



Motor News  
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## News

### Ministry of Justice Reform of Motor Personal Injury Claims Process Back on Track

The Ministry of Justice's reform of the personal injury claims process (initially for road traffic accidents only) has made significant progress with the agreement on costs reached by claimant and defendant representatives at mediation now receiving ministerial approval.

Issues such as the Part 36 rules, the costs of children's claims and London weighting however remain unresolved.

The new process will apply to RTA claims in England and Wales involving an element of personal injury, valued at £1,000 -£10,000 (excluding vehicle damage and hire costs) occurring after **6th April 2010**. A brief summary of the known details of the new process with the amount of set costs for each stage is shown below:

#### Stage 1

- Claims will be submitted on a standard Claims Notification Form.
- As soon as the claimant's solicitors have all of the required information they must notify the defendant/insurer via an on-line web portal (intended to replace e-mail and postal communication).
- Except for MIB cases there is a 15 working day deadline for an answer on liability. If liability is contested (save for contributory negligence arguments on seat belts) the claim will leave the process.
- Fixed Stage 1 costs of £400 to be paid within 5 working days.

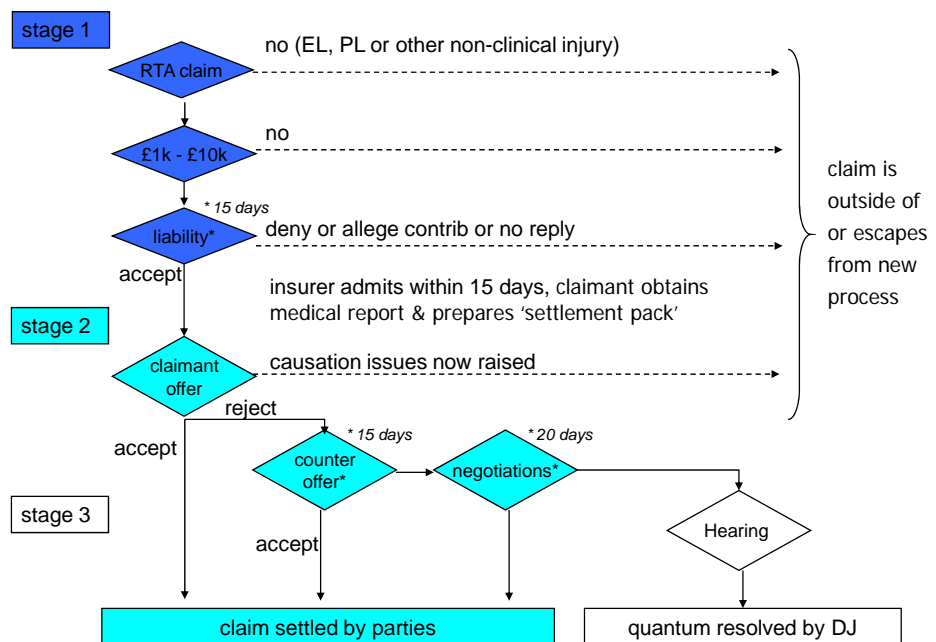
#### Stage 2

- Following an admission of liability the claimant's solicitor will obtain a medical report and submit it to the defendant/insurer within 15 working days of the claimant confirming it to be factually accurate together with the Settlement Pack form and documentary evidence in support of any special damages claim.
- The defendant/insurer has 15 working days from receipt of the Settlement pack to respond to the claimant's settlement proposals.

- If the offer is accepted Stage 2 costs of £800 become payable. If a counter offer is made the claimant has 20 working days to respond unless a longer period is agreed.
- Pending settlement the defendant/ insurer must make an interim payment of the full value of their counter offer.

**Stage 3**

- If the parties cannot reach agreement the court will assess the damages. This is intended to take the form of a paper hearing unless either party opts for an oral hearing.
- Best offers in sealed envelopes and comments on the disputed heads of claim will be put before the court but no new evidence is permitted.
- Damages and costs (subject to the impact of any Part 36 offers) will be payable following the court’s decision. Costs are £250 for a paper hearing and £500 for an oral one.



