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Strategies and Tactics in Litigating Personal Injury

Claims: Tort Law in Action ¹

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Keywords:

Tort, Personal Injury, Compensation, Litigation, Tactics, Settlements, Negotiation, Legal Costs, Compensation Culture, Socio-legal, Empirical

Abstract:

This article reveals some of the tactics which lawyers may use when conducting personal injury litigation. The research is empirically based by being drawn from structured interviews with a cross section of practitioners. This qualitative evidence helps to place the rules of tort in a wider context and suggests that tactical considerations may affect the outcome of individual cases irrespective of their legal merits. A range of strategies are considered here to illustrate how they may be used at different points during the litigation. In addition, the article updates our understanding of the compensation system by considering the practitioners' responses in the light of the major changes made to this area of practice in recent years. It reveals how negotiation tactics have developed since research in this area was last carried out. Overall the article adds to a very limited literature dealing with

¹ This is a revised and expanded version of an article that was published as 'Tort Tactics: An Empirical Study of Personal Injury Strategies' (2017) 37(1) *Legal Studies* 162 - 185. I am grateful to Nicola Glover-Thomas and Bruce Wardhaugh, the editors of that publication, for permission to reproduce the study here so that the article might gain a wider readership among practitioners. For a related article also relying upon the fieldwork which forms the basis of this study see R. Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' That article is to be published in University College London's 'Current Legal Problems' series and was the subject of a lecture given at UCL in February 2018.

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negotiation and settlement of personal injury claims. The picture of litigation painted here runs counter to the misleading image of individualised court-based justice that is often portrayed as the defining characteristic of tort law.

INTRODUCTION

In practice the outcome of a claim for personal injury does not depend upon application of the rules of tort alone. It is affected by many other factors. These include, for example, the skill, experience and reputation of the lawyers, the resources either side is able to bring to establish evidence, and the ability of the parties to bear the threat of legal costs. As part of this wider picture, the way in which a claim is negotiated also helps to determine its outcome. The relationship between the representatives on either side is at the heart of the litigation, and the ways in which tactical advantage can be gained is central to whether a claim succeeds and how much damages are then paid. One solicitor interviewed for the present study went so far as to suggest

The majority of litigation is tactics rather than law. It's all about what you disclose, ... whether you use a particular witness or not, the type of experts you choose, ... whether you put questions, ... which barrister you pick, ... and whether you issue soon or whether you issue late - that kind of thing.
EW7

The importance of such matters is accentuated by the fact that the overwhelming majority of personal injury claims are disposed of by negotiations which are conducted out of court: judges determine less than one per cent of all cases.³ The process of bargaining in the shadow of the law is therefore very much what tort in practice is all about.

³ Out of 943 cases only two went to trial in the data supplied by insurers to Lord Justice Jackson for the *Review of Civil Litigation Costs: Final Report* (2010) chapter 2 paras 3.3 and 3.4. In the specialised area of clinical negligence only 0.7% of cases went to trial in 2016-17 according to the National Audit Office Report, *Managing the Costs of Clinical Negligence in Trusts* (2017, HC 305 session 2017 - 19) para 3.14. For earlier similar general findings see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson) (the Pearson Report) vol 2 table 12, and the Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm 394). H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009) chapter 2.

However, the art of negotiation is complex and the legal procedures and business structure of the claims system adds to that complexity. There is no universal strategy that must be pursued for the best resolution of all the many different types of injuries suffered whether large or small. Practitioners on the same side may differ about how very similar claims should be conducted. Much depends, for example, upon who is the opponent, the actions they take, the money at stake, and the point that has been reached in the litigation. However, practitioners will all agree that the negotiating process affects the outcome of each case and is crucial in determining how the tort system actually functions.

This article gives examples of a wide variety of tactics that may be used throughout the period of litigation. This breadth of coverage is achieved only by severely limiting discussion of the individual tactics themselves; much more could have been said especially with regard to strategies which divide opinion. Another qualification to this article is that, in spite of drawing upon extensive interviews, it introduces no new quantitative evidence to assess, for example, whether the views expressed are in fact commonly held or acted upon. The difficulties in relying solely upon qualitative evidence are well recognised: the interviewees may not accurately reflect what is happening in the system because they may be concerned to project a favourable public image of their role or that of their firm; invariably they will want to be seen as reasonable people adopting sensible approaches to the resolution of disputes.⁴ In spite of this, the portrait of litigation drawn here offers challenges to more traditional perspectives of tort where it is often implicit that claims are resolved only upon the basis of textbook rules on liability and damages. In addition, the portrait updates previous studies and argues that the changed environment in which personal injury litigation is now conducted has significantly affected negotiation practices.

Existing Scholarship

Although the literature on negotiation in general has increased considerably in recent years,⁵ there are only a few empirical studies of how bargaining operates in the context of

⁴ M. Q. Patton, *Qualitative Research and Evaluation Methods: Integrating Theory and Practice* (London: Sage Publications, 4th ed 2015).

⁵ See the numerous textbooks and journals cited in J. Lande, 'A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pre-trial Litigation' (2014) 16 *Cardozo J of Conflict Resolution* 1. Among the Harvard University publications dealing with negotiation techniques in general are the *Harvard Negotiation Law Review*, H. Raiffa,

personal injury litigation in the U.K. Laurence Ross conducted a major study in the USA of how tort claims for bodily injury were processed. He published the results in 1970 in *Settled Out of Court: The Social Process of Insurance Claims Adjustment*.⁶ However, the book examined a system which differs in many respects from that in this country and was narrower than the present study because it focused only upon motor claims. In addition, it mostly recorded the views of insurance personnel rather than lawyers because it looked at negotiations conducted by adjusters directly with unrepresented claimants. Nevertheless the book provides a classic study of Ross's thesis:

To understand the legal system and the nature of rights and duties, it is not sufficient to know the formal rules; one must know the law in action.⁷

This approach was a cornerstone of the studies of the compensation system that were carried out by the Socio-Legal Centre at Oxford University which began in the 1970's under the directorship of Donald Harris. Together with others, Harris published the results in 1984 in *Compensation and Support for Illness and Injury*.⁸ One of the co-authors was Hazel Genn who, three years later, published *Hard Bargaining: Out of Court Settlement in Personal Injury Actions*.⁹ Genn found that there were structural and situational inequalities between the parties which placed insurers at a considerable advantage in defending claims. Claimant solicitors were said to have a formidable task.¹⁰ A key factor was whether the claim was

Negotiation Analysis: The Science and Art of Collaborative Decision Making (Harvard University Press, 2007) and R. Fisher and W. Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House, 2012). For consideration of how psychology affects the bargaining process see J.K. Robbennolt and V.P. Hans, *The Psychology of Tort Law* (New York: NYU Press, 2016).

⁶ H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Chicago: Aldine, 1970). Earlier empirical work is noted by H. Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in P. Cane and H. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford: OUP, 2010) 887. An excellent historical account of the rise of loss adjusters and the standardisation of tort claims is given by S. Issacharoff and J. F Witt, 'The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law' (2004) 57 *Vanderbilt LR* 1571.

⁷ Introduction to Ross above.

⁸ D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield, and Y. Brittan, *Compensation and Support for Illness and Injury* (Oxford: OUP, 1984).

⁹ H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon Press, 1987).

¹⁰ *Ibid* 164.

brought by an experienced lawyer who specialised in such litigation. The analysis which attracted most attention is now a familiar one in the general negotiation literature:¹¹ Genn distinguished those claimant lawyers who adopted a co-operative approach in dealing with the other side from those who employed a more aggressive and combative style. Whereas the ‘hard bargainer’ relentlessly pursued matters towards trial and was very ready to refuse initial offers to settle, the softer negotiator was reluctant to initiate or even consider the issue of formal proceedings and was more likely to be among the two thirds of lawyers who accepted the first offer made.¹² Genn suggested, subject to qualifications, that more favourable settlements resulted from being more combative and that it was the specialist lawyers who were more likely to use this approach.

This conclusion was questioned in an article in 2000 by Dingwall and others which relied upon two empirical studies carried out some years previously.¹³ Using econometric as well as qualitative data they suggested a more nuanced approach was necessary. In particular, they emphasised that claimant lawyers appreciated that defendants were a varied group: although most defendants were ‘repeat players’ and regularly involved in litigation, some were not because they were ‘one-shotters.’¹⁴ Defendants were not only large general insurance companies but also included smaller regional insurers, Lloyds syndicates, self-insured

¹¹ C. B. Craver, *Effective Legal Negotiation and Settlement* (LexisNexis, 7th ed 2011) chapter 2 and A. Boon, ‘Co-operation and Competition in Negotiation: The Handling of Civil Disputes and Transactions’ (1994) 1 Int J of the Legal Profession 109.

