

SPOTLIGHT

Welcome to the new quarterly format of the Voice

In this edition, we develop a technological theme and welcome a guest contribution from Dominic Clayden (MIB) on being safer and stronger together.

Publisher

Forum of Insurance Lawyers (FOIL)
1 Esher Close
Basingstoke
Hampshire
RG22 6JP

www.foil.org.uk

Editors

Editor in Chief – Stratos Gatzouris, DWF

Guest Editor – Dr Jeffrey Wale, FOIL

FOIL Technical Authors – Paul Finn and Leigh Shelmerdine

Thanks to our guest contributors in this edition: Dominic Clayden, Graeme Drysdale and Niralee Casson.

Future Editions

If you are interested in contributing material to a future edition of the Voice, please contact info@foil.org.uk

Disclaimer

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In this Edition

- 3 - Welcome to the new edition of the Voice
- 4 - President's Page (Nicola Critchley, DWF)
- 5 - Some words from a sponsor (Hawkins)
- 7 - A 60 second interview with Niralee Casson (Hawkins)
- 9 - Safer Together, Stronger Together (Dominic Clayden, MIB)
- 11 - Practice Spotlight – The Digital Claims Portals (Dr Jeffrey Wale, FOIL)
- 13 - Future FOIL - Twenty First Century Lawyers and their Clients (Dr Jeffrey Wale, FOIL)
- 15 - Autonomous Vehicles (Paul Finn, FOIL)
- 17 - Care Claims: Strategies and Solutions (Events Team)
- 19 - FOIL Scotland
- 20 - FOIL Northern Ireland and FOIL Ireland
- 21 - Welcome to our new Technical Authors
- 22 - FOIL in the Media
- 22 - AGM and President's Conference
- 23 - Latest News
- 24 - FOIL Sponsors

Welcome to the new edition of the VOICE

Welcome to the new edition and format of the Voice. FOIL has decided to publish the Voice quarterly with a new look and feel to the publication. As well as modernising the look of our flagship publication, we wanted to offer a range of guest and forward-thinking contributions.

In our first edition, we look ahead to the FOIL AGM and the President's Conference on 23 November 2023. There is still time to register for both events and it is important that we are quorate for the AGM.

It would be an understatement to say that this has been a busy year for FOIL members and their clients. It is hard to know where to start with all the changes – from the Fixed Recoverable Cost extension, the new Intermediate Court Track and almost constant flux within the Digital Claims Project. FOIL has worked hard to provide a space (or as our name says a forum) for collaboration between members operating in a highly competitive and challenging market. FOIL has continued to deliver a broad range of knowledge exchange events across an expanding range of Sector Focus Teams (SFTs). These SFTs are the backbone of FOIL, and it is great to see members working together to produce so many thought-provoking events that add value to members and their clients, as well as our growing portfolio of trade and industry partners. FOIL seeks to draw upon the combined experience and knowledge of our members to lead thinking and to influence public policy and legal processes, especially where it is important to their clients and their organisations. Ultimately, FOIL's key aim remains to ensure that our members' voices are heard.

We are excited to have guest contributions from Dominic Clayden at the MIB and Hawkins. Dominic talks about the work of the

MIB in the uninsured drivers, the OIC and international driver spaces. There is a plea to collaborative working which fits with FOIL's core mission.

Hawkins is one of FOIL's sponsors and was established in Cambridge in 1980 and specialises in forensic root cause analysis, expert witness services and engineering consultancy to the insurance, legal, risk management and commercial sectors. FOIL remains grateful for the support of our sponsors and guest speakers who play an important role in facilitating the delivery of events and the provision of regular updates to our members and partners.

This edition has a technological theme, with articles covering developments in the various claims portals and a section called Future FOIL – exploring the attributes and skills that future lawyers and FOIL members are going to need in an ever-changing digital and online legal landscape. We also explore current and proposed changes in the regulation and availability of automated vehicular transport. Other highlights include an introduction to FOIL's new technical author team and a recap on the recent Care Claims event, held at Clyde & Co in Manchester on 2 November 2023.

Hopefully, this gives you a sufficient flavour of what to expect from our refreshed publication. We hope that you enjoy this edition and the new publication format.

Looking forward, please do send through ideas and contributions for the next edition of the Voice. We welcome your feedback and your continued support.

Editor in Chief – Stratos Gatzouris, DWF

Guest Editor – Dr Jeffrey Wale, FOIL

The President's Page



To mark the end of a busy year as FOIL President, I would like to invite you to a conference of debate, vision and insight looking back over 2023 and forward to 2024. The key themes for the FOIL President's Conference are:

- How has the legal landscape changed and what will it look like this time next year?
- Will climate change lead to new types of liabilities and litigation?

The event will be held in person at the Manchester offices of DWF (1 Scott Place, Hardman St, Manchester M3 3AA) on 23 November 2023 and will start at 1.00 pm.

The running order for the afternoon is now confirmed as follows:

1.00 - 1.30 Light lunch

1.30 - 1.45 Welcome and FOIL overview

1.45 - 2.30 Steve Jarman, Deputy Director, Civil Justice & Law Policy – MoJ on Civil Justice Reform

2.30 - 2.50 Margaret McDonald, Barrister – Kenworthy's Chambers on Extended FRC

2.50 - 3.10 Tea/coffee

3.10 - 4.30 Panel discussion on climate change and litigation chaired by DWF Partner Dan Williams featuring:

- Richard Guest, Home Claims Operations Director - RSA
- Michael White, Head of Complex & Strategic Litigation - Zurich
- Mark Shepherd, Assistant Director, Head of General Insurance - ABI
- Stephanie David, Barrister - 39 Essex Chambers.

