establish a claim in respect of psychiatric illness resulting from shock, it was necessary to show not only that such injury was reasonably foreseeable; but also that the relationship between the plaintiff and the defendant was sufficiently proximate. A plaintiff must also show proximity in time and space to the accident or its immediate aftermath.

There followed a slew of cases exploring the nature of the relationship between primary and secondary victims, and the precise delineation of the necessity for the latter to witness the injury to the former. Because the law in this area is avowedly policy-led, it soon became clear that in borderline cases, it would be difficult to predict the outcome.

Now the doctrine is to be reviewed once more by the Supreme Court, which will have the advantage, this time, of having a Law Commission report on liability for psychiatric illness (www.lawcom.gov.uk/project/liability-for-psychiatric-illness). But whatever the Supreme Court may determine in *Paul,* it is highly unlikely to determine one issue on which there is no binding authority: how do the doctrines of contributory negligence and secondary victim claims interact?

A possible approach

We do have some clues as to the Supreme Court's likely approach to this question. Lord Oliver in *Alcock* considered the analogous position where the primary victim was the defendant to the secondary victim's claim.

Without coming to any settled conclusion, he suggested that the courts would be likely to follow the view of Deane J in the Australian case *Jaenesch v Coffey* [1984] 8 WLUK 48, that such a duty of care should be excluded on grounds of policy. But he added that if so, 'the limitation must be based upon policy rather than upon logic'.

Lord Oliver noted that the suffering and shock of a wife or mother at witnessing the death of her husband or son is 'just as immediate, just as great and just as foreseeable', whether the accident were due to the victim's own negligence, or that of another. He added that 'if the claim is based, as it must be, on the combination of proximity and foreseeability, there is certainly no logical reason why a remedy should be denied in such a case.'

Lord Oliver added: 'Take, for instance, the case of a mother who suffers shock and psychiatric injury through witnessing the death of her son when he negligently walks in front of an oncoming motor car. If liability is to be denied in such a case, such denial can only be because the policy of the law forbids such a claim, for it is difficult to visualise a greater proximity, or a greater degree of foreseeability.'

He added: 'I can visualise great difficulty arising, if this be the law, where the accident, though not solely caused by the primary victim, has been materially contributed to by his negligence.

'If, for instance, the primary victim is himself 75 per cent responsible for the accident, it would be a curious and wholly unfair situation if the plaintiff were enabled to recover damages for his or her traumatic injury from the person responsible only in a minor degree, whilst he in turn remained unable to recover any contribution from the person primarily responsible, since the latter's negligence vis-a-vis the plaintiff would not even have been tortious.

'Policy considerations such as this could, I cannot help feeling, be much better accommodated if the rights of persons injured in this way were to be enshrined in and limited by legislation as they have been in the Australian statute law…'

So Lord Oliver's view, albeit *obiter,* was that where the primary victim was the tortfeasor, the secondary victim could not recover damages from them. Further, and by analogy, where the primary victim had contributed to the occurrence of the accident, it would be 'curious and wholly unfair' if the secondary victim could recover damages from the tortfeasor in full. Lord Oliver concluded that these questions were matters of policy that ought to be considered, and in respect of which Parliament and not the courts should provide the answers.

It soon became clear that in borderline cases it would be difficult to predict the outcome

Lord Oliver concluded that these questions were matters of policy in respect of which Parliament and not the courts should provide the answers

Law Commission report

The Law Commission in its report on psychiatric injury considered these questions. It found that on the one hand, the most persuasive argument against applying the doctrine of contributory negligence in secondary victim cases was that otherwise there would, in effect, be a duty on individuals to look after themselves, simply in order to protect others from the likely psychiatric effects of an accident; and that this would place an undesirably restrictive burden on self-determination.

But on the other hand, where the defendant's self-inflicted injury results in the claimant's physical injury, for example where the claimant has been injured while rescuing the defendant, the claimant may recover damages despite the arguments in favour of self-determination.

To this extent at least the courts do recognise that there is a duty not to place oneself in harm's way. And of course the point can be made that the entire legal system, both civil and criminal, is founded on the principle that there are limits to a person's right to self-determination. We are all at liberty to do whatever we want. But if we harm another person in doing so, we are at risk of having to compensate them. Why should secondary victim claims be any different?

In the event, the Law Commission recommended that where the defendant was the primary victim, the law should adopt a compromise position under which there should be no general restriction, but 'Courts should have the scope to decide not to impose a duty of care where satisfied that its imposition would not be just and reasonable because the defendant chose to cause [their] own death, injury or imperilment.'

As regards contributory negligence, the Law Commission found it was not attractive to reduce the secondary victim's damages in line with the primary victim's contributory negligence, as 'it would be contrary to the underlying principle that the defendant owes a separate duty of care directly to the [secondary victim] claimant'.

Interesting though these ruminations are, the government rejected the Commission's recommendation that it should act to clarify the law, and so they did not pass into law.

There followed a slew of cases exploring the nature of the relationship between primary and secondary victims

Greatorex v Greatorex

The only authority relevant to the issue remains the pre-*Alcock* decision in *Greatorex v Greatorex* [2000] 1 WLR 1970, in which Cazalet J accepted the self-determination argument against imposing a duty on a primary victim in relation to a secondary victim.

The claimant was a fireman who attended a car crash where the victim who was to blame for the crash turned out to be his own son. The claimant suffered post-traumatic stress and sued his son (effectively suing his son's motor insurers). His claim failed for a number of reasons, including that imposing a duty on his son to avoid self-inflicted injury would limit the son's right to self-determination.

As the claim also failed on other grounds, it was not appealed; and so remains of tangential interest only.

It is perhaps surprising that there is no binding English authority on whether or not the claim of a secondary victim may be reduced on account of contributory negligence, or whether a tortfeasor may seek a contribution or indemnity from a primary victim in respect of a secondary victim's claim; but so it is.

Other than the *obiter* comments of Lord Oliver in *Alcock* and the Law Commission's opinion, there is very little indication of how a court would approach any such argument, and because the law on secondary victims is very heavily policy based, it would be useful if the legislature could be prevailed upon to express a view.

As the Law Commission observed, it would be strange if a tortfeasor were to be 100% liable to the secondary victim of a tort, but only 50% liable to the primary victim. On the other hand, the argument that a primary victim owes a duty to a secondary victim not to cause them injury through insufficient care for themselves is a novel one. But then, in this area of the law there are many novel arguments to be had; and in *Paul,* we shall soon see what the Supreme Court makes of one of them.

Sarah Prager is a barrister at Deka Chambers

AVOIDING COCKUP CORNER

RICHARD BARR'S TOP TIPS ON WHAT TO DO WHEN THINGS GO WRONG

In my 50 or so years as a solicitor I have committed my share of cockups and witnessed many perpetrated by others. That is the theme of this article. Below are some thoughts and suggestions to keep you out of Cockup Corner. Read carefully. Do what I say, but not necessarily what I have done.

Communication (or lack of) is a fertile source of cockups. In days gone by (before the widespread use of window envelopes) it was all too easy to put the wrong letter in the envelope. While fewer letters are written these days, it is still an occupational hazard - as one firm discovered when its letter to the opponent's solicitors threatening to take a claim to the 'highest court in the land' and beyond was exchanged for the one intended for their client, advising him that he had a very weak case indeed.

Modern technology makes these potential problems much worse. It is so easy to dash off an email, with the satisfaction of knowing that within seconds it will be received at the other end and you will have taken a positive step in your client's claim. That is, until you realise that you sent an early draft that is not only full of mistakes, but also contains concessions that you later decided you did not want to make.

Or you might have fired off an internal email to colleagues ranting about a particularly obnoxious client (we all get them from time to time) but failed to notice that said client was included in the recipient list.

Then there are the fish files. They are the kind of file that sits on the floor neglected, unopened and covered in dust. You know you must act, but every time you look at it you lose the will to live. The longer you leave it the worse it smells and the less you are inclined ever to open it again. But limitation dates wait for no woman or man.

Allied to fish files are drowning files. The problem you took on seemed simple to start with, but as time wore on it became more complicated, convoluted, confused and ultimately catastrophic. You soldier on, you put huge effort into the case, but nothing seems to work. You lose sleep, suffer depression and reach for the bottle (and it's not just water). Or worse, you take stupid actions that are almost doomed to end your career - like lying, inventing correspondence or - in one case I heard about - paying an amount of your own money to a client, pretending it was compensation paid by the third party to settle the case.

Avoiding disaster

It may be that to most APIL members the accounts above are works of pure fiction. But just in case they ring a tiny bell somewhere behind the sofa, here are some thoughts on how to avoid Cockup Corner.

The first thing is to slow down. We are all under pressure, but a few minutes of extra thought and preparation can be a life saver. Do not rush into action. If you are angry, by all means draft that vituperative letter, but sit on it for 24 hours and contemplate whether it would be well received by a crusty old judge.

Secondly, you are not alone. A problem shared… you know the rest.

We are all under pressure, but a few minutes of extra thought and preparation can be a life saver

Emails

Do not put the address of the recipient into a draft until you have perfected it. That way it can never be sent prematurely either by you or your cat (if you are working from home). Consider drafting a formal letter instead of an email; you may be less likely to miss a vital detail if looking at a piece of paper instead of a screen.

Make sure that your emails have the 10 second send delay switched on, giving you the brief option of cancelling even after you or your cat press the send button.

Fish files

The short advice is: open the file. In your imagination its menace may have assumed gargantuan dimensions; but once you peer inside it may not be as bad as feared. Take some action on it. You will immediately feel better. If you still can't or won't, take it to a colleague and confess. Most are delighted to help because they know that they too could easily become a victim of fishdom. A new perspective will generally freshen up the file and may even remove its stench altogether.

Drowning files

In a word: don't. Try to anticipate the problems before you take on the case. How near is the limitation date? How many previous firms have handled the claim? Has the client arrived at your office with a suitcase full of paper? If you are too far in, get someone else to knock some common sense into you. If the claim is bound to be lost, far better to be lost sooner than later. If it means telling the client you cannot proceed, then so be it.

A word to the boss

Ensure you instil a culture of support. In my experience, if those you work with are relaxed and happy, they will deliver far fewer cockups.

In his very wise book Black Box Thinking, Matthew Syed again and again emphasises that those organisations - hospitals, airlines, and even courts - that positively encourage reporting of errors and accept new ideas and concepts, function far better - and are sued less often - than those where colleagues live under a regime of terror.

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For details of how APIL's new Mentoring Hub is helping members support one another see www.apil.org.uk/mentoring

BONE OF CONTENTION

ARUNI SEN EXPLAINS DIFFICULTIES IN DIAGNOSING SCAPHOID FRACTURES

THE SCAPHOID, A SMALL BONE IN THE HAND, CAN BE FRACTURED AFTER A FALL. THESE FRACTURES ARE OFTEN SUBTLE AND FREQUENTLY MISSED ON FIRST PRESENTATION. DELAYED DIAGNOSIS CAN LEAD TO A RANGE OF PROBLEMS.

Missed scaphoid fractures are notoriously common and are frequent source of litigation

Mechanism of injury

If we stumble forward, instinct makes us put a hand forward to prevent the fall. This mechanism, in the emergency parlance, is called 'Foosh' – Fallen On Out-Stretched Hand. The brunt of this force is borne by the small bones of the wrist. The same mechanism applies when the wrist is forced backwards and upwards by an object (such as a football stopped by a goalkeeper), known as a cock-back injury.

This sudden forced movement of the wrist backwards is 'dorsiflexion or extension'. The eight small carpal bones are compressed between the metacarpal bones and the radius in the forearm. The carpal bones are, from outside in, trapezium – trapezoid – capitate – hamate on the farthest (distal) row and scaphoid – lunate – triquetrum - pisiform on the nearest (proximal) row.

The scaphoid has an anterior (distal pole), a narrow waist, a proximal pole and a tubercle palpable on the palmar aspect. Dorsiflexion distorts the scaphoid because of its anatomical shape (narrow in the middle called 'waist') and the angled position. This is the reason behind scaphoid fractures caused by Foosh.

Of the eight carpal bones, scaphoid is the commonest (70%) bone to fracture. These fractures occur 65% in waist, 15% in proximal pole, 10% in the distal pole and 8% on the tubercle. Blood supply to scaphoid is from the anterior (distal) pole, traverses through the waist and is often disrupted in displaced or missed fractures, causing avascular necrosis of the proximal bone.

Clinical assessment

Bedside clinical tests are in common use to determine whether a scaphoid injury is suspected. The widely used clinical method of any limb injury is to proceed as LOOK – FEEL - MOVE - X-RAY.

LOOK (inspection): Looking at the wrist area after a Foosh is rarely helpful, unless a large bruise or severe deformity is visible.

