



Insurers' Rights Of Subrogation – Clash With The "Public Interest"?

The insurance industry has this in common with the legal profession: we are aware and have been for some time that we are not popular with the general public! That this is so can be demonstrated by the approach the media takes to us. Like all stereotyping there is a core of truth to some of the criticisms made, but they are frequently vastly overstated and/or based upon either facts which are nothing of the sort or which are at least only part of the story. We all know that there is little that can easily be done to alter such perceptions.

In a variety of areas the insurance industry (and the employers who pay for liability insurance) can justifiably feel that they are not treated fairly by Government, the Trades Unions, and the Courts. In short, there seems to be an assumption that employers and their insurers are quite literally bottomless pits of cash. This is not to say that any of us should be seeking to defend those industry sectors which have produced disproportionate levels of claims. It can strongly be argued that there were quite literally many scaffolding businesses which did not deserve to exist in the sense that they have for too long made profits at the expense of both their employees' safety, and at the financial expense of their insurers. Perhaps the public must get used to paying more for such services: of course that will result in further adverse comment in the media. I do not seek to make an unfair point here - there are perhaps also some firms of solicitors whom although they do not actually physically injure their clients, have in the past been able to financially damage them without having to pay a premium for insurance which reflects their poor practice. It is to be hoped that both these categories of business will be forced to either dramatically sharpen up their acts, or cease to exist.

A good example of the attitude of government and the media occurred following the fire at Yarl's Wood detention centre in February 2002. A representative of the underwriters was interviewed on Radio 4's World at One, and there was a sense of incredulity on the part of the radio interviewer when the representative of underwriters explained that they were entitled to, and therefore most certainly would, pursue a subrogated claim arising from the loss under the Riot Act of 1714. The suggestion appeared to be that this was somehow immoral! It was clear that the Government were extremely angry that this should be the case. Both the Government and the media appeared to miss (or ignore) the more significant broader issue arising from the fire: that although inmates of the centre had started it deliberately its severity was substantially contributed to by the fact that there were no sprinklers. It seemed that the Government had chosen to make a financial saving in this respect when construction took place, and yet (quite rightly) that no private sector operator would have been allowed to construct a building which created such a physical risk to its inhabitants, and a financial risk to its insurers, despite the obviously high risk posed by the intended inhabitants.

In this somewhat grim context, insurers are bound to seek opportunities to recoup losses into their overall claim "pot" - that is to achieve recoveries from outside the insurance sector. One area where this could be achieved is where properties have been caused to subside due to the actions (or more likely inactions) of public authorities in their management (or non-management) of trees. The annual cost to buildings insurers of subsidence claims is in the region of £300m, although this will vary from year to year. A great many claims are caused by trees for which the



local authority is responsible. The decision of the House of Lords in *Delaware Mansions v Westminster City Council* (2001) caused a degree of comment not only due to the legal issues raised, but also as the "£1-million" tree case. However, from insurers' point of view the greater aggregate benefit is in effectively pursuing the greater number of claims in the £5-10,000 bracket.

Many councils will argue that where sufficient evidence is provided to them at an early stage they will take sufficient measures to prevent an established legal nuisance from continuing. Many adjusters pursuing such claims would be doubtful of this, and the arguments will doubtless rage on. Much of the law favours the claimant interest - most recently the Court of Appeal decision in *L E Jones v Portsmouth Borough Council* (2002) which emphasised that local authorities could not insist upon a long drawn out period of trial and error before finally accepting that a tree had become a nuisance. There is however a sub-plot to the attitude of public authorities to such claims, namely, that trees are in the "public good" and that consequently the cost of damage caused by them should not fall on the public purse, but instead should fall randomly on the individuals affected and hence upon their insurers. One can have some sympathy with the local authorities, as whenever they do carry out or sanction remedial action in relation to trees the environmental lobby will leap into action, and will create adverse press coverage. However, as a matter of principle, the suggestion that private individuals/insurers should subsidise the community at large is profoundly unjust: the public at large cannot be allowed the benefit of tree coverage without also bearing the burden of the costs arising. The existing law of nuisance reflects this.

Keith Gaston
Partner
Gaston Whybrew

Article from Claims Professional Magazine –Oct 2003