*The above flow chart is reproduced courtesy of Berryman Lace Mawer.*



## Credit Hire

### Supply of Replacement Cars by Defendants, Claimants Obligations to Mitigate Loss: Copley v Lawn and Madden v Haller – Court of Appeal (2009)

The Court of Appeal considered whether a claimant who refuses a defendant's offer of a replacement vehicle fails to mitigate their loss and if so whether they should then forfeit their rights to recover even the sum that it would have cost a defendant or his insurers to provide the replacement.

At first instance and at the first appeal (see *January 2009 TCB*), it was held that the claimants, by ignoring the defendants' insurer's offers of replacement vehicles at no cost to themselves, had failed to mitigate their losses and were not entitled to recover anything in respect of the cost of the replacement vehicles not even the amount that they would have cost the defendants' insurer. The claimants appealed.

The Court of Appeal upheld the appeals finding that the claimants had no knowledge of the cost of the replacement vehicles to the defendants' insurers and could not therefore have made any comparison with the cost of credit hire. A claimant could only be said to have failed to mitigate if they could have made such a comparison and still opted for the more expensive option.

The insurer's standard letter making the offer of a replacement car was criticized as having "an unpleasant threatening tone" and for failing to suggest that the claimant should seek advice on it from their own insurer or solicitor. The insurers practice of "cold calling" claimants to offer replacement vehicles was also attacked as "inappropriate".

If a claimant does unreasonably reject a defendant's offer of a replacement vehicle then their claim should be limited to the cost that the defendant or their insurers would have incurred in supplying it. Unless a defendant can show that they could have supplied a car more cheaply than at normal market rates then "spot" rates would apply.

*Comment: it is important to remember that the judgment does not prevent defendants from offering replacement vehicles to claimants. Defendants will have to specify the cost of the replacement vehicles but provided that they do so they can now be certain that claimants who reject their offers and opt for more expensive credit hire will be held to have failed to mitigate their losses.*

*"...it is not unreasonable for a claimant to reject or ignore an offer from a defendant (or his insurers) which does not make clear the cost of hire to the defendant for the purpose of enabling the claimant to make a realistic comparison with the cost which he is incurring or about to incur;"*

*Lord Justice Longmore*

### **Unenforceable Hire Agreements: M. O' Brien v Welsh Ambulance- Wrexham County Court (2009)**

The credit hire agreement in this case was deemed to be unenforceable when the claimant told the court she had had no idea that she had signed up to one. She thought that she had been given a courtesy car and said that she would not have entered into a credit hire agreement had she known what it was as she could not afford it!

*Comment: insurers have long suspected that many claimants have little idea what they are being signed up to when entering into credit hire agreements. In this QBE case the claims handler's suspicions about the validity of the agreement were proved to be correct.*

## Fraud

### **Fictitious Accidents, Credit Hire, Non-Party Costs Order: Farrell and Short v Birmingham City Council- Court of Appeal (2009)**

The claimants alleged that their car had been damaged by one of the defendant's dust carts. They made use of a credit hire car supplied by Direct Accident Management Services who referred the case to solicitors to recover the hire charges, the pre-accident value of the car and damages for minor personal injuries. The defendants settled the vehicle damage claim promptly but declined further payments after evidence of fraud came to light.

The claim was discontinued in the face of detailed fraud allegations and a costs order made against the claimants. The After the Event insurers refused to fund the costs order by reason of the claimants' fraud so the defendants applied for an order for costs against the credit hire company DAMS on the basis that they were instigators and potential beneficiaries of the action. After a contested hearing DAMS were ordered to pay 80% of the defendant's costs.

DAMS appealed against the costs order arguing, amongst other things, that 80% was excessive and not reflective of their commercial interests in the case, that they had not funded or controlled the claim and that any costs liability should not exceed 10%.

Dismissing the appeal the court held that the credit hire agreement and the authority signed by the claimants were the basis of the claim for hire and was the catalyst for the litigation.



