# aware

## Complex Injury

ISSUE 02

Keoghs
a Davies business

# Contributors


## Ken Young
**Partner - Head of Complex and Catastrophic Loss**
T: 0247 665 8212
E: kyoung@keoghs.co.uk

## Emma Spencer
**Partner - Spinal SIG Lead**
T: 01204 678807
E: espencer@keoghs.co.uk

## Libby Ferrie
**Partner - Brain Injury SIG Lead**
T: 01204 677242
E: lferrie@keoghs.co.uk

## Carrie Hoey
**Partner**
T: 01204 672395
E: choey@keoghs.co.uk

## Rob Gray
**Partner**
T: 01204 672347
E: rgray@keoghs.co.uk

## Liam Walsh
**Solicitor**
T: 01204 678850
E: lwalsh@keoghs.co.uk

## Aidan Geary
**Partner**
T: 01204 678694
E: ageary@keoghs.co.uk

## Joanne Willits
**Partner**
T: 0191 449 0118
E: jwillits@keoghs.co.uk

## Julian Martin
**Legal Executive**
T: 01204 678644
E: jmartin@keoghs.co.uk

## Mike Pope
**Partner**
T: 0161 329 7144
E: mpope@keoghs.co.uk

## Aaron Reynard
**Associate**
T: 01204 677092
E: areynard@keoghs.co.uk


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# Welcome

Welcome to our second Complex Injury Aware, which we hope once again provides you with some interesting updates from the world of complex and catastrophic loss.

The last few months have been incredibly busy, including the farewells for Andrew Underwood who retired in October. For his retirement there was a collection for the Bolton Mountain Rescue Team (I know there aren't any proper mountains in Bolton) and colleagues and clients donated an incredible £1,650! I know he was extremely grateful for everyone's generosity. We couldn't let him go without asking a few questions, and in his responses his gives his opinions on what may impact our industry in the coming months – we all know he will be watching closely!

There are some updates from our Special Interest Groups, including further spinal treatment research, and a summary from the care webinar hosted by the Brain Injury SIG.

If you're a keen music listener in the car, then you may be interested in the article from Aaron Reynard on page 8.

There are also two more technical articles focusing on mandatory arbitration and police disclosure in civil proceedings, providing some practical advice for certain cases as well as two interesting cases from the team, with a focus on the importance of evidence, with one case involving surveillance and social media evidence, and the other reasonable competency.

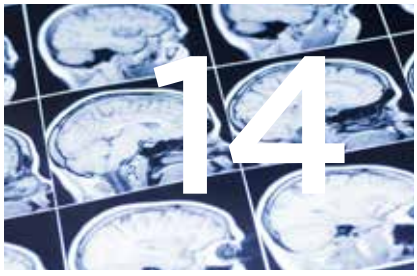
Finally, while we don't usually shout about ourselves, we have had some great feedback for the team in the latest legal directory rankings, so we have highlighted some of the quotes which demonstrate the strength and depth of our team. Many thanks indeed for all those who kindly provided feedback.

As we head towards 2022, there are many pressing things on the horizon, but at the top are surely the increase in care rates and the build up to the next Discount Rate review and doubtless they will feature in our future editions.

**Happy reading and a Happy Christmas and New Year from all the team.**

**Ken Young**




# Andrew Underwood the interview

We caught up with Andrew ahead of his retirement to ask him a few questions reflecting on his life at Keoghs and what the future holds.

## The Past

### What would you say has been the biggest legal change to affect the insurance world since you started your career?

Whilst not perhaps a 'legal change', one cannot ignore technology which has had a profound effect on the way we work.

When I started my career, we were not (quite) using quill pens, but the fax machine was the brand new kit in the office (slight concern was that the paper and ink was found to fade over time so that conveyancing files were pulled from storage to reveal a file of blank pages) and emails, let alone PCs, were a thing for *Tomorrow's World*.

Technology has moved on apace and has transformed the way insurers work and what they in turn expect of their panels.

Emails create instant communication and expected advice. The days of incoming letters and time to think have become 'strained'.

In terms of 'legal change' I think the culture of litigation has changed beyond recognition. Without naming names I recall my first supervising partner at Keoghs having five EL trials in a week. Trials were commonplace even if this actually meant a deal in the corridor with block booking of far too many cases to be heard by the judges due to the expectation of settlements!

Like it or not, the shift towards looking at how cases are prepared and pre-action conduct through the protocols has brought about a revolution in the way cases develop and often settle, long before the corridor.

The problem with the protocols is not their inception, but the way successive Masters of the Roll and governments use them within policy reform. This may be well meaning, but with a resultant impenetrable soup of protocols and schemes that struggle to live with one another, despite valiant efforts by the Civil Procedure Rule Committee to bring order to the show. Sadly the CPRC are left looking like the Dutch boy with two corks and three holes to plug - an impossible task.

### What would you describe as the top three significant changes in the market?

Supply chain management: when I started with Keoghs, work depended on local office relationships. Contracts were local agreements covering charging rates and who did the work. Over time this local autonomy disappeared in favour of supply chain managed relationships, tendering exercises and smaller panels. This revolutionised the industry and required successful firms to become both fleet of foot and commercial to survive. This drove wholesale consolidation of the insurance legal market and many high street names consigned to a footnote in history.

Insurer solicitor panels: a side effect of the above change has been the move to legal panels. I can recall the time a major general insurer called a panel meeting over two days in deepest Kent. This was the first occasion such a meeting had happened at any insurer and reflected one of the first steps after a panel review exercise. The day of arrival saw awkward dancing around handbags as we all tried to work out the ground rules. By the second day the mood had relaxed and by the second event a year on, the atmosphere was transformed. I met some hugely talented lawyers in these meetings, adopted by all insurers over time, and, despite being competitors, worked as a team for the benefit of the client. Those firms that struggled with this new norm have not flourished over time.

