# motoring news

Headlight

## welcome

**to 'Headlight', Dolmans Solicitors' motoring news bulletin.**
**In this edition we cover:**

## case summaries

- **changing expert**

  Wright v Firstgroup plc [2018]

- **deceit**

  UK Insurance Ltd v Stuart John Gentry [2018]

- **disclosure in alleged fraud**

  (1) Accident Exchange Ltd (2) Automotive & Insurance Solutions Group plc v Colin McLean & 9 Others [2018]

- **sentencing for fraud**

  Amlin Insurance Ltd v Kapoor & Another [2018]

  Aviva Insurance v Ahmed [2018]

## articles

- **civil liability bill**

- **annual increase in NHS charges**

**spring 2018**

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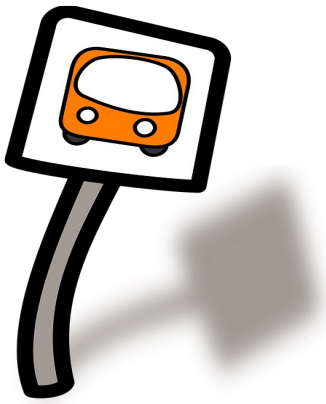
## Wright v Firstgroup plc [2018]

The claimant had been struck and seriously injured by a bus that was being driven by the defendant's employee at 27mph. The issue at trial was whether the driver should have been driving slower and whether he could have avoided the accident by braking earlier or swerving.



Each party instructed an accident reconstruction expert. The claimant's expert initial report expressed the view that the driver should have appreciated the potential hazard of the claimant, who had been standing at a crossing, and could have slowed down. The defendant's expert opinion stated that there was nothing the driver could have done to avoid the accident. Following a joint discussion, each expert signed a joint statement which appeared to say there was nothing the driver could have done and that the speed before braking would have had to be significantly below 27mph to have avoided the claimant.

The claimant argued that the sudden change in his expert's opinion, not fully explained, would destroy any prospect of him succeeding at trial which was due to begin the following week. The claimant applied to adjourn the trial to appoint a new accident reconstruction expert.

The court said that the claimant did not have a right to change experts, especially at such a late stage, simply because the expert said something disadvantageous to them. However, there had been a lack of clarity regarding the claimant's expert's current view, which was exacerbated by some of his answers to questions on the issue. The lack of clarity meant that the claimant had an unjustified disadvantage if forced to proceed on the basis of the current expert evidence. He had suffered life threatening injuries and his damages were likely to be substantial if he succeeded at trial. The court, therefore, erred on the side of caution and took the exceptional course to adjourn the trial and allow the claimant to instruct a new expert.

## UK Insurance Ltd v Stuart John Gentry [2018]

The defendant alleged that on 17 March 2013, his Range Rover had been involved in a collision with a Peugeot driven by an individual who was insured by the claimant. The defendant claimed that the collision was the other driver's fault and that it had been witnessed by a passenger in his car.

The insurers accepted fault and paid the defendant the sum of £14,000 for the value of his car. The defendant issued proceedings in the county court seeking damages for personal injury and the cost of hiring another vehicle. Damages were assessed in the sum of £75,089. In 2014, the claimant (insurer) carried out internet searches which indicated that the defendant and the other driver knew each other before the alleged collision and had taken part in cross-country running events together. In a witness statement, the defendant had asserted that he had not known the other driver before the accident. However, he later accepted that that was untrue. The claimant insurer's case was that the accident was not genuine and it sought damages for deceit from the defendant.

The court held that the totality of the evidence showed that the accident was staged. Both drivers were friends at the time of the collision, yet neither of them informed the insurer of the fact. The insurers' policyholder gave every impression in his initial telephone call that he did not know the defendant. Further, when the insurer discovered that the two were friends, the defendant denied this was the case and said, untruthfully, that they had only become friends after the collision. The court found that the lie the defendant told in his witness statement was evidence of a staged collision. The witness gave evidence that he was unaware that the driver of the other car was a friend of the defendant, but, if the collision was a genuine accident, it was inconceivable that that was not mentioned by the defendant to the witness. The court found that the witness was privy to the plan to stage an accident.

It was also significant that the other driver's car was old and worth very little and, as such, was willing to assist his friend. The court held that it had the required very high level of confidence that the insurers' allegation was true and judgment was granted on that basis.

## (1) Accident Exchange Ltd (2) Automotive & Insurance Solutions Group plc v Colin McLean & 9 Others [2018]

The claimants provided replacement motor vehicles on credit terms to clients whose vehicles had been damaged in road traffic accidents. They recovered the hire charges from the at-fault drivers or their insurers. A company (Autofocus) had provided forensic services for cases where a question arose about the hire recoverable by a client who had hired a replacement vehicle on credit terms. It was the claimants' case that Autofocus had been involved in the systemic fabrication and manipulation of evidence about hire rates so as to deceive the claimants and the court. The first two defendants were the former directors of Autofocus, while the other defendants were solicitors who had acted for drivers facing claims for hire by the claimants' clients.

