

Note for Candidates Academic Year 2016/18: The provision of the Third Parties (Rights against Insurers) Act 2010 will be examinable from June 2017 in the event that the Act commences on or before 31 December, 2016.



Title	Introductory Considerations for Personal Injury Lawyers	
Level	4	
Credit value	8	
Learning outcomes The learner will:	Assessment criteria The learner can:	Knowledge, understanding and skills
1 Understand the key features of Personal Injury litigation	1.1 Define 'personal injuries'	1.1 Limitation Act 1980 definition: includes any disease or impairment of a person's physical or mental condition; S38 LA 1980, CPR 2.3
	1.2 Identify the key participants in a PI case	1.2 The claimant, the claimant's lawyer, the defendant, the defendant's lawyer, the defendant's insurer and the medical expert
	1.3 Analyse the roles of the key participants in a PI case	1.3 The claimant has suffered personal injury and is responsible for bringing the case; must be aware of: <ul style="list-style-type: none"> • limitation period including impact of any disability on time limits e.g. a minor • burden of proof • obligations in relation to overriding objective (CPR1) • obligations to defendant and to own lawyers • funding options • implications of QOCS under CPR 44.15 and 44.16 and in relation to Part 36 offers The claimant's lawyer conducts the claim on behalf of the claimant; bears the burden of assembling, issuing proceedings (ref: Limitation Act 1980) and proving the case. Role includes: investigation of and preparation of the claimant's case, the law, causes of action, likely defences, evidence, advice on merits, managing the client's expectations, ensuring compliance with relevant pre-action protocols, considering alternative dispute resolutions e.g. mediation; considering merit of Part 36 offers (including pre-action) in light of client objectives, risk and likely outcomes; progressing the case in compliance with obligations under SRACC and the civil procedure rules to assist the court to meet the overriding objective, The defendant (who may be an individual or a

		<p>company) responds to the allegations and arguments made, e.g. breach of duty, causation and quantum and, as appropriate, raises any allegations of contributory negligence. Is guided by the advice of its legal representative as to the conduct of the litigation and must comply with procedural requirements e.g. duty of disclosure.</p> <p>The role of the defendant's lawyer, including: representing the interests of the defendant and investigating the claim, considering: the law, possible defences, including contributory negligence, evidence; advising on merits, including possible prospects of a timely application to strike out (CPR44.15) and implications for QOCS, risk and likely outcomes; need for Part 36 offers and implications for QOCS; need to progress the case in compliance with obligations under SRACC and the civil procedure rules including consideration of alternative dispute resolution and assisting the court to meet the overriding objective.</p> <p>The defendant's insurer will be responsible for paying any damages and costs to the claimant if the case is proven; considers issues of indemnity which may affect cover under any policy in force; may influence decisions on liability and settlement.</p> <p>The role of the medical expert is to examine the claimant and report upon the nature and extent of the injury sustained - the diagnosis, and prospects for recovery – the prognosis; to whom primary duty owed; methods of instruction and differences e.g. may be jointly selected or jointly instructed; must comply with CPR35 and PD Part35 and Pre-Action Protocol for Personal Injury claims ;</p>
	<p>1.4 Evaluate the factors that may impact on the attitude and behaviour of the different participants in a PI case</p>	<p>1.4 The claimant may have a sense of injustice and may have pressing immediate and long-term financial needs. Implications for understanding of the litigation process, implications on attitude/behaviour if defendant raises allegations of contributory negligence or exaggeration; understanding difficulties arising in particular claimant/defendant relationships e.g. employer/employee, parent/child,</p>

		<p>school/pupil etc.</p> <p>The claimant's lawyer may have a direct financial interest in the client winning or achieving a settlement. He or she will be concerned that the work required is proportionate to the prospects of success; understanding need to manage claimant's expectations objectively and to achieve outcome in client's best interests (observing SRACC) and to advise client accordingly;</p> <p>The defendant may have a sense of injustice and a strong desire to defend the case or to settle if necessary to avoid adverse publicity. Differences between viewpoint of defendant and that of his insurers. Difficulties arising in particular claimant/defendant relationships e.g. employer/employee, parent/child school/pupil etc.; understanding implications arising for attitude/behaviour if insurers refuse to indemnify defendant</p> <p>Obligations of the defendant's lawyer to balance the interests of the lay clients and the insurer client and to give pragmatic advice.</p> <p>Interests of the defendant's insurer; implications arising if there are indemnity issues under the policy e.g. late notification of claim</p> <p>The medical expert should be independent of the parties and report to the court fairly and impartially; requirements of CPR35 PD Part 35 and the Pre-Action Protocol for Personal Injury claims.</p>
	<p>1.5 Apply knowledge of the key features of personal injury litigation a given situation</p>	<p>1.5 Application to a complex scenario</p>