4.30 – 6.00 Drinks reception

I am sure that the event will be of interest to FOIL members, and I look forward to seeing you there and to celebrate all the work that FOIL has done and will do in the year ahead.

Please click this [link](#) to register. I also look forward to seeing you at the AGM being held at DWF Manchester on 23rd November at 12.00 noon.

I really hope that you enjoy the new format of the Voice.

Nicola Critchley, DWF, FOIL President

Some Words from a Sponsor



Hawkins was established by Dr Roy Hawkins in 1980 to provide consulting scientist and engineering services to the Insurance and Legal professions. Roy served as our Managing Director from the company's inception until the year 2000, when he stepped down from the post to become a consultant. From the outset Roy established the principles which form the foundations of Hawkins business today.

There was a strong ethos of building up from the physical evidence, rather than merely relying upon what a witness might say. This was coupled with a careful, methodical examination of documents and other evidence to reach conclusions that were built on firm and secure foundations. Speed of reporting and great communication in a market where experts were notoriously detached and slow, helped grow and sustain the business.

In 2000 Hawkins had grown from one to four offices and employed some twenty investigators. Today we have eight UK offices, as well as offices in Dubai, Singapore and Hong Kong, employing one hundred and sixteen engineers, scientists, accountants and architects investigating on behalf of a huge range of insurance, legal and corporate customers around the globe.

Hawkins is an employee-owned business, and we like to think of ourselves as the John Lewis of forensic investigation. Being employee owned has enabled Hawkins to continually

invest in people, premises, and equipment, without worrying about the pressures of satisfying the financial requirements of external investors.

In 2023 Hawkins was delighted to be awarded the RoSPA Gold Medal Award from the Royal Society for the Prevention of Accidents for the sixth consecutive year. The RoSPA Gold Medal is awarded to those businesses which have achieved a very high level of performance, demonstrating well developed occupational health and safety management systems and culture, outstanding control of risk and very low levels of error, harm and loss.

The business is proud of our zero-risk approach to employee Health & Safety, and we have invested heavily in PPE. Recently we installed downdraught air benches in each of our laboratories. The air benches minimise the risk of fire investigators being exposed to potentially carcinogenic combustion products during investigation of fire damaged equipment.

Employee ownership enables us to continue to invest in new technology to provide our customers with a cutting-edge service. This year we invested in 5 Hirox 3D Digital Microscopes which offer up to x5000 magnification, 3D modelling, surface roughness measurement, and 2D and 3D measurement tools. This equipment is transforming the investigation of materials failures and will benefit customers for years to come.

Hawkins was initially known as a fire investigation business. The reality was that in the beginning academically clever people with industry experience were employed who could turn their hands to any personal injury or property damage incident which a client required investigating. We continued to grow the business on this basis and in parallel started to engage subject matter experts to specialise in a particular field.

The business now comprises both generalists and specialists. Inevitably, there is a certain amount of cross over between the two groups with generalists developing specialisms and specialists acquiring expertise and a market following in new areas.

A good example of this approach is demonstrated by Charles Murdoch who joined the business in 2014. Charles is a Materials Engineer previously employed by Rolls-Royce where he investigated component failures. Since joining Hawkins, Charles trained in Road Traffic Accident reconstruction. He combined his academic expertise with his passion for motorcycle racing to develop a practice specialising in motorcycle accidents, component failures and protective headgear cases.

Another example is that of Ian Major who joined us in 2010 and now manages our Reigate Team. Ian joined Hawkins specialising in the investigation of property damage and personal injuries involving civil engineering and building incidents. He is also an experienced fire investigator, having investigated over 200 fires including major and complex losses in domestic, commercial and industrial premises. In his specialist field of engineering, Ian has determined the causes of a wide range of losses from small domestic claims of water ingress through to catastrophic building collapses.

In the last decade Hawkins has grown significantly with the development of specialist practice areas and the recruitment of niche expertise. The greatest practice area of growth has been our Built Environment Team. BE is an umbrella term which encompasses both the expanding team of Civil and Structural Engineers (who are coordinated by Richard Giles-Carlsson), but also Architects (coordinated by Niralee Casson), Fire Engineers, Building Service Engineers and Hydrologists, located at each of our UK and overseas offices.

The recruitment of Architects was prompted by customer enquiries following the Grenfell Tower fire. The BE team is now regularly instructed on cases spanning property damage losses, professional indemnity claims, construction site personal injury, building defects and design issues. This group is supported by the wider Hawkins community.

We have many examples of cross team co-operation bringing wide ranging experience to bear on complex cases. For example, Structural Engineers instructed to investigate failures involving glass curtain walling in high rise buildings can rely upon the expertise of our Materials Scientists and Engineers.

Dr Eleanor Jay who leads the Materials Team specialises in the root-cause analysis of glass failure mechanisms and will investigate whether the glass failure was caused by a nickel sulphide inclusion during the manufacturing process. Similarly, Fire Engineers can assist Fire Investigators with establishing whether the design or construction of building contributed to the rate of fire spread and severity of the damage.

Hawkins continues to invest in people, training, and equipment. Ultimately, we aim to provide the Insurance and Legal Markets

with specialists in every conceivable area which might produce a requirement for expert witness services. We are a modern, forward thinking, agile business representing the views and aspirations of all our people who are collectively our owners.

It is the employee ownership of Hawkins which makes us different. We believe in diversity and have a strong Environmental, Social and Corporate Governance culture. As we push towards net zero, we have introduced an electric car scheme which is available to all staff, and we are exploring installing solar panels and EV chargers at all our office locations. We are committed to diversity in the workplace and have established a Charities Committee with a commitment to distribute generously to local charities.

