



**Richard West**  
Partner,  
Local Authority Unit

**Welcome to Kennedys' Local Authority briefing. In this issue we comment on current legal developments and issues that directly affect local authorities.**

The topics covered include the use of the correct medical expert in personal injury cases, exceptions to the double recovery principle (whether a claimant should be able to recover under an employees' insurance policy as well as in a claim for damages); and how to mitigate the effect conditional fee agreements have on local authorities' claims experience. In addition, we look at the new housing disrepair protocol and its implications for local authorities and provide an update on local authorities' duties to maintain the highway.

I hope you will find these articles interesting. If you would like to discuss these or any other issues please do not hesitate to contact us – at the back of this briefing we include contact details and biographies of the Kennedys' Local Authority Unit.

Our local authority clients have come to rely upon our technical ability and the added value that we provide. All of our clients have remarked that they find our team to be particularly approachable. We would be delighted to discuss the service that we can provide for you.

**Contact Richard West on 01277 698 736 or via e-mail [r.west@kennedys-law.com](mailto:r.west@kennedys-law.com) or log onto [www.kennedys-law.com](http://www.kennedys-law.com)**

## Expert choice

**Richard West** Partner, Local Authority Unit

### **A High Court judge has emphasised the importance of choosing the right expert in medical cases.**

On 15 December 2003, at the High Court, Judge J Leighton-Williams QC gave judgment in *Thomas Ball v London borough of Southwark*. Mr Ball had tripped and fallen over a pavement slab and claimed that he suffered a brain injury as a result.

Kennedys' partner Richard West acted for the London borough of Southwark, who argued that Mr Ball had not suffered any brain injury and that the personality changes he had experienced were from some other cause.

The court agreed that there had been no brain injury or personality change as a result of the accident. Although the claim was in the region of £750,000, Mr Ball was awarded only £7,000. Before the issue of proceedings, an interim payment of £10,000 had been made. This meant that the claimant left the court with nothing and faced a considerable order for costs.

#### **The case before the court**

The dispute turned upon a difference in the opinion of medical experts. Mr Ball said that he had received a blow to the head as he fell forward and struck his head on a wall; he had then fallen backwards and banged his head on the pavement. He instructed consultant neurologist Dr Peter Harvey.

Dr Harvey made an initial diagnosis of "dysexecutive syndrome". Then he changed his mind, deciding that there had been frontal lobe damage. He recommended that a SPECT scan of the claimant's brain should be performed.

The SPECT scan was carried out by a Dr Buscombe, who agreed that Mr Ball had indeed suffered brain damage and that this was related to the fall in question.

The borough instructed Professor Raymond Dolan, a consultant neuropsychiatrist. He examined Mr Ball and doubted that he had suffered any brain injury. He recommended a PET scan of the claimant's brain.

Both the doctor who conducted the PET scan and Professor Dolan found the scan to show no brain injury to the claimant.

Mr Ball had been a publican at the time of his injury. It was said that, after the accident, he had needed to give up work and to sell his pub. He did so after he had seen Dr Harvey.

He also based his case on a number of personality changes, saying that these had arisen as a result of the accident.

In evidence, the claimant's wife in fact accepted that her husband's personality changes had not come on until approximately 12 months after the incident. This was around the time when he was first assessed by Dr Harvey.

When finding that the claimant had suffered no brain injury and that any personality changes had arisen as a result of matters unconnected with the accident, the judge found that the SPECT brain scan was an inadequate tool for the investigation of traumatic brain damage and that the PET scan was the appropriate tool to be used.

#### **Criticism of expert**

Dr Harvey was criticised on a number of grounds. He had denied seeing a letter in which Dr Buscombe had identified the area in the brain where the damage was supposed to have been – a finding which was inconsistent with Dr Harvey's diagnosis of frontal lobe damage. The judge said, "I am reluctantly forced to conclude that he ignored that letter because it was inconvenient to his case".

There was, said the judge, substance in the submission made by counsel for the borough that Dr Harvey failed to qualify as an independent expert because he was neither independent nor an expert. He had clung to the diagnosis of brain damage despite numerous warning bells which should have caused him to think again.

The judge found that Dr Harvey's use of the term "frontal lobe syndrome" was out-of-date and imprecise. He also pointed out that the doctor had engaged in a discussion about the relative merits of the SPECT and PET scans without the necessary expertise. The judge said: "It is disappointing to come across such a situation, and all the more so because lack of expertise increases the length of a trial with consequent increase in wear and tear on those involved."