The claim had not been funded by DAMS but only because a CCFA (with the solicitors which they referred the case to) made that unnecessary. The Judge at first instance's finding that DAMS had been instigators of the litigation was justified and he would have been entitled to make an order that DAMS pay 100% of the costs.

*Comment: The Court of Appeal decision is helpful to defendants confirming that accident management and credit hire companies do have a liability for costs where they have a financial interest in and an element of control of a claim.*

### **False Statements, Exaggerated Claim, Contempt of Court: Kirk v Walton- High Court (2009)**

Following a minor road traffic accident the claimant alleged severe injuries and sought compensation exceeding £750,000. After disclosure of surveillance evidence by the defendant however the claimant accepted a payment into court of only £25,000. The defendant's solicitors made a successful application to the court to bring proceedings for contempt of court.

The judge hearing the contempt proceedings rejected most of the allegations against the claimant. Whilst she might have exaggerated her symptoms such exaggeration "may be a matter of degree and fine distinction" and she should not be committed for contempt "because she may feel or suffer pain more keenly than others".

The claimant had however made claims about specific disabilities, disproved by surveillance and other evidence, when applying for state benefits on two occasions.

She had re-stated these falsehoods when responding to a Part 18 request for further information. The judge held Mrs Kirk must have known that her statements were false and that they would interfere with the course of justice. She was therefore in contempt of court.

The judge had the option of imposing a custodial sentence but considered that this was inappropriate citing the claimant's vulnerable state of health and instead opted for a £2,500 fine.

He also ordered that the claimant pay 50% of the defendant's costs on the basis that the allegations of contempt had been partially successful.

*"In my judgment, where Mrs Kirk overstepped all appropriate boundaries was in falsely filling out her claims for state benefits ..... Furthermore, when given the opportunity to retract these untruths in responding to the Part 18 request, she deliberately re-stated them to assist her personal injury claim."*

*Mr Justice Coulson*

*“I have some sympathy with the view that fraudulently exaggerated claims should be struck out in their entirety. However, I do not think that such a change would necessarily solve the problems of insurance companies; their real problem with phantom passengers and staged accidents is detecting the frauds in the first place. ”*

*Lady Justice Smith*

*Comment: the judge in this case seems to have been reluctant to penalize the claimant for general exaggeration of her symptoms which could have been simply a question of perception but held that when the claimant made specific false written claims for state benefits and repeated them in her statements to the court, she was clearly in contempt. The inference seems to be that for a claimant to be found in contempt good evidence of specific falsehoods is required.*

### **Staged Road Accident, Custodial Sentence for Fraudster: R v Musharaf Dean – Bolton Crown Court (2009)**

Mr Musharaf Dean, the proprietor of Nationwide Car Care in Bolton, was jailed for 18 months after being convicted of conspiracy to defraud. The elaborate fraud was based on a fabricated three vehicle collision and involved accomplices paid by Dean to allege injury. The claims made to insurers were rejected and civil proceedings were abandoned by the claimants in the face of forensic evidence that vehicle damage was inconsistent with the circumstances of the alleged accident. The Judge commented that Dean had failed to take into account how thoroughly the insurers involved (Zurich) would investigate the claim.

*Comment: the custodial sentence in this case reflected both the large amount of money involved and the very devious behaviour of the perpetrator who was described by the judge as “building a total web of deceit”.*

### **Tainted Claims, Striking Out, CPR 3.4 (2): Shah v UI-Haq and others- Court of Appeal (2009)**

The appellant Mrs Shah negligently drove into the rear of Mr UI-Haq’s car. Claims for injury were subsequently made by Mr UI-Haq, his wife and his mother. At first instance the recorder found that Mr UI-Haq’s mother was not in the car as alleged and that Mr UI-Haq and his wife had conspired with her to support a fraudulent claim. He dismissed her claim and ordered her to pay indemnity costs. He awarded Mr and Mrs UI-Haq damages of £2,585.38 and £2,259.37 respectively.

Mrs Shah’s solicitors argued that the Recorder should use his powers under CPR 3.4 (2) to strike out Mr and Mrs UI-Haq’s claims because of their involvement in the attempted fraud.

