Kennedys
Legal advice in black and white

20 March 2017

Personal Injury Brief

Welcome to the latest edition of Personal Injury Brief.

Headlines in this edition include:

- Discount rate part two
- Civil justice landscape: “interesting times”
- Legal innovations and the insurance industry
- Striking out for want of prosecution: no scope for delay
- Virtual reality: a personal injury perspective

Please see our market insights article for further details.

As always, we hope you enjoy reading this edition and welcome your feedback.

Rachel Moore

Partner

Market insights

Personal Injury Brief March 2017: market insights

A summary of key developments including the discount rate reduction, review of fixed recoverable costs, rapid resolution and redress scheme for severe birth injury, raising the small claims limit, proposals for transforming the justice system and updated guidance on patient information.

Discount rate reduction

The Lord Chancellor's announcement on 27 February 2017 to reduce the discount rate from 2.5% to minus 0.75% surprised those representing both claimants and defendants. Whilst all parties anticipated it would fall, it was not expected to be a reduction of this magnitude. The last 10 days, since the announcement, has seen a flurry of activity with claimants seeking to withdraw Part 36 Offers and defendants accepting them out of time.

The Lord Chancellor, when making her announcement on 27 February 2017, indicated she would be publishing a further consultation on the discount rate, and in particular, will review the framework under which the rate is set and whether it remains fit for purpose for the future. The significant discount rate reduction may, of course, be short lived with an increase following this consultation. Few anticipate the discount rate remaining at minus 0.75%.

This is subject to the Chancellor not freezing the discount rate at 2.5% until after the Lord Chancellor's consultation.

As we approach 20 March 2017 we explore the following issues now facing those dealing with CAT claims:

- Withdrawal and acceptance of Part 36 Offers
- Impact on CAT claim damages reserves
- How do we deal with Robert v Johnstone?
- Periodical payment orders now only option?
- Can defendants use s1(2) Damages Act 1996 to dis-apply the discount rate in "exceptional" cases?

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Extension of fixed recoverable costs

The Department of Health has published a consultation seeking views on the government's proposal to introduce a mandatory system of fixed recoverable costs (FRC) for clinical negligence claims valued up to £25,000. The consultation will close on 1 May 2017. Meanwhile, Lord Justice Jackson is leading a wider review of FRC to help to inform the government-led consultation to extend FRC to further areas of civil litigation. The terms of reference include consideration of the value of claims to which such a regime should apply. The call for evidence closed on 30 January 2017. Jackson LJ is to submit his report by 31 July 2017. While Sir Rupert is sticking to his £250,000 upper limit, soundings (including from other members of the judiciary) suggest a more modest figure of around £100,000. Realistically, October 2018 seems a likely date for implementation.

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Related item: Fixed recoverable costs: mixed news for defendants
http://www.kennedyslaw.com/article/fixed-recoverable-costs-mixed-news-for-defendants/

Rapid resolution and redress scheme for severe birth injury

The Department of Health has published an open consultation seeking the views on the proposed investigations into severe avoidable birth injury and the support and compensation scheme. The consultation outlines the government's proposal to introduce a Rapid Resolution and Redress (RRR) scheme – as recommended by the 2016 National Maternity Review. The government also intends to use the consultation as a call for further data and evidence, including, in particular, from families affected by serious birth injury, clinicians, patient groups and those involved with the litigation process. The consultation closes on 26 May 2017.

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Reforming the claims process: increase to small claims limit

Justice Secretary Liz Truss has unveiled the Prisons and Courts Bill, which aims to modernise the court system and further enhance the United Kingdom's status as a world-leading centre for dispute resolution. Key measures within the legislation include a new fixed tariff to cap compensation payments for minor injuries arising from a road traffic accident (RTA). The small claims limit for RTA-related claims

will rise to £5,000 and to £2,000 for other personal injury claims. The reforms are expected to be introduced as a package on 1 October 2018.

MPs on the justice select committee have since launched a "short" inquiry into the personal injury reforms contained in the Prisons and Courts Bill, which received its second reading on 20 March 2017. The justice committee has invited written submissions of no more than 3,000 words to address issues including: the definition of whiplash; and the impact of raising the small claims limit to £5,000 for road traffic accident-related whiplash claims.

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Transforming the justice system

The Ministry of Justice has published "Transforming our Justice System", a paper proposing approximately £1 billion of reforms to the justice system to meet the aim of automating and digitising the entire process of civil money claims in the civil courts by 2020. The proposals seek to speed up resolution by replacing paper and post with digital working and to look at options to extend fixed recoverable costs much more widely. The consultation closed on 27 October 2016. Meanwhile, Justice Minister Sir Oliver Heald has promised a review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) by April 2018.

