

Welcome...

It gives me great pleasure to introduce the third edition of **Catastrophic Injury News** produced by the specialist catastrophic injury team at Rix & Kay Solicitors LLP.

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

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Frances Pierce *Head of Catastrophic Injury Team*

Fatal Accidents

Fatal accident claims present one of the biggest challenges to personal injury lawyers. Not only do the tragic circumstances of the case require the utmost in client skills, the relevant law is complex and difficult. Damages are generally modest and in some cases entirely absent. Indeed, the level of damages and the painstaking work that must be done to prove them is an aggravating factor for clients, causing upset at a distressing time. Recovering compensation is not at the forefront of the mind of the client who visits their solicitor after a friend or relative is involved in a fatal accident. There are of course many immediate and more pressing concerns that he/she and the solicitor have to deal with. If someone dies unexpectedly, then there is a duty to inform the Coroner of the death. The Registrar of deaths is obliged to notify the Coroner:

- If the deceased had not been seen by a doctor after his death or in the fourteen days preceding death.
- If the deceased was not attended by a registered medical practitioner during an illness.
- Death occurred during an operation or anaesthetic or within 24 hours of an operation.
- If the cause of death is unknown.
- If the death may have been caused by violence, neglect, abortion or suspicious circumstances.
- If there is a suspicion of industrial disease or industrial poisoning.
- In instances of stillbirth, where the child may have been born alive.

The Coroner may decide that the death was due to natural causes, in which case a death certificate will be issued and there will not be an inquest. If there is an inquest, then its purpose is to find out:

- Who has died
- When they died
- Where they died
- How and in what circumstances they died.

The current law, found in the Coroners' Act 1988 and the Coroners' Rules 1994, prevent the Coroner from apportioning blame for death. Inquests are therefore commonly used to find out more information about the circumstances surrounding the death, to see if a claim can be brought. In order for a legal claim to be brought, there are three essential questions that need to be answered:

- 1) Does this client have a claim as a result of the death;
- 2) If so, how much is that worth; and
- 3) What is the procedure for obtaining those damages.

There are two different elements to a fatal accident claim. The Law Reform (Miscellaneous Provisions) Act 1934, which allows an action to be brought on behalf of the estate and the Fatal Accidents Act 1976 (as amended), which allows an action to be brought on behalf of the dependants of the deceased. Dependants are those who relied financially on the deceased and are limited under the Act to the wife or husband or former wife/husband of the deceased, any person living with the deceased in the same household immediately before the death for two years, parents or other ascendants of the deceased.

Coroners Reform

On 17th July, the Coroners (Amendment) Rules 2008 came into force. The amended rules provide for statutory bodies and organisations to respond to coroners' reports within 56 days and enquiries should be undertaken to prevent future deaths. Bereaved parties and interested parties will get access to the reports to ensure that they are aware of the action being taken. Additionally, the findings of the reports will be collated centrally to monitor and identify trends so that lessons can be learned. The new rules precede the Coroners and Deaths Certification Bill, which is due to be published in the next parliamentary session.

Rix & Kay's specialist Catastrophic Injury Team frequently represent families at inquests and deal with these cases with the utmost compassion. Please do not hesitate to contact us if you think we can assist.

RIX & KAY
SOLICITORS ■ LLP



*'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.*

**The next KABIF meeting is
on 11th September 2008
at 3pm @ Headway The
Sustain Centre, Kent and
Canterbury Hospital.**



Alternative Dispute Resolution

(by Nicholas Baldock)

Most personal injury cases settle without a Court hearing. Alternative Dispute Resolution (ADR) is a means of resolving, or attempting to resolve, issues in a claim without the need for court intervention. It brings the two, or more, parties together for a 'round table meeting' to discuss outstanding matters; sometimes, but not always, with the help of an independent mediator. It should also, however, be properly prepared for.

