PI FOCUS

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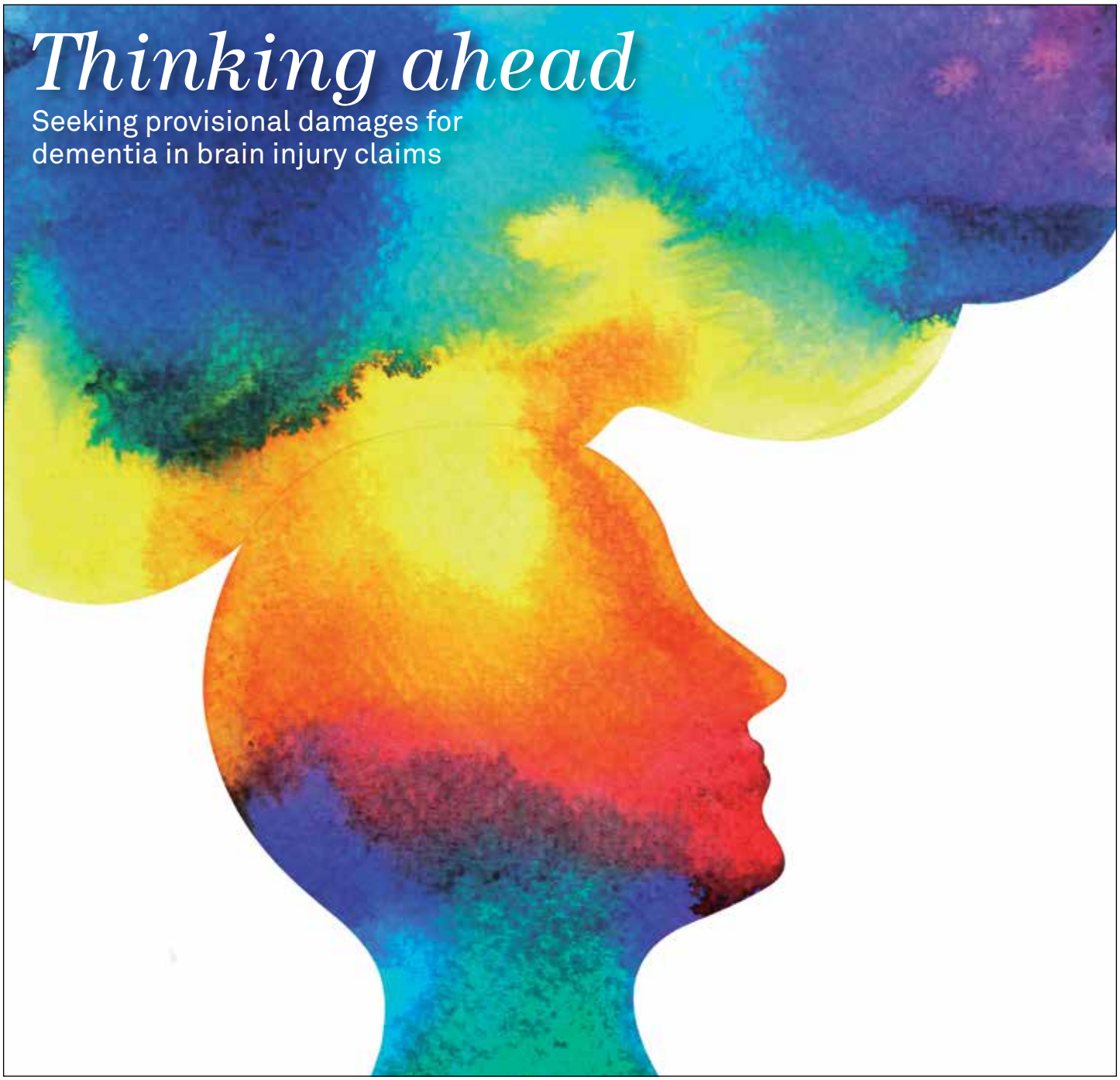
apil

Thinking ahead

Seeking provisional damages for dementia in brain injury claims



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OPINION

'We should be looking after each other. That message could never be more clear than after the events of the last 18 months'

When APIL was formed, one of the objectives of the association was to warn the public of potential hazards that could cause injury, and this work to prevent needless injury remains a key pillar of our continuing strategy. Injury Prevention week, which commences on 2 August, is the lynchpin of this work.

The theme of the week is to help people understand how they can prevent injury by educating them about where their responsibilities lie and who they are responsible for. We should be looking after each other. That message could never be more clear than after the events of the last 18 months.

The objectives of this year's event are to support our strategic objective of working towards a national injury prevention strategy; to build on the huge popularity of last year's event; and to help build on parliamentary engagement by encouraging MPs to spread the message to their constituents that they have a duty to prevent needless harm, and that this usually requires little more than plain old-fashioned common sense. I ask all members to once again get involved and provide all the support you can.

As in years gone by, please share our social media content, write blogs and organise your own press stories. For the past few years APIL has focussed on road safety, but in view of the strategic plan, we are taking a wider and different approach - but it still means we need membership participation and support.

Please look out for information in forthcoming issues of Weekly News. Look out particularly for research we have commissioned about how much people consider the impact of their day-to-day activities on the safety of others.

The involvement of our members will ensure that we get across a repeated message to the public that we must care for each other. That is the aim of this event. I am sure that with your help, this event will be a tremendous success.

Neil McKinley
President

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APIL NEWS

APIL evidence on NI discount rate

Executive committee member Oonagh McClure has dismissed the need to change the methodology for setting Northern Ireland's personal injury discount rate.

In an oral evidence session with the Northern Ireland Assembly's Committee for Justice, McClure defended the current methodology as 'the best way of ensuring that a person receives 100% full compensation'.

The committee is scrutinising the Damages (Return on Investment) Bill, which had been introduced by the Department of Justice (DoJNI) to change the methodology from *Wells v Wells* to one based on the model used in Scotland.

Discussions about the Bill have so far been dominated by argument about whether Northern Ireland should adopt the Scottish model, or the model used in England and Wales. Neither system is perfect because they no longer treat injured people as risk-free investors. McClure told members of the committee that people who receive compensation do so because their injuries have been caused by someone else through no fault of their own, and these people 'by their very nature, are not canny investors'.

Despite APIL's objection to a departure from *Wells v Wells*, if the DoJNI is intent on a change, there are aspects of the Scottish system that make it preferable to the system used in England and Wales.

One aspect favoured by APIL, but which has not received universal support, is that the Scottish model ensures the discount rate is an actuarial decision, rather than a political one. This point was picked up by committee chair Paul Givan, who asked why APIL viewed it simply as an actuarial decision. McClure explained that once the methodology has been set, there is no reason for politics to become involved, adding that 'calculating it is really a matter for actuaries, who look at the returns on investment as they are at that time'. McClure stressed, however, that political accountability still remains, because the DoJNI will have the power to alter the methodology and the notional portfolio set out in the Bill.

The committee has until the end of October to complete its scrutiny of the Bill, but at the time of writing, it is unclear whether the current session of the Assembly will last that long. Changes at the top of the Democratic Unionist Party could mean an early election, and any Bills not yet passed would fall.

Injured people, financial advisers, insurers and solicitors could, therefore, be living with the 'interim' -1.75% discount rate a little longer than they all expected.

FAIRNESS FOR FAMILIES

Jessica Bowles on allergy-related deaths and bereavement damages

In May, the press reported the disappointment of Owen Carey's family at the lack of damages awarded following his death.

In April 2017, Owen Carey was a teenager celebrating his 18th birthday at Byron Burger. He ordered a skinny grilled chicken burger and he informed staff of his dairy allergy. He was not told that buttermilk was included. Within an hour of eating this dish, he collapsed, and he sadly died later that day.

As a mother of a child with a severe, potentially fatal nut allergy, I spend a lot of time checking menus and speaking to waiters and servers about allergies when ordering food. The thought that a staff member could get it so wrong fills me with dread.

Following a coroner's ruling that Owen Carey was not told about the allergens that led to his death, the family brought a compensation claim. It has recently been reported that the family were not awarded any compensation for their pain and suffering, and the only damages awarded were for some funeral costs.

I cannot imagine the pain and anger that his family must feel at finding out that they are not entitled to claim for any of their pain and suffering caused by the restaurant's negligence, resulting in their son's unnecessary death.

However, as a serious injury lawyer I understand that legally, unfortunately, this is all the family were entitled to under the current law in England and Wales.

Current Law

In England and Wales, compensation for the grief and trauma of losing a loved one is set at £15,120 and is only available to a restricted category of relatives:

- Spouses or civil partner
- Cohabitee (if lived together for two years)
- Parents of unmarried children under the age of 18.

Contrary to the current law, I do not consider that the pain and grief of losing a child would diminish just because the child is over 18. This leaves a huge number of grieving families who are not entitled to claim any compensation for their loss, following the wrongful death of a loved one.

In the case of Owen Carey, he had only just passed this arbitrary threshold.

A fairer way forward

This age threshold is not the same in all parts of the United Kingdom. In Scotland, the law recognises that a parent's love for a child does not diminish just because the child is over 18, and also recognises that grief can extend to grandchildren and the closeness of siblings. The amounts awarded are also assessed on a case by case basis, which reflects the closeness of a family member, rather than a token set figure.

In April 2021 the Association of Personal Injury Lawyers released a campaign for a change in the law of England and Wales and Norther Ireland to seek alignment of bereavement damages across the UK; to better reflect modern society. A copy of this report can be found at *https://apil.org.uk/files/online-files/473-207505/Bereavement-Damages-A-Dis-United-Kingdom.pdf*. This campaign includes polling that shows that the majority of British adults consider the set amount of £15,120 is too low, and should be varied on a case by case basis.

Owen Carey's family will have to live with the knowledge that his death could have been avoided had Byron had better information and processes in place to deal with allergies, and will never receive any compensation to reflect this. Byron have confirmed they have improved their allergen procedures, and his family is campaigning for better specific allergy labelling on menus.

No amount of money can ever compensate for the loss of a child or close family member. But the current law does not adequately reflect up-to-date family dynamics and relationships, or consider the losses people experience on an individual basis. Accordingly, it is imperative that APIL's campaign is properly considered and the law of England and Wales and Northern Ireland is updated.

If not, family members will continue to be excluded from receiving compensation and obtaining proper justice for the wrongful loss of a loved one.

Jessica Bowles is a solicitor at Irwin Mitchell

THINKING AHEAD

Laura Collignon and Heather Petrie on claiming provisional damages for increased risk of dementia after brain injury

Those of us who have endured the hardship of having a loved one suffer at the hands of dementia know too well the astronomical emotional and financial burden the disease causes. So it should come as no surprise that in our professional capacity as claimant lawyers, we are conscious of this possible ticking time bomb for our brain injured clients.

We do not have a crystal ball, but the concern is real, and it is right that we continue to do everything we can to protect our clients now and into their future. The difficulty remains that the law needs to catch up with the science. We all have a part to play in making this happen.

Recently there has been increasing interest and coverage regarding claims being brought by rugby players for dementia, following repeated impacts to the head over a long playing career (see *www.bbc.co.uk/sport/rugby-union/55201237*). Similar concerns have been expressed in relation to the risks for professional footballers (see *https://www.bbc.co.uk/sport/football/56637812*).