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Confidentiality guidance: good practice in handling patient information

The General Medical Council has published revised guidance on disclosures to support patient care. The updated advice sets out the framework for disclosing personal information, as well as doctors' responsibilities in relation to managing and protecting information – including with regard to sharing personal information with third parties. The updated guidance comes into effect on 25 April 2017.

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Case law

Personal Injury Brief: latest decisions March 2017

A round up of recent court decisions raising issues relating to the out-of-hours response to dangerous defects, surveillance evidence, stage three fixed costs and multi-track claims started in the portal.

The out-of-hours response to dangerous defects
Lee Michael Crawley v Barnsley Metropolitan Borough Council [02.02.17]

The Court of Appeal decides that there has to be some means of responding quickly to complaints from members of the public of serious and dangerous defects in the road.

Decision

The Court of Appeal held: the report made to the local authority on Friday afternoon gave rise to a real risk that the pothole was a Category 1 defect within the meaning of the Well Maintained Highways: Code of Practice.

The defect represented an immediate or imminent hazard which required immediate attention.

The local authority's system failed the s.58 test because, had reasonable steps been taken, whilst the injury may not have been prevented, the reports of potentially serious defects were not being evaluated by anyone with the requisite skills outside of working hours, unless the report came from emergency services.

It is common ground that a lack of resources does not justify a failure to provide a reasonable system. It might be perfectly reasonable to have reduced staff and activity over the weekend. However, there must be some means of responding quickly to complaints from members of the public in relation to serious and dangerous defects.

View our full case review: The out of hours response to dangerous defects
http://www.kennedyslaw.com/article/the-out-of-hours-response-to-dangerous-defects/

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Surveillance evidence requires careful assessment
Hayden v Maidstone and Tunbridge Wells NHS Trust [19.12.16]

The court provided guidance on the relevance of evidence, in this case surveillance evidence, in relation to the claimant's damages claim following an accident at work.

The claimant applied for permission to rely on the evidence of a Mr Jeffrey A Simm, a video evidence analysis consultant, in the form of a witness statement or, in the alternative, permission to rely on his evidence in an expert capacity in the form of a report.

Decision

Whilst Mr Justice Lay acknowledged a degree of inconsistency between the claimant's level of functioning and the pleaded claim, he did not consider this to amount to an attempt to mislead. He commented: "Surveillance evidence is capable of being very compelling but in less clear-cut situations requires carefully parsing and assessment."

View our full case review: Surveillance evidence requires careful assessment
http://www.kennedyslaw.com/casereview/surveillance-evidence-requires-careful-assessment/

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Fixed costs: stage 3 costs where disposal hearing listed
Bird v Acorn Group Ltd [11.11.16]

Rising claims costs seem inevitable following the Court of Appeal's decision to allow stage 3 fixed costs in cases listed for disposal following judgment on admission or in default.

Decision

Following a leapfrog appeal, the Court of Appeal found unanimously for the claimant and upheld the decision of the lower court in awarding the claimant the full stage 3 fixed costs.

View our full case review: Fixed costs: stage 3 costs where disposal hearing listed
http://www.kennedyslaw.com/casereview/fixed-costs-stage-three-costs-where-disposal-hearing-listed/

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Fixed costs: not applicable to multi-track claims started in the portal
Qader and others v Esure Services Ltd [16.11.16]

The Court of Appeal has given its view on the application of fixed costs to multi-track claims that started in the portal. While the decision appears a just one, the route to it is surprising.

Decision

The Court of Appeal found unanimously for the claimant, reversing the decisions of the courts below, even though those decisions were correctly based on the unambiguous rules as they presently stand. The Court of Appeal has found that the rules must be a drafting error and urged the rewriting of them.

The Court of Appeal considered this case together with the appeal in *Khan and another v McGee*, in which it reached the same conclusion.

Read our full case review: Fixed costs: not applicable to multi-track claims started in the portal
http://www.kennedyslaw.com/casereview/fixed-costs-not-applicable-to-multi-track-claims-started-in-the-portal/

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Articles

Impact of Lord Chancellor's dramatic discount rate reduction

The Lord Chancellor's announcement on 27 February 2017 to reduce the discount rate from 2.5% to minus 0.75% surprised those representing both claimants and defendants. Whilst all parties anticipated it would fall, it was not expected to be a reduction of this magnitude. The intervening period, since the announcement, has seen a flurry of activity with claimants seeking to withdraw Part 36 Offers and defendants accepting them out of time.

