

The Key

Disclosure of electronic material

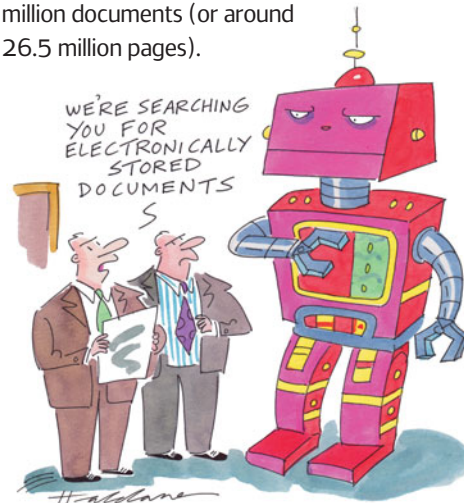
It is now essential – rather than a luxury – to be able to conduct electronic searches efficiently.

Described by Lord Justice Jackson in his Review of Civil Litigation Costs (preliminary report) as “the search for electronically stored documents and information and organisation of that material for litigation”, e-disclosure is currently a very hot issue. Below, we provide a brief overview of the reasons for this growth and outline some of the implications facing insurers.

Over the last 20 years, technology has revolutionised the way in which people work. Email is now the prevalent method of communication, distribution lists may include hundreds of people and a vast amount of data can be stored on a memory card no bigger than a stamp.

This change has dramatically increased the number of documents produced. Although a

traditional disclosure exercise may have involved a prolonged search through a client’s archives, the actual amount of documentation produced was often insubstantial. Nowadays, even a medium-sized case may generate a huge amount of material; retrieving 500Gb of data is not unusual and while this information can be stored on a book-sized hard drive, it could contain over seven million documents (or around 26.5 million pages).



Printing, sorting, reviewing and copying this amount of data using standard disclosure methods would be prohibitively expensive in time and costs. However, technological solutions have developed to process digitally both electronic and hard-copy documents.

E-disclosure processes

The most common example of an e-disclosure process is the elimination of identical documents, inelegantly known as “de-duplication”. For example, if a set of meeting minutes is emailed to 10 people, there will, in theory, be at least 11 identical copies of the document and 11 identical copies of the email.

De-duplication uses an algorithm to scan, code and index documents and then simply removes duplicates. This process alone usually reduces the volume of documents by 20-30% (even more in larger cases).

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The pool of documents requiring manual review can be further reduced by searching for near-identical documents (i.e. above 95% similarity) or those that are clearly irrelevant. Documents may be given topical tags (enabling more efficient searching and filtering) and email threads can be pulled together to be read in a logical order, all of which are of benefit when analysing and preparing a case. More nascent processes include concept searches, where software will analyse the juxtaposition and frequency of keywords within a document, and then automatically pull together a bundle of documents relating to a particular topic.

The growth of specialised e-disclosure service providers makes these processes readily available, and affordable, to nearly all litigants. As technology improves and these services are increasingly utilised, the costs and timescales involved will fall.

The enthusiasm of the courts

The courts are also aware of the problems caused by the increased volume of electronic documents and are taking steps to ensure there are sufficient guidelines to clarify what is expected of litigants. The Civil Procedure Rules already contain provisions on e-disclosure (see Practice Direction 2A to Part 31). However, in practice, these are not always followed by the parties and the approach of the judiciary to e-disclosure is not always certain.

In July 2009, Senior Master Whitaker's working party on e-disclosure produced a draft updated practice direction. This sets out procedures for dealing with e-disclosure – for example, the early consideration and the use of an ESI (electronically stored information) questionnaire. Similar guidelines can already be found in the Chartered Institute of Arbitrators' protocol for e-disclosure and in the US Federal Rules of Civil Procedure.

The new e-disclosure practice direction and questionnaire will take effect from 1 October 2010 and will apply to multi-track cases (including those in the Technology and Construction Court).

At the end of 2009, Senior Master Whitaker gave a taste of what was to come by annexing the ESI questionnaire to his judgment in *Gavin Goodale v The Ministry of Justice* [2009] EWHC B4.1 (QB).

Documents relevant to a particular topic in dispute can be called up onscreen, and analysed there and then.

Recent case law also makes it clear that simply waiting for the revised practice direction is not an option. In *Earles v Barclays Bank Plc* [2009] EWHC 2500 (QB), the successful defendant's costs were reduced by 50% because it did not disclose electronic documents: the bank had mistakenly taken the view that the electronic documents in question were irrelevant and their disclosure would be disproportionate.

An opportunity not a threat

Daunting upfront costs, the use of complicated new technology and the need to invest in a new range of skills may not appear to be a particularly appealing prospect. Yet when the bigger picture is considered e-disclosure offers more opportunities than threats. The initial processing of documents (for example de-duplication) may cost thousands of pounds but this should be offset against the more incremental (but generally higher) costs of conducting a traditional review process (i.e. by printing and reviewing each document). The simple de-duplication of even 20% of recovered

documents is likely to save far more in lawyers' fees than the cost of running the process.

