

# The Key

## Cold comfort for banks

Financial institutions have to be careful about preserving funds in accounts that have been frozen by court order.

**A freezing injunction is one of the most powerful legal remedies available to someone who has been cheated by a fraudster. Essentially, it is an interim remedy that stops a defendant from removing its assets from the jurisdiction, or indeed dealing with them in any other way. Often the relevant assets will be bank accounts held in the name of the defendant.**

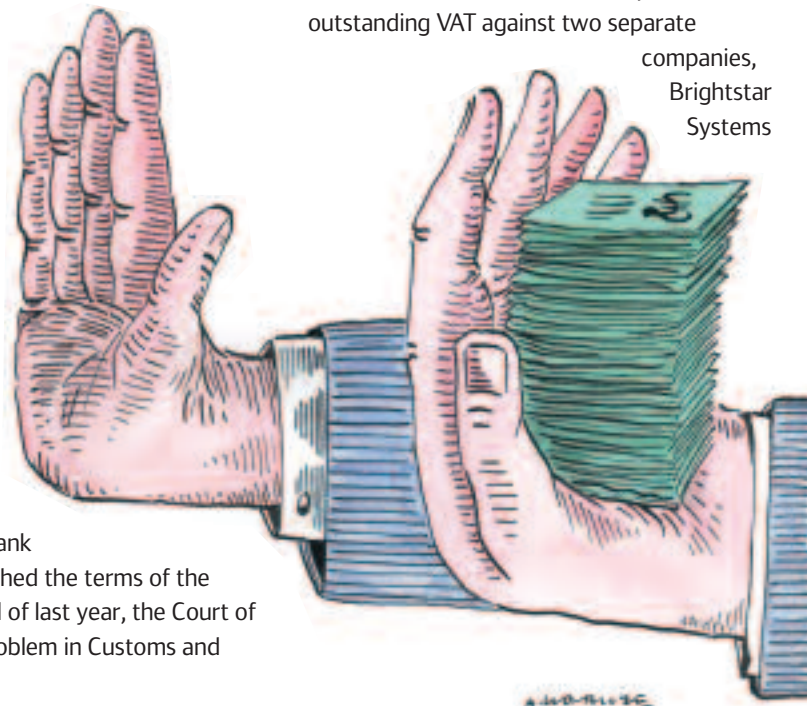
Once it has obtained the injunction, the claimant will serve a copy of the order on the bank(s) at which the defendant has an account, thereby freezing the defendant's money until the court has made a decision on the claimant's case. Having been served with the order, the bank does not at that point become a party to the proceedings, but it does have certain duties to the court.

These duties were discussed by the Court of Appeal as far back as 1981 in the *Z Ltd v A*

case. From the moment it knows about the order, the bank must not breach the injunction – for instance, by allowing the defendant to transfer funds out of its account without the court's authority. If it deliberately transfers funds out of the account, the bank will be liable for contempt of court. But until recently, the courts have been silent on the duties owed by a bank to a claimant in cases where there is no suggestion that the bank has deliberately breached the terms of the injunction. At the end of last year, the Court of Appeal tackled the problem in *Customs and*

*Excise Commissioners v Barclays Bank plc*. The case involved two separate freezing injunctions obtained by the Custom and Excise Commissioners (Customs) in respect of outstanding VAT against two separate

companies,  
Brightstar  
Systems



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and Doveblue Ltd. Both companies held accounts at Barclays Bank that were in credit.

The matter came before the Court of Appeal as a preliminary issue and the court proceeded on the assumption that the facts set out in the particulars of claim were true. There was no suggestion that Barclays was in contempt in either instance.

### Brightstar

A freezing injunction up to the value of £1.8m was granted against Brightstar on 26 January 2001. A copy of the freezing injunction was then faxed to Barclays at 12.33pm on 29 January 2001. Under that order, Customs undertook to pay the reasonable costs of third parties in relation to the injunction.

On 29 January 2001, one of the bank's legal advisers wrote back to Customs, saying that the bank would abide by the terms of the court order but would charge a fee for compliance. But at 2.30pm that day, the bank permitted three payments out of Brightstar's account – two of which were sent overseas – and further debited the account with charges relating to the overseas payments. The amounts paid out and debited totalled more than £1.2m. The bank said this was due to 'operator error'.