The Hawkins ethos is summarised in a quotation from our current Managing Director, Dr Andrew Prickett:

"Clients come back to Hawkins because of our honesty and integrity. Our subject matter experts have sound technical knowledge and expertise, married with a real commercial awareness of what our clients need. Hawkins provides a rapid response, giving timely, accurate advice and communication of the evidence in a way our clients can act upon."

To find out more about Hawkins please visit: www.hawkins.biz or contact our Business Development Manager at graeme.drysdale@hawkins.biz, tel : +44 7881091233

A 60 Second Interview with Niralee Casson (Hawkins)



Niralee Casson is a Chartered Architect at Hawkins with over 10 years of construction industry experience.

Hi Niralee, thank you for agreeing to our 60-second interview. Let's start with the basics, what made you move from designing buildings to providing expert witness services as a forensic architect?

Hi Jeffrey, before spending 10 years in architectural practice, I studied and completed an undergraduate degree reading Law. This had a lasting impact on how I experienced the design and construction of buildings, and I often found myself drawn to contracts, risk management and investigating the context around mistakes (defects). When Hawkins & Associates decided to add 'architectural expertise' to their burgeoning repertoire of built environment experts, it seemed like the most natural route for me to take.

Have your day-to-day activities changed much from design to expert?

Although there is the obvious change of client (from developers to insurers) and the change of objective (from designing and constructing a building to investigating defects and assisting the court with technical matters), there is a surprising amount of overlap. I review drawings, specifications, contracts and correspondence, much like I did whilst

working in practice. I read British Standards, technical guidance and undertake CPD, as any competent architect should. I also translate technical information into understandable terms for non-technical readers. This is where the most obvious difference comes in. I used to convey information through drawings and images, whereas now I mainly use words – although I am increasingly using more illustrations and 3D modelling in my reports as, in my experience, being able to visualise complex building construction goes a long way towards helping us to understand it.

Do you see any common themes in terms of claims against architects?

As the role of an architect is so complex, the claims are incredibly varied. Broadly speaking there are cases concerning the architect's appointment, where terms have not been clearly defined or there's been divergence from the agreed terms. There are cases rooted in design and coordination, where budgets have been exceeded, or legislation hasn't been followed, such as planning conditions or Building Regulations. And there are cases regarding the role of contract administrator, where there's been a failure to detect and action defective building work, or over-certification of amounts payable. These are just some examples of claims made that require an expert architect to opine on whether the architect in question acted competently.

This all sounds very desk-based, reading contracts and reviewing drawings. Do you undertake any physical investigations?

Much like an architect in practice, as a forensic architect, I spend time both behind a computer screen and on site. The difference is now the buildings I visit include those that are uninhabitable and those already in use, as

well as under construction. Typically, I undertake a physical site investigation when I am required to determine if there are any defects with the construction. I also need to visit site if previous surveys or expert's reports do not provide enough information, such as number of locations surveyed across the external façade.

Uninhabitable sounds ominous. What is the worst condition building you've visited?

Two buildings immediately come to mind. The first was a student accommodation that I visited a few days before Christmas. Most of the students had vacated a week or more before, and the smell coming from the communal kitchens was so egregious I nearly resorted to using my respirator mask. The sheer quantity of dead flies made me fear for their extinction. The second was a fire damaged residential building that had become home to a large number of pigeons. Aside from the risk of infectious disease, they proved very distracting for investigating building defects. The silver lining: I now know what baby pigeons look like.

I'm glad to hear these experiences haven't put you off the job! Do you have any parting advice for professional indemnity insurers to pass on to their architects?

Document, document, document! Not only variations in scope or changes to instructions, but also when design decisions were made (and who signed them off) and what was seen during site inspections (and who was notified of any errors). The nature of construction disputes means that often years have passed, and members of staff have moved on. What might be clear as day now can be murky later, so having a paper trail of decisions and approvals can help an architect demonstrate their competence, if it is called into question.

Safer together, stronger together

How we can work together to best support victims of uninsured and hit-and-run driving.



Dominic Clayden, MIB

Like many businesses, Covid had a significant impact on the way we work. When the first lockdown was announced, we had to move an entirely office-based workforce to home-working almost overnight. Lockdowns also coincided with the switchover to a new claims system, which was immediately made more challenging with everyone at home. It was undoubtedly a tough period, but I'm pleased with the way we pulled together as an

In Brief

- ❖ Organisational change at the MIB
- ❖ Delivering customer satisfaction and efficient claims handling
- ❖ Facilitating international travel
- ❖ Reducing uninsured motorists

organisation to deliver for our customers, and I'm delighted with where we stand today.

Settling claims faster, in the UK and beyond

In the past two years we have reduced the number of open claims by 25%, and we now have the lowest volume of open cases for nearly ten years. Last year alone, we supported 40,000 people injured by an uninsured or hit-and-run driver, as part of our mission to compensate victims quickly, fairly and compassionately. I am particularly pleased with these numbers given MIB traditionally manages a greater proportion of hit-and-run claims which are more complex and take longer to settle. It's not just about speed though – it's vital we treat people in the right way and get the right outcome for them. The fact our customer satisfaction is touching 80% – which includes both direct claimants and claims represented by law firms – shows we're providing a positive experience.

The last two years also saw the culmination of the build and launch of the Official Injury Claim portal on behalf of MOJ as part of their whiplash reform programme. To date, we have received over 600,000 claims with over 155,000 closed settlements. In 2023 we are starting to see a relatively stable number of between 8,000-9,000 claims a month settling,

with unrepresented claims settling faster than those with representation.

We are constantly listening for ways to improve the service. We recently launched a Help Hub on the OIC website to give more support for unrepresented claimants and valuable resources for professional users. This summer, we held another series of roundtable events, inviting users from claimant and defendant communities, and trade bodies, to share their experiences of using the portal to help us enhance it.