The indexing and tagging of documents makes document management far easier and this becomes especially relevant in cases approaching trial. Documents relevant to a particular topic in dispute can be called up onscreen, and analysed there and then. This is a far quicker and more responsive system than having to refer to the paper files and search through reams of paper for potentially relevant documents.

The ever growing numbers of electronic documents – and the desire of the judiciary to manage the disclosure procedure efficiently – make the increased use of e-disclosure inevitable: it will become the norm and quickly. Insurers should not seek to reject or avoid this but see it as an opportunity to assess their case at an early stage and reduce expenditure on legal fees.

Drawing up a plan of action

Although technology can give a great deal of help, the principles behind standard disclosure still remain. It is essential, therefore, that lawyers develop the necessary technical skills to deal with e-disclosure issues. Indeed, one of the recommendations in Lord Justice Jackson's Review of Civil Litigation Costs (final report) is that e-disclosure should form part of training programmes for solicitors, barristers and the judiciary (see chapter 37, para 4.1(i)).

The early involvement of senior lawyers is necessary to construct a proportionate disclosure programme, liaise with the opposition (to decide on relevant keywords, sources and date ranges) and to develop an adequate plan of action. Once this is agreed – or at least discussed – the appropriate service provider

and software package can then be selected, managed and continually reviewed.

Failure to manage such issues adequately from an early stage can prove expensive. In *Vector Investments v Williams* [2009] EWHC 3601 (TCC), the successful claimant was ordered to pay £20,000 towards the defendant's costs after a large number of duplicate and irrelevant documents were disclosed. Similarly, in *Digicel (St Lucia) Ltd v Cable & Wireless* [2010] EWHC 774 (Ch), there was a failure to discuss keywords at the start of the litigation and the defendant was ordered to repeat a disclosure process estimated to include 1.1 million documents and to cost approximately £2m.

An essential skill

Clearly insurers should evaluate each case on its merits but they should be wary of underestimating the usefulness of e-disclosure solutions, especially on the basis of upfront costs. The volume of reviewable documents in litigation can be overwhelming but this does not diminish the need to apply the disclosure provisions of the Civil Procedure Rules. E-disclosure should not be viewed as an optional luxury: it is now essential to carry out adequate electronic searches and to instruct lawyers and service providers with the technology and skills to do it – failure to do so may not only inhibit your own case but also incur serious cost consequences at court.

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Toxic Sofas

Largest consumer group action in the UK.

In June 2008 Nottingham Crown Court made a group litigation order relating to consumers who had allegedly suffered extensive skin reactions from sitting on sofas that were contaminated with fungicide. The sofas had been manufactured by Chinese companies Linkwise and Eurosofa, imported into the United Kingdom and sold by numerous high-street retailers. The group action was launched against three of the UK retailers – Argos, Land of Leather and Walmsleys. All three have since admitted liability.

Over 2,000 people lodged proceedings in the United Kingdom and it was alleged that up to 50,000 UK households could have been affected. The contaminated sofas gave rise to what is believed to be the largest consumer group litigation in UK legal history.

On 16 September 2008 the court ruled that further investigation into the medical evidence was

necessary, and stated that greater clarity was needed on affected sofa models and batch numbers. In October 2008 an advertising campaign was launched to warn the public of the potential link between skin rashes and the affected sofas.

The burns were caused by dimethyl fumarate, which is known to cause skin irritation. The chemical is used as a fungicide and was contained in sachets that were placed inside the sofas for protection against mould during transportation and delivery. Exposure to dimethyl fumarate can allegedly be fatal; it was also claimed that the chemical caused rashes and pain similar to severe sunburn or scalding. The use and manufacture of the chemical has been banned under EU biocides legislation since 1998, but it was legal to import it into the European Union until 1 May 2009.

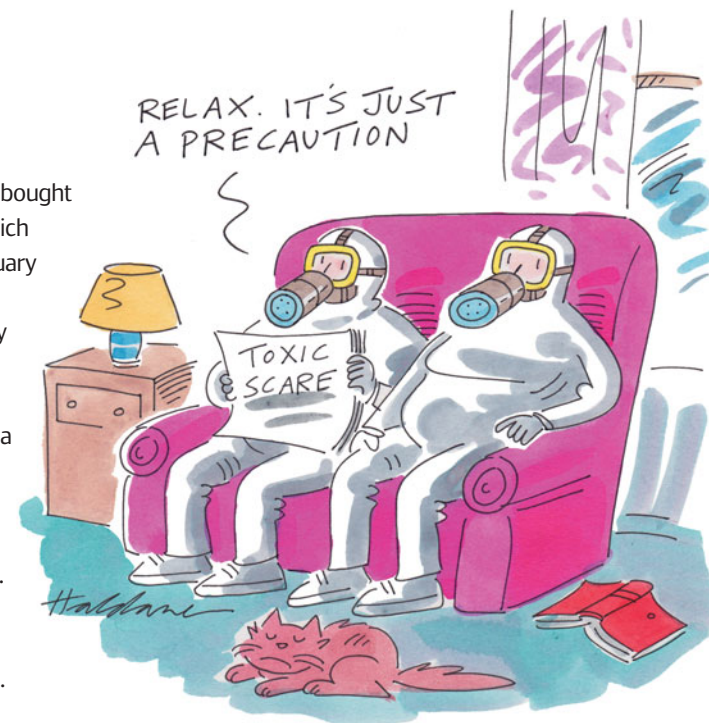
On 26 April 2010 the High Court announced that consumers injured by the toxic sofas will share a payout of up to £20 million. The judge heard that a claims-handling agreement had been reached which could potentially benefit between 1,500 and 2,000 claimants through a series of "swift" payments. The victims are expected to receive between £1,175 and £9,000 each, depending on the severity of their symptoms – the claims-handling agreement is understood to relate only to what were described as "non-severe" cases.