Two days later, the bank wrote to Customs explaining what had happened. Customs obtained judgment in default against Brightstar

in May 2001 for over £2.2m. The shortfall on the amount of the judgment debt exceeded the amounts paid out of the account by Barclays.

### Doveblue

A freezing injunction was granted against Doveblue on 30 January 2001. It was served on Barclays by fax at 11.38am the same day. At around 2pm, the bank permitted payments out of Doveblue's account totalling over £1m.

The following day, the bank's legal department wrote to Customs saying that a problem had arisen shortly after service of the court order. Doveblue had used the bank's Faxpay system to make direct transfers through the bank's payment centre without reference to the branch where the account was actually held. Although steps were taken to change the instructions on the system, the payments were made before the changes took effect. The bank immediately tried to recall the payments but failed.

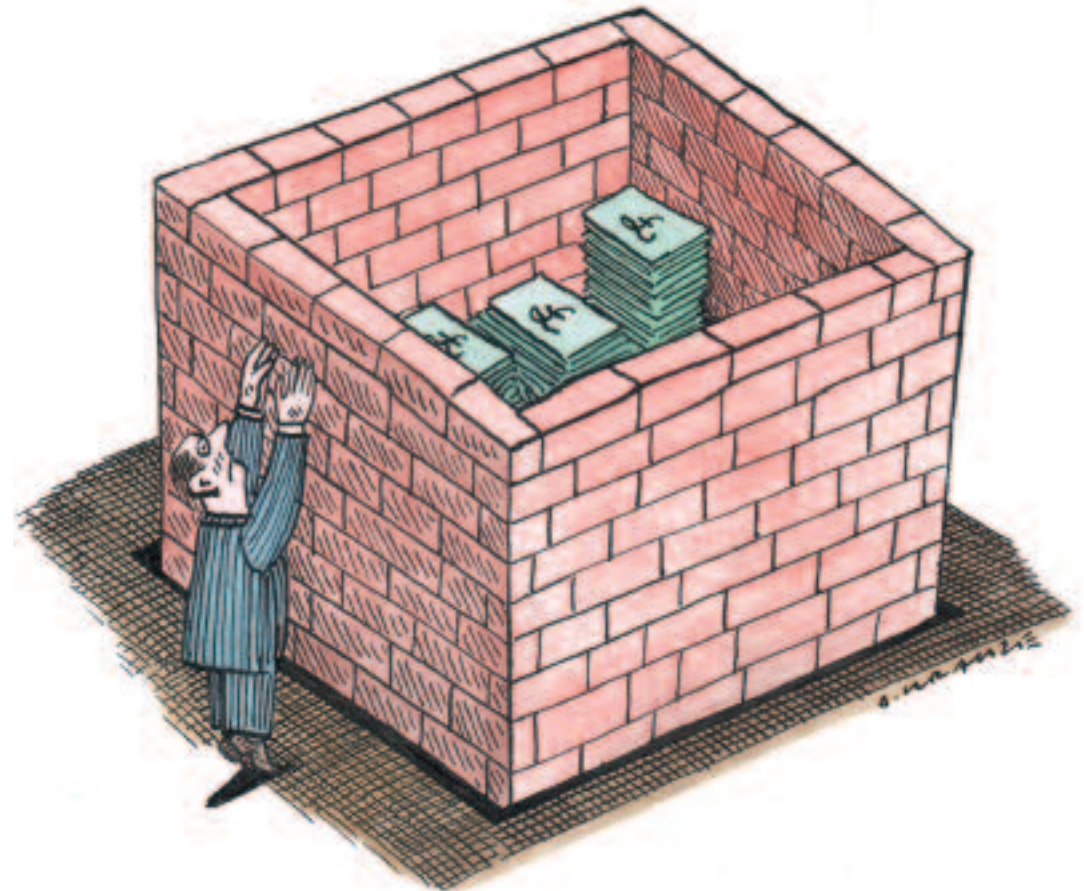
On 23 February 2001, Customs obtained judgment in default against Doveblue for over £3.9m. However, the shortfall in the money recovered comfortably exceeded the amount paid out by the bank.