2 Understand the professional culture and terminology of medical experts involved in the litigation process	2.1 Explain the different roles of the medical personnel involved in the litigation process	2.1 Likely medical personnel: paramedics, triage nurses, GPs, treating consultants, physiotherapists, occupational therapists; appreciation of their function; distinction between them and medical experts.
	2.2 Describe the main professional medical bodies	2.2 General Medical Council and the British Medical Association
	2.3 Outline the functions of the main parts of the skeleton and tissues of the human body	2.3 Understanding of the physical structure of the body including bones, muscles, joints, tendons, ligaments, nerves, cartilage, organs and systems
	2.4 Explain how an accident can cause injury	2.4 Direct physical injuries resulting from an accident; indirect physical injuries resulting from an accident; an accident may exacerbate existing injuries; an accident may accelerate a pre-existing condition; non-physical injury e.g. PTSD or other psychiatric trauma; importance of establishing a causal link between breach of duty and injury and impact of contributory negligence on blameworthiness for the cause and extent of the injury.
	2.5 Identify the main types of scarring	2.5 1 st , 2 nd and 3 rd degree burns, contracture scars, keloid scarring, hypertrophic scars
	2.6 Describe the main types of fractures in the human body	2.6 Hairline, greenstick, simple, unstable, comminuted, impacted, crush
	2.7 Outline the effect on the human body of a whiplash injury	2.7 Injury to soft tissue of the spine; cause, onset and type of symptoms, duration and any complications from the injury itself or as a result of an exacerbation of a pre-existing condition or acceleration of symptoms
	2.8 Apply knowledge of the culture and terminology of medical experts to a given situation	2.8 Application to a complex scenario

3 Understand how damages-based agreements operate in PI cases	3.1 Explain what a damages-based agreement is	3.1 Section 45 of Legal Aid, Sentencing and Punishment of Offenders Act 2012; Section 58AA Courts and Legal Services Act 1990; agreement whereby client makes payment of fees to his/her lawyer if they are successful in recovering damages; the payment is a percentage of the damages recovered and is paid from the damages recovered; cap on recovery of costs (25%); effect of CPR 44.18 and award of costs where there is a DBA; understanding of the indemnity principle.
	3.2 Explain the legal formalities which must be met for a damages-based agreement to be enforceable	3.2 Damages-Based Agreements Regulations 2012 (in force from 1 April 2013): Regulation 3
	3.3 Explain the detail and purpose of the information that must be provided by a solicitor to a client when entering into a damages-based agreement	3.3 SRA Code of Conduct Chapter 1; this includes information to be given, when costs will be payable, challenging the costs and explaining the meaning and effect of the agreement
	3.4 Apply knowledge of damages-based agreements to a given situation	3.4 Application to a complex scenario
4 Understand how conditional fee agreements (CFA) operate in PI cases	4.1 Explain what a conditional fee agreement is	4.1 CFAs are a method of funding litigation, where the client does not pay his/her lawyer's fee if the claim fails. If the claim is successful, the lawyer will charge a success fee in addition to his basic costs; The client remains liable for payment of disbursements incurred e.g. court fees, medical expert fees, counsel's fees; interaction with ATE policies and principle of QOCS
	4.2 Explain the legal formalities which must be met for a CFA to be enforceable	4.2 Certain types of cases cannot be the subject of a CFA (s58A Courts and Legal Services Act 1990 as amended by s44 Legal Aid, Sentencing and Punishment of Offenders Act 2012). CFAs must meet certain conditions (s58(3) and s 58(4) Courts and Legal Services Act 1990). Further regulation is provided by the Conditional Fee Agreements Order 2013 (SI 2013 / 689).
	4.3 Explain the operation of success fees	4.3 Section 58(2)(b); how the 100% cap on a success

