

MB NEWS

PERSONAL INJURY & CLINICAL NEGLIGENCE NEWSLETTER

Welcome to the Spring Edition of our newsletter. This quarter, we had hoped to bring you news of the Ministry of Justice's plans to reform the system for making personal injury claims.

They were expected to have been announced earlier on in the year. Unfortunately, an announcement is not now expected until the end of May and the deadline may well be extended further:

This delay has been met with frustration by many in the industry with claimant and defendant lobby groups accusing each other of deliberately holding up the process. This is a shame as now is a good time for all of the stakeholders in the process to work together to make the system better for everyone.

Also in the news is the increasing practice of "Third Party Capture", where insurance companies

approach claimants directly shortly after an accident and make an offer of compensation before the claimant has representation. This practice has been widely criticised as there is a perception that cases may well be settled for less than their true value. There have been calls for regulation of this practice or even for it to be banned altogether.

This edition we have an article from Timothy Spring, our Head of Clinical Negligence, on the new NHS complaints procedure and one from Damian Horan, our Insurance Division Head, on periodical payments and how we used them to achieve a good result for one of our clients. We also have a costs update

and a round up of recent cases of note.

We hope you enjoy the newsletter and look forward to hearing from you with any feedback you may have.

Sarah Stanton
Editor & Senior Solicitor

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Draftsmen – the changing role Poacher ‘and’ Gamekeeper?

Sarah Taylor-Moore – Partner tms Legal Costs Consultants

Traditionally, the Costs Draftsman's role didn't really extend much beyond staggering out of a solicitors' office with boxes of files and returning (usually some months later!) with a 'red line' bill. That was the sum total of their involvement in a case – apart from the rare occasion when the matter might proceed to 'taxation'.

Perhaps regrettably, those occasions are no longer rare. The whole costs process, for both paying and receiving parties, has become extremely complex and continues to be the subject of much debate, speculation and change.

Clients now require a much faster, and also broader, service from their draftsmen. They should be able to call on their expertise to advise, for example, on the interpretation and enforceability of Terms and Conditions, compliance with the

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Code of Conduct, funding/retainer documentation, as well as many other aspects directly, and also indirectly, associated with costs.

Similarly, during the course of a claim there will be occasions when fee earners and claims handlers really should seek specialist advice, particularly with regard to the recoverability of certain elements of work or disbursements and the interpretation of interlocutory orders, where there is much confusion. A draftsman's involvement in the preparation of costs estimates at key stages is now crucial, as has been proved by the following cases.

Tribe v. South Down Gliding Club and *Master Cigars Direct Ltd. v. Withers LLP* highlight, for both claimant and defendant, how critical it is to get costs estimates right – particularly as a case gets closer to trial. Weighing or measuring the thickness of the file to assess its value, or relying on a ledger printout, could be financial suicide! It is now simply not enough for draftsmen to just be conversant with costs case law. They must keep abreast of associated legislative and statutory changes. Currently, for example, topical items under review are the suggested extension of the personal injury limitation period, the proposals to reduce costs in lengthy High Court trials, the (delayed) Ministry of Justice reforms to the personal injury claims process and the decision in

Willis v. Nicholson. This case demonstrated that it is unlikely that the judiciary will provide guidance on costs capping, which means a possible revision of the CPR via the Rules Committee. A Working Party is currently considering this issue.

Now, more than ever, paying parties need to rely on qualified costs specialists in order to limit their liability. tms was possibly the first costs drafting practice to be retained by a major insurer; assuming the role of 'poacher turned gamekeeper' and is now one of the few with an ability to go on the court record.

Satellite litigation has provoked numerous changes to both case law and legislation. Challenges to methods of funding, principally Conditional Fee Agreements (CFAs), continue to dominate the scene. Whilst the courts appear to be less inclined to accept technical challenges, paying parties have been assisted by some recent decisions (*Andrews v. Harrison Taylor*; *Bevan v. Power Panels* and *Utting v. McBain*) where submissions concerning breaches of Regulations 3 and 4 (now revoked) were successful and the CFAs deemed unenforceable. Interestingly, the recent case of *Jones v. Wrexham* also supported this line of thinking – although found for the claimant (who argued protection from Regulation 4 by virtue of a 'CFA lite'). It is essential that draftsmen keep abreast of decisions such as these and,

of course, possess the skills and knowledge to identify other weaknesses in the opponent's claim.