Our work managing claims is not limited to the UK; we play a key part in enabling frictionless travel for motorists in Europe. Over the last few years our priority has been to minimise the disruption to insurers and motorists by the end of the Brexit transition period. That saw MIB initiate and complete individual agreements in 48 countries in the European Economic Area (EEA) to enable UK drivers hassle-free travel across Europe and a route to compensation in the event of an accident with an uninsured or hit-and-run driver. On behalf of insurers, we negotiate and deal with technical issues with international counterparts on behalf of insurers. In 2022, MIB was involved in the settlement of over 18,000 accidents caused by foreign vehicles in the UK. We also acted as a guarantee body for 5,700 accidents caused by UK vehicles in the 48 countries.

So, while I look back with pride at the work we do to help compensate victims of uninsured and hit-and-run driving across MIB, OIC and cross border claims, that doesn't mean we will rest on our laurels. How can we improve further? One of the biggest challenges facing compensators (including

MIB) in getting people the support they deserve is increasing delays in the process chain. This includes securing dates for court hearings and getting medical evidence from law firms. In fact, data from OIC shows that in Sept 2022 there were 125,000 claims waiting for medical evidence to be shared with a compensator. A year later, 50,000 of those 125,000 claims were still waiting for medical evidence to be shared. This puts increasing pressure on compensators to settle claims quickly. I would certainly welcome discussion with insurers and legal firms to see how we can work together to speed up the process without negatively impacting on ensuring the right outcome for victims.

Making roads safer

MIB is probably best known for its claims work. After all, that was the core remit when the organisation was established more than 70 years ago. And yet many of the conversations I have on a day-to-day basis are about one of the many other aspects of MIB's increasing remit. One of those is how we work with our partners to make roads safer by getting uninsured drivers off our roads. Uninsured driving remains a big problem in society, causing devastation to innocent victims and their families. There's the economic injustice too – asking honest motorists to cover the cost of dealing with the minority who think it's OK to drive uninsured, especially in a cost-of-living crisis, is something we should never accept. We know that compensating victims is only dealing with the problem when it's too late, and that's why MIB's long-term vision is to end uninsured driving for good. We've achieved a great deal so far. Since 2005, our work with government,

insurers and the police has helped seize more than 2.5 million uninsured vehicles, and our police helpline now takes around 4,000 calls every month.

However, we don't want to stop there so we're about to scale up this work like never before. Earlier this year, the MIB Board approved a further £5 million investment to get uninsured drivers off our roads. Since then we have agreed a further three years funding for the successful Operation Tutelage and we've expanded our enforcement team to better support and equip the police. But there's a lot more to come. We'll focus on leveraging technologies and data such as utilising predictive analytics; identify better-informed "hotspots", establish partnerships with commercial business who we believe can help tackle the uninsured problem and do more to educate people of the consequences of uninsured driving to make people think twice. And of course, we'll continue influencing government on the matter. As an example, the current penalties for driving uninsured simply aren't strong enough. When you have fines that are less than buying an insurance policy, you can see why some people choose to take their chances. If the penalties were more severe, we believe it would act as more of a deterrent.

Looking ahead, we are as committed as ever to settle claims quickly, fairly and compassionately. We are also committed to get rid of uninsured drivers to make our roads a safer place. We'll do that nurturing tried and tested methods and exploring new innovations in data and intelligence in our digital world. But deep down, we know the best results happen when everyone involved

pulls in the same direction. Let's work together to make that a reality.

Practice Spotlight – The Digital Claims Portals



Dr Jeffrey Wale, FOIL Technical Director

It has been a really busy time for FOIL members in the digital justice space. As many of you will be aware, FOIL has an active DCP (Damages Claims Portal) Subgroup which meets monthly. Although the group has faced and continues to face challenges, it has worked tirelessly with other stakeholders to shape government policy and legal procedure in the digital claims space. After concerted lobbying by FOIL and other user groups, the MoJ and HMCTS finally agreed to some (albeit imperfect) user and live testing frameworks. Several FOIL members on the DCP subgroup have been actively involved in the user acceptance testing process in advance of the early adopter rollout in the DCP (anticipated later this month). As such, the group have been keen to support the digitisation project as far as they can.

Whilst there are various problems with the functional operation of these digital platforms, the key concerns include (1) rule and PD governance and (2) the increasing fragmentation within and between the digital claims platforms. In terms of concern (1), members are being told about and shown planned functional changes in the platforms but they are not getting advance dissemination of the proposed PD changes. In some cases, the Practice Directions do not match or reflect operational practice once rolled out. In the regular HMCTS open meetings, there appears to be a clear disconnect between the product/design teams and the rules that will need to sit behind any functional changes. Often the product owners are unable to communicate what is going to happen with the accompanying PD. The introduction of a transitional (early adopter) roll-out in the DCP across 16 courts is going to add to the fragmentation of the rules and the system. It is fair to say that the training resources of member firms are being stretched by the lack of clarity and notice, together with the continuing absence of clear project milestones and transparent governance arrangements.

In respect of concern (2), in addition to the fragmentation being introduced by the early adopter rollout, we have seen other evidence of divergence. In recent weeks, members were told about the new Citizens User Interface (CUI) for LR v LIP functionality in the OCMC. Apart from different compulsion and nomination requirements, we are told that new service arrangements are being introduced that diverge from the DCP/conventional practice and generate

various anomalies for certain economically and technologically disadvantaged groups. No rationale has been offered for these anomalies or fragmentation. We also have ongoing claims divergence in the DCP for claims which are not 1 Claimant vs 1 Defendant and for 3 or more party claims.

Whilst accepting that the digitisation process is going to have some teething problems during the development phase, the issues being reported go far beyond that and FOIL members are reporting a degree of confusion, fragmentation and complexity that is not working and critically, is causing significant challenges and resource demands for court users.