The Lord Chancellor, when making her announcement on 27 February 2017, indicated that she would be publishing a further consultation on the discount rate, and in particular, will review the framework under which the rate is set and whether it remains fit for purpose for the future. The significant discount rate reduction may yet be short-lived, with an increase following that consultation. Few anticipate the discount rate remaining at minus 0.75%.

To coincide with the new rate becoming effective on 20 March 2017, we explore the following practical issues now facing those dealing with CAT claims:

- Impact on CAT claim damages reserves
- How do we deal with *Robert v Johnstone*?
- Will claimants still opt for periodical payment orders?
- Withdrawal and acceptance of Part 36 Offers
- Can defendants use s1(2) Damages Act 1996 to disapply the discount rate in "exceptional" cases?

Impact on CAT reserves

The change in the discount rate from 2.5% to -0.75% has had a dramatic impact on reserves for nearly all claims where there is a future loss element. However, this change is seen most dramatically in catastrophic injury claims. This is clearly demonstrated by an analysis of the percentage increase in Ogden Table 1 multipliers:

Age	2.5%	-0.75%	Percentage increase
10	34.08	108.32	217.84%
20	32.10	88.96	177.13%
30	29.60	71.43	141.32%
40	26.52	55.66	109.88%
50	22.69	41.44	82.63%
60	18.30	29.19	59.51%
70	13.44	18.85	40.25%

However, these percentage increases do not provide an accurate indication of the increase in the value of the overall claim. In trying to get a sense of the increase of a claim's total value, after applying the new discount rate, a number of variable factors need to be taken into account.

Variable factors include:

- Is the claimant male or female?
- The claimant's age. The younger the claimant, the more dramatic the impact of the rate change is likely to be. A large sample of our cases across all lines of business has indicated that the average age of a claimant where the claim is £1 million plus is 30 – 40.
- Life expectancy of claimant.
- The period from the date of accident to the date of calculation as this increases the total value of past losses.
- The percentage of future losses to the overall claim. Where a claimant falls within the average age bracket of 30 - 40 our cases indicate that the percentage of future losses to the overall claim is 80 – 90%.

In view of the number of variables there is 'no rule of thumb' which can be applied to assess the overall impact to the total value of a claim due to the increase in the discount rate. We will refine our analysis of the impact of the new rate as time progresses. In the meantime, we set out below an early 'broad-brush' assessment

of the impact of a -0.75% discount rate on a £5 million claim of a claimant with normal life expectancy:

Age	% increase in value of claim	Revised total
10 – 20	100 – 200%	£10m - £15m
20 – 30	80%	£9m
30 – 40	75%	£8.75m
40 – 50	70%	£8.25m
60 - 70	40 – 50%	£6m - £7.5m

Roberts v Johnstone

Since 1989, the *Roberts v. Johnstone* (*R v J*) formula has provided a pragmatic method of calculating damages for a seriously injured claimant's increased accommodation requirements without gifting a windfall to the beneficiaries of the estate on death.

The *R v J* formula involves an assumed rate of return being applied to the additional capital sum required to purchase a larger property and for this figure to be multiplied by the claimant's life expectancy multiplier.

The assumed rate of return set by the Court of Appeal in *R v J* [1989] was 2%. Subsequently, the House of Lords in *Wells v Wells* [1998], approving the *R v J* approach, increased the rate to match the net return from ILGS, then 3%. In 2001, under power given to the Lord Chancellor in the Damages Act 1996, this was reduced to 2.5% until the current drastic revision to -0.75% by the current Lord Chancellor.

Whereas this new rate massively increases the level of awards for future losses, a negative discount rate will extinguish the *R v J* element of the accommodation award as whatever the additional capital sum required, the application of a negative discount rate will produce a negative multiplicand to which the lifetime multiplier is to be applied, even if that life time multiplier itself will have increased as a result of the new discount rate.

A claimant will still receive compensation for adaptation/building costs and other incidental items but the compensation for the lost income and investment return under *R v J* will now be nil.

It would seem that, unwittingly, the Lord Chancellor has dealt the death knell for the *R v J* formula, something claimant lawyers have long been campaigning for because of perceived unfairness in particular for claimants with short life expectation.

A new approach is inevitable as the negative discount rate makes the *R v J* formula unworkable and it is unlikely to withstand judicial challenge before the Court of Appeal or Supreme Court absent further intervention by the Lord Chancellor and legislation.