FEEL (palpation): Feeling involves deep touch to elicit pain (tenderness) over the suspected bone. Bony tenderness can also be elusive if the fracture is subtle; so it is important to elicit tenderness over multiple zones around the scaphoid in order to enhance the suspicion of a fracture. These tenderness zones are elaborated below.

Anatomical Snuff Box (ASB): A descriptive term to denote the hollow just beyond the tip of the radial styloid process laterally on the wrist. ASB is made prominent by extending the thumb. Margins of ASB are the radial styloid (base) and the tendons of Extensor Pollicis Longus (EPL) & Abductor Pollicis Longus / Extensor Pollicis Brevis (APL/EPB) on either side. The waist of the scaphoid bone lies on the floor of this hollow and may be tender if fractured.

Scaphoid tubercle: Located on the palmar (volar) aspect as a prominent point at the base of thenar eminence (bulge due to muscle belly on base of thumb), where the tendon of Palmaris Longus is attached. This can be tender on deep palpation.

Axial load: This may cause pain in scaphoid fractures when the four fingers are pushed proximally against the steadied wrist. This action squeezes the scaphoid across its waist, which is placed obliquely across the line of pressure, against the articular surface of the radius.

Wrist deviation: Flexion and ulnar deviation of the wrist may cause pain in a scaphoid fracture by distorting the fracture segments.

No single clinical test of eliciting scaphoid tenderness is discriminatory on its own. While ASB tenderness is 87% sensitive, it is not specific for fractures. ASB tenderness alone cannot be relied on in ruling out a fracture. Combining the zones of tenderness increases diagnostic accuracy and clinical suspicion. The probability of scaphoid fracture is 60% in the presence of tenderness over ASB, scaphoid tubercle and axial loading.

MOVE: Movements of the wrist in all directions are generally painful in scaphoid fracture, as well as wrist or thumb sprains. Although wrist flexion and ulnar deviation causes more pain in scaphoid injuries, this is not discriminatory.

X-RAY: Contrary to popular belief, scaphoid fractures are subtle, telescoped (impacted) against each other and often do not show up on a plain X-ray (XR). Signs are subtle, such that an X-ray may not be done, or a normal X-ray is relied on to rule out a fracture.

It is common clinical practice to check for both colles and scaphoid fracture for all patients with FOOSH, and request two X-ray views – wrist and scaphoid. Wherever suspected, the scaphoid is imaged in four views – AP, lateral, right and left oblique. These show maximal details of the bone.

The X-ray can be normal, even in the presence of a fracture – making the injury occult (hidden). If a clinical suspicion exists (based on mechanism and tenderness in any zone), yet the X-ray is normal, the injury should be treated as a 'clinical' scaphoid fracture as opposed to a 'radiological' one. These clinical fractures should be put in a splint for 10-14 days and reviewed.

At the time of review, if tenderness over the scaphoid zones persist, specialised imaging with CT or MRI scan is common practice. MRI is the 'gold standard' in diagnosis of scaphoid fracture, with the advantages of not using radiation as well as identifying ligament injuries. Repeating the plain X-ray or Isotope bone scan are not helpful.

> **For missed fractures and delayed diagnosis, there is high rate of non-union, delayed union, malunion, avascular necrosis and early degenerative arthritis**

Treatment and missed fractures

Radiologically proven fractures need a plaster (POP) with the wrist in neutral position for at least 4-6 weeks, often longer for displaced waist fractures. The healing rate in POP is mostly good. Delayed or non-united fractures usually need operative fixation, sometimes with bone grafting to promote healing.

Ten percent of scaphoid fractures are not visible on the first X-ray. The false negative rate of plain X-ray for recent scaphoid injuries can be 54%. Most 'clinical' scaphoid injuries involve ligaments and do not have an underlying fracture.

However, for missed fractures and delayed diagnosis, there is a high rate of non-union, delayed union, malunion, avascular necrosis and early degenerative arthritis. Some of these complications need operative fixation and bone graft.

Non-union rate can be 40% if diagnosis is delayed by 3-4 weeks and cause problematic symptoms that compromise hand function. Missed scaphoid fractures are notoriously common and are a frequent source of litigation.

In order not to miss a subtle fracture, the clinical practice is to pay attention to all the zones of tenderness after a Foosh. As outlined above, with any clinical suspicion, 'clinical' fractures should be splinted and reviewed in 10-14 days.

If the clinical suspicion persists on re-examination of the wrist, an MRI scan is the best option. An MRI, even if done early instead of splinting for 14 days, would reliably diagnose a fracture or ligament injury. This can inform plaster immobilisation or free movement out of a splint.

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70% of carpal bone fractures relate to the scaphoid bone

10% of scaphoid fractures are not visible on the first X-ray

40% rate of non-union if diagnosis delayed by 3-4 weeks

SPECIAL FOCUS: COSTS

CHALLENGING TIMES

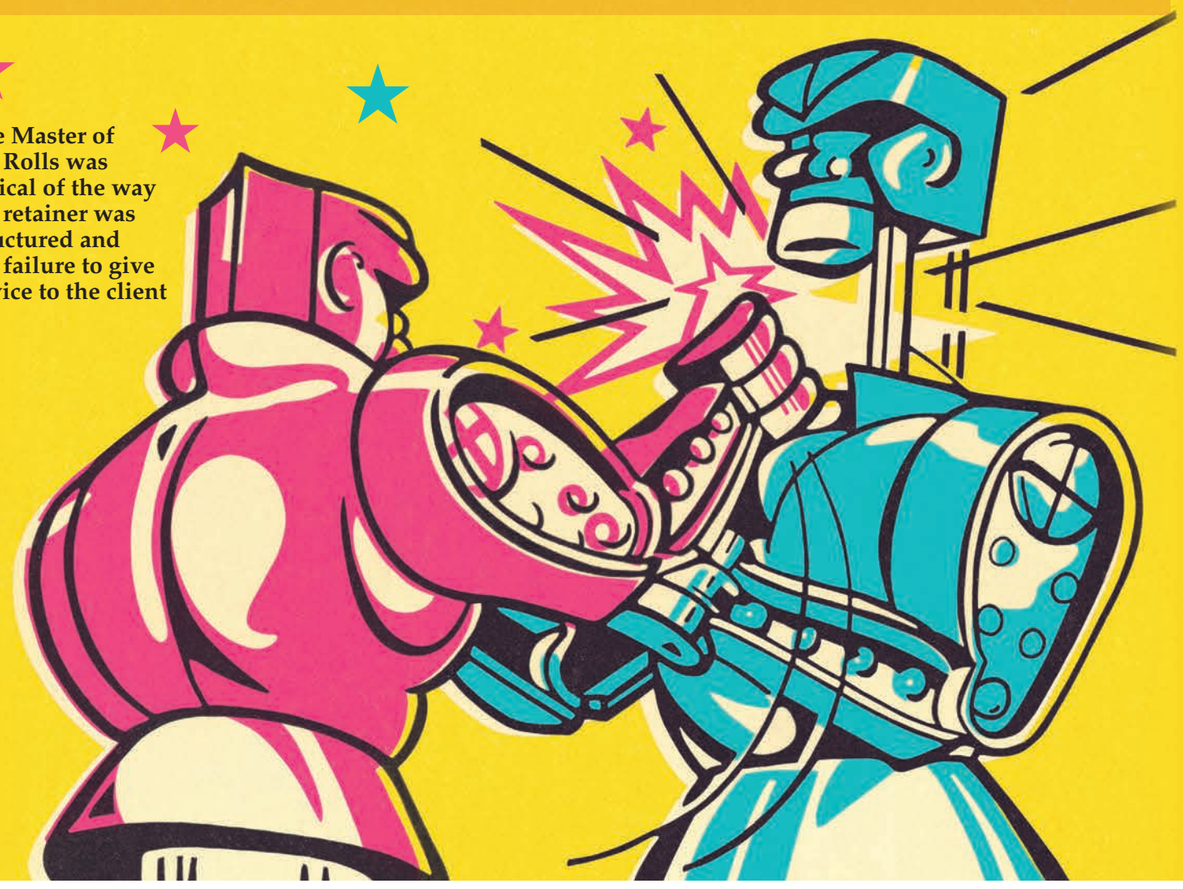
ANDREW HOGAN ON RETAINER AND FEE DISPUTES BETWEEN SOLICITORS AND FORMER CLIENTS

For many years disputes about retainers have been at the heart of the 'Costs Wars' fought historically against solicitors by compensating parties, and more latterly by their former clients.

Unless and until the indemnity principle – which means a party can never recover more in costs from their opponent than they would have had to pay their own lawyer - is fully abolished, such disputes on an inter partes basis are likely to continue, and between solicitor and client will never go away as the prize is very great.

An unenforceable or legally dubious retainer can make a costs challenge well founded and deprive a solicitor of all or part of their fees. So it is not the case that retainer challenges are coming back into vogue: they never went out of fashion, but the protagonists and the arguments have evolved over the years.

In this article, I look at both challenges arising from the drafting of conditional fee agreements, and those arising from the costs purportedly incurred under them.



The Master of the Rolls was critical of the way the retainer was structured and the failure to give advice to the client

Enforceability

A pre-requisite for drafting an enforceable Conditional Fee Agreement (CFA) is that it must comply with the terms of the Courts and Legal Services Act (CLSA) 1990 and the provisions of the Conditional Fee Agreements Order 2013, otherwise the statute will deem the CFA to be unenforceable. If the CFA is unenforceable, then the client is under no obligation to pay their solicitors anything.

That in turn means that on any assessment of costs between the parties to the substantive litigation, applying the indemnity principle, the measure of costs that the client can recover will be 'nil'. To add insult to injury, if the lawyers have paid themselves and their disbursements from the judgment sum or settlement, they could find themselves having to refund the client that money and stand the disbursements themselves.

Costs challenges

If the use of a CFA is problematic - or potentially so - for the lawyers using them, in turn they represent an opportunity for their opponent to probe the terms of the lawyer's retainer and to seek to make enforceability arguments. If those arguments succeed, then the lawyers will recover nothing in respect of their costs. So how will such challenges be mounted and what considerations will apply?

The starting point for a paying party is to scrutinise any bill of costs closely and see whether it refers to the existence of a CFA funding arrangement. This will be set against what else is known about how costs are being funded, derived from the conduct of the substantive litigation.

Next, disclosure of the CFA will be sought - and should be firmly resisted. If a genuine issue can be shown about the potential enforceability or otherwise of the retainer, then the court will require the claimant to elect whether to produce the CFA. Often the genuine issue can arise simply because of a miscertification of the bill of costs. The paying party will then look to see if the CFA is defective, perhaps because it claims more than 100% by way of success fee or does not include the statutory cap on success fees at first instance and on appeal; or fails in some other regard to meet the statutory requirements.

The test for determining whether a CFA is enforceable was set out in *Hollins v Russell* [2003] 1 WLR 2487. The Court said that in deciding whether the relevant conditions in the CLSA had been complied with, costs judges should ask themselves whether the particular departure from the requirements had had a 'material effect' on client protection and the proper administration of justice. If not, the departure is immaterial.

This test was confirmed in *Garrett v Halton* BC [2007] 1 WLR 554 to relate to the degree of non-compliance with the statutory provision, rather than its effect on the client in the sense of a detriment, or whether financial prejudice has been sustained.

It follows that when the lawyers acting under the CFA must defend an enforceability challenge, their best argument will often be that the breach is in fact immaterial. Other arguments might be raised, but there are problems with them.

For example, a common argument is that there is a 'fallback' position such as a private retainer should the CFA fail. But the concept of two parallel retainers in this context does not work. The receiving party would be surprised to be told that despite the making of the CFA, they were still liable to pay the lawyer's costs win or lose. Any objective observer would conclude that the purpose of the CFA was to supersede any pre-existing privately paid retainer.

Enforceability arguments do not just arise in inter partes costs disputes: in the recent case of *Diag Human Se and Stava v Volterra Fietta* [2022] EWHC 2054 (QB) enforceability arguments were used by a former client to defeat a solicitors bill for just under $3 million on the basis that the CFA the solicitors had been retained under was unenforceable and could not be saved.

When the lawyers acting under the CFA must defend an enforceability challenge, their best argument will often be that the breach is in fact immaterial

Fee challenges

In October 2022, the Court of Appeal (CA) ruled in two cases of considerable significance for solicitor-own client costs disputes brought under section 70 of the Solicitors Act 1974: *Belsner v Cam Legal Services* [2022] EWCA Civ 1387 and *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388.

The judgments were handed down together as the cases were heard consecutively by the same division of the CA - the Master of the Rolls, the Chancellor of the High Court and Nugee LJ - earlier in October 2022. The context of the cases is well known: many PI solicitors who make deductions from their clients' damages for success fees or other unrecovered costs have found themselves embroiled in solicitor-own client costs disputes, when their former client instructs new representatives to challenge their bills of costs.

