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# liabilityMatters

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# Welcome



Welcome to liabilityMatters, the publication that looks at key case law and discusses the trends we're seeing in the liability claims we're handling, and in the wider claims marketplace.

In this issue we lead with an article on the new 15<sup>th</sup> edition of the Judicial College Guidelines which have just been published. Aside from a general increase of 7% in valuations, what else do practitioners need to know?

In 'Family love' we take a look at whether a costs order can be made against a non-party to proceedings. And in our final article we reconsider the control tests the court will apply to stress claims from secondary victims.

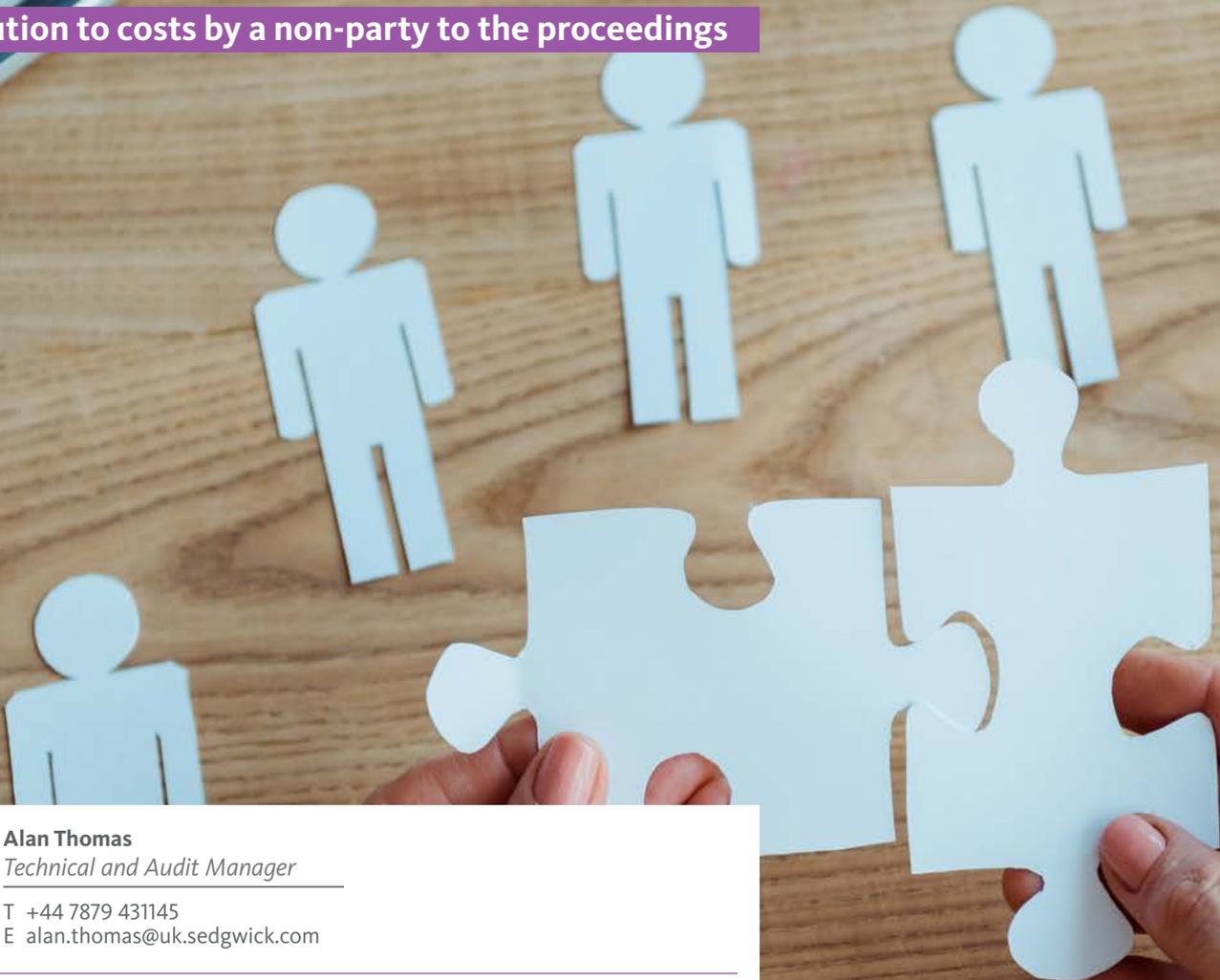
We hope you enjoy this issue and, as ever, if there are subjects you'd like to see covered, or if you have any comments regarding the content, we'd be delighted to hear from you.