### Duty of care

Customs sued Barclays for negligence, seeking to recover the amounts transferred out of the

accounts and interest. The bank – which was not involved in the underlying Brightstar and Doveblue litigation – opposed the claims, arguing that it did not owe Customs any duty of care. The bank won in front of the trial judge, and Customs appealed.

The Court of Appeal took the view that Barclays did indeed have a responsibility towards any claimant who obtained a freezing injunction: the bank had to take care that the funds of a person whose account was frozen by the injunction were not dispersed in breach of that court order.



In making that decision in favour of Customs, the Court of Appeal went back to – and applied in turn – the basic tests for determining whether one person owes someone else a duty of care in economic loss cases. These tests are:

- 1 the Caparo v Dickman (1990) threefold tests of foreseeability, proximity and fairness;
- 2 the voluntary assumption of responsibility test; and
- 3 the incremental approach.

When applying test (1) above, Barclays accepted that it was foreseeable that Customs would suffer loss (in the form of not collecting the amount of VAT payable) as a result of any breach of the freezing injunction by the bank. And Barclays had failed to establish any mechanism to prevent the defendants from withdrawing money from their accounts. Lord Justice Longmore concluded two things:

- Formal notice of the court’s order had to be served on a bank for there to be sufficient proximity between it and the claimant.
- But once Barclays had been served with the order, the bank had to appreciate the claimant’s active interest in trying to ensure that money in the defendants’ accounts was not transferred out.

The fairness element of test (1) was trickier, however. Lord Justice Longmore recognised that

freezing orders caused major problems for banks: that was why they were entitled to charge claimants a reasonable sum for their co-operation. The very nature of a freezing order, he continued, demonstrated the court’s concern that the assets should not be dissipated; and such orders were served on banks to secure their co-operation in preserving the defendant’s assets. Freezing orders would be pointless unless financial institutions took reasonable care to ensure that any funds in frozen accounts were preserved until the proceedings had finished.

In a separate judgment, Lord Justice Peter Gibson agreed that test (1) imposed a duty of care on Barclays. On the issue of fairness, he added that the key fact was that, in the absence of an adequate remedy, Customs would suffer loss as a result of the bank’s errors.

Lord Justice Longmore went on to decide that the application of test (3) above also imposed a duty on a bank towards any claimant serving a freezing injunction on it. This duty was no different from the other types of liabilities that banks had assumed towards their customers over many years.

Barclays argued that it had not assumed responsibility towards Customs just because it had been served with the freezing injunction or because it had written to Customs acknowledging that it was bound by the

order. Without this assumption of responsibility, Barclays said, there could be no duty of care. Lord Justice Longmore took the view that, although an assumption of responsibility could lead to the imposition of a duty of care, it was not always essential. He entirely agreed with the bank that it had not assumed responsibility simply by writing to Customs acknowledging the orders. But in the end, this did not matter: a duty should be imposed because the order had been served on the Bank. Lord Justice Gibson agreed with this conclusion.

The third member of the court – Mr Justice Lindsay – took the same overall line as Lord Justice Longmore, saying that each one of the three tests was a check on the conclusion provisionally reached on the application of the other two. Even if test (2) above was resolved in the bank’s favour (something he personally was against), it was nevertheless impossible to conclude that the other two tests should be resolved in the same way.

### Conclusion

The Court of Appeal has made things clearer: it has stated categorically that banks served with freezing orders have to take care in preserving the funds of anyone whose accounts have been frozen. If a bank negligently releases the funds, it will be liable to a claimant for the amount of those funds.

Following the court’s decision, it is now vital that banks have procedures in place that:

- 1 enable them to freeze accounts as soon as they are served with a freezing injunction; and
- 2 ensure that those funds remain frozen until the matter has been dealt with by the court.

Banks may need to review their current procedures to ensure that errors of the type that occurred in the Barclays Bank case do not happen in the future.

Overall, the decision is obviously good news for claimants who have suffered loss as a result of a bank erroneously paying funds out of frozen accounts. At the same time, it remains important for claimants who have obtained a freezing injunction to ensure that the court order is served on the relevant bank as soon as possible: this is the best way to prevent a fraudulent defendant from dissipating any funds from accounts covered by the order.