What will take its place is speculative. Over recent years many alternatives have been proposed all with advantages and disadvantages including:

- Full funding of capital purchase subject to charge over the property (one issue will be whether the charge is limited to return of capital or capital plus capital gain).

- Lump sum to cover interest element of mortgage (assuming lenders available).

- Adapting PPOs and indexation to cover interest on mortgage.

- Actual notional rental costs (assuming suitable property and adaptation available).

- Insurers purchasing property and granting life interest to claimants at a peppercorn rent (there has been discussion about this in recent years although nothing more tangible).

What is clear is that innovative thinking is now urgently required by either government, parliament, judiciary, insurers and lawyers or any combination thereof to remedy this unintended consequence of the negative discount rate.

In the meantime negotiating the accommodation head of loss will require pragmatism on both sides which of course was the intention behind the *R v J* formula in the first place! For the present, *R v J* remains binding authority and defendants can argue there is no loss as with a negative discount rate, no income is generated on the tied up capital.

Periodical payment orders

Parties to CAT litigation have long been familiar with periodical payment orders (PPOs) as an alternative form of award, which has historically been more popular in the healthcare than general liability market. Defendants can circumvent the impact of the discount reduction by actively promoting use of PPOs and paying future losses annually, index linked to an inflationary index, rather than paying a lump sum award calculated using a minus 0.75% multiplier. Rather than limiting

periodical payments to care and case management (index linked to ASHE 6115) as is the general practice, PPOs could be extended and used more regularly to address future loss of earnings (index linked to ASHE Median) and various therapies and non-earnings related future losses (index linked to RPI). The Practice Direction supplementing CPR 41 expressly provides that the court must take into account the defendant's preferred form of award, not just the claimant's. It is therefore feasible that the parties could proceed to a contested hearing regarding the most suitable form of award, with the defendant arguing the advantages of PPOs in the circumstances of the case.

Some commentators have suggested claimants may not be interested in PPOs following the discount rate reduction. Whilst this may be the case in adult CAT claims we consider those child claimants with long life expectancies will remain committed to PPOs, particularly for the largest head of loss, care and case management. It is a brave claimant advisor who ignores the clear advantages of PPOs.

Jennifer Stone, Director at Nestor and an independent financial advisor who specialises in advising claimants on mode of award of any high value claim and thereafter managing the lump sum of any high value settlement says:

> "Although a discount rate reduction makes a lump sum award more attractive, on the face of it, all the advantages of periodical payments continue to apply.
>
> Comparing a future loss lump sum (albeit bigger using -0.75% compared to 2.5% discount rate) versus earnings-linked PPOs is still a complex decision, and one which will affect the lives of personal injury claimants for many years to come. Time for adequate consideration at the end of the litigation process is, in our view, just as vital as it has always been.
>
> The fact that future loss lump sums will be greater in value does not in itself allow those advising personal injury claimants to give a cursory glance towards a PPO then disregard it. There are, and always will continue to be, significant advantages for a claimant to have part of their future loss damages paid by way of a PPO.
>
> As regards the reduction, the assumptions used when the Lord Chancellor made her decision still remain only assumptions. The new rate ignores mortality, and lump sum awards cannot match the lifelong, tax free, inflation proofed certainty of a PPO."

Time will tell over the next few months whether the discount rate reduction has changed perception of PPOs for both claimants and defendants.

Part 36 offers

Our experience has been that, for claims with a value over £1 million, we do not often receive Part 36 offers save on liability. It is frustrating for defendants that claimants show a marked reluctance to put a value on their claim until very close to trial despite the advantages that they could gain from an early and well-judged Part 36. For greater insight into how the change in the discount rate has impacted upon claims and behaviours, we may see trends more clearly emerging on cases valued between £250,000 and £1 million.

We can report that, within that value band, since the announcement we have seen a number of Part 36 offers withdrawn before the expiration of the 21 days. In some no new Part 36 offer has been made whereas in others an increased offer reflecting the % change has replaced it.

In cases requiring court approval settled at JSM's / mediations prior to the announcement, we have experience of opposing counsel advising that he or she can no longer recommend the agreed figure and renegotiating the settlement. This has led to some significant increases from the initial figure.

A lot of the initial commentary about the practical implications of the rate change has rightly urged parties to review Part 36 offers made under the old discount rate. The ability of claimants to quickly withdraw such offers or defendants to quickly accept is of course regulated by Part 36 which operates as a self-contained code.

