

Welcome...

It gives me great pleasure to introduce this first edition of **Catastrophic Injury News**, produced by the specialist **Catastrophic Injury Team at Rix & Kay**.

The aim of this bi-annual publication is to provide you with a snapshot of the type of cases that we have the privilege of being involved in and also special interest topics and up-to-date news on this specialist area.

Frances Pierce Head of Catastrophic Injury Team



What is Catastrophic Injury?

A catastrophic injury usually occurs suddenly without warning. The types of injuries that are considered catastrophic, due to the enormous impact they have on the lives of the individuals who experience them, include brain injury, spinal injury, amputations, severe burns, multiple fractures, neurological disorders and fatalities.

Management of the injury is often complex. Expertise is needed not only in the medical sense but also in the legal sense. The long-term needs of someone who has experienced this type of injury far surpass those individuals with less severe injuries. That is why you cannot afford to instruct someone who is not a true expert in the field when looking at pursuing a claim for compensation.

Individuals may recover from some catastrophic injuries if they receive proper early medical treatment. Often the most serious injuries arise from road traffic accidents where there is likely to be a legal claim. More often than not the emergency services are able to save the life, but what happens then? Getting the correct, early, appropriate treatment isn't always easy because facilities for people with catastrophic injuries are run by many different organisations. Most start with the NHS and then go on to Social Care. Some find a voluntary sector, others have resources to afford private help. The problem is that no one person is responsible to see that you get what you need when you need it. Often it is a lottery as to whether those who know what is appropriate are actually there for you at the time. Getting access to specialist advice early on is absolutely crucial and if someone else is to blame an interim payment can often be released through a legal claim to fund private rehabilitation. This will maximise the chances of a better outcome.

Frances Pierce and Sheila Riches, together recovered over £10 million worth of damages in the last year for their clients. They are a force to be reckoned with and Rix & Kay are proud of their reputation as leaders in the field.

Brain Injury

It is estimated that each year one million people in the UK attend hospitals as a result of acquired injury to the head. Of these nearly 12,000 will suffer a severe brain injury and only 15% of those will return to work within 5 years.

Nearly 10,000 will suffer a moderate brain injury and many of those will have ongoing physical and psychological problems for years after the event. Brain injury can occur for many reasons but the most common are road traffic accidents, accidents at work, assaults and clinical negligence.

Any damage to the head can have far reaching consequences. Even a minor brain injury can affect you every day of your life. Only 45% of those who have minor brain injuries go on to make a good recovery after one year.

To have a brain injury often means difficulties with:

- **Poor memory**
- **Poor concentration**
- **Reduced planning and problem solving skills**
- **Personality changes**
- **Inappropriate behaviour**
- **Fatigue**
- **Physical disabilities**
- **Problems with sight, hearing and sensitivity**

There is no question about it, brain injury has a devastating impact not only on the person injured but their family, friends, work colleagues and will completely change your life. The effects should not be underestimated. It is important that those medics and legal professionals involved in this specialist field have a real understanding of what it means to have a brain injury and that a proper expert is chosen to assist.

RIX & KAY
SOLICITORS



'Rix & Kay are experts in this field.'

We can help you, a friend or relative, if you have suffered a catastrophic injury.'

Your first consultation is free of charge.

Forthcoming Conference

Who decides now?

12th November 2007

Meet Richard Brook the Public Guardian. This Conference has been designed to support everyone who is going to be affected by the long awaited Mental Capacity Act.

For further details and booking form

please contact Neil Barstow

Tel: 01273 623222

e-mail neilb@pavpub.com or write to

Pavilion, Richmond House, Richmond Road, Brighton, East Sussex BN2 3RL

Case Study

Rix and Kay acted for D in a recent case heard in the High Court. D suffered a severe brain and other injuries when he was knocked down outside his home.