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# Paying periodically

Damages for personal injury by way of lump sums will no longer be the norm.

The latest update to the Civil Procedure Rules makes it possible for courts to order damages in personal injury actions to be paid by way of periodical payments.

Up until now, it has been usual for personal injury claims involving future loss to be paid in lump sum awards. These have been calculated at the date of agreement or hearing, and allowed defendants to achieve finality with regard to individual claims at the time of their resolution.



But this snapshot method of quantifying future losses has meant that fixing damages has been a pretty broad-brush exercise – an approach that does not always suit particular cases and may lead to inaccuracies. Although it is commonly thought that this has generally been to the disadvantage of claimants, there have been instances when it has resulted in a defendant paying a larger sum than eventually proved appropriate, following changes in the claimant's circumstances.

## Update to rules

Of course, structured settlements are nothing new; but recent decisions in the courts have highlighted the need for general reform. This has now appeared in the 37th Update to the Civil Procedure Rules, introducing new powers for the courts to order that damages for future loss and care costs in personal injury cases may be paid in the form of periodical payments.

These changes came into force on 1 April 2005 along with sections 100 and 101 of The Courts Act 2003 which amend section 2 of the Damages Act 1996 to give the courts these new powers. Additionally, the provisions of part 36 of the CPR have also been changed, allowing periodical payments to be incorporated into offers.

Defendants will need to be aware of these changes and be prepared to budget for settling claims over longer periods – and for this to become a more common practice. Although this will mean a significant change, with a structured approach defendants may gain greater flexibility in calculating future liability.

## Procedure

Both parties are encouraged, at the outset of any claim, to plead whether they consider periodical payments or a lump sum to be the most appropriate form for all or part of an award of damages. The court then has power to consider the matter and to determine whether to impose periodical payments.

As the order will not necessarily be with the parties' consent (unlike the previous provisions of section 2 of The Damages Act 1996 where consent was necessary), anyone with a particular reason to avoid periodical payments should put extra efforts into negotiations before proceedings begin.

## Settlements

The amendments to part 36 allow any offer in settlement of a claim to include either or both a lump sum and periodical payments. It is yet to be seen how this will work in practice but the courts will presumably look favourably on the use of periodical payments and claimants may well make use of these new provisions to put increased pressure upon defendants.

## Variations

It should also be noted that the Damages (Variation of Periodical Payments) Order 2005 now enables courts to vary orders and agreements under which all or part of the damages take the form of periodical payments. This is only permissible in cases where there is a chance that there will be some change in the claimant's condition – it must be shown that he or she may develop some serious disease or suffer a major deterioration, or enjoy some significant improvement. Nevertheless, the Order carries the potential to bring further uncertainty as to the finality of settlements.

Decisions to vary orders may be made on the application of one of the parties, or with the consent of both. They may also be made on the court's own initiative – a provision which could well lead to unforeseen developments. Of course, such developments need not be negative, as it must be remembered that payments can be varied both upwards and downwards.

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# A lack of self-control?

The claims management industry has an uphill struggle to demonstrate that self-regulation will work.

**The Lord Chancellor's announcement that claims management companies will be subjected to statutory regulation reflects increasing frustration with the industry which has failed to prove that self-regulation will work.**

In May last year, the government's Better Regulation Task Force (BRTF) concluded that claims management companies (CMCs) should have until December 2005 to prove that self-regulation will work. As part of that process – and in response to the BRTF's report – the Claims Standards Council was established as a voluntary regulatory body for personal injury claims managed by CMCs.

There was good reason for the BRTF to be concerned. The unscrupulous business techniques of some claims handlers have long been criticised – a fact reflected, for instance, in the strong language used in the House of Commons debate on the subject on 11 January 2001. And while there are established complaints authorities to help people who are unhappy about the way they have been treated by solicitors or insurers, there has been no clear-cut equivalent in the case of CMCs.

As a result, more claims for redress have been brought against solicitors and insurers because there has been no regulatory way to proceed against anyone else. Complaint by default is hardly a good system.

## The Claims Standards Council

The Claims Standards Council has achieved a fair amount. This includes, for instance, attracting new members, holding public meetings, drumming up support from the government and major insurers such as Norwich Union, and drafting a code of practice that has already been submitted to the Office of Fair Trading.