The following are some thoughts to assist. Settlement may seem a long way off at the early stages of a catastrophic injury claim, however it should be borne in mind throughout for two main reasons:

Firstly, courts encourage settlement by ADR. Although parties cannot be compelled to use ADR, there is at least a risk of adverse costs consequences if refusal is found to be unreasonable. *Halsey -v- Milton Keynes NHS Trust* [2004] 1 WLR 3002 is essential reading in that regard and notes the approval of the order used by Master Ungley in clinical negligence cases whereby, before trial, parties have to justify any refusal to go to ADR in a

privileged witness statement that can be referred to on costs once proceedings are over.

Secondly, settlement, on the right terms, takes the uncertainty out of the proceedings for the Claimant. There may be, for example, a level of damages which would allow the critically injured Claimant to be suitably rehoused with other needs reasonably provided for. Achieving that figure in negotiation may well be thought preferable to going to court for a higher overall settlement but putting the rehousing at risk were the result to be unfavourable.

Even if the settlement process does not

Psychosocial outcomes after a good neurological recovery from aneurysmal subarachnoid haemorrhage (SAH)

Only one-third of patients regain functional independence after aneurysmal subarachnoid haemorrhage (SAH) but, despite this recovery, many of these patients experience psychosocial problems. Last year a group of neurologists in the Netherlands assessed the long-term effects of subarachnoid haemorrhage on employment, relationships, personality and mood in patients who had regained functional independency after aneurysmal subarachnoid haemorrhage. They included patients who had been treated by clipping the aneurysm after SAH between 1985 and 2001 and who had resumed independent living.

Patients underwent structured interviews regarding employment, relationships, and personality before and after the SAH. Anxiety and depression were assessed by the Hospital Anxiety and Depression Scale and scores were compared between the study group and a control population.

Six hundred and ten patients were interviewed and of the employed 26% stopped working and 24% worked shorter hours or had a position with less responsibility. On average patients returned to work 9.4 months after discharge, 7% were divorced because of SAH related problems, 59% of the patients reported changes in personality, with the most commonly noted changes being increased irritability (37%) or emotionality (29%). Patients with SAH had a statistically significant higher mean depression score than the control population.

Only 25% out of the 610 patients reported a complete recovery without psychosocial or neurological problems.

The conclusion of this research is very much in line with previous studies in this area and it shows that the long-term psychosocial effects of SAH are considerable, even in patients who regain functional independence. There is a real need for ongoing focused rehabilitation and treating physicians, especially GPs, should be aware of these long-term effects of SAH when discussing prognosis and reintegration to work with patients and their families.

Limitation on victims of untraced drivers

The Motor Insurers Bureau (MIB) is a company limited by guarantee set up in 1946 to compensate the victims of road traffic accidents caused by uninsured and untraced drivers. All authorised motor insurers are required to be members of the MIB, which administers a central fund that is funded by the insurers.

A recent Court of Appeal ruling - *Byrne -v- Motor Insurance Bureau* 2008 - has overturned the Motor Insurers Bureau Untraced Drivers Agreement 1972. The case involved a three year old boy who was injured in an accident with an untraced driver in June 1993. It was not until 2001 that his parents first applied to the MIB for compensation, but the claim was rejected as he was out of time. The normal limitation for bringing a claim for personal injury is 3 years from the date of the accident; except in cases of mental incapacity, date of knowledge and, in respect of this article, in the case of minors when the 3 year limit does not begin to run until the minor reaches the age of majority (18).

The MIB Untraced Drivers Agreement however currently requires all victims of untraced drivers to apply for compensation within 3 years of the date of the accident irrespective of the age of the victim. This requirement, it was ruled, was incompatible with a European Directive that demanded that those injured by hit and run or uninsured drivers should be no less favourably treated than other road accident victims. Lord Justice Carnwath has directed that the Agreement be reviewed in light of his ruling. The MIB's Uninsured Drivers Agreement has no such limitation restrictions. The case was brought against the Department of Transport and the MIB and the Secretary of State has applied for leave to appeal against the ruling. This decision, if upheld following any further appeal, will affect

many potential claimants who were a minor, or under a disability, at the time of their accident and who believe that their claim is out of time. It is unknown how many potential claimants there are who may be affected by this decision.