The defendant had been driving a stolen vehicle. He attracted the attention of plain clothes police officers who attempted to block his path with their vehicle but he eluded them by driving on the pavement around the vehicle and was making good his escape up the hill and round the bend when he struck D at about 50 mph. D was thrown over the vehicle and ultimately came to rest in the carriageway having suffered catastrophic injuries. D through his

litigation friend brought proceedings, but because of his injuries D was not in a position to give evidence and there were no other witnesses to the incident. The defendant's insurer admitted primary liability.

The hearing at the High Court in July this year concerned the issue of contributory negligence only. The defendant's insurers from the outset believed that D had been contributory negligent in that he had run across the carriageway in a northerly direction when the impact occurred, without giving the driver any opportunity to stop or avoid him. This was despite the fact that there were no witnesses to

the case or a shred of evidence to support their contention. Prior to the hearing the defendant's insurers offered to settle the claim first on a 50/50 basis and immediately before trial made a 75/25 offer. Both offers were rejected as we believed that D should not be held responsible in any way for the accident. The defendant was drunk and driving a stolen car and the idea that D was as much to blame as the defendant was for the accident is outrageous.

The case went to trial at the High Court and the judge ruled that: In the instant case, there were no witnesses who actually saw where D was



Recent Conference

Action against Medical Accidents (AvMA) and The Medical Protection Society (MPS) hosted a very interesting conference titled Legal and Ethical Issues in Healthcare attended by many doctors and healthcare lawyers as well as other interested parties.

Speakers included the Deputy Chief Medical Officer, members from the Medical Protection Unit, AvMA, practising doctors as well as the Medical Director from Harrogate & District NHS Foundation Trust.

The theme of the conference was to discuss the legal and ethical dilemmas faced by Health Professionals and patients brought about by technical advances in healthcare, social and political attitudes to issues such as rationing of healthcare, life and death decisions about access to treatment, and changes to the law and arrangements for regulating health professionals.

The conference was interesting in that it was hosted by The Medical Protection Society (acting for doctors) and the patient's charity Action against Medical Accidents. It was clear from the conference that, whilst the two parties did not agree on everything, there was some common ground and in particular relating to what should happen when a patient is injured during treatment. It was agreed between the parties that doctors must be open, honest, sincere and always tell the truth even when things go wrong, that patient safety is a serious issue and both patients and doctors are harmed when things go wrong.

However, it was clear from hearing from many of the medical speakers that the NHS is poor in supporting its staff including doctors particularly when things go wrong and that this might be a reason why some doctors do not

Who Decides Now? Conference 12th November, 2007

The long awaited Mental Capacity Act came fully into force in October 2007.

The Act is to protect people who do not have the capacity to make their own decisions. This may be because of learning disabilities, mental health conditions or problems that come with old age such as Alzheimer's disease. The Act says that everyone should be treated as able to make their own decisions unless they show that they can't. It also states that people should be able to make 'eccentric' or controversial decisions if they want to. Capacity to make each decision must now be assessed separately and in relation to that particular decision. When a decision is made on behalf of someone else, it must have been considered against a checklist of factors set out by the Act and be in that person's 'best interests'.

This will mean many changes in the day-to-day practice of many people who work with and care for others. Agencies, companies and multi-disciplinary networks, as well as individual professionals, will need to incorporate these changes into their work. This conference has been designed to support and inform everyone who is going to be affected by the Act. It will look at the new and different responsibilities

that people must be aware of; consider the new powers and demands it presents; discuss any problems it may create; and look for gaps in how it is being implemented.

The Act was drawn up after extensive consultation and is a landmark piece of legislation designed both to empower and protect vulnerable people, which aims to improve many people's quality of life. This conference will help you to ensure that you smoothly integrate its principles into your work.

Rix and Kay are hosting the conference chaired by Professor Hilary Brown, Professor of Social Care, Canterbury Christ Church University and Alan Foster Partner of Rix & Kay Solicitors. It will take place at Salomons (Canterbury Christ Church University) on 12 November 2007 at a beautiful country mansion between Tonbridge and Tunbridge Wells. The public guardian Richard Brook will talk about his new role.

