

*The Chartered Institute  
of Loss Adjusters*

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# CILA Conference 2016

*2.30pm – 3.15pm*

*A Guide to Pursuing an Effective Recovery Action in  
Europe and Beyond*

***Introduced by:***

*Martyn Gabbitass , Technical Director at QuestGates and Chair of the CILA  
Liability SIG*

***Speaker:***

*Shane Sayers, Partner, Kennedys in London*

*Victoria Suite*

# LOST IN TRANSLATION - RECOVERY CLAIMS IN EUROPE AND BEYOND

## LECTURE - CILA MANCHESTER

### 14 SEPTEMBER 2016

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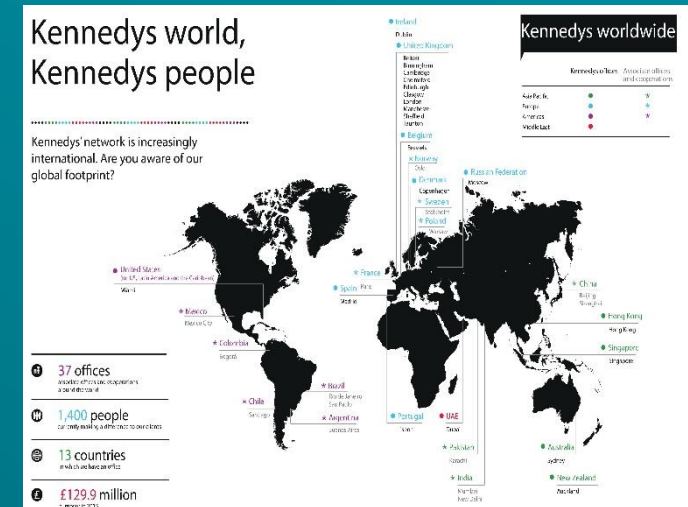
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# Shane Sayers - Kennedys Biography

## Kennedys Biography



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Shane Sayers is a partner with Kennedys solicitors. He is the Head of the Product Liability Department. He qualified as a solicitor in 1981 and has extensive experience in handling international claims including, product liability (pharmaceutical, medical, consumer, clinical trials) as well as construction and engineering matters. He is also a CEDR qualified mediator.

Shane has advised both manufacturers and insurers on a number of leading product disputes and class actions. These include the Organophosphate and IOL class actions as well as vaccine and other medical products matters. His clients have included Johnson and Johnson, Ciba Geigy, Novartis, Bausch and Lomb, General Electric Healthcare, Ethicon and Charles River. He has also been retained by the UK Government to act on behalf of the National Health Service in several group actions. He has acted for various pharmaceutical and clinical trials companies co-ordinating trans-national claims. He has also advised UCB Celltech and other companies in relation to cross-border clinical trials matters as well as advising a major pharmaceutical company in relation to MMR claims and recently acted for a major U.S Manufacturer in relation to a US\$150 million defective products mass tort claim in Italy. He acted for a leading international intraocular lens manufacturer co-ordinating a global response to claims and has advised on a defective adhesive claim with losses in 4 different jurisdictions.

Shane also has extensive experience handling and monitoring major international claims on behalf of insurers and companies in various jurisdictions including Italy, France, Spain, Germany, Belgium, China, Thailand, Singapore, Hong Kong, Australia, USA, South Africa, Papua New Guinea, Hungary, Turkey, U.A.E, India, Peru, Malta, Egypt, Russia, Romania, Bulgaria and New Zealand.

# Shane Sayers - Kennedys Biography

## Kennedys Biography

### Shane Sayers

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Shane has more than 25 years experience acting for professionals defending claims against engineers, architects, surveyors, lawyers and accountants and has acted both as counsel and arbitrator in numerous international construction disputes since 1983. These were held under ICC or UNICITRAL rules. Those disputes include damage caused to a dam and canals (Peru - \$25 million); joint venture dispute in Al-Taweelah (UAE - \$200 million); power line construction termination (Papua New Guinea - \$45 million); channel tunnel engineering breach of contract (France - UK - \$20 million).

Shane also lectures on international claims, pharmaceutical and clinical trials, arbitration and mediation. He has also published articles in journals and newspapers, including The Times.

Shane is also a member of the Product Liability Forum of the British Institute of Comparative law and was recently involved in advising the EU Commissioner on the impact and future development of the Product Liability Directive. He lectures internationally and edited the “The A-Z of Woolf - An Overview of the Civil Procedure Rules (CPR)”.