However, 350 customers who bought sofas from Land of Leather, which went into administration in January 2009, are not entitled to compensation. Although liability had been admitted, Land of Leather's insurer has refused indemnity for the claims, citing a breach of policy. This decision was upheld by the courts in April 2010 and is likely to be referred to the Court of Appeal. Legal proceedings are ongoing for a further 3,000 cases in which liability remains disputed.

The dimethyl fumarate claims litigation has demonstrated how well the UK group litigation order process can resolve claims on a mass scale, and is likely to influence the way in which future group actions are conducted. It is also likely to affect UK retailers' dealings with foreign suppliers and their insurance requirements. For example, UK retailers would be wise to:

- request far more product-related information from their foreign suppliers (including storage and preservation guidance);
- review their supplier terms and conditions; and
- employ more due diligence and quality control over the products supplied to them.

It is also advisable for retailers to review their product recall policies; they should have efficient systems in place to identify all relevant



documents, suppliers and vendors and to allow for potential recovery against suppliers immediately should the need arise. Equally, their insurers should ensure that they can fully assess risk in such circumstances, and that their insureds act appropriately.

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Don't forget strike out

Webb -v- Macdonald QC & Dakers Green Brett.

Detailed notes on the solicitors' file, which supported the Courts approach in *Moy v Pettman*, were vital in the decision of Mr Justice Vos to strike out a claim against a barrister and solicitor. Kennedy acted for the solicitors.

The Claimant instructed the solicitors (DGB) and barrister (Macdonald) to defend him in a substantial action by Lloyds Bank for sums due under a corporate guarantee, which he signed whilst managing director of a (now) insolvent company. The Claimant had granted a legal charge over his interest in his home to the Lloyds. Lloyds demanded money due under the guarantee when the company went into voluntary liquidation. The Claimant entered into an Individual Voluntary Arrangement (IVA) with his creditors which did not include his home. The Bank issued a claim against the Claimant seeking possession of his home and claimed sums due to repay the sum due under the guarantee. Whilst Lloyds included its claim in the IVA for dividend purposes only, it also stated that it had not relinquished its right to rely on its security over the Claimant's home.

The Claimant raised various defences including that the bank's proof in the IVA amounted to a release of security over his home. Counsel advised that the IVA argument was unlikely to succeed at trial and the claim by Lloyds was eventually settled by negotiation immediately before trial. The Claimant subsequently

commenced proceedings against DGB and Macdonald alleging that they had negligently advised him to settle with Lloyds at too high a level and, in particular, that Counsel had "negligently advised him" that he would withdraw from the case if he did not accept Lloyds' settlement offer. The Defendants applied for summary judgment (or strike out in old money).

CPR Part 24.2 provides that the court may grant summary judgment against a claimant on the whole or part of a claim if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial. The inclusion of the word "real" means that the respondent has to have a case which is better than merely arguable. The test in Part 24.2 sets a high bar and is often difficult to overcome in document intensive and fact sensitive professional negligence claims.

Held: Vos J found that the allegations made against Macdonald and DBG were unsustainable and there was no real prospect of the claim succeeding. He specifically noted that the Defendants' advice and approach (backed by the solicitor's detailed file notes) was entirely

prudent and realistic and had been given in a sensible and balanced way. He therefore held, following Lord Caswell in the leading case of *Moy v Pettman*, that the advice provided was such that no reasonably competent counsel of Macdonald's level of seniority, or for that matter a reasonably competent solicitor, could have given. Therefore, the Claimant's prospect of



Note not non-existent. We should also add that DGB (as solicitors) had another layer of protection via a reasonable reliance upon Counsel defence, but this was not required due to the general finding in favour of the legal team.

Comment: This case highlights that:

- Summary judgment can be successfully used in professional negligence claims which do not involve substantial dispute as to the facts. In this case the solicitor had made detailed attendance notes of all the meetings, discussions and conferences, which provided valuable contemporaneous evidence and the Claimant was drawn into admitting that the contents of the notes were not disputed in any essential respects; and
- Cases do not have to be simple to make them suitable for summary judgment. The underlying bank guarantee claim was extremely complex and involved volumes of documentation. However, the issue for determination on summary judgment in the professional negligence claim was whether the advice on settlement was such that no reasonably competent solicitor or barrister could have given. Negotiation is very much a matter for the solicitor and, as we all know, it is not an exact science, which is why it is encouraging to see Vos J conclude that the settlement was within a reasonable range of possible outcomes.