Thank you to all our readers for your support this year, we look forward to seeing you again in 2020 and in the meantime have a lovely festive season.

**Simon Hiscock**  
Client Director

# Family love?

## Contribution to costs by a non-party to the proceedings



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**In the case of *Kazakhstan Kagazy Plc v Baglan Zhunus* [2019] EWHC 2630 (Comm), the claimants were awarded a substantial sum following a fraud trial. The award included £8m in costs with the defendants, Mr Arip and Ms Dikhanbayeva, indicating that they could not pay the award.**

In enforcing the award, the claimants discovered that family members had jointly funded over 50% of their defence costs, notwithstanding that they were not involved in the proceedings and an application was made for these family members to pay the legal costs.

The court, in considering the circumstances of this funding, ascertained that Mr Arip prior to the proceedings had transferred large sums

into a trust, of which he and Mrs Arip were the beneficiaries and that after proceedings started, large sums were distributed to Mrs Arip. In addition to funding the defence large sums were also transferred to other family members to include her mother, which was either unexplained or missing.

The court formed the view that the transfer of monies by Mrs Arip was no more than an effort to put the funds out of the reach of the claimants and suggested a joint enterprise between Mr and Mrs Arip.

Consequently, the court found that the funding of the defence was not out of love and affection as protested by Mrs Arip but was a joint plan to frustrate the enforcement of the award. The court duly found for the claimants.

### Comment

The recovery of costs is dealt with under Section 51(1) and Section 51(3) of the Senior Courts Act 1981. This guidance is not restrictive, and the exercise of justice must be paramount. Under S51(3) the court has full power to determine by whom and to what extent the costs are to be paid.

In this case the courts saw through efforts made by the defendant and his extended family to hide the defendant's funds so that it was out of the reach of the claimants and it was just that the costs award was made against Mrs Arip and her mother.

# Secondary victims – the proximity test

*Paul & Others v The Royal Wolverhampton NHS Trust [2019] EWHC 2893 (QB)*



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Mr Paul had Type II diabetes and related complications and had been admitted to New Cross Hospital in November 2012 with chest and jaw pains. Whilst he was treated for acute coronary syndrome and had an echocardiogram, he had no other cardiac investigations.

Some 14 months later, Mr Paul was out shopping with his two daughters when he collapsed in the street and died of a heart attack. His two daughters suffered post-traumatic stress disorder (PTSD) because of witnessing the death of their father.

It was the claimants' case that there were failures in the care their father received for cardiac symptoms in 2012, arguing that a coronary angiogram should have been arranged then, which would have demonstrated significant coronary artery disease and appropriate treatment offered. They brought claims for PTSD.

The defendant applied to have their claims struck out on the basis that the claims had no real prospects of success, with it submitted that the deceased's daughters cannot be described as secondary victims because there is no relevant event and no proximity.

For the purpose of the application it was accepted by all parties that the children will succeed in establishing

that they fall within each of the recognised control mechanisms to be regarded as a secondary victim except that of "proximity". The fundamental question for the court was whether the death of Mr Paul was capable of being the relevant "event" for deciding the proximity question.

It was held by Master Cook at para 40 that:

*"To focus simply on the death of Mr Paul as being the first point at which the consequence of the Defendant's negligence became apparent is not an approach which is supported by the authorities. To do so overlooks entirely that there must be a proximate connection between the initial negligence and the shocking event. It is this proximity in space and time that allowed Lord Oliver to impose the duty of care in Alcock and was described by Lord Dyson MR in Taylor v A Novo as "a necessary, but not sufficient, condition of legal proximity". It is this proximity which has been found to exist in all successful secondary victim claims including Walters and it is the lack of such proximity which explains why the claims in cases such as Taylor v Somerset Health Authority and Taylor v A Novo failed."*

Accordingly, the claimants' claims for psychiatric injury as secondary victims could not succeed, and therefore their claims were struck out.

