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Serious Injury (2020)

29th July 2020

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Serious Injury (2020)

The law as stated during this webinar is up to date as of **1st July 2020**

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Michelle Knapp
Director
DWF

Edward Cleary
Senior Associate
DWF

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Stepping Out:

Pedestrian RTA Liability Update

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Agenda

- A very brief look at some of the leading cases in this area
- Analysis of a selection of more recent cases:
  - Wormald v Ahmed [2016] EWCA Civ 823
  - Woolridge v George [2017] EWHC 332
  - Ellis v Kelly & Anor [2018] EWHC 2031
  - Hill v Gill [2018] EWHC 2703
  - Podesta v Akhtar & Anor [2018] EWHC 1245
  - Leonard v First Manchester [2020] EWHC 982
- Avoiding a finding of primary liability
- Assessment of contributory negligence

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Some of the leading cases in this area

- *"…this court has consistently imposed on the drivers of cars a high burden to reflect the fact that* ***a car is potentially a dangerous weapon****"* – Lord Justice Latham in Lunt v Khelifa [2002] EWCA Civ 801
- *"The potential destructive disparity between the parties can readily be taken into account as an aspect of blameworthiness…****It is rare indeed for a pedestrian to be found more responsible than a driver*** *unless the pedestrian has suddenly moved into the path of an oncoming vehicle"* – Lady Justice Hale in Eagle v Chambers [2003] EWCA Civ 1107
- *"…the legal test is not a question of the counsel of perfection using hindsight. Of course it is not, and* ***drivers are not required to give absolute guarantees of safety towards pedestrians****. The yardstick is by reference to reasonable care"* – Lord Justice Davies in Birch v Paulson [2012] EWCA Civ 287

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Wormald v Ahmed [2016] EWCA Civ 823

Judge:	Lord Justice Lloyd Jones (on appeal from His Honour Judge Foster QC)
Age:	Adult
Facts:	• C was struck by D's taxi as he crossed the road diagonally at night • C had been talking to two people on the pavement before setting off • By the time D saw C, it was too late to avoid a collision
First instance:	60/40 in C's favour
Appeal:	D's appeal on primary liability dismissed (permission to appeal the apportionment of contributory negligence was refused)

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Woolridge v George [2017] EWHC 332

Judge:	Her Honour Judge Walden-Smith
Age:	Adult
Facts	• C had been drinking and was crossing the road near to a junction • D was driving at 20 mph and was not distracted • D did not see C at all prior to impact
First instance:	70/30 in favour of C

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Ellis v Kelly & Anor [2018] EWHC 2031

Judge:	Mrs Justice Yip QC
Age:	Child (8 years old)
Facts:	• C had been allowed to go out with his older cousins without adult supervision • C ran across the road diagonally near to a zebra crossing outside a park • D was travelling in excess of 40 mph
First instance:	Judgment for C and Part 20 claim dismissed (primary liability had been admitted)

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Hill v Gill [2018] EWHC 2703

Judge:	Master Davison
Age:	Child (14 years old)
Facts:	• C ran across a busy three lane carriageway from the central reservation • D set off from the traffic lights some 70 metres away in the nearside lane • D's view of C was obscured by a van in the middle lane
First instance:	Judgment for D

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Podesta v Akhtar & Anor [2018] EWHC 1245

Judge:	Her Honour Judge Clarke
Age:	Adult
Facts:	• C had been drinking at a work function and was crossing the road late at night • C stepped off the kerb, crossed a hatched area and entered the carriageway • D had not seen C standing on the traffic island before crossing
First instance:	70/30 in C's favour

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Leonard v First Manchester [2020] EWHC 982

Judge:	Mr Justice Freedman (on appeal from Mr Recorder Lazarus)
Age:	Adult
Facts:	• C was crossing the road at a cross roads and attempted to cut the corner • D's bus had to move slightly to the left to pass another oncoming bus • D's driver focused his gaze on the other bus and did not glance to the left
First instance:	Two thirds/one third in C's favour
Appeal:	D's appeal on primary liability dismissed (there was no challenge against the apportionment of contributory negligence)