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“Who’s to say who’s an expert?” Part 3

Paul Newman (1925-2008)

In The Key (May 2010), we looked at how French court experts work. This time we focus on Belgium.

A new procedure for expert evidence came into force on 1 September 2007 with a reform of the Code Judiciaire (CJ). The changes tackled long-standing criticisms that the existing procedure was too long, too complicated and too expensive.

The effect of the reform remains to be seen, however, as the intended improvement is to be achieved through enhanced judicial control of the conduct of the expert’s investigation. In the past, though, Belgian courts have proved notoriously slow.

Using expert evidence

A judge may appoint experts on technical, scientific or other specialised issues if they think this is necessary to resolve a case or where legal action is threatened (see article 962 CJ).

So a court can appoint an expert before a substantive action is launched – a practice we have already encountered in France – as an interim protective measure. A judge might want to do this, for example, in order to protect a party’s rights while investigating a temporary state of affairs; to limit continuing exposure to loss; or to determine disputed factual issues early on. Otherwise, appointing an expert is deferred until the parties have filed pleadings and disclosed documents.

Article 875 bis CJ requires a judge to limit evidence-gathering to the steps that are necessary to determine the litigation by the simplest, fastest and least burdensome means. This echoes the English principle of proportionality when using expert evidence.

The appointment

The court appoints an expert either on its own initiative or on a party’s application. The judge usually only appoints a single expert, unless more are necessary (see article 982 CJ).

As in France, the courts maintain registers of experts from which the appointment is usually made. Although the court makes the formal appointment, the Belgian regime is not as rigid as its French counterpart. The choice is not limited to experts with formal court accreditation. In addition, the parties can agree to nominate the proposed expert, who will then be appointed provided the court is satisfied that they have the suitable expertise to enable the court to understand and resolve the issues in dispute.

The parties can also instruct their own experts privately to advise on technical issues. These private specialists usually participate in (and shadow) the investigation carried out by the court-appointed expert, who may ask them for their views on the issues under examination. However, their role is not a formal one, being first and foremost to support their client’s arguments. Their conclusions will usually be omitted when the court expert finalises his or her report.

The investigation

The order for the investigation (served by the court) usually:

- summarises the circumstances rendering the investigation necessary;
- identifies the appointed expert(s);
- describes precisely the scope of the investigation; and
- fixes the date of a case conference, unless this is waived by the judge and the parties.

The expert has eight days to refuse the appointment (giving reasons for doing so) or – unless a case conference is ordered – to notify

Once an investigation is ordered, the parties are obliged to collaborate with the expert. If they do not, the judge can draw any appropriate conclusions.

the place, date and time when they will start their investigation. The expert informs the parties, judge and lawyers by registered letter.

Once an investigation is ordered, the parties are obliged to collaborate with the expert. If they do not, the judge can draw any appropriate conclusions.

A non-participating party can still become involved without further formality at any stage of

the investigation, including attending (or being represented) at meetings or sending written observations to the expert (see article 980 CJ).

The investigation is, however, treated as having complied with the *principe du contradictoire* (the natural justice – as discussed in the context of French proceedings). Consequently, a defaulting party cannot challenge decisions made or actions taken during the investigation.

The case conference

The case conference takes place in chambers in front of the judge ordering or supervising the investigation. The parties must attend but the expert may be contacted by telephone or other means of telecommunication (such as video conferencing, for example), unless a party or the judge requires their personal attendance.

At the case conference, the judge deals with:

- the scope of the investigation and its possible amendment;
- the place, date and time of the subsequent activities of the expert;
- the need for assistance from technical advisers;
- provision for the expert’s fees;
- the period of time to be allowed for the parties to make observations on the expert’s draft report; and
- the period for filing the final report.

All this is new, forming part of the court's more proactive role in managing and supervising the investigation. If the initiating order does not provide for a case conference, the judge can give the above directions when ordering the investigation.

Before the conference, the parties must send the expert a list of all the relevant documents. If there is no conference, this must be done before the expert begins their investigation.

Judicial control

The reform puts the judge very much in overall control of the investigation, which is very different from the position in France. Article 973 CJ sets out a detailed procedure, stipulating that the judge:

- will follow the course of the investigation and supervise it so as to ensure compliance with time limits and the *principe du contradictoire*;
- may (for reasons of urgency) abridge time limits or adjust procedural formalities;
- may attend the investigation process personally (however, unless he or she has been specifically asked by the parties to take this step, the judge must inform the experts, parties and their counsel – including any non-participating parties – that he or she will do so);
- will determine any disputes relating to the investigation, whether between the parties or with the expert, including requests to replace the expert or to extend (or prolong) the investigation. Such disputes are dealt with by summonses heard in chambers, with deadlines for filing briefs, the hearing and the reasoned determination of issues.

