

Claims against the police and detaining authorities: Strategies and practicalities

Carolynn Gallwey, Bhatt Murphy solicitors

1. Introduction

1.1 Appended to this paper is an anonymised case plan from a police law claim in which I was recently instructed. At the seminar I will use this case plan to structure a discussion around the strategies and practical issues arising at the following key points in the conduct of a 'classic' police law action:

- (a) Funding (LAA and CFA)
- (b) Preparing and evidencing your case
- (c) Issuing proceedings
- (d) Expert evidence
- (e) Special Damages
- (f) Mediation and ADR

1.2 Given the time constraints, I will only be able to give headlines against each.

2. Funding: legal aid

2.1 Practitioners will be familiar with the changes to civil litigation funding brought by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') which came into force on 1 April 2013.

2.2 Under LASPO, Sch. 1 Part 2, **Para 21** funding will still be available for claims against a public authority which constitute an abuse of its position or powers where the act or omission is:

- (a) deliberate or dishonest; and
- (b) results in harm to a person or property that was reasonably foreseeable

- 2.3 “Deliberate or dishonest” are alternatives, therefore acts which are deliberate but not dishonest are included and vice versa. Applying this to claims against the police: detaining, assaulting or prosecuting will always be deliberate acts (as well as often dishonest). They will therefore be covered under the new funding regime.
- 2.4 “Reasonable foreseeable harm” is a surprising requirement given that any losses flowing from an intentional tort are recoverable, whether reasonably foreseeable or not. In any event it should not pose a problem in many actions against the police as:
- (a) detention is a foreseeable consequence of a false imprisonment;
 - (b) injury is a foreseeable consequence of battery;
 - (c) prosecution is a foreseeable consequence of a malicious prosecution;
 - (d) invasion of privacy is a foreseeable consequence of trespassing upon a person’s property etc
- 2.5 On this basis one would expect funding to be made available for most claims against the police under the post- LASPO regime.
- 2.6 LASPO Sch. 1 Part 2 **Para 22** deals with breaches of Convention rights by a public authority. This paragraph provides funding, including for claims in tort (or a claim for damages other than a claim in tort) in respect of an act or omission by a public authority that involves a significant breach of Convention rights by the public authority.
- 2.7 What amounts to a “significant” breach is not defined in paragraph 22; however, the Lord Chancellor’s Guidance helpfully states that it should bear its natural meaning and that “factors which might be relevant in considering whether there is a significant breach of a Convention right by a public authority include:
- (a) the severity of the violation;
 - (b) whether the breach was deliberate; and

(c) whether the individual has suffered a significant disadvantage taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case".

2.8 Given that breaches of Convention rights by public authorities in police cases can cause death, detention, risk of conviction, trespass, injury and damage to reputation, many will come within paragraph 22.

2.9 There are further provisions eg relating to discrimination claims, immigration detention and inquests which are outside the scope of this seminar.

3. Funding: CFAs

3.1 LASPO also of course changes the landscape for CFA funding, in that it abolishes the entitlement to recover success fees from the losing party in all CFAs signed after 1 April 2013 (see section 44 of LASPO and the CFA Order 2013).

3.2 If a success fee is charged, it is expected that your client will pay it out of damages, albeit that in personal injury cases, the success fee must not exceed 25% of the damages, excluding damages for future care and loss. In reality, damages in police claims are small, rarely exceeding £25,000 in routine cases, and this would therefore be a punitive requirement to enforce.

3.3 Ostensibly to counter-balance the shift to the Claimant in terms of responsibility for the success fee, a 10% increase in non-pecuniary general damages will apply to all tortious claims, unless they are funded by a pre 1 April 2013 CFA (see *Simmons v. Castle* [2012] EWCA Civ 1288).

3.4 Also, ATE insurance premiums are no longer recoverable from the losing party (see section 46 of LASPO). In theory this type of insurance can still be obtained if the Claimant is willing to fund the premium, but in reality, given the value of claims in this area, this is rarely feasible, as premiums would dwarf or even extinguish damages. In consequence there is no longer a viable market for this type of insurance.