These two cases reached the Court of Appeal on issues respectively as to whether the solicitors were limited to the costs they recovered inter partes and a modest success fee, due to failing to obtain their client's informed consent; and whether the solicitors had 'won' the assessment, and were entitled to their costs of an assessment, because they had capped their costs on a delivered bill.

Disclosure of the CFA will be sought - and should be firmly resisted

Turning first to *Belsner*, the main issue was whether the work done by the solicitors was 'non contentious' rather than 'contentious' business, with the effect that section 74 (3) of the Solicitors Act 1974 and rule 46.9(2) CPR either applied or did not apply at all.

Section 74(3) provides that 'the amount which may be allowed on the assessment of any costs … in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and… counterclaim'.

Rule 46.9(2) provides an exception as follows: 'Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings'.

The argument was also made - and accepted in the High Court - that a solicitor and client stand in a fiduciary relationship; and so failing to obtain a client's 'informed consent' to the retainer involved a breach of fiduciary duty which vitiated the claim to fees due under it; save in respect of those fees recovered from the opponent and a modest success fee calculated on the fees so recovered.

The CA summarised the issues thus:

'The key questions that will require determination are:

'(i) whether section 74(3) and Part 46.9(2) apply at all to claims brought through the RTA portal without county court proceedings actually being issued

'(ii) whether the solicitors are required to obtain informed consent from the client in the negotiation and agreement of the CFA, either due to the fiduciary nature of the solicitor-client relationship or through the language of Part 46.9(2)

'(iii) if informed consent was required, whether the client gave informed consent to the terms of the CFA relating to the solicitors' fees

'(iv) whether, in any event, what can be regarded as the term in the solicitors' retainer allowing the solicitors to charge the client more than the costs recoverable from the defendant to the RTA claim was unfair under the Consumer Rights Act 2015; and

Continued on P37

'(v) what are the consequences of the determination of these issues on the assessment in this case.'

The Court succinctly summarised its conclusions in relation to all these points:

'(i) Section 74 (3) and Part 46.9(2) do not apply at all to claims brought through the RTA portal without county court proceedings actually being issued

'(ii) the judge was wrong to say that the solicitors owed the client fiduciary duties in the negotiation of their retainer

'(iii) although the solicitors were not obliged to obtain the client's informed consent to the terms of the CFA on the grounds decided by the judge, the solicitors did not comply with the SRA Code of Conduct for Solicitors in that they neither ensured that the client received the best possible information about the likely overall cost of the case, nor did they ensure that the client was in a position to make an informed decision about the case

'(iv) the term in the solicitors' retainer allowing them to charge the client more than the costs recoverable from the defendant was not unfair within the meaning of the CRA 2015; and

'(v) the court can and should reconsider the assessment on the correct basis, which is under paragraph 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009 (the 2009 Order), which requires the solicitors' costs to be "fair and reasonable having regard to all the circumstances of the case". The costs actually charged to the client in this case were fair and reasonable.'

Also of interest was the CA's obvious concern over the business model of the representatives instructed by the client in this case. The MR said:

'It is also unsatisfactory that solicitors like checkmylegalfees.com can adopt a business model that allows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind.

'The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances, but the whole court process of assessment of solicitors' bills in contentious and non-contentious business requires careful review and significant reform.'

Of significance going forward, the CA fired some warning shots about the potentially unfair structuring of some retainers and the need to comply with professional duties.

In *Belsner,* the client was not told the level of fixed recoverable costs to be paid by the defendant, which meant she did not realise that she was assuming a liability to pay the solicitors five times the costs she would be getting back from the defendant – although she was never actually charged this much.

The MR said: 'It is wholly unsatisfactory for solicitors… routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. Solicitors do not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case is settled.'

The CA focused its judgment on whether a fair fee had been charged to the client, and so the failure to provide the best possible information did not affect the outcome in *Belsner.* But the Ombudsman certainly would be concerned with such failures, and the potential would exist for a remedy to be granted.

Karatysz v SGI Legal

The case of *Karatysz,* while a shorter decision on simpler point, is just as important for low-value PI litigation.

The first point is that, given that a solicitor will invariably cap the costs they have incurred set against what they expect the client to pay, what is the actual amount of the bill for the purposes of section 70(9) of the Solicitors Act 1974? Despite all the powder and shot spent in the Court of Appeal, in the end the court decided that the amount of the bill of costs is simply the amount that the client is asked to pay.

The CA then went on to explain how a bill of costs should be structured:

'Properly drawn bills ought in future to state the agreed charges and / or the amounts that the solicitors are intending by the bill to charge, together with their disbursements.

'They should make clear what parts of those charges are claimed by way of base costs, success fee (if any), and disbursements.

'The bill ought also to state clearly (i) what sums have been paid, by whom, when and in what way (ie. by direct payment or by deduction), (ii) what sum the solicitor claims to be outstanding, and (iii) what sum the solicitor is demanding that the client (or a third party) is required to pay.'

Finally, the CA was again critical of the practice of bringing High Court proceedings for disputes over costs where objectively trivial amounts were at stake. The MR noted that just £177.50 was at issue in the claim, apart from the 'massive sums by way of costs'. He said: 'The process whereby small bills of costs are taxed in the High Court is to be discouraged. It is far more economic to use the Legal Ombudsman scheme…

'Firms such as checkmylegalfees.com and their clients should be in no doubt that the courts will have no hesitation in depriving them of their costs under section 70(10) if they continue to bring trivial claims for the assessment of small bills to the High Court, even if those bills are reduced on the facts of the specific case by more than one fifth under section 70(9). The critical issue is and always will be whether it is proportionate to bring this kind of case to the High Court. In this case, it was not.'

At a stroke, this means that where a claim is brought for a refund of a few hundred pounds, even if successful, there is an excellent argument that the client should be deprived of their costs. This is because they acted disproportionately in seeking such a trivial sum by way of High Court proceedings when they should reasonably use the Ombudsman service.

It is time to revisit retainer documentation and client care letters

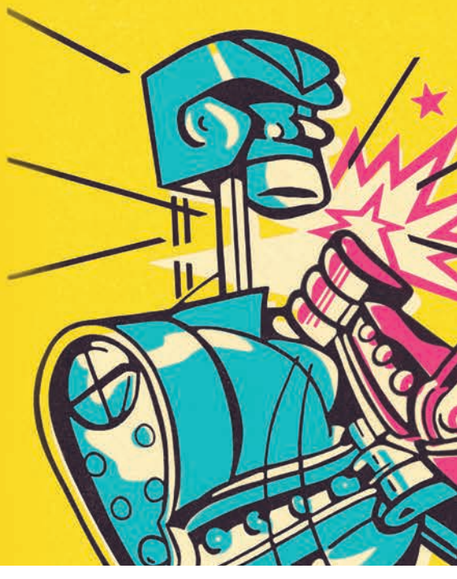
Future points

There are a number of points for law firms to bear in mind going forward. First, it is time to revisit retainer documentation and client care letters. While the solicitors in this case escaped consequence, the MR was critical of the way the retainer was structured and the failure to give advice to the client about likely levels of recovered fixed costs.

Second, it is time to revisit the way cases are billed and whether the form of bill currently used reflects the CA's guidance above.

Third, claims for the return of low-value deductions are probably now dead in the water if pursued as a solicitor-own client assessment, as the CA has clearly indicated that a client should not recover the costs of doing so if the proceedings are disproportionate.

Andrew Hogan is a barrister at King's Chambers



PIC'S DOMINIC WOODHOUSE REPORTS ON HOW THE COURTS ARE APPROACHING NEW GUIDELINE HOURLY RATES

Dominic Woodhouse
PIC

The new and updated guideline hourly rates have been with us for a year now and are still taking some bedding-in in all situations costs-related, from budgeting to detailed assessment, which can be particularly problematic for those dealing with substantial personal injury litigation.

Per paragraph 27 of the *Guide to the Summary Assessment of Costs*, the guideline rates are not scale figures, but broad approximations only. One would think on that basis there would be an automatic recognition of some flexibility in their application. Many will say not so, citing *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 and the exhortation that a clear and compelling justification needs to be provided for inter partes recovery in excess of guideline rates, coupled with paragraph 29 of the *Guide* in that departure from the guidelines is perhaps only applicable in the context of substantial and complex litigation.

One might say that the comments in *Samsung* are worthy of further interrogation, in that restriction of rates to guideline rates for London 1 was in the context that the receiving party's solicitors offered no justification for the rates at all (it appears) - other than a generic comment that hourly rates in competition litigation were almost always more than guideline rates. This was in circumstances where, as the Court of Appeal observed, London 1 guideline rates already assume that the litigation in question qualifies as 'very heavy commercial work'. Distinct from all other bands, London 1 reflects a work type of an expected level of arduousness rather than solely a geographic location.

Since then, in *Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See* (Costs) [2022] EWCA Civ 1061, hourly rates were sought 'well in excess' of the guidelines and again, in the context of substantial commercial litigation, justification for those much higher rates was needed.

In the regions

But what of work done in the provinces? More recently in *Lappet Manufacturing Co Ltd v Rassam* [2022] EWHC 2158 (Ch), a National 1-based firm seeking rates substantially more proximate to (and in some instances in excess of) London 1, in a trademark infringement case of potentially limited value, appears to have had little trouble in persuading the Court of the reasonableness of some departure.

With reference to the need for specialist knowledge of the procedures involved, it was accepted that a departure from guideline rates was justified on the basis of the long-established principle that specialist solicitors in specialist areas of activity should recover an uplift to reflect that specialism, where that is justified in the circumstances.

The guideline rates for London 2 appear to have been used as something of a yardstick, with ultimate allowance slightly less than those rates, though reflecting a mark-up on guideline rates for National 1 of between 30 and 35%. Interestingly, if cross-checking using the old 'A factor plus B factor' approach (which was supposed to have fallen out of vogue some time ago, but is once again making a resurgence, for example in *EVX v Smith* [2022] EWHC 1607 (SCCO)), this would reflect a B rate of between 95 and 101% (where historically a 'B' factor of that order would be appropriate where the work was 'exceptional', per *Johnson v Reed Corrugated cases* [1997] Costs LR 180)).

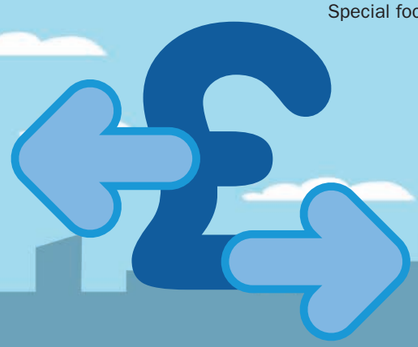
The principle of best foot forward will mandate always volunteering justification for hourly rates in *excess* of guidelines, but insofar as *Samsung* will likely be a stick frequently brandished in arguments over costs, the point should be robustly made that it is rooted very specifically in the context of a single set of rates specifically designed for the broad case type involved.

Dominic Woodhouse is Advocate & National Training Manager at PIC

> **The new and updated guideline hourly rates have been with us for a year now and are still taking some bedding-in**

> **A clear and compelling justification needs to be provided for inter partes recovery in excess of guideline rates**

STRETCHING THE BUDGET



DARREN LEWIS EXAMINES PROBLEMS WITH COSTS BUDGETING

COST BUDGETING HAS BEEN IN FORCE FOR NINE YEARS, AND HAS BOTH SUPPORTERS AND DETRACTORS. IT IS NOW SUBJECT TO A REVIEW BY THE CIVIL JUSTICE COUNCIL. THIS ARTICLE DISCUSSES SOME OF THE PRACTICAL CHALLENGES I ENCOUNTER IN COST AND CASE MANAGEMENT HEARINGS (CCMCS) AS A PI AND COSTS BARRISTER.

Crystal balls

Costs budgeting is often criticised as 'an exercise in crystal ball gazing'. Many low-end multi-track cases are predictable and progress in a broadly similar way. But where there is uncertainty surrounding incomplete medico-legal evidence, capacity to return to work, or the efficacy of rehabilitation or treatment, then estimating costs is challenging. These are 'trajectory changing' triggers in litigation. If not known at time of budgeting, they can make the budgeting exercise of little to no value later on - as there will be a 'significant development' requiring a Precedent T to amend costs substantially.

So where there is a potential trigger point in the near future – like rehabilitation treatment ending, surgery, or even a consultation with an expert - solicitors should always consider agreeing with the defendant to adjourn the CCMC to a reasonable time after the index date. I see too many CCMCs that adjourn or are only partially budgeted because they see a potential trajectory change merely days or weeks ahead of the CCMC. This leads to the cost of two CCMCs. A sensible consent order accompanied by an email explaining the trajectory change might be enough for a Court to deal with it informally. Some Courts will require a formal adjournment application.

Frontloaded problems

Budgeting incentivises claimants to 'frontload' work so that it appears as 'incurred costs' in the budget, and so is not budgeted – avoiding potential unexpected and substantial reductions.