The conduct of the investigation

As in France, the expert usually instigates a series of meetings or inspections. They draw up

notes of meetings, sending a copy to the judge, the parties and their counsel.

If the deadline for filing the final report exceeds six months, the expert will draw up a progress report every six months (see article 974 CJ). This is then sent to the judge, the parties and their counsel, detailing the investigations already carried out, the investigations since the last report and the investigations still to be carried out.

If the expert wants an extension of time for filing the final report, they may ask the judge, giving reasons for their request. The judge can refuse the extension if they think it is unjustified and must give reasons for their refusal. If the deadline is exceeded without a prior request for an extension, the judge will summon the parties for an explanation.

Unlike in the French procedure, the Belgian expert must attempt conciliation between the parties. If they do reach agreement, the expert must:

- declare the investigation to have no further purpose;
- lodge at court the terms of settlement, the parties' documents and notes, plus a detailed account of the expert's fees and expenses; and
- send the parties (and their lawyers) a copy of the terms of settlement, plus an account of the expert's fees and expenses.

ANY CHANCE OF
APPLYING YOUR EXPERT
KNOWLEDGE TO MY
CRYPTIC CROSSWORD?



Otherwise, on completing their investigation, the expert will issue their proposed findings as a provisional opinion (see article 976 CJ). If there has been no case conference, the

expert will fix a reasonable deadline (taking account of the nature of the litigation) for the parties to file observations. The expert will not take into account any observations received

after this deadline, and will exclude them from the pleadings.

Filing the report

If there is more than one expert, they will prepare a single report with multiple views, stating reasons for any differing opinions. The report must be signed by all the experts.

The original final report, the documents and notes of the parties, plus a detailed account of the expert's fees and expenses, are then filed at court. The report must:

- be dated;
- record who attended the meetings, their verbal statements and their requests;
- record documents and notes disclosed by the parties (reproducing them to the extent necessary to discuss the issues); and
- be signed by the expert(s) (otherwise, the report will be null and void), preceded by the following statement: "I swear that I have fulfilled my assignment in honour and conscience, with accuracy and probity."

On the date of filing, the expert needs to send a copy to the parties and their counsel.

The judge does not have to follow the expert's opinion.

If the report does not clarify the issues sufficiently, the judge can:

- order a further investigation by the same expert;
- instigate a new investigation by another expert, who may ask their predecessor for any relevant information;

- hear a statement from the expert; or
- at the request of the parties, hear their technical advisers.

If the judge hears a statement from the expert, then the expert can refer to the relevant documents during the hearing. The expert's statement will be minuted in a report signed by the judge, the court clerk and himself.

As parties may be joined to the proceedings at any time during their course, the Code Judiciaire provides that the outcome of the investigation cannot be raised in argument against any party joined after delivery of the provisional report unless that party waives this right. Parties joined after the investigation has started cannot, however, require it to be restarted in the absence of prejudice by the expert.

Challenging the expert

A party can challenge the appointment of an expert. However, they must have good reasons for doing so, such as:

The challenge must be made within eight days from the party becoming aware of the grounds for objection. The expert then has eight days to accept or dispute the challenge.

- the inappropriateness of the expert's skill and knowledge to the issues at stake;
- the expert's pre-existing relationship with the other party; or
- the expert's previously expressed views

suggesting that they will not give an unbiased opinion.

Any expert aware of a reason for challenge must declare it immediately and stand aside if they are not released by the court or the parties (see article 967 CJ). If chosen by the parties, the expert can only be challenged for reasons occurring (or becoming known) after the appointment.

Any challenge must be made before the case conference – or, if there is no such conference, before the expert begins their investigation – unless the grounds for challenge have only come to light subsequently. The challenge must be made within eight days from the party becoming aware of the grounds for objection. The expert then has eight days to accept or dispute the challenge.

The judge determines the issue, having heard the parties and the expert in chambers. If the challenge is dismissed, the challenging party may be liable to pay damages to the expert, who, if awarded such damages, cannot remain in that role. If the challenge is allowed, the judge will automatically appoint a new expert, unless a choice is agreed.

If requested, the judge may replace an expert who does not fulfil their assignment correctly (see article 979 CJ). If the parties make the request jointly, the judge must replace the expert. The judge determines the application in chambers, giving reasons for the replacement, and immediately appoints a new expert.

A replaced expert must lodge the documents, notes of the parties and an account of their fees (plus expenses) at court within 15 days.

The expert's remuneration

At the case conference, the judge will:

- estimate the overall cost of the investigation or the method of calculation;
- fix the amount of any deposit and a deadline for making it; and
- determine how much of the deposit can be released to the expert.

On payment, the court or credit company will inform the expert and pay any part approved for release to them. The judge may draw the appropriate inferences if the deposit is not paid by the deadline. If the expert considers the deposit or the part released insufficient, they can ask the judge for a supplementary deposit or additional release. However, the judge will refuse the application (giving reasons) if they think it is unjustified.