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Large loss collaborative handling: early in my technical career in what was then large loss I had the good fortune to work with Steve Williams, then of Eagle Star, and also the late Danny Miles, then of Norwich Union. Both men were way ahead of their time in my view in shaking up the perceived way of dealing with large loss cases. The focus was on case planning, rehabilitation and working with, not against, the claimant and their legal team. This was a revolution in work style and for me was transformative and pushed me on to wider reform when the opportunity arose through FOIL and the Multi Track Code.

To be asked into a room after a deal was struck in an amputee case and thanked (genuinely) for the new limb the claimant had bought with an interim payment cuts deep; it was not my money, but more importantly that claimant's life had been turned upside down by an accident.

## What has been your most significant achievement or proudest moment in your career?

It is difficult to pick out one, not due to the number, but rather because of the word "significant". In the maelstrom of a caseload and market activity you have little time to reflect or capture a view at the instant.

Remaining throughout my legal career on qualification at the same firm is right up there. I was lucky to join Keogh Ritson when I did, and the roller coaster ride that has ensued has been worth every bit, even the late nights, weekend working, mass audits, and dreaded MI! It was, and remains a great place to work, primarily due to its people, the single factor that has made it the glorious success that it has become. In 1987 there were a little over 50 in the whole firm - a fraction of the size of our current complex team, let alone the whole business. Being part of the Keoghs success story is something I am very proud of.

In terms of other proudest moments in my career, I think the development and launch of the Serious Injury Guide is right up there. I like to think this initiative made a difference and will continue to do so. This achievement was not a personal one, but a fantastic team effort through various bumps and turns, but the contributions of APIL, in particular Colin Ettinger and Amanda Stevens, along with key insurer representatives such as Ian Sinho and John Saunders of Direct Line, Danny Miles of Aviva, Ray Fisher of Zurich, Steve Clarke and Ben Hibbs of LV, Jon Ramsay of Munich re and David Fisher of AXA, and many others, were central to its success.

Appointment to the Ogden Working Party, and then the Civil Procedure Rule Committee were important milestones, as was the good fortune of seeing the email (or was it a letter?) from Hazel Hammonds about an idea to set up a counterpart to APIL in the early 1990s. This prompted a steering group that built what is now FOIL - an organisation with a powerful voice and seat at the market table. Work with all these organisations served to lift my gaze well beyond the file on my desk.

My time at Keoghs was made so much easier by the team that worked with me on my cases - the brains of the operation. The number who moved on (they might say 'dodged a bullet') to be standalone lawyers with their own teams, as well as those who stayed with me for well over 20 years is a source of real pride.

## Is there anyone who you would say most influenced your career?

Within Keoghs I have to pick out the late Barry Taziker. He had immense work ethic, attention to detail and an incisive legal brain. But his skills with clients was second to none. He always had a knack of treating every call as if it was the single most important call he would make that day. He gave his time and guidance on all issues in a practical, no-nonsense way that informed, educated and inspired confidence.

Outside of Keoghs, this will surprise many. A senior lawyer at Thompsons had significant impact on me without ever knowing it. I can vividly recall a telephone call from the late Jon Whelan of Thompsons, who rang me up in response to a perhaps intemperate letter, with the words – "this is litigation not war". Given John's own style I almost said 'kettle and black', but the sage advice was bob on and stuck with me from then on. We worked well together and could agree to disagree, without being disagreeable.

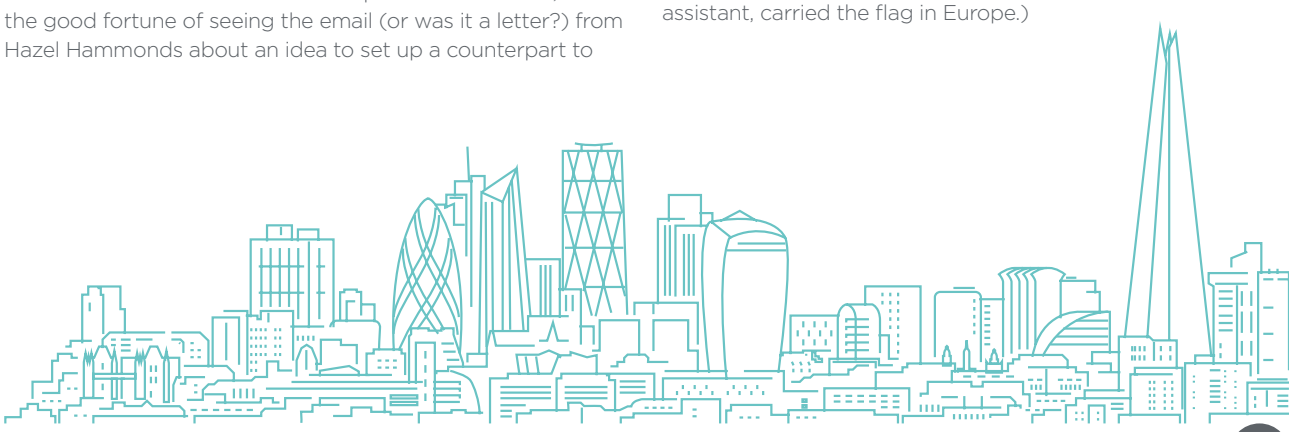
## What has been your favourite and least favourite parts of the job?

I loved working with claimant lawyers and their counsel, be it settlement meetings or route mapping, along with my insurer client. In large loss work, there is often a common goal of helping the family and the claimant to move on from the claim to living the rest of their lives. There is rarely a winner or loser in many of these cases, and the best outcomes were the ones which saw mutual recognition of the line being drawn under the case.

Least favourite? Two letters which bring fear to my heart: 'M' and 'I'.