#### **Chambers Guide comments include:**

*‘Kennedys growing team has ‘an unparalleled level of expertise’. Led by Shane Sayers, who is ‘excellent’, the team is instructed by insurers in relation to the high-profile alleged train wagon failure in Italy that led to more than 30 deaths and damage likely to exceed \$100m. Also recommended are Trevor Davies, who is ‘calm and authoritative’, and Tracy Head. Chris Langford joined from Mayer Brown International LLP.’*

#### **Leading Individual: Shane Sayers**

“Following its merger with Davies Lavery in September 2008, Kennedys has expanded its breath of experience across the pharmaceuticals, consumer products, food and drink, and cosmetics fields. The practice represents more than 50 leading insurance companies, such as AIG, AXA, Zurich, Swiss Re, Munich Re and numerous Lloyd’s syndicates. Shane Sayers and his team are ‘highly recommended’, and provide ‘excellent service’.”

*“Group leader (Product Liability Team) Shane Sayers enjoys a ‘deservedly fine reputation’, clients said. He spends the majority of his time on product liability but is also experienced in other civil litigation and international construction work.”*

*A canny operator, Shane Sayers continues to be admired by interviewees as reflecting the strength and depth of the practice”*

# Setting the Scene

- Potential loss identified
- Possible recovery action against supplier/manufacturer/installer
- Jurisdiction and/or law is outside U.K. - Must check legal position
- Other critical matters covered in following slides - limitation, cost, evidence, court appointed expert, timing including possible appeals, integrity or bias of the Court, enforceability and financial standing of potential development

# Limitation Period

- Critical to check
- Statutory can vary - 1 year to 10 years for similar actions in Italy. If Insurer making a recovery the period may be different
- But Contractual Period may be shorter, say 1 months, and can be upheld by the court (in Scandinavia)

# How to Beat Limitation

- Ensure legal requirements and timescales for issuing and serving proceedings are complied with
- Check all relevant potential contracts and clauses - assume the worst and notifying
- Potential to extend limitation period by issuing proceedings and waiting or having the court appoint an expert or write a qualifying letter (see example below)



# In the EU - Role of the Court Appointed Expert

- Pre-Action/Mid-action
- How is the expert appointed? Court Register
- What is the effect of the appointment?
- The scope of the appointment is set by the Court
- The investigation is controlled by the expert
- The importance of submissions (“dires”)
- The Expert’s report
- You may ask court to appoint before proceedings/cheap

# In the EU - Role of the Court Appointed Expert

## Tactics

- Get involved before expert is appointed
- Provide briefing to the Court on relevant issues
- Provide guidance on type of expert needed
- Identify questions that need to be considered
- Give expert briefing note/submissions and any relevant papers
- Advise expert of documents needed from others

# Costs

- Generally for lower in the E.U. Usually higher in Middle East and Far East (Hong Kong, China and Singapore)
- The successful party will only be normally recover a small part of their costs - unlike England. These need to be factored into any recovery
- The independent expert investigation (before proceedings) may be more expensive than actual proceedings (Paris Automated Car Park)

# Timing

- This is a principle consideration before commencing any recovery action
- Proceedings in some jurisdictions could take 5 years or more (Italy and India are very bad with long delays). Again Court Appointed Experts' Investigation can take years
- Very little that can be done other than keep the experts' investigation on track

# Discovery/Disclosure

- Very limited in most jurisdictions other than U.S. and England
- Normally disclose only documents you seek to rely on
- Must be able to prove recovery without relying on disclosure from the other party
- But ... if you ask the Court Appointed Expert the right question then he may request documents (airbag claims, car maintenance)

# Hearings/Witnesses

- No hearings. Court tends to consider written evidence, although Court appointed expert holds meetings
- No witness examination or cross examination. Documents are king
- You must be able to prove the case on documents and physical evidence
- In the U.S. you have depositions and therefore impact witnesses
- Court Appointed Expert will normally trump your own expert

# Integrity of the Court

- In some jurisdictions the court the quality of the decision may be affected by outside influence
- There is evidence of this at a political level in various countries including China and various African jurisdictions. This must be considered. Overall the level of political interference is reducing as countries appreciate the adhesive impact on business
- Likewise the risk of corruption should be discussed with local lawyers. It may be possible to bring a claim before a higher/central court rather than one that might not be as straightforward

# Case Studies continued

- UK bandage manufacturer
- Major surgery sterile bandages - sold to US
- Defective material supplied from Sweden
- Just caught short limitation in Swedish contract
- Tactically issued proceedings in UK for (declaration)
- Settled - quick judicial resolution (Amsterdam airport hotel)