Costs consultants, like the rest of the legal profession, must be commercially aware. New markets demand having management systems in place. Both Moore Blatch and tms continue to invest in training and technology, to ensure regulation compliance and the effective implementation of policies and procedures. This has facilitated a seamless integration between the two organisations. The development and tailoring for tms of a specialised Case Management System not only ensures compliance with agreed service levels, but also facilitates self-assessment and the provision of detailed statistical and financial information. Moore Blatch has the comfort of being able to monitor file turnaround times (now measured in days rather than months!) and, most importantly, keep a finger on the pulse regarding work in progress and the control of fee income. Regrettably, despite all the modern technology, we draftsmen still have to stagger around with boxes of files – some things don't change!

More detailed information on the above cases, and others, are posted on the tms website at www.t-ms.co.uk

How to make a complaint about the NHS

Timothy Spring, Head of Clinical Negligence.

If you are unhappy about the treatment or service you have received from your GP, or at an NHS Hospital, you are entitled to make a complaint, have it looked in to and receive a response.

Short of making a formal complaint a concern about treatment should be raised directly with your treating doctor; and a concern about service generally can be raised with the Patient Advice and Liaison Service (PALS) established in every NHS Trust and Primary Care Trust. PALS are not part of the complaints procedure itself, but can help in resolving concerns informally and give detailed advice about the NHS Complaints Procedure and the availability of independent complaints advocacy services.

For more serious concerns requiring detailed investigation and the learning of lessons, the more formal complaints procedure is the route to take. In the first instance, the complaint should be directed to the healthcare professional concerned. If the complaint is serious, however, it may be appropriate to make the complaint in writing to the Chief Executive. Complaints should be made within 6 months of the incident although there is discretion to extend the time limit.

A reply should be received within 10 working days from a Primary Care Trust, and about 25 working days from the Chief Executive of an NHS Trust.

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Complaints Procedure – What Is New In 2009?

Until April 2009 we have a three stage process, local resolution as described above, but if you are unhappy about the response to your complaint, you can ask the Healthcare Commission for an "independent review" of your complaint. The Healthcare Commission is an independent body established to provide improvements in healthcare.

If you remain unhappy about your complaint after local resolution and an independent review, then you can embark on the third stage and involve the Health Service Ombudsman.

These arrangements were established in July 2006 replacing a system whereby the so called independent review stage had hitherto been handled by the NHS body being complained about, clearly not a process to which the word "independent" could truly apply.

Between July 2006 and January 2008 the Healthcare Commission received 27,000 requests for an independent review.

The top five issues complained about were, safe clinical practice, communication with patients, effective medical practice and finally the overall patient experience which could include ward cleanliness, concerns about car parking and the handling of complaints itself.

From April 2009 the three stage procedure becomes a two stage procedure.

From April 2009 there will be a simpler two stage system with the removal of the second stage review by the Healthcare Commission.

How to **make a complaint** about the NHS

The change to the two stage system will, in the view of Anne Abraham the Parliamentary and Health Service Ombudsman, make no difference to her basic role, but will put it into sharper focus and give it greater prominence.

From a patient's point of view, the process should be simpler and less drawn out. Once local resolution has been completed, direct access to the Ombudsman who is completely independent of the NHS and of Government, can be achieved.

From the Ombudsman's perspective it enables a direct dialogue with the NHS about the resolution of complaints and the lessons to be learned.

In the view of the Ombudsman a two stage system has worked well in Scotland and will do so in England.

Do I Need Legal Advice To Make A Complaint

The short answer is no, but there are circumstances where early legal advice can be a great help.

Help in making and formulating a complaint can be provided by PALS, Citizens Advice Bureau and the Independent Complaints and Advocacy Service (ICAS), but where sub-standard care has resulted in injury the Moore Blatch clinical negligence team can provide free advice. Our team includes three solicitors with more than 30 years collective experience of investigating serious medical accidents for the NHS. Our team also includes lawyers qualified in the three major healthcare disciplines of medicine, nursing and midwifery. A well crafted letter of complaint may not just result in clear answers, it may also take you a long way down the road to securing appropriate compensation if that is due.