¹² Genn at 166 and Harris at 95. A lower acceptance rate was later found by T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (London: The Law Society and the Civil Justice Council, 2002) 154. However, a third of cases still settled after only one offer, almost two thirds after two and ninety per cent after three. Similarly, little time was spent on negotiating low value claims in H. Kritzer, *Let’s Make a Deal: Understanding the Negotiation Process in Ordinary Litigation* (Madison: University of Wisconsin Press, 1991).

¹³ R. Dingwall et al, ‘Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases’ (2000) 20 Legal Studies 1. Interviews were conducted with 15 personal injury lawyers in the one study and, 25 claimant lawyers, 12 defence lawyers and 12 insurance claims managers in the other study confined to asbestos litigation. Genn’s conclusion was also questioned earlier by A. Boon, ‘Ethics and Strategy in Personal Injury Litigation’ (1995) 22 J Law & Soc 353. This study relied upon interviews with only four claimant lawyers involved in trade union work. Ten personal injury solicitors were also interviewed in a wider study of negotiation positions in A. Boon above n 11.

¹⁴ M. Galanter, ‘Why the “Haves” Come out Ahead’ (1975) 9 Law & Society Rev 95.

companies and government bodies. Hard bargaining could be less productive in certain cases or against certain defendants. Dingwall therefore urged that it should not be pursued as a consistent strategy. Instead specialist claimant lawyers were said to be more sophisticated and were only aggressive when the occasion demanded.

The Changed Environment

There have been important changes to personal injury litigation which have affected negotiation tactics since the above studies were published. Only a very brief outline can be given here. Most noticeably, claims have risen considerably. In 1988 it was estimated that there were 340,000 claims a year.¹⁵ In the next dozen years to the new millennium they doubled in number. Since then they have grown again by almost half to reach about a million a year.¹⁶ The growth has been almost all in motor claims which have doubled in the last ten years and now constitute more than three quarters of the total. A notable feature is that whiplash and neck injuries now constitute most of the claims made.¹⁷ Because these injuries

¹⁵ Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm 394) para 391.

¹⁶ Department for Work and Pensions, *Compensation Recovery Unit – Performance Statistics*. The figures are analysed in detail in R. Lewis and A. Morris, 'Tort Law Culture: Image and Reality' (2012) 39 J Law & Soc 562 at 581 et seq, Weightmans Market Affairs Group, *An Analysis of the UK Personal Injury Market* (2015) and R. Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System' in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publications, 2016) chap 2.

¹⁷ Neck injuries including whiplash account for 87% of all road traffic claims. Transport Committee, Eleventh Special Report, 2013-14, *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013–14*, (HC 902) 4 and table 1 annex B Contrast the lower figures supplied by CRU to the Association of Personal Injury Lawyers (APIL) following a Freedom of Information Act request. J. McGlade 'No Basis for Reforms?' [2017] J Personal Injury Law 63. However, these figures fail to take account of the threefold rise in injuries classified as either 'neck' or 'back' injuries and excluded from the 'whiplash' figures. For trenchant criticism of the figures see K. Oliphant, "'The Whiplash Capital of the World: The Genealogy of a Compensation Myth' in E. Quill and R. Friel above n 16 chap1. It has also been argued recently that, based on insurers' own statistics, the cost of whiplash claims fell by 17 per cent between 2007-16. Capital Economics, *Boosting Insurers' Profits* (2017) <https://accessjusticeactiongroup.co.uk/ce-report/>

are usually minor ones, the tort system is now even more pre-occupied than it was in the past with very small claims, the great majority leading to damages of less than £5,000.¹⁸

In part this rise in claims has resulted from the new ways in which they are financed. Conditional fees replaced legal aid 17 years ago¹⁹ and the financial risk of litigating now falls much more on the claimant lawyers. Until recently these lawyers were able to offset some of the potential cost by claiming from a defendant an increase in their fees if their case proved successful. However, this has recently been changed so as to allow a success fee to be obtained only from the claimant lawyer's own client instead of from the defendant: the fee must be deducted from the damages obtained.²⁰ In addition, there have been a series of other measures to limit the exposure of defendants to potentially high legal costs. These include the progressive introduction of fixed fees for various classes of work especially for claims of low value. Many of these are now processed by the electronic 'Claims Portal' which streamlines procedures and limits legal fees accordingly. As we shall see, this has also limited the traditional scope for negotiation.

In response to the changing environment, law firms have capitalised on initiatives first taken by claims management companies to trawl for clients: they use 'no-win, no fee' advertising and other methods to pursue potential claimants much more vigorously than in the past,²¹ although they are no longer able to pay referral fees for cases obtained from other organisations. Business models have urged that firms specialise and manage their work to deal efficiently with bulk claims. There was a move towards specialisation at the time Genn was writing²² but it has increased considerably since. Today, firms still are being urged to

¹⁸ Capital Economics analysed 171,000 motor cases settled in 2016 and found compensation was below £5,000 in 80% of them. Legal Futures, 4 July 2017. In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK* appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Funding* (2011). The average payment for non-pecuniary loss for cases settled within the claims portal in 2014 was £2,540.

¹⁹ The Access to Justice Act 1999 s 27 and s 29.

²⁰ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 44.

²¹ Discussed in more detail in R. Lewis, 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' [2014] JPIL 209 and Lord Justice Jackson above n 3.

²² Relying upon Law Society figures, T. Goriely et al above n 12 at 25 noted that prior to 2000 personal injury solicitors were becoming increasingly specialised. The Association of Personal Injury

‘get big, get niche or get out.’²³ In other words, they need either to become larger and more efficient or to develop specialist skills in order to deal with the minority of claims where more serious injury is suffered. Otherwise they will fail. In response to such advice there has been a series of mergers of traditional personal injury firms. The advice was reinforced by the head of Slater & Gordon who in 2014 predicted that just three firms would soon control up to 40 per cent of all claims.²⁴ The entry to the U.K. of that Australian firm was a significant event: it was the first law firm to be publicly listed on a stock exchange and is the largest of the Alternative Business Structures now permitted to work in the personal injury field.²⁵ Its size and method of operation reflected the changing business environment.

In parallel with these changes in the structure of claimant firms there has been a consolidation in the insurance market. A handful of insurers now dominate personal injury so that in motor claims, for example, there are only four companies which share over half the market.²⁶ To increase efficiency, insurers have sharply reduced the number of law firms which act for them. These firms have had to survive a competitive tendering process to obtain this work and they have had to limit their costs accordingly. Another significant development is that insurers can no longer be seen as acting exclusively for defendants because they now also assist many claimants. This is because of the rapid expansion of before-the-event

Lawyers was founded in 1990. Melville Williams, ‘A.P.I.L.’ (1991) 19 Civil J Q 103. See now ICF Consulting Services, *An Assessment of the Market for Personal Injury* (2016), a report for the Solicitors Regulation Authority <https://www.sra.org.uk/sra/how-we-work/reports/pi-report.page>.

²³ David Marshall, (2013) 157 Sol J October 16. Marshall is a former President of the Association of Personal Injury Lawyers.

²⁴ ‘Slater chief predicts rapid consolidation in PI market’ [2014] Law Soc Gazette, 1 May. A year later, the three leading firms controlled an estimated 22 per cent of the market. N. Rose, ‘Slater & Gordon strikes £677 million deal to buy Quindell’ [2015] Legal Futures, 30 March. However, as a result of this deal the firm revealed that it had suffered catastrophic losses. Offices were closed, a serious fraud investigation begun, and a class action suit was brought by shareholders. By 2017 the shares in that ‘alternative business structure’ firm had lost 98% of their value and it was recapitalised by its lenders. Financial Times [2017] June 30.

²⁵ For detailed discussion see R. Lewis (2016) above n 16.

²⁶ Based on the premiums collected in 2012, the companies are Direct Line, Admiral, Aviva and AXA. Evidence of Thompsons solicitors to House of Commons Transport Committee, *Driving Premiums Down: Fraud and the Cost of Motor Insurance* (2014) First Report of Session 2014 – 15 (HC 285). Association of British Insurers, *Company Rankings 2014 - Motor*.

insurance which now covers more than half the population.²⁷ As a result, insurers direct injured policyholders who have this cover for their legal costs to go to one of the few law firms that have been selected and approved by them. Insurers' thus control representation not only for the great majority of defendants but also very many claimants. This has further contributed to the production of bulk litigation within specialist firms.