Accepting a Part 36 offer out of time

If a Part 36 offer is accepted beyond the 21 day relevant period (accepted "out of time"), unless the parties are able to reach an agreement in respect of liability for costs, the parties will need to apply for a hearing and have the court decide on the issue.

Where a Part 36 offer is accepted out of time, it is open to the offeror to argue that their costs incurred after the 21 day relevant period expired should be paid on the indemnity basis, rather than on the standard basis. For defendants accepting claimant offers, any additional costs liability is likely to represent a fraction of the damages saving if settling on the basis of the old discount rate. This opportunity is in any event likely to be short-lived as claimants gradually withdraw old offers representing an under-valuation compared to the new rate.

Accepting a withdrawn Part 36 offer within the "relevant period"

This is governed by CPR 36.10 (1) and (2) which makes it clear that where the claimant makes a valid Part 36 offer and, within the "relevant period" (usually 21 days or longer), then serves notice of withdrawal, the defendant may nevertheless serve a notice of acceptance of the offer within the same period, but the onus is

then on the claimant to apply to the court for permission to withdraw within seven days. CPR 36.10 (3) comes into play which is relevant to the Lord Chancellor's announcement. The court will give permission to withdraw if it is "satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission". In the current climate that may be a relatively easy condition to satisfy considering the financial impact of the rate change.

Damages Act exception from applying discount rate

Subsection 1(2) of the 1996 Act expressly provides that a court may take a different rate of return into account "if any party to the proceedings shows that it is more appropriate in the case in question". That provision has previously been invoked by claimants in common law jurisdictions applying the law of England and Wales, where the Lord Chancellor's discount rate would lead to under-compensation based on local economics and inflation. The best-known example is probably *Helmot v Simon* [2012] where the Privy Council endorsed Guernsey rates of -1.5% for earnings-related losses and 0.5% for other future heads. That exception could, alternatively, now be argued by defendants in cases proceeding in England and Wales but where the claimant is foreign-domiciled and local performance of index-linked gilts generates a higher net return than -0.75%. For example, Kennedys is currently defending cases involving claimants injured in the United Kingdom who have since relocated to the United States of America where the local rate is 2.5% or higher.

Conclusions

The arguable fallacy of the current approach is that all claimants are assumed to select entirely risk-free investments generating the lowest returns, when a significant proportion of them benefit from financial advice, often provided by the investment arms of the same law firm, and achieve net returns from a balanced portfolio exceeding the old rate of 2.5%. The rate methodology is to be examined during the further consultation and it is to be hoped that empirical evidence is collected regarding actual investment products and behaviours, in order to ensure a more realistic approach to setting the rate in future. If the methodology remains based on the risk-free principle, a creative solution for the government, looking at the projected cost to public sector defendants, would be to create a dedicated investment vehicle for personal injury claimants, underwritten by the treasury and offering a risk-free return of more than -0.75% net.

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Related item: Discount rate
http://www.kennedyslaw.com/discountrate/

Civil justice landscape: "interesting times"

The dust appears to have settled slightly on the government's response last month on reforming the whiplash claims process. Alternatively, it might be that the dust has been blown away by the discount rate bomb dropped on 27 February. Given the interlude, we highlight some of the immediate consequences of the whiplash response that will have an impact between now and October 2018.

Perhaps more in the past fortnight than ever before has the claimant and defendant insurance sector been living in "interesting times". The "interesting times" quotation seems to range from an ancient Chinese curse, to Robert F Kennedy's famed speech of 1966, and on to the title of the Seventh Discworld Novel by Terry Pratchet. After the developments of the past two weeks, we suspect many who work in the injury space of civil justice are unsure if we have been cursed or are living in a fantasy world.

By way of a quick recap – ministers have made a number of policy decisions, including:

- The introduction of a tariff of fixed compensation for pain, suffering and loss of amenity (PSLA) for claims with an injury duration of between zero and 24 months.

- Providing the judiciary with the facility to both decrease the amount awarded under the tariff in cases where there may be contributory negligence, or to increase the award (with increases capped at no more than 20%) in exceptional circumstances.

- Introducing a ban on both the offering and requesting of offers to settle claims without medical evidence.

- Increasing the small claims limit for RTA related personal injury claims to £5,000.

- Increasing the small claims limit for all other types of personal injury claim to £2,000.

So what will the immediate consequences of these policy decisions be on whiplash reform?