3.5 As a further counter-balancing measure, a new costs protection regime has been introduced for personal injury claims (including clinical negligence) (see CPR 44.13 to 44.17). This is called Qualified One Way Costs Shifting (QOCS) and means that the court can only make costs orders against a losing Claimant which do not exceed the total amount paid to them in damages or other costs.

4. Front-loading the preparation of your case

4.1 Between taking first instructions and sending a letter of claim, this type of case requires a considerable degree of preparation. The following examples of steps taken by way of gathering evidence are specific to police law claims but are broadly applicable to other claims against detaining authorities:

- (a) Sending an early notification letter to the Defendant seeking preservation of evidence.
- (b) Requesting a copy of any custody record¹
- (c) Requesting any Magistrate's clerk's notes and any memorandum of acquittal from the Court.
- (d) Requesting any medical records (e.g. Ambulance Service, GP, A&E, counsellor etc).
- (e) Obtaining papers from the client's criminal defence solicitor, if applicable.
- (f) Considering serving a questionnaire under the Equality Act 2010.
- (g) Considering a Data Protection Act (&/or Freedom of Information Act) request.
- (h) Speaking to witnesses and obtaining statements
- (i) Obtaining condition report from treating GP
- (j) Filing a police complaint and following this up
- (k) Obtaining employment records, historical wage slips and statements from previous employers/colleagues.

¹ See Police and Criminal Evidence Act Code C paragraph 2.4A which states:
"When a detainee leaves police detention or is taken before a court they, their legal representative or appropriate adult shall be given, on request, a copy of the custody record as soon as practicable. This entitlement lasts for 12 months after release"

4.2 You will expect then to analyse and organise this material, and to take a detailed proof and instructions from your client before preparing a letter of claim.

5. Issuing proceedings

5.1 Before issuing key things to consider are:

- (a) Have you correctly identified all of the parties? Think about contracted out responsibilities, dependants in a death claim etc.
- (b) Do you need permission to issue? Think about s329 of the Criminal Justice Act (*Adorian v Commissioner of Police for the Metropolis*²), s139 of the Mental Health Act 1983 (*Seal v Chief Constable of South Wales Police*³)
- (c) Do you have funding in place? A costs liability arises as soon as proceedings are served.
- (d) Do you need probate?

5.2 The general rule⁴ is that non-personal injury cases with estimated damages of *less* than £25,000 should be issued in a County Court and those with a value over £25,000 can be issued in the High Court⁵. Personal injury cases with estimated damages of *less* than £50,000 should be issued in a County Court and should only be issued in the High Court if the value is over £50,000.

5.3 AAP claims valued below £25,000/£50,000 can be issued in the High Court relying on Practice Direction 29, 2.6 which states that the High Court is suitable for trials involving "... (5) malicious prosecution or false imprisonment and ... (6) claims against the police". See also CPR PD7A, 2.4.

5.4 However since 22 July 2013 there has been a gateway process in the High Court whereby any issued claim with a value under £250,000 will be

² [2008] EWHC 1081 (QB)

³ [2007] UKHL 31

⁴ CPR PD 7A, 2.1 and 2.2

reviewed by a Practice Master who will determine whether the matter should be transferred to a County Court. It is therefore very important to explain in your covering letter in any claim worth less than £250,000 that you are relying upon PD 29 2.6(5) and/or (6). If an order is made to transfer the Claim to a county court there are three days to appeal.

- 5.4 19 March 2012 saw a change to how Part 7 claims are issued in the County Court. Where the claim does not raise issues under the Equality Act and is a money claim only, it must be issued via the National Civil Business Centre in Salford, which will then allocate it to the County Court closest to the incident. There are some exceptions to this.

6. Expert evidence

- 6.1 You will need to make early decisions about expert evidence – you may wish to obtain an expert opinion before preparing your letter of claim, although this will be unusual. There is no pre-action protocol applying to actions against the police and detaining authorities, in which case the Practice Direction on pre-action conduct applies. You can also draw on the PI protocol or the clinical negligence protocol.
- 6.2 The clinical negligence protocol in particular can be of assistance at the letter of claim stage, as there is an expectation in that field that separate experts will be required, in view of the complexity of the evidence. It can be helpful to include a paragraph invoking the clinical negligence protocol in your letter of claim, and propose that if the Defendant cannot agree the injury and the factual matrix it would be appropriate to instruct separate experts.
- 6.3 You will need to serve evidence of the personal injury sustained with your Particulars of Claim (see CPR 16PD.4). This is generally accepted to apply to condition and prognosis reports, with causation reports expected to be served later in the proceedings if necessary.