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Avoiding a finding of primary liability

- D must have been travelling at a reasonable speed in the circumstances (consider speed limit, location, weather, lighting, etc)
- D must have been keeping a proper lookout
- C must have moved suddenly or unexpectedly into D's path
- At the point at which the reasonable and prudent motorist would have identified C as a hazard, there must have been insufficient time to slow down or stop and avoid a collision

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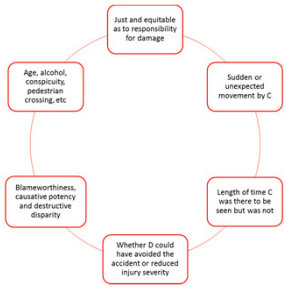
Assessment of contributory negligence



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Serious Injury Guide

Defendant Perspective

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Serious Injury Guide

- Serious Injury Guide - What is it?
- Principal Aims
- Key Steps
- Achieving the Objectives
- Key to Success

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Serious Injury Guide

- This best practice Guide is designed to assist with the conduct of personal injury cases involving complex injuries, specifically cases with a potential value on a full liability basis of £250,000 and above and that are likely to involve a claim for an element of future continuing loss.
- Product of years of collaborative work between APIL, FOIL and a number of major insurers.
- Developed with a view to parties working together to narrow the issues.
- The parties may well agree to operate the Guide in lower value multi track cases.
- Excludes clinical negligence and asbestos-related disease cases.
- Encourages positive collaborative behaviour and works in parallel with the Civil Procedure Rules.
- It is a "Guide" not a Protocol.

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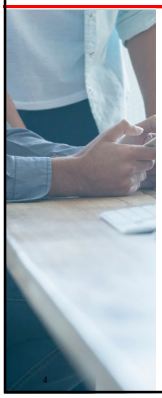
Principal Aims



The principal aims include a commitment to:

- Resolve liability as quickly as possible.
- Where beneficial to the Claimant to provide early access to rehabilitation to maximise their recovery.
- Resolve claims in a cost appropriate and proportionate manner.
- Resolve claims within an appropriate agreed time frame.
- Resolution through an environment of mutual trust, transparency and collaboration.

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Key Objectives

- Collaboration/Case Planning
- Notification
- Liability
- Considerations on Resolution of Liability
- Rehabilitation
- Interim Payments
- Part 36/Calderbank Offers
- Disclosure/Documents

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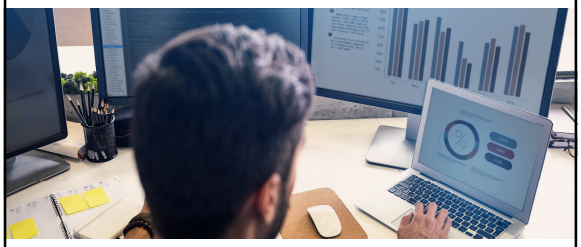
Achieving the Objectives

9 Steps!



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1. Collaboration and Case Planning

- Collaboration is a central objective.
- The parties should work together to narrow the issues throughout the claim, leading to resolution at the earliest time.
- Collaboration begins with a commitment to early notification of a claim to the potential Defendant.
- Collaborative working between the parties should continue throughout the life of the claim with the objective of achieving:
  - Early liability resolution
  - Maximising rehabilitation opportunities
  - Making provision for early interim payments
  - Emphasising restitution and redress
  - Early identification of issues not in dispute
  - Flexible approaches to resolution of issues in dispute
- Framework/timetable for engaging on a regular basis in order to bring the case to conclusion.

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2. Early Notification

- The Claimant's solicitor should ensure that the Defendant and its insurer/handling agent are given early notification of the claim.
- The Claimant's solicitor should aim to send a written notification within 7 calendar days of instruction.
- A formal detailed Letter of Claim is not expected in the first instance.
- The aim is to alert the proposed Defendant and its insurer/handling agent to the potential claim.
- Enables the Defendant and its insurer/handling agent to investigate the claim and set the appropriate reserve.

