

The Vaccine Damage Payments Act 1979 and the coronavirus (COVID-19) vaccine

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In the first post of the second instalment of this two-part series looking at COVID-19 vaccinations, [Elizabeth Boulden](https://www.12kbw.co.uk/barristers/elizabeth-boulden/) (<https://www.12kbw.co.uk/barristers/elizabeth-boulden/>) and [Cressida Mawdesley-Thomas](https://www.12kbw.co.uk/barristers/cressida-mawdesley-thomas/) (<https://www.12kbw.co.uk/barristers/cressida-mawdesley-thomas/>) consider no-fault compensation under the Vaccine Damage Payment scheme (<https://www.gov.uk/vaccine-damage-payment>).

This article was first published as a News Analysis article on Lexis®PSL, which can be accessed [here](https://www.lexisnexis.com/uk/lexispsl/personalinjury/docfromresult/D-WA-A-WVU-WVU-MsSAYWZ-UUA-UZEYAAUW-U-U-AUUU-U-U-U-AZAAWVUAYV-AZUYYWUEYV-WEBUZBEVE-AUUU-U/2/412012) (<https://www.lexisnexis.com/uk/lexispsl/personalinjury/docfromresult/D-WA-A-WVU-WVU-MsSAYWZ-UUA-UZEYAAUW-U-U-AUUU-U-U-U-AZAAWVUAYV-AZUYYWUEYV-WEBUZBEVE-AUUU-U/2/412012>).

Personal Injury and Clinical Negligence analysis: Elizabeth Boulden and Cressida Mawdesley-Thomas, barristers at 12 KBW, discuss the [Vaccine Damage Payments Act 1979 \(VDPA 1979\)](https://www.legislation.gov.uk/ukpga/1979/17/section/1) (<https://www.legislation.gov.uk/ukpga/1979/17/section/1>), its impact on the coronavirus (COVID-19) vaccine and whether it is fit for purpose.

What are the main provisions of the VDPA 1979?

The VDPA 1979 provides for a single, tax-free payment of £120,000 to anyone who has suffered severe mental and/or physical disablement as a result of a vaccination against one or more specified diseases. From 31 December 2020, it will include coronavirus vaccinations, pursuant to the [Vaccine Damage Payments \(Specified Disease\) Order 2020, SI 2020/1411](https://www.legislation.gov.uk/uksi/2020/1411/made) (<https://www.legislation.gov.uk/uksi/2020/1411/made>). The vaccine damage payment scheme under the VDPA 1979 (VDPA scheme) (<https://www.gov.uk/vaccine-damage-payment>), is a state-financed, no-fault scheme, whose barriers to access are meeting the high threshold test of ‘severe disablement’. This means at least 60% disablement, and it has to be demonstrated through medical evidence from the sufferer’s treating clinicians. The applicant must also show that this disablement has been caused by the vaccination(s). Both the level of disablement and causation are decided on the balance of probabilities.

The vaccination which is the subject of the claim must have taken place in the UK or Isle of Man (unless it was part of armed forces medical treatment), and must have (i) occurred at a time of outbreak of a disease, in response to that disease, or (ii) prior to the individual’s 18th birthday, or (iii) in response to one of a handful of specified diseases. VDPA 1979, s 1(3) also enables claims to be made in respect of vaccines given to a claimant’s mother before they were born, as well as potentially in respect of individuals who acquired the disease from a person who was vaccinated against it. A claim on behalf of a child can only be made once the child reaches the age of two. Claims can also be made by the personal representatives of a deceased person, provided that, as per VDPA 1979, s1(1) (a), the deceased was severely disabled as a result of a relevant vaccination ‘immediately before his death’.

The time limit to bring an application is not determined by the date of injury (as is often the case for civil claims), but instead is the later of six years from the date of vaccination or the date upon which the person suffering disablement attains, or would have attained, the age of 21. Further, unlike civil personal injury claims, there is no discretion to extend the time limit to bring a claim; however, there is no specified time limit within which an appeal can be brought to the First-tier Tribunal or Upper Tribunal to challenge the decision below.