The problem with significant frontloading of costs is twofold. First, it is used by defendants to reduce any estimated costs going forward (so if the case has evolved, this needs to be set out in your assumptions). Since the significant 'incurred' sum is not budgeted by the Court, there is also more likely to be greater scrutiny after the conclusion of a case (the opposite of what Sir Rupert Jackson intended when introducing costs budgeting).

The wisdom of Solomon

Costs budgeting in front of judges experienced in PI practice is always an efficient, informed and valuable exercise. But we have all encountered judges with less practical experience who will budget at a halfway point between the Precedent H sum and the Precedent R sum. This leads costs draftsman to pitch much higher for claimants and much lower for defendants, in a fight to bring the halfway point to a favourable position.

This conduct should be discouraged on both sides. It is mostly preferable to agree those features you can agree and set a reasoned battle line on those you cannot. There will be judges who take a halfway point; but when an overly inflated Precedent H and an unreasonably low Precedent R come before a judge who knows the area, they reject the documents as worthless and take quite stringent control of the process. This removes all predictability or input from the unrealistic party.

> **We have all encountered judges with less practical experience who will budget at a halfway point**

A problematic rule

The most breached rule in costs budgeting is PD 3E 4 (a). Where a party's total costs are less that £25,000 or the value of the claim on the claim form is less than £50,000, the parties must only use the Precedent H front sheet.

I am not going to advise you to breach the rules. I will say that with the front sheet only, it is very hard for the barrister attempting to defend the budgeted sums. It is hard for the barrister attacking the budgeted sums to narrow issues (so attacks are more wide ranging) and it is harder for the judge to truly understand how the sums are arrived at. A number of judges have told me (with the tape off) that they do not understand the utility of this rule.

Reform on the cards

From October 2023 fixed recoverable costs (FRC) will extend to cases worth up to £100,000. This will take a significant percentage of PI cases out of costs budgeting. Many of these will be the more formulaic matters where medico legal evidence would already be completed before CCMCs. This may lead to even greater frontloading of work by claimants in order to identify case values over £100,000, or identify other complicating factors taking them out of the FRC regime.

Last year the Civil Justice Council ran a consultation on the future of costs budgeting which ended on 14 October 2022. No doubt it will take some time to digest the wide-ranging views.

From the commentary on the consultation and the questions posed, we get some hint at potential reform and also tensions in approach. It seems clear there is a tension between judges in London and the regions, with the latter feeling that CCMCs are the only 'tool to prevent disproportionate costs in cases at the lower end of the multi-track'.

The consultation does not rule out abolition of the whole budgeting process, but the balance of questions asked in the consultation seems to suggest that reform is more likely. One possibility is for budgeting to be limited to smaller classes of PI cases, or for a judicial discretion to be given as to whether or not to trigger costs budgeting.

Whatever happens, 2023 looks set to be an interesting and perhaps turbulent year for PI costs.

Darren Lewis is a barrister at St John's Chambers

PROTECTED AREA

COLIN CAMPBELL LOOKS AT THE CHANGES AHEAD FOR QOCS

‘Qualified one-way costs shifting’ (QOCS) – it’s a bit of a mouthful. Where did it come from? What does it mean? For the answers to these two questions, we need to take a trip down Memory Lane.

Cast your minds back a few decades to when most PI cases were funded by legal aid. That effectively enabled injured claimants to use a state-provided overdraft to finance their claims.

On a win, the state would be reimbursed from the costs recovered from the tortfeasor. On a loss, the defendant would be awarded costs ‘not to be enforced without leave of the court’. This was colloquially known as the ‘football pools order’ following a ruling by Pearson J in *Rogan v Kinnear Moodie & Co Ltd* [1955] 1 Lloyd’s Rep. 442 that ‘in case Mr Rogan suddenly becomes rich, wins a football pool or whatever it may be, then the defendants can apply.’

Unnerved at the perceived expense of legal aid, the government passed the Access to Justice Act in 1990, through which conditional fee agreements (CFAs) were permitted, to replace the system of state funding.

There was no money to be paid up front by the claimant, nothing due on a loss, but on a win, success fees and after-the-event (ATE) insurance premiums, as well as the solicitors’ costs, would be recoverable from losing defendants.

That came at significant cost for those defendants (especially the NHS). If the success fee was 100%, it meant double your money for victorious legal representatives, and nothing for a claimant to pay on a loss, because the ATE insurance took care of that. It cost a fortune - so the government appointed Sir Rupert Jackson to find an alternative.

That brings us to our first answer: as Sir Rupert expressed it in his Report into the Costs of Civil Litigation 2009: ‘Litigation costs can be reduced by taking away the need for ATE insurance… This can occur if QOCS is introduced…’

And now for the second answer. Sir Rupert’s recommendation to end this costs casino was the implementation of section II of Civil Procedure Rule 44 (See CPR 44.13 – CPR 44.17). A claimant seeking damages for personal injuries, under the Fatal Accidents Act 1976 or arising out of death or personal injury for the benefit of an estate under the Law Reform (Miscellaneous provisions Act) 1934, would pay no costs on a loss. In return, success fees and ATE premiums ceased to be recoverable (with limited exceptions) from defendants, but as a further quid pro quo, general damages increased by 10%.

By this means, Sir Rupert wrote, anyone with a good claim ought not to be deterred from bringing it for fear of having to pay costs if the action failed. No risk, then, of any claimant losing their shirt, still less their house, on a loss.

But the costs protection was to be ‘qualified’ where:

(1) the action was struck out (CPR 44.15) or

(2) the claim was found by the court to have been fundamentally dishonest and the court gave permission to enforce an order for costs made in the defendant’s favour (CPR 44.16).

So struck out or dishonest claimants would be liable in costs to their last penny.

In a mixed claim, QOCS protection should continue to apply until all claims in the action have been tried or otherwise resolved

Setting off costs

So far, so clear. But what happens if a claimant wins the case, but on the way, is ordered to pay some costs – such as the defendant’s consequential costs of amending the defence after an amendment to the particulars of claim? CPR 44.14 takes care of that. The defendant can enforce those costs against the *aggregate* of any damages or interest *ordered* to be paid to the claimant.

So at worst, an honest claimant can never be out of pocket to a defendant in having brought the claim. They will simply leave with nothing; albeit that a winning claimant in this situation will still have personal liability to pay their own solicitors’ costs.

The emphasis above is important because the defendant’s entitlement to enforce a costs order only arises where there has been an *order*, which means a judgment or order of the court for the payment of damages and interest. In this context, the acceptance of a Part 36 offer will not do. As Coulson LJ explained in *Cartwright v Venduct Engineering Ltd* [2018] 4 Costs LO 495:

‘Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 offer would also be outside the words of rule 44.14(1).’

But what if the aggregate of damages and interest awarded to the claimant by order is not enough to satisfy the defendant’s costs? In an action not covered by QOCS, such a defendant will look to CPR 44.12, which permits a simple set-off of one costs order against another. No such luck, however, where the claimant has QOCS protection. In *Howe v MIB* [2020] Costs LR 297, the Court of Appeal permitted the MIB to set off costs it was owed by Mr Howe against those due to him, because the Court considered it ‘just’ to do so.

But in *Ho v Adelekun* [2021] Costs LR 927, the Supreme Court allowed an appeal which overruled *Howe*, albeit with some reluctance. Lord Briggs put it this way:

‘We recognise that this conclusion may lead to results that at first blush look counterintuitive and unfair. Why should a defendant which has a substantial costs order in its favour have to pay out costs to a claimant under an order made against it when the two costs orders would net off against each other, leaving both sides to meet their own solicitor’s costs themselves?’

The result meant that Ms Adelekun could not use any of the £48,600 costs in her favour to extinguish her liability to Mrs Ho for fixed costs of £16,700, which remained payable.

Is the outcome in *Ho* unfair to defendants? The government appears to think so, as the Civil Procedure Rule Committee (CPRC) currently has rule changes to CPR 44.14 lurking in its in-tray.

The following proposals in italics are under consideration:

‘(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages, costs and interest made in favour of the claimant.…

‘(2) For the purposes of this Section, orders for costs include orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9…

‘(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.’

If implemented, these changes will give defendants with costs orders a hand stronger even than they had before the decision in *Ho* was reversed; and claimants will find that their QOCS protection has been still further diluted. It will mean that a Part 36 acceptance will become an order to pay rather than a mere record of a settlement, and that the set-off of costs against costs will be permissible as of right, with no requirement that it must be just - as was the case when *Howe* was good law.

Will that outcome be unfair to claimants? If the minutes of the CPRC meeting on 4 October are anything to go by, the government thinks not. Save for a further amendment to CPR 44.14(1) to clarify that a costs order can be enforced where there has been ‘an agreement to pay’, the Committee noted that these draft rules delivered the policy intention of the Ministry of Justice and resolved that the final drafting would be determined at the next meeting.

If these changes are implemented, spare a thought for the law of unintended consequences.

Most personal injury claims are funded by no win, no fee CFAs, so that only on a win does an entitlement arise for the solicitor to charge a fee. On a loss, the claimant pays nothing. However, with the possibility in future for all damages to wiped out by set off as well as by enforcement, not only potentially will there be no compensation for claimants to keep for their injuries, but also there will be nothing left to pay their own solicitors. The consequence of that will be that as QOCS protection does not work in reverse, a winning claimant will be at risk of losing their shirt as well as their house to their own solicitor, even though the case has been honestly brought, and has ended in success.

In those circumstances the claimant would be better off if they had lost altogether! Is that how Sir Rupert intended QOCS protection to work? Surely not.

Is the outcome in *Ho* unfair to defendants? The government appears to think so

The claimant would be better off if they had lost altogether. Is that how Sir Rupert intended QOCS protection to work?

Mixed claims

QOCS matters can also be complicated where there is a ‘mixed’ claim in which the claimant seeks not only compensation for personal injuries, but also damages for other losses.

If the personal injury part is struck out under CPR 44.15, the issue then arises: can the defendant have the costs now for that part of the action, or must they await the conclusion of the proceedings as a whole, when the outcome of the non-personal injury part is known?

The Court of Appeal in *Achille v Lawn Tennis Association Services Ltd* [2022] Costs LR 1553 gave the answer in October. ‘Proceedings’ in this context in CPR 44.13 means all the claims made by a claimant against a single defendant, when one such claim is for personal injury.

It followed in that case that while it had been permissible for the court to have carried out a summary assessment of £4,250 for the costs of the struck-out aspect, enforcement of those costs needed to be deferred until the outcome of the non-personal injury claim was known.

In other words, in a mixed claim, QOCS protection should continue to apply until all claims in the action have been tried or otherwise resolved.

Colin Campbell is a consultant at Kain Knight Costs Lawyers and a former costs judge

A winning claimant will be at risk of losing their shirt as well as their house to their own solicitor

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A CHOICE OFFER

KRIS KILSBY EXPLAINS THE LATEST PART 36 DEVELOPMENTS

No section of the Civil Procedure Rules has generated as much case law or satellite litigation as Part 36, and 2022 was no exception.

As readers will know, one of the main benefits of a defendant making a strong, early Part 36 offer is that under CPR 36.13, if such an offer is accepted after the expiry of the relevant period, the defendant will be entitled to their costs from the date of expiry to the date of acceptance. This effectively acts as a 'double-whammy' in that it deprives the claimant of their costs for that period while also providing for the defendant to recover their own costs for that period.

But according to CPR 36.13(5) the court should not make such an order where it is unjust to do so; which was at the heart of the recent case of *MRA v The Education Fellowship Limited* [2022] EWHC 1069 (QB).

MRA v The Education Fellowship Ltd

In this historic child abuse claim the defendant made a very early Part 36 offer which the claimant accepted more than two years after expiry. The court had to consider whether it was unjust to make the usual order given the significant two-year gap between expiry and acceptance.

The defendant's offer was for £80,000 in a claim issued and limited to no more than £100,000. The claimant attempted to argue that the Part 36 offer had not been accepted sooner due to uncertainties in the claimant's prognosis, making it impossible to advise if the offer should be accepted. Further, the claimant argued that such an order would take out most of the claimant's damages.

The court recognised the difficulties of such a decision. It confirmed that the bar to establishing that it is unjust to make the usual order is a high one; and that references to uncertainty of prognosis and reasonableness were not enough to meet that bar.

> **Even a relatively small concession can amount to a genuine offer to settle**

Omya UK Ltd v Andrews Excavations Ltd

Omya UK Ltd v Andrews Excavations Ltd & Anor [2022] EWHC 1882 (TCC) highlighted the benefits of a good and early Part 36 offer. Even a relatively small concession can amount to a genuine offer to settle; and if you are able to beat this offer then the benefits of Part 36 can be significant.

The claimant recovered the full sum claimed: £765,094 at trial. Almost 18 months earlier the claimant had made a Part 36 offer for £756,287; a 1.15% reduction. The Court considered whether this was a genuine offer to settle and the judge referred to the decision in *Rawbank SA v Travelex Banknotes Ltd* [2020] EWHC 1619 (Ch), where a 0.3% deduction was held to be a genuine offer to settle.