Demands for greater efficiency and reduced cost have encouraged law firms to employ many more junior staff to deal with the increasing volume of claims. A lot of the work involving run-of-the-mill cases is now being carried out by unqualified or paralegal personnel.²⁸ They are paid much less than a partner in the firm who typically now has the difficult task of supervising a team of junior employees whilst also ensuring that the higher value claims are dealt with by more experienced litigators. The paralegals are left to work in what has been identified in the USA as 'settlement mills' where the assembly line resolution of claims 'represents quite a departure from the intimate, individualized, and fact-intensive process thought to underlie the traditional process of tort.'²⁹ The legal process has been de-skilled and to an extent de-personalised in these new claim factories. As we shall see, this has also affected how claims are negotiated.

We can speculate further about other effects structural changes may have had upon the negotiation of claims. For example, to what extent have the financial pressures which produced more streamlined processes made it harder to use certain tactics or encouraged others? Again, has the greater financial risk now taken by claimant firms been reflected in concern to resolve claims quickly to ensure that the firm's costs are met and that its cash flow is not restricted? Consolidation in both the legal and insurance industry has meant that

²⁷ R. Lewis, 'Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?' (2011) 74 MLR 272, FWD Group, *The Market for 'BTE' Legal Expenses Insurance* (2007).

²⁸ Association of Personal Injury Lawyers, *The Impact of the Jackson Reforms on Costs and Case Management* (Evidence to the Civil Justice Council) (2014). D. Evans, 'Shifting Strategy in the Personal Injury Market' [2014] JPIL 85. Lewis (2018) above n 1.

²⁹ N. Engstrom, 'Sunlight and Settlement Mills' (2011) 86 New York University LR 805 at 810, 'Run-of-the-mill Justice' (2009) 22 Georgetown J of Legal Ethics 1485 and D.A. Remus and A.S. Zimmerman, 'The Corporate Settlement Mill' (2015) 101 Virginia LR 129. Standardisation of the claims process has developed over many years in the U.K. For example, some of its features including the 'dumbing down' of staff following implementation of the Woolf reforms in 1999 were noted by Goriely et al, above n 12 chap 2.

although firms on both sides are more likely to come up against the same repeat playing larger organisations, it is less likely that negotiators will deal with the familiar local representatives of insurers as in the past. Instead the respective firms may be at opposite ends of the country. As a result, traditional practice arising from a course of dealing with particular individuals face to face may be less common. Is this a concern of litigators? A final example of the potential impact of change relates to the greater central direction of firms and the increased importance attached to reputation and corporate image. Is this reflected in negotiation tactics? Although this article does not set out to provide definitive answers to all these questions, it does illustrate that there are factors affecting claims today which were not in evidence when the earlier studies were conducted.

The Interviews and the Wider Project

The survey involved conducting 29 structured interviews of lawyers in England and Wales, all of these being recorded, transcribed and made anonymous.³⁰ Each interview lasted on average ninety minutes and in total they produced a text of 258,000 words. The interviews were carried out in 2014 by a field worker who had previously been employed as a personal injury solicitor for 14 years. Although the interviews were closely structured, they ranged over a number of issues extending beyond the scope of the present article. This was because the questions were devised to cover matters relating to a wider project which compares personal injury litigation in three jurisdictions across four countries: Norway and the Netherlands are compared to England and Wales. Funding for this project came from the Institute for European Tort Law based in Vienna. In looking at how ‘the law in the books’ is translated into ‘the law in action’ and the factors which affect that transition a range of common questions were devised to be used for each country. General and specific questions covered such matters as the lawyers’ objectives when given notice of a potential claim; the main factors influencing whether a claim succeeds and how much damages are paid; the pressures that arise during the litigation including, for example, the effect of the costs recovery rules; and the effect of procedural reforms such as the adoption of streamlined processes for particular claims and the increasing use of judicial case management.

³⁰ By comparison, in the studies cited above n 13 Boon relied upon less extensive interviews with no more than 14 lawyers, Dingwall et al interviewed 52 lawyers and Genn 62 in addition to relying upon other sources.

Therefore, although the tactics used in the course of negotiations were important, they were only a part of the larger study.

Among the interviewees there were 13 claimant solicitors and one claimant legal executive. On the other side there were nine defendant solicitors and an insurer. However, seven solicitors had represented the other side when working elsewhere and so appreciated the perspectives of both. In addition, five barristers with mixed practices were interviewed. There were eight women in total. The interviewees had various levels of experience and seniority. They covered a wide area of personal injury work. This included high volume routine road traffic claims as well as more individual work-related liability although this also included large scale occupational disease claims. Some interviewees had dealt with public liability claims, many of them involving trips and slips and usually resulting in only minor injury. Among the more experienced lawyers were those who had done a variety of work but now were involved only with higher value claims. Some of them concentrated exclusively on catastrophic injuries. Among the specialists were four clinical negligence lawyers and one solicitor who now only worked on product liability claims. The lawyers were selected in various ways: most were chosen from personal injury firms' websites to reflect the need for diversity in age, experience and nature of work; others were recommended by those interviewed; and a few were personally known to the researchers. All except four were based in cities in the southwest.

The interviews were structured by the use of mostly open questions on individual topic areas. For present purposes, the lawyers were asked what tactics they used to achieve the objectives which they had disclosed earlier in the interview. This was followed by a question asking about what tactics they thought the other side adopted. More specifically (with the Genn analysis in mind) they were then asked whether they considered that they adopted a combative or co-operative approach to negotiations and why they did so. There were also open questions which related to other parts of the project which also produced discursive answers that were relevant to litigation tactics. Some of the quotations from the interviews below were therefore drawn from a range of responses across the project area, although most were taken from the questions specifically asked about the use of tactics.

ANALYSIS OF THE INTERVIEWS

This section relies heavily upon the words of the practitioners themselves. The analysis lies in devising the overall framework and in selecting the comments. Where space permits, attention is especially drawn to whether tactics have changed in response to the developments in practice highlighted above. The comments are discussed in the approximate chronological order during which tactics might be considered in the course of litigation.

1. Securing a Reputation

About a third of the lawyers interviewed referred to how litigation might be affected by the reputation of their firm and the regard in which they were held personally. Tactics might be used to affect how they were initially perceived in order to influence negotiations not only in the immediate case but also later ones. Although this factor was discussed briefly by Genn,³¹ it featured more prominently in the present survey. It may have assumed greater importance because of the changes in the structure of the firms described earlier. This was suggested by a defendant lawyer:

Bearing in mind that we're coming across – and of course the claimant market is consolidating pretty quickly now – the same people again and again, how we're perceived ... and standing your ground is all important in order for us – in a very large portfolio of cases in the volume end – to achieve the results that our clients demand of us. EW18

Respondents were keen to establish that, although ready to negotiate, they were serious litigators and would contest matters vigorously if it became necessary to do so. Reputation could affect the procedural steps that were taken and could also set the parameters for negotiation. One senior claimant lawyer emphasised that you have to show that you are prepared to go to trial:

That's why you've got to issue proceedings. You can't just settle everything pre-issue and so on. They've got to take you seriously. EW4

Similarly a defendant explained that a reputation for being a strong litigator could bring home to claimants and their lawyers what may lie ahead, and thus contain their expectations:

You've got the spectre of the claimant lawyer doing your job by saying to the client: 'Look, I've played this guy before, he doesn't mess about, he'll make you an offer, but I'll let you know, when he says this is going to trial, it's going to trial.' EW5

³¹ H. Genn above n 9 at 48.