### The appropriate expert

The judge said that, when instructing an expert witness, the following questions should be borne in mind:

- Do they have the relevant expertise to comment upon the issues that are being raised?
- Are they out-of-date or inexperienced in modern techniques?
- Do they still practise clinically within the NHS or privately or, are they effectively a professional medico-legal expert? If the latter, they may be best avoided.
- Has the expert in question been criticised previously by other judges for an apparent lack of independence? If so, then that expert should be avoided.



## No more double money

**Andrew Caplan** Partner, Local Authority Unit



Andrew Caplan

### Should a claimant be able to recover under an employees' insurance policy as well as in a claim for damages?

The Court of Appeal has overturned its 1990 decision, *McCamley v Cammell Laird Ship Builders Ltd*. In a unanimous judgment in *Gaca v Perrelli General plc*, the court has re-examined the exceptions to the double recovery principle.

### The facts

Ms Gaca was injured in an accident at work and made a claim against her employers. Ms Gaca's injuries prevented her return to work; this qualified her for payment under an employees' insurance policy.

The question for the court was: should the proceeds of the insurance policy be deducted from the damages awarded to the claimant?

In *McCamley*, where the facts were almost identical, the Court of Appeal had found in favour of the claimant, saying that the case came within the "benevolent exception" to the principle of avoiding double recovery.

**Benevolent exception**

In his leading judgment, Lord Justice Dyson referred to the principle that the person responsible for an injury should not benefit as a result of the generosity of third parties. When a claimant has received money, say, from a disaster fund, this money must be disregarded.

But the position should be different where the payment has been made by the defendant to the claim. The claimant should not be compensated twice by the person who has done him or her wrong. Employers injuring employees would be discouraged from making ex gratia payments if these were not deducted from awards in damages.

McCamley was wrongly decided; an ex gratia payment by an employer who is responsible for the wrong done to an employee does not fall within the benevolence exception to the double recovery rule.

**The insurance exception**

Ms Gaca had not contributed to the insurance policy provided for her. The position would be completely different where a claimant paid premiums on an insurance contract, met with an accident and received compensation under the policy.

It was suggested to the court that, by working for the employer, Ms Gaca had indirectly contributed to the premiums which the employer had paid. This argument was dismissed; contribution could not be inferred by the fact that a claimant was an employee for whose benefit the insurance was arranged.

**Comment**

The Court of Appeal has properly reversed the decision in McCamley. Employers were paying premiums both on permanent disability insurance cover and to insure against claims for loss of earnings. With premiums based on claims experience, a company would face increased premiums while a claimant was unjustly enriched. Damages should put the claimant in the position he or she would have been in but for the accident, not provide a windfall.

This is different from where a payment is made from sympathy or the claimant has prudently taken out insurance cover.

A question: does the insurance exception apply where claimants have – on the basis of having received a benefit in kind – paid tax on an insurance policy taken out by employers on their behalf?

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*“The feedback that I have from Gallagher Bassett customers who Kennedys act for is very positive. If my customers are happy – I'm happy.”*

*Keith Savill – Gallagher Bassett*

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**Local Authorities and Conditional Fee Agreements – a potentially higher claims experience.**

**Richard West** Partner, Local Authority Unit

**Conditional fee agreements (CFAs) have become an increasingly popular option for claimants since the removal of legal aid as the usual way of funding personal injury litigation. Local authorities on the receiving end of CFA-backed lawsuits therefore need to look closely at their claims handling processes if they want to minimise their legal costs.**

In essence, a CFA is a funding agreement between a claimant and their solicitor. The solicitor agrees to act for a claimant on the basis that the solicitor will be paid only if the case is won. If the case is lost, the solicitor will not be paid. However the claimant can still be liable to pay their own disbursements and the defendant's costs. To avoid that potential liability, the claimant, when entering into a CFA with their solicitor, is also likely to take out after-the-event insurance (AEI). If the legal action is ultimately unsuccessful, such a policy will protect the claimant from paying their own disbursements and the defendant's costs.

The advantage to claimants is that they have nothing to pay except for the insurance premium. If they are successful, that premium can usually be recovered from the defendant. The advantage to the claimant's solicitor is that the Conditional Fee Regulations allow the solicitor to charge a success fee in the event that the case is won.

In summary, therefore, the claimant's solicitor will be paid nothing for losing but will be paid an amount higher than their usual hourly rate for winning. In addition the AEI premium can also be recovered.