Medical research by Glasgow University in 2019 showed that professional footballers have a significantly higher rate of death due to neurodegenerative disease than that seen in the general population. Meanwhile, there is currently a parliamentary inquiry into the issue of concussion in sport, with (at time of writing) the latest hearing having taken place on 25 May. Concern is sufficiently great that the FA issued guidelines last year to the effect that children aged 11 and under are not to be taught to head footballs during training, and the Premier League is currently trialling concussion substitutes.

In addition to the developing research in relation to these risks in professional sports, there is also medical research supporting an increased risk of dementia following a single impact to the head leading to brain injury. Dr Niruj Agrawal (neuropsychiatrist) and Jeremy Ford (barrister) published a detailed

article considering recent research on this subject in *PI Focus*, July 2018 (page 10).

The research is unfolding, and an increase in public and press awareness and interest is adding welcome fuel to the fire. In these pivotal medical moments, we can learn and draw reference by looking back in time.

Not many years ago, medical research established a correlation between smoking tobacco cigarettes and ill-health, but the reason was unclear, and so the focus shifted to investigating and discovering the causal link between smoking and the impact on health. This is where we are with the increased risk of dementia following head injury.

This means that when acting for clients who have sustained brain injury, whether in a single impact or over a longer period, we should be considering provisional damages for the increased risk of dementia. We should be asking medical experts to consider this from an early stage, in the same way that we do for an increased risk of epilepsy.

Provisions and procedure

The power to award provisional damages was introduced in July 1985; before that, the courts were bound to assess damages on a 'once and for all' lump sum basis, running the risk of significant under or overcompensation for future risks. The relevant statutory provisions are s.32A Senior Courts Act 1981, or s.51 County Courts Act 1984. S.32A SCA 1981 states:

'This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.'

The procedural rules for provisional damages are set out in the Civil Procedure Rules at CPR 16.4(d) and in CPR PD 16 paragraph 4.4. There are some further provisions in CPR 41 and PD41A.

To claim provisional damages, you should explicitly plead in the particulars of claim that they are sought, setting out the grounds for doing so. You must:

- State the relevant statute further to which you are seeking the award (as above).
- State that there is a potential that your client will develop a serious disease or suffer serious deterioration in their physical or mental condition.
- Specify the disease or type of deterioration to which you are referring, and the remedy sought if this unfortunately transpires.
- Specify the period within which such an application may be made (or specify all of the periods within which such an application may be made if you are guarding against more than one disease or type of deterioration).
- The specified period can be for the claimant's lifetime.

Should judgment for provisional damages be awarded (or agreed between the parties), a selection of key documentation will need to be preserved as the 'case file'. This is required to support any future applications for further damages, the contents of which need to be listed in a schedule attached to the judgment entered (or the settlement order). Further details as to the contents of the case file can be found in PD41A paragraph 3.2.

The expert neurologist and / or the neuropsychiatrist instructed will need to forensically consider the risk ratios for your client as against the general population, in order to guide how to best plead / consider the specified period of any increased risk of dementia. In cases of mild traumatic brain injury it may be more difficult to establish causation. However, it is only necessary to establish that there is an increased risk to be awarded provisional damages.

Existing case law

The three-stage test for a provisional damages award was considered by the Court of Appeal in *Curi v Colina* (29 July 1998, CA; Times Law Reports 14th October 1998), where Roch LJ said:

'The section should be confined to those cases where to compensate for the condition for which there is a chance on the basis that it will occur would be unfair to the defendant; and to leave the claimant without the opportunity to ask for further compensation should the condition, of which there is a chance, materialise would be unfair to the claimant.'

The writers are not aware of any contested cases on provisional damages for increased risk of dementia following brain injury where medical evidence has been considered and the point fully argued. The writers are aware of the case of *S v U* (summarised in the Case Notes section of *PI Focus*, November 2019, page 27), where a settlement on behalf of a 17-year-old included provisional damages for the development of post-traumatic epilepsy and the development of dementia. However, this was a court approval of a settlement rather than a contested hearing.

The writers' experience is that there is a reluctance on the part of insurers to agree to provisional damages for the increased risk of dementia as part of a settlement, regardless of apparent merit and / or expert support. Including provisional damages for epilepsy is usually considered less controversial, even for the claimant's lifetime, given the longstanding and better-established risk.

This reluctance is hardly surprising. If a claimant developed early onset dementia they may need to retire early, with potentially significant care needs and possibly full-time residential care. A later application for further damages, should the risk be realised, could be for six or seven figures. It is essential for this risk to be factored into the claim, because of the extent of the potential further costs faced by a claimant as a result of their injury.

However, the medical research is still developing. It is also open to defendants to argue that neurodegenerative disease is characterised by a gradual deterioration, and as such should be treated as similar to arthritis, where provisional damages awards are not

Personal injury update - autumn 2021

16 September - The Nottingham Belfry, Nottingham
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29 September - Worsley Park, Manchester and live streamed
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APIL's PI updates bring you all the very latest on PI and caselaw. There is so much content, they run twice a year – nothing is ever repeated.

Our six monthly update is back for the autumn! Written and presented by top expert practitioners, professional presenters and JPIL case digest editors, APIL vice president, Brett Dixon and APIL secretary, John McQuater will teach you everything you need to know in their usual lively and entertaining way.

We are all very excited to be back on the road again and we're also delighted to offer our Manchester date as a hybrid event, which means that delegates can either choose to attend in person or view the programme virtually, via APIL's dedicated training app. Places are very limited at the venues themselves, so please do book early if you would like to attend in person.

Areas and cases to be covered are as follows*:

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- Apportionment and overlap with clinical negligence claims
- Highway authorities and ice
  - Burden of proof
- Responsibilities of businesses adjacent to the highway
  - Traffic schemes
  - Construction sites

Employers liability

- Post Enterprise Act
- Responsibilities of parent companies
- Vicarious liability update
  - Religious groups
  - Care homes
- Police and dynamic risk assessments

Damages

- Dealing with dividends
- Wrongful birth

Procedure

- The latest CPR updates
- Dishonesty
- Relief from sanctions
- Witnesses and memory
- Costs
  - Recovery from the client and informed consent
  - Issue based costs orders and conduct
  - Costs budgets and variation
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- Assumption of responsibility
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considered appropriate (See *Willson v Ministry of Defence* [1991] ICR 595, QBD, where a claim for provisional damages for possible post-traumatic osteoarthritis was refused and an award of damages made on a full and final basis). However if the increased risk is established as a matter of causation as occurring due to the injury, the loss must be compensated, either by way of provisional damages, which protects the defendant should the risk not materialise, or in a sum to 'buy off' the potential for the risk as part of a full and final settlement.

In terms of causation, there are experts who may argue that the connection between brain injury and increased risk of neurodegenerative disease is not sufficiently established in a particular case. There is a large body of evidence showing an association between them, but this does not automatically translate into causation for your client.

It is worth bearing in mind that for a provisional damages award, it is only necessary to establish 'a chance' that the claimant will develop some serious disease or deterioration (CPR PD 16 paragraph 4.4(2)). Provided that the risk is not *de minimis*, the level of risk required for a provisional damages award may well be met.

This issue was considered by Scott Baker J in the *Willson v MoD* case, where (considering post-traumatic osteoarthritis) he said:

'A chance... is not defined in section 32A... It seems to me that the legislature has used a wide word here and used it deliberately. I think Mr Nixon is right when he points out that it can cover a wide range between, on the one hand, something that is de minimis and, on the other hand, something that is a probability. In my view, to qualify as a chance it must be measurable rather than fanciful...'

This approach to risk was approved by the Court of Appeal in *Curi v Colina* (above). The increased risk of dementia following brain injury may be small both in itself and when compared with the risk for the general population, but it may well satisfy the test of being measurable.

A provisional damages award is usually considered appropriate where the risk or chance is in the range 2% to 20% (see *Kemp & Kemp* at paragraph 25-008). If the risk is of a more serious disease or deterioration, the court may make a provisional damages award even for a smaller risk.

In *Cronin v Redbridge BC* (*The Independent 20 May 1987*) the risk of sympathetic ophthalmia in a child who had suffered a serious eye injury was only one in a thousand. However, if this risk materialised, there was a 70% chance of total blindness. This was sufficient on the facts to merit an award of provisional damages. Similarly in *Mills v JP Barnes* [2013] LTL 6 May (Leeds CC, HHJ Cockcroft), the risk of serious consequences including cancer and tuberculosis was low, but the seriousness if they did arise merited an award of provisional damages.

In *Slava Davies v Bradshaw* [2008] EWHC 740 (QB), the increased risk of syringomyelia was around 2% to 8%, but there was evidence that it could be treated successfully with surgery if identified early. Provisional damages were not awarded. Similarly, in *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB), provisional damages were refused where there was a real risk (30-40%) of deterioration in the claimant's mental health, but this was likely to be temporary and treated successfully within about one year of onset.

Where the risk is of early onset dementia, although the degree of risk may be limited, the consequences are potentially very serious and, in some cases, devastating.

In claims seeking provisional damages for dementia, it may be many years before the risk actually materialises (if at all) and the claim is brought back before the court. Medical research on the link between brain injury and the increased risk of dementia will advance over this time. The court should be asked to consider the potential seriousness of the condition if it did develop, and its likely impact on earnings and need for care.

The extent of the financial burden of early onset dementia, should it develop, may be persuasive in arguing for provisional damages even if the risk is relatively small.

Strategy

In the writers' experience, insurers may be reluctant to settle claims that include provisional damages for dementia. However, with the support of experienced and well-informed medical experts, the risk is something that should be taken into account either in the terms of a settlement or an award made at trial.

It is fair to note that claimants often also prefer finality and may prefer to settle on a full and final basis, accepting the longer term increased risk of neurodegenerative disease, in the hope that this will not actually materialise.

Practical tips

- Always consider pleading provisional damages from the outset of the claim when there has been significant brain injury.
- When you plead provisional damages, set out the personal injuries the claimant has suffered and the chance or risk of developing a serious disease or deterioration (giving particulars as far as you can), and ask that discretion to be exercised in favour of an award of provisional damages.
- Ask your medical experts to consider and comment on this issue from the outset and ensure they have considered the latest research studies available.
- Ask the medical experts to consider this issue in their joint statement so you can see the extent of any disagreement and the reasons for it.
- When considering settlement options, advise your client on the risks and consider with them whether they would prefer to conclude their claim on a full and final basis, or whether they would like to leave this open and seek an award for provisional damages.

Laura Collignon is a barrister at Thomas More Chambers, London, and Heather Petrie is senior solicitor in the adult brain injury team at Bolt Burdon Kemp, London

TAKING THE WHEEL

Lucie Clinch and Julian Chamberlayne on autonomous driving developments

Britain is seeking to be the world leader in automated driving, and as a step towards this, the government has announced that automated lane keeping systems (ALKS) will be defined as 'autonomous' for the purposes of the Autonomous and Electronic Vehicles Act (AEVA) 2018. This has raised many legal questions about the future of driving and road safety.

Despite consultation responses in 2020 being widely unsupportive of defining ALKS as autonomous vehicles, the government is pushing ahead with this definition. In doing so, it is bringing autonomous driving on our motorways one step closer.

In this article, we consider what this could mean for the law and injured accident victims. We also examine the suitability of the proposed new rules in the Highway Code dealing with autonomous vehicles.

What is an automated lane keeping system (ALKS)?

ALKS is a traffic jam chauffeur technology designed to control the lateral and longitudinal movement of a vehicle for an extended period without driver command.

ALKS vehicles will be limited to operate at speeds of up to 37mph in certain conditions such as heavy, slow-moving traffic on motorways.