Another defendant was reluctant to offer concessions in an individual case if it might have an effect upon other claims:

If you develop a reputation for messing around, then you've earned it.... We've had discussions amongst the [defence] team about not taking a particular stance on this case because we know it's going to affect us later on in other cases. EW27

Defendant lawyers were thus aware that it was not only their personal reputation and that of their firm that could be at stake; also affected could be the reputation of the insurer or the employer they regularly represented. Conceding too easily in certain cases could generate a flood of similar claims. It may be that the great increase in claims since the start of the millennium was in part a result of reluctance to defend cases vigorously for fear of the resulting legal costs. One claimant lawyer reflected the views of several others:

If it becomes known, as I think it did with whiplash, that all you have to do is say, 'I was in a car and it was an accident' and really the insurers just pay you some money, I'm not sure that that's necessarily a good message to be sending out to the public. So I think insurers have got a bit ... caught really. EW4

However, attitudes now appear to have changed. Because of the danger of encouraging other claims, a defence lawyer admitted that he was being asked to contest certain cases irrespective of the evidence:

You can have a case where you are sunk ... on liability, but the insured's view is, 'no, we're having too many claims from this department, then someone's going to have to go to court because they have to understand that we're not just going to roll over on these'. EW5

For similar reasons there was greater readiness nowadays to defend certain types of case irrespective of the firm from which they originated. One lawyer thought that stress at work cases fell into this category:

They want to fight stress cases on principle.... People being ill as a result of stress at work is the biggest growth area..... Insurers are very keen not to just give in and pay out on these cases so that people see it as a way of bringing more claims. So I think there is an institutional element. EW4

Overall, this could mean that the cost pressures of the particular case could be subsumed by the wider economic picture:

Clients like to really get a message out there that claimants can't just write a letter and expect a cheque in the post.... It's more getting a message out to other claimants that they can't just try it on. EW22

The danger of this approach is that it drives up the costs bill in individual cases. This was recognised by a barrister who recalled the well-known general practice of one particular insurer was to take a hard line with claims. He thought that ultimately this approach could prove expensive. The insurer

... could to make it perfectly plain to the claimant's solicitors that they were going to have a hard time if they brought a claim against [X Co], and it worked in some cases. Some solicitors would think, 'oh, I don't need this, I want a quiet life'. Obviously the more sophisticated claimant solicitors wouldn't take that approach and they'd be up for the fight and you just think, 'oh well, they're going to pay more costs at the end, that's up to them.' EW19

As well as being concerned about their own reputation, litigators also evaluated the standing of their opponents. They adjusted their tactics according to the law firm or insurer involved:

We know which insurance companies are a pain in the backside and which tend to be more reasonable. EW17

Specialist solicitors in Genn's time were similarly influenced by the reputation of their opponents. However, the extent that insurers and defendant firms monitor in detail the performance of claimant lawyers has grown significantly. Genn found that insurers adopted different strategies when faced with a specialist firm acting on behalf of a trade union.³² However, since that time the relative importance of work accident claims has declined.³³ The insurer interviewed emphasised that today there were different approaches for many types of firm, not just those that were union linked. Defendant law firms also now place great importance on the use of trend analyses to monitor patterns in claims. These could be used in a variety of ways. At one extreme they could again result in hopeless cases being fought to the bitter end for the greater good:

Sometimes you have to trial certain tactics against certain claimant law firms at the volume end, knowing that you might lose, in order to finalise and thereafter implement a strategy that will work in order to thereafter bring down indemnity spend for your client for future cases that come in

³² H. Genn above n 9 at 113 and 168.

³³ Although claims for work injuries in the last four years have increased by a third, there are fewer today than when the Pearson Commission reported in 1978. They have declined in relative importance and now account for only 7 per cent of all claims whereas Pearson found that they constituted 45 per cent. R. Lewis, 'Industrial Injuries Compensation: Tort and Social Security Compared' (2017) 46 *Industrial LJ* 445.

from that particular claimant's solicitors.... A trend analysis is something we focus on hugely now so that we can help to devise certain strategies against certain claimant firms. EW18

The increased use of technology since Genn's study in 1987 has made it easier to monitor performance and establish patterns in settlement. This has had a growing effect upon how claims against particular firms are negotiated.

2. The Timing of Claims

Although both Genn and Ross suggested that insurers had an advantage in litigating because they were the first to receive notification of any injury,³⁴ the lawyers interviewed here modified this view. They emphasised that a major difference between the parties was that it was claimants who had control over when formal legal proceedings are begun. Restricted only a little by the limitation rules which require a claim to be brought within three years, claimant lawyers have the opportunity to prepare their case in detail before they notify the other side. The advantage which could be gained was noted by a defendant lawyer:

The claimant potentially can ... get their house in order before they choose to issue proceedings.... We don't have that luxury so we're reliant on what our clients have done or not done beforehand. EW18

A claimant lawyer noted the difficulties that a late claim could cause his opponent:

Defendants often don't see a lot of evidence. This is going to be their big complaint when they talk to you. ... Until the case is issued we have the negotiating cards. We can try and prepare our case as well as we can and that's why I take full advantage. EW4

Another claimant lawyer saw other advantages in not giving the other side early notice of the intention to seek damages. It could enable her to be first lawyer to get to the accident scene. She advised:

Delay making your claim ... because once you make the claim, you're putting the other side on notice.... If you felt your case was going to turn on the evidence ... then you may want to get in there and do your investigating very quickly. Very often witnesses will only provide a statement to one party and they feel once they've ... done their job they're reluctant to go through the same process [again].... It also gives you a chance to have a look at any documents ... and that's been invaluable. I've seen documents that the defence have claimed they've not had and you can say, 'well, here they are', and the next thing you know, you're getting an admission and you're settling it. EW20

³⁴ H. Genn above n 9 at 61 and H.L. Ross above n 6 at 94.

3. Initial Case Preparation

A claimant solicitor stated his general philosophy was to prepare his caseload thoroughly from the start:

We do prepare for trial from day one so our case is risk assessed on the basis that it will go to court. We don't take cases on the basis that hopefully they'll settle. EW6

Another solicitor who also specialised in catastrophic cases summarised what he described as his 'blockbuster' approach:

We will get the best experts ... to provide their reports. We will then get as much documentation from the client as we can or other sources around losses We will write a letter of claim early obviously just to alert the other side and tell them what's going on ... but at some point before we issue proceedings, we would normally send out a pretty major pack of stuff basically with the experts' reports plus the schedule [of loss] plus a lot of supporting documentation plus an offer, usually.... You can only mediate or negotiate from a position of strength in my opinion, so you've got to show that you know what you're doing, [and that] you've got a really stonking great set of evidence to back it up and that they're in for a big fight if they want to take you on. EW4

In response, a couple of defendants similarly suggested that, as soon as they received notice of a serious injury, they would work hard to investigate the circumstances and make early preparation for litigation:

We frontload investigations, so if we think that if a serious incident occurs at one of our client's premises, they would get us in at that stage in order that we can amass the best possible evidence, so that in the event of a claim then we have the evidence to hand and witnesses' memories haven't become jaded. EW12

Another agreed with this approach and pointed to other advantages:

By the time the case management directions come along, we can then be on the front foot, make a [tactical offer] and we can start to try and keep the directions timetable as tight as possible.... So it's that getting up to speed as quickly as possible for those cases that we want to fight in earnest to get that competitive advantage against whoever we're up against. EW18

These approaches contrast with the changed tactics now employed to deal with the mass of low value cases such as those that enter the claims portal for speedy resolution:

We used to spend a lot of time investigating cases and liability.... Now we just chuck them straight into the portal and see if the other side simply accept it. EW6

Increasing costs pressures may not only limit the claims handler's preparation of the case but also how much is known about the accident and the effect that it has had:

Frankly, the profession is being dumbed down. If you think a case is only worth £2-£3000, you haven't got the time to spend two hours with the client taking a detailed statement.... It's mitigating against that kind of more thorough approach which ultimately helps you understand the case. EW07

Similar pressures affect defendants although the use of modern technology can also reduce the amount of work done compared to years ago:

For lower value claims ... we can investigate more remotely – by email, by telephone, digital photographs being sent to us – so the onsite investigation which was so much a feature of those claims in the past is less so now.... You can't employ vastly experienced expensive lawyers to do the work, so you have to get paralegals in.... EW11

Costs may also limit the quality of the experts now being used:

I think it's more of a factory line ... [with] much higher use of GP experts rather than a traditional consultant with lower level injuries, simply to keep the costs down and to be able to turn the cases over.... EW20

Inflating Costs

Defendants recognised that their opponents' case preparation could be much influenced by whether they could obtain costs for their work. A particular criticism of their opponents and the economic driver of litigation was that unnecessary preparation was being carried out:

The difference between us frontloading something and a claimant frontloading it is that ultimately we're going to get paid a fee by our insurance clients regardless, whereas on the claimant's side of the fence the reason that they are trying to push forward with production and generation of documents that don't need to be generated at a particular point within the procedure because they want us - or rather our insurance clients - to pay for it ultimately. EW18

Agreeing with this, another defendant said:

I think some of ... the main claimant firms' ... tactics are to make as much money as they possibly can. All this rubbish about altruism is just that. They are commercial concerns and they look at each case as a means via which they're going to make as much money as possible and you can see that with the bills of costs. EW11

A few defendants were concerned that the value of some claims was being manipulated so as to gain entry to the 'multi-track' procedure where costs are more generous than those available under the 'fast track':

I think there is the potential for games to be played in that arena in order to get those cases out and into the multi-track.... I've seen ... what I would call 'creative' schedules of loss.... So you see items of loss such as do-it-yourself and gardening claims on volume claims whereas, historically, they would usually [only] have been seen in cases involving £100,000 plus where there are genuine serious injuries that have impact on day to day living. EW18

As an example of the high level of suspicion held by some, one defendant suggested that tactics might be adopted to keep the claim out of the electronic portal and thus avoid the very low costs now awarded:

If you have a hearing loss claim with more than one defendant or a disease claim with more than one defendant, it's excluded from the portal. So it's in claimants' interests to come up with more than one defendant, and how do we know that they had a valid claim against two defendants? Are they just saying that there are two potential defendants in order to come within the exclusions of the portal? EW12

4. Gathering the Evidence

Although many low value claims may be processed in a standard form manner and involve only limited fact gathering, the evidence that may be relevant to larger claims is potentially very extensive. The following offers just two examples of the tactical considerations that may then be relevant.