- 6.4 Following receipt of the Defence, directions will either be agreed with your opponent or ordered by the Court. These should include directions on expert evidence if appropriate. See CPR 35 and its supporting Practice Direction, and the pre-action Practice Direction and pre-action protocols.
- 6.5 Expert reports will be mutually exchanged, and they must meet and try to agree a joint statement. It is useful to prepare and agree an agenda. Factor in time for conferences with you and with Counsel.
- 6.6 Be aware of the following:
- (a) Documents provided to the expert are discloseable, although the letter of instruction rarely is. The substance of your instructions can however be repeated in the report. See CPR Part 35.10(3) and (4).
 - (b) Legal aid rates for experts have been slashed (see the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 and the supporting guidance from the LAA).

7. Special Damages

- 7.1 You will need to serve a Schedule of Loss with your Particulars of Claim, setting out any loss of earnings claim including past and future loss, and any other out of pocket expenses such as criminal defence legal fees, funeral expenses in a death case, care costs etc.
- 7.2 Material supporting such claims can be difficult and time-consuming to gather and you should therefore start to think about this early in the life of the case.
- 7.3 Some things to think about:
- (a) Pension loss
 - (b) Handicap on the employment market (a *Smith v Manchester* award)
 - (c) Provisional awards
 - (d) Whether you can justify instructing an employment expert.

7.4 You will be required to serve an amended Schedule of Loss following the disclosure stage, and the Defendant will then serve a Counter-schedule in the run up to trial.

8. Mediation and ADR

8.1 There is an increasing expectation on the parties to try to resolve claims through ADR. ADR can take the form of without prejudice discussions, Part 36 offers, roundtable discussions, facilitated mediation etc. Liability only Part 36 offers can be particularly useful in focussing attention on the strengths of your case, and if you go on to win the indemnity costs consequences attaching can be very helpful in negotiations are in their own right.

8.2 It can also be useful to include a provision in your Order for directions requiring the parties to consider ADR, and to file a witness statement explaining their reasons for refusing to take part, to be shown to the trial judge only on conclusion of the case and in respect of costs. You can also serve a formal Offer of Mediation at any time in the proceedings, which can be useful at the point of determining costs.

8.2 In the case of *PGF II SA v OMFS Company Limited* [2013] EWCA Civ 1288, the Defendant was denied costs that would otherwise have been awarded under Part 36 because of its failure to respond to an offer to mediate.

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CASE PLAN

Some definitions

I explain below some of the legal terms that will appear in documents about your case.

- **Claimant:** You, in that you are claiming compensation.
- **Defendant:** The Commissioner of Police for the Metropolis, who is responsible in law for the actions and omissions of police officers and/or civilian employees.
- **Causes of action:** The types of claim that you are bringing against the defendant.
- The following causes of action have been identified arising from the events of 5 March 2012, and subsequently:
 - **Assault and battery:** an allegation that officers used force against you without lawful justification.
 - **False imprisonment:** an allegation that you were detained by the police without lawful justification.
 - **Malicious prosecution:** an allegation that you were prosecuted without reasonable and probable cause and that the prosecution was improperly motivated.
 - **Misfeasance in public office:** an allegation that officers acted outside their powers with reckless indifference to the harm that might be caused to you and that you were caused damage, or in the alternative, that they acted outside their powers and you were caused damage as a result.
 - **Breaches of the Human Rights Act 1998:** an allegation that your rights under the European Convention on Human Rights were violated contrary to s.6 of the Human Rights Act 1998. It is our case that the failings of the police have caused a breach of your right to personal integrity and privacy (Article 8).
- **Damages:** The money that you are seeking from the Defendant in respect of the wrongs that you have suffered. There are different types of damages and we will advise you about the guidelines applicable to the calculation of each type:
 - **Basic compensation:** Damages intended to compensate you for the loss or injury you suffered.
 - **Special damages:** Quantifiable losses such as loss of earnings and out of pocket expenses.
 - **Aggravated compensation:** An additional sum of compensation intended to compensate you for any additional hurt to your feelings caused by the manner in which the wrongs were done to you.