Brain Injury

There is no doubt about it, brain injury can be devastating for sufferers and for other family members. For society as a whole, severe brain injury may impose a long-term burden of continuing care. Cars are becoming safer and the incidents of head injuries are falling but half the people who suffer from severe brain injury have had road traffic accidents. There have been

improvements in the management of the head injured and in the acute phase of care following injury. These have led to the improvement of survival rates. It is true that many patients who would previously have died are now alive and for those patients who survive the outcomes are also improving. The improvements in survival mean an increase in demand for rehabilitation services.



In the UK as a whole, rehabilitation facilities for those patients who have severe brain injuries have been scarce and very difficult to access and far too often it falls to the families to give up their lives to care. While the failure of adequate investment in rehabilitation services for the brain injured is a matter for Government and the Department of Health to address, there are many charities working hard to make life better.

These make an enormous contribution to filling in the gaps in the current service structure. In many cases, the facilities are made available by the voluntary sector and by private organisations. They have often made the difference between a life of permanent institutional care and restoring a fulfilling, happy, helpful and useful life in the community. Kent Acquired Brain Injury Forum have mapped the provision of services in the county of Kent. For more information, please see www.kabif.org.uk



produce an immediate result, it usually has beneficial effects. Statistics for formal mediation show that of those that do not settle on the day, many settle soon afterwards. Even if there is no overall settlement, it is often the case that some aspects of the claim can be agreed, saving costs and speeding up the trial process.

Settlement on the right terms requires proper preparation. By preparing the case on the assumption that it is going to trial, the Claimant will be in the best position to negotiate. Experts and the like should be discouraged from assuming a case will settle.

Criminal Injuries Compensation

Most victims of violence are unable to obtain compensation from the perpetrator of the act because that person has little or no resources to satisfy any judgment. Whilst compensation orders can be made by the criminal courts, the amounts involved are usually small and very often not paid.

Because of these difficulties, the Government decided to make a Scheme for the compensation of victims of criminal violence from state funds. The Scheme was originally set up in the 1960s and was based, very largely, on the civil system of compensation.

In the 1990s the Scheme was becoming too costly for the Government and they introduced the Criminal Injuries Compensation Act 1995. It was introduced in 1996.

The Scheme introduces a tariff of awards for different injuries. There is no discretion involved in the awards that are made. Where someone has suffered several injuries as a result of the same incident, they are awarded the full compensation for the most serious injury and then 10% of the tariff for the second most serious injury and 5% for the third most serious. No compensation is made for any injuries beyond that.

The only compensation payable over and above the tariff award is in relation to loss of earnings and other expenses. The payment of loss of earnings compensation is only made where the victim has lost earnings for more than 28 weeks as a direct result of the injury.

This Scheme specifically states that no award will exceed £500,000. The Scheme is operated by the Criminal Injuries Compensation Authority. To obtain an award, you have to make an application for compensation and submit that to the Authority within two years of the offence. This is different from the Personal Injury Limitation, which is three years.

Straightforward road traffic accidents are excluded from the Scheme, but the Scheme does accept that an injury attributable to the use of a vehicle will be a criminal injury where the vehicle was used so as deliberately to inflict, or attempt to inflict, injury on a person.

Often victims of violent crime may not be awarded the full amount of compensation that they are entitled to under the Scheme. Many

The ADR process itself should be carefully considered. In personal injury claims the issue is almost always as to the level of damages alone. With sensible lawyers on each side there should be no need for a mediator to be appointed to conduct the settlement; a "round table meeting" should suffice. However, mediators can be useful in certain circumstances. For example, if a Defendant's legal team is being unreasonable. They may, for example, have given initial advice to insurer clients from which they feel they cannot depart. A good mediator will be able to judge where the difficulties in coming to a sensible view stem from and make unreasonable Defendants

applicants make their claims without expert solicitors' advice behind them. Even a deserving applicant may have their award reduced or withheld altogether if they fail to inform an appropriate body of the events without delay, to enable that body to investigate the crime. Where the applicant is regarded as being undeserving, such as the applicant having past criminal convictions themselves or their conduct before, during, or after the incident, there may be a reduction or remission of the entire award.