For further details and booking form please contact Neil Barstow Tel: 01273 623222 e-mail neilb@pavpub.com or write to Pavilion, Richmond House, Richmond Road, Brighton, East Sussex BN2 3RL.

admit their mistakes. The MPS stated that 38% of litigated clinicians suffer clinical depression, 27% of suspended doctors have contemplated suicide and actions for manslaughter against doctors have increased from one a year to almost one a month since 1988.

We heard about what the effect of claims and complaints have on a professional's behaviour, namely, the immediate effects are lack of confidence and lack of trust and the ongoing effects are depression, anger and an erosion of goodwill towards patients and the real risk that other patients are seen by the professional to be like the complainant.

This is a no win situation and in many instances when things go wrong it is not just the patient who suffers but also the professional. Human error is an inescapable consequence of healthcare and an error attributed to a doctor may be the result of system failure. Retribution

and punishment weighs heavily against the wish for a culture of openness.

We know that being open is the right thing to do morally, ethically and legally, it is a requirement of the General Medical Council's guide on good medical practice. It can reduce the likelihood of patients and their families seeking redress and it may well save money in terms of legal actions not been pursued.

But to enable this to happen there has to be in place a system which accepts that sometimes things do go wrong and professionals like others make mistakes, a support system to support those who are involved and a move away from the blame culture. It is only then that we will have a chance of a culture of openness, but there needs to be ongoing training for healthcare professionals on the legal and ethical issues in healthcare.

when he was struck or what he was doing at the time. There was not enough evidence to piece together exactly what had happened and certainly not enough to conclude that D had placed himself in front of the vehicle in order to flag it down, as suggested by the defendant. Such a finding would need to be based on evidence and there was insufficient evidence to come to a firm decision and in the absence of such evidence any assessment as to the nature of the risks undertaken by D would be speculative in character. Taking all the circumstances into account, the defendant had

not discharged the burden of proof in demonstrating contributory negligence and the claim would be dismissed.

Leave to appeal was refused and the defendants insurers have since applied for leave to appeal and we await the outcome of that.

Recovery of 100% damages for D is very important as D requires 24 hour care and is likely to do so for the rest of his life. It would have been easy to have accepted a 75/25% split but at Rix and Kay solicitors we believed from the outset that D should not be blamed in any way and worked tirelessly to prove that.



Working Time Regulations

Did you know.... many of those who work as carers, buddies or who nurse are caught by the Working Time Regulations? These were introduced as part of the Health & Safety requirements in the workplace and every employer is under a duty to protect their workers, which includes employees, casual workers, agency workers and in some cases, self employed workers (particularly those who provide night care whether awake or not).

All workers are entitled to weekly, daily and "in work" rest breaks and the employer must ensure that the worker can take their breaks. The employer should also check to make sure that the workers do take the breaks they are entitled to.

A daytime worker is entitled to one 24 hour period off in each 7 days (weekly rest break),

11 hours uninterrupted break in each 24 hour period (daily rest break), and a 20 minute break for each 6 hours worked ("in work" rest break).

However the daily rest entitlement may be incorporated into the weekly rest entitlement if this can be justified.

The weekly rest break may also be averaged over a two week period so long as the worker takes two consecutive days off a fortnight.

In addition to the above, a worker should not work more than a 48 hour week on average without having signed an opt-out agreement giving their employers the right to request them to do so. It is important to note that this relates to all work, so hours worked for another employer are taken into consideration when working out the 48 hours. In addition, most

workers are entitled to paid annual leave which is currently 4 working weeks off a year, and half the bank and public holidays, if the worker is full time.