		<p>fee works; staged success fees and fixed success fees; success fees for RTA and employers' liability claims are fixed by the court under CPR 45.</p> <p>After 1 April 2013, the success fee is paid by the client. The maximum success fee that can be charged is 100% of the lawyer's basic costs - (Article 3 CFA Order). However, in personal injury cases, the maximum success fee recovered must not exceed 25% of the damages, excluding damages for future care and loss - (Article 5 CFA Order).</p> <p>A claimant may take out After the Event Insurance to cover disbursements if the claim is unsuccessful. The premium is not recoverable from the defendant and remains the claimant's liability</p>
	<p>4.4 Explain the detail and purpose of the information that must be provided by a solicitor to a client when entering into a CFA</p>	<p>4.4 SRA Code of Conduct Chapter 1 – Client Care; in particular, Indicative Behaviour (IB 1.17); this includes information to be given, when costs will be payable, challenging the costs and explaining the meaning and effect of the agreement</p>
	<p>4.5 Evaluate the likelihood of recovering the costs incurred under a CFA from the opponent</p>	<p>4.5 The Claimant has to demonstrate that the CFA is valid;</p> <p>After 1 April 2013; basic costs – in personal injury cases the general rule is that the claimant's basic costs including disbursements will be paid by the defendant if the claim succeeds. Success fee – the claimant will be responsible for paying the success fee. This is not recoverable from the defendant; Section 44(4) Legal Aid, Sentencing and Punishment of Offenders Act 2012.</p> <p>A claimant will generally not have to pay the defendant's costs if the claim fails; understanding operation of One Way Qualified Costs Shifting (QOCS). CPR 44.13 – 17; understanding the effect</p>

		of the exceptions to QOCS and circumstances in which a claimant may become liable to pay the defendant's costs (interaction with CPR 44.15, 44.16 and in relation to Part 36 offers)
	4.6 Apply knowledge of conditional fee agreements to a given situation	4.6 Application to a complex scenario
5 Understand how legal expenses insurance works in PI cases	5.1 Explain how Before the Event (BTE) insurance works	5.1 Add on policy; types of policy and examples; checking the policy; client choice; the Insurance Companies (Legal Expenses Insurance) Regulations 1990; reasonable grounds for not relying upon a BTE policy, e.g., <i>Sarwam v Alam</i> (2001);
	5.2 Explain how After the Event (ATE) insurance works	5.2 Purpose of the policy; to protect the claimant against the making of an adverse costs order e.g. one of the exceptions to QOCS applies – CPR 44.13-17 incl stand-alone policy; S 29 Access to Justice Act 1999; extent of cover required and what the solicitor must disclose, e.g., <i>Tankard v John Frederick Plastics Ltd</i> (2008); liability of claimant for payment of premium upfront; deferred premiums; ATE provider's requirements for completion of proposal form and evidence in support
	5.3 Evaluate the likelihood of recovering the premium for an ATE policy from the opponent	5.3 Position for any policies taken out before 1 April 2013: opponent could challenge the cost of the policy, the coverage of the policy, or suggest that the policy should have been a staged premium (including the application of the <i>Liverpool ATE Test Case (2012)</i> on cases governed by the RTA Low Value Protocol). For policies taken out after 1 April 2013: the premium is not recoverable from the defendant but is deducted from the claimant's damages recovered; see s46 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

	5.4 Apply knowledge of legal expenses insurance to a given situation	5.4 Application to a complex scenario
6 Understand how compensation for PI may be recovered via an insurer in an employer's liability case	6.1 Analyse the use of Employer's liability insurance	6.1 The effect of s1 Employers' Liability (Compulsory Insurance) Act 1969 and in particular: every employer shall insure against liability for bodily injury or disease arising out of employment
	6.2 Explain the claimant's options in PI cases if the employer defendant becomes insolvent	6.2 The effect of Third Parties (Rights against Insurers) Act 1930 and 2010; the role of the Employers' Liability Tracing Office; the application of the requirements of Third Parties (Rights against Insurers) Act 1930 and 2010, including information and disclosure and in particular relevant insurance, actual liability and insolvent defendant; precondition to liability under the Act including admission or a judgment of the court; e.g., <i>Post Office v Norwich Union (1967)</i>
	6.3 Analyse the limitations on the claimant's options if the employer defendant becomes insolvent	6.3 Limitations include: no rights where company dissolved, e.g., <i>Bradley v Eagle Star (1989)</i> , getting pre-action disclosure, e.g., <i>Burns v Shuttlehurst (1999)</i> ; getting Part 18 further Information, e.g., <i>Harcourt v FEF Griffin (2007)</i> ; the effect of the Third Party (Rights against Insurers) Act 2010 in particular, transfer of rights will take place before judgment obtained
	6.4 Apply knowledge of how compensation may be recovered via an insurer to a given situation	6.4 Application to a complex scenario
7 Understand the right to bring a direct action against the insurer in a road traffic case	7.1 Explain how the insurer may be sued direct in road traffic cases	7.1 The effect of the European Communities (Rights against Insurers) Regulations 2002; the effect of Reg 3 EC(RI) Regs 2002, including residence, cause of accident, place of accident; right to sue the insurer direct; Impact of <i>Vnuk v Zavarovalnica Triglav D.D.</i> CJEU (Third Chamber) 4/9/2014 C-