It was the claimants' case that all 10 defendants were party to a scheme to produce false and misleading information and to deploy it in litigation against the claimants and in settlement negotiations. The claimants sought inspection of documents over which the solicitor defendants asserted privilege on behalf of their clients.

The issue was whether the "iniquity exception" defeated any claim for legal professional privilege. The rationale for that exception was that legal professional privilege applied to lawyer/client communications which were confidential, and communications made for any iniquitous purpose did not have the necessary confidential nature, which only arose out of a relationship in the ordinary course of professional engagement of a lawyer. The question was whether the nexus between the wrongdoer and the client took the lawyer/client relationship outside the ordinary scope of professional employment. It was held that it did not. The iniquity exception did not apply to the documents of which the claimants sought inspection. There was no nexus between Autofocus' wrongdoing and the client which took the lawyer/client relationship outside the ordinary scope of professional employment. Their wrongdoing was, however, parasitic upon an existing lawyer/client relationship which was created and continued for a normal and legitimate purpose. The application for disclosure of documents was refused.

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## Amlin Insurance Ltd v Kapoor & Another [2018]

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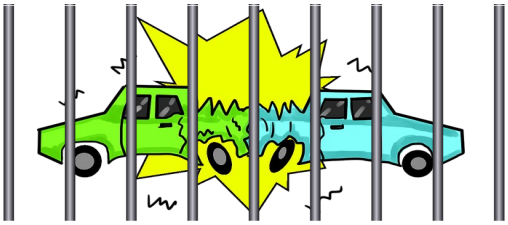
The respondents, husband and wife, brought personal injury proceedings against a van driver insured by the claimant following a road traffic accident on a motorway slip road. The van had driven into the respondents' car and they had claimed damages, in particular for personal injury, vehicle damage, credit hire and ongoing storage fees totalling around £176,000. They attended their GP and consulted with a medico-legal expert complaining of soft tissue injuries and had arranged physiotherapy appointments. Their particulars of claim and schedule of loss were verified with statements of truth. At trial, the judge found that the husband had braked for no reason and staged the accident, and dismissed the claim as being fundamentally dishonest. The insurer applied to commit the respondents for contempt of court. The respondents each submitted a sworn affidavit stating that the accident had been genuine, but, unbeknown to them, their claims management company had exaggerated the amount of damages. However, shortly before the hearing, both respondents changed their stories and accepted that they were in contempt of court.

The court found that the contempt by each respondent was proved to the criminal standard as they had admitted it. The court was satisfied that each respondent had made the statements as alleged, signed with statements of truth, knowing them to be untrue and that they were false in a way so as to interfere with the course of justice in a material respect. The husband had no substantial mitigation and he was sentenced to an immediate custodial term of 12 months. Although the wife accepted that she was in contempt of court, she maintained that she had to go along with what her husband did. She was sentenced to 9 months imprisonment, suspended for 12 months, in order not to punish her three children.

## Aviva Insurance v Ahmed [2018]

The defendant brought a claim in the county court for personal injury following a road traffic accident. He had, in fact, deliberately caused the accident by driving in front of another car and then braking hard so that the car crashed into him. The defendant did not attend the committal hearing and the judge found him in contempt of court in relation to fraud and sentenced him to 9 months imprisonment. Two months later, the judge received a letter from the defendant in prison asserting that he had not been aware of the committal hearing and that he had not caused the collision. The case was re-listed and the defendant was brought from prison to the court for a hearing.

The insurers brought CCTV footage of the accident to court and it was clear from the footage that the collision had not been an accident and that the defendant had caused it deliberately. The defendant subsequently admitted to having caused the collision in order to obtain money, but realised what he had done was a crime and was genuinely remorseful. He contended that his situation equated to the very belated mitigation of a guilty plea so that the court should reduce the term of the sentence.



The Judge held that the defendant had been thoroughly dishonest and the fact that he had endangered the safety of other road users aggravated the underlying criminality of the fraudulent claim. The court also accepted the insurers' position that the defendant had only accepted his guilt after viewing the CCTV footage and realising his guilt was plain. However, the experience of serving 7 weeks in prison had had a very marked effect on the defendant and the court could see that only that experience had brought home to him quite how serious his crime had been. The defendant was 33 years of age and of previous generally good character, apart from a conviction aged 16 for taking a car without the owner's consent. The defendant had apologised to the other driver and to the court and his sentence was reduced from 9 months imprisonment to 8 months imprisonment.

## civil liability bill

On 20 March 2018, the civil liability bill was introduced to the House of Lords dealing with two contentious issues in the personal injury compensation system of England and Wales; being compensation for whiplash injuries and the personal injury discount rate.

Readers may well recall that the then Chancellor, George Osborne, proposed reform to tackle the rising cost of motor insurance as long ago as 2016. Subsequently, there was the introduction of the prisons and courts bill which, amongst other provisions, set out proposals for whiplash reform, but proceeded no further due to the announcement of the general election. In June 2017, the Queen's speech announced that the government would be tabling a civil liability bill.