They are not approved to operate on other roads, such as those with cyclists or pedestrians. ALKS drivers should not be required to pay full attention to the driving task when ALKS is engaged. But crucially, ALKS should also maintain the ability to return control to the driver safely, by issuing a transition demand, as and when required.

Why the announcement, and what does it mean for our roads?

The government is keen to ensure that the UK remains at the forefront of the autonomous driving revolution. The announcement means that we could be seeing automated cars with ALKS on our roads during 2022, at the earliest.

While ALKS is an important first step towards developing systems with higher levels of autonomy, there are still plenty of questions to be answered before they become widely available for use.

Will ALKS be an autonomous vehicle (AV) for the purposes of the AEVA 2018?

This is where the legal position becomes complicated. When the government announced the arrival of ALKS, it coincided with an announcement that ALKS technology could be legally defined as 'self-driving' under the AEVA as long as it has GB type approval, meaning that it meets a set of standards within Great Britain (as opposed to a set of standards as required by another country), and there is no evidence to challenge the vehicle's ability to self-drive.

However, there is no list yet under the AEVA as to what vehicles are AVs. ALKS vehicles can only be listed if they have a certificate confirming the vehicle meets certain regulatory, technical and safety requirements (ie. are 'type approved'). We await news of any vehicles being placed on the list, even though the Act received royal assent in April 2021.

Interestingly, most respondents to the ALKS call for evidence had concerns about whether a vehicle with ALKS would automatically be considered an automated vehicle under the Act.

Several respondents suggested that ALKS should be considered as an advanced driver assistance system (ADAS) as there is a requirement for the driver to be able to take back control.

Similarly, concerns were raised by Thatcham Research and the Association of British Insurers as to the functionality of ALKS technology and the regulations under which they will operate. Thatcham Research says that ALKS cannot replicate what a competent and engaged human driver can do and, therefore, are not safe enough to be classified as 'automated driving'.

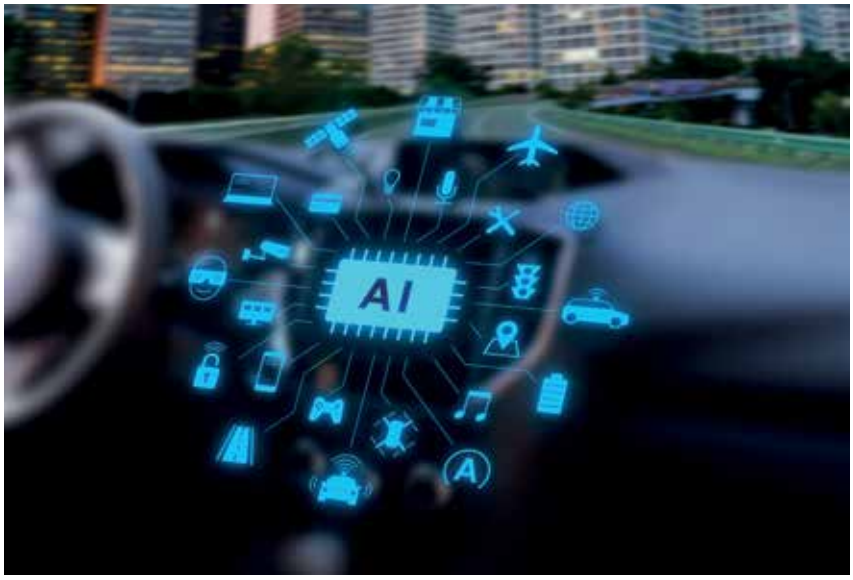
Nevertheless, the government says that vehicles with ALKS will be defined as self-driving under the Act. This means that an accident involving ALKS should invoke a right of action against the insurer of the ALKS vehicle for the purposes of injured victims' compensation.

Are there benefits of defining ALKS vehicles as 'self-driving' under AEVA?

The AEVA defines an AV as 'driving itself' if it is 'operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual'.

The AEVA was drafted in anticipation of full automation, ie. a vehicle that does not require any human monitoring and can be expected to respond to various traffic scenarios without any need for human control or intervention. We have previously written about the various liability issues for semi-autonomous vehicles, to which the Act will not apply (see *PI Focus* October 2018, p9). Taking the government announcement at face value, it seems that vehicles with ALKS would, in theory, be covered by the AEVA.

A transition demand is the procedure whereby the system requests to transfer the driving task back to the human driver. So, we must ask, can a vehicle with ALKS be 'driving itself' if it also requires a driver to be ready to take back control on demand? ALKS suggests you can take your hands off the wheel and engage in other



activities. Not only does this risk public and driver confusion, but it also risks the safety of the driver and other road users. Drivers must be educated as to what is and is not permitted if the vehicle is in ALKS mode, and is defined and listed as an AV under the Act.

If a vehicle with ALKS is defined as self-driving under the AEVA, that potentially opens up a direct route for injured victims of ALKS accidents to pursue compensation directly from the ALKS insurer under section 2(1) of the Act, where an accident is 'caused or partly caused' by the AV.

While it would be reassuring for those injured that the insurer would be directly liable under the Act, we anticipate disputes as to whether and when a 'transition demand' was issued, whether and when the driver should have taken control, and disputes as to whether he / she failed to do so in time.

The current suggestion is that control should be taken within ten seconds of the demand being issued by the vehicle. There might also be questions of whether ALKS should have been in use at all, causing questions around driving and traffic conditions at the time of the accident, driver training and driver awareness.

Where would the line be drawn between the human driver and the vehicle in relation to liability? It is still unclear as to how this law will work in practice and what standard of driver would be applied.

The uncertainty

The consultation responses and review showed plenty of areas of concern that must be clarified before ALKS is rolled out. To summarise, these include:

- ALKS technology and capability remains unclear. There is a risk that the marketing of a system to be autonomous will cause drivers to overestimate its capability (as drivers have and already do with the Tesla 'autopilot' function).
- If ALKS allows drivers to take eyes off the road, concern remains as to whether the driver would be able to take control in a timely manner in unexpected situations, such as a sudden change in weather conditions or falling debris.
- How are drivers to be trained on ALKS driving? Who should provide this, and should salespeople be trained in relevant guidance at the point of sale? What involvement should manufacturers have in the training process, and should learner drivers be taught ALKS driving?
- It is not clear how ALKS might detect emergency vehicles approaching from behind with sirens and lights, requiring the vehicle to pull over.
- ALKS does not yet have the capacity to operate effectively and would have difficulties distinguishing between road user collisions for which the vehicle should stop, and those where stopping is unnecessary. A concern would be for low impact collisions or scenarios where an ALKS vehicle skims or nudges a vehicle, causing a larger accident

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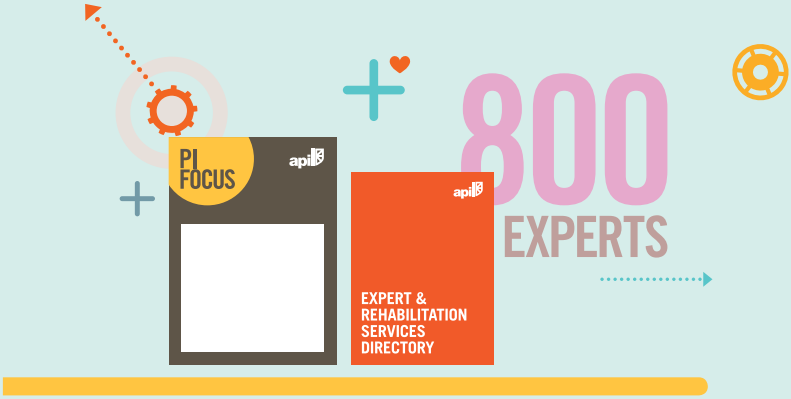


that the vehicle itself is unaware of and drives on.

- It remains unclear who would be given access to accident data. Responses to the call for evidence suggested that insurers, manufacturers, drivers and injured victims should be granted access to data. Questions remain about the processing and sharing of such data, where it is likely to be classified as 'personal' data.
- While the ALKS regulation suggests a 'handover time' of ten seconds from vehicle to driver, a study commissioned by the government from TRL, a subsidiary of the Transport Research Foundation, showed that there is no clear answer as to what drivers may do while being required to take back control on demand, nor how quickly they can do so. While ten seconds may be enough to place hands back on the wheel, the driver must also recover situational awareness, which could take longer. If the driver fails to respond and the vehicle stops in the lane as it is programmed to do, could more harm be caused to the driver, passengers and other road users?

Is this good news or bad news for injured claimants?

Unfortunately, it is not yet entirely clear what it means for injury claimants. On first look, by bringing ALKS into the AEVA, it is correct to assume that there might be some protection for injured accident victims in terms of recourse to compensation. However, there remains scope for the government to backtrack on its announcement and confirm that ALKS will not be 'automated' by definition. Either way, there is still potential for injured parties to be faced with complicated multi-party claims, potentially involving manufacturers and developers, where it is not possible to determine who or what was at fault. Access to accident data remains crucial to injured victims and their families.

The New Highway Code

Alongside the ALKS announcement and the review of the responses to the call for evidence, a short consultation was launched into changes to the Highway Code to deal with automated driving.

The new rules add to the confusion over autonomous driving, despite seeking to 'future proof' the code for certain scenarios. It is known that many people do not look at or regularly review the Highway Code once they have passed their driving test.

Crucially, the proposed new rules state the following:

'Automated vehicles are vehicles that are listed by the Secretary of State for Transport. While an automated vehicle is driving itself, you are not responsible for how it drives, and you do not need to pay attention to the road.'

Based on the announcement, this must mean vehicles with ALKS, and these vehicles are, we believe, going to be listed by the Secretary of State for Transport. However, the rule in the Highway Code goes on to say:

'If the vehicle is designed to require you to resume driving after being prompted to, while the vehicle is driving itself, you MUST remain in a position to be able to take control. For example, you should not move out of the driving seat. You should not be so distracted that you cannot take back control when prompted by the vehicle.'

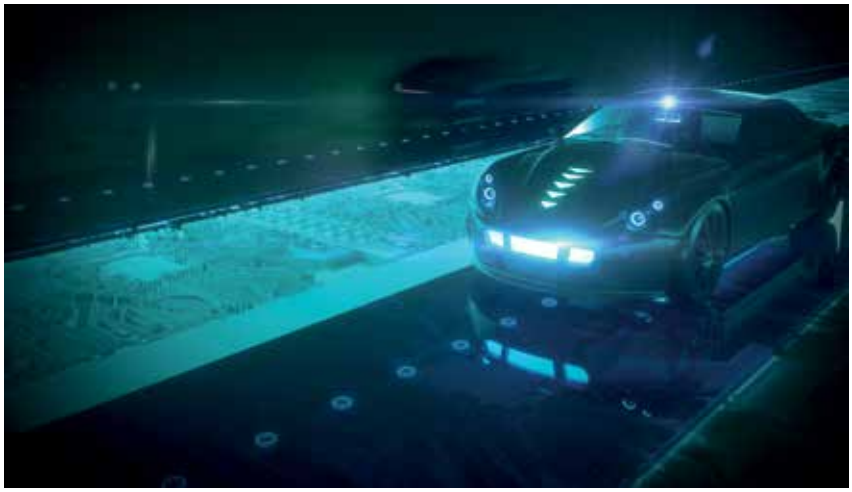
This sounds like ALKS, too, as you might be prompted to resume driving if you are still in the driving seat and not distracted. The rule itself is not clear, which goes against the regular stream of stakeholder responses to both the ALKS consultation and the Law Commission consultations on the importance of driver education and autonomous driving.