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Final Tips

Insist on a written reply to your letter of complaint. You may be offered a meeting instead, but the problem with meetings is that everyone can leave the meeting with a different idea as to what has been agreed. Meetings are good opportunities for a dialogue and for questions to be put, so attend one if offered if you have the confidence to do so. Even if you would agree to a meeting, you can still ask for a written reply in addition so that you have something to reflect upon at home with your family and whoever is supporting and advising you. To prepare a written response will involve obtaining written input from the clinicians and staff concerned with your complaint, and should it transpire that you do have a legal claim, your legal advisor can obtain a copy of the complaints file in which these documents will be kept.

Do not think that your complaint is unimportant. It is, not just to you but for all users of the NHS, since voicing concerns and complaints enables the NHS to learn and improve.

A medical negligence claim may involve proving a large number of facts which going down the complaint route may establish beyond doubt. If you attend a meeting, keep your own note. If you are not able to do this at the time, prepare one, before your memory fades, immediately after to record the things that were said, so that this may be compared and contrasted with any subsequent written reply.

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Case/Quantum Digest and Regulations Update

Case/Quantum Digest

Welsh Ambulance Services NHS Trust & Anor v Jennifer Mary Williams [2008] EWCA Civ 81

Following the death of a successful family businessman, the wife of the deceased (on behalf of herself and her adult children) bought a claim for damages for the loss of generated income and services under the Fatal Accidents Act 1976.

Mr Williams' death had been caused by an ambulance driver who had been negligently driving an ambulance whilst in the course of his employment with the Defendant. Liability was admitted for the accident.

Mr Williams had established a family business in which he, his wife and their eldest children were equal partners. The Court was told that the family business had grown because of Mr Williams' drive, energy and flair. However, since his death the children had taken over the role of their father so successfully that the rate of the growth of the business was the same, if not better, than before.

There was an issue as to whether the profits that were attributable to the work carried out by the children should be taken into account when assessing their loss. Mrs Williams argued that their services should not

At the first instance, the Court agreed with Mrs Williams and found that the family should be compensated for the cost of replacing the services rendered by

Mr Williams and they were awarded just over £1.7 million with interest.

The Defendant appealed on the basis that there was an issue with regards to whether the Judge had erred in law in finding that there was any dependency at all. It was argued that the family were in a similar financial position after Mr Williams' death and therefore the award should be substantially reduced.

Held
The Court of Appeal dismissed the appeal.

It was found that Mrs Williams and her children had lost the benefit of the value of Mr Williams' labour and services as a 'wealth creator' and the Judge had been correct to value those services on the open market.

Mr Williams would have gone on creating wealth for potentially another 30 years. As his wife and children had played no significant role in initially creating that wealth, the continuing success of the business due to the children's subsequent efforts was irrelevant.

The crucial point was the fact that Mrs Williams and her children had lost a valuable dependency as a result of his death. Furthermore, a dependant could not by his or her own conduct after the death, impact on or affect the value of the dependency as it stood at the time of the death.

Evans v Kosmar Villa Holiday Plc [2007] EWCA Civ 1003

The Claimant 'E' was 17 years of age when he went on holiday with a large group of friends to a holiday

complex in Corfu.

The complex was independently owned by a Greek company but the Defendant had exclusive use of the complex for its customers.

In the very early hours of the morning, E dived into the shallow end of the swimming pool and sustained serious head injuries which resulted in incomplete tetraplegia. There were no "no diving" signs erected to warn visitors that the pool was unsafe to dive into.

E brought an action under the Package Travel, Package Holidays and Package Tour (PTHT) Regulations 1992 reg.15 citing that there had been an improper performance of the holiday contract.

This was on the grounds that there was an implied term within the holiday contract which provided that reasonable skill and care would be exercised in the provision of facilities at the complex. This included the use of the swimming pool and there should have been signage to indicate that the pool was unsafe to use for the purposes of diving.