A solicitor stressed that in gathering statements in an employers' liability case it was very important to consider

... who you actually approach for your statements. If you go straight in there to a foreman, for example, (unless that foreman may be a union steward, where very often you'll get a different attitude in terms of providing evidence) you know it's going to forewarn potential defendants.... If it is ... a trade union health and safety representative, ... they've obviously got more scope to carry out that initial investigation into key documents. So again, it can be finding out who is there, and who is able to support, and who is able to look at the documents for you. EW20

The use of filmed evidence was rare at the time Genn conducted her research and was not mentioned. However, several of our interviewees discussed how important this evidence has become. In order to discover how the accident occurred in the first place, there has been increasing use of closed-circuit television and dashboard cameras. More traditionally, the tactical use of surveillance evidence has been associated with covert attempts to discover the

effects of the injury on the claimant's mobility and way of life. One solicitor specialising in catastrophic injury believed that

... on every single one of these cases that I have they will have surveillance. Whether they disclose it or not, I don't know. EW9

Where surveillance indicated that the claimant's disability was less than that alleged it could be challenged by asking for disclosure of the complete film:

We ask for the unedited version ... because often [defendants] will have months and months' worth of footage which they will condense perhaps down into three or four hours' worth They will have selected the worst parts to ensure that they're contained within the footage. They haven't necessarily shown the client on a bad day. EW14

The same lawyer also commissioned 'day in the life' films of his clients to give a better indication of the effects of injuries. This tactic was used by another lawyer to counter the evidence of a care expert:

I had a case recently – a spinal injury. He was incomplete, so he could walk a little bit and they were again trying to show ... that his disabilities weren't that bad. It was incredibly selective, and they were saying things like ... 'oh he should get himself dressed.' It took him about half an hour to get his socks on, and we had a film of him putting his socks on. EW9

5. Discovery and Disclosure

Respondents recognised that knowledge of the rules relating to the disclosure of information was an important civil procedure skill to acquire. One claimant solicitor explained what she did if defendants did not comply fully with her request:

I've also adopted a tactic saying 'what documents do you have? Give me the full list now', knowing that I have some of them here. I wait for the list to come through and then send them off a copy and say, 'why didn't you release this because it's in your file?' And that makes a massive difference in terms of offers. EW20

However, the ability to obtain important information from opponents in a more informal way was also noted together with the likelihood of gaining insights into the case from the more junior staff who now deal with claims:³⁵

Let's be honest, a good negotiator will ask questions of their opponent and ... they might answer something which gives you a tactical advantage. I

³⁵ Genn at 132 similarly found insurers prepared to exploit situations where they were in direct contact with the other side.

think ... owners of claimant personal injury law firms know that when they push the work down [to paralegals] that you're more likely, if you're inexperienced, to volunteer information that perhaps you ought not to be volunteering to give yourself a tactical disadvantage. EW18

6. Making Offers to Settle

The tactical considerations surrounding the making of offers can be complex. If an offer is made formally via the court process - a 'Part 36 offer' - and later is not bettered at trial it can considerably affect the amount of costs borne by each side and ultimately the net payment made. The court can punish either party for refusing an offer which in hindsight can be seen as reasonable. However, other less formal offers may also be made in the course of negotiations and these may not have the same effect. In addition, particular agreements can be reached both on quantum and liability issues, such as the extent of contributory negligence. There are a variety of tactical considerations in making these different types of offer. Which side should make the first approach? When should the offer be made? At what level should it be pitched?

a. Making the First Approach

Traditionally defendants made the first approach³⁶ and several told us that claimants were still reluctant to be first to put a figure on the value of the claim:

I think a lot of claimant solicitors work under the driver that they won't make the first offer: they'll wait and see what's offered, lest they should perhaps offer a sum to settle that maybe is too low. EW13

This was characterised by a barrister as a 'one way street problem' whereby

... claimants see it as positively their role not to respond [and] it's the defendants' role to settle the case.... That is a well-worn tradition that's been going on with certain firms since time immemorial. In other words, you know your offer's right when they accept it or when they start to communicate because normally they won't. EW5

A claimant lawyer agreed that defendants were more likely to make the first offer especially where there was uncertainty about the full effects of the injury. He also noted that in more serious cases they were now more ready to settle early:

With multi track [cases the defendants] certainly seem keener to try and buy the cases off at an early stage, whereas we won't make an offer until we've

³⁶ T. Goriely et al, above n 12 at 2.7, found around 2001 that defendants made the first offer in 85% of the cases in the study.

got everything resolved and the injuries have sorted themselves out.... So we won't be looking to make a part 36 offer generally for two or three years but we will often find that we'll have offers come into us from the other side which certainly gets us thinking. EW14

However, another claimant lawyer thought that defendants were less pro-active and could be slow to respond:

If we're talking about pre-litigation work, I think that on the whole defendants are fairly reactive. There are some insurers who will ... make early offers – and this is mostly in relation to [road traffic accident] work. Other than that they sit back and wait for you to do things really. So, if you don't accept that early offer, then they wait for the claimants to produce the evidence so they can value it. EW23

One type of early offer mentioned by this solicitor is the 'pre-med offer.' These are offers made by defendants very early in the proceedings, often immediately on receiving notice of a claim and before any medical report has been obtained. They are pitched at a low level and are aimed at removing the nuisance value of a small claim together with its potentially disproportionate legal and disbursement costs. Commonly made in whiplash cases, these pre-med offers have been heavily criticised on the one hand as attempts to buy off claims for derisory amounts³⁷ and, on the other hand, as encouraging claims where injury is non-existent and thus feeding a 'compensation culture.'³⁸

A claimant solicitor explained the difficulties posed when such offers were made before the extent of injury had been assessed:

We're left trying to advise the clients on the reasonableness of an offer [and] ... explaining to them that ... if there were any complications [in recovery from the injury] then there is a risk that you could be under-settling the claim. EW14

This solicitor also saw an advantage in certain circumstances in claimants making an early offer instead of leaving the initiative to defendants:

If we think there is going to be some contributory negligence, then generally we would like to get in first and put the other side on the back foot with a liability offer. EW14

³⁷ J. Spencer, 'Pre-med offers result in injustices' [2014] Law Soc Gazette, 11 March, J Hyde, 'Insurers' pre-med offers encourage opportunism' [2015] Law Soc Gazette, 18 May. Contrast D. Fisher, 'A defendant's view of the unscrupulous activities of claimant lawyers' [2010] *JPIL* 231.

³⁸ Ministry of Justice, *Reducing the Number and Cost of Whiplash Claims: A Government Response to Consultation* (October, 2013) cm 8738.

This tactic could not be used when Genn conducted her study because then only defendants were allowed to make a formal offer of payment into court.