A rush to litigate

One of the inevitable consequences of the reforms will be a drive to litigation in the coming 19-months (until October 2018). Claimant law firms will seek to maximise their profits under the current regime advancing claims through the

online claims Portal to Stage 3 quickly and seeking to drop claims out of the Portal to achieve increased costs.

The gloves are off

If a claimant firm decides to exit the motor market will their behaviour change? Will it become even more aggressive given they have no concerns about future relationships?

Behavioural changes

One immediate and obvious solution for those in the claimant market not operating under a damages based agreement (DBA) will be to move immediately to a DBA. Those who do so in haste may have retainer issues insurers could exploit. However, the likelihood is that insurers will see DBA based behaviours in all claimant firms moving forward. DBA behaviours can be summarised as the claimant law firm negotiating in £100 units seemingly driven by the fact for every £100 they get from the insurer they boost their costs figure by £25.

Pre-med offers not to be recommended

Will the claimant law firm be advising their client that the pre-medical offer made by the defendant is shortly to be banned and as such should not be accepted? Even those who had previously been content to advise acceptance may now be more reluctant. Human nature being what it is would suggest that if something is to be 'banned', it is bad for us. Therefore, will we see an immediate decrease in the acceptance rate of pre-medical offers?

Know your opponent (KYO)

While KYO is a well advanced tool for many insurers, the market will undoubtedly change quickly in the coming months. If the doomsayers in the claimant fraternity are correct, established players may disappear.

More concerning will be the rise of the claims management companies. Rumours abound that those with a background in PPI claims may seize an opportunity in the claims sector.

Will some claimant firms seek to secure their future by traditional mergers? Will they 'merge' with credit hire providers, physiotherapy and treatment providers or medical agencies?

Unreasonable behaviour arguments on the increase in small claims

Our motor teams have noted a number of larger claimant firms almost habitually making unreasonable behaviour costs applications in small claims hearings in an obvious attempt to increase their recoverable costs. In the most recent attempt

that was defeated, the claimant firm served a costs schedule to support their application of £2,500. Will this become the new norm?

There is no sanction against the claimant for making the application and failing, so from their perspective – why not? If they run ten such applications and succeed in one, it is still a windfall for them.

The coming months will surely see the claimant firms use this time to refine their arguments in this area.

What is certain is that we do live in interesting times and that the claimant firms will undoubtedly turn their minds to maximising the costs.

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Related item: Fixed costs: two un-appealing decisions for defendants

http://www.kennedyslaw.com/article/fixed-costs-two-un-appealing-decisions-for-defendants/

Legal innovations and the insurance industry

There has been a profound shift in the provision and delivery of legal services to the insurance industry within the last ten years. The introduction of government driven, online claims portals and medical reporting criteria for the majority of personal injury cases has forced a reduction in the proportion of those claims heading into litigation.

Such a seismic shift should have seen a correspondingly dramatic change in the way that lawyers offer legal services to the insurance industry.

In spite of exciting opportunities to modernise, many lawyers still seek to differentiate product defiantly and depressingly purely on price, notwithstanding that there are a plethora of new technologies that lawyers should be investigating for their clients' benefit. Artificial Intelligence and its application to the delivery of legal services; and insurers' push towards solutions built on coding, such as Blockchain, are but two possibilities.

In 2009, I wrote an article focused on innovation. I argued then that clients regard the instruction of their own lawyers as 'a distress purchase'. Lawyers who have continued to set their pricing models based on ever-increasing claims volumes or greater levels of attritional work are, therefore, rather missing the point, and missing it by some distance. As a consequence, they face in 2017, a very significant

risk in the wake of the current whiplash consultation, which promises to eradicate huge swathes of the litigation upon which the solvency of such businesses depends.

The intervening years

In 2009, external investment in law firms was coming. It's moot whether such investment was a success for clients. Very little external investment appears to have been truly directed at innovation for the benefit of clients, rather than for the benefit of the lawyers receiving that investment.

Claims numbers have continued to rise, and litigation numbers generally seem to have stabilised, often for the wrong reasons. As one client has recently said to me, "there will always be such a thing as good litigation". However, I understand that some lawyers require clients to guarantee litigation numbers. Such clients are compelled to become addicted to their lawyers, while those same lawyers race to the bottom on service and price.

To offer value, innovative legal solutions for the insurance industry must help claims teams to reduce their reliance on lawyers and to break the addiction.

The way forward?

Therefore, a modern law firm must offer innovative ways to cure clients of their traditional addiction on lawyers.

Insurers are now developing their thinking far more quickly than the lawyers who profess to advise them. For example, On-Demand Insurance built on AI coding and the work being carried out by insurers, based around Blockchain, should also be changing lawyers' understanding of the insurance market.