For further information or advice on a specific query please contact Valli on 01825 761555 or email vallimorison@rixandkay.co.uk



Acquired Brain Injury Forums

Kent Acquired Brain Injury Forum (KABIF) is a group of acquired brain injury survivors, carers, front-line professionals and policy-makers who wish to advance brain injury in the county of Kent. There are similar forums in Sussex – Sussex Acquired Brain Injury Forum (SABIF) – and Surrey.

The Kent forum is chaired by Rix & Kay's Frances Pierce and has recently launched a website detailing the provision of services within Kent. Sussex have a similar website and Surrey are working on theirs at the moment. Details can be found at www.kabif.org.uk & www.sabif.info.co.uk.

If you would like to come along to a KABIF or SABIF meeting then please contact FrancesPierce@rixandkay.co.uk. Please visit the website for details of forthcoming meetings.

Recovery of NHS Costs in Personal Injury Cases

Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 (the 2003 Act) provides for a scheme whereby the NHS can recover the costs for providing treatment to an injured person where that person has made a successful personal injury compensation claim against a third party.

The current position under s1 Road Traffic (NHS Charges) Act 1999 allows the NHS to recoup costs in RTA cases only. However, this

section was repealed by s169(1) of the 2003 Act on 29th January 2007. The scheme now covers all cases where a payment of personal injury compensation is made, whether or not it was made by an insurance company, and will include motor accidents, employers and public liabilities.

The new scheme requires the compensator who pays damages to the injured person to also satisfy NHS medical costs, including ambulance expenses, up to an overall limit of £37,100 for any one injury. The recovery charges will be flat rated at £159 per ambulance journey, £505 for treatment without hospitalisation and £620 per day for treatment with hospitalisation. These tariffs will be subject to an annual review and increase.

The NHS hopes to recover an additional £150 million annually from compensators whereas Marsh estimates that the NHS will recover £200 million to £250 million annually from employer's liability insurers.

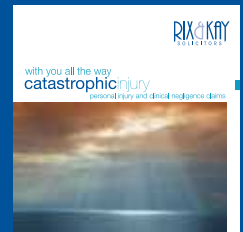
How many Primary Care Trusts are aware of the current position and exercise their full rights of recovery? The insurance industry is unlikely to broadcast the extension to the current scheme.

For more information see www.legislation.hmso.gov.uk/acts/acts2003.htm





To download our
Catastrophic Injury brochure,
please visit our website
www.rixandkay.co.uk



Frances Pierce, Partner Catastrophic Injury Division

Frances specialises in catastrophic personal injury and clinical negligence work and heads the Catastrophic Injury Team at Rix & Kay.

She has been a member of the Law Society's Personal Injury Panel since 1996, is on the Headway Personal Injury Solicitors List and actively supports Headway. She is Chairwoman of the campaigning group Kent Acquired Brain Injury Forum and sits on the Legal Services Commission's Special Cases Unit as well as being the Honorary Secretary of Kent Law Society.

Frances' commitment to her clients and their families extends beyond the immediate business of their case – she really cares, most of her work involves those with severe brain injury or spinal injuries, amputees or fatalities.

Sheila Riches, Senior Solicitor Catastrophic Injury Division

Sheila is a Senior Solicitor in the Catastrophic Injury Team. She joined Rix & Kay in 2007. Sheila specialises in catastrophic injury work, both personal injury and clinical negligence.

When acting for a client and their family, Sheila uses her skills to support them all throughout the legal process to ensure that, whilst nothing can change the past, as much as possible is done to support the family in the short and long term. Ensuring that a client recovers maximum damages is always a priority.

Sheila has been an AvMA panel member since 1999, is on the Headway Personal Injury Solicitors List and was actively involved in setting up the Sussex Acquired Brain Injury Forum (SABIF).

She graduated with an MSc in Medical Ethics from Imperial College, London in 2006. Prior to being a solicitor Sheila was a sister in a neuro-intensive care unit.



For more information please contact
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us on 01825 745 360.