The judge considered the actions of the defendant and noted that there were no factors that made it unjust to apply the usual consequences of Part 36. As such, the defendant was ordered to pay an extra £63,255 pursuant to CPR 336.17(4)(d)(i), interest at an enhanced rate of 5% over the base rate, and costs on the indemnity basis from the date of expiry of the relevant offer.

> **If you are able to beat this offer then the benefits of Part 36 can be significant**

Fixed recoverable costs

At time of writing, the proposed rules for the extension of fixed recoverable costs to cases worth £100,000 have yet to be published by the Civil Procedure Rule Committee. If the approved rules reflect the initial proposals, then where a Part 36 offer is beaten, it will no longer be the case that costs after the expiry of the relevant period will be on the standard / indemnity basis. Instead, there will be a flat 35% uplift to the fixed costs for the stages during and after the expiry date.

Further, the case of *Doyle v M&D Foundations & Building Services Ltd* [2022] EWCA Civ 927, which clearly set out that parties are able to contract out of fixed costs through the wording of settlement orders, cannot be ignored.

It is essential for all litigators to think carefully about settlement offers and the form they take going forward. The work will not stop simply because an acceptable offer has arrived in the inbox. Quite the contrary - even more consideration will be needed as to the form and consequences of accepting the offer, not just its basic terms.

Kris Kilsby is a Council member of the Association of Costs Lawyers and a costs lawyer at Paramount Legal Costs

GROWING PAINS

DR KATIE BYARD AND LAURA MIDDLETON-GUERARD ON THE TRANSITION TO ADULTHOOD FOR BRAIN-INJURED CLIENTS

In this article we look at how, from a clinical psychologist's perspective and a lawyer's perspective, we can support emerging adults with brain injury who are making the transition towards adulthood, within the framework of ongoing litigation.

What do we mean by transition?

Transition refers to the developmental process of moving from child to adult. Clinically, neuroscientific models of normal brain development, and the ways that the development of a child with brain injury can be different and change from that of a typically developing child, are important.

Litigation involving children with brain injury can take many years to conclude. It will require planning for and support at key developmental transitions, such as the client's journey through education, the move towards independent living (with or without support) and towards meaningful vocation and community participation, particularly as a client moves beyond education.

The length of litigation means it will probably be necessary to navigate the transition from child to adult statutory services and / or private provision; and possibly, changes to personnel in the treating team to best meet the developmental needs of a young adult client. Recognising and understanding a client's needs as they are developing is vital and, in the scenarios we set out below, holding a developmental perspective is central.

During adolescence and well into our 20s, we now know that the brain undergoes profound development

The adolescent brain

Advances in brain imaging have allowed neuroscientists to track structural and functional changes in the human brain.

During adolescence and well into our 20s, we now know the brain undergoes profound development - particularly in the prefrontal cortex, a brain region involved in planning, impulse control (inhibiting inappropriate responses), decision-making, self-awareness and social cognition (understanding people, reading other people's behaviour, taking on other people's perspectives and understanding people's underlying emotions and mental states from their facial expression / behaviour) and the limbic system (involved in emotional and reward processing).

The neuroscience of adolescent brain development helps us understand about typical teenager behaviour such as higher risk taking and seeing only their own perspective; struggling with decision-making and being more influenced by peers than their parents; and pushing towards autonomy and independence (Blakemore, 2019) .

Adding brain injury into this already potentially volatile, unpredictable developmental period can create dilemmas for the treating team, for the client and their family and for the litigation in terms of how to assess and manage risky behaviours; how to assess a client's mental capacity; and how to enable the client is to live independently, and with what level of support.

A client's mental capacity

Given the likelihood of increased risky behaviours, and being mindful of the typical, natural transition of decision-making moving from parents to the emerging adult child during this period of adolescence, the assessment of a client's mental capacity and decision-making ability comes to the fore.

To assess whether a client can make a decision (understand, retain, use, communicate), adhering to the five principles of the Mental Capacity Act (MCA) 2005 requires awareness of the complexity and dynamic nature of mental capacity assessment. As a treating psychologist, assessing a client's mental capacity is an enriching process for rehabilitation planning, as it informs how the client can be supported in their decision-making *by all means possible* (MCA, 2005). From a treating perspective, as part of this process, attention to different views, expectations, priorities and concerns of the client, the family, and the team, also guides the planning and delivery of rehabilitation goals.

The first two scenarios set out below explore some of the issues that can crop up when addressing a client's mental capacity in the context of decision-making and risk management, as part of rehabilitation.

Adding brain injury into this already potentially volatile, unpredictable developmental period can create dilemmas for the treating team

We must take care to avoid the Litigation Friend becoming aware of issues for the first time when reading a report

Impact on the family

The psychosocial impact of brain injury on the family is well cited in the research literature, alongside the influence of family and child functioning on outcome (Reed, Byard & Fine, (2015)[2] ; Jim & Cole, (2020)[3] . The research highlights the value of addressing the contextual nature and complex interplay between family functioning and outcomes post injury, by supporting the family and wider system. It recognises that brain injury can interrupt the typical developmental flow of family life, with developmental transitions often experienced as especially poignant for the family, because they emphasise what has been lost, and expectations that have not been met.

Holding the family needs in mind across time; and understanding, as well as anticipating and planning for support at key transitions for the family as well as the client, can be very helpful. We will examine this further in scenario 3 below.

The three scenarios are fictitious, drawing on clinical and litigating experiences across a number of cases.

Scenario 1

A young adult male with brain injury is in his early 20s, living independently, with light touch support - two hours of daily support to scaffold planning, initiation and completion of ADLs (activities of daily living), and daily plans including getting ready for part-time paid employment working in a bar. As part of the settlement, the joint expert neuropsychologist opinion is that the client has capacity to manage his financial affairs, though with some skill learning and practice needed.

The treating team is concerned about the expert's opinion regarding capacity to manage financial affairs. The client routinely runs out of money; when he has money he spends it impulsively, and he has a tendency to give money to his friends when they ask. Parents report that they do not think their son has been well understood by the experts, who do not see the chaos their son leaves in his wake - that the parents often need to pick up. They describe having sleepless nights about their son's often 'reckless' living, and feel he is vulnerable to abuse by others because his friends know that he will just give them money if they ask. The client is delighted with the outcome and is already starting to talk about a back-packing trip around Australia with two of his mates.

Psychology comment: In a case like this, it is important to listen to and understand the worries of the team around the client, as this can so often inform and guide the content of rehabilitation for the client themselves, and also address the needs of the wider team. On cases such as these, neuropsychological input usually includes a package of support that considers:

(1) **Insight development:** developing and / or further building a client's awareness and insight about their limitations (as well as their strengths) and why, for example, risk management or support mechanisms (delivered via carers / support workers and rehabilitation and skill practice) are needed.

(2) **Skill development:** developing and practising skills that build greater competence and confidence in identified skill deficits in activities of daily living, financial and money skills. This may require further assessment to understand a client's neuropsychological profile and everyday functioning and skills (perhaps from an occupational therapy perspective) to support rehabilitation plans.

(3) **Goal setting and review:** rehabilitation is shaped by collaborative goal setting and review with the client and team to show outcomes, and progress (or its lack).

(4) **Psychological support to the wider system:** this might be support to parents as they adjust to an adult child living more independently, to discuss their concerns and have plans in place to manage their own emotions, and any consequences of what is perceived as more risky decision-making by their adult child. It might also include support to the team to reflect on their own opinions and views about risk, and how it is managed.

The COP3 form can be a useful tool not only for assessment to provide opinion for the Court of Protection, but also as a treating tool in rehabilitation. It can show level of ability, areas of need (identifying where skill building and practice is required) and build evidence for the client themselves and for the team around them. At reassessment, the COP3 form provides a measure of outcome and progress, and is an evidence- and confidence-builder for the client and the people around them to show specifically what has changed with respect to patterns of decision-making and behaviour; and what skills have developed during the rehabilitation.

Continued on P47

Scenario 2
An emerging young adult woman with brain injury, with fluctuating ability and presentation, is at college, managing fairly well with adaptations and help from support workers in college and at home.

The client lives with her parents and is desperate to live in her own place. The parents support this but are concerned about the implications for their daughter, and their relationship with her. The litigation involves questions around her capacity to manage her financial affairs. There is a question about whether the client will mature and grow into her skills and capacity, while noting that what she says at assessment contrasts with her everyday decision-making and actions with money; and about what level of support is required if she were to live independently. The experts do not yet have enough evidence for a final opinion and prognosis.

Psychology comment: My personal experience has been that the transition to independent living can be complex for a treating team, and requires listening to multiple perspectives and understanding the concerns and priorities of different voices as part of any rehabilitation plan.

Building evidence about what is working well - and not so well - for the client, parents and wider team; considering how to build in supports, scaffolds and meaningful progress measures; and narrating outcomes and issues of concern, must be done in a way that promotes awareness and insight for both the client and their wider support system. It is also helpful to notice attentively the ways in which the client's decision-making and goals towards autonomy can be supported, and to explain this clearly in routine reports and case notes.

Although it is of course vital for the litigation and treating rehabilitation to remain separate, there is an expectation that rehabilitation plans and their outcomes will inform expert opinion. So the treating team needs to consider how it can build and show evidence about progress or its lack, via a routine goal-setting and review process, chronological reporting and narrative descriptions of factors associated with progress and non-progress.

I have learnt not to be afraid to report on *stuckness* and any lack of progress, as this will help the wider team to understand the limitations of rehabilitation to improve function and skills (while noting its potential value in maintaining function and safety, minimising risks, promoting access and participation in meaningful activity and enhancing overall quality of life).

The expert's assessment is usually a 'snapshot' of the client at one point in time, or several points in time across the litigation process. In a client with a more variable presentation or where there are questions about the level of mental capacity and / or levels of support required, with, for example, a trial of independent living, the treating team's reporting and evidence-building can be particularly useful and enhance understanding about the client's everyday presentation and functioning.

Legal comment on Scenario 1 and 2:

I would echo Katie's comments above. Experts are often asked to determine capacity issues, notably around the client's ability to litigate and to manage financial affairs (but they can also be asked to comment about ability to use social media, to consent to sex, marriage, medical treatment and so forth).

With paediatric cases, there is rarely a track record of the client's attitude towards money management, for example. Experts need evidence before they can even start to consider rebutting the presumption that a client will have capacity when they reach 18. In my view, this is where the rehabilitation process can help build the evidence for the experts to make, on balance, the appropriate call.

This is an important area.

1) Get it right and if a client needs a deputy, the costs of a professional deputy will be included and recovered as part of the client's claim for however long the experts are of the view that this client will lack capacity to make decisions around the management of their financial award.

2) Get it wrong, with the client needing a deputy later on down the line / post settlement, and these costs will need to be covered by another head of loss, leaving a client in a tight spot. Of course, capacity assessments are not a precise evaluation, but it is really important to ensure experts have all at their disposal when making the assessment.

Katie mentioned neuro-psychology records. Parents' concerns would also be recorded in their witness statements. I would add that as part of any living skills work, budgeting should be on the agenda, and this is often a way of monitoring a client's spending patterns.

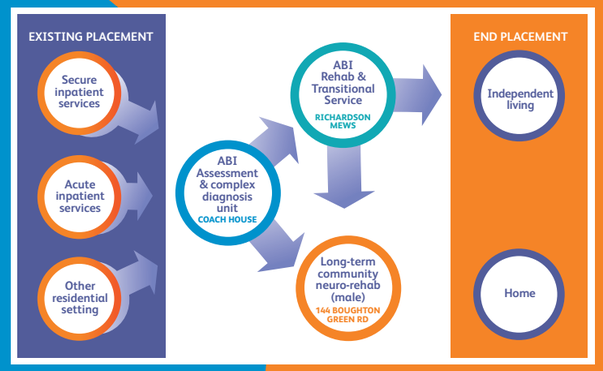
My experience is that many clients know in theory how they would like to manage their compensation award - and can say the right things when in an assessment setting. But nothing matches seeing how they manage funds day to day (be it their earnings or part of their interim payments).

One of my clients was able to detail the different Monzo accounts he had for every head of expenditure, and what he was saving for, during an assessment with the defendant expert. In reality, he would typically run out of money mid-month, transfer the funds from these different accounts to his current account, spend it all and then ask his family for funds. He could not forward plan, and while on holiday, had to rely on friends to bail him out. With the evidence from his family and the key clinicians in his team, we were able to record those patterns and emergency situations, and provide this to the experts who were then able to consider the appropriate level of support this client needed.

Simply put, it is all down to the lay evidence and the evidence from the clinical team.