It is in this area that The Guardian recently cited a woman known only as "Helen" who was claiming compensation because she was raped.

The press confirmed that her award had been reduced by 25% because she had been drinking before her attack. She was sensible enough to obtain legal advice and following her solicitor's intervention the reduction in her award was overturned.

The article mentioned that she had achieved £11,000 by way of compensation for her rape. Had the solicitors not intervened then she would have lost £2,750 of that award. It is unlikely that the £11,000 that was reported is the entirety of her claim. She is likely to have had a claim for loss of earnings and other expenses in addition.

Once an application has been made, the Board will investigate the claim and it is up to the person making the claim to prove their losses and what tariff they believe they should be paid from.

The Board usually commence their enquiries by writing to the Police and the GP. It is quite often the case that severe injuries are not properly compensated for under the Scheme because applicants make a claim without solicitors' advice.

Because the Scheme does not allow legal costs to be recovered, applicants are often put off seeking expert assistance in making the claim. This can often have a detrimental affect on the award.

We often advise people who have sustained brain injuries as a result of assaults with claims of this nature. Evidencing the extent of the injuries requires very careful handling and expert evidence from the right specialisms.

We have very often been able to persuade the Authority to increase awards to clients and have often persuaded them to make the maximum payment possible, i.e. £500,000,

reconsider their stance. Be careful, therefore, to choose an appropriate mediator with personal injury experience.

Likewise choose the right time to mediate; in other words when the Claimant's evidence is in good order and the claim properly formulated.

A Claimant should not be rushed into negotiations. In the light of Halsey above, explain in correspondence that ADR will be agreed to but only at the appropriate time. Nicholas Baldock is a personal injury barrister and CEDR trained mediator practising from 6 Pump Court.

where a serious injury has been involved.

A revised scheme will come into effect on 3 November 2008 for all claims submitted after that date. There is no increase in the overall cap on compensation, which remains at a maximum of £500,000 for the injury award.

The majority of awards in the tariff have remained unchanged, but there have been some up-rating and down-rating of awards. There is also now provision for allowing a claim for the reasonable costs of setting up and administering a special needs trust. There will be different awards for dominant/non-dominant limbs and there is now a category for being stabbed.

The biggest changes have been at the more severe end of the claim spectrum where brain injured applicants have benefited from the changes with greater awards. Most of this has sadly been funded by reductions in awards at the bottom end of the scale so the overall amounts have not actually been increased.

Rix & Kay are instructed to assist with claims under the scheme. If you have sustained a catastrophic injury as a result of a criminal act then please do not hesitate to contact us and we will do our best to help you with your application to maximise the award that you achieve.



Corporate Manslaughter and Corporate Homicide Act 2007

This act provides a new criminal offence of corporate manslaughter (corporate homicide in Scotland) where the way in which a company's activities are managed or organised cause a person's death. This does not apply to prison services until 2011, but came into force in the UK on the 6th April 2008.



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



Frances Pierce

Partner

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 Solicitors Regulation Authority Personal Injury Panel since 1996, is on the Headway - the brain injury association Personal Injury Solicitors List and actively supports her local Headway where she is a trustee. She is Chairwoman of the campaigning group Kent Acquired Brain Injury Forum and a committee member of the Brain Injury Social Workers Group, she sits on the Legal Services Commission's Special Cases Unit and is 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.

Tony Merriman

Associate Solicitor

Tony is a real specialist in catastrophic injury. He has been a member of the Solicitors Regulation Authority Personal Injury Panel since 1998 and is on the Headway - the brain injury association Personal Injury Solicitors List and helped found the Kent Acquired Brain Injury Forum where he sits on the steering committee. He is an honorary legal advisor at Tunbridge Wells Citizens Advice Bureau.

Wendy Morcom

Fellow of the Institute of Legal Executives

Wendy is a member of the Association of Personal Injury Lawyers. Wendy specialises in all areas of catastrophic injury. She assists Frances and Tony with the large multi - million pound cases, which require a team approach and many hours of detailed work.