Please see our website for more details and individual profiles at www.rixandkay.co.uk as well as for forthcoming events.

If you know of anyone who would like a copy of this newsletter then we are more than happy to add them to our circulation list. Please email their details to
BeccaCoffey@rixandkay.co.uk.

NHS Redress Act 2006

The NHS Redress Act 2006 was given Royal Assent on the 8th November 2006.

The purpose of the act is to settle Clinical Negligence claims without the need for court proceedings. The current system for settling claims is complex and slow. It is costly in terms of legal fees, time consuming in terms of time and morale. Even when cases are settled there is often a lack of explanation and rarely an apology and the system encourages defensiveness and secrecy.

The new act relates to cases in England only and the Department of Health have determined a cap on compensation under the scheme of £20,000 and the scheme will only deal with cases that have not been the subject of civil proceedings. The scheme is only relevant for secondary care and it concerns negligence of health care professionals in diagnosis and treatments.

Under the new scheme the first step will be to create a publicly funded scheme through which patients will hope to receive, after the initial investigation, an explanation, an apology and possible compensation for negligent care that they received from the NHS. A report on actions taken following the negligence will be provided to the patient.

It is hoped that the changes will be advantageous to many patients who are concerned about taking their claim to court, often because it is too expensive or it may be difficult for them to obtain funding or it may be troublesome. However, there is a risk that the duty to consider cases might mean that some will be compensated when they would not previously have been or that the scheme itself will encourage more people to make claims.

The National Health Service Litigation Authority (NHSLA) will have authority to manage the scheme and currently the NHSLA handles all clinical negligence claims on behalf of the NHS and it is the body that determines whether to admit or deny liability for an incident on behalf of the NHS. Under the new scheme any experts used in the process will be taken from a list held by the NHSLA and there is real concern that this system will not be objective as the NHSLA will become a body that effectively acts as a Judge and Jury in determining whether a claim will succeed or not.

Also under the act there is a provision for patients involved in the scheme to have access to free legal advice when considering any settlement agreement arranged between the parties. This free legal advice is only available when considering an offer or a settlement agreement and it is not available when considering whether a patient enters the scheme or when investigations are being conducted by the NHSLA and there does seem to be a significant imbalance in equality here with the NHSLA being the decision maker.

The Department of Health says that legal advice will be provided from independent solicitors who are on a list maintained by an independent organisation and that the remuneration will be a flat rate. However it is unclear whether or not this flat rate will take into account any of the known complexities of some clinical negligence claims and the time it sometimes takes to provide meaningful advice to a patient. There is a real risk that if solicitors on the list are not remunerated appropriately that they will stop providing advice within the scheme or alternatively that junior solicitors will be used who do not have the necessary experience to advise appropriately.

As stated previously, it is very difficult to get public funding where the value of the claim is below £20,000 and the Department of Health have stated that decisions relating to Legal Aid and clinical negligence claims will be made on a case by case basis. However, the Legal Services Commission, when considering an application for public funding will take into consideration the patient's decision not to pursue a claim under the redress scheme and they will also take into account any rejection of an offer under the scheme. There is real concern that patients will be denied public funding because they either opted not to go into the scheme or alternatively rejected an offer which in effect may well be far below that which they would have obtained had they gone to Court and in some cases this will deny the patient the right to go to Court because there may not be funding available to support their case.

It may be beneficial to those patients involved in open and shut straightforward cases of low value, but it is questionable whether the scheme will be suitable for complicated claims where considerable resources are required to investigate and advise on these cases.

Whilst the Department of Health have capped the compensation scheme at £20,000, there is real anxiety that cases worth more than £20,000 will be settled at that amount when the case should have proceeded through the normal process i.e. through the courts. There is real risk that over time this cap will gradually increase making it more and more difficult for patients to bring claims through the normal court process.

It is questionable whether the interests of patients will be protected under this scheme because the NHSLA will have overall control.

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