## Any regrets?

Not really – one cannot live in the past. Provided I gave it my best shot I cannot really have regrets. (I lie – part of me regrets being unable to attend the European Court of Justice due to a diary clash; however, Kate Scholefield, my brilliant assistant, carried the flag in Europe.)



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# The Present

## What advice would you give to new young talent entering the legal and/or insurance market?

Two attributes are critical:

1. Try to make a difference, not just handle the cases from one end of the cycle to the other. In a virtual world I fear there will not the same opportunities I was given, but who knows. Lord Justice Rose spoke at one of our partnership dinners early in my career and commented that lawyers must never become postboxes; if by this he meant we must rise above the transactional, I entirely agree.
2. Momentum is everything: the pace and passage of all claims through their lifecycle is dynamic and can be influenced. This is not achieved by multiple emails, let alone conferences with counsel, but by isolation and identification of the issues to be resolved on the evidence. A malaise of momentum is the enemy of the claim's life cycle!

## If you could create one law (or repeal one), what would it be?

The Limitation Act for cases involving children and protected parties: time should start to run at age 18 or the date on which a lawyer is consulted, whichever is the earlier; for protected party cases the 18-year old long stop should strike, but with section 33 discretion to extend or waive.

Some will know where this comes from, but I would love a law that says that if you lose two appeals you get the third one as a win for free; this might have improved my win ratio!

## If you could invite four people to a dinner party who would they be?

I hate this sort of question. If pushed...

Sir Clive Woodward: I would like to hear from someone who won without needing an appeal.

Rory Stewart: how can a man do so many different things in such a short time in life?

Nelson Mandela: epitomises the importance of the Rule of Law in society.

Edmund Blackadder (in any of his guises): a "cunning plan" is always a good idea (long JSMs were helped along by Blackadder bingo – inserting quotes into negotiations without being spotted).

## Tell us some things we don't know about you

1. I took up baking sourdough as my lockdown skill
2. I volunteer with St John Ambulance in its Covid-19 vaccination programme – this may be the reason for the low take-up locally!
3. I cooked and ate a worm omelette on a survival weekend
4. I am an operational team member with Mountain Rescue
5. I can talk to dogs...they, on the other hand, have not a clue what I am saying!

# The Future

## Leaving us with some knowledge – what do we need to watch out for in the next 12 months?

Agency rates will continue to drift upwards through a mix of labour shortages and inflation: however, there is a dearth of evidence for actual rates drifting up, despite the rise in agency rates. The agency market has consolidated. Are the rate rises a reflection of increased profit or a risk in labour cost? We need to find the evidence to pique judicial interest.

The clock is ticking on the next discount rate review in 2023/4. The MOJ will sound the starting gun with a look at dual rates. Insurers must push the new Lord Chancellor to get off his beach lilo and demand evidence of actual returns. Hopefully Dominic Raab cannot make as much a Horlicks of the task as his arch nemesis, Liz Truss.

Rules around medical evidence: the current PAPs create an uneven playing field in our arena for claimant firms who do not want to play nicely. The current review of the PAPs by the CJC provides an opportunity to take a fresh look at this critical issue. I have little faith that the CJC will grasp this nettle unless cajoled and encouraged to do so. The ABI has a major role here. The industry must avoid inertia and malaise settling in for the status quo. With fixed fees up to £100k a reality – now is the time to look at the process and how lifecycles can be shaken up.

## Going further, what do you think are the biggest opportunities and/or threats to insurers over the next five years?

All insurers will be way ahead of a techy lawyer on these issues already. However, AI has the potential to revolutionise the way we run and resolve cases. Tools are already infiltrating the market, Keoghs has developed several in recent times, but the breadth and scope for change will be revolutionary. The skill for the lawyers will be blending these tools with tactical nous and skill. However, as AI reduces the fee footprint, will there still be scope for firms to flourish in the long term? I hope so.

## Finally, what are your plans for retirement?

Carpe diem!

**Andrew Underwood**
**Partner, Complex Injury**

**Emma Spencer**
Partner - Spinal SIG Lead

# Spinal Injuries:

## 'ground breaking' Scottish trials begin

In the last edition of complex injury aware, I wrote about stem cell research in Japan being used to "treat" spinal cord injuries, with early results showing improvement in the function of those participating in the study. It certainly feels as though research into spinal cord injuries is gathering pace and this is evidenced by recent headlines reporting on a "ground breaking" trial in Scotland that has seen paralysed individuals regain function in their arms.

The trial is part of the work of Grégoire Courtine and neurologist Jocelyne Bloch, two researchers based in Switzerland who have made significant progress developing technology that allows electrical stimulation to produce movement in paralysed individuals. For those with an interest in this area, this 15 minute video is well worth a watch: https://falling-walls.com/discover/videos/how-neurotechnology-enables-patients-to-walk-again/

The treatment involves the creation of an electronic "bridge" which re-connects the patient's brain with the area below the damage to the spinal cord using electrical impulses. This is invasive treatment involving an implant device to the spinal cord but participants in this study have shown that not only are they able to walk using rollators when the implant device is activated but also that the electrical stimulation encourages re-growth of the neurons below the level of injury, leading potentially to long lasting recovery in paralysed leg muscles. The technology requires the participant's brain to engage with the electrical stimulation i.e. the electrical stimulation alone will not move the muscles, the patient must "want" this too. This differentiates the treatment from technology such as the exoskeleton for example.

In the past, many developments such as these have not yet progressed beyond small scale trials and whilst the achievements will be incredible for those involved, the commitment and physical endurance needed to participate in such trials may seem out of reach for most. However, what is exciting about this project is that the Swiss technology has rapidly expanded from a small cohort of patients in Switzerland. The trial in Glasgow (along with 12 other spinal centres around the world) of the Up Lift device, involves non-invasive electrical stimulation meaning the potential pool of suitable candidates was far wider.