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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.

Wendy's Guide to Brain Injury 'Jargon'

Wendy joined the specialist CIGN team at Rix & Kay in March 2008 and is helping many of our families to understand the complexity of brain injury jargon.

This is the first in a series of 4 articles that will 'go back to basics' and, hopefully, will help your understanding.

Glossary of Terms

Coma – the state of profound unconsciousness in which the patient cannot be roused, and reflex movements are absent.

Cranial Cavity - The space or hollow within the skull.

Glasgow Coma Scale (GCS) - a numerical score given to head-injured patients starting immediately after the injury and ranges from a minimum score of 3 to a maximum score of 15. It measures the patient's degree of unconsciousness and a score of 7 or less indicates that the patient is in a coma. A score of 15 indicates that the patient can speak coherently, obey commands to move and can spontaneously open his/her eyes. Recovery from a coma is gradual, starting with the opening of the eyes, then responding to pain before responding to speech. The length of a coma is an accurate predictor of the severity of residual symptoms.

Haemorrhage – blood loss/bleeding.

Neuron – a single unit of the nervous system consisting of a nerve cell with its various processes and the nerve fibres to which it gives origin.

Post Traumatic Amnesia (PTA) - the inability to remember continuous events, after a blow to the head which causes an alteration of consciousness, even when the patient appears to be awake, lucid and seemingly in touch with his or her surroundings; but unable to remember everyday things such as a conversation they have just had. The patient is likely to be disorientated in space and time, unable to remember the day, date or year, or even why they are in hospital; and are likely to be agitated and restless.

The Brain

The average human brain weighs about 3lbs and represents about 12% of the body's total weight. It has the texture of blancmange and is approximately 75% water. The brain consists of 100 billion neurons which is about 166 times the number of people living on Earth. The brain uses approximately 20% of the total oxygen pumping around the body and about 750ml of blood is pumped through the brain every minute.

Brain Injuries

These are sub-divided into: acquired brain injury (abi) and traumatic brain injury (tbi). An 'acquired brain injury' can be caused by a stroke, tumour, brain haemorrhage or viral infection. These account for 25% of brain injuries.

A 'traumatic brain injury' is an abi caused by external forces causing damage to the brain tissue. These account for the remaining 75% of brain injuries, which are split as follows: 40% as a result of road traffic accidents; 20% by falls/domestic accidents; 10% from assaults and 5% from work/sport accidents.

Tbi's can be sub-categorised into:

Minor brain injury

This is where there has been either no loss of consciousness or a loss of under 15 minutes and **post traumatic amnesia (PTA)** of less than an hour. A **Glasgow Coma Scale (GCS)** score of 13-15 would apply.

Moderate brain injury

This would be where the loss of consciousness was 15 minutes to 6 hours; with a **PTA** of up to 24 hours and a **GCS** of 9-12.

Severe brain injury

This is where the patient is in a **coma** for more than 6 hours; a **PTA** of more than 24 hours and a **GCS** of less than 9.

A head injury is usually a series of injuries. The first injury is at the time of the impact, which causes damage to brain tissue and disruption of communication pathways. The second injury occurs as a result of the brain swelling and pressure from bleeding inside the **cranial cavity**, which causes impairment of blood circulation and an interruption in the oxygen supply to the brain. This occurs during the immediate minutes after the accident and if the blood supply to the brain is interrupted for even 2 or 3 minutes the brain cells are starved and will die. The third injury occurs during the hours and days following the original accident and consist of bleeding, bruising, development of blood clots and chemical changes within the brain.



In the next issue of CIGN News we will provide more information on how the different areas of the brain function; then the effects of brain injury on the different areas of the brain and finally on how brain injuries and their effects differ between people. If there is a particular area you would like us to cover please do let us know by contacting Wendy at wendymorcom@rixandkay.co.uk.

Mince Pies

Neil Cawthorn from Temple Head and the Chief Executive of the English Community Care Association will be speaking and enjoying mince pies at a Kabif event on 3rd December 2008 @ 7pm - see www.kabif.org.uk for further details.



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