Continued on P53

Richardson Care
Caring is in our DNA



Richardson Care restructures to provide seamless care pathway

Richardson Care has restructured its specialist services for adults with acquired brain injury or learning disabilities and complex needs to provide a seamless and flexible care pathway.

The Northampton-based care provider has six residential care homes and a long proven track record of delivering successful outcomes for service users. It remains an independent family business and Director Laura Richardson-Cheater explained the reasons for the restructure: "We have always placed the service user at the centre of their care and the business has evolved to deliver different types of rehabilitation and therapy. We realised that by making some small changes, we could redefine our services to make them clearer for commissioners and take the business forward to a higher level of excellence.

> *"We have the flexibility to provide a seamless rehabilitation pathway, which enables the individual to progress within the supportive environment of the Richardson Care family."*

The specialist acquired brain injury services are:

1. **ABI assessment & complex diagnosis unit, The Coach House**
2. **ABI rehabilitation & transitional service, The Richardson Mews**
3. **Long-term community neuro-rehabilitation service for men, 144 Boughton Green Road**

Laura continues: "Our admissions policy has always been to place an individual in the home that is most appropriate – both for their needs and the needs of the existing residents. This restructure has formalised that process while retaining flexibility.

"We have over 30 years of experience in supporting people with acquired brain injury and complex needs and have found that they need an initial period of stability before we can fully assess their needs. The Coach House is the ideal environment for this because it is self-contained and secure. After this period the individual may stay in the Coach House or move to our transitional or long-term community rehabilitation services."

Richardson Care combines a unique homely environment with a therapeutic regime devised by an experienced multi-disciplinary team of therapists. This supportive environment contributes to engagement in therapies with the ultimate goal of service users being able to live a happy and fulfilling life.

For more information
Call: 01604 792166
or visit:
www.richardsoncares.co.uk

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Scenario 3

This scenario focuses on the client's family rather than the client themselves.

The client, a young adult male with a significant brain injury requiring 24:7 support, lives at home with his parents and much younger sibling in a dwelling bought and adapted using funds from the litigation. The client is engaged with and likes his care team, and is fed up with his mum's involvement in his day-to-day care.

His parents have grave concerns about their son's and the treating team's plans for rehabilitation and move towards increased independence that does not include the family. The client's parents' have described plans for a UK holiday for the client with 24:7 support from his care team as unsafe. The client's parents' response to rehabilitation has often been described as 'disruptive' and in conflict with the treating team and the litigation.

They have often complained at the content of reports, describing them as inaccurate and simply not who their child is.

Psychology comment: I hold strongly to the view that brain injury rehabilitation must include the family – and not at just one point in time and / or to meet a crisis, but in an ongoing way that meets their needs in a planned, timely way. Evidence shows the value of this.

A few things to note:

• Expert assessments generally take place around the same time as developmental transitions, for example the move from primary to secondary school, academic examinations, a move to further and higher education college, planning for vocation / employment as a young adult. Parental adjustment takes time and is especially hard at these poignant times.

• Parents can find it hard to engage with reports relating to their child. The report process can be retraumatising when recall of the index accident is required. A report is often written in stark language, sharply focused on describing their child's difficulties and future prognosis. To be reminded of the impact of a child's brain injury and their possible future, and how that is different from what they had hoped, can be deeply painful for a parent, even one who is regarded as psychologically robust.

• Involving the parents in rehabilitation can feel dangerous and unhelpful, particularly parents that teams find 'difficult'. It is important to understand the parental perspective, including, for example, when there is resistance to a plan for a trial of independent living with less parental involvement.

Overall, the importance of managing parental expectations and how they are likely to experience loss, distress and worry at points of transition, considering parental wellbeing, their possible changing involvement and role in the care and support of their child over time and in the rehabilitation, and what skills they may need to develop and build over time in their roles as parents of children with brain injury, are helpful interventions to consider.

From a team's perspective, planning, anticipation and preparation, and having a good communication system in place with regular MDTs, goal-setting and review, alongside other outcomes pertinent to the goal, are helpful scaffolding processes that hold and punctuate the rehabilitation.

Structures such as these enable prompts to anticipate and prepare, and routine check-ins to note progress and to listen out for concerns that inform next steps.

> **Experts need evidence before they can rebut the presumption that a client will have capacity when they reach 18**

> **Many clients say the right things in an assessment setting, but nothing matches seeing how they manage funds day to day**

Legal comment:

The above is vital - especially as, from a litigation perspective, one of the parents will often be the Litigation Friend acting and giving instructions on behalf of the injured child / young adult. In letters of instruction to expert neuro-psychologists and neuro-psychiatrists, I will often ask them to consider the wider family context, and whether a parent or sibling would benefit from input to come to terms with not only the loss of their child or sibling's potential and the life they were expected to have, but also the ongoing pressure of being on call, dreading the next phone call with bad news.

The timing of these reports and when they are shared is important. We must take care to avoid the Litigation Friend becoming aware of issues for the first time when reading a report. Never assume that parents know their child may struggle in mainstream education without more support, never assume that they know their behaviour may become far more difficult to manage when they become teenagers.

Parents need a good clinical team around them to introduce them to these issues slowly. It is important to find a way to communicate with families. Each family will be different. Some understand where a litigation case is going by number crunching; for others, it will be discussing all issues at a plenary conference or MDT; for some, it will be through discussing things with former clients' families, for example.

It is important to find out what modes of communication work best to ensure the client's support network can work hand in hand with the clinical team / the litigation process.

Dr Katie Byard is a consultant clinical psychologist in neuropsychological rehabilitation and the clinical director of Recolo (www.recolo.co.uk); Laura Middleton-Guerard is a partner at Irwin Mitchell

This article stems from a webinar series hosted by Irwin Mitchell's Children Services Group

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IN NEED OF REPAIR

CHRIS RICHARDS EXAMINES A POORLY DRAFTED SECTION OF THE DEFECTIVE PREMISES ACT

This article focuses on Section 4(4) of the Defective Premises Act 1972 (DFA).

Readers will be familiar with Section 4 of the DFA, which sets out when landlords will be liable for harm caused by defects in properties they are renting out. The first three subsections of the Act are straightforward:

• Section 4(1) sets out the duty of care owed by those renting properties out;

• Section 4(2) requires the landlord to have actual or constructive knowledge of the defect causing the harm;

• Section 4(3) states that defects will be relevant if the landlord would be required to remedy them under the tenancy agreement.

Section 4(4) is much more complex. This section significantly expands the scope of the duty of care in Section 4(1). It provides that if the landlord has a right to enter the property to remedy certain defects, they may be treated as if they were required to remedy these under the tenancy agreement. This means that the defects may become relevant for the purposes of the Act, even if the landlord is not required to remedy them under the tenancy agreement.

Section 4(4) is quite poorly drafted, creating a great deal of case law trying to make sense of it. There are also important questions over whether the right to enter the property to remedy certain defects can be implied into the tenancy agreement - expanding the scope of the duty of care even further.

This article explains Section 4(4) in more detail.

> **Section 4(4) is quite poorly drafted, creating a great deal of case law trying to make sense of it**

> **The landlord is magically treated as if they are obliged under the tenancy agreement to repair any defects**

Extending the duty of care

Section 4(4) says:

'(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsection (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.'

This section, in my reading, has two key effects:

(1) If the tenancy agreement does not include a maintenance or repairing obligation, but the landlord has the right to enter the premises to carry out any description of maintenance or repair, the landlord is treated as if the tenancy agreement included a maintenance or repairing obligation, with the maintenance or repairing obligation effectively copied across from the description of maintenance or repair for which the landlord has the right to enter the premises.

Translating this into plain English, let's say we have a tenancy agreement that does not require the landlord to do any maintenance or repair. Assuming that there is no obligation implied into the contract (for example by section 11 of the Landlord and Tenant Act 1985), this would normally mean that there would be no duty arising under section 4(1). But let's say that the landlord has a right under the tenancy agreement to enter the property to fix any broken windows. The effect of Section 4(4) is to treat the landlord as if the tenancy agreement required them to fix broken windows. If there is a broken window, this will potentially become a relevant defect.

In *Smith v Bradford Metropolitan Council* (1981-82) 4 H.L.R. 86, a claimant was injured by a faulty patio. The tenancy agreement (entered into before the Landlord and Tenant Act 1985) did not require the landlord to carry out any repairs or maintenance. But it did confer upon the landlord a right to enter and carry out 'repairs'. The Court of Appeal appears to have taken it as read that a right to carry out 'repairs' meant that the landlord was treated, for the purposes of the DFA, as if they were required to repair anything within the property which was out of repair.

In *Pritchard v Caerphilly CBC* [2013] WL 6980728, a Circuit Judge held that where a landlord has the right under the tenancy agreement to enter the premises to carry out a certain type of repair, they will be treated as if their duty extended to that type of repair. The right to enter the premises and carry out the repair becomes a duty.

Pritchard was cited with approval by the Court of Appeal (Northern Ireland) in *Argue v Northern Ireland Housing Executive* [2016] NICA 18 (paragraph 32).

The second key effect of the wording of Section 4(4) is as follows:

(2) If the description of maintenance or repair for which the landlord has the right to enter the property is wider in scope than the maintenance or repairing obligation which is already in the tenancy agreement, the scope of the maintenance or repairing obligation is effectively expanded to include the description of maintenance or repair for which the landlord has the right to enter the property.

So let's say a tenancy agreement only includes the basic obligations implied by Section 11 of the Landlord and Tenant Act 1985. There is an accident involving a broken window. The repair of broken windows does not fall within the maintenance or repairing obligations implied by Section 11. But let's say that the landlord has a right under the tenancy agreement to enter the property to fix any broken windows. The effect of Section 4(4) is to treat the landlord as if the tenancy agreement required him to fix broken windows. If there is a broken window, this will potentially become a relevant defect.

Implying a right to enter

Even if the tenancy agreement does not confer on the landlord the right to enter the property for maintenance or repair, the court may be willing to imply this right into the tenancy agreement.

This is what happened in *McAuley v Bristol City Council* [1992] QB 134. The Court of Appeal found that the landlord had an implied *right* to enter the property to remedy defects that exposed tenants or visitors to a serious risk of injury. This being so, the landlord was treated as being under an *obligation* to remedy such defects.

The defect in question (a flight of unstable steps) exposed tenants or visitors to a serious risk of injury, and so was treated as a relevant defect. This logic was cited with approval in the recent case of *Rogerson v Bolsover District Council* [2019] EWCA Civ 226 (paragraph 53).

I find this logic very unsatisfactory. It seems that in any tenancy agreement, the court will likely be willing to imply into the tenancy agreement a right to enter the property to remedy defects (regardless of whether the defects are 'serious', as in the case of *McAuley*, or whether the repairs are 'necessary' as in the case of *Rogerson*). The landlord is then magically treated as if they are obliged under the tenancy agreement to repair any defects for which they have the right to enter the property.

The approach in *McAuley* seems to remove the protection provided to landlords by section 4(3) of the Act. This states that the landlord should have a duty in respect of those defects that they are *obliged* to repair under the tenancy agreement. The landlord can decide at the time of entering into the agreement which defects they should be obliged to repair. But if the landlord is treated as if they are required to repair any defects that they could conceivably enter the property to remedy, section 4(3) becomes irrelevant.

The approach in *McAuley* also seems to conflict with the statement in *Lafferty v Newark and Sherwood DC* [2016] EWHC 320 (QB) that sections 4(1), (2), (3) and (4) form part of a 'harmonious code' and do not conflict with each other (paragraph 37). I suspect that the true interpretation of section 4(4) is that the right to enter the property is that which is included on the face of the tenancy agreement. Perhaps we are due another trip to the Court of Appeal.

It may be best for landlords to assume that whatever is said in the tenancy agreement, if the defect is the sort of thing that the landlord would have been able to enter the property to remedy, they will owe the tenant a duty to make sure that they are reasonably safe from harm caused by the defect.

Practice point

Section 4(4) is a powerful weapon – but one needs to know how to use it. This is particularly important in terms of pleadings.

A generic reference to section 4(4) is not enough. In the particulars of claim, a claimant should identify how they are applying section 4(4) to the particular facts of the case. This should include a reference to the individual term said to bring the claimant within the scope of section 4(4). The defence may then choose to challenge the application of section 4(4).

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PROTECTING AN AWARD

You have secured an award for your clients – what happens next, especially when substantial funds have been awarded, needs to be carefully considered and understood. The options available require skilful management to ensure the provision of the care and support needed for the duration of the individual's lifetime:

Personal injury trusts

This option is available if the injured party is deemed to have the mental capacity to manage their property and financial affairs. Although a capacitous recipient of a compensation award can simply manage their award themselves, it is commonly recommended that they settle the compensation funds within a personal injury trust for the following reasons:

- to shield the sums received so that they do not affect the recipient's entitlement to means tested benefits;
- to protect the interests of recipients who may be vulnerable for a variety of reasons;
- to provide expert assistance, including from professional trustees, in managing potentially large compensation awards.