Acting on these concerns, FOIL has contacted the MOJ and a range of other stakeholder groups (including MASS and ACSO) and has been offered a future meeting with Steven Jarman (MoJ); Johnson J, Meade J and Kerry Greenidge (Senior Services Manager – Civil Jurisdiction) to discuss user concerns further.



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FUTURE FOIL

21st Century Lawyers and their Clients

Dr Jeffrey Wale, FOIL Technical Director

A recent FOIL/Canadian Defence Lawyers event on Generative AI highlighted various challenges for insurance lawyers and their clients in the years ahead. Professor Richard Susskind anticipated that the window for disruptive change was a relatively short one – predicting seismic change in the way lawyers will need to operate in the dispute resolution space by 2030. In particular, he emphasised the need for innovation in the digital and technological space, over basic replication or automation of existing human processes. Professor Susskind argued that the COVID-19 pandemic tended to accelerate automation but decelerate innovation in the justice space. Indeed, one of the points that I will advance is that the digital civil justice project (via the Damages Claims Portal and similar online claims platforms) appears to be driven by a desire (at least in part) to replicate historic claims processes. Of course, the underlying policy may have been to simplify or automate certain processes. Whilst we can debate whether simplification was the real driver, it is probably fair to ask whether anyone stood back at the design stage and asked why certain processes exist. Might there be ways we could do things differently, or perhaps eradicate tasks entirely?

We are understandably focussed on today's technological developments (most notably Chat GPT and similar generative AI systems) but there may be a risk that we produce solutions that are already redundant by the time they are rolled out. The speed of technological development and human

In Brief

- ❖ Automation vs innovative problem solving
- ❖ Digital skills and knowledge needed by future lawyers
- ❖ Building solutions for the unimagined challenges
- ❖ New problems need new solutions

redundancy appears to be accelerating. The landscape that we will be dealing with in the future will have problems that have yet to be imagined and technology that has yet to be invented. Susskind claims that the lawyers of today have a positive obligation to future lawyers not to squeeze new legal problems into 20th-century or even early 21st-century thinking and solutions. There is nothing particularly groundbreaking about this argument – we have had to make difficult regulatory choices before from the advent of the horse and cart, through to motorised transport and now into electric and automated transportation. However, it probably means that lawyers of today should be looking for solutions that go well beyond the automation of legal research and document or practice management.

In these uncertain times, we need to carefully consider what kind of attributes and skills future legal recruits will need to serve future clients and legal issues. Historically, Law Schools have tended to focus on the core foundations of legal knowledge although the advent of new routes to qualification (including the SQE) has forced many to re-think the kind of foundational skills that the 21st-century lawyer will need for employability. Now it is vitally important that you can manage and apply a vast repository of collective legal knowledge with the assistance of technology. Understanding the complex

regulatory challenges and solutions in a data and information-driven world are key. So is a critical understanding of the interface and alignment between the online and offline worlds. Detailed technical and legal understanding of new digital assets (whether it be cryptocurrencies or NFTs) and digital platforms are valuable underpinning. Knowing, for example, the differing ways in which crypto assets are validated using the blockchain or understanding how bias can underpin or influence algorithmic decision-making seem to be important for the future lawyer.

Collaboration with law technologists and developing career pathways for new law tech roles should also play a key role in the success of law firms and legal service providers more generally. The core attributes of flexibility and adaptability will remain as important as ever. Understanding how humans can seize the opportunities that new technology brings, and demonstrating a willingness to look for technological and not simply anthropomorphic solutions will offer service providers a definite advantage. Susskind suggests that those who can embrace risk-based predictive thinking and asynchronous solutions are likely to do better in this brave new world.

Insurance clients are likely to be facing increasingly complex and demanding regulatory frameworks where data and privacy concerns, cyber threats and the opportunities and risks associated with generative AI are pervasive. The need to demonstrate value and fair consumer outcomes will also be key drivers for insurers. Lawyers need to think about how they might collaborate and interface with insurers to offer value to their businesses and their policyholders in these environments.

You may have seen the Law Society's latest proposals for a [21st Century Justice System](#) (published in October 2023). Central to these proposals is the development of an online diagnostic tool (the 'Solutions Explorer') aimed at supporting individuals and small businesses to identify the scope of their legal issues and to signpost them to appropriate forms of redress. Now, while appreciating that this recommendation needs to be seen in context with their wider recommendations, the Law Society acknowledges that their proposal is based on first-generation AI technology. This employs decision-making trees to help users select the best solution or avenue for redress. There is a significant risk in applying old technology (1st generation AI) to offer solutions for future legal challenges and disputes. Whilst acknowledging that the new generative AI platforms are still evolving and that not everyone will necessarily be able to access new technology, there is a risk that the Law Society's proposals could involve significant resources to implement, yet fall outside the truly innovative, predictive and preventative solutions that Susskind envisages will be key for success in the future dispute resolution landscape. The suggestion that HMCTS might be an appropriate host for this diagnostic tool, might cause some to pause for thought given the challenges that members and their clients have continued to face during the implementation of the digital claims portals. There is an opportunity for FOIL members to respond to these proposals by 5 January 2024. I would encourage members to consider whether the proposals offer the right set of solutions for a future dispute resolution landscape that has yet to be fully imagined.



Autonomous Vehicles



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Paul Finn, FOIL Technical Author

Dr Jeffrey Wale FOIL Technical Director

On 31 October 2023, FOIL hosted an event at the London offices of Kennedys titled “Who knows where autonomous vehicles are going?” We were joined by three speakers: Jamie Hodsdon (OXA); Niall Edwards (Kennedys) and Tom Leggett (Thatcham Research).