- **Exemplary damages:** A further sum intended to reflect public disapproval of arbitrary, oppressive or unconstitutional conduct on the part of the police officers if it is considered that the sum allowed in basic, special and aggravated compensation is not sufficient for that purpose.
- **Letter of claim:** The means by which the defendant is put on notice of your claim, allowing them an early opportunity to settle the matter, if they so wish, without requiring you to issue proceedings.
- **Proceedings:** The process by which your claim will be pursued through the courts against the defendant in the absence of an early settlement of the matter. In that event, you may find it helpful to be aware of the following terms:
 - **Claim Form:** The document lodged issued at court to commence proceedings on your behalf.
 - **Particulars of Claim:** The formal document setting out the details of your claim, which will be served upon the defendant with the claim form.
 - **Defence:** The formal document served by the defendant setting out the details of his case in response to your particulars of claim.
 - **Statements of Case:** The generic term for the formal legal documents setting out the case on behalf of each party, such as the particulars of claim and the defence, including any later clarification or elaboration provided by each party.
- **Settlement:** The process by which the claim may be satisfied at any stage before trial. It is difficult to predict which cases the police will settle and which they will defend to trial. I will of course keep you informed about my views on this as the case progresses. Generally speaking, there are two stages at which the police usually offer to settle cases. The first is before proceedings are issued and the second is not until after the witness statements have been exchanged (see the table overleaf).
- **Legal Aid Agency (LAA) public funding certificate:** The means by which the work we do on your intended claim and the expenses we incur will be funded. As you are aware, the LAA has granted a public funding certificate for the purposes of your claim, and we have already written to you explaining the implications of the grant of such a certificate. The funding certificate is limited by two factors: by scope, in the steps that we are permitted to take, and by costs, in the amount of expenses we are permitted to incur. If we need to take a step outside a current scope limitation, we would have to apply to the LSC to extend the scope of the certificate for that purpose. If we need to undertake further work on your case in excess of a current costs limitation, then we would have to apply to the LSC to extend that limitation. For further information concerning LSC funding, I would suggest that you first refer to the letters that you have already received and if you have any queries please do not hesitate to contact us.

What happens next?

The table below sets out the likely steps in your claim and an approximate timetable for the completion of each stage. We shall advise you if there is likely to be any major change in the timetable or the steps to be taken but the dates are fairly approximate at

this stage. We shall endeavour to ensure that at each stage you are aware of and feel comfortable with the steps being taken on your behalf.

You should always know what stage your case has reached, and you should feel free to call me if you ever have any queries in that regard.

Please note that the time estimates given below are subject to change. Things can take longer if, for example, we need to go to court for a ruling on specific disclosure or for other legal argument, or if we need to commission expert evidence.

Step	What this means	Time estimate
Taking your instructions	This was our first meeting, when I gathered some information from you about your claim and identified the work that needed to be done.	done
Funding	We have persuaded the LAA that you have a good case and that the case is sufficiently serious to justify public funding, and this has now been granted.	done
Gathering information	Before we can fully assess the merits of your case we need to gather information from as many sources as possible and review that material. There can be delays while we ensure that a complete set of paperwork is obtained. We have now obtained GP records, A&E records, notes of the Magistrate's trial, a copy of your criminal solicitors file and documents from the IPCC concerning your complaint and appeals.	done
Notification to the defendant	At an early stage, we inform the defendant that we are contemplating a claim and request that all relevant paperwork is kept safe. We also seek a copy of your custody record at this stage.	done
Your statement and gathering evidence	We will want to prepare a long statement setting out your instructions about what happened and covering your background and circumstances. We will want to see any witnesses, review medical records and reports, etc. We will need to take your comments on the material we have gathered.	Asap
Letter of claim	After your statement has been taken and the evidence has been gathered, we will be in a position to send a detailed letter setting out your claim. The intention is to give the other side an opportunity to settle the case. We need to give them sufficient information so that they can decide how much your case is worth. We should not issue proceedings until we have given the police 4 months to consider this letter.	By 8 March 2013