The Up Lift Device consists of electrodes being placed on the skin to activate nerves below the levels of injury rather than a spinal implant. The trial has been focused on tetraplegics and has shown some quite remarkable results in improving hand and arm function – in one case, someone injured 16 years ago was able to use a mobile after just one month of participation. The study also reported marked improvements in bladder function and temperature control of participants and those results were sustained even after a short period of treatment.

To date the study has focused on "chronic" patients but the next step is to use it on patients with new injuries early on in their rehabilitation, who it is hoped will see the most benefit. More candidates have been recruited to the Scottish trial, including someone who has relocated from the South of England to participate, such is their excitement of this project. Whether the non-invasive product will extend to helping paralysed people walk again is an unknown but this is perhaps some of the most promising research to date.

The commercial launch of this technology is anticipated in 2024. This is an area we will continue to keep a close interest in as wide-scale availability will almost certainly see it start to feature in spinal cord claims, even if as part of a rehabilitation programme in the short term.

Aaron Reynard
Associate

# Urabn Hymns or a Chopin Nocturne for town driving?

On 20 September, *The Times* published an article reviewing some new and interesting research published in August called:

> **Psychological and psychophysiological effects of music intensity and lyrics on simulated urban driving.**

*The Times* article, accompanied by a picture of James Corden, called "Why karaoke hits can drive you to distraction" suggests the research could have implications on motor claims.

Many of us have had cases where drivers have been suspected of being distracted by phone use, pedestrians by use of music through headphones, and cyclists by GPS performance technology. Could this research provide ammunition for a finding on liability in what otherwise might be borderline cases? The title suggests this could be a step in that direction.

However, closer review of the article itself gives a more nuanced picture that does not accord with the journalistic enthusiasm... The research can be found through this link: https://www.sciencedirect.com/science/article/pii/S1369847821001303?via%3Dihub

The overarching finding is that music with or without lyrics did not have a bearing on safety relevant behaviours. There were some interesting broad inferences though:

1. Quiet, non-lyrical music revealed a mildly calming effect
2. Listening to familiar music (e.g. classic hits on a radio station) does not result in any significant decrements in simulated driving performance
3. Drivers should be wary of loud lyrical music in urban environments given the risk of elevated activation and even aggression

These inferences, however, fall short of the eye-catching title.

## Are there implications?

As is already the case these issues will be worthy of consideration and we might see requests for disclosure of the music streaming history from the time of the collision, just as phone records are already explored. However, for now, the issue is perhaps one that adds colour to the evidence as opposed to a 'killer blow'. Not for the first time a journalist has (perhaps) overstated the significance of research for the sake of a catchy Corden title!

For now I will nonetheless drop my current Spotify list for Chopin when driving in towns.

Carrie Hoey
Partner

Liam Walsh
Solicitor

# Surveillance and social media evidence

## BM v Ministry of Defence

Keoghs recently represented the defendant in a High Court case involving a claim for NFCI (non-freezing cold injury). The case was handled by partner Carrie Hoey and solicitor Liam Walsh.

The claimant had been discharged from the Army after ten years' service due to his injury. Breach of duty was admitted.

In February 2021, the claimant served an updated Schedule of Loss totalling £3.7 million with future loss of earnings pleaded at £826,000 and future care at £1.7 million.

In March, approximately three months before a five-day trial, the defendant applied for permission to rely upon surveillance evidence (obtained in September 2020) and social media evidence emanating from the claimant's wife's Facebook account, and to amend its defence to plead fundamental dishonesty.

### The outcome

HHJ Auerbach granted the defendant's application. The decision reiterates well-established principles regarding privilege: the Court's power to control the evidence and the balance between the interests of justice and ambush.

- Applying the tests, HHJ Auerbach permitted the defendant to rely upon both the surveillance and social media evidence.
- Following detailed submissions regarding the timing of the application, the judge could not say that the defendant had acted deliberately, cynically or had tactically delayed its application.
- The judge found that the defendant had conducted the litigation in a responsible manner.
- The probative value of the surveillance evidence meant it should be admitted.

Authority rests with Rall v Hulme [2001] EWCA CIV146 – the starting point is where video evidence is available which undermines the claimant's case, it would usually be in the overall interests of justice to admit it.

The defendant was also granted permission to rely upon social media evidence, depicting in particular the claimant dancing at a barbeque in August 2019, despite his witness statement confirming that he could not stand or sit for any length of time and his dependence on a walking stick.

HHJ Auerbach held social media evidence was not privileged and was subject to the ordinary rules of ongoing disclosure pursuant to CPR Rule 31.11. Arguably, the defendant required relief from sanction under Rule 3.9 CPR having obtained the social media evidence between June and September 2020 - and if so then Denton principles apply.

### Key Takeaways

1. The balance between the interests of justice and ambush is always delicate. In this particular case, the Covid-19 pandemic had significantly hampered the defendant's attempts to observe the claimant and attracted some judicial sympathy. The claimant was seen to have pinned his colours to the mast when he served a vastly increased schedule of loss in February 2021.
2. The decision that social media evidence was not privileged is perhaps doubtful. It would be for the defendant to decide whether they wish to waive privilege on surveillance evidence.
3. If the social media posts had been made by the claimant and not his wife, then he should have disclosed them himself.

Joanne Willits
Partner

# From a red light to green

## Mandatory arbitration and what will this mean in practice

**Historically, alternative dispute resolution (ADR) has been viewed as a consensual process. In 2018, a working group at the Civil Justice Council stopped short of recommending a "presumption" that parties will agree to ADR as a condition for issuing proceedings but confirmed it was committed to promoting alternatives to litigation.**

Jump forward to 12 July 2021 and the Civil Justice Council's report on compulsory alternative dispute resolution (commissioned by an advocate of ADR, Master of the Rolls Sir Geoffrey Vos)[1] has concluded that mandatory ADR is compatible with Article 6 of the European Human Rights Convention and is, therefore, lawful and should be encouraged. Sir Geoffrey Vos commented that: "ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute'. This report opens the door to a significant shift towards earlier resolution"

The report, therefore, conflicts with the earlier decision in Halsey v Milton Keynes [2004] EWCA Civ 576, [2004] All ER (D) 125 (May), which had established that whilst costs sanctions could be imposed where a party unreasonably refused to engage in ADR, a party could not be forced to submit to the process on account that compulsory ADR was considered unconscionable and was an unacceptable constraint on a person's right of access to the court and a breach of Article 6 of the European Convention on Human Rights.