Jamie Hodsdon covered the event's first question: “Where are we with the technology?”. OXA sees the practical application of autonomous vehicular technology in various specified circumstances, e.g., low-speed, transportation, closed-loop journeys and self-driving vehicles. The technology is already very advanced internationally and moving forward the technology is almost ready. However, the question is “What is acceptable to the public”? Jamie hoped we would see a revised Automated Vehicles Bill announced in the King's speech. The industry and government have been adopting a very collaborative approach to achieve these results. One of the key questions is “How safe is safe enough?”. A long-term conversation for the Law

In Brief

- ❖ Anticipating the King’s speech (see page 23)
- ❖ Reactive vs preventative safety
- ❖ How safe is safe enough?
- ❖ Transitioning from advanced driving technology to fully automated vehicles
- ❖ Ensuring data capture is crash proof

Commission has focused on both reactive safety and preventative safety. Reactive safety must be robust to failure and communication/component failure and be able to identify failure rate. Preventative safety is very different depending on real consensus across the industry. The “careful and competent” driver is the legal concept, but this is subject to public opinion and in all probability, greater safety standards are going to be expected of automatic vehicles. Context is key – where the automated vehicle technology is to be developed and the difference between individual safety and aggregate safety, maybe the activity benefits will not be visible for some time and will depend upon the data. DFT research reveals that public perceptions show that the reality of AV technology is boring and that the exception rather than the rule is what tends to affect public responses.

Niall Edwards covered the following questions: (1) Where are we with the regulations in the UK?; (2) Who will be liable if there is an accident? In 2017, Kennedys undertook a public survey which revealed that 98% of all plane travel was automatic, nevertheless, the public perception is that this remains dangerous even to this day. The Automated

Vehicles Bill should be mentioned in the King's speech but the Automated and Electric Vehicles Act 2018 is the current regulatory instrument. Looking forward to the new legislation, it will need to distinguish between advanced driver assistance, such as intelligent cruise control and fully automated driving. Driving safety standards will need to be developed with the Secretary of State and various stakeholders. The concept of "transition demand", where a driver can handover to self-drive, and then take back control will need to be addressed. On the issue of safety, the Law Commission believes the public's consensus is that safety standards must be at least as good as those of a human operator, namely a careful and competent driver.

Tom Leggett picked up the final question "If there is an accident, how do insurers make sure that they can see the data that tells them what went wrong?". Presently, there is no obligation upon the software companies to share the data in national law, and accordingly, it is hoped that we will see further guidance and clarification on this in the hopefully forthcoming AV Bill. All parties need to establish clarification and very clear definitions of what data is to be produced and disclosed and how long after a material incident. The disclosure of various types of data is currently a difficulty and is creating problems moving forward. The challenge of bundling data is also ensuring that all necessary data is sufficiently crashproof and survives any collision or incident.

Originally, the driving force for the development of automatic vehicles was both safety and increased access to mobility for the general public. However, factors have changed, and in the future, we may see

standards and requirements of vehicle licensing develop to incorporate automatic vehicle technology in private vehicles.

In closing, three soundbites were delivered from our speakers –

Jamie - "Automated vehicles are no longer science-fiction, the technology is tangible and realistic now."

Niall - "From a legal perspective, we seek clarification within the King's speech of the 2018 Act and this will be a significant first step forward."

Tom – "... We are witnessing cautious steps forward into a world of coordination to enable safe and sustainable adoption of automatic vehicles."



Care Claims – Strategies and Solutions

**A FOIL Roundtable Event hosted by Clyde & Co, Manchester on 2 November 2023.
Sponsored by Crown Office Chambers**

The original idea for this event came from FOIL's Catastrophic Injury, Clinical Negligence and Rehabilitation Sector Focus Teams. The difficulties associated with claims inflation and the resourcing of care packages have been persistent themes in a wide range of casualty claims. The event heard from Claire Toogood KC at Crown Office Chambers, Stuart Furniss/Sally Whalley at Clyde & Co and Michelle Hornsby/Rachel Pegrum from Fiona Johnson Ltd.

Claire laid out the basics for selecting and managing a care expert. You could probably dispense with a care expert in past loss only cases, instead relying on factual witnesses and medical evidence to address the care delivered. In moderate value cases, there may need to be a choice between the nursing or OT discipline depending on the claimant's need. In catastrophic cases, it is really important that the chosen expert has the relevant experience (for adults, children etc).

There was some discussion about the benefits of the sequential as opposed to simultaneous exchange of care and other expert reports, at least from the claimant. This may save the need for further experts. Unless there is a really detailed schedule of loss this should be considered. However, the timing of initial instruction and any home visit by a care expert needs to be given careful thought. Early instruction and a desktop report with a subsequent home visit where needs have stabilised may be appropriate in cases where there is a real need for currency in the

evidence. Making sure that the expert has all the pleadings, medical records and any other evidence available is critical. Having and obtaining details about each head of loss was also valuable. There was a general discussion of the value of care experts videoing the claimant, to give a much clearer visual picture of the claimant's needs. This may need to be supplemented by covert surveillance in appropriate cases. The need for independence by the expert witness was emphasised – see also [The Bond Solon Expert Witness Survey 2023](#)

We then heard from Michelle Hornsby (Head of Legal) and Rachel Pegrum (Social Worker and Expert) at Fiona Johnson Ltd. They gave participants an insight into how their experts are trained on CPR Part 35 and the pitfalls for expert witnesses highlighted by recent court decisions (e.g., *Muyepa v MOD* [2022] EWHC 2648 (KB)). They emphasised the use and value of statutory funding reports, Care Act assessments and expert intervention in case management. This enabled the socio-legal issues to be bridged; could assist with the rehabilitation of the injured party and help ensure any available statutory provision is maximised. The importance of care experts reviewing social care assessments when dealing with past and future care recommendations has been emphasised in the case law (*Scarcliffe v Brampton Valley Group Ltd* [2023] EWHC 1565 (KB)). The benefits of securing statutory funding even in full liability cases (but especially in part

liability cases) should be considered in appropriate cases.