A more recent development has occurred to relation to low value claims which is also having effect on other negotiations:

In the portal process it's the claimant who takes the initiative of making the first offer.... I think that's also led to a slight change of culture that defendants kind of half expect you to make the first move now more these days than they used to. EW7

b. Timing the Offer to Take Advantage of Claimant Susceptibility

Several claimant solicitors noted that defendants were very prepared to make offers when they thought there was financial need which might induce acceptance. One noted that an offer had been made shortly before his client's wedding, whilst several recognised a seasonal element to offers:

From the end of October ... right up until mid-December, we'll have quite a few offers coming in, just trying to tempt them to settle before Christmas. EW14

Claimant lawyers also thought insurers would take advantage of other weaknesses in their clients' backgrounds:

If they're unemployed, they may put forward a lower offer to try and tempt the client to settle. They know the claimant may be in need of money, as opposed to a high earner. EW28

The weakness may not only be financial:

If [the insurer] were to receive a psychological report which shows the impact that the claim is really having on the client - they've been diagnosed with either stress or a depressive disorder as a result of this and it's clear in the report that the client just wants this case resolved - I wouldn't be surprised if we then received an offer very shortly after disclosing that. They're really going to effectively dangle that carrot in front of the client. EW14

A defendant admitted he made use of weaknesses perceived in the claimant or the nature of the claim:

I'm pretty sure that the vast majority of [claimants] have no intention of going anywhere near a courtroom and just want what they can get. And often it's not so much what they can get, it's how quickly they can get it. So I do think in the volume claims arena, say up to £50,000, I think that's a key factor and one which any decent defendant will try and exploit. EW18

c. The Combined Damages and Costs Offer

Particular difficulties are caused when the defendant's offer is one sum which is stated to include the solicitor's costs as well as the claimant's damages. The best interests of the claimant may then not coincide with those of the firm representing him. A barrister explained the potential conflict of interest:

Sometimes they make damages and costs offer all in one, which isn't a proper part 36 offer, but there are inherent conflicts in the interests of the lawyers and the claimants: the lawyers want to get paid, the claimant wants to get some damages. It's not really the defendant's interest as to how they divvy up what they're willing to pay them, so it's quite difficult. EW16

A defendant elaborated:

I've certainly had claimant lawyers who will take those offers. How they deal with the conflict internally, I don't know. But if we say: 'We're prepared to offer you £15,000 and you could view this as £2,500 compensation and £12,500 costs' then in doing so you are ... helping them out with their potential conflict but it still means our client's liability is restricted to £15,000. EW2

d. The Appropriate Level of Offer

The amount that should first be offered by either side to encourage settlement was another important tactical aspect. A defendant noted that the claimant was in the best position to accurately assess the extent of the injury and the true losses. He therefore was reluctant to make a reasonable offer at the beginning of negotiations and instead saw the first figure as merely the start of a continuing process:

The claimant knows the bottom-line, whereas for the defendant it's more of a guessing game.... I tend to start negotiations at an incredibly low figure to try and tease out the bottom-line even though some claimants might see our offer as an insulting offer.... The whole point of negotiation is that you go in as low as you can and the claimant's going to go in as high as they can, and you meet somewhere in the middle eventually. EW22

A claimant lawyer noted the tendency for defendants to make low early offers but suggested they had little effect:

My experience is frankly that it's never enough, so you feel quite confident that, when you do the investigations, you're going to come out with a figure that's going to be more than they have offered. EW9

He was supported by another solicitor who voiced her frustration at receiving a series of low offers:

They come down with a ridiculous offer and they'll only ever increase by very small increments. You're thinking ... every letter I'm not getting paid for. I may as well issue it. And they say, 'why did you issue so soon?' And the problem is ... that the pressure will be to accept those low offers when you're on fixed costs. EW10

Other defendants pitched their offers higher. In defending this practice one solicitor argued that making more realistic offers could save costs in the long run:

Ultimately, I don't have any reservations about paying what the claim is worth, but no more.... There may be insurance companies that perhaps don't like that approach but any payments in damages where they might make savings by making ridiculously small offers, I can counter balance that by showing them savings on costs by not making these arguments. EW13

e. The Formal Offer under Part 36

Making more formal offers under Part 36 carries with it clearer costs consequences and gives rise to special tactical issues. Again some of these revolve around setting the offer at an appropriate level and making it at the right time. One defendant thought

An effective part 36 offer should always allow for a bit of fat because ... no one wants to get it wrong by a couple of hundred quid. EW18

This lawyer also emphasised the importance of making the offer at the appropriate time:

It's all very well to do it at the eleventh hour at the door of the court but actually you've got no cost benefit by doing that.... So our philosophy has always been to make sure that we get fighting part 36 offers in early.... I certainly don't advocate that you need to wait to have all of your evidence lined up before you do that. EW18

By contrast, another defendant was not in favour of early offers:

I won't make a part 36 offer until I'm aware of the potential risk to the client.... [when] we can say: 'Well, we've quantified the case, we think your case is inflated, we're prepared to offer this sum of money'. EW13

To encourage acceptance of these formal offers this defendant also made it clear what would be the effects of refusal:

I know there's a mind-set with a lot of solicitors that you never accept the first offer given. But if you put that offer to them and you give a reasoned approach as to how you've come to that offer [it is more likely to be accepted] When I make my part 36 offer I will invariably couch it in terms of: 'if this offer is rejected, we want the following' I will [then] list all of the documents that we want to get ... EW13

7. The Game of Poker

The course of negotiations has been likened to a card game. It can be marked by the exaggeration of a client's case and by the use of bluff to gain the desired position. Not everyone is good at this:

I think people have difficulty in negotiating, particularly if they're trying to drive a better deal than they've actually got authority to drive. So, the poker player – there's not a poker player in all of us – some are better at it than others. EW11

Not all cards may be laid on the table immediately. Concessions may not readily be made if they could be used later to forge a deal. A claimant lawyer recognised that some defendants were more prepared to make concessions than others:

Some defendants just say straightaway: 'Fair enough, we're guilty, let's just concentrate on quantum.' But others regard it as a negotiating tactic. EW17

Similarly, the use of defences could vary. One lawyer suggested that he would always put in a defence if there was any basis for doing so:

You're going to put the defence in and use it as a negotiating tool, even if you've got no intention of actually taking it to trial. EW2

Another defendant elaborated on the game of bluff involved:

Even though we and our client may be aware that a case has no chance ... the other side don't necessarily know that. Obviously, you have to call their bluff to a certain extent by saying that you've got the strongest case possible but you understand the risks and you're trying to get out of it if you can. You try to sell it to them on the basis that a bird in the hand is worth more than two in the bush. EW22

8. Controlling the Pace of Negotiation

Another technique used to place pressure on the other side was to continually harass them into providing various responses. A claimant lawyer noted that with the increasing number of claims

Everyone is overworked and understaffed on the defendant's side and probably the claimant's side too. So if you're always hurrying them ... that rattles them and doesn't let them take the case at their own pace and deal with it as they want to. EW17

A claimant lawyer complained of similarly being harried when the defendant made an offer that was open for a very short period of time:

I've had a brain injury case where I was given an offer and 24 hours to deal with it.... They are certainly using those different tactics out there to put a lot of pressure on.... It means you've got to be on top of it in terms of evaluations because sometimes you may have to react very very quickly. EW20

By contrast, a tactic also used was to wear down the other side by prolonging the litigation and being generally obstructive. A claimant lawyer described this as the traditional approach:

Standard litigation tactics [were] not giving much away; not admitting anything; not helping; not cooperating in terms of joint instruction of experts in appropriate areas; and making you do all the running for longer than might be necessary. EW1

Although this lawyer thought these were old fashioned tactics and less in use today there are further examples of the technique considered below.

Several interviewees from both sides complained about the difficulties caused by a particular aspect of the uncooperative approach. This was where firms failed to communicate or respond to initiatives to settle cases. A claimant lawyer noted that 'some insurers just stonewall you hoping that you'll go away.' A defendant suggested that the majority of claimant firms were willing to negotiate but that a minority refused to do so:

There is this one pattern which is: 'We won't speak to you. We won't even answer the phone to you. We won't accept service by fax or email.' ... There is a deliberately designed behaviour at that end. I understand that in a fixed fee regime, you've only got time to do so much work and still make a profit. But actually fixed fee work works best if you can get it resolved quickly. The firms that will make money are the efficient firms, not the firms that won't pick up a phone.... I've been at meetings where I'm the only person talking. I don't like that. So I guess you develop strategies through the years to try and deal with that sort of situation. EW27

Another defendant thought that there was often ineffective communication not because of deliberate obstruction, but because negotiations were being conducted with paralegals who were unable to make decisions on the case. Negotiating with junior staff was said to be very different from dealing with the experienced lawyers more commonly encountered in the past:

They are clearly running [the case] off a [tick box] list.... The minute you try and ring them and speak to them, they will run like you're walking in there with a Colt 45 or something. And it's sad in a way because more often than not I'm not trying to trip people up in that situation; I just want to understand what's going on. The days of being able to pick up the phone to an opponent and say, 'look, there's this case - what are we going to do about it?' I'm afraid have gone in my view. You've got so many firms now where ... the individuals who are sort of my peers [are] stepping back from the coalface and therefore very often you're not dealing with them, you're dealing with their subordinate. EW5

In order to get the attention of the other side this defendant solicitor also used particular tactics:

You're doing things to get it on the desk of the supervisor, so you pull something that's going to make your opponent go: 'Oh My God!', and refer it to their supervisor because you know that once the supervisor looks at it, they're going to go: 'Right, I'll see what he's at', and they'll pick the phone up.... You do things to telescope the communication. EW5

Tactics to get a response varied but usually involved taking the claim to a higher level. For example, claimants might decide to go to the next litigation stage by issuing formal legal proceedings.