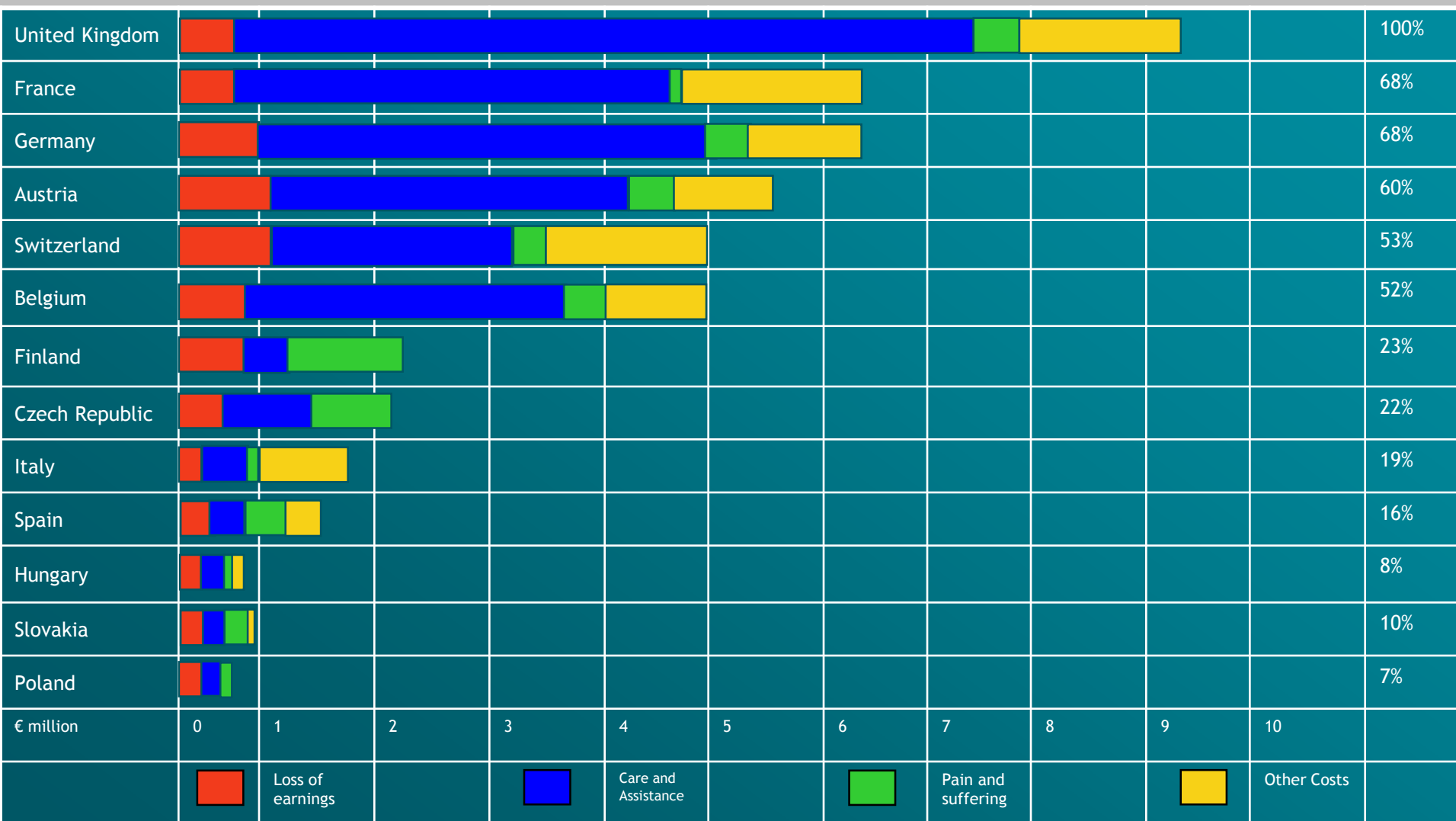
# Overall

- Make a presumptions/talk to experienced legal advisors
- Act quickly (limitation periods can be fatal).
- Consider all relevant matters including cost/evidence and timing
- Do not be frightened to proceed but make sure the value of the claim warrants the risk