In the second part of the event, Stuart Furniss sought to tackle the challenges of claims inflation and resourcing of care. Geographical variations could make a significant difference to the costs and availability of care provision. Typical week-day average agency rates in 2023 are £23.29 per hour. We are seeing a significant uptick in case manager rates and the preponderance of hourly rates. According to the latest ASHE statistics (November 2023), the median weekly earnings for full-time care workers increased by 7.99% carrying on the trend of carer's earnings increasing at a higher rate than earnings generally. Stuart also highlighted the pressure on general damages (e.g., *Blair v Jaber* [2023]) and the high annual care packages that we are now seeing in the most severe cases (*CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023]).

Looking for solutions, Stuart emphasised the importance of choosing the right expert, highlighting *Scarliffe* and CCC as already discussed. Consideration of different models of care – not just the conventional or the one in operation; the smart use of data and the use of technology in appropriate cases were also valuable avenues for the legal advisor to explore.

Sally Whalley explored the complexity of avoiding double recovery arising from private provision and statutory funded care. The issue is most stark where the statutory funding will not be affected by the compensation package. From a claimant's perspective, they are entitled to claim for private funding in place of statutory provision. The Court of Appeal in *Peters* held: "*We can see no reason in policy or principle which*

requires us to hold that a claimant who wishes to opt for self funding and damages in preference to reliance on the statutory obligations of a public authority, should not be entitled to do so as a matter of right.". The inadequacy of publicly funded care may also be a genuine concern, as was the uncertainty regarding the future provision and availability of statutory funding. Ultimately, there is a risk that statutory funding may not adequately meet the claimant's needs. Some claimants may not wish to be dependent on the state. From a defendant's perspective, they cannot argue that a private care provision should be dismissed because the publicly available package is cheaper. If it is the defendant's case that the claimant should use local authority provision, it must (1) investigate to what extent the relevant local authority can provide any suitable care; (2) examine the feasibility of and cost of the appropriate top-up care that might be needed and (3) give the claimant the opportunity to respond to the case for local authority accommodation and care by pleading it fully. Arguments for statutory funding can be used more successfully where there is a gap to fill in terms of meeting the claimant's care needs (i.e., in part liability/contributory negligence cases). It may be an important avenue of inquiry in cases where the Defendant's policy limit of indemnity is likely to be breached.

Sally discussed several of the options for seeking to avoid double recovery but concluded that there was no silver bullet. However, appropriate strategies might include (1) identifying suitable cases as early as possible; (2) raise early on with the claimant representatives that state funding entitlement needs to be considered; (3) consider the current care regime and how it is funded and

consider appropriate interim payments; (4) consider expert intervention to develop the entitlement to statutory funding and to ensure the claimant gets proper entitlements. The use of reverse indemnities may be difficult to enforce or police and may not be appropriate in some cases in any event.

There followed a really useful discussion about the possibility of differential arguments about statutory funding where the defendant was a private vs public body; and the impact and response to the case management costs decision in *Hadley v Przyblo* [2023] and what this might mean for collaboration and involvement in the cases management process by defendant legal representatives. Clearly, early engagement and discussion with the claimant's legal representative was required pending resolution of the related *Hadley* appeal (expected February 2024). Also, proportionality and the progressive value of lawyer attendance was deemed critical. The policing of case management and related costs was seen as important. The role of the video recording of expert examinations was also debated at length. Finally, the long shadow of the pending Personal Injury Discount Rate review also loomed over claims in this space.

FOIL Scotland



Kate Donachie, Brodies LLP Solicitors and Chair of FOIL Scotland

Kate offers a snapshot of developments in Scotland:

Alternative Business Structures (ABS).

The Legal Services (Scotland) Act 2010 allowed for ABS in the legal sector, however this legislation has never been implemented. The delay has recently been due to a review of legal regulation in Scotland. That review has now concluded, and the Regulation of Legal Services (Scotland) Bill is before the Scottish Parliament. It is anticipated that the Bill will pass into law next year and pave the way for the 2010 Act to finally be implemented and the Scottish ABS scheme to be launched. Behind the scenes, the Law Society of Scotland has been working with the Scottish Government on a proposal for the practical operation of an ABS scheme but the details of what is being considered are not publicly available. It is anticipated by supporters of ABS that its introduction in Scotland will increase competition, allow the Scottish legal market to be more flexible and drive investment in technology and innovation. ABS have been permitted in England and Wales for more than a decade.

QOCS in Scotland

QOCS came into force in Scotland in June 2021, but it is only really in the last few months that we have started to see a stream of reported decisions in relation to the operation of the exceptions to QOCS protection. Overall, the Scottish Courts are setting a high bar for removal of QOCS protection, and it is only in cases where there is evidence of a deliberate effort to deceive that the protection has been lost. FOIL Scotland is taking an active role in collecting decisions and sharing them with member firms.

FOIL Northern Ireland

There is to be a 9% increase in the majority of NI court fees, effective from 1 November 2023, with a further 9% increase from 1 October 2024. The NICTS indicates it is planning a more fundamental review of court fees which will be subject to public consultation. The publication of the Guidelines on Personal Injury Awards in Northern Ireland (the Green Book) is imminently awaited.

FOIL Ireland

FOIL Ireland held an online event on the subject of Forensic Collision Reconstruction with Gavin Dunn of Hawkins Forensics. A written update is now available on the FOIL website.

FOIL in Wales

FOIL has been working with the Welsh Government on their plan to introduce a special mandatory licensing procedure for tattooing, body piercing, electrolysis and acupuncture. FOIL has been helping policymakers to better understand the insurance implications of this policy.