The additional sum that can be claimed by the solicitor for obtaining a successful outcome is known as a “success fee”. The level of the success fee is generally set when the claimant and their solicitor first meet; and will be based upon the facts known to the parties at the time that they enter into the CFA. It is based upon the strengths and weaknesses – and therefore the risks – of the case as they stand at the time the agreement is concluded.

The success fee is a percentage increase on the basic hourly rate that the solicitor would normally charge a client.

It would not be surprising for a claimant who had fallen over in the street to agree a relatively high success fee (50% – 100 %) because at the time the CFA is entered into the claimant's solicitor will not know whether the local authority will be able to make out a defence under either s41 or s58 of The Highways Act 1980. That will not be known until the local authority has responded to the initial letter of claim and either admitted liability or provided preaction disclosure under the Personal Injury Praction Protocol (The PI Protocol).

Conversely, a passenger in a local authority vehicle who is injured following an accident involving that vehicle will know that either the driver of the local authority vehicle or the driver of another vehicle involved in the accident is probably to blame. Here the success fee will be relatively low (10% – 25%).

100% will usually be allowed if the case progresses to trial.

A claim worth £5,000 may traditionally have generated claimant solicitors' profit costs of, say, £3,000. The same case with a 100% success fee would result in those costs doubling to £6,000. If a local authority has 500 such cases in a year, the additional liability to the local authority will be £150,000. This does not include the additional sums that must be paid to discharge the claimants' AEI premiums, which could average £650, thus adding a further £32,500 to that local authority's bill.

The government and the appeal courts have made it clear that they favour CFAs and AEI policies. Local authorities therefore need to adapt to prevent their claims bills increasing dramatically.



At the current time the most effective way to limit a claimant's success fee is to avoid the claim in the first place. Effective risk management systems should therefore be in place to ensure that the numbers of claims received are minimised.

Once a claim has been made, the best way to restrict the success fee is to investigate the claim fully within the three-month period allowed by the PI Protocol. If the claim is fully investigated and a proper decision to admit liability is made early, it can later be argued that the claimant's success fee should be reduced from the date of the admission. This is on the basis that the risks for the claimant have been significantly reduced following that admission.

A delay in such investigations or document gathering will not enable a local authority's claims handlers to assess properly the strengths and weaknesses of a particular case. That may result in liability being repudiated inappropriately. The claimant will then have a good case for seeking a high success fee once the case is settled.

#### **Recommended Action**

1. Pass on letters of claim that you receive to your insurers/claims handlers/insurance department as soon as possible.
2. Pass on the documents that you will be required to disclose under the PI Protocol as soon as you can – and respond promptly to any requests for clarification or additional documents received from your insurers/claims handlers.
3. Provide your own views to your insurers/claims handlers. There may be a good reason why your authority has acted differently to another – but your insurers/claims handlers will not know unless you tell them.
4. Emphasise to the departments within your authority the need to respond properly. They may not appreciate the urgency needed, or the money that can be saved by a speedy response.
5. Accept the advice of those acting for you. They are skilled at advising on the likely outcome if the matter proceeds to trial.

Of course, it will not always be possible to admit liability. But an appropriate early admission, in an expeditiously investigated case, will save a local authority significant sums when it comes to the claimant's bill. Not only can it be argued that a success fee percentage should be reduced following an admission of liability; but the claimant's costs will be lower in any event as their lawyers will not have to incur costs in dealing with the liability aspect of the case.

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*“We are delighted with the work Kennedys have done on our behalf. At a time when the cost of claims is rising, we have seen a dramatic reduction in the amount we pay out. I believe that much of this is down to the expertise of the team at Kennedys, and the excellent teamwork between our two organisations.”*

*Jason Goodwin – Westminster City Council*

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**Tackling housing neglect****Richard West and Andrew Caplan** Partners, Local Authority Unit

**Keeping to the timetables and making intelligent use of existing complaints procedures will help local authorities and institutional housing providers get the most out of the new housing disrepair protocol.**

The key aims of the new housing disrepair protocol, which came into force six months ago, are to avoid unnecessary litigation, promote speedy and appropriate repairs, and effect an early exchange of information so as to keep costs down. Properly used, the protocol can achieve these goals, especially as it gives disgruntled tenants a better way of tackling disrepair in their homes than going to court.