## Comment

Whilst the court had nothing but sympathy for the claimants, the secondary victim claims were bound to fail. Mr Paul's death over 14 months after the alleged negligent incident could not be said to be the "relevant event" for deciding the proximity required to establish liability under the established control mechanisms.

This is an important lesson for all practitioners – full consideration must be given to all of the 'control mechanisms' when considering secondary victim claims.

# Latest Judicial College Guidelines issued – what's new?

New: Edition 15 of the 'Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases'



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The 15<sup>th</sup> Edition of the Judicial College Guidelines was published on 26 November 2019. It's 27 years since the 1<sup>st</sup> Edition was produced back in 1992 and the guidelines have now become the first port of call for claims handlers, lawyers and the judiciary when seeking to value a personal injury claim award.

As usual, the guidelines are broken down into the affected body parts, the type of injury, and the severity of the injury. The basic structure of the guidelines has remained the same with a generally consistent increase of around 7% being adopted to valuations across the chapters. Whilst this is slightly higher than the rate of inflation over the two year period since the 14<sup>th</sup> edition was published, the increases also seek to reflect some of the recent damages awards made by the courts.

Whilst there are fixed (non-banded) awards for certain categories of injury, many awards have wide guideline brackets. Placing an award correctly within the band is clearly the most important starting point. That's a determination relying on the skill and judgment of the claim handler, reviewing the medical evidence and legal precedent.

For example, minor permanent impairment of vision was valued at £7,990 – £18,390 under the 14<sup>th</sup> Edition (section 5(A) (g)). This wide range is because the bracket caters for blurred vision and/or light sensitivity, and for one or possibly both eyes being affected. The 15<sup>th</sup> Edition banding is raised to £8,550 – £19,690.

Whilst the 7% increase is notable, it's far less than the width of the bracket itself with the highest award being 130% more than the lowest. The need for a skilled claim handler is therefore clear to see.

There are some additional categories detailed in the 15<sup>th</sup> Edition too. An award has been introduced 'in the region of £75,000' for serious bowel complaints persisting after surgery and causing embarrassment and distress, typically following injury giving birth. Perhaps this highlights the ongoing appetite for clinical negligence claims being brought against the NHS for damages assessment in the higher courts?

Claims handlers do need to be aware of the general implications that these monetary increases in the 15<sup>th</sup> Edition pose. Offers made prior to the revised guidelines may no longer offer costs protection and should be reviewed on a case by case basis.

When doing so, practitioners should remember that, whilst an important reference point, the guidelines are just that. They are influential but are not binding and the court will always look at factors such as the impact the same injury has on different people when assessing damages. The physical and psychological effects of an injury on one person may be greatly different to another, and hence so will the damages.

Claimant solicitors may be able to justify higher global injury awards for example where several minor injuries are suffered, even allowing for some pain overlay. Case valuations may also jump portal bandings, such that increased fixed costs are automatically sought so reserves will have to be reviewed with that in mind.

And finally, in our September edition of liabilityMatters we referred to the introduction of a tariff for RTA whiplash injuries, under the Civil Liability Act, in April 2020. The introduction section to the latest guidelines confirms that the legislative scheme, when it eventually takes effect, may well give rise to interesting issues as to how the courts will seek to award damages for whiplash injuries in combination with other injuries.

We will all be keeping a close eye on developments in this regard but until any changes take effect, the revised 15<sup>th</sup> Edition remains the benchmark.



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# liabilityMatters

## About us

We're a specialist liability practice trusted by many of the world's leading insurers, brokers and corporate clients to protect their interests – and those of their customers – when the unexpected happens.

Leading our clients expertly through the claims process, we help mitigate risk and claims spend, protecting our clients' brands, reputations and commercial relationships.

We apply market leading technology to improve the customer experience, settle claims faster and identify fraud. Our digital thinking never stops, we're always developing new technology to make claims more transparent and easier for everyone.

**Wishing you all a merry Christmas,  
happy holidays and a wonderful New Year.**

## Contact us



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For more information about the work done by our liability team, [download the liability claims services brochure here](#).

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