Instructing experts	While we are waiting to receive a response to the letter of claim, we will need to consider whether to instruct a psychiatrist to prepare a formal opinion as to whether you have suffered a psychiatric injury. It will be necessary to gather all your medical records together to instruct any such expert(s). You may then have to meet the expert(s) who will prepare a report.	Review by 1 June 2013
Letter of response	The defendant's letter of response should either admit liability or explain why liability is not admitted. If liability is not admitted, the defendant should provide copies of documents upon which they rely. The defendant can make an offer to settle whether accompanied by an admission of liability or not. Upon receipt of this documentation, we will undertake a review of the merits of your case.	9 July 2013
Counsel's advice	With the benefit of the evidence we have gathered and the response to the letter of claim, we may seek an opinion from an independent barrister concerning the merits and likely value of your claim. This advice may also be needed to obtain an extension to your public funding.	30 July 2012
Particulars of claim	In the event that we think that your case is strong but there has been no settlement achieved, we will instruct a barrister to prepare particulars of claim which is the formal statement of your case. You will be asked to check this document.	14 Sept 2013
Issuing proceedings	Formal documents will now be issued and filed at court including a claim form, the particulars of claim and any supporting documents. These will then be served on the defendant's solicitors.	3 Aug 2013
Defence	The defendant will have to respond with a formal statement setting out his case. We may ask you to come and see us to discuss this document.	15 Nov 2013
Allocation and directions	We are required to complete a document concerning your case and the steps that will be needed to prepare the case for trial. Directions will be given usually at a case management conference (CMC). After the directions have been given we will have a good idea of when the trial will take place.	21 Dec 2013
Clarification of statements of case	We may exchange questions with the other side to find out more about their case. The defendant may also seek clarification about your case.	10 Jan 2014
Disclosure	This is the process by which we obtain copies of the relevant documents from the defendant. This is an important stage and the police often fail to co-operate. If that happens, we will apply to the court for orders to ensure that you are	1 Feb 2014

	provided with relevant documents.	
Your instructions	We will want to obtain your instructions on the documents and the defence if we have not already done so.	15 Mar 2014
Witness statements	<p>Before trial we must provide the defendant with statements from yourself and any witnesses. It is important that your statement is accurate. We have to check this against the medical evidence, the pleadings, any evidence you gave in the criminal proceedings, the disclosure and so on. We will ask you to see us to go through the draft statement.</p> <p>Sometimes we ask your barrister to check the statements we have drafted and if that is the case, we often arrange for you to meet him/her at this time. The police will also be preparing witness statements and we will give you copies of these.</p>	19 April 2014
Expert reports	Before trial, the parties are obliged to exchange expert reports upon which they intend to rely. We will have to consider any amendments to the expert evidence already obtained and consider further evidence. We can ask for clarification concerning the reports served by the police and we are obliged to attempt to agree the expert evidence to reduce the time spent at trial. The court usually requires the experts to meet and prepare a report.	7 June 2013
Review of merits	<p>After the completion of disclosure and the mutual exchange of statements and expert reports, we will review the merits and likely value of your case and obtain a formal opinion from your barrister.</p> <p>The barrister's opinion will also be necessary to secure LAA funding for trial.</p>	28 Jun 2013
Listing Questionnaire	At about this stage the court will request information from us about the proposed trial date and try to ensure that your trial takes place on the date planned. There may be a hearing to discuss this and any other outstanding issues.	5 July 2013
Trial preparation	In the period, before the trial actually takes place we will review the entire file, prepare trial bundles and assist you with preparing to give evidence. You will need to meet with your barrister.	26 July 2013
Trial	A three month window during which the trial will be fixed will be decided upon at the CMC (see above). Several months before trial a date or a date within a much shorter trial window will be	From 1 August 2013

	given. We will know the actual date for the trial several months in advance.	
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