It's also quite a big step in defendants' minds, I think, when you change from investigating to actually issuing proceedings [when] it will almost certainly change ... the type of case handler. EW17

Similarly either side might give up on trying to arrange an informal settlement and instead lodge a formal offer. A claimant lawyer thought that if 'part 36 offer' was written in bold at the top of the correspondence the words always produced a response:

It's possibly a psychological trigger to them or it's in their case management systems as a trigger, so they will always seem to treat those part 36 offers more seriously than if you just do a 'without prejudice' offer of some sort. EW4

9. Making Effective Use of Settlement Meetings

Since Genn's study the parties have been increasingly encouraged and sometimes judicially directed to arrange a settlement meeting to help resolve matters.³⁹ In particular, in cases of serious injury involving claims for more than £100,000 a Joint Settlement Meeting (JSM) may be set up. Various tactical issues then arise in relation to when such a meeting should be held, what should be negotiated and who should be present. A claimant lawyer expressed her preference for using a JSM over other tactics:

Clients very often like it: they're involved in the process but you've still got a little bit of arm's length.... You tend to get more of the cards on the table [and] you get a better idea in terms of the risks in your case because you have a dialogue. Part 36 doesn't give you that dialogue and you have to be careful what you put in letters as well whereas when you are at a JSM which is without prejudice You can be very open what you talk about. I think the parties tend to feel much happier. It always gives them a bit of a taste of a court experience - that kind of drama - but without actually having

³⁹ Lord Justice Jackson, above n 3 chapter 36.

to go through it, because most clients do not want to go through a trial.
EW20

However, a defendant lawyer was especially cautious about agreeing to such a meeting late in the proceedings:

Inevitably because you're in an adversarial environment both parties will want to be in the most advantageous position going into a negotiation. If you are bluntly stupid enough to allow a JSM to take place within 3 weeks of trial, they're just going to walk in and whatever you offer, they're going to walk straight back out again because they're at no risk whatsoever. EW5

A claimant solicitor emotively saw especial advantage in his client being present at a JSM because his view of the other side was that:

I don't think they have any emotion at all. They're heartless basically, whatever they may say.... When we have these JSMS the last thing they want to do is meet our client just in case it tugs on their heartstrings at all. I think that they generally view our clients as lead swingers and fraudsters who are just laying it on, and they're looking for that at every available opportunity. And I just think it helps them sleep at nights because otherwise ... 'What did you do today, Daddy?' 'Oh, I just kept some seriously injured man out of a couple of million pounds he was entitled to by hoodwinking the system.' EW9

10. A Combative or Conciliatory Approach?

A follow up question asked respondents to consider whether they took a combative or conciliatory approach to negotiations and the litigation process. In part this was prompted by Genn's conclusions, discussed above, favouring more aggression. The difficulties involved in relying upon interviewees' self-labelling in this way are clear,⁴⁰ but the question did offer a way to discuss tactics in a more personal and challenging context. Almost all the interviewees saw themselves as adopting a conciliatory approach and acting as reasonable negotiators. However, underneath this façade it was apparent that some could be much more aggressive than others and that their self-evaluation may not have reflected how they were seen by others. This is revealed in several 'combative' responses set out above as well as in the comments made below when the lawyers were asked to explain why they considered themselves to be in one category or the other. Most said that their approach depended on a variety of factors including, for example, the value and type of case involved, the extent of provocation from the other side, and whether the parties were previously known to one

⁴⁰ A. Boon above n 11.

another. In particular, whether the opponent had a reputation for ‘being difficult’ was an important factor.

a. The Conciliatory Approach

This approach was reflected in a comment from a senior practitioner who had been involved in many very high value cases:

Unfortunately you have to play a game and the game is that you start high, they start low, and you gradually work towards some sort of compromise and you try and be nice to one another.... At the end of the day both of you want to settle it. I have had a case where we settled it over a cup of coffee in Starbucks, and actually it’s the biggest case I’ve ever had. EW9

This supports Dingwall’s argument discussed earlier that a combative approach is only used selectively by the most experienced litigators, although it may also disguise the use of harder tactics for this solicitor previously admitted preparing by using a ‘blockbuster’ approach. At a lower level, another claimant lawyer gave her reasons for being conciliatory:

Most clients would rather settle sooner rather than later. Most people don’t want to go to court and are frightened by the prospect. So if you can achieve a negotiated settlement which is in the right bracket, the client will be happy ... and if the defendant thinks they’ve saved something and they go away happy, that’s fine too. EW17

A defendant lawyer emphasised the importance of controlling costs as a reason for limiting any aggressive approach:

As a team, I don’t think we’re combative.... I say to the clients, ‘For the sake of £5,000 you could get shot of this now,’ and generally speaking they follow the economics. EW12

b. The Combative Approach

A barrister noted:

Some people litigate far more aggressively than others.... They make life very difficult for their opponents, don’t agree to extensions, and constantly make requests for specific disclosure. EW16

Genn characterised the combative approach as involving rejection of first offers and the formal issuing of legal proceedings, both of which have been discussed above. Other examples of combative strategies include the techniques used to create a robust reputation and to prompt the other side into a making a response. The timing and making of offers could also be seen at times as aggressive, as could certain court applications such as seeking a default judgment or attempting to strike out a claim. A claimant lawyer described what she called the ‘hardball’ approach taken by some defendants by accusing them of

... dragging it out as long as possible, making it as difficult as possible and wearing the claimant down. I used to work in defendant work and we used to get correspondence from a very big insurer and our instructions would be 'take your usual robust approach.' So in other words you wear them down because it gets to the point that a few years down the line, the claimant says: 'I just can't fight over that last £20-30,000 anymore, I've just had a gutsful.' EW20

c. Factors Influencing Which Approach is Employed

There could be many reasons for taking a more combative approach. As previously discussed, defendants might be keen to avoid a reputation which might encourage more claims. Similarly, if fraud is suspected, insurers are likely to direct their lawyers to take a very combative approach. The insurer interviewed described such litigation as 'hard and nasty.' A defendant lawyer agreed that in fraud cases:

You can make life very, very difficult for the lawyers and for the claimant and just try and grind people into submission. EW16

A more robust approach might also be dictated by the type of claim being made. For example, one defendant was particularly concerned about the high costs claimed for the hire of replacement vehicles following accidents:

I certainly tend to employ that tactic with a lot of the credit hire firms because a lot of the time ... I consider a lot of the credit hire cases to be inflated and exaggerated.... Sometimes, by taking a firm stance, you're more likely to get a result. EW13

Both the problem of credit hire and the incidence of fraud have increased substantially since Genn's study.