The Claims Standards Council has a number of aims. These include:

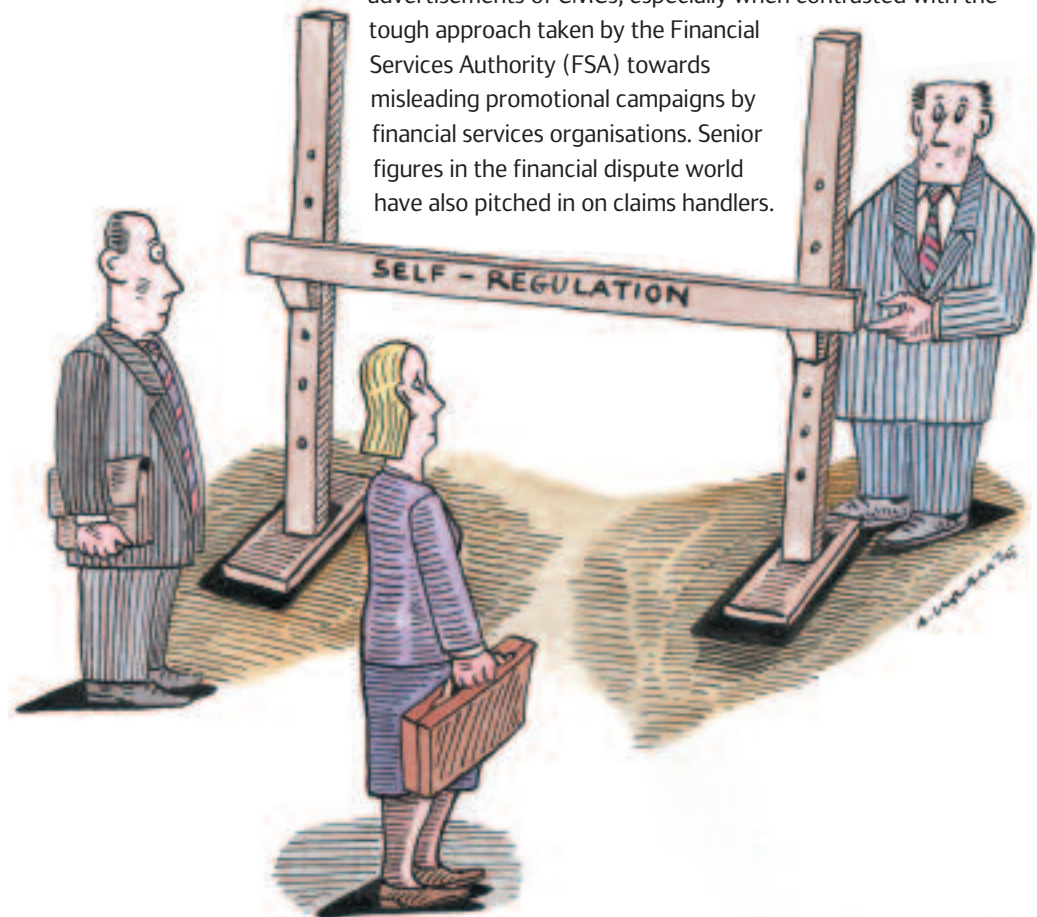
- vetting individuals and organisations seeking membership of the Council;
- setting out the required process for handling claims; and
- providing a forum for dealing with complaints and disciplinary matters.

The Council stresses that it is a non-profit making body which is totally independent of the CMC industry – a key factor in restoring public confidence.

## The imposition of statutory regulation

Earlier this year, the Department of Constitutional Affairs minister David Lammy made it clear in Parliament that the Claims Standards Council was truly the last chance saloon for claims handlers. Unsurprisingly, his announcement prompted several CMCs and related professional organisations to express support for the Claims Standards Council.

However, considerable concern remained about the cold-calling practices and misleading advertisements of CMCs, especially when contrasted with the tough approach taken by the Financial Services Authority (FSA) towards misleading promotional campaigns by financial services organisations. Senior figures in the financial dispute world have also pitched in on claims handlers.