The Recorder declined to do this but ordered Mr and Mrs UI-Haq to each pay 2/3 of Mrs Shah’s costs in defending the claim with the net result that the damages for the two genuine claims were wiped out and the three claimants between them had to pay Mrs Shah a net amount of £1,375.75.



Mrs Shah appealed to the High Court arguing that the two genuine claims should have been struck out by reason of the claimants' complicity in fraud. The High Court Judge whilst accepting that the Court did have discretion to strike out the claims found that the fraud in this instance was not serious enough to justify doing so.

Mrs Shah made a further unsuccessful appeal to the Court of Appeal who whilst expressing their condemnation of fraud held that CPR 3.4(2) did not give the court the power to strike out claims tainted by fraud after a trial had taken place. The discretion under CPR 3.4 (2) was not designed to punish a claimant for participation in fraud and could only be used to strike out a claim during trial if the claimant's dishonesty made a fair trial impossible or if it became clear that the claim could not succeed.

*Comment: this is a disappointing judgment from the point of view of insurers and defendants generally and will mean that decisions such as that in Bashir and Others, where genuine claims were struck out due to complicity in fraud, are unlikely to be repeated.*

*It is also disappointing that despite Lord Justice Toulson's comments, that the claimants in this case were guilty of serious criminal offences, no police investigation or criminal prosecutions were pursued.*

### **Phantom Passengers, Custodial Sentences: R v Singh and Others – Manchester Crown Court (2009)**

A groom and his parents who had falsely claimed to be passengers on a coach involved in a minor collision on the way to his wedding were each given a custodial sentence of one year after pleading "guilty" to conspiracy to defraud and perjury.

A total of 73 personal injury claims were made following two minor accidents in July 2004 involving two coaches carrying wedding guests. The defendants (insured by QBE) disputed the claims on the basis that the collisions occurred at too low a speed for any injuries to have been suffered.

Of the original 73 claimants, 27 persisted with their claims and issued proceedings. As the case continued evidence emerged that the groom and his family were not on either of the coaches involved in the accidents. In an effort to counter this, the claimants produced an edited copy of the wedding video which they maintained proved that the main wedding party was on the coach involved in the first accident.

*"Offences of this type are far too serious to warrant anything other than an immediate custodial sentence."*

*Recorder David Heaton QC*

The production of the video however proved to be very unhelpful to the claimants as the sequence of events it showed made it highly improbable that the groom and his family were on the coach they claimed.

It also showed a number of the claimants, who had allegedly sustained injury, energetically dancing and the groom and his father being carried on their guests' shoulders.

Of the 27 remaining claims, 2 were settled on Counsel's advice, 21 were dismissed and 4 discontinued after a second hearing where their evidence collapsed. Costs orders were made against all 25 of the unsuccessful claimants.

Following press and television coverage of the case, the Greater Manchester Police Economic Crime Unit brought charges against the groom, his parents and two brothers for perjury and conspiracy to defraud. The groom and his parents agreed to plead "guilty" to the charges on the understanding that the charges against the two youngest family members are not pursued.

The Recorder hearing the case commented that insurance companies were particularly vulnerable to fraudulent claims and that a strong deterrent was necessary. A message had to be sent out and the only way to achieve this was to deprive the claimants of their liberty.

*Comment: it is encouraging to see the courts taking a tough stance with fraudulent claimants and it can only be hoped that publicity about custodial sentences being imposed on cases such as this does have a deterrent effect.*

## Indemnity

### **RTA, Conflict with EU Second Motor Directive: Wilkinson v Fitzgerald and Churchill Insurance Company Ltd – High Court (2009)**

The claimant was a passenger in his own car who had permitted the first defendant to drive it even though he knew he had been drinking and had no insurance. The first defendant lost control of the car and it crashed causing the claimant to suffer serious injuries.

The vehicle insurers accepted that they must indemnify the driver in compliance with *section 151 (5) of the Road Traffic Act 1988* but because the claimant had permitted the use of his car they also argued that they were entitled to recover from him any monies paid in compensation, by virtue of *section 151 (8)*. Since the person claiming compensation was also the



person who the insurers would recover the money from, this would effectively deprive him of any compensation for his injuries.