These trusts can also be set up on behalf of a child with court approval if they are likely to have capacity at age 18.

Deputyships

If the claimant is deemed to lack mental capacity to manage their property and finances and there is no lasting power of attorney (LPA) in place, an application to the Court of Protection (CoP) for authority to manage financial affairs will be necessary.

Generally, if one has received a large compensation award, a professional deputy is preferred - either alone or jointly with a lay deputy - as they tend to be better equipped to deal with the complexities that may arise out of managing large sums of money.

The (rare) hybrid option

There is also a hybrid option which involves making an application to the CoP for authority to set up a personal injury trust on behalf of an incapacitous person. Whilst possible, these remain rare.

Us

Recognised by both Chambers UK and The Legal 500, our specialist Court of Protection solicitors have extensive experience in dealing with high value compensation awards. The team has established a significant reputation for advising and assisting individuals, their families, carers, trustees, beneficiaries and other professionals.

Many of our clients may lack capacity to handle their own financial affairs. Our solicitors can act as professional deputies and assist with CoP procedures where the deputy is a family member.

The team is on the Office of the Public Guardian's list of panel deputies and are often appointed as a deputy when no one else is able to act for someone who lacks mental capacity, one of only a small number in the country to have been selected to act in this role.

We offer expert advice on:

- acting as expert witnesses at trial
- acting as a panel deputy
- acting as a professional deputy for property and financial affairs
- applications for statutory wills
- assisting with applications to the Court of Protection for the appointment of a lay deputy
- preparation of personal injury trusts
- preparation of disabled person's trusts
- the legal requirements of the Mental Capacity Act 2005 and the Code of Practice for lay deputies including decisions relating to an individual's personal welfare

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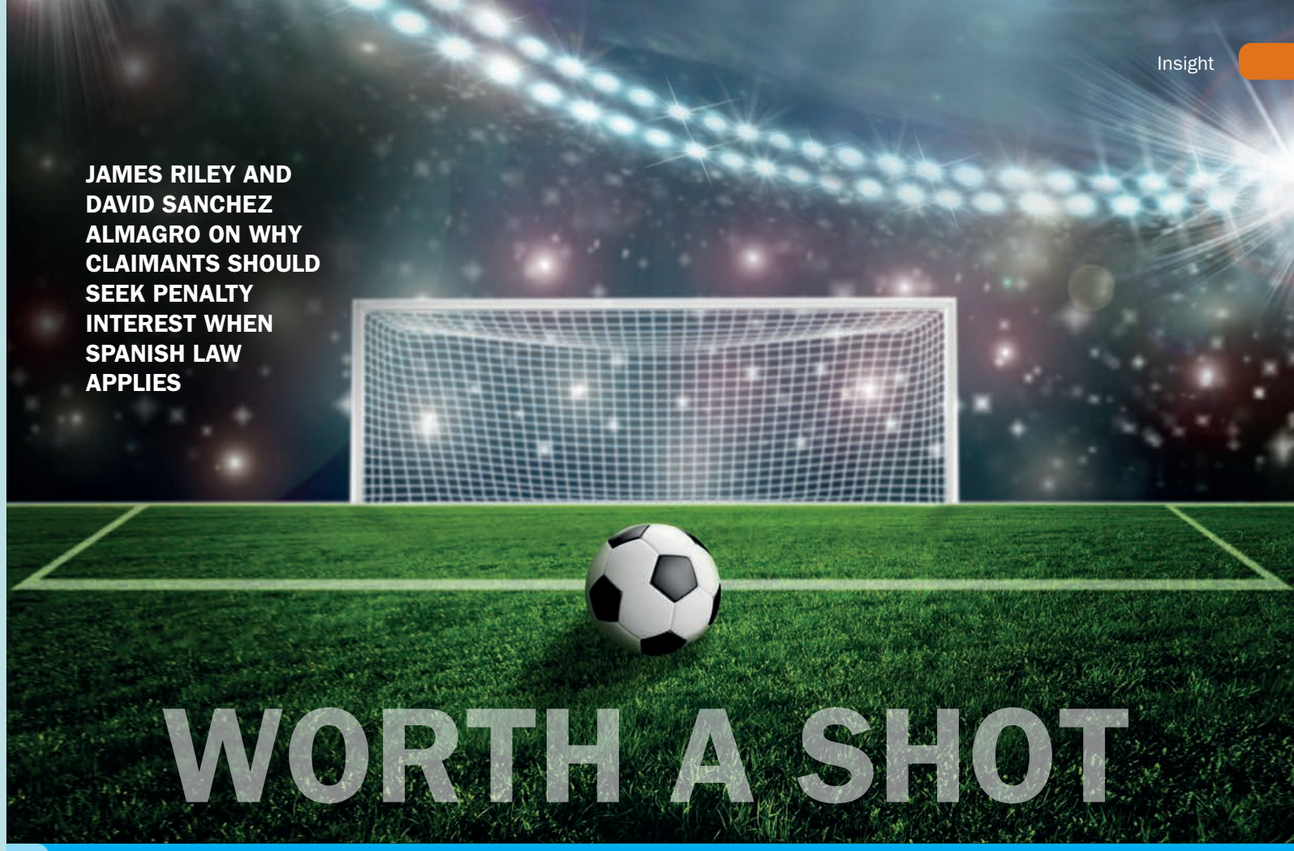


JAMES RILEY AND DAVID SANCHEZ ALMAGRO ON WHY CLAIMANTS SHOULD SEEK PENALTY INTEREST WHEN SPANISH LAW APPLIES

WORTH A SHOT

Spanish penalty interest – is it procedural or substantive? Does it really matter?

This vexed issue has been the subject of argument since Rome II was implemented. Here, we explain when Spanish law penalty interest will apply in personal injury claims both in England and Wales and in Spain.

We explore whether it matters in practical terms if Spanish penalty interest is a matter of procedural or substantive law.

Spain

Under Spanish law, there are two rates of interest that can apply in claims against insurers. These are the standard interest rate of 3% (which has been at that rate since 2016) and the penalty interest rate, in accordance with Article 20 of the 50/1980 Insurance Contract Act of 8 October 1980 (Article 20).

In a ruling on 1 March 2007 [RJ 2007/798], the Spanish Supreme Court provided guidance as to how the penalty interest rate should be calculated.

For the first two years from the date when interest starts running, interest will accrue at 50% of the current Spanish legal interest rate, making it a 4.5% annual interest rate. Two years after the date when interest starts running, interest accrues at a rate of 20% per annum. Interest under Article 20 is payable upon the full amount of the damages award, including both non-pecuniary and pecuniary losses.

Article 20 triggers fairly soon, in fact only three months after the accident, and where the insurer has failed to make an interim payment for a reasonable amount.

In accordance with paragraph 8 of Article 20, an insurer may be exonerated from penalty interest - but only if there is a justified reason for the delay.

The Spanish Supreme Court has recently confirmed the principle that a dispute about liability is not enough to exonerate an insurer (Judgment nº 559/2021 of 22 July 2021). And more recently, in Judgment nº 888/2021 of 21 December 2021, the Spanish Supreme Court restated the principle that a dispute about quantum is not a good reason to exonerate an insurer from having to pay penalty interest.

An insurer will only be exonerated from penalty interest if there is serious doubt about coverage or the occurrence of the accident.

An insurer will only be exonerated from penalty interest if there is serious doubt about coverage or the occurrence of the accident

Continued on P55

England and Wales

The Court has the power to award interest under section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984. This is a discretionary power and so a judge has the right to decide whether to award interest, and if so, how much.

The question for the judiciary in cases involving the application of foreign law under Rome II has been whether interest falls to be determined in accordance with the lex forum or the lex causae. Is interest a matter of procedure, where the law of the forum will apply (see *Wall v Mutuelle de Poitiers Assurances [2014] 1 WLR 4263 (CA)*); or is it a point of substantive law, where the law of the cause of action will apply, in accordance with Rome II?

The Courts have grappled with this issue for well over a decade, but there have been some very recent developments. A summary of the latest position is as follows:

In *Maher v Groupama* [2009] EWCA Civ 1191, Moore-Bick LJ said:

'… the existence of a right to recover interest as a head of damage is a matter of French law, being the law applicable to the tort, but whether such a substantive right exists or not, the court has available to it the remedy created by section 35A of the 1981 Act.

'Having said that, the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of French law relating to the recovery of interest. To that extent I agree with the judge that both English and French law are relevant to the award of interest.'

In *Hyde v Sara Assicurazioni SpA* [2014] EWHC 2881 (QB), HHJ Moloney QC said: '… following the *Maher* case (which, of course, dealt specifically with this issue of interest) the English court has the discretion to award interest or not in accordance with its own principles as a procedural or remedial matter, whether or not Italian law would give any substantive right to interest or impose any limit on it.'

More recently in 2020, in *Scales v MIB* [2020] EWHC 1747 (QB), Cavanagh J found that 'The existence of a right to claim interest as a head of loss is a substantive matter to be determined by reference to the foreign law, the lex causae. This was made clear by the Court of Appeal in *Maher*…

'It is common ground that Spanish law provides a substantive right to interest. In any event, whether or not such a substantive right exists, the English Court has a discretionary power, under section 35A of the Senior Courts Act 1981, to decide whether to award interest and to determine the amount of interest: *Maher*, paragraph 35 and 40.

'This power must, of course, be exercised judicially. In exercising the Court's discretion, the Court of Appeal said in *Maher* that the English Court might well take into account any relevant provisions of the foreign law relating to the recovery of interest.

However, in *Troke & Anor v Amgen Seguros Generales Compania De Seguros Y Reaseguros SAU* [2020] EWHC 2976 (QB), Griffiths J said: 'I agree with the judge that the award of interest in this case was a procedural matter excluded from Rome II by article 1(3); that there was no substantive right to interest at Spanish rates to be awarded to the claimants under the lex causae; that interest could be awarded under section 69 County Courts Act 1984 as a procedural matter in accordance with the law of England and Wales as the lex fori; and that he was entitled to award interest at English and not Spanish rates accordingly.'

The position post *Troke* became very uncertain for claimants, as there were two competing High Court decisions. There have now been two very recent judgments in which clarity on the issue has been sought.

Firstly, *Woodward v Mapfre Espana Compania De Seguros Y Reaseguros* was a case heard in the Norwich County Court by HHJ Walden-Smith, in which judgment was handed down on 7 October 2022.

The Judge found: '… the right to penalty interest is not a substantive right. It is acknowledged that it will not always apply, albeit that is in restricted circumstances, and as such is a matter of procedure to be determined by the lex fori (the law of England and Wales).

Continued on P57.

The Courts have grappled with this issue for well over a decade, but there have been some very recent developments

'What this court does have, is a discretion to award interest pursuant to the provisions of section 69 of the County Courts Act 1984. In my judgment, it is appropriate to award interest, as a matter of lex fori, at the same rate as the penalty rate of the Spanish law. This was suggested by *Maher* and encouraged by Whipple J in *XP v Compensa Towarzystwo SA.'*

Following a very helpful section setting out the circumstances as to why penalty interest was appropriate in this particular case, the Judge concluded: '… while the lex fori rather than the lex causae applies to the interest to be added to the final judgment on both general and special damages, I determine that the interest to be applied is in accordance with the penalty interest to be applied in the Spanish court, pursuant to the discretion under section 69 of the County Courts Act 1984.'

This resulted in a significant award for interest, at a similar level to that awarded for all of the other heads of loss in the case combined.

The most recent case, in which judgment was handed down on 26 October 2022, is *Sedgwick v Mapfre Espana Compania De Seguros Y Reaseguros SA,* heard centrally in the Kings Bench Division by Lambert J.

As in *Woodward,* the Judge found that 'Whether the decision in *Troke* is binding upon me or not, I agree with its conclusion and the underlying reasoning which I endorse and follow. I make the following observations and findings:

'i) the right to claim interest by way of damages clearly falls within Article 15 of Rome II, and hence to be determined by the law applicable to the non-contractual obligation.

'Article 15(d) applies the law of the non-contractual obligation to the measures which the court may take to ensure the provision of compensation: "The right to claim interest by way of damages in a claim in tort is within the ambit of Article 15 and is not, in any sense, a procedural question for the law of the forum. " See *Maher v Groupama* (supra) and Dicey 16th edition at [4.113].

'ii) The purpose of penalty interest in Spanish law is to incentivise early interim payments and to discourage delay and procrastination on the part of the defendant… penalty interest is a procedural sanction to give teeth to a procedural regime aimed at early disposal of cases; and as such, it is not a substantive right.

'iii) The purpose of an award of damages for personal injury is to restore the victim of an accident to the position [they] would have been in but for the accident. Full reparation is the objective.