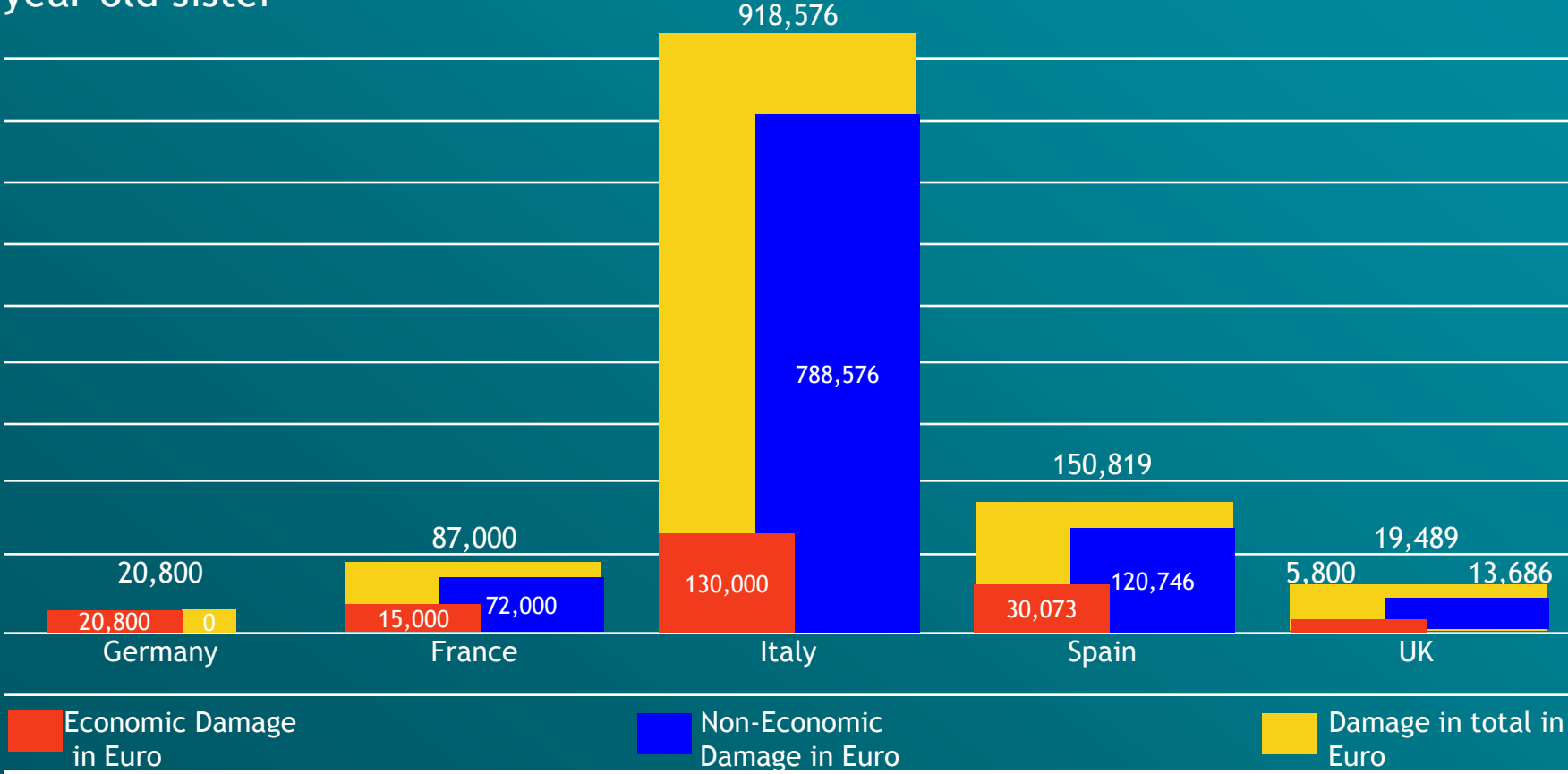
# Engineer Case Study

- English engineers designed robot car park  
- Paris
- French expert investigations
- Dires about failure to allow testing and local parking rates and traffic flow
- Settlement reduced claim from \$12 million to \$3 million

# Quantification of Damages in Europe



Graph 2-17 year old male, pupil/apprentice; survivors: parents and 14 year old sister



# Tip: Settlement is possible

- Although settlement not as common as UK/US, it is possible!
- Settlement discussions are confidential between lawyers only
- Essential to gather information (instruct local lawyers to get court files, medical reports)
- Ensure all aspects of injury are covered in settlement
- Consider whether possibility of future claim for worsening of damage (“*aggravation*”)

## Tip: Watch out for “Aggravation” (a worsening)

- Civil law allows future claims even after a settlement
- For newly discovered injuries or consequences
- Claimant must prove causal link with original accident
- Courts will usually rely on Expert Report to decide if worsening has occurred

## Tip: How to limit “aggravation” claims

- Medical conditions should be described in detail in settlement agreement so it is “benchmarked” against an alleged worsening
- Consider instructing specialist to give opinion on future worsening before settlement
- Set a reserve for claims in which an aggravation is likely (e.g: severe disability, brain injuries ...)

The End



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