The expert must submit a detailed account of fees and expenses with their final report. If there are several experts, the collective account must indicate their shares clearly.

Once the report is issued, the judge will fix the amount of the fees and expenses (unless the parties agree these figures) without regard to the possible damages and interest. In doing so, the judge will take special account of the rigour of the investigation, the compliance with deadlines and the quality of the investigation undertaken.

The assessment is enforceable against the funding party or parties. When the court gives its final judgment, these sums will be assessed as legal costs.

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Australia: new insurance rules

The country's Insurance Contracts Act is about to be updated.

In Australia, most insurance contracts are governed by the Insurance Contracts Act (the Act). Introduced in 1984, it modifies the common law in many important respects. However, on 17 March 2010, the Insurance Contracts Amendment Bill 2010 (ICAB) was finally introduced into the Australian parliament. It will probably receive royal assent later this year, after which the ICAB provisions will be incorporated into the Act.

Many of ICAB's provisions are similar (if not identical) to those contained in the exposure draft bill published by parliament three years ago. However, ICAB differs in several significant ways to the 2007 exposure draft. Most importantly, the long-awaited proposed amendments to sections 40 and 54 of the Act are not included in ICAB.

Duty of good faith

A failure by a party to a contract of insurance to comply with the duty of utmost good faith implied in a contract is also now a breach of the Act (section 13). In relation to an insurer, the Australian Securities and Investments Commission (ASIC) may exercise its powers under the Corporations Act 2001 dealing with the variation, suspension and cancelling of

financial services licences as if the insurer's failure to comply with the duty of utmost good faith amounts to a failure to comply with a financial services law. This provision was not contained in the 2007 exposure draft.

In addition to ASIC's powers relating to a breach of the duty of utmost good faith, a new section 11F of the Act gives ASIC the power to intervene in any proceedings relating to any matter arising under the Act.

Duty of disclosure

The objective test of an insured's duty of disclosure is amended by the substitution of a new section 21(1)(b). This new provision attempts to clarify the objective test by reference to one non-exclusive criterion – namely, “the nature and extent of the insurance cover to be provided under the relevant contract of insurance”. ICAB therefore does not adopt the two other non-exclusive criteria contained in the 2007 exposure draft.

In relation to eligible contracts of insurance, an insurer will (under section 21A) have to ask a proposed insured certain specific questions if it wants to be able to enforce the insured's duty of disclosure. Under section 21B, the insurer will have to ask these questions both at the start of the policy and on renewal, but not on any variation, reinstatement or extension of the policy.

But insurers will not be entitled to ask catch-all questions at the start (or on the renewal) of a policy, otherwise they will be treated as having waived the insured's duty of disclosure.

On renewal, an insurer may, however, choose to seek updates to the answers previously provided by an insured, rather than go through all the original questions again.

Insurers' obligation to inform

Clause 22 of ICAB imposes new requirements on insurers when it comes to informing insureds about their duty of disclosure. In particular, they must tell insureds:

- (in writing) that the duty of disclosure applies right up until the time they enter into the proposed contract; and
- about the general nature and effect of sections 21A and 21B of the Act (if the contract is an eligible contract of insurance) and the effect of section 31A (if the contract is a contract of life insurance).

If an insurer does not comply with these provisions, then it cannot rely on any failure by the insured to comply with the duty of disclosure unless that failure is fraudulent.

Life insurance

The provisions of ICAB relating to life insurance

include the unbundling of contracts (see further below) and new remedies for non-disclosure and misrepresentation, which are essentially the same as those set out in the 2007 exposure draft.

The new “unbundles” life insurance contracts that combine more than one type of life

The new “unbundles” life insurance contracts that combine more than one type of life insurance cover, so that different remedies for non-disclosure or misrepresentation will apply to each particular type of cover.

insurance cover, so that different remedies for non-disclosure or misrepresentation will apply to each particular type of cover.

The remedies contained in section 29 of the Act are now limited to contracts of life insurance that contain a surrender value or provide cover in respect of death. Other types of life insurance are dealt with under the new section 28(1A), which offers the same remedies as section 28 in its current form.

As regards any life insurance contract to which section 29 applies, an insurer can now only avoid the contract on the basis of non-disclosure or misrepresentation if the insured would not have entered that particular contract (as opposed to another standard life insurance contract) on any terms.

Third party beneficiaries

ICAB contains a raft of changes regarding the rights and obligations of third party beneficiaries under insurance contracts. Most of these amendments are consistent with the changes contained in the 2007 exposure draft.

Section 4.1 of the Act is amended by ICAB to give third party beneficiaries the same rights as an insured under a contract to require the insurer to inform them:

- in writing about any admission of indemnity in relation to a claim; and
- whether the insurer intends to conduct the proceedings.

Under subsection 48(1), a third party beneficiary also has a right to recover from the insurer even though they are not a party to the contract.

Summary

While many of the amendments contained in the 2007 exposure draft have found their way into the 2010 bill in substantially the same form, some provisions are notable for their omission – in particular, the proposed amendments to sections 40 and 54 of the Act.