**Real deadlines**

The key feature of the protocol is its insistence on the early exchange of information. A claimant can activate the protocol by writing either an early notification letter or a full letter of claim. The early notification letter will give basic details and request disclosure from the landlord. The landlord must respond within 20 days, otherwise it will have breached the



protocol and may be penalised by cost orders and penalty interest. Assuming, however, that the paperwork is completed on time, the parties are then encouraged to commission a joint report from a surveyor on the state of the property.

The protocol deadlines are critically important. If, for example, the landlord fails to respond to the expert, it will be stuck with a single joint expert in cases where the expert may be assessing questions of both liability and quantum. An obvious example is a case involving damage through damp, where liability can turn on poor usage and condensation rather than on the failure of a damp-proof course for which the landlord will be responsible.

**Complaints procedure**

Under the new system, other options must be considered before activating the protocol, though. In the case of local authority clients, this includes making use of their complaints procedure. (All local authorities are required to have such a procedure.) By routing claims through a complaints process, the protocol – and, in particular, its very tight timescales – can be avoided. This can have distinct benefits. For example, local authority clients say that claims farmers are currently targeting tenants on their housing estates. However, the complaints procedure is a very effective way of preventing tenants activating the protocol, claiming costs and thus frustrating the claims farmers.

**Other key points**

Landlords must:

- maintain a good system of recording complaints – and of when inspectors have attempted to access the property – as it is vital to have an effective paper trail when issues of notice of disrepair are raised;
- ensure the expert has clear instructions and that their remit is carefully defined (which includes agreeing the expert's letter of instruction and the scope of their report with the other parties involved); and
- comply strictly with timescales to prevent the court drawing detrimental inferences about the landlord in cases involving complaints of delay.

Kennedys' local authority liability unit has held a number of workshops for landlords on the practical implementation of the protocol. For further information, please contact Richard West or Andrew Caplan.

*“Our experience has been that all members of their team are approachable and fully knowledgeable which helped to nurture an excellent working relationship between our two organisations. ...The rapport between Kennedys and Basildon District Council staff is excellent and has helped us to develop an improved customer service approach to claims management.”*

**Gerry Levelle – Manager of Audit & Business Risk,  
Basildon District Council**

**Biographies**

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**Practice area**  
Liability Unit

**Experience and specialisms**

- Catastrophic injury
- Psychiatric injury
- Public and employer's liability
- Motor
- Training clients' claims staff

**Profession**  
● Qualified 1993

**Clients**  
● Local authorities and London boroughs  
● Reinsurers, motor insurers and Lloyds syndicates  
● Insurance brokers  
● PL and EL claims handling companies

**Publications**  
Author of:  
● Claims Handling – Law and practice – a practitioners guide (Wetherbys 2004)  
● Essential Law for Claims Handlers (Butterworths 2000)

**Memberships**  
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**Practice area**  
Liability Unit

**Experience and specialisms**

- Gross negligence
- Public and employer's liability
- Motor
- Sports injury
- Industrial disease

**Profession**  
● Qualified 1997  
● Joined Kennedys 2002

**Clients**  
● Local authorities  
● Insurers including ZMI, NU and Liberty and Willis

**Publications**  
Contributor to:  
● Berrymans and Bingham's  
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● Speaker at client seminars

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**Practice area**  
Liability Unit

**Experience and specialisms**

- Litigation
- Defendant RTA personal injury
- Employer's Liability
- Public liability

**Clients**  
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**Profession**  
● 2003 Joined Kennedys  
● 1998-2003 Amlin plc

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**Practice area**  
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**Experience and specialisms**

- Personal injury (defendant)
- Family litigation including ancillary relief and children matters
- Conveyancing

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**Experience and specialisms**

- Claimant and defendant work
- Recovery work
- Infant claims

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**Profession**  
● Kennedys  
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Liability Unit

**Experience and specialisms**

- Motor claims
- Criminal matters
- Public and employer's liability

**Profession**  
● Qualified 2002  
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● Fellow of Institute of Legal Executives

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**Practice Unit**  
Liability Unit

**Experience and specialisms**

- Public and employer's liability
- Motor
- Highway claims (defendant)
- Risk evaluation in connection with conditional fees

**Clients**  
● Local authorities

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**Practice area**  
Liability Unit

**Experience and specialisms**

- Handling claims for local authorities, county councils and police forces
- Public and employer's liability
- Motor claims
- Material loss and damage

**Clients**  
● Local authorities

**Profession**  
● Fellow of Chartered Insurance Institute – 1975  
● 2000 to date – Kennedys  
● 1986-2000 – South east law firm  
● 1971-1986 – Royal Insurance Claims Department