While a publicity campaign will be required on ALKS and the new section of the Highway Code, does the wording itself assist drivers entrenched in certain driver behaviours in knowing what they can and cannot do in a seemingly 'automated' vehicle?

In Stewarts' response to the consultation to the new Highway Code, we suggested that the wording, if implemented, should be released alongside reminders to drivers that the usual rules such as wearing a seatbelt and not driving while under the influence of drugs and alcohol still apply. In other words, the conventional rules of driving will apply to these vehicles within the code. Finally, if this is to be the new rule, we ask whether ALKS or any other vehicle will have the technology to stop anybody breaching the relevant rules on self-driving. Again, this is not yet clear.

If ALKS or any form of automated driving is going to be introduced successfully, public education is paramount, as is clarity on the law and regulation.

It is crucial that the public also know what standard they can expect from such vehicles; is that the same standard as that of a reasonable human driver, or one that is better and safer than that? It appears that accidents are inevitable, particularly while automated and conventional vehicles are sharing the roads. The question remains as to how safe is safe enough, to warrant the arrival of our first truly self-driving vehicles?



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CAUSING A FIGHT

Christopher Kardahji outlines a ruling on whether causation could be tried as a preliminary issue

Trials on preliminary issues are not uncommon in personal injury litigation. Many practitioners will have had experience of the courts ordering liability or limitation to be determined as preliminary issues, ahead of the main action being disposed of.

Where there is a genuine dispute over such an issue, and where quantum evidence is likely to be extensive and expensive, it can be an efficient and proportionate use of court time. The court's focus can be placed solely on the key issue in dispute, with the anticipation that once that issue has been determined at trial, the parties are likely to be able to reach a compromise on the remainder of the case.

The recent case of *Mather v Ministry of Defence* [2021] EWHC 811 (QB) threw up a rather more novel question when it comes to preliminary issues.

Mather v MoD

Mr Mather was a paint sprayer for the RAF from 1989 through until 2003. His job involved stripping and re-painting RAF aircraft, and he was exposed to a variety of organic solvents during the course of his employment.

Shortly before he left the RAF, Mr Mather began to experience neurological symptoms which, with the benefit of hindsight, were in fact the early harbingers of Multiple Sclerosis (MS), with which he was formally diagnosed in 2008.

It was later suggested to Mr Mather that there could be a link between his exposure to organic solvents while working as a paint sprayer for the MoD and his diagnosis of MS. He therefore sought legal advice and commenced a claim against the MoD in 2017.

His claim is brought on the basis that he was negligently exposed to excessive levels of organic solvents during the course of his employment with the RAF, and that that negligent exposure has led to him developing MS.

This is a novel issue; the courts have never before been asked to determine the question of whether organic solvents can cause MS. In *Wood v MoD* [2011] EWCA Civ 792, the Court of Appeal upheld the High Court's finding that exposure to organic solvents had caused Parkinson's disease, but the link between organic solvents and MS remains untested by our courts.

All aspects of the claim are disputed by the MoD, with limitation, breach

of duty, causation and quantum currently in issue.

The case is proceeding in the Royal Courts of Justice and case and costs management directions were given in 2018, with an eventual trial window originally listed in late 2020. At the time of that initial case management, no order for a split trial was made, and it was therefore anticipated that the trial would consider and determine all issues in the case.

During the summer of 2020, it became apparent to the parties that it was going to be impossible to identify a period during the existing trial window when all experts and witnesses were going to be available for a full trial. The claimant's position was simply to request another trial window, but the MoD offered a solution of using the existing trial window for the determination of a preliminary issue instead. Where a full trial of all the issues was not going to be possible in the window, a shorter preliminary issue trial might be.

Causation as a preliminary issue

What made the MoD's position unusual was that the preliminary issue they were asking the court to determine was the issue of causation. Such an order is not without precedent in the field of personal injury; in *Young v AIG Europe Ltd* [2015] EWHC 2160 (QB) the court ordered a trial of the preliminary issue of whether a road traffic collision had caused or materially contributed to the claimant in that case suffering a debilitating stroke.

The claimant in *Young* was successful as it happens, but that case concerned causation in the context of a traumatic incident (the road traffic collision) where the question of causation is both relatively straightforward and well settled as a matter of law, namely: would the claimant have suffered the injury but for the traumatic event?

As practitioners in the field will know, when it comes to disease cases, the issue of causation is a rather more thorny one. It can be impossible to prove traditional 'but for' causation in the context of a disease, because there can be a number of genetic and / or environmental factors that have all potentially caused or contributed to the onset of a disease, and saying with any authority whether or not the disease would still have presented *but for* any particular one factor might be beyond the available medical science.

The best that can often be said is that one factor – or a combination of factors – increased the risk of developing the disease. Alternatively, it may be clear that a single agency has caused the disease, but there might have been both negligent and non-negligent exposure to that agency in a particular case.

This has led to the courts taking a variety of different approaches to the issue of causation.

As Dame Janet Smith concluded in her 2009 paper entitled 'Causation – The Search for Principle':

'I called this paper "Causation – The Search for Principle" and I have tried to find the principles. It is not easy. Even when the principles are identified, it can be unclear which principle should be applied to which facts.

'I fear that barristers and advocates will continue to have difficulty with questions of causation and that the issue will continue to occupy the time of the Court of Appeal as often as it presently does.'

A trawl through the authorities in the 12 or so years since that paper was written might reasonably lead to the conclusion that the search has not gotten any easier.

Despite that, the MoD submitted that the issue of causation could in fact be distilled into a very simple test, namely:

- *Can* exposure to organic solvents cause MS generally (the generic test); and if so
- *Did* exposure to organic solvents cause MS in the claimant's case (the factual test)?

With the relevant test expressed in that way by the MoD, the issue could be determined by the court with evidence just from the expert neurologists and expert epidemiologists followed by legal submissions, thus taking up a fraction of the time and expense of a full trial and, crucially, capable of being accommodated within the existing trial window.

The MoD's proposed test appears to have its roots in the rules for the Armed Forces Compensation Scheme (AFCS), but despite the attraction afforded by its simplicity, it does not appear to have been universally adopted as the relevant test for causation in disease cases by the civil courts (it was not the test used by the court in *Wood*, for example).

Importantly, it was not accepted by Mr Mather as being the relevant test for causation in his case, and the MoD's application was opposed.

The matter was originally considered by Master Thornett, who took the view that this was essentially a trial management issue that should therefore be adjourned and referred to a High Court Judge. It should also be noted that by this time, the court had already informed the parties that no trial – whether a full trial of all issues or a shortened trial of causation only – could be accommodated within the existing trial window, and no listing at all would be possible until 2021.

The issue therefore came before Freedman J in March 2021.

The MoD proposed to determine the issue of causation using a set of assumed facts, taken from the claimant's expert occupational health evidence on exposure levels. MS, it said, was an indivisible condition and, in order to answer the 'factual question' element of their proposed test, the court therefore needed to find that exposure to organic solvents had effectively doubled the claimant's risk of developing MS in order to establish causation.

The position advanced on the behalf of the claimant was that despite the superficial attraction offered by the MoD's proposal to hive off causation as a preliminary issue, that attraction was very much only skin-deep, and once one began to dig a little deeper, it was in fact inherently flawed.

It is well recognised that whenever the court is ordering that an issue is to be determined as a preliminary issue, that issue must be clearly defined. That is crucial to then identifying how the issue is to be determined and what evidence the court will need to hear in order to do so.

It was here, the claimant said, that the MoD began to run into trouble. As

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has already been alluded to above, the law in respect of causation in disease cases is, to an extent, somewhat of a moveable feast, with the court having adopted a variety of differing approaches in the past.

That uncertainty is compounded further by the fact that the court has never previously considered the issue of causation in respect of organic solvent exposure and MS.

In order to arrive at the correct test, the court would need to consider whether MS was divisible or indivisible; whether the associated psychiatric injury was similarly divisible or indivisible; whether, even were it to be indivisible, the material contribution test could still be said to apply and / or whether, if found to be indivisible, a material increase to the risk would satisfy causation (essentially an extension of the *Fairchild* exception to include MS); or whether a doubling of the risk would even be required to establish causation (noting that in several cases it had not).

Even the supposedly safe ground of using the claimant's expert evidence on exposure levels as the basis for the assumed facts for the preliminary issue trial was potentially treacherous.

Although expert evidence identified those times when the exposure was alleged to have exceed the legal limits, simply using the alleged exposure above those legal limits as the basis for the level of tortious exposure might not be adequate. That is because the most toxic of the relevant organic solvents the claimant was exposed to were subject to Maximum Exposure Limits (MELs) under the relevant COSHH regulations, meaning that it was not simply sufficient to keep exposure below the MEL; it had to be reduced to the lowest level practicable.

The level of tortious exposure therefore relied on the court's findings in respect of what the lowest practicable level of exposure below the MEL would have been. In that respect, the issue of causation is therefore inextricably linked to that of breach, and separating the two would not only be artificial; it would likely hamper rather than help the court.

Finally, and perhaps most importantly, it was said that at its heart, the issue of causation is not one that can be neatly defined in disease litigation because it is so heavily influenced by matters of public policy.

Freedman J neatly summarised the claimant's submission in this respect when he said 'the law in respect of causation is pragmatic and yields to the justice of each case'. In other words, where the person has suffered a wrongdoing, the courts will, at times, take a pragmatic approach in order to provide them with a remedy and ensure justice is done, particularly where medical science is only able to assist so far.

Ultimately, Freedman J concluded that causation in this context was not suitable for determination as a preliminary trial, largely for the reasons advanced by the claimant, but also for more practical considerations, such as the fact that if the claimant succeeded on a preliminary issue of causation, the parties would still need to go back to deal with limitation and breach, topics that could lead to a duplication of some of the evidence - and thus increase rather than reduce costs.

In addition, the prospect for an appeal of any decision on causation (something both parties have hinted would be a very real prospect) could lead to significant delays in an eventual resolution for an already ill claimant.

Conclusions

There are perhaps two conclusions that can be drawn from this interlocutory decision.

Firstly, where any proposed preliminary issue would concern substantive points of law, that law must be settled, and it is not appropriate to proceed on the basis of assumptions. While that does not automatically exclude causation generally (as has been seen in *Young*) it must make it difficult in disease cases, particularly with a complex or novel situation such as Mr Mather's.

Freedman J noted that despite the MoD's assertion that whatever test for causation the court adopted, the claimant would not succeed, this was not a case where an application for strike-out or summary judgment had been made, and as such, where issues were to be explored at trial, they must be fully explored.

Secondly, there is likely to be an in-depth exploration of the law in respect of causation, and specifically with regards causation of MS following exposure to organic solvents in the foreseeable future, when Mr Mather's case reaches a full trial, expected later in 2021.

Dame Smith's prediction in her 2009 paper that the issue of causation will continue to trouble the appellate courts could still hold true.

Christopher Kardahji is senior associate team leader at Irwin Mitchell LLP and acts for Mr Mather in the above case

DELIBERATE POLICY

James Hastie on a dispute with insurers over an exclusion clause

In *Grant v International Insurance Company of Hanover Ltd* [2021] UKSC 12, Fiona Grant raised a claim for damages following the death of her husband on 9 August 2013.

His death came about in somewhat unusual circumstances. He was in a bar in Aberdeen near to closing time and fell asleep at the table. He had not been there long, but had been drinking elsewhere earlier in the evening.