The later decision of Lomax v Lomax [2019] EWCA Civ 1467, [2019] All ER (D) 87 (Aug) determined that the courts have the power to compel parties to undertake an early neutral evaluation (ENE being a form of judge-led ADR with judicial evaluation of the merits of the case). The court promoted ENE as being an additional step in the court process which can assist with the fair and sensible resolution of cases, whilst noting that the parties are not prevented from having their dispute decided by the court if it is not resolved at or following the ENE. The question of mandatory ADR was considered again in McParland v Whitehead [2020] Bus LR 699, but a judicial decision was not required as the parties agreed to a direction to mediate. The conclusions by the CJC will not, therefore, come as a surprise to many given the judicial interest in this topic over recent years. The judiciary.uk website, commenting on the report's conclusions, makes it clear that "mandatory alternative dispute resolution is lawful and should be encouraged".

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1. Compulsory ADR published 12 July 2021

The Civil Mediation Council (a charity which exists to promote greater use of mediation and other forms of ADR) responded favourably to the CJC's report on 13 July 2021, highlighting the following:

- Case law, practice and procedure have all moved on significantly over the past two decades since the decision in Halsey;
- ADR will offer an alternative way to clear the civil court backlog, impacted by the post-Covid delays;
- ADR is already a successful part of the justice system globally and in our jurisdiction has been successful in family proceedings where there is a requirement to attend a MIAM (Mediation Information and Assessment Meeting) or to obtain an early conciliation certificate from ACAS before starting Employment Tribunal proceedings;
- To be a success, better education of the public will be required - for example by the creation of a proper online resource detailing the different forms of ADR and how to access them;
- Active support of ADR is required by the Government, the courts and the wider legal community;
- The CEDR's Ninth Mediation Audit published in 2021 concludes that £4.6 billion will be saved this year by parties engaging in commercial mediation, with £40 billion saved since 1990.[2]

Parties must wait to see how any such changes will be introduced and the extent to which legislation, or amendment of the rules of court, will be required. Clear guidance and further 'meat on the bones' is required for practical implementation in relation to the following:

- Costs consequences and sanctions for failing to 'properly' engage with the process/what will happen if some parties simply pay 'lip service';
- Will mediators be appointed privately by the parties and what will happen if there is disagreement in relation to the appointment of a specific mediator;
- The interplay with traditional JSMs/ENE and settlement hearings already ordered on some circuits;
- Can parties be encouraged to consider ADR at route mapping meetings when setting agendas for the future conduct of the case so there will become an interplay between discussions in relation to liability, quantum, rehabilitation aspects of the case alongside the merits of engaging ADR at an early stage;
- At what stage will parties be ordered to arbitrate and what input will they have to ensure it is at a time when it is likely to be the most productive: pre issue, post issue, or when directions have been issued?
- How will obstacles be overcome when testing the evidence in person assists, for example where there are fraud/ fundamental dishonesty concerns?
- What evidential steps will parties need to take to prepare for arbitration? Full and frank disclosure by all parties should surely be a prerequisite? What evidence will be provided to the arbitrator and in what format? Protocols will be required.
- Will parties be ordered to mediate on discrete issues and will this assist?
- Where a claim is litigated, will judicial approval of a settlement still be required?
- Blocker mediation?

**Clearly with the recent call for evidence on Dispute Resolution issued by the Ministry of Justice and the above issues, this a developing area and one which we will continue to monitor over the coming months.**

2. CEDR Ninth Mediation Audit 2021

Mike Pope
Partner

# Reasonable competency: importance of evidence

## Chan v Peters & Advantage [2021] EWHC 2004 (QB) 16 July 2021

In a collision with a pedestrian the defendant had met the standard of a reasonably competent driver – but without the right evidence, this could have been more difficult to prove.

This case was handled by Keoghs Partner Mike Pope and solicitor Joanne Knapman.

### Facts

The circumstances surrounding this accident were straightforward, being a situation insurers and defence solicitors have encountered on many occasions.

The claimant was a 17-year old student in Sheffield at the time of the accident, which occurred at 12:45pm on 29th November 2017. He was injured crossing the road outside his school when he collided with the first defendant's car. He sustained a traumatic brain injury, and the initial letter of claim described the consequences as being significant (although later enquiries revealed he had successfully passed his A levels after the incident, and proceeded to university).

At interview the insured was found to be traumatised by the accident, while at the same time presenting as entirely credible and with a very good recall of events. Her account was subsequently validated by the CCTV footage. The claimant entered the road from the defendant's nearside, passing through a parking bay immediately outside the school before doing so. There were two vehicles in that bay: a Vauxhall Zafira first, with a small gap before a double-decker bus (from the defendant's perspective, travelling east). The claimant entered the road jogging from between those two vehicles. As such, his entry into the road was obscured from the defendant's view by the Zafira. To complicate matters, two of the claimant's friends situated on the offside pavement were waving to him in the seconds before the accident occurred; in addition, an independent witness travelling behind the defendant indicated he saw the claimant's approach, while the defendant had not.