LJ Briggs, in his report on the reform of the structure of civil courts, has proposed a world in which citizens can secure justice through innovation, technology, and a greatly reduced reliance on the legal profession. Rather than fighting that inevitability, how much better would it be for the legal profession to create the innovations that ensure access to justice for the disadvantaged?

I work with a group of visionary people who have designed a range of products to meet a 21st century insurance market that empowers clients with the means to make their own legal decisions. I have also seen the future in the form of KLAiM, a virtual lawyer that does away with insurance clients' need to instruct a lawyer at all in many injury cases.

Such innovations support the core principle that legal innovation must help clients only to use a lawyer when they really need one.

This article was first published by Insurance Post on 6 January 2017.

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Related items:
A toolkit to support every step of the claims journey
http://www.kennedyslaw.com/el/
Innovation – the worm that is still turning? (17 September 2015)
http://www.kennedyslaw.com/article/innovation-the-worm-that-is-still-turning/

Striking out for want of prosecution: no scope for delay

It is back - the ancient jurisdiction to strike out a civil claim for want of prosecution, enshrined in the old Rules of Court and seemingly removed on 26 April 1999 with the arrival of the Civil Procedure Rules (CPR).

The underlying principle was that if a plaintiff (now claimant) allowed an issued action to become dormant, the defendant could pounce and seek dismissal of the claim. There was no obligation upon the defendant to prompt the other side. Indeed, 'The White Book ' explicitly recognised the right to 'let sleeping dogs lie'. Typically, the defendant would make noises about memories fading and the diminished ability to secure a fair trial.

The Empire Strikes Back

Fast forward to today and striking out for want of prosecution (SOWP) is back with a vengeance. This raises a risk for claimants and a corresponding opportunity for defendants. There was an oblique reference to the concept in *Denton and Others v TH White* [2014] [http://www.kennedyslaw.com/casereview/correctapproachtomitchell/] where Lord Justice Jackson succinctly stated: "What litigants need is finality, not procrastination."

Indeed, the appeal in Denton was allowed because, by allowing in late witness statements, the judge had thrown away a ten-day fixture which in turn caused a further 17 months of delay in listing the hearing. This last point does not appear in the transcript.

In *Solland International v Clifford Harris & Co* [2015], the claimant had failed to file a listing questionnaire due 31 months earlier. The defendant applied for a strike out and in response, the claimant then served the questionnaire and sought relief from sanctions. The court held that no automatic sanction for this breach existed. Instead, the court had the ability to make whatever order it felt appropriate. The chronic failure to progress the matter was evidence of a dilatory

attitude which was unacceptable, which constituted an abuse of process; striking out was therefore warranted under CPR3.4(2) and the professional negligence claim put at £4 million against a firm of solicitors was dismissed. An appeal upheld the decision.

Master Matthews has recently delivered a staggeringly comprehensive analysis of the law in *Phelps v Button* [2016]. He draws upon decisions going back to 1969 in another strike out application. The novelty of this case is that the claimant had won insofar as that he had obtained a liability judgment after a hearing in February 2007. Directions were then given for the determination of quantum. That order was not honoured and so a further order to similar effect was made September 2010. That too went unfulfilled.

Unlucky for some

In October 2016, the action came before Master Matthews; some 13 years on from the commencement of proceedings. There were two applications before the court: the claimant wanted the matter listed for what it described as a quantum hearing and the defendant retaliated with an application to strike out for abuse.

A core observation made by the Master, drawing upon a series of authorities, is that the abuse of process concept is not engaged solely on account of delay in the prosecution of a claim; there must be more. He found it. The unexplained and unacceptable delay meant that the quality of a trial today would be greatly diminished compared with one that ought rightly to have been concluded in perhaps 2008:

"...defendants are still entitled to all the usual advantages of a proper trial in the English sense, and that includes pre-trial disclosure and the ability to obtain documents where relevant from third parties".

The suggestion that the defendant contributed to the delay was swept aside. It is the duty of the claimant, who launched the litigation, to conclude proceedings in a timely fashion.

One further observation from Phelps ought to be noted by everyone who conducts litigation: "We no longer have the luxury of being able to schedule repeat performances of hearings because the parties are not ready. It is a much harder game to play".

Indeed, the ethos of litigation practice has been transformed in recent years. That, for example, is why late amendments to pleadings are now nigh impossible to secure. This was explained with her customary clarity by Mrs Justice Carr in *Su-Ling v Goldman Sachs International* [2015], a decision that Jackson LJ believes to be one of the most important of that year and is compulsory reading for all.