The claimant argued that this conflicted with long standing EU policy aimed at ensuring that victims of road traffic accidents were compensated whether or not the driver responsible was insured. The court dealt with this as a preliminary issue and found that the insurers were not entitled to recover their money. *Section 151 (8)* of the RTA could not be applied to contravene article 2 of Directive 84/5 (the “second motor directive”).

*Comment: the circumstances of the accident (i.e. a young man on a night out permitting a drunken friend to drive) are not particularly unusual and similar claims may be brought in future on the basis of this judgment. The defendants have been given leave to appeal.*

## Liability

### Cycle Helmets, Contributory Negligence: Robert Smith v Michael Finch- High Court (2009)

The claimant was riding his bicycle when he was in collision with the defendant’s motorcycle. The claimant who was not wearing a cycle helmet, suffered catastrophic head injuries and had no recollection of the accident. The court was asked to determine liability for the initial collision and whether the claimant’s failure amounted to contributory negligence.

The judge held that on the available evidence the defendant was entirely to blame for the collision. The claimant’s injuries would not, on the facts of this particular case, have been prevented or reduced by his having worn a helmet. The speed at which his head struck the road was too great (more than 12mph) and the part of the head which struck it (the occipital region, at the back of the head) would not have been covered by the helmet. There was therefore no contributory negligence on his part.

As a general principle however, a cyclist who elected not to wear a helmet was in a similar position to someone travelling in a motor vehicle without a seat belt and the observations made by Lord Denning in the Court of Appeal case of *Froom and Others v Butcher (1976) 1 QB 286* applied.

If a defendant could establish that a claimant’s injuries could have been prevented or considerably reduced by wearing a cycling helmet than a finding of contributory negligence on the lines of *Froom* i.e. 15-25% contributory negligence would be appropriate.

*“it matters not that there is no legal compulsion for cyclists to wear helmets and so a cyclist is free to chose whether or not to wear one because there can be no doubt that the failure to wear a helmet may expose the cyclist to the risk of greater injury;...”*

*Mr Justice Griffith Williams*

*“.....where the vehicle in question is deployed by one of the emergency services ...the driver is normally entitled to assume that other road users will not ignore the unmistakable evidence of its approach... ”*

*Lord Justice Judge*

*Comment: defendants have been arguing for some time that contributory negligence should apply to cyclists who were not wearing helmets. This judgement brings useful clarity to the issue, allowing the scale of reductions set out in *Froom and Butcher* to be applied.*

### **Emergency Vehicles, Speed, Use of Siren: Armsden (as Executor of the Estate of Rachel Cheesewright deceased) v Kent Police – Court of Appeal (2009)**

The defendant's police car was travelling along on an “A” road at high speed in response to an emergency call when it collided with a car which had turned right out of a minor road into its path. The driver and passenger in the police car survived but the driver of the other vehicle was killed and her estate brought a claim against the police.

The police driver was using the blue flashing lights on his car but not the siren and was travelling at a speed of about 93mph. A witness also gave evidence that on rounding a bend in the road, just before the accident, the police car had crossed the central white line. At first instance the police driver was found to be 100% liable.

The police appealed to the Court of Appeal. They argued that their driver's failure to use his vehicle's siren had not been pleaded as a specific act of negligence at first instance and that there was no evidence that the deceased driver would have heard it had it been used. The police driver was also entitled to assume that other drivers would not ignore his approach (as per LJ Judge's statement in the 2001 Court of Appeal case of *Scutts v Keyse and the Commissioner of Police for the Metropolis*) and that even had he crossed the central white line as alleged this was not causative of the accident.

The Court of Appeal was critical of the judge at first instance's acceptance of the claimant's accident reconstruction expert's evidence that the deceased driver could only be expected to have looked right and then left before turning.

She should have looked right, left and right again especially as her view to the right was restricted by a bend in the road. The police driver had been entitled to assume that a driver waiting to turn onto the main road would not do so without keeping a lookout to the right.