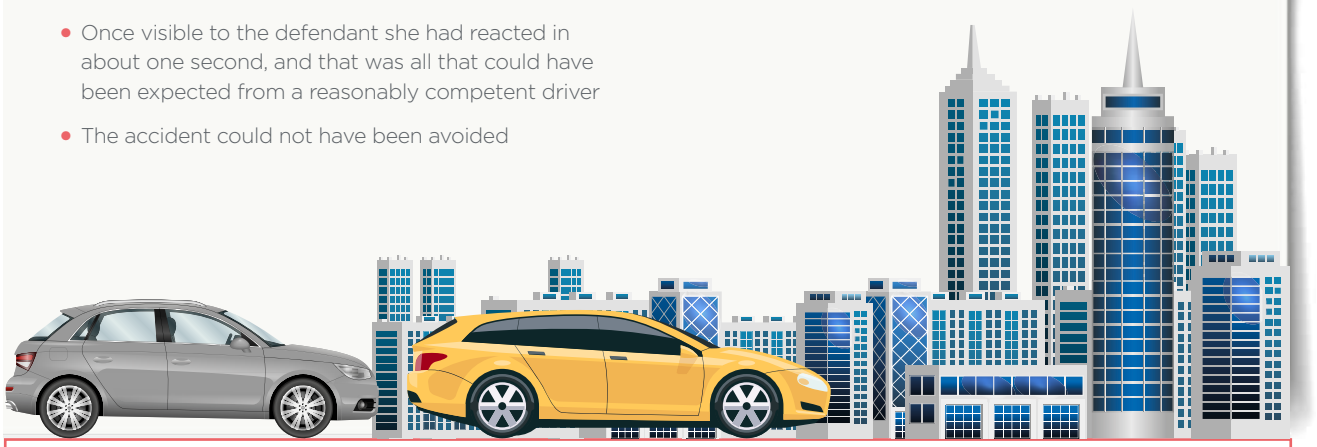
It was alleged the defendant should have seen the claimant's approach, in common with the witness behind her, and that the waving pedestrians should have put her on notice there was the possibility of a hazard emerging from the nearside.

## Decision

The court's findings of fact were universally unfavourable to the claimant:

- The defendant had not failed to take account of her surroundings
- The claimant did not look right in the direction of the defendant's car before he set off into the road
- The defendant's speed of 25mph (in a 30mph zone) was appropriate, since it was not the start or end of the school day with a significant amount of pedestrians; furthermore, the defendant had given the car and bus a wide berth as a precaution
- The claimant was virtually or entirely obscured by the Zafira before entering the road, and only visible for 0.6 seconds
- Once visible to the defendant she had reacted in about one second, and that was all that could have been expected from a reasonably competent driver
- The accident could not have been avoided
- The pedestrians waving did not serve to put the defendant on notice a hazard may be about to emerge from the nearside
- Nothing rested on whether damage to the car was slightly towards the front or slightly towards the side of the car

Critically, the court did not rely upon evidence from the driver behind the defendant, since his account of the claimant's visibility could not be reconciled with CCTV, and it was suspected he may have confused the claimant's approach with another student. In any event, this witness exonerated the defendant.



## Practice Points

- It is of paramount importance to exhaust enquiries in connection with CCTV. In this case, there were cameras on the bus which captured the incident, and some of the events leading to it (although there was a gap, such that the claimant's approach across the parking bay was not recorded). Without CCTV, and expert commentary upon it, this defence would have failed. The witness travelling behind the defendant was a doctor, and entirely credible. Without footage of the incident the court would no doubt have accepted the claimant was there to be seen; after all, a driver further back had watched his approach.
- In a case with some quantum potential it is always beneficial for the conducting solicitor, or a member of their immediate team, to interview the insured; a conference with counsel is not a substitute for this exercise. Witness evidence is paramount in these cases.
- All cases carry risk, but when CCTV is available this can provide a degree of comfort when viewing the evidence from a risk management perspective. The judge is likely to be a driver, and there can be a sympathy factor for the defendant, despite serious injuries suffered by a claimant.
- Once you have set out your stall with an opponent after conducting a risk matrix for the case, continue with that robust stance as the case progresses, unless and until any evidence comes to light which upsets the balance in the claimant's favour. As this case evolved there were some minor aspects arising which caused us to rethink; but nothing of such magnitude that we felt obliged to make settlement proposals to a claimant of driving age, who simply ran into a road without looking in the defendant's direction.

**For further information, please contact Mike Pope T. 0161 329 7144 E. mpope@keoghs.co.uk**

**Click below for the full judgment:**
Chan v Peters & Anor [2021] EWHC 2004 (QB) (16 July 2021) (bailii.org)

**Libby Ferrie**
Partner - Brain Injury SIG Lead

**Rob Gray**
Partner

# Counting the cost of care in TBI claims

## On 14 October the brain injury Special Interest Group held a webinar with care expert Jill Ferrie and Chris Kennedy QC of 9 St John Chambers.

The session covered a variety of issues including the increasing cost of care, the various tactics and strategies to be considered when dealing with different levels of brain injury severity and interim payment funding requests including for Independent Living Trials. We also touched on an initiative coming from Keoghs using our AI capability.

Jill and Chris provided much food for thought on a topic that is likely to become more prominent given the challenges being faced, such as increasing care rates and severe staff shortages.

**If you would like to receive a copy of the seminar video, please contact:**
**Eleanor Conway - econway@keoghs.co.uk**

# Directory delight

Autumn is the time of legal directories announcing their latest rankings – and the Complex and Catastrophic Loss team have fared well once again, thanks to the feedback from our clients. So we would like to say thank you to everyone who responds to the yearly surveys, and also well done to some of our lawyers who have received fantastic feedback this year, across all of our offices.

Jamie McCabe has unparalleled expertise in defending the most serious injury cases especially brain injury, spinal and amputations and has nurtured a team of lawyers who share his forensic approach. He is always approachable and has an easy manner that we as clients really appreciate.