Welcome to our new Technical Authors



Leigh Shelmerdine

Leigh, a qualified teacher, has worked in the legal sector for the last 5 years. Whilst working at the Judicial Office based at the Royal Courts of Justice, she had day to day responsibility for the Civil Justice Council. Working as part of the civil justice team within the Private Office of the Master of the Rolls, she has developed an excellent understanding of the civil justice sector; in particular, pre-action protocols, costs, alternative dispute resolution, civil procedure, housing, personal injury, the Online Injury Claim portal and the wider reform of the civil justice system.

Leigh also sits on the Board of a property company where she provides strategic oversight and leads on finance and insurance.



Paul Finn

Paul has a long history and experience of being formerly a solicitor having worked for more than 20 years in the field of civil litigation and specifically personal injury and clinical negligence. For 17 years he was head of department and subsequently Partner at a Legal 500 Law firm based in South East London. With a proven track record of success in handling PI and Clinical Negligence Claims including high-profile, high value and complex cases.

After leaving the Legal sector Paul has worked with the Quest Partnership as a claims manager and is involved with assisting a number of the UK's leading defendant insurers. He has had a wide range of technical experience in the field of personal injury including employers' liability, public liability, road traffic, criminal injuries compensation, clinical negligence as well as catastrophic injury and fatal accidents.

FOIL in the Media (September - November)

As well as producing FOIL updates and publications like the VOICE, FOIL members regularly contribute to external media publications. Here are some contributions:

Dr Jeffrey Wale produced an article for the New Law Journal on the future of open justice in the digital claims arena: 3 November 2023

Jonathan Drake, Member of FOIL, and partner at DWF featured in Modern Insurance Magazine, in which he discusses Consumer Duty and claims: 26 October 2023

Pete Allchorne, Vice President of FOIL and Partner in DAC Beachcroft and Charlotte Halford (DAC Beachcroft) discusses the challenges of AI in the insurance sector in the Insurance Post: 17 October 2023

Tara McSorley of Clyde & Co, FOIL Northern Ireland Chair, authored a piece for Insurance Day, detailing what insurers are hoping for from the upcoming Northern Ireland Green Book: 27 September 2023

Insurance Day published a piece from Dr Jeffrey Wale, discussing the MoJ consultation into Open Justice: 20 September 2023

Pete Allchorne, also wrote a piece for Insurance Edge, following MP's warning that cyber-attacks on self-driving cars risks causing mass casualties: 17 September 2023

FOIL also secured coverage on their generative AI event in the Claims Magazine and Solicitors Journal: 17 October 2023.



FOIL - the Forum of Insurance Lawyers



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Notice of the FOIL Annual General Meeting and the President's Conference

FOIL will be holding its AGM on **23rd November 2023**. The AGM will take place in person at the offices of **DWF in Manchester (1 SCOTT PLACE, 2 HARDMAN ST, MANCHESTER M3 3AA)** from **12.00 – 12.30 p.m.** and will then be followed by the President's conference, from **1.00 – 4.30 p.m.**, after which there will be a drinks reception.

Please register here for attendance at the [AGM](#).

Subject to election, **Pete Allchorne** of **DAC Beachcroft** is FOIL's President-elect for 2023-2024.

Notice of London FOIL President's Conference

Topic: Biodiversity; the new emerging climate risk

7th December 2023 at DAC Beachcroft London (The Walbrook Building, 25 Walbrook, London EC4N 8AF) from 3.30 pm

Please register using the following [link](#).

Latest News

Consultations and Calls for Evidence.

Reforming Fees in the United Kingdom

Supreme Court

This Ministry of Justice consultation proposes a series of reforms to the fees payable in the Supreme Court of the United Kingdom. The proposals include (1) combining certain fees; (2) removing the distinction between devolution jurisdiction case and civil case fees; (3) increasing fees using CPI and (4) future routine reviews and uplifts in court fees.

Full details of the consultation can be found at the following [link](#).

Consultation responses are due by 27 November 2023.

The Scottish Government's Information Gathering Exercise - Process for low-value personal injury claims resulting from road traffic accidents.

This call is seeking views on the current process for personal injury cases in low-value motor insurance claims and to gather views on potential improvements. In particular, the possible development of an online claims portal in Scotland similar to that introduced in England and Wales in 2010.

The deadline for responses is 19 December 2023.

King's Speech

Key highlights from the King's Speech include:

Automated Vehicles Bill – the introduction of a new safety framework for self-driving vehicles including new legal and safety thresholds, clarity on accountability and new processes for accident investigation. There will also be an attempt to clamp down on misleading marketing relating to the term 'self-driving'.

Digital Markets, Competition and Consumers Bill – new competition rules for digital markets. The legislation will focus on bad business practices, including fake reviews and subscription traps.

Data Protection and Digital Information Bill – will introduce revisions to the data protection regulatory framework. The aim is to introduce greater flexibility in the regime for businesses. There are also plans to introduce a framework for secure digital verification services.

Arbitration Bill – this aims to modernise the law on arbitration as recommended by the Law Commission of England and Wales. Changes will include (1) empowering arbitrators to expedite decisions on issues that have no real prospect of success; (2) introducing a statutory duty on arbitrators to disclose circumstances which might give rise to justifiable doubts about their impartiality and (3) simplifying the procedure for challenging arbitral awards.

Terrorism (Protection of Premises) Bill – this seeks to deliver on the Government's promise to legislate following the Manchester Arena attack. The Bill will require specified venues to fulfil certain steps according to their capacity to mitigate the impact of a terrorist attack and reduce harm.

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1 Esher Close

Basingstoke

Hampshire

RG22 6JP