He was asked to leave and was escorted off the premises by the door stewards. Once outside, an altercation ensued and Mr Grant was wrestled to the ground by those door stewards. One, Mr Marcius, applied a neck or choke hold and held Mr Grant in that position for a number of minutes. Unfortunately, Mr Grant died as a result, with the post-mortem concluding that the cause of death was mechanical asphyxiation.

Mr Marcius stood trial at the High Court on a charge of murder. The jury did not convict him of that charge, but did convict Mr Marcius of assaulting Mr Grant by seizing him on the neck, forcing him to the ground, placing him in a neck or choke hold, compressing his neck and restricting his breathing.

In her sentencing statement the trial judge, Lady Wolff, accepted Mr Marcius' actions were 'badly executed, not badly motivated'.

The action

Mrs Grant initially sued Mr Marcius, his employer and the owner of the bar making claims under the Damages (Scotland) Act 2011.

The employers went into liquidation and steps were taken to direct the case against their insurers, Hanover, under the Third Party (Rights Against Insurers) Act 2010, with the owners of the bar and Mr Marcius being let out the action.

A proof was fixed to deal with the question of Hanover's liability under the policy, it being the case that, under the 2010 Act, Mrs Grant stepped into the employer's shoes. The issues were whether in terms of the policy liability to indemnify was excluded entirely under the deliberate act exclusion, or alternatively whether it was limited to £100,000 by virtue of it having arisen out of a wrongful arrest.

No oral evidence was led at proof, with the parties having agreed the evidence by way of a Joint Minute. While that Joint Minute included agreement (i) that Mr Marcius 'initially took hold of the deceased around his shoulder or neck area when taking him to the ground. He applied a neck or choke hold to the deceased for up to three minutes of the period during which he was restrained'; and (ii) that the cause of death was mechanical asphyxiation, there was no agreement that Mr Marcius had intended to injure, far less kill, Mr Grant.

The Lord Ordinary found in favour of Mrs Grant, among other things finding that the 'death was an

unintended and unfortunate consequence of [Mr Marcius'] assault upon the deceased'.

Hanover appealed to the Inner House. All three judges gave Opinions and agreed that the appeal should be refused.

The Inner House also refused permission to appeal to the Supreme Court. The Supreme Court, however, granted that permission.

The policy

The policy provided that Hanover would indemnify an insured against 'all sums the insured shall become legally liable to pay as compensatory damages arising out of accidental injury', with the definition of injury including bodily injury or death. The policy was subject to a number of exclusions, one of which was concerned with deliberate acts. That exclusion applied to:

'Liability arising out of deliberate acts wilful default or neglect by the INSURED any DIRECTOR PARTNER or EMPLOYEE of the INSURED...'

In relation to wrongful arrest, liability was excluded under the policy, but then included by one of the extensions, subject to a limitation of £100,000. A wrongful arrest was defined as 'any unlawful restraint' and included 'assault and battery committed or alleged to have been committed at the time of making or attempting to make an arrest...'.

***Hawley v Luminar Leisure Ltd* [2006] PIQR 17**

In *Hawley* a doorman, employed by ASE and working at a club run by Luminar, had punched the claimant causing him to fall, fracture his skull and suffer permanent serious brain damage.

The doorman was convicted of grievous bodily harm. ASE's policy covered accidental injury, with accidental being defined as 'sudden, unforeseen, fortuitous and identifiable' and injury having the same definition as in Mrs Grant's case. The Court of Appeal held that accidental had to be judged from the perspective of ASE not the doorman, and in that context, while the injury was obviously not accidental from his perspective, it was accidental from the perspective of ASE. The insurers were therefore liable.

It was understood by Mrs Grant's representatives in this case that the 'deliberate acts' exclusion clause in the policy had been worded in such a way as to deal with the consequences of the decision of the Court of Appeal in the case of *Hawley*.

The policy was subject to a number of exclusions, one of which was concerned with deliberate acts

Supreme Court

The issues in the Supreme Court were:

(a) Was the death of Mr Grant brought about by a deliberate act of Mr Marcius within the policy, such that liability was excluded?

(b) Was the death of Mr Grant brought about by Mr Marcius' wrongful arrest of him, such that liability to indemnify was limited to £100,000 within the terms of the policy?

In the context of the first question, Hanover argued that deliberate acts meant acts that were intended to cause injury or acts that were carried out recklessly as to whether they would cause injury. Mrs Grant argued that deliberate acts meant acts that were intended to cause the specific injury which results in, in this case death, or at least serious injury, but that on any view it did not include reckless acts.

The Court (Lord Hamblen gave the judgment, with which the other Supreme Court Justices agreed) concluded that the most natural interpretation of the deliberate act exclusion clause was that it was the act of causing injury which must be deliberate. The Court further concluded that the terms of the policy did not provide any support for an interpretation that drew distinctions between different kinds of injury, and that focusing on the specific injury led to unsatisfactory and arbitrary results.

The Court therefore accepted Hanover's argument that in the context of the case, deliberate acts meant acts that are intended to cause injury.

However, the Court was not persuaded of Hanover's argument that deliberate included recklessness.

Conclusion

The Court then applied its interpretation of the deliberate acts' exclusion clause to the facts of the case.

It found that there was no finding in the case of an intention to injure. The conviction for assault did not establish such an intention to injure. The trial judge's sentencing remarks provided no support for an intention to injure. In fact, the finding that what Mr Marcius had done was 'not badly motivated' was inconsistent with such an intention.

In those circumstances, the exclusion clause did not apply on the facts as found. The appeal was therefore refused.

Postscript

Hanover would appear to have been vindicated in relation to its primary argument as to interpretation of deliberate acts in the exclusion clause, albeit not in respect of the alternative argument about recklessness. However, in the particular circumstances of this case, it was unsuccessful on its substantive position that liability to pay damages to Mrs Grant and her young son following the death of Mr Grant was entirely excluded under the policy.

The case will be remitted back to the Court of Session for the outstanding issues, principally quantum, to be resolved. It is hoped that eight years on from Mr Grant's death, Mrs Grant and her son will now achieve some degree of justice.

James Hastie is a barrister at Compass Chambers who acted for Mrs Grant in the above case

NO TIME TO WAIT

Andrew Dinsmore and Lucie Clinch on obtaining an interim payment for accommodation

This article outlines the recent case of *PAL (a child by her mother and litigation friend COL) v Davison & ors* [2021] EWHC 1108 (QB), in which Stewarts obtained a £2m interim payment to enable its client, a seriously injured child, to buy a property now rather than wait until the trial.

Background

The claimant was walking along a pavement with her family when a vehicle mounted the curb and struck her, causing serious injuries, including a serious brain injury. Initial evidence is that it is unlikely a definitive prognosis as to her injuries will be possible before the fifth anniversary of the accident, when she will be 17.

Following the accident, the claimant was discharged from hospital but was unable to return to her three-bedroom end of terrace family home. An alternative rental property was found at short notice, but was never considered a viable long-term option for her complex needs. In addition, the tenancy on her current property was due to expire within the next 12 months at the time of the application.

The first defendant was the driver of the vehicle, the second defendant owned and operated the vehicle he was driving, and the third defendant is the insurer. The first defendant had not responded to the claim, and judgment was entered against him. The second and third defendants are jointly represented; the third defendant insurer accepts liability to meet the claim.

The defendants were aware that the claimant's tenancy would expire in April 2022 and acknowledged that the rental property was unsuitable for the claimant. However, the sum of £2m claimed to purchase the required property was disputed.

The claimant had previously received £1m in interim payments in order to fund her ongoing care, case management therapy and equipment needs. Given the urgency and the lack of viable alternative properties on the market, and the need to have the interim payment approved by the court in any event, Stewarts made an urgent application for a £2m interim payment for accommodation, so that the claimant could purchase a property suitable for her ongoing needs.

A professional deputy had been appointed by the Court of Protection to manage the claimant's financial affairs. The professional deputy had applied to the Court of Protection for an order authorising them to purchase a property. However, that application was rejected on the basis that, at the time, a suitable property had not been identified.

It was understood by the professional deputy and the claimant's legal team that full time High Court judges do have inherent jurisdiction as Court of Protection judges. Therefore, Stewarts invited the High Court judge to exercise that jurisdiction and vary the Court of Protection order at the same time as ordering the interim payment. This would enable the deputy to purchase the property without the need to seek approval in advance from the Court of Protection.

Prior to the interim payment hearing, the professional deputy also made an urgent application to the Court of Protection seeking to vary the order to enable the purchase of the property identified by the claimant.

Suitable property and the property market – the evidence

Expert evidence for the claimant demonstrated that there was only one potential property available in the area in which her mother was content to move that could accommodate the claimant's long-term needs. This property would need adaptations to suit those needs.

This property was marketed at £1,250,000, although it was believed that an offer of £1,190,000 would be accepted. The expert opinion was that the property could be adapted and extended to suit, which would cost up to £612,000.

The defendants provided desktop expert evidence as to what properties might be available in the area. These were limited to three. Of the three properties, two were marketed at around £960,000 and would require adaptations costing around £490,000. However, by the time of the hearing, these two properties had been sold.

Only one potential property was available, and this was outside the claimant's mother's desired locality.

The area where the claimant's mother wanted to live was one with high demand, and suitable properties were difficult to find. The judge acknowledged that the claimant's mother had cogent reasons to not move out of the area as proposed by the defendants.

The claimant sought £2m, compared to the defendant's offer of £1.25m.

The court's approach – *Eeles v Cobham Services*

The case of *Eeles v Cobham Services* [2009] EWCA Civ 204 summarises the approach a judge should take when considering whether to award an interim payment in a personal injury claim. *Eeles* confirms that the judge should generally avoid ordering a sum that might fetter the trial judge's discretion to allocate damages, including on periodical payment orders.

Mrs Justice Yip applied the two stages of *Eeles* as follows:

Stage 1

Eeles stage 1 confirms that the judge dealing with the interim payment application must assess the likely amount of the final judgment, leaving out of account the heads of future loss the trial judge might wish to deal with by a periodical payment order (ie. care and case management).

Mrs Justice Yip said the starting point is that 'the assessment should only comprise special damages "to date" for pain, suffering and loss of amenity, with interest on both'.

As per *Eeles*, it will usually be appropriate to include accommodation costs in the expected capital award. Mrs Justice Yip said it should 'not be too difficult to assess the capitalised accommodation costs' at the first stage, but stressed that it is essential to keep in mind the clear principles underpinning stage 1 of *Eeles*. In attempting to estimate the likely amount of the lump sum element of the final judgment, she must avoid the risk of overpayment but not keep the claimant out of his or her money.

In assessing the likely award for pain, suffering and loss of amenity (PSLA), past loss and accommodation, the court may award a reasonable proportion of that amount. Mrs Justice Yip acknowledged that she should not embark on a 'mini-trial' as there was little dispute between the parties about the need for accommodation, and only its cost.

We argued that the interim payment would be no more than a reasonable proportion of the final lump sum that the court may award for general damages, past loss to trial and future accommodation.

There is conflicting case law and argument about whether past losses 'to date' under *Eeles* was intended to be interpreted as meaning up to the date of the application or up to the date of trial. Justice Yip elected to calculate losses for the purposes of her *Eeles* assessment to the date of our application.