'The substantive right to an award of interest to compensate the victim for being kept out of [their] award and the loss of use of the money is therefore consistent with this objective. But the imposition of an award of penalty interest by definition is not intended to achieve restitutio in integrum for the claimant; but to penalise the defendant for having failed to comply with the requirement of making a conservative payment within three months of the claim.

'The observations in Dicey… that penalty interest might be seen as a remedy in the form of compensation for the claimant being kept out of [their] money, must in my view be considered in this context.'

At paragraph 102, the Judge confirmed 'to my mind, the penalty interest provisions are discretionary; they may be excluded if there is a good reason to do so and they are, to my mind, procedural in character.'

But crucially, the Judge added: 'In considering this question I take into account that, had this case been issued and tried in Spain, then the penalty rates of interest would have been applied. There is no good reason why they would have been excluded under Article 20(8).'

As in *Woodward,* the Judge went on to give a very good summary as to why, in this particular case, penalty interest should be awarded; and confirmed that 'I exercise my discretionary power under s.35A Senior Courts Act 1981 to award interest on general and special damages in accordance with the penalty rate which would have been applied had this litigation been issued and pursued in Spain.'

The practical effect of this was that there was a significant award of penalty interest.

Conclusion

We are conscious that this article has been prepared by part of the team for the claimant in *Scales,* and so we obviously prefer the reasoning of Cavanagh J in that case over that of Griffiths J in *Troke.*

But the recent decisions in *Woodward and Sedgewick* show that even if the Court finds that Spanish penalty interest is a matter of procedure, where the law of the forum will apply, the Court will look at the circumstances of each case and use its discretion to award penalty interest if it considers it appropriate to do so - as a Spanish Court would.

So the force of the case law is that, however you get there, penalty interest is something that injured claimants should expect to receive in appropriate circumstances, when Spanish law applies to their case.

James Riley is associate solicitor at Irwin Mitchell; David Sanchez Almagro is abogado, Estudio Jurídico Almagro, S.L.P.

A dispute about quantum is not a good reason to exonerate an insurer from having to pay penalty interest

Full reports of all cases listed are available on APIL's website at www.apil.org/legal-information-search

CASE NOTES

Houston v Turtle Bay (14 October 2022, unreported)

Summary

It is well known that the 'exceptional circumstances' required by CPR 45.29J to depart from the fixed costs regime is a high hurdle to clear. However, in the recent case of *Houston*, those acting for the claimant were able to demonstrate such exceptional circumstances through the defendant's repeated failure to engage with a single essential issue.

In light of *Houston*, defendants should be conscious of blanket denials in cases where they have the knowledge to make an appropriate concession

Facts

Ms Houston was a relatively elderly lady who sustained injury when she tripped and fell in a pothole partway down a set of flagstone steps. The steps were located on premises which were being leased by Waitrose Ltd. Waitrose Ltd had issued a license to the defendant relating to part of that land.

The defence

The central pillar of the defence, which was maintained repeatedly by the defendant during pre-action correspondence, was that it was not the party responsible for the upkeep of the accident locus.

To that end, it had provided a diagram from its license agreement with Waitrose, both in pre-action correspondence and in its defence, but without providing either the full agreement or the legend for the diagram.

Disclosure of licence agreement

Despite repeated requests by the claimant for a full copy of the license agreement, pointing out that it should have been disclosed by the defendant as part of pre-action protocol given their reliance on it, the claimant did not receive a copy of the agreement until provided by Waitrose (which was not a defendant in the matter) shortly after filing and service of the defence.

The defendant did not disclose that it had a copy of the license agreement until disclosure by list.

Once disclosed, the claimant identified that the license agreement was unequivocal as to the defendant being the party responsible for upkeep of the accident locus. The claimant therefore produced a reply to defence clearly setting out those relevant provisions from the license agreement.

Despite the reply to defence, the defendant continued to defend the claim until shortly before trial. At that time, it accepted the claimant's Part 36 offer outside the relevant period and stated an intention to pay only fixed costs.

The claimant disagreed, and the issue of costs went before the court for determination.

DJ Wales awarded the claimant their costs on the indemnity basis from the date of their reply to defence. He identified the following three key features which, in combination, rendered the defendant's conduct exceptional:

(i) On at least two occasions, the defendant had misled the claimant as to the content of the license agreement by suggesting it supported their position. This was either incompetent or intentional. However, he did not have the evidence to conclude the latter.

(ii) Despite their reliance on the license agreement, the defendant had not disclosed this at any time prior to disclosure by list and in contravention of the pre-action protocol.

(iii) From the date of the reply to defence, it should have been apparent to the defendant that it was the occupier of the accident locus. To continue to dispute this was remarkable.

The defendant sought to argue that, regardless of the issue of occupancy, the matter would have continued in any event because the claimant was, for example, put to proof as to her injuries.

DJ Wales noted that, although it was not the only issue raised in the defence, the issue of occupancy was the central pillar of that defence. Further, CPR 45.29J only required that there were exceptional circumstances, not that those exceptional circumstances had necessarily caused increased costs.

Practice point

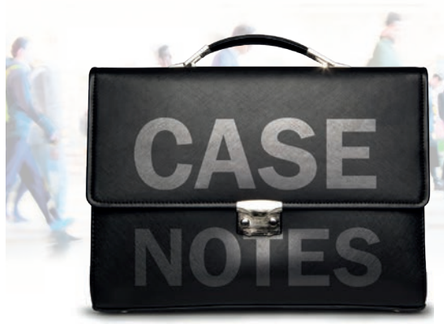
In light of *Houston*, defendants should be conscious of blanket denials in cases where they have the knowledge to make an appropriate concession.

They should be making early disclosure of relevant documents in their possession and taking the time to properly digest their contents. Should they do otherwise, claimants will be lying in wait with CPR 45.29J at their disposal.

Mr P Hughes (counsel) instructed by W Weller and J Weller of Thatcher + Hallam, acted for the claimant.

Clyde and Co acted for the defendant.

Defendants should be making early disclosure of relevant documents in their possession and taking the time to properly digest their contents



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CASE NOTES

WR v Trek Bikes Ltd

Summary

The claimant suffered a serious accident on his mountain bike which led to a painful nerve injury.

The injury meant the claimant was no longer able to work the long hours he had done previously, and he had to sell his business.

The claim ultimately settled for £700,000, primarily for future loss of profit.

> **The defendant's insurers originally considered that the matter was a 'portal claim' with a value under £25,000... the claim was compromised in the sum of £700,000**

Background and injury

The claimant was cycling his 'Trek' mountain bike on holiday in France in August 2016, when suddenly and without warning, the front wheel quick-release lever became trapped in the disc brake, causing the front fork to snap. As a result the claimant was thrown with some force over the handlebars.

He landed heavily on his right side, sustaining injuries – the main one being a fracture to his right cheekbone and eye socket. He was knocked unconscious and was treated at the scene by paramedics for 30 minutes before being taken to hospital.

The claimant needed surgery, and he returned to the UK two days later, so that the operation could be performed. During the surgery, three metal plates were inserted.

The claimant ran his own business and had to take eight weeks off work to recover. He was used to working up to 14 hours a day, organising and mentoring his team, and managing new and existing clients.

During his recovery at home, the claimant was unable to eat properly, he had a permanent tingling sensation in his nose, and he was suffering from extreme fatigue.

He went to see a consultant surgeon who confirmed that he had severed the main nerve in his cheek (the trigeminal nerve), and this would take a long time to heal.

As time progressed, the clamant realised that his ability to focus on work had diminished, mainly due to the facial pain being so uncomfortable and distracting.

He was unable to work the hours that he was doing pre-accident. The facial pain was due to the damage to the trigeminal nerve.

As a result, the claimant took the difficult decision to sell his business to some of his trusted senior staff – essentially a 'management buy out'.

Medical evidence was obtained from experts in maxillofacial surgery, neurology, psychiatry and pain management. A report was obtained from a forensic accountant.

The claim was litigated and was listed for trial in November 2022, with there being disagreement as to the extent and value of the claim for financial losses, principally the future loss of earnings claim.

The defendant's accountancy evidence was that the reasons for the claimant selling his business were unlikely to have been accident related – completely at odds with the evidence obtained by the claimant.

Liability

The defendants accepted liability - subject to causation.

Settlement was eventually agreed and apportioned at 80% in the claimant's favour – with the deduction being for the claimant's failure to wear a bike helmet – as per the medical evidence and relevant caselaw.

Quantum

The defendant's insurers, XL Catlin AXA, originally considered that the matter was a 'portal claim' with a value of under £25,000. As matters progressed, the pleaded claim went on to total over £2 million.

At a JSM, it was recognised by both sides that there were very real risks in progressing to trial, and so the claim was compromised in the sum of £700,000.

A breakdown of the settlement was not provided, though the majority of the damages were for future loss of profit.

Justin Valentine of St John's Chambers acted for the claimant, instructed by Mr Kimmo Boote of Simpkins & Co.

BLM / Clyde & Co acted for the defendant.

> **There was disagreement as to the extent and value of the claim for financial losses, principally the future loss of earnings claim**

> **The claimant took the difficult decision to sell his business to some of his trusted senior staff – essentially a 'management buy out'**

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CASE NOTES

Adekoya v Peabody Trust

Summary

On 25 August 2022, the 58-year-old claimant agreed a settlement of £40,000 for PSLA in a claim involving damp and mould in her two-bedroom maisonette property, which the claimant asserted had exacerbated her asthma.

Facts

The claimant was a tenant of Peabody Trust. In 2020 she alleged disrepair, and in particular damp and mould in her two-bedroom maisonette property.

The claim was issued in the County Court and at a disposal hearing on 16 March 2022 the parties were able to agree terms of settlement, to include completion of outstanding works and damages for disrepair, but expressly excluding a claim for personal injury.

The claimant was given permission to apply to join in a claim for personal injury arising from the disrepair claim.

Personal injury claim

The claim for personal injury for aggravated asthma arising from housing conditions was initiated through the Low Value Claims Portal for Public Liability Accidents on 12 October 2021.

The defendant insurers admitted liability on 5 January 2022, at which point a report from a consultant respiratory and general physician was commissioned addressing causation and prognosis.

The claimant's symptoms included breathing difficulty, with limitation of mobility and reduction of capacity to complete activities of daily living and work

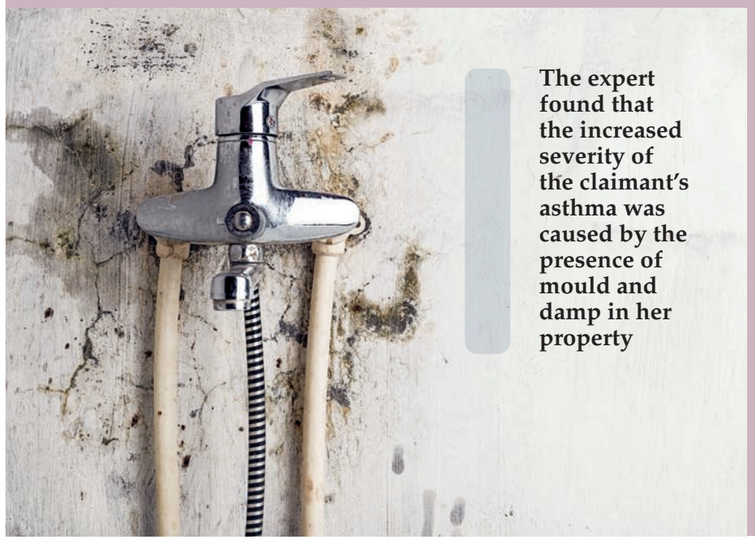
The expert found that the increased severity of the claimant's asthma, as evidenced by the clinical records, was caused by the presence of mould and damp in her property; and that thereafter the claimant's asthma became greater and less easily controlled even with both inhaled and tablet medicines.

The claimant's symptoms included breathing difficulty, with limitation of mobility and reduction of capacity to complete activities of daily living and work; associated sleep disturbance caused by asthma, resulting in increased fatigue and reduced mental concentration; and impact on employability, particularly for work requiring normal levels of physical activity including walking and climbing stairs / inclined stairs.

Further, the expert found that the increased severity of asthma caused by mould and damp may persist even when exposure to these conditions ceases (and in that regard the expert referenced two academic studies: Woodcock A, Mould and Asthma, Time for Indoor Climate Change? – Thorax (2007); 62:745-74; and D W Denning, O'Driscoll B R, Hogaboam C M et al, The Link Between Fungi and Severe Asthma, a Summary of the Evidence – see erj.ersjournals.com).

By reference to the Judicial College Guidelines, the claimant's solicitor placed the claimant's valuation for general damages between the top end of the bracket at Chapter 6(D)(b) and the bottom end of Chapter 6(D)(a), and an initial Part 36 offer of £45,000 was made - with the parties eventually settling on general damages of £40,000.

P Spence of Dowse & Co acted for the claimant



The expert found that the increased severity of the claimant's asthma was caused by the presence of mould and damp in her property

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