Another anomalous feature of the VDPA 1979 is the fact that, as per VDPA 1979, s 1(4), the extent of disablement is assessed by reference to industrial injuries disablement (see section 103 of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) ([http://Social Security Contributions and Benefits Act 1992 \(SSCBA 1992\)](http://Social Security Contributions and Benefits Act 1992 (SSCBA 1992)))), which refers to VDPA 1979, Sch 6). Accordingly, as per SSCBA 1992, Sch 6, para 1(c) 'the assessment shall be made without reference to the particular circumstances of the claimant other than age, sex, and physical and mental condition'. Rather unappealingly, Social Security (General Benefit) Regulations 1982, SI 1982/1408 (<https://www.legislation.gov.uk/ukSI/1982/1408>), Sch 2, (SS(GB)R 1982) sets out prescribed percentages of disability for different types of loss of faculty. There are therefore prescribed descriptions as to what would constitute 'severe disablement' (ie at least 60% disabled) under the VDPA 1979, and any assessment of the extent of disablement under VDPA 1979 should be done in accordance with Schedule 2 (*Secretary of State for Work and Pensions v FG on behalf of John (A Minor)* [2017] EWCA Civ 61, paragraph 46).

What are the implications of the indemnification of the coronavirus vaccine under the VDPA 1979, and do you foresee claims regarding the definition of 'disablement'?

The addition of coronavirus to the list of specified diseases in the VDPA 1979 means that redress is available to those who suffer 'severe disablement' as a result of coronavirus vaccines. Having such a payment scheme ensures that the public can be confident that, should anything go wrong from their acting for the good of the community in receiving the vaccine, they will be compensated (discussed in the BIICL briefing paper 'COVID-19 vaccines: in favour of a bespoke compensation scheme for adverse effects (http://10510_briefing_note_for_cv-19_vaccine_acceptability_-_11_nov_20_-_final.pdf (biicl.org))). This is some acknowledgment of the fact that: '...National immunization programmes not only aim to protect the individual but also to protect society...If individuals are asked to accept a risk (even a very small one) partly for the benefit of society then it seems equitable that society should compensate the victims of occasional unlucky mishaps (Help for Victims of Immunizations', Br Med J, 1973, 1, 758). It is also for the benefit of the state that a no-fault compensation scheme is in place—by having this as the first port of call, litigation may be less likely, which may well significantly reduce the level of any adverse publicity about the vaccine. Any adverse publicity, whether justified or not, is crucial to avoid if vaccine uptake is to be high and for the full benefits of mass vaccination to be felt.

Given that the current list of disablement percentages is very much focused on amputation, loss of sight and loss of hearing, it is not hard to envisage challenges being brought about the type of disablement which meets the threshold for a successful claim. Neurological, psychological, fatigue and pain conditions, for example, have huge variability in the level of disablement they cause and may require a more nuanced approach.

Indeed, *Secretary of State for Work and Pensions v FG on behalf of John (A Minor)* [2017] EWCA Civ 61, was such a case. The initial claim under the scheme was brought on behalf of a child who had developed narcolepsy and cataplexy after having a vaccination against swine flu. The child developed behavioural issues due to constant tiredness, as well as suffering hallucinations and night terrors, and loss of muscle control perhaps 5 or 6 times a day, which sometimes involved spontaneous collapse. The DWP appealed against the Upper Tribunal's allowance of an application under the scheme. While the First Tier Tribunal considered that the child was not 60% disabled at the

time of the assessment, they decided that they could take into account the reasonably foreseeable disablement likely to occur in the future and thus found he was at least 60% disabled, which the Upper Tribunal upheld. On the DWP's appeal, the Court of Appeal held, contrary to the appellant's submissions, that the fact that a condition was lifelong could be taken into account when determining the extent of disablement. The Court of Appeal also confirmed that SS(GB)R 1982, SI 1982/1408, Sch 2 should be taken into account in the assessment of disablement, notwithstanding the fact that the injury did not align with the prescribed categories in the Schedule.