The unsurprising upshot of Phelps was that a case which had been won, subject only to proof of recoverable damages, was lost and the culpable defendant walked away.

Get on up

A claimant who launches litigation is now more than ever before expected to get on with it. Delay clogs the arteries of the court system and is not going to be tolerated.

This approach explains why the Court of Appeal refused to grant relief in *Jamadar v Bradford Teaching Hospitals NHS Trust* [2016]; a clinical negligence action worth approximately £3 million, where liability was admitted. Those advising the claimant were uncertain about track allocation. Consequently, they failed to file a costs management budget. They ought to have done. Failure is punished by CPR 3.14, which provides that a party that does not file is taken to have lodged one claiming no costs whatsoever save for the outlay of court fees.

In a tart judgment, the court was unforgiving. A claim of such magnitude with a 'five a side' for experts was achingly multi-track material and a budget was mandatory. On appeal, Jackson LJ was perturbed at the idea of directions and costs being dealt with at different hearings and this clearly influenced the unanimous decision of the Court of Appeal. Time would be wasted.

The overriding message is clear: get on or risk being thrown out.

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Related item: Common sense restored: Mitchell misunderstood and misapplied
http://www.kennedyslaw.com/casereview/correctapproachtomitchell/

Virtual reality: a personal injury perspective

The advent of new technologies often coincides with an increased interest in the legal ramifications of the use and misuse of those emerging technologies, with drones being of major interest in the last couple of years.

With virtual reality (VR) glasses being one of the bestselling new technologies of recent times, we examine the risks of using VR headsets and the relevant legal issues surrounding those risks.

Devices

VR devices for sale include headsets that position mobile phones within a couple of inches of eyes. Other devices have specifically designed headsets to project images into the eyes of the viewer. Users are able to download apps and videos to the mobile phones, and then view these through a special headset in order to play games or watch a 3D show as if they were actually there. Examples of such videos include going on safari or riding on a roller coaster.

However, the uses for VR are not limited to games and videos. Businesses in the education, military, property and healthcare areas are looking to incorporate the use of such tools and realise the opportunity of incorporating this emerging technology.

Risks

The developers of many VR products are aware that their products are accompanied with the potential to cause injury, with the maker of one of the best-selling VR devices having a health and safety 'Warning Notice' on its website, drawing attention to:

- Seizures
- Potential tripping and movement hazards
- Repetitive stress injury
    - Danger of; electrical shock, skin irritation, contagious conditions, loss of awareness, eye strains, altered vision, dizziness, and disorientation;

along with numerous other symptoms.

Although the majority of these injuries are likely to be short term, there are ongoing concerns over the long term damage caused by the use of VR.

With companies often under pressure to rush to push out products to compete with devices already on the market, often the long term consequences of using such devices cannot be truly assessed before being released to the general public.

It is common knowledge that use of computer screens can strain eyes, making eye conditions worse. We reported on the toxic risk relating to blue LEDs within our "Emerging risks report 2016 [http://sites.kennedys.vuturevx.com/6/3252/downloads/emerging-risks-report-2016-(kennedys).pdf]".

With ongoing concerns about the use of and impact of mobile phones on the health of users, there is a potential that now VR devices are becoming more commonplace in the public domain that such long term damage may become more widespread.

Liability issues

The question of importance to potential clients is: if injuries and illness occur as a result of using VR devices, who would be to blame?

- If it is the actual headset which has caused injury, there may be product liability issues which will require manufactures to consider whether the actual design of the device was safe.
- The developers of smart phone applications that accompany VR devices need to be aware that they may be potentially at risk of being named as defendants in these types of claim.
- There are occupier's liability concerns, for example, if an injury is caused on either public or private property, then the owner of the property may face a risk of a claim against them.

We are aware that claimant solicitors firms are starting to become aware for the potential of these claims, with a number of them already advertising specific assistance in relation to claims due to using VR.

Expectations

Manufacturers and developers need to ensure that users of products are well aware of the risks and design devices to ensure protection against those risks.

Insurers and underwriters for those companies need to be made aware of the potential for personal injury claims, and the concerns and risks involved with VR products. Companies that are considering the use of VR within the workplace need to consider the risk to employees and make sure suitable training is provided.

This is a developing area of law, and with the sale of VR devices very likely to continue to increase in the future, we expect that the number of personal injury claims relating to VR will increase also.

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