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	7.2 Apply knowledge of the right to bring a direct action against the insurer in a road traffic case to a given situation	7.2 Application to a complex scenario
8 Understand the impact of the doctrine of Limitation of Actions on PI claims	8.1 Explain why limitation is important for PI lawyers	8.1 Limitation Act 1980; actions must be commenced within definite time-scales; different time scales for different causes of action; and categories of claimant; primary defence to a claim that it is Statute-barred; possibility of negligence claim against claimant lawyer
	8.2 Explain the important terms used in the relevant legislation relating to the Limitation of Actions	8.2 meaning and implication of 'cause of action', "accrued" 'significant', 'knowledge'
	8.3 Explain the ordinary limitation period in personal injury claims	8.3 The effect of s11 LA 1980; 3 years from accrual of the cause of action or date of knowledge, if later; practical application of this e.g. calculation of limitation period; consideration of limitation period where claimant a minor or with other disability s.28 LA 1980
	8.4 Explain the latent damage period in personal injury claims	8.4 The effect of s11 LA 1980; 3 years from the date of knowledge, if later; the effect of s14(1) LA 1980; the legislation noting that knowledge includes constructive knowledge acquirable personally or through expert advice (but not if claimant has sought and acted on advice): s14(3) LA 1980; the need to consider (and be able to advise in relation to) significance and the instituting proceedings test: s14(2) LA 1980; the injury was attributable to the breach and the identity of the defendant s14(1) LA 1980; the effect of these key cases including: <i>A v Hoare (2008)</i> , <i>B v MOD (2010)EWCA 1317</i>
	8.5 Evaluate what steps can be taken to disapply the limitation bar	8.5 The effect of s 33 LA 1980; being able to apply the following principles: balancing prejudice to claimant

		<p>and prejudice to defendant: s33(1) LA 1980; taking into account all the circumstances of the case and in particular: length of claimant's delay, reasons for delay, effect on cogency of evidence, conduct of defendant, disability of the claimant (if any), promptness of action following knowledge, steps to obtain advice and advice given; making a decision based on what is 'equitable': s33(1)LA 1980; including the need to be wary of windfall to the defendant, e.g., <i>Cain v Francis (2008)</i>; consideration of forensic prejudice, e.g., <i>McDonnell v Walker (2009)</i>; and general rule in cases of long delay, e.g., <i>Horton v Sadler (2006)</i></p>
	8.6 Apply the law on limitation of actions to a given situation	8.6 Application to a complex scenario

Additional information about the unit

Unit aim(s)	The learner will have a broad understanding of the key features of personal Injury litigation. They will also have a broad understanding of the roles of the different medical professionals who may be involved in personal Injury cases and the key symptoms and medical terminology that may be featured in Personal Injury cases. An understanding of costs, compensation and direct actions will also be gained.
Details of the relationship between the unit and relevant national occupational standards (if appropriate)	This unit may provide relevant underpinning knowledge and understanding towards units of the Legal Advice standards; specifically SFJ1B14: Personal Injury Legal Advice and Casework
Details of the relationship between the unit and other standards or curricula (if appropriate)	N/A
Assessment requirements specified by a sector or regulatory body (if appropriate)	N/A
Endorsement of the unit by a sector or other appropriate body (if required)	N/A
Location of the unit within the subject/sector classification	15.5 Law and Legal Services
Name of the organisation submitting the unit	Chartered Institute of Legal Executives (CILEx)
Availability for delivery	1 st April 2013