# Anxiety pays

## A new chapter in the story of asbestos litigation.

For example, Walter Merricks – the chief ombudsman in the Financial Ombudsman Service – has highlighted the unfairness of some CMCs raising their clients’ hopes unrealistically, and the need for claims handlers to be much more upfront about their processes and fees.

This led to the announcement on 22 March 2001 by the Lord Chancellor that CMCs will be brought within statutory regulation when the government introduces legislation to implement the Clementi reforms. Lord Falconer criticised “high-pressure selling, sharp practices and targeting of vulnerable people” and described CMCs as “a major driver in fuelling the perceptions of a compensation culture”.

The door is left open for the Claims Standards Council to have a future role. While criticising CMCs for their lack of commitment to clean up their act, the Lord Chancellor has praised the Council’s hard work and suggested that it can still play an important role in closing the regulatory gap. It could even be a candidate for the role of the new regulator.

### Why was self-regulation rejected?

Self-regulation has generally fallen out of favour, and statutory regulation is now widespread. Witness the replacement of the financial self-regulatory organisations such as the Personal Investment Authority, the Securities and Futures Authority and the Investment Management Regulatory Organisation by the statutory authority, the FSA. This trend in favour of external control mechanisms is further confirmed by the recent Clementi review of legal services and the Morris review of the actuarial profession.

One problem is the financial and organisational cost of compliance, including the expense of drawing up new training programmes, corporate policies and internal procedures. As long as regulation remains voluntary or internal, CMCs will commercially want to do as little as possible by way of compliance in order to save money and retain a competitive edge. The Lord Chancellor intends to introduce a new ‘watertight statutory regulatory mechanism’ for CMCs. Even statutory regulation is far from watertight, but in the meantime consumers should proceed with caution.

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**The High Court has been considering whether there should be compensation for negligent exposure to asbestos when this has caused no physical or recognised psychological condition but where the claimants have experienced anxiety about the risk of further injury.**

In *Grieves v FT Everard & Sons* (LTL 16/02/05), Mr Justice Holland was looking at the cases of 10 claimants, each of whom displayed radiological evidence of asbestos pleural plaques. These plaques were caused by their occupational exposure to asbestos fibres due to the defendants’ negligence. Although the claimants were free from any respiratory or other physical symptoms, the judge decided that they were still entitled to be compensated for their injuries.

On behalf of the claimants, it was argued that symptom-free pleural plaques constituted a ‘disease’; it was said that the formation of the plaques should be considered alongside concomitant factors, including the risk of further and more significant disease or injury and the anxiety engendered by that risk.

### Earlier decided cases

Three similar asbestosis cases came before the High Court in the 1980s and have remained unchallenged since. Two of the three predated the introduction of provisional damages. In each case, the defendant argued that a claimant who is free from symptoms should not, as a matter of principle, be awarded damages. All three trial judges overcame this argument by relying on the perceived anxiety of the claimant about the risk of further injury.



# Climbing high

## New regulations about working at height.

None of these cases had gone to the Court of Appeal – doubtless, the defendants avoided the expense of appealing because of the modest sums awarded – and so, although persuasive, they were not binding on Mr Justice Holland. In the 1980s, it could not be anticipated that there would be the number of pleural plaque cases that are seen today nor could it be foreseen that the average size of current awards would be so high.

### What is ‘injury’?

The defendants’ principal argument was that pleural plaques cannot be regarded as a ‘disease’ and that, in any event, they give rise to no physical impairment. Although pleural plaques amount to scarring of the lungs, they have no impact upon bodily function. The defendants also argued that anxiety engendered by the risk of further injury is not, as a matter of law, something which may be compensated; it cannot contribute to ‘damage’ so as to found a claim.

Mr Justice Holland said that “damage” or “injury” in these cases was: “the permanent physical penetration of the chest by asbestos fibres to such an extent as to give rise to:

- (a) the actual development of pleural plaques;
- (b) the possible future onset of symptoms, even of a terminal condition; and
- (c) consequent, potentially continuing anxiety”.

He agreed that pleural plaques could not, in themselves, be categorised as a “disease” or

“impairment of physical condition” but, relying on *Cartledge v Jopling* (1963) AC 758, he found that “anxiety engendered by tortuously inflicted physiological damage can properly contribute to damage or injury so as to complete the foundation of a cause of action”. On this basis, he decided the cases in favour of the claimants.