By excluding the accommodation sum from stage 1, the claimant would not be restricted in relation to later interim payments, which she will need for items such as care and case management expenses prior to trial (particularly given her young age and the early stages of her rehabilitation). Mrs Justice Yip saw no reason why the parties should not be able to strike such a balance and reach agreement on other heads of loss / special damages in the future, without the need for applications for interim payments.

Mrs Justice Yip was minded that any testing of the expert evidence will be undertaken at trial, and there was a possibility that the defendant expert evidence might be preferred. Accordingly, she found that £2m was not a reasonable sum for a property by a conservative assessment of the relevant heads of loss (applying stage 1).

Stewarts felt it was clear from the evidence provided in support of the interim payment application that there was a real, reasonable and immediate need for funds for a property purchase now, and that the application would succeed under stage 2.

Stage 2

The assessment under stage 2 would only arise / be applied where there is a real or urgent need for funds.

Stage 2 of *Eeles* outlines when a judge will be entitled to include the likely amount of any final judgment. The interim judge will need to be able to predict confidently that the trial judge might award a larger capital sum than that covered by general and special damages and accommodation costs alone. In addition, there must be a real need for the interim payment.

When considering a request for an interim payment for accommodation, the judge considering the application must be satisfied that there is a real need for the accommodation now, rather than after the trial.

Unlike in the *Eeles* case, where the claimant was housed, and there was unlikely to be a move before trial, our client had a real need for accommodation now. Mrs Justice Yip held that it was more than reasonably required and, in fact, 'essential' that accommodation was found urgently. The evidence was sufficient to conclude that there was a real, reasonable and immediate need for the interim payment for the purpose it had been requested.

The claimant's evidence was clear that a property search since the claimant's discharge from hospital in August 2020 had shown no alternative rental options. Also, there was insecurity, as her current property was due to be returned to the owner for his own family within the next year.

Mrs Justice Yip made no finding on whether the potential property on offer was suitable, as she was not required to do so for the purposes of the *Eeles* assessment. She was, however, satisfied that the sum of £2m sought by the claimant was reasonably required and would cover the purchase, ancillary costs, adaptations and relocation costs of the only available property. She also found that there ought to be some surplus for aids and equipment.

She was confident that in awarding the interim payment at this level, the trial judge's freedom to allocate future loss would not be fettered. Therefore, the application for £2m succeeded at stage 2.

Proceedings in the Court of Protection

Full-time High Court judges can exercise discretion over the Court of Protection and vary a deputy's appointment to allow a property to be purchased. However, Mrs Justice Yip did not consider she should do so and did not invoke that jurisdiction. She said she hoped that in ordering the interim payment, the Court of Protection would now authorise the property purchase.

Mrs Justice Yip preferred to leave authorisation and purchase of a suitable property to the Court of Protection in the absence of the full file and all relevant information.

Postscript

Further to her reasoned judgment, Mrs Justice Yip (while keen to maintain separate function from the Court of Protection) stated that she would attempt to assist with expediting the approval from the Court of Protection. As the Court of Protection faces severe delays, Stewarts contacted Mrs Justice Yip after the hearing for such assistance. She made a further order directing that the Court of Protection be invited to expedite the claimant's application and determine it as soon as reasonably practicable. This order has been provided to the Court of Protection for its urgent attention.

Key takeaways

The case confirms that while High Court judges can exercise dual jurisdiction in relation to the Court of Protection, the facts of the case may determine that the decisions of judges within the Queen's Bench Division may continue to remain separate to those of the Court of Protection, even in an urgent scenario like this.

The following practice points are also worth noting:

- Evidence is key. Stewarts had already been providing rolling disclosure to the defendants as to care, case management and therapy needs further to a court order, and the defendants were aware of the claimant's ongoing needs. In obtaining early expert accommodation evidence, Stewarts could present to the court, with some degree of certainty, that there was a lack of viable property options for the claimant in her locality. That choice was limited to one by the time of the hearing.
- Act with urgency. Stewarts' proactivity in making the urgent application when it became clear the claimant was at a real risk of becoming homeless within the next year was paramount. Our ability to also respond quickly to the defendant's rebuttal evidence on accommodation was also important.
- Timing is relevant. In child cases, where the trial is some time away, and there is uncertainty about what is required now and in the future, it is more difficult for the court to aggregate past losses to trial for special damages, such as rehabilitation. However, in applications made closer to trial it might be easier to secure payments under *Eeles* stage 1, particularly for an adult claimant with capacity.

Our work is ongoing in seeking the Court of Protection's urgent approval to purchase the property.

Andrew Dinsmore is a personal injury partner at Stewarts who acted in the above case. Lucie Clinch is senior associate, knowledge development lawyer at Stewarts

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MINORITY REPORT

Zahra Awaiz-Bilal on challenges faced by abuse survivors from ethnic minority communities

In April 2021, the Independent Inquiry into Child Sexual Abuse (IICSA) published its report 'Engagement with support services for ethnic minority communities', which highlights the difficulties faced by survivors from ethnic minority communities when disclosing or reporting child sexual abuse.

The report's findings are based on information gathered from support organisations such as domestic and sexual violence support services, women's groups, religious charities, mental health agencies and specific ethnic minority organisations that work with these communities. It focuses on six common themes, namely (i) mistrust of and inadequate access to services; (ii) language; (iii) closed communities; (iv) culture; (v) shame and honour; and (vi) education.

Mistrust of and inadequate access to services

One of the biggest hurdles facing survivors of abuse from ethnic minority communities is their lack of trust in organisations such as the police, social services and health care services, which has been built up over many generations. Survivors fear that lack of diversity and institutional racism within these organisations will lead to them being judged and the outcome of their disclosure being determined by their race or religion.

All victims of abuse, irrespective of their background, fear that they may not be believed. For ethnic minority survivors, and black male survivors in particular, who have had prior contact with the criminal justice system, this concern is even greater. They feel that the police's response to their disclosure will be clouded by their history.

Survivors from South Asian communities carry an additional burden of protecting their wider community from being targeted as child abusers, or facing Islamophobia in light of the narrative promoted by the media about 'Asian grooming gangs'. This can greatly influence their decision to not disclose abuse.

The report also found that survivors with a recent or insecure immigration status are some of the most vulnerable. They are less likely to engage with support services due to concerns about their status, which for them overrides all other concerns, and worries that their children will be taken away.

The fact that such individuals do not have access to the same services as those with a secure immigration status, compounds this issue further. For instance, one organisation revealed that 'social care services are reluctant to accept people with non-secure immigration status who are victims of child sexual exploitation'.

Language

Effective communication is key to disclosing abuse, and the words and nuances used will have a significant impact on how that disclosure is dealt with. So it is not surprising that language can prevent survivors from ethnic minority communities from speaking up. But not being able to speak English is only one of a number of barriers that have been identified.

Survivors who are native English speakers can lack the language to talk about sexual abuse. This may be as a result of not attending relationships and sex education classes at school, or considering words that are needed to talk about sexual abuse, such as words for genitalia, as taboo and disrespectful.

Interpreters are often needed to overcome language barriers, but this is not as simple a solution as it may seem. Where family or community members are acting as interpreters, there is a risk that survivors' confidentiality may not be maintained, and they may feel additional shame in discussing sexual abuse. For this reason, survivors may not disclose the full extent of the abuse they have suffered.

The family or community members themselves may also not be able to

translate fully or literally from their language to English, sometimes because there are no direct translations, and at other times because of their own personally held beliefs of cultural respect or feelings of shame. This creates a risk of important information being lost in translation.

Where professional interpreters are used, overlooking the differences between a survivor's and an interpreter's dialect can lead to confusion and misunderstanding. More importantly, the report reveals that a majority of professional interpreters lack the experience and training to talk about child sexual abuse and work compassionately with survivors.

The report also highlights that there are problems generally with access to, funding for and the quality of interpretation services.

Closed communities

The term 'closed communities' is explained in the report as describing:

'... communities which are insulated from wider mainstream society. Strong social ties within these communities are based on culture, heritage, religion and language. Closed communities provide their own, highly integrated, non-statutory support services, sometimes including parallel religious councils or courts'.

Such communities are considered by support organisations as 'hard to reach'.

Some communities that have been identified as 'closed' include Romany, Irish Traveller, Ultra-Orthodox Jewish and some South Asian diaspora communities.

Survivors from these communities are bound by a strong sense of collective identity and loyalty. This prevents them from disclosing abuse, for fear that it would damage the reputation of the community as a whole and be seen as a betrayal.

Instead, religious leaders are relied upon – by both those within the community and support services – for guidance. Sadly, their desire to protect the community from stigma often outweighs the need to support the victim, and in many cases is compounded by their denial that sexual abuse exists in their community. The undesired consequence of this is that survivors are failed and left unsupported by both internal and external systems of authority.

Culture

The fact that many ethnic minority communities are patriarchal, placing emphasis on purity and forbidding sexual behaviour outside of marriage, is in itself a barrier to disclosure faced by survivors of sexual abuse within some communities. In others, it is the importance of certain beliefs held in a survivor's culture or religion. An example is of some diasporic African communities in the UK, whose belief in black magic and being cursed by the perpetrator or others in the community prevents them from disclosing abuse.

Survivors feel that service professionals from a non-religious culture struggle to understand the context in which they hold these beliefs and fears. On top of this, they often treat individuals from ethnic minority communities as part of one homogenous group, and fail to challenge what may be seen as 'traditional', which can lead to little or no action being taken.

Shame and honour

All survivors of child abuse struggle with feelings of shame. Add to this the burden of protecting family honour and emphasis on virtues of purity and virginity, and we can begin to understand why survivors from ethnic minority communities find it even more difficult to disclose abuse.

The report reveals, however, that shame and honour are gender based; with some communities expecting females to maintain the family's honour. In such communities, survivors of sexual abuse are labelled as 'impure', and the entire family can be shunned. This encourages victim blaming, and can lead to life threatening consequences for the survivors.

Education

There is a general lack of education and awareness about child sexual abuse and its impact at all levels within ethnic minority communities.

In some closed communities, children are often home schooled, do not attend school regularly or are removed from school at a young age. In others, they are withdrawn from relationships and sex education. Without the knowledge to understand sexual abuse, children are more vulnerable to being targeted and are not equipped to prevent it from happening or reporting it.

Adults often fail to recognise and report sexual abuse because of gaps in their own education. Support organisations reported that they found it difficult to source educational materials for adults who did not attend relationships and sex education classes themselves, or who came to the UK as adults.

Survivors within ethnic minority communities are also failed by a lack of understanding of the long-lasting impact of child abuse because of how dismissive some communities are of mental health issues.