At first instance the Judge held that the Defendant was in breach of its

contractual duty of care and therefore it was liable under the PTHT Regulations 1992 reg.15 for the improper performance of the holiday contract, however; the Judge also found E to be 50 per cent contributory negligent for his own actions. The Defendant appealed on the grounds that diving into a shallow end or unknown depth of a swimming pool was an obvious risk and one which the Claimant knew about (on the evidence which had already been presented to the Court) and was able to assess for himself without the need for signage.

Held
The appeal was allowed.

The Court of Appeal held that there was no duty on the Defendant to display better or more prominent signage and visitors had to accept responsibility for the risks that they chose to run. There was no duty, implied or otherwise, to protect visitors against such obvious risks.

On the issue of causation, the Court of Appeal also held that on the evidence before them it was unlikely that the signage would have prevented the accident in the first place.

For further information please contact the following:-

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Periodical payments: the principles and their practical application

The Court of Appeal recently provided a definitive ruling and some guidance on what had become known as the 'indexation issue'.

In a landmark ruling in *Thompstone v Thameside and Glossop Acute Services NHS Trust* and other appeals – [2008] EWCA Civ 5, the Court of Appeal upheld all of the first instance decisions on the issue of whether and in what circumstances the court may depart from the Retail Prices Index (RPI) set by Damages Act 1996 (The Act) when inflation-proofing a periodical payments order in a personal injury claim that features a claim for future loss.

It ruled that the Act empowers the court to apply a different measure for the indexation of future periodical payments.

It also approved, on the facts, the suitability of the Annual Survey of Hours and Earnings (ASHE) as an alternative indexation measure for the Claimants future care needs. Previously, future increases in care costs had been based on the Retail Price Index (RPI).

The implication of the ruling is that there is likely to be a substantial increase in costs to the NHS and the insurance industry of settling catastrophic bodily injury claims. In the vast majority of such claims it is the cost of future care and case management which generally represent the largest heads of claim.

Although this case is a significant ruling it will not be every Claimant who would wish to settle their claim

using a periodical payments order. Many Claimants still prefer lump sum payments for good reasons and whilst the court must now consider whether a periodical payments order ought to be made in practical terms this will not always be the case.

The Moore Blatch personal injury team have recently concluded a High Court periodical payments claim. On the 4 June 2005 the Claimant, Motoko Tribe, who was then aged 79, was injured in a road

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traffic accident on a garage forecourt in Devon. In consequence Motoko suffered severe and irreversible brain damage. One week post accident Motoko showed the first signs of recovering consciousness, but it was another 2 weeks before she spoke her first words. Motoko was discharged to her local community hospital near her home in Devon at the end of July 2005, and then about 10 days later she was transferred to a private nursing home. Motoko was subsequently transferred to a nursing home in Hampshire, so as to be near to her family.

The effect of Motoko's brain damage was significant. Motoko is doubly incontinent, confined to her bed or a wheelchair and requires 24 hour nursing care. But for the accident Motoko would have been able to live independently and would not at any

foreseeable time have needed to move into a residential nursing home.

Motoko's life expectancy on the medical evidence had been reduced by 3 to 5 years. She is now aged 82. Motoko's life expectancy at best was estimated at between 3.3 to 5.3 years only.

A settlement was reached on the basis of a payment of £125,000.00 in respect of the claim for General Damages. This was

injury practice represented Motoko Tribe and her Litigation Friend Christopher Tribe before the Judge. The learned Judge was satisfied that the settlement was in Motoko's best interests. It provided certainty for the family and ensured continuity of payment for the rest of her life.

Christopher Tribe, the Litigation Friend, who attended the hearing said “My step mother was very fit and healthy for her age, it is a tragedy that she has ended up in this situation. However the settlement means that we have been able to look for the best care available for her, rather than be constrained by the cost”.

“Until now I have not had any involvement in litigation, Mr Horan was very patient in explaining the complexities of the process and kept me well informed of the progress of the case. He was well briefed in the details, as were the defendants, which ensured that the result was fair to all concerned”.

If you require any further information regarding periodical payments please contact Damian Horan. Damian Horan is highly recommended by the Legal 500 for his extensive experience in catastrophic injury claims.

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