In the current circumstances, is the VDPA scheme fit for purpose?

It is submitted that the VDPA scheme is not fit for purpose and requires updating. It is worth noting that the VDPA 1979 was originally passed as a temporary measure with a plan for follow-up legislation. Two of the key issues with the VDPA 1979 are, firstly, the high threshold of disablement for a claim to succeed, and, secondly, the level of compensation available.

Looking at the first point, the threshold of at least 60% disability to qualify as 'severe disablement' is exceedingly high. For example, in SS(GB)R 1982, SI 1982/1408, Sch 2, loss of a hand (60% disabled) would just meet the disablement threshold, whereas the loss of four fingers on one hand (50% disabled) would not. Further, through SS(GB)R 1982, SI 1982/1408, Sch 2 being taken into account in the assessment of disablement, applicants would have to square their level of disablement with that of someone who had suffered an industrial accident, which would not always be comparable. Interestingly, the VDPA scheme originally had a threshold level of 80% disablement to qualify, which was not changed to 60% until 2002 (pursuant to the Regulatory Reform (Vaccine Damage Payments Act 1979) Order 2002, SI 2002/1592 (<https://www.legislation.gov.uk/uksi/2002/1592/contents/made>), Articles 2 and 4, Sch 4).

The other important limit of the VDPA scheme is that it provides only £120,000 to successful applicants; a sum which, in most cases, will be a fraction of what would be received for a comparable level of disablement in a civil claim. Injuries which do surpass the high threshold of 60% disablement, such as total loss of sight, would be very much undercompensated under the VDPA scheme: for example, in a case of total blindness, even before special damages such as future loss of earnings or care needs are considered, the Judicial College Guidelines range for PSLA alone is roughly double the VDPA scheme's limit, being in the region of £229,260–£252,180 (set out in Chapter 5, subsection (A)(b)).

What (if any) is the interplay between product liability and the VDPA 1979? Will Brexit have an impact?

The difference between the VDPA 1979 and product liability under the Consumer Protection Act 1987 (<https://www.legislation.gov.uk/ukpga/1987/43/contents>) (CPA 1987) is the requirement to prove fault in the latter. As per CPA 1987, s 3, the claimant must prove that the safety of the product was not such as persons generally are entitled to expect. Given the shortcomings of the scheme under the VDPA 1979, prospective claimants may well turn to the CPA 1987 for redress, although they will be trading off the chance of a higher award against the risks entailed in having to prove fault. Following Brexit, The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/696 (<https://www.legislation.gov.uk/uksi/2019/696/contents/made>), s 6, Sch 3, will modify the CPA 1987, most significantly changing CPA 1987, s 2(2)(c) so that importers of the product into the UK will also become liable for any damage caused by defective products.

However, the issue with both the VDPA scheme and the CPA 1987 is the requirement to prove causation, ie that the vaccine caused the injury. This is likely to pose a significant hurdle to many claimants. While some injuries, such as an immediate allergic reaction or extreme immunological response to a vaccine, would quite clearly be linked to the vaccine, difficulty is likely to arise in cases

involving injuries which materialise later or which could have a number of other causes, such as brain or neurological conditions. For example, in the case of *Loveday v Renton (No 1)* [1989] 1 Med. L.R. 117, the court found that it was not proved that the pertussis vaccine could cause permanent brain damage in young children.

It is suggested that causation might be easier to establish under the CPA 1987 than under the VDPa scheme: in the product liability case of *Sanofi Pasteur* Case C-621/15, the Court of Justice allowed courts to find that causation had been established in cases of scientific uncertainty, where the research neither established or excluded a causative link between the vaccine and the injury. However, this was with the control mechanism that the evidence adduced had to be 'sufficiently serious, specific and consistent to warrant the conclusion that [...] a defect in the product appears to be the most plausible explanation for the occurrence of the damage'.

Interviewed by Halima Dikko

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