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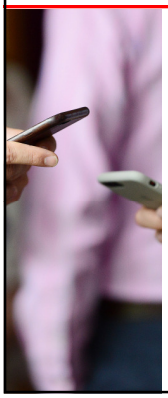
3. First Contact



- The Defendant insurer/handling agent has 14 calendar days to respond and 28 calendar days to make contact with the Claimant's solicitor with a view to establishing lines of communication.
- Early dialogue may include:
  - The parties' views on indemnity issues and liability
  - The present position of the Claimant's injuries and recovery
  - Rehabilitation needs
  - Interim payments
  - Evidence
  - Records
  - Experts
  - Timescales
  - Agreement when to hold further discussions: "route map" or "pathfinder" meetings.

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4. Multiple Defendants

- The Claimant's solicitor must be kept informed in the event that additional Defendants are identified.
- In the event that there is more than one potential Defendant it is expected that one Defendant will coordinate correspondence with the Claimant's solicitor.
- The identity of the coordinating party must be communicated within 28 calendar days of the last Letter of Claim where more than one is sent.
- If a coordinating Defendant cannot be agreed between the Defendants then in such cases the Claimant's solicitor must be notified of the fact immediately.

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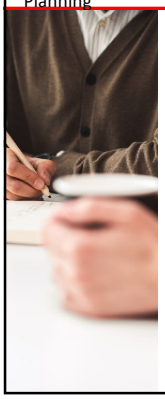
5. Ongoing Review and Forward Planning



- Regular ongoing dialogue should take place between the parties with a view to agreeing the next steps required to progress the case.
- Material changes in circumstances should be communicated immediately.
- The Claimant's solicitor should give reasonable access for medical facilities when requested by the Defendant insurer.
- Route map discussion points can include:
  - Liability position
  - Rehabilitation
  - Discussion whether discrete heads of loss can be agreed
  - Informal directions
  - JSM/ADR

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6. Rehabilitation

- Parties to discuss early intervention at the earliest stage.
- Parties are encouraged to agree the selection of an appropriately qualified Case Manager.
- Defendant insurer to be kept up to date with rehabilitation progress.
- Rehabilitation reports and case management material should be provided to the Defendant insurer on a regular basis.
- Parties should seek to agree the frequency with which records and documents should be disclosed.
- Parties should seek to agree the frequency of meetings or conference calls with the Case Manager (if such meetings are appropriate).

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7. Escalation Procedure

- In the event that either party feels that the opposing handler is not acting in accordance with the spirit of the Guide the first step must always be to exhaust attempts to resolve the point of concern by dialogue or a meeting.
- If such dialogue fails, then contact should be made with the nominated contact point for either party to try to deal with the issue.

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8. Dispute Resolution

- Ongoing dialogue is fundamental to the process.
- The parties will continue to discuss the case on a regular basis and at the times agreed.
- All methods of dispute resolution should be considered including:
  - Early Neutral Evaluation
  - Joint Settlement Meeting
  - Mediation
  - Arbitration
- Considering other methods of dispute resolution does not prevent the parties from starting legal proceedings including Detailed Assessment if needed.

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9. Costs

- Where the stage has been reached in the case where it looks like there stands a good prospect of resolution, the parties should consider how to resolve costs promptly.
- The Claimant should provide cost details 7 days prior to the JSM.
- Parties should agree the manner in which the cost details will be given i.e. by way of a schedule or Bill of Costs.

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Closing

- The guide can work well when both parties genuinely engage.
- Reduces delay and enables you to narrow the issues.
- When it works cases tend to be settled more quickly.
- Benefit to insurers is that early settlements reduces lifecycles.
- Early disclosure can help set appropriate reserves.

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Upcoming Personal Injury webinars

- Procedural CPR Update (2020) – 22nd July 2020
- Employer and Vicarious Liability (2020) – 24th July 2020
- (LIVE) Personal Injury – end of year round-up (2020) – 24th November 2020

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Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
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