The Court did not consider that the police car crossing the white line was indicative of negligence nor was the failure to use the siren negligent in itself. The fact that the siren was not in use however effectively reduced the speed at which it was safe for the police driver to travel.



The main cause of the accident was the deceased's failure to keep a lookout to her right when entering the major road. The excessive speed at which the police driver was travelling without his car's siren sounding was a contributory cause of the accident. Liability was attributed 60/40 in the police driver's favour.

*Comment: the judgment is helpful to the emergency services in two respects. Firstly the Court of Appeal endorsed the comments in Scutts that an emergency service driver is entitled to assume that other road users will not ignore emergency warning equipment. Secondly, the court recognised that it is the duty of drivers to proceed as fast as they safely can in an emergency situation.*

*This successful appeal was funded by QBE who insured the Police car.*

### **Road Traffic Accident, Speed, “Agony of the Moment”: Richard Lambert v Jenny Clayton (Administratrix of the Estate of Paul Clayton Deceased) – Court of Appeal (2009)**

The appellant Lambert was driving a pickup truck towing a trailer and was turning right into a lane leading to his farm when he was in collision with an oncoming motorcyclist Mr Clayton. Clayton's motorcycle struck the rear nearside corner of Lambert's pickup and the front nearside corner of the trailer and he was killed instantly.

Mr Clayton's widow sued the appellant who at first instance was held to be primarily liable on the basis that he should have aborted his turn as soon as the motorcyclist came into view. There was however also a finding of 75% contributory negligence on the part of the motorcyclist who was held to be travelling at 80mph and who had not braked at all.

On appeal the appellant argued that when he commenced his turn the motorcyclist was not yet in sight.

By the time that he was in sight (the view up the road was blocked by a hill) he was committed to the manoeuvre. He decided that the safest option was to try and clear the road by continuing his turn and accelerating.

Allowing the appeal the Court of Appeal held that the “*overwhelming*” cause of the accident was the excessive and dangerous speed of the motorcyclist, particularly as he was riding over a “*blind summit*”.

In the heat of the moment the appellant was faced with three options (i.e. to brake, turn back into his own carriageway or continue his turn) all of which had disadvantages.

*“Mr Clayton’s dangerous driving created the emergency for Mr Lambert and, in my view, Mr Lambert is not to be held negligent and liable because, in the split-second available, he took what turned out to be the least favourable decision.”*

*Lady Justice Smith*

He should not be blamed for making what in hindsight was the wrong decision when it was the motorcyclist's dangerous driving that had created the emergency in the first place.

*Comment: the Court of Appeal has recognized that excessive speed can be the primary cause of road accidents.*

### **Evidence of Accident Reconstruction Experts: Michael Stewart (by his Litigation Friend....) v David Glaze – High Court (2009)**

The claimant suffered catastrophic head injuries when he walked into the path of a car. The claimant had been out drinking with a friend prior to the accident and they had both been sitting at a bus stop when the claimant suddenly decided to cross the road. The defendant had seen the claimant and his friend sitting at the bus stop as he approached them but had not anticipated that the claimant would suddenly get up and walk into his path. Applying the standard of the actions of a reasonable driver the defendant was held not to be liable.

In his judgment Mr Justice Coulson was at pains to remind the parties that the role of accident reconstruction experts should be confined to using their technical expertise to assist the court in interpreting the factual evidence.

The two accident reconstruction experts in this case had assisted the judge with the issue of stopping distances but they had also strayed into the role of advocates and into areas which were for the judge to rule on. It was the primary factual evidence that was of the greatest importance and expert evidence should not be used as a fixed framework against which the defendant's actions should be judged.

*Comment: expert witnesses who exceed their remit are likely to incur the displeasure of the judge and may damage the case they are supporting if they are seen as lacking objectivity.*

**Completed 29<sup>th</sup> September 2009 – Copy Judgments and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: [john.tutton@uk.qbe.com](mailto:john.tutton@uk.qbe.com)).**



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