Conclusion

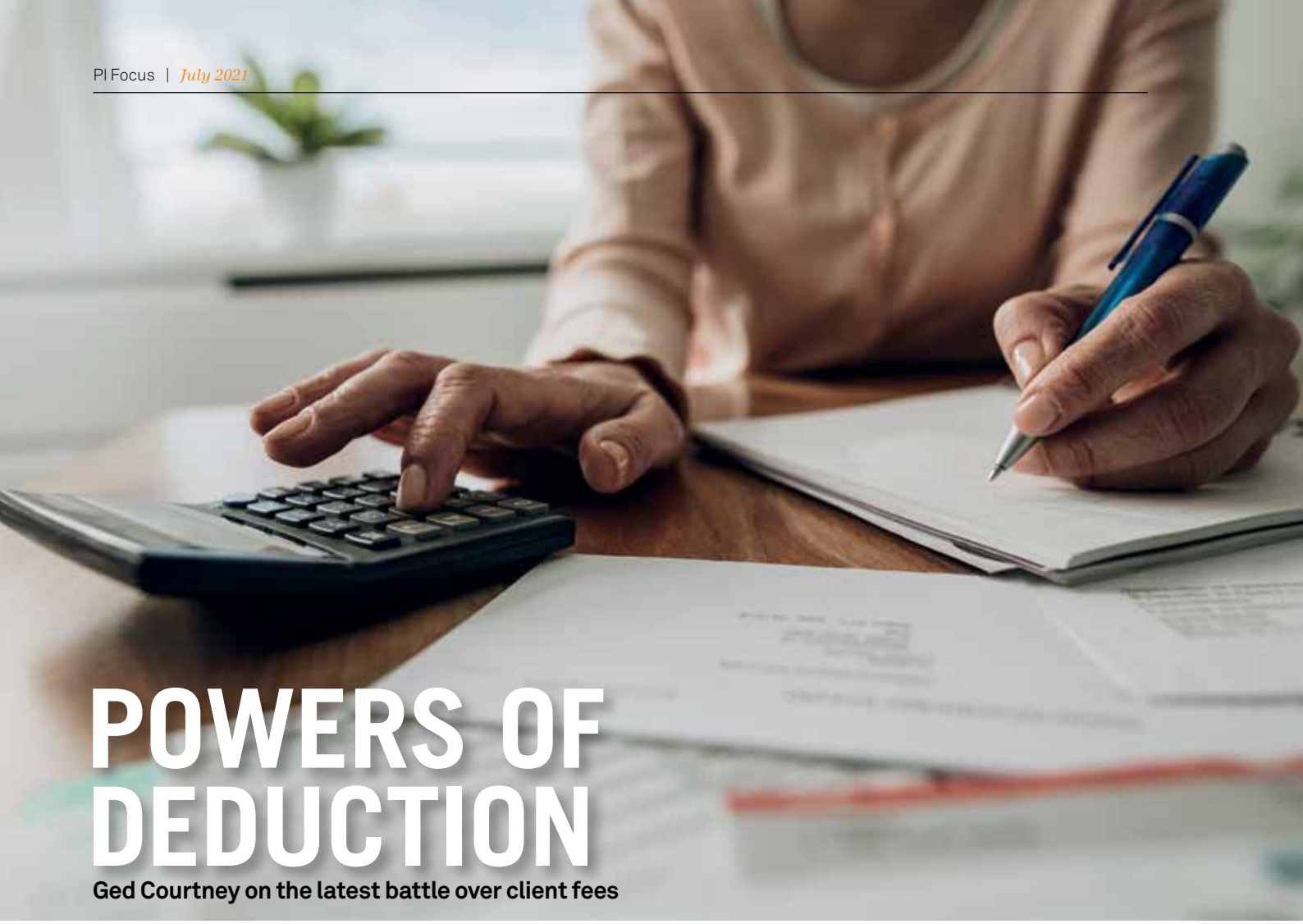
As a lawyer representing survivors of abuse, I welcome the commissioning and findings of this report. It is clear that much needs to be done to provide access to culturally sensitive services so that survivors from ethnic minority communities feel fully supported when disclosing or reporting abuse. While we await IICSA's recommendations in this regard, we can all play our part in ensuring this happens.

As a British Muslim, of Pakistani heritage, I believe that many of the issues highlighted by this report need to be tackled from the bottom up, because the experience of each survivor within a community will dictate the decision of many others to speak up. This, in my opinion, is a two stage process.

Firstly, denial within some ethnic minority communities about the existence, and indeed prevalence, of abuse and the stigma attached to victims of abuse needs to be eradicated by targeting the lack of knowledge and understanding surrounding this issue.

Secondly, to ensure that survivors of abuse from ethnic minority communities are truly empowered, cultural norms within these communities need to be recalibrated in the light of moral, religious and legal education.

Zahra Awaiz-Bilal is a senior associate in the abuse team at Bolt Burdon Kemp



POWERS OF DEDUCTION

Ged Courtney on the latest battle over client fees

Despite the disruptions caused by the Covid pandemic, the appetite for claims by former clients against their solicitors continues; and those who represent them continue to frame arguments in a manner that carries on evolving.

The most recent reported decision comes from Mr Justice Lavender (who also heard the appeal in *Belsner v Cam Legal Services Ltd*) in *Karatysz v SGI Legal* [2021] EWHC 1608 (QB).

It is easy to see this decision as a resounding victory for the legal profession, with the solicitor having fought off a claim by their former client, and demonstrated that the sums deducted from her damages were reasonable. While this decision certainty results in a few holes beneath the waterline for those seeking to bring claims such as this, in my view the main thrust of the decision is largely on its own facts; and save for a couple of discreet points, does not necessarily bring matters much further forward. There is some useful guidance in relation to relief from sanctions in respect of the late filing of a Respondent's Notice; but this falls outside the scope of this article, and is based very much on its facts.

Ms Karatysz's claim was pursued through the low-value RTA portal and settled at stage two. The judgment itself sets out in great detail the case history (including the detailed assessment proceedings). The claimant recovered fixed costs from her opponent, and a bill was sent to her that sought a deduction to the claimant's damages of 25%. This was based on a mixture of success fee and unrecovered basic charges.

The first hearing

The claimant challenged the solicitor's bill, citing that she had not given her informed consent to be charged more than was recovered from the third party.

She said that s.74(3) of Solicitors Act 1974 limited the solicitors' fees to the fixed costs recovered from her opponent. Alternatively, the claimant argued that the Court could, by applying CPR 46.9(3)(c), limit the sums in the same manner as s.74(3). In his 'paper assessment', District Judge Bellamy in the County Court at Sheffield had found that s.74(3) did apply in this case, but was persuaded to reverse his decision on the point at oral review.

During the course of the assessment, the district judge had decided that nine hours at £120 (£1,080) was a reasonable sum for the profit costs in this matter. Despite this, the Court felt that informed consent was needed to charge more than was recovered from the other side, either by application of s.74(3), or on the basis that costs over and above the sums recovered, without informed consent, would be presumed unreasonable by application of CPR 46.9(3)(c)(i)&(ii), which says costs are presumed:

> '(c) to have been unreasonably incurred if –
>
> '(i) they are of an unusual nature or amount; and
>
> '(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.'

The judge therefore restricted the basic charges to the sums recovered from the other side, and used this figure to calculate the success fee. This restriction of the basic charges was referred to as 'the limitation decision' and was appealed by the defendant. The claimant also sought to overturn the Court's finding that s.74(3) was not engaged, but for a variety of reasons relating to the late filing of the Respondent's Notice, this was not permitted.

The appeal

Lavender J's judgment gives very thorough analysis of the limitation decision. The defendant tried to argue that they had their client's informed consent to charge in the manner they did, and that the cap on the fees the client had to pay supported this. The judge did not agree that informed consent was given however, noting that the cap was 'an aspiration rather than a commitment'.

In consideration of CPR 46.9(3)(c)(i), Lavender J felt that the judge below was entitled to find that the hourly rates sought by the defendant were 'of an unusual nature or amount'. The defendant had argued that they had told the claimant that the sums from the other side may be lower than their fees, and that this was sufficient to satisfy the second portion of the test, but the judge below had found that in order to rely on CPR 46.9(3)(c)(ii), the solicitor must have their client's informed consent - and that had not been obtained here.

Ultimately, Lavender J found that the judge below was wrong to find that informed consent was required in this context, saying at 108:

'Mr Marven submitted that informed consent is irrelevant to CPR 46.9(c)(ii). In my judgment, that is right. The issue under CPR 46.9(c)(ii) is whether or not the solicitor told his client what is there set out. That issue concerns what the solicitor said, not whether the client agreed with or approved what the solicitor told him.'

The court went on to consider the effect of these findings. At para 110 the judge states:

'In any event, even if the district judge was right in his construction of CPR 46.9(3)(c)(ii), and supposing that it was to be presumed under CPR 46.9(3)(c) that the defendant's rate of £161 per hour was unreasonable, it does not follow that it was appropriate to limit the defendant's base costs to the amount recovered from Aviva in respect of fixed costs.

'The effect of CPR 46.9(3)(c), where it applies, is to create, for the purposes of an assessment of costs on the indemnity basis, a presumption that certain costs were unreasonably incurred. Where a solicitor claims costs at an unreasonable rate, the appropriate course on assessment on the indemnity basis is usually to allow costs at a reasonable rate.'

District Judge Bellamy had already, during his assessment, assessed the Bill and found that nine hours at £120 per hour was reasonable. To reduce that further to £750 would be contrary to that earlier finding:

'While I accept that the district judge could, for good reason, have departed from the "hours times hourly rate" method of assessing the defendant's base costs and could, for good reason, have alighted on £900 as the reasonable amount for the defendant's base costs (in the sense that any greater amount would have been unreasonable), I am not persuaded that that is what the district judge did.'

The Court therefore allowed the defendant's appeal, and found that the sums deducted from damages were reasonable.

Crucially, however, the Court found that it could have simply awarded a single, reasonable figure for the basic charges without reference to time spent and hourly rates, but merely found that the judge in this case did not do that. Undoubtedly those representing the former clients in these cases will seek to rely on this element on the judgment in the hope of departing from the typical 'hours times hourly rate' assessment procedure. Whether there is an appetite for such an approach going forward remains to be seen.

Costs of proceedings

A separate and more wide reaching element of the judgment related to the costs of the proceedings. Typically those representing the lay clients say that the total of the bill is the full amount of the profit costs, VAT, success fee and disbursements. At first blush this seems logical, but in many cases, solicitors cap their bills at a sum equal to the amount recovered from the third party plus a percentage of the client's damages. The claimant had pointed to the higher amount, arguing that reducing this figure by 20% results in their entitlement to costs of the proceedings, even if the reduction does not result in a refund. Clearly this outcome would be perverse, as it would mean that a solicitor, having shown that the deduction made was reasonable, could still be ordered to pay costs. Lavender J found:

'In my judgment, the key to the issue which arises under subsection 70(9) is the construction of subsection 70(9) and, in particular, the phrase, "the amount of the bill". Since a bill of costs is a demand for payment, it is in my judgment plain that the amount of a bill is the amount demanded by the bill.'

Later he added:

'Nevertheless, if one asks the question, "How much was being demanded by this bill?" the answer is clear. The defendant was merely seeking by this bill to justify its retention of the £1,116 received from Aviva and the £455.50 deducted from the claimant's damages. The defendant was not by this bill demanding payment of any more, and certainly not a further £1,160.40, from the claimant.'

There has been some suggestion that the claimant will seek leave to appeal in this matter. The limitation point is on its own facts and well-reasoned. It may be the costs element of the judgment that will be appealed, but that again appears to be well reasoned, and permission to appeal could well be refused.

Ged Courtney is an advocate and senior costs draftsman at Kain Knight Costs Lawyers; www.kain-knight.co.uk

CASE NOTES

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

***King v Royal United Hospitals Bath NHS Foundation Trust* [2021] EWHC 1576 (QB)**

Liability: secondary victim, psychiatric injury; quantum: loss of earnings

16 June 2021

Philip Mott QC, sitting as a Deputy High Court Judge

The claimant Mr King, is married to Ms Podemski. The couple's second son, Benjamin, was born at the Royal United Hospital, Bath (RUH) by emergency caesarean section on 5 May 2016.

Tragically, he died on 10 May 2016. On 4 July 2017, the defendant admitted liability for his death 'in not providing care that would have led to the option of Benjamin being delivered before 5 May 2016'.