Keoghs has a deservedly strong reputation for defendant insurance/PI work. Ken Young is an outstanding, experienced and pragmatic lawyer. He knows how to properly assess the strengths and weaknesses of the most serious of cases at an early stage and gives insurers a clear and unvarnished assessment of the pros and cons, together with unerringly sound tactical advice.

The quality of their work is fantastic; they are shooting ahead of everyone else.

Keoghs are very focused and give specific recommendations on tactics. They are a specialist appointment and are very good at what they do..

I have worked on several cases with Matt Perkins and Ben Smoker. They are both outstandingly able lawyers and a pleasure to work with in the most serious and/or sensitive of catastrop.hic injury cases.

Keoghs are always prepared to go the extra step. They provide training and a service that quite often outperforms their competitors.

Matt Burfield is a pragmatic, no-nonsense litigator with years of experience across the board.

# Police disclosure in civil proceedings

## Due to variation in practice and procedure when dealing with police disclosure, the College of Policing and the National Police Chiefs Council have produced national Guidelines which encourage timely disclosure in civil claims.

The Guidelines provide a useful single reference point for what can and should be disclosed by police forces, where available, and likely timescales. These have been available for some years but a working knowledge is required as problems can be encountered in accessing this critical material, especially at a time when police budgets and resources are so stretched. During the pandemic we have seen a decline in the speed with which police documents are disclosed.

The Guidelines emphasise that, where possible, insurers and solicitors should be provided with complete and early police disclosure in order to properly assess the merits of a civil claim. Resistance is often seen in cases where an inquest and/or a criminal prosecution is contemplated or pending and even here the Guidelines support the disclosure of:

- The Police Collision Report, the Forensic Collision Investigators Report together with accompanying photographs, plans, CCTV footage and notebook entries of reporting officers upon request.
- Witness statements, providing permission has been given from the witness, subject to consultation with the CPS on any conditions that might be imposed. (The CPS may block release pending completion of any police action/inquest.)


## Time frames

| | |
|---|---|
| Basic information, or abstract report (e.g. date and time of the collision, names and addresses of parties, details of vehicles involved, vehicle insurers, copies of certain statements, name of defendant in any forthcoming criminal proceedings and the date and place of hearing) | Within 4 weeks after the incident |
| Other documents (e.g. Police Collision Report, Forensic Collision Investigators Report, photographs, plans, CCTV footage and notebook entries of reporting officers) | Preferably within 4 months and no later than 6 months after the incident |
| Witness statements | Within 6 months and no later than 9 months after the incident |
| Where **witness statements are withheld** due to concern that disclosure may prejudice the criminal trial | Within 4 weeks of the verdict |
| The outcome of any criminal proceedings | Immediately on request |
| If no prosecution is envisaged, disclosure should be as quick as possible | Preferably within 4 months and no later than 6 months after the incident |

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# Investigating officer interviews

In cases involving serious injury, there is an expectation that access to interview reporting officers is granted irrespective of the position in relation to criminal proceedings.

## Comment

There are 43 police forces in England and Wales operating predominantly independently. In practice there is inconsistency in the way forces interpret and apply the Guidelines.

The main difficulty that most people encounter is obtaining documents when criminal proceedings are pending. The Guidelines suggest that witness statements may only be withheld where their disclosure may prejudice criminal proceedings.

However, the CPS website states:

> Completion of Proceedings: It will not be usual to disclose material until the proceedings have been completed. This is to ensure that the criminal trial process and any continuing police enquiries are not prejudiced.

Further, Lord Reid in Conway v Rimmer [1968] I All ER 874 at page 889:

> ...it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.

This is generally the default position of most forces on the ground.

A phone call or an email to the officer in charge probably remains the best bet for gleaning early information about the case. A gentle reminder of the content of the COP Guidelines is likely to assist as regards the nature of the information the officer is prepared to volunteer. Interviewing officers may be most effective where officers are reluctant to engage informally.

The initial contact with the investigating officer should focus on the following:

1. Identifying the material that will be available, even if not physically released at the time due to ongoing investigations/prosecutions.
2. If the police have seized physical evidence, identify what they have retained and where it is being kept.
3. Is there a need to track the release of the evidence to avoid loss to scrappage etc? The storage facilities can be open to the elements that can damage critical evidence so securing early inspection of facilities is important as well as transfer to safe storage when the police are ready to release the vehicle.
4. Insurers must keep in mind the obligation to retain important physical evidence that any claimant may want to inspect in the course of a civil claim; failure to do so could prejudice any future defence.

## The types of documents that could be disclosed by forces include:

| Document or information | Comment |
|---|---|
| Collision Report form: Form 524 pink. | |
| RTA stats report form: Form 524 Continuation – Yellow | Not often disclosed as it contains officer opinion, but worth asking. |
| Witness details | Names and addresses – if the witness has consented. |
| Witness statements | |
| Offending driver's details | |
| Offending driver's 'Record of Taped Interview' | The insured is entitled to a copy of any tape on the day of the interview – if able to do so, make sure a copy is requested on the day. |
| Officers' pocket notebooks: witness details, vehicle details, CCTV locations, contemporaneous interviews, any other potential sources of evidence | A useful source of 'verbals' from the scene. |
| Copies of CCTV (business/private) | If referred to but not secured, urgent measures to identify and secure before wiped. |
| Copies of Officers' 'Body Worn Video' | Retained automatically for 3 months unless tagged in which case it would be retained for up to 6 years. Request retention and diarise to repeat request as needs be. |
| Copies of Police 'Roads-Policing' in-car video to show initial scene and vehicle positions etc. | Depends on vehicle usage; normally available for 2 weeks until overwritten, but could have been downloaded to a computer hard drive and DVD copies made. See above. |
| Photos taken at scene by police officers on their work issue mobile phones/tablets. | Notebooks should refer where obtained. |
| Also the police on occasion decide what they feel are 'relevant' photos. Vital that all photos are seen. | |
| Forensic Collision Investigators Report or initial findings | Where a collision investigator has attended, the raw data will be obtained but without a collision report being prepared.<br>A full report may not have been submitted, but if officer attended to a potential Serious/Fatal RTA, then they will secure evidence which is then retained. Report (at a cost) can then be requested. |
| Alcohol / Drugs / Eyesight / Field Impairment test results. | |
| Exhibit list | Can include clothing, helmets, earphones, mobile phone, mobile phone interrogation logs from service provider, drugs/alcohol/medication. |
| Police Incident Log | Potential witness details, any first accounts to police, collar numbers of all police officers in attendance, vehicle details, actions taken by police as the incident unfolds) |
| 'Unused' material | A court order may be required to access material classified as 'unused' material in any prosecution. Application to Criminal Court for release. Failure to secure an order may be a contempt of court! |