### Low awards

The insurance industry can take little comfort from Mr Justice Holland’s findings on liability; but there is some consolation in his findings on quantum. For those claimants claiming provisional damages, the judge considered general damages for pain and suffering to be worth between £3,500 and £4,000.

For those claiming damages on a full and final basis, where the anticipated risk of further injury was low, he refused to follow the approach to assessment taken by county courts, which have commonly been making awards starting at around £12,500; he considered a bracket of £6,000 to £7,000 to be more realistic.

It should be noted that this decision is the subject of an appeal.

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**On 17 March, the Health and Safety Commission announced that the new Work at Height Regulations were to be laid before parliament. The regulations came into force on 6 April 2005.**

This step follows a lengthy consultation process, which has involved both a substantive consultation exercise, and a shorter one on whether to retain the rule that measures providing protection from falls only applied to construction work above two metres from the ground.

### 2m rule

The most significant point in the new regulations is the decision not to retain what was known as ‘the 2m rule’; the new rules will apply to ‘all work at height where there is a risk of a fall liable to cause personal injury’.

It is clear that there will be many questions about ‘work at height’ and about whether ‘there is a risk of a fall liable to cause personal injury’; these terms are capable of wide definition and their application will vary from one situation to the next, depending on particular circumstances.

### Briefing

Kennedys will very soon be providing a full briefing on the effect of the detailed regulations and the schedules attached to it.

In the meantime, it should be noted that there is now a need to implement the following advice:

- avoid working from height where possible;
- where this is not possible, try to mitigate the effect of any potential fall;
- plan the work, ensure that there is clear evidence of the plan in a proper record and that the plan is available to those actually doing the work;
- ensure workers are trained so that they are competent to undertake the work – and make sure that the training is suitable, effective and recorded;
- use suitable and effective equipment.

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# A running problem

Legally, at least, drivers have less to fear from kids running alongside the road than into it.

**If a motorist sees a child apparently heading directly towards the road down which they are driving, then they need to take extra care – for example, by sounding their horn, flashing their lights and taking as much avoiding action as possible. On the other hand, if they see a child running down the pavement next to the road, they don't have to worry immediately about the possibility of that child slipping sideways into the carriageway and under the wheels of their vehicle.**

## Chadli case

This is the central lesson of the recent Chadli v Brooks and London Central Bus Company case. The claimant – Gavin Chadli – was an 11 year old boy. The first defendant was a bus driver employed by the second defendant. At the time of the incident, Mr Brooks was pulling into a compulsory bus stop in Camberwell in South London, where passengers were waiting to board.

As Mr Brooks pulled into the bus stop, Gavin Chadli and his family were running to catch the double-decker Routemaster. Gavin tripped over some rubbish and fell sideways underneath the bus, which, at that moment, was travelling at approximately 2mph-5mph. As a result of the injuries he sustained, Gavin ultimately had his left leg amputated. His left arm was also seriously damaged.

*“Commonly, bus drivers see people of all ages running to catch a bus, ... and only relatively rarely would it give rise to a foreseeable risk of injury.”*

In suing Mr Brooks and the bus company, the claimant argued that (1) there was a foreseeable risk that a child running along the pavement towards the bus stop and parallel with the road, could trip and fall into the road in front of the approaching vehicle; and (2) in those circumstances, the bus driver should at least have sounded his horn

or flashed his lights to warn Gavin and others of the bus's approach – or better still, stop his bus immediately. The defendants countered by saying that the incident was not foreseeable and that the driver in any event could have done no more than he did. The courts – both at trial and on Appeal – decided that the defendants were not to blame for the accident.



hurryingly child had been a toddler, for instance, then Mr Brooks might reasonably have been expected to take extra care. But the present case was different: Gavin was not an infant, he was fully aware of the bus's presence and Mr Brooks was driving in a perfectly responsible fashion.

## Good for insurers

The case is important because it highlights the critical difference in a possible liability between a child running at – rather than alongside – a roadside. This distinction will reduce the number of possible claims against drivers. It is therefore good news for insurers.

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