It was accepted that 'had Benjamin been delivered before 5 May 2016, he would have avoided injury and survived'.

Judge Mott noted that claims on behalf of the estate for bereavement, and for psychiatric injury to the claimant's wife (as a primary victim), had all been dealt with. This action concerned the claimant's claim for psychiatric injury, with consequential loss and damage, as a secondary victim.

The judge said the claimant's claim was founded 'solely on what he saw and was told on his first visit to see Benjamin in the Neonatal Intensive Care Unit (NICU) at the RUH on the morning of 5 May 2016.' He added that the stress of the next few days, which culminated in the claimant and his wife having to make the 'terrible decision to move to palliative care, and therefore to allow Benjamin to die as he did on 10 May 2016', could form no part of the claim, because of the requirement of a 'single shocking event' for secondary victim claims (as outlined in *Liverpool Women's NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588).

Judge Mott said: '[The claimant's wife] was taken for surgery almost immediately. [The claimant] was left outside the delivery suite, and paced up and down in the corridor, anxious and afraid, trying not to think of the worst.

'Eventually he says he stopped a random member of staff to ask what was going on, as a result of which a member of the team came out to tell him that Benjamin had been born and had been taken to NICU. He was relieved to hear this and asked to go there immediately. The nurse went with him and he went straight in. His statement continues:

'"When I entered I saw that there were a lot of people around Benjamin's cot working on him and I kept telling myself he was alive and he would be okay. As I walked closer I saw that it was much worse than I thought. He was attached to machines and they were all bleeping loudly.

'"There were a lot of different people working around the cot and there seemed like a lot of panic. I recognised Dr Steve Jones who had cared for Oliver and I said 'He's alive?' but Dr Jones said, 'Yes, he's alive, but he is very sick and we still might lose him'.

'"In that instant all my hopes were dashed and I shouted out 'Don't say that, we don't know that yet'. My knees were weak and I was fighting the energy in me. I felt like I wanted to punch him for taking away my hope.

'"There was a lot of tension in the room. As I looked down at Benjamin, I felt sick to my stomach. I desperately wanted to hold him but I couldn't. He was all hooked up to machines, looking like a science experiment and I couldn't get close to him."'

Liability

In considering liability, Judge Mott summarised the relevant legal test. 'For the claimant to recover as a secondary victim, he must have suffered a "sudden and unexpected shock" which amounted to "a horrifying event, which violently agitates the mind",' he said.

The judge quoted Judge Hawkesworth QC in *Ward v The Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB) that:

'An event outside the range of human experience, sadly, does not it seems to me encompass the death of a loved one in hospital unless also accompanied by circumstances which were wholly exceptional in some way so as to shock or horrify.'

Judge Mott said: 'What is clear from the authorities is that "shock" in the *Alcock* sense requires something more than what might be described as "shocking" or "horrifying" in ordinary speech.

'It may be for that reason that the word "exceptional" has crept in, not as an addition to the test, but as an explanation that the shocking event must be outside ordinary human experience in the context in which it occurs.

'In ordinary language, what happened to the claimant was "horrifying". He had been waiting for the birth of his second child, what should have been a joyous event, and instead he was told that Benjamin was seriously unwell and might die.

'That would be a nightmare for any parent. But from time to time such things happen, with or without clinical negligence, and hospital staff have to prepare the parents and allow them to see their damaged child. Fortunately it is a rare occurrence...

'The sight of Benjamin in NICU on his first visit must have brought home to the claimant vividly the seriousness of his condition as explained previously by Dr Edmonds. I have no doubt that the claimant is a person especially affected by visual triggers, and with a capacity to imagine and empathise with suffering which is invaluable to him as an actor.

'The agreed psychiatric evidence is that this sight did cause him PTSD. But in my judgment, it was not an objectively shocking and horrifying event in the *Alcock* sense.'

Judge Mott added: 'I have considered whether the additional words of Dr Jones take the case over the threshold. Certainly they added significantly to the level of risk to which the claimant was alerted.

'Had Dr Jones realised that Dr Edmonds was not aware of the latest blood gas readings, and therefore did not fully realise the risk to life, he may have been more cautious about expressing himself as he did.

'But the claimant had the right to know the truth, and Dr Jones tempered his warning with the information that other babies in Benjamin's condition had made a good recovery.

'In my judgment this does not take the case over the threshold. Even taking what the claimant saw and what he was told together, this was not an objectively shocking and horrifying event in the *Alcock* sense.

'As a result the claim must fail on liability.'

Ben Collins QC and Kara Loraine, instructed by Augustines Injury Law, acted for the claimant

Jeremy Hyam QC and Gemma Witherington, instructed by Bevan Brittan, acted for the defendant

ASSISTANCE

AFM Holdings Ltd

Seeking insurer information for AFM Holdings Ltd concerning a mesothelioma claim for the period 1970 to 1981, at which time the company traded as BTU (Maintenance) Ltd.

Documentation suggests that before 1976 the EL Policy was taken out by a sister company MS Rose (Heating) Ltd and included cover for BTU.

MS Rose (Heating) company number is 00523867. There is also a meeting minute that suggests the company may have been covered by Iron Trades Mutual in the 1960s.

Any information or assistance to trace insurer details contact: Helen Blundell / APIL / 3 Alder Court / Rennie Hogg Road / Nottingham / NG2 1RX / email: helen.blundell@apil.org.uk

Beldam Asbestos Co Limited, Hounslow

We are acting for a man who recalled exposure to asbestos when working for Beldam Asbestos Co Limited in Hounslow between approximately 1953 and 1958.

He recalled the company made asbestos products, mostly for ships, including asbestos seals and asbestos rope.

We seek details of the insurers for Beldam Asbestos Co Limited between the years 1953 and 1958.

If you are able to assist regarding the above-named company, please contact:

Mr Ewan Tant / LEIGH DAY / Priory House / 25 St John's Lane / London / EC1M 4LB / DX: 53326 Clerkenwell / 020 7650 1357 / 020 7253 4433 / etant@leighday.co.uk

Compoflex Co Limited / TI (Tube Investments)

I represent the family of Mr Thomas Higgins who succumbed to lung cancer on 2 March 2019.

Mr Higgins was employed by Compoflex Co Limited in the 1960s and 1970s.

Compoflex formed part of the TI (Tube Investments) group of companies.

Compoflex Co Limited was based in an old textile mill named Lumb Mill located in Delph near Oldham.

Mr Higgins' family recall Mr Higgins' work involving the manufacture of flexible hosing / tubing for use in the transfer of chemicals, gas and oil and the family suspect this is where asbestos exposure occurred.

I would be grateful if anyone with information about Lumb Mill or Compoflex Co Limited could make contact via email or telephone as follows:

Mr Michael Wolstencroft / SLATER & GORDON LAWYERS / 58 Mosley Street / Manchester / M2 3HZ / DX: 14340 Manchester 1 / 0161 684 6628 / 0161 383 3636 / michael.wolstencroft@slatergordon.co.uk

H C Atkins / Herbert C Atkins Limited

My client has developed mesothelioma having been exposed to asbestos during employment with Herbert C Atkins Limited, also known as H C Atkins, in the 1960s and 1970s.

The company had its headquarters in Nottingham but traded throughout the North of England.

If you have any information at all regarding this company's insurance history, please contact:

Mr Jordan Bell / SLATER & GORDON LAWYERS / 58 Mosley Street / Manchester / M2 3HZ / DX: 14340 Manchester 1 / 0161 383 3436 / 0161 383 3636 / jordan.bell@slatergordon.co.uk

Lux Lux Limited / Stirling Lingerie Limited Glossop

I am instructed by a claimant who has been recently diagnosed with mesothelioma.

My client was employed by Lux Lux Limited (last trading as Stirling Lingerie Limited) at Howard Town Mill in Glossop from 1975 to 1979 as a machinist.

Howard Town Mill was also occupied at the time by another company named Ritz Manufacturing Co Limited.

I would be grateful if anyone with information about Howard Town Mill or Lux Lux Limited / Stirling Lingerie Limited or Ritz Manufacturing Co Limited could make contact via email or via telephone:

Mr Michael Wolstencroft / SLATER & GORDON LAWYERS / 58 Mosley Street / Manchester / M2 3HZ / DX: 14340 Manchester 1 / 0161 684 6628 / 0161 383 3636 / michael.wolstencroft@slatergordon.co.uk

Schools asbestos exposure claim

We are currently investigating a claim for compensation on behalf of a family whose mother passed away after being diagnosed with mesothelioma.

She worked at the following schools:

Tufnell Park Primary School, Islington, London 1962 – 1968

Holloway County School, Islington, London 1968 - 1970

Jewish Free School, Camden, London 1970/1 – 1971/2

Torriano Infants School, Camden, London 1972 – 1992

Any asbestos exposure witness evidence in relation to similar claims against these schools between the above dates would be greatly appreciated.

Please contact:

Mr Vijay Ganapathy / LEIGH DAY / Priory House / 25 St John's Lane / London / EC1M 4LB / DX: 53326 Clerkenwell / 020 7650 1341 / 020 7253 4433 / vganapathy@leighday.co.uk

THE LAST WORD

A big thank you to all those members who have actively supported our flagship campaign, 'Rebuilding Shattered Lives' (RSL). The support from members and their firms has been unprecedented. I have talked to dozens of members and firm leaders, and meaningful support and encouragement has been universal. The profile of RSL continues to grow, and we are now planning the second phase for an autumn launch. The success shows what can be achieved when - with the right united message and delivery - we work together.

The campaign is clearly about stamping out the myths and misconceptions that continue to haunt our sector. It aims to reassure people that they should not be ashamed about making a claim to help put their life back on track, and it provides a home for stories about real people, giving them a safe place and an effective voice.

Equally though, RSL is a response to years of government interventions that have been misguided and based on half-truths. It aims to put the injured person at the heart of government policy-making.

My resolve for our campaign to succeed in changing hearts and minds was strengthened further on 31 May: 'Do-it-Yourself Claims Day', when an appalling government press statement boasted about the 'over £1 billion savings for motorists' and how the whiplash reforms will put an end to 'greedy opportunism'. Evidently the government is still up for a strong dose of one-sided spin on a bank holiday Monday. It will serve to make many people fear being seen as a fraudster and made to feel guilty for making a claim. This irresponsibly risks reducing the number of genuine claims, leaving injured people to suffer in silence at the cost of the NHS.

'On 31 May... an appalling government press statement boasted about how the whiplash reforms will put an end to "greedy opportunism"'

This insensitive approach will not fool consumers when insurance savings fail to materialise. Interestingly, most independent analysts expect premiums to begin to significantly increase from the third quarter of this year. More so, people injured will be horrified at the low levels of compensation the tariffs provide and the effort required to make a claim. How many, I wonder, will happily embrace the 64-page guidance for using the Official Injury Claim portal?

APIL's dignified stance throughout years of campaigning has been that the reforms would curtail access to justice and lead to widespread under-compensation. This view will stick as we head towards the government review required by 2024. By this time, big insurers will have reported to the Financial Conduct Authority (FCA) where the 'around £35' of savings for motorists have gone. Despite our protests, it will be the government that will assess the impact in 2024 rather than the FCA, which smacks of 'marking your own homework', especially given the stance the government has taken and its willingness to dance to the tune of insurers.

It will always be tough to call for empathy for injured people when faced with the insurer's carrot of premium cuts. But we must all be determined, resolute and resilient. All qualities I see every day in our members!

Mike Benner
Chief executive

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