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## Application for non-party disclosure

This is the 'nuclear option' where resistance is met and there is a reasonable belief that documents are available, but haven't been disclosed and/or the above timescales are being disregarded. It must be remembered that such an application (because it is against a non-party) can only be made after proceedings have been commenced.

## Comment on non-party disclosure applications

In Sparkes, the claimant had a reasonable belief that the initial search was inadequate and/or the documents initially disclosed were incomplete, and made focused, sensible proposals as to the existence and location of further relevant documents. A careful 'run up to the wicket' is always required to satisfy the court as to relevance and proportionality. In all cases proceedings are required and so in extreme cases 'friendly' proceedings and a stay may be required through cooperation with the claimant's lawyers.

## Summary

- Request: Utilise the College of Policing and National Police Chiefs' Council Guidelines where possible, but expect that where criminal proceedings are contemplated/pending it will remain the case that disclosure of all but basic information will be withheld until the criminal process has run its course.
- A phone call or an email to the officer in charge should reveal early information about the case, subject to the limit of what they can reveal voluntarily. Reference to the COP Guidelines when making such enquiries may assist as regards the nature of the information the officer is prepared to volunteer. Emphasise the importance to the injured claimant and decisions around rehabilitation funding that hinge on disclosure.
- Interviewing officers may be most effective where they are reluctant to engage informally. Have in mind that there is an expectation that access to interview reporting officers is granted irrespective of the position in relation to criminal proceedings.
- Identify what material has been or is in the process of being created, which may later be crucial to any possible future non-party disclosure application.
- Non-party disclosure is an option in the right cases subject to proportionality and relevance and there being a set of civil proceedings to use. Be aware of parallel efforts being carried out by claimant solicitors. If documentation becomes available it will not be privileged and you will be obliged to disclose it. Care is needed in relation to any police documents received from criminal solicitors by way of advance disclosure. Again, privilege will not attach to such documentation but consent for disclosure may be necessary from the defendant, particularly if there is any issue over indemnity.
- The obtaining of police documents by claimant solicitors is something that is pressed for especially if there is any doubt over liability and the prospect of obtaining a substantial interim payment. Be aware that upon receipt of such disclosure the position of the defendant in relation to resisting any interim payment request may weaken.

## Conclusion

Due to budget constraints the police may delay the release of critical information required in order to determine liability. The Guidelines published by the police provide a useful reference point in the event of obstacles to prompt disclosure. If an application to court is required, reference to the Guidelines and a clear case on relevance, proportionality and why the material is holding up the case should help with the application. Parallel police action against a driver will delay disclosure and is likely to weaken the prospects of an early non-party application against the police.

**Please see the next page for a standard letter template.**

## For further information, please contact:

**Aidan Geary**
**Partner**
T: 01204 678694
E: ageary@keoghs.co.uk

**Julian Martin**
**Legal Executive**
T: 01204 678644
E: jmartin@keoghs.co.uk

>

A suggested standard letter with a list of what we want and referencing the College of Policing:-

Dear Sirs

Road traffic accident: [date and time]

Location: [address and grid reference]

Driver name:

Claimant name:

[We are instructed by xxx through insurers [y] in relation to the above incident.]

[We are the motor insurers of x in connection with this accident.]

[We are required to deal with any claim brought by [z] against [y] as insurer concerned.]

In accordance with the National Guidance from the College of Policing in association with and National Police Chiefs' Council for dealing with disclosure requests we request disclosure of all documents held by xxx Police concerning the above road traffic accident, to include the where applicable:-

- Collision Report Form 524; both pink and yellow
- The identity and collar number of the reporting officer, and their base Station
- Witness details
- Witness statements
- Driver's details
- Records of Taped Interviews
- Officers pocket notebooks
- Copies of CCTV
- Copies of Officers 'Body Worn Video'
- Copies of 'Roads-Policing' in-car video.
- All photos taken at scene by Police Officers on their work issue mobile phones/tablets.
- Forensic Collision Investigators Report, or initial findings if no report prepared.
- Alcohol / Drugs / Eyesight / Field Impairment test results
- Police Incident Log

[Civil proceedings have been commenced by x v y] [Civil proceedings are likely to be commenced by x v y] and the documents are required to enable the parties to resolve who is responsible for the accident.

Please retain all documents and other evidence relating to this road accident pending the determination of the claim. The evidence must please not be destroyed.

If you are not prepared to release the above information at this time please can you indicate when the material will be provided and the reason why it cannot be released at this time.

Thank you for your assistance.

Yours faithfully.

**For full details see:**

**http://www.seriousinjuryguide.co.uk/national-policing-guidance-on-disclosure.pdf**


## Head Office:

2 The Parklands
Bolton
BL6 4SE
T: 01204 677 000

E: info@keoghs.co.uk
@keoghslaw
W: keoghs.co.uk
F: 01204 677 111

Belfast | Bolton | Bristol | Coventry | Glasgow | Newcastle | Liverpool | London | Manchester | Southampton