In the interim, on 27 February 2017, Liz Truss, the then Lord Chancellor, changed the discount rate from 2.5% to - 0.75%, effective from 20 March 2017. The insurance industry was very critical of the change and, in particular, criticised the fundamental basis on which the discount rate was based on very low risk investment behaviour.

The civil liability bill, unlike the prison and courts bill, does not deal with the proposed changes to increase the small claims limit in road traffic related personal injury claims from £1,000 to £5,000 and for all personal injury claims from £1,000 to £2,000. Those issues are still being considered by the Civil Justice Committee.

### whiplash reform

The bill provides for the following:

- The introduction of a tariff of compensation for pain, suffering and loss of amenity for whiplash injury as defined within the bill. The tariff itself has yet to be detailed and will be set out in secondary legislation in due course.

- The introduction of a regulatory ban on settling or offering to settle whiplash claims without medical evidence.

- Provides the judiciary with discretion to exceed the tariff for pain, suffering and loss of amenity in exceptional circumstances. There will be a limit for exceptional payments, which is to be set out in secondary legislation in due course.

Readers would be correct in concluding that the foregoing is nothing more than a repackaging of the provisions set out in the previously abandoned prison and courts bill.

**discount rate**

The change in the discount rate was made by Liz Truss under the powers conferred on her by the Damages Act 1996, guided by the 1999 case of *Wells v Wells* in which the court determined that the discount rate should be based on the yields of index linked government stock.

When the discount rate was reduced in February 2017, the government appreciated this would lead to higher levels of compensation for those with future losses, and that not only would this impact negatively on insurers, but also on public services with large personal injury liabilities, particularly the NHS. Thereafter, there followed a consultation launched in March 2017 resulting in the civil liability bill setting out measures to:

- Establish a new basis for the calculation of the discount rate that continues to support the principle of 100% compensation, but also reflecting the reality of how claimants actually invest damages.

- Putting in place a process of setting the discount rate on a statutory footing with the Lord Chancellor to review the rate at least every 3 years.

- Establish an independent expert panel to advise the Lord Chancellor so as to ensure that the rate set is fair and transparent.


It is clear that the MOJ and Justice Committee have agreed that the discount rate should reflect "real-world" claimant investment behaviour. The MOJ maintains that research by the Actuary Department indicates average awards may exceed the expected return by about 35%, although after an allowance is made for necessary expenses on tax and investment management, this figure may fall to between 20 to 25%. This is largely due to the way the current discount rate is calculated, making unrealistic assumptions about investment and returns. The MOJ have previously indicated that utilising the new proposed methodology may result in a discount rate of between 0 and 1%. The Justice Committee, on the other hand, has called for further evidence in relation to this issue before the draft legislation is progressed.

The introduction of the bill is a clear indication that the government remains committed to reforming the personal injury compensation system in England and Wales.

## annual increase in NHS charges

With effect from 1 April 2018, the Compensation Recovery Unit, on behalf of the Department of Health, is entitled to recover increased charges incurred by the NHS as a result of treating people following injury and who are successful in seeking compensation.

For inpatient treatment, the charges have increased from £833 to £846 and outpatient treatment from £678 to £688. Ambulance charges have also increased from £205 to £208 per journey. The maximum amount recoverable has increased from £49,824 to £50,561. The table below has been released by the DWP and sets out the history of treatment and ambulance journey charges.

If there are any topics you would like us to examine, or if you would like to comment on anything in this bulletin, please email the editor:

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**treatment and ambulance journey charges**

| accident date (on or after) | out-patient | in-patient | cap | ambulance charges (per person / per journey) |
|---|---|---|---|---|
| Pre 02.07.97 | £295 | £435 | £3,000 | |
| 02.07.97 | £354 | £435 | £10,000 | |
| 01.01.03 | £440 | £541 | £30,000 | |
| 01.04.03 | £452 | £556 | £33,000 | |
| 01.04.04 | £473 | £582 | £34,800 | |
| 01.04.05 | £483 | £593 | £35,500 | |
| 01.04.06 | £505 | £620 | £37,100 | |
| 29.01.07 | £505 | £620 | £37,100 | £159 |
| 01.04.08 | £547 | £672 | £40,179 | £165 |
| 01.04.09 | £566 | £695 | £41,545 | £171 |
| 01.04.10 | £585 | £719 | £42,999 | £177 |
| 01.04.11 | £600 | £737 | £44,056 | £181 |
| 01.04.12 | £615 | £755 | £45,153 | £185 |
| 01.04.13 | £627 | £770 | £46,046 | £189 |
| 01.04.14 | £637 | £783 | £46,831 | £192 |
| 01.04.15 | £647 | £796 | £47,569 | £195 |
| 01.04.16 | £665 | £817 | £48,849 | £201 |
| 01.04.17 | £678 | £833 | £49,824 | £205 |
| 01.04.18 | £688 | £846 | £50,561 | £208 |