Additionally, the proposed change to section 31 of the Act – which extends a court's discretion to review an insurer's ability to reduce its liability to nil – has not been implemented. This is good

news for insurers, given that the proposed amendment offered a likely means for insureds to challenge insurers' denial of cover for innocent non-disclosure or misrepresentation.

Most of ICAB's provisions will take effect from the date of royal assent. However, the provisions requiring insurers to provide certain notices regarding disclosure to insureds are the key exceptions to this general start date. These amendments will take effect

18 months after the new legislation comes into force. This is to give insurers a chance to amend their business practices in response to the new rules regarding the operation of the duty of disclosure and provision of associated notices.

The other provisions of ICAB that will have a delayed start are the Schedule 5 amendments regarding changes to the remedies for particular contracts of life

insurance. These new rules will come into operation 12 months after the date of royal assent so as to give insurers a chance to factor into their affairs the changes to available remedies.

Under subsection 48(1), a third party beneficiary also has a right to recover from the insurer even though they are not a party to the contract.

When implemented, the ICAB amendments to the Act will have a significant impact upon insurers from an administrative perspective, particularly regarding the form and nature of notices to be provided to insureds. But at least insurers will have a 12-18 month breathing space in which to update their businesses practices to accommodate most of the important changes.



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Professional Indemnity Insurers Beware

Professionals risk losing their immunity as experts.

Generally speaking, professionals are held accountable for their actions. One major exception though is when they act as expert witnesses. For public policy reasons, such witnesses enjoy immunity from both civil and criminal legal action. But this principle is about to be reviewed by the UK Supreme Court and may well be abolished altogether. If this happens, there will be serious implications for insurers operating in the professional indemnity market.

It is a well-established principle of law that witnesses giving evidence in good faith should be protected from liability arising from their testimony. This principle has been extended by the courts to professionals who act as expert witnesses. They are accorded blanket immunity, it is said, so that they will be able to give their evidence fearlessly.

However, expert immunity has come under scrutiny in recent years and the case of *Paul Wynne Jones v Sue Kaney* [2010] EWHC 61 (QB) is set to challenge the principle.

Reasons for immunity

The leading authority for expert immunity is the Court of Appeal decision in *Stanton v Callaghan* [2000] QB 75. In a claim against insurers, the

Stantons relied on the evidence of an expert witness – a Mr Callaghan – who subsequently revised his views, thereby undermining the claim. The Stantons sued but the Court of Appeal upheld Mr Callaghan's claim to immunity.

The court held that there was no justification for distinguishing between an expert and a lay witness. Just like other witnesses, experts are covered by the general policy established in *Saif Ali v Sydney Mitchell and Co* [1980] AC 198 that trials should be conducted “without avoidable strains, intentions of alarm and fear in those who have a part to play in them”. The public interest in ensuring experts are not deterred from testifying transcends the need to provide a remedy for individuals.

However, even in *Stanton*, doubts about the principle of blanket immunity were evident, with Lord Justice Chadwick saying that “the proposition that the defendants can escape liability for negligence on the ground that [advice] was given in the context of litigation requires careful scrutiny”.



End of barristers' immunity

The justification for blanket immunity was undermined by the House of Lords in *Arthur JS Hall v Simons* [2002] 1AC 615, which reviewed barristers' immunity. The House of Lords ruled that the public policy arguments for immunity were no longer appropriate for barristers and the immunity was therefore lifted. This decision is likely to have a significant impact on the court's review of expert immunity.

There were several reasons for the law lords' decision in Hall, including the fact that courts now had power under the Civil Procedure Rules to prevent an abuse of process. In addition, it was said that a court could distinguish between true negligence of barristers and the sorts of errors of judgment that are inevitable when practising the art of advocacy. Consequently, there would not be a sudden flood of negligence claims against barristers.

The issue ultimately came down to the key distinction between barristers and lay witnesses: barristers owe a duty of care to their client, whereas lay witnesses owe no duty except to tell the truth.

The court may find that the principles applied to barristers in lifting barristers' immunity also apply to experts.

Is a change in the law overdue?

The change in the law relating to barristers' liability has shifted the focus onto expert immunity and arguments used in *Hall* may well be applied to the *Paul Wynne Jones* case to finally determine this tricky area of the law.

The court may find that the principles applied to barristers in lifting barristers' immunity also apply to experts.

In the latter case, Mr Jones sought damages for personal injuries following a road traffic accident. Dr Kaney was retained as an expert to advise on the psychological aspects of the psychiatric injury claim. After conferring with the opposing expert, Dr Kaney signed a joint statement agreeing that Mr Jones was being "deceptive and deceitful" in portraying his symptoms. It later emerged that Dr Kaney had felt pressured into agreeing with the opposing expert.

The claim settled at an undervalue and Mr Jones launched negligence proceedings. However, Dr Kaney pleaded expert immunity and applied to have the claim struck out.