By contrast, a much more co-operative approach was said to exist for clinical negligence claims. This was partly because there might be more sympathy for such claimants and because the lawyers were more likely to be part of a cohesive smaller group of practitioners who regularly came up against one another:

[Clinical negligence] doesn't have an aggressive feel to it that, say for example, professional negligence in the solicitors' world has.... Clinical negligence still has a more old-fashioned approach because I think people should genuinely care that there's a person who feels that they've been injured in that process.... You don't come across bitterness generally between the claimant and the defendant. They're both traumatised and that's a different approach sometimes. EW8

Even outside the clinical sphere, if the parties were in regular contact, their previous course of dealing could help determine the approach taken:

When you work in a local environment, you tend to know who the people are that you work with on the same circuit. There are certain opponents out there who you know will work with you and be very open. And you can have that sort of relationship with them as well because it's to the benefit of both parties. EW20

The only legal executive interviewed found it easier to deal with other non-qualified lawyers rather than solicitors:

I find it's often very amicable on the phone. I don't know if that's because by and large I'm not dealing with solicitors. I'm dealing with people who work for insurance companies who probably ... won't be formally qualified.... I think solicitors are more adversarial. EW21

Respondents agreed that this amicable approach was taken in settling most claims but that there were firms and individuals who deviated from the norm:

It gets really frustrating where you find a handler - perhaps one in every five or six cases - who really takes a completely different approach to cases. There are certain defendant solicitors that ... the heart will sink a little bit just because we know that it's not going to be a straightforward case. EW14

A few respondents emphasised that it was actions taken by opponents that were likely to be the cause of aggressive responses and the relationship can then be soured into the future so that later litigants are affected:

I don't like falling out with people, although I can be described as being quite difficult.... Most people get one opportunity not to fall out with me and then when they do fall out with me, it lasts.... If you're going to be personally difficult about it, I've got a pretty able skillset on that as well. EW5

Reciprocal treatment could also be reason for being more cooperative. This was because there was concern about what may be done in response to any aggressive ploy:

I've always appreciated that as a defendant you are going to have fewer opportunities to stick the boot in to the claimant's solicitors than vice versa. So my approach is to be more cooperative than combative. EW11

This was echoed by another defendant lawyer who favoured that approach because

... you don't know when you might need a favour from your opponent, so falling out with them is never a good option.... I'm absolutely certain that you get a better outcome if your opponent thinks they're winning. EW18

Ultimately, cooperation was generally seen as a better tactic because being combative could be counter-productive:

You just end up with two people at loggerheads and you end up in court. It's probably not much to do with the claim at the end of the day, it's just

personalities. I'm not sure how that can be in your client's best interests really. EW22

It has been suggested that psychological factors affect which negotiating style is followed,⁴¹ and this is reflected in a very combative comment from a senior defendant lawyer:

I come from a background of doing things that make me potentially quite combative. For instance, I spent a lot of years doing martial arts. So in a way when you read around subjects like that, there's all kinds of pseudo philosophical stuff that gets transmitted into American corporate structures Therefore you can become very good at mind games.... Yeah, you can do all the usual tricks.... There are a lot of claimant lawyers who seem to run things on the basis of: 'This is a points exercise and every time I get one over on you I will'. Now the difficulty with that situation is – as one of my old bosses used to say to me – if you're going to put the boot in, make damn sure your laces are done up. EW5

11. Going to Trial

A final tactic examined was the readiness of the parties to go to trial. Respondents were asked what they thought of the prospect. A majority of both claimant and defendant lawyers indicated that, although the threat of going to trial could be used as a tactic, they were unhappy about their cases being determined by a judge:

Cases that go to trial are a bit of a failure of negotiation really because ... you haven't reached a view, a convergence on what the real risks in the case are. EW4

An experienced claimant lawyer summarised the reasons for his reluctance to go to court and pointed to a difference in approach compared to twenty years ago:

In the 90s I said you've got to be a trial lawyer ... and now I'd very happily call myself a settlement lawyer. ... I would far rather a sensible settlement than a trial because you don't have any control when you get to trial: witnesses say things you wouldn't expect them to; claimants say something differently; who knows what the judge is going to react like? I think it's a lottery that I don't need to join. EW6

An equally experienced claimant solicitor went on to highlight the loss of control he suffered if a case went to trial:

⁴¹ C. Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn from Mediation' (1993) 56 MLR 361 at 377.

The good claimant solicitor will control the case right the way through You own a lot of the evidence, you own the client, you own his medical records, you'll own some of the witnesses.... But as soon as they say 'all rise' in court then you can't control it anymore, and that's the trouble. EW7

Another agreed:

In a period of 13 years, I've had 3 trials. But you ask yourself this – why would you want a total stranger making a decision on a case that you know intimately when it's a lottery in a courtroom? Much as it would be lovely to have all the precedents that we want, actually we're not doing this for ourselves, we're doing it for our clients and the best outcomes for our clients are probably not going to be in a courtroom. EW3

Lawyers from both sides were also concerned about the costs to which their clients could be subject if they were not successful, especially as those costs could increase considerably in the event of trial.

By contrast two defendant lawyers were in favour of going before a judge. One enjoyed the excitement and adrenalin produced at trial. The other saw a tactical advantage that might be gained over claimant lawyers with high caseloads:

I see myself as a trial lawyer because I think that's one of the major advantages that defendants have.... I have not met a claimant lawyer who is a trial lawyer. And I don't mean that as a criticism. Why would you want to be a trial lawyer if you're a claimant lawyer and you've got a cabinet full of 500 files, 480 of which you know will settle? What possible advantage does that skillset have to you? None. EW5

CONCLUSION

This article has revealed how strategic considerations are relevant throughout the period of a personal injury claim. It gives voice to the views of solicitors and barristers and provides a different perspective on the tort system from that usually encountered by academics. The practitioners' views reflect the law in action and, in particular, the pressures that they now face. The area of practice has developed considerably since the few previous studies of litigation tactics were published. Although many features of negotiation remain the same, others have been modified to accommodate the changing landscape.

Reasons for these changes are suggested here. In particular, it is argued that reform of the various ways in which the claims industry is funded has led to a considerable increase in the number of actions brought and has changed the way in which law firms and insurance companies are structured. This has affected the way in which they negotiate. They have had

to devise techniques to deal efficiently with large numbers of claims. In addition, consolidation in the industry has led to the breakdown of traditional relationships between negotiators: dealing with familiar local representatives of the other side is less common. By contrast, the reputation of a law firm or insurance company now features more prominently and greater care is taken to safeguard this during negotiation. Similarly, the standing of opponents is now tracked much more carefully and tactics have been tailored to deal with a much wider range of firms and types of claim compared to when the previous studies were published.

A major factor affecting the tactics used is whether costs are recoverable. Defendants complained of claimants frontloading work in order to claim disproportionate rewards. They also thought that the value of claims was being manipulated in order to avoid the fixed cost limits which played no part in the past. Litigators recognised that renewed emphasis on costs being proportionate to the value of claim limited their room to manoeuvre. They suggested that cases now were less well prepared and that they were less familiar with the details especially where minor injuries were involved. Where low value claims were made which fell within the 'claims portal' there might be little investigation of the accident at all. By contrast, in more serious claims the need to present a strong evidential case remained as important as ever.

Contrary to previous studies, there was evidence in the survey that it was claimants who enjoyed the initial tactical advantage. This was because they were able to prepare their cases thoroughly before giving defendants first notice of the claim. Although there was much support for the traditional view that it was for defendants to make the first offer, it was suggested that this culture is beginning to change partly because claimants are now expected to take the initiative in smaller claims. Earlier studies emphasised that defendants could take advantage of various weaknesses in both claimants and their lawyers and this was further illustrated here. There has always been disagreement concerning the appropriate level at which an offer should first be made. However, the earlier studies did not discuss two types of offer now being made by defendants: the 'pre-med' attempt to dispose of a claim at a very early stage, and the combined offer which does not differentiate costs from damages.

It has always been important to get information from the other side so as to be better able to evaluate the strength of the case. However, the deskilling of the industry in recent years has resulted in many cases now being dealt with by paralegals. More experienced litigators may more easily take advantage of their junior opponents by inducing them to reveal more of

their case than they should. To counteract this, junior staff may be instructed to avoid entering into dialogue because they lack authority or wider understanding of the issues. This has led to the use of various tactics to gain access to more senior lawyers who are in a position to make the decisions needed on a case. The channels of communication have been restricted by the more impersonal arrangements which characterise the way in which many firms now operate. Techniques have therefore been developed to counter this.

Although the traditional defence tactic of delay was noted in the survey as part of a strategy to wear down the other side, it did not figure prominently. More widely recognised was the need to dispose of claims quickly and at low cost. Harrying the other side into a favourable settlement where it is suspected that they are already under pressure of work is a traditional strategy. However, there may now be more opportunity to use this tactic because of increasing pressures resulting from the need to process bulk claims. When considering whether it was better to adopt such a combative approach or to be more conciliatory there was evidence in the survey to support Dingwall's view that experienced litigators are selective in the techniques they employ. Interviewees discussed the difficulties that could be caused by the more aggressive approach advocated by Genn.

Overall, the experience of those in practice clearly reveals that the resolution of claims is not determined only by the rules of tort but is affected by many other factors and, among these, the tactical skill of the litigator can be key. In response to the changing structure of personal injury litigation these negotiation tactics continue to develop. They are an integral component of a bureaucratic institutional regime presently dominated by concerns about costs and efficiency. The picture of litigation painted here runs counter to the misleading image of individualised court-based justice that is often portrayed as the defining characteristic of tort law.