Mr Jones argued that expert immunity under *Stanton* is no longer binding because that case:

- (1) was based on the principle of barristers immunity, which has now been lifted; and
- (2) it preceded the Human Rights Act, the application of the right to a fair trial under Article 6 of the European Convention on Human Rights and case law indicating that blanket immunities may be contrary to Article 6.

The district judge at the first hearing and Mr Justice Blake in the High Court both took the view that they were bound by *Stanton*. However, Mr Justice Blake hinted that the courts are ready to lift expert immunity, saying "*there is substantial likelihood that on re-examination by a superior court...it will emerge that the public policy justification for the rule [on expert*

immunity] cannot support it".

Given the significant public interest and legal issues involved, the claimant has been granted

Since the removal of barristers' immunity, there has been a growing expectation that expert immunity will also be abolished before too long.

what is known as a "leapfrog" certificate, asking the Supreme Court for permission to appeal. The case goes before the Supreme Court in January 2011. For professionals who act as expert witnesses – and for their insurers – this is a case to watch.

Comment

There are, of course, good public policy reasons for ensuring that expert witnesses are able to give their evidence freely. However, there is now a feeling that the law needs to be changed because all professionals should be held accountable and because blanket immunity is seen as an expanding area of legal injustice. Since the removal of barristers' immunity, there has been a growing expectation that expert immunity will also be abolished before too long.

Given this climate, the Supreme Court is likely to seize the opportunity of carrying out an in-depth review of this area of the law. Right now, therefore, the survival of expert immunity is hanging in the balance. But if the Court does rewrite the immunity rules, this will have a significant impact on the professional indemnity market, as more and more professionals take on expert work to supplement their core business.

Sushma MacGeoch

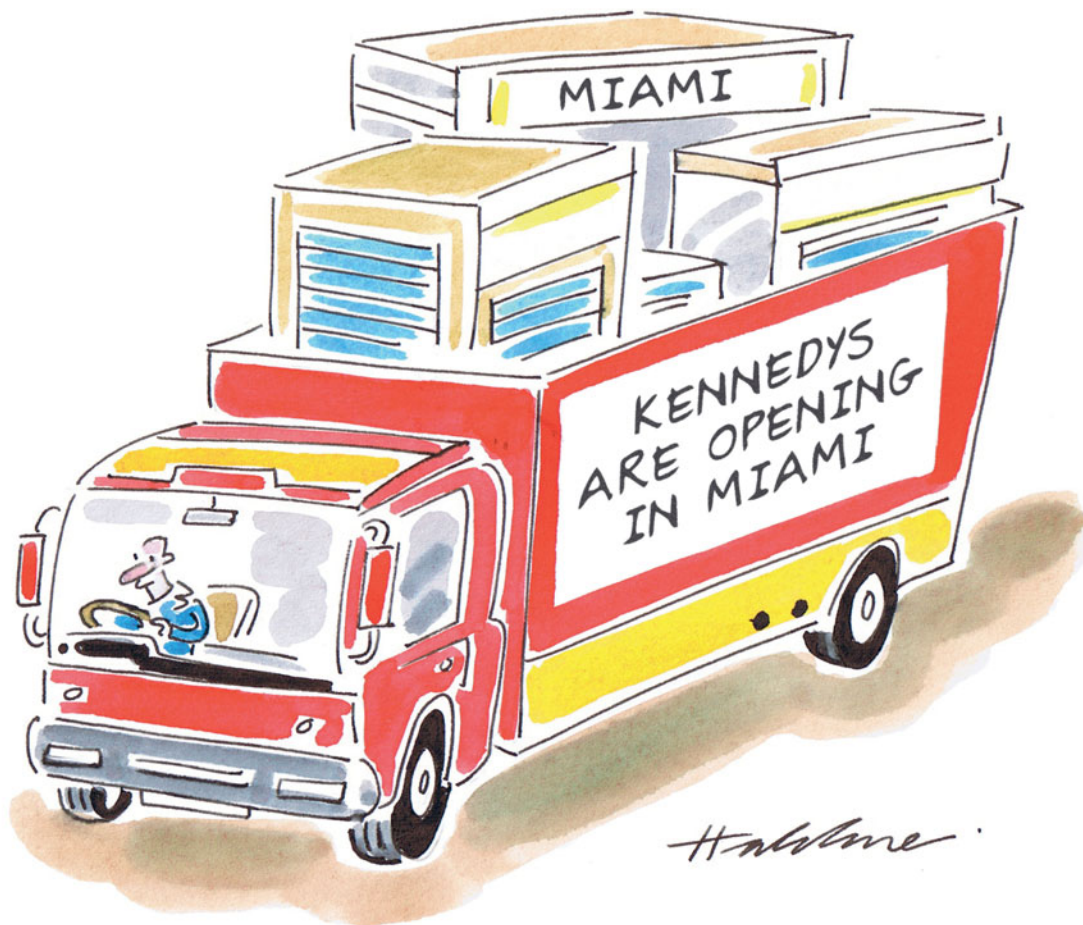
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