

Going for the broke

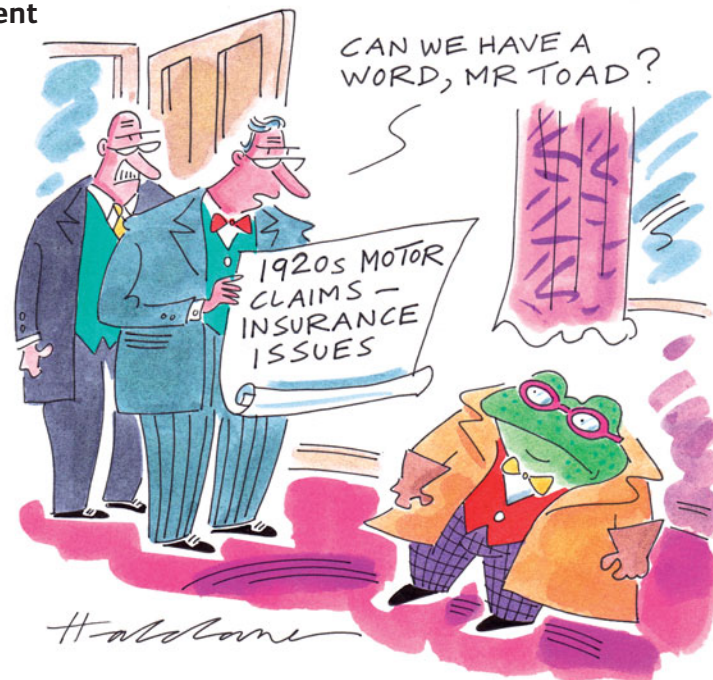
New law should make it easier to claim compensation from insolvent defendants.

The Third Parties (Rights against Insurers) Act 2010, given Royal Assent on 25 March 2010, should improve life for liability insurers who have to tackle the problems associated with an insolvent insured. According to the Ministry of Justice, the Act law will make it “easier and less expensive to claim compensation from insolvent defendants”. The new procedures will, it is hoped, have similar cost and ease-of-use benefit for insurers as well.

A long overdue reform

The Act amends the Third Party (Rights against Insurers) Act 1930 which was enacted to deal with insurance issues relating to motor claims in the 1920s and so was long overdue an overhaul.

The 1930 Act introduced a cumbersome procedure to circumvent the common law rule that any liability insurance payment made following a judgment against an insolvent insured had to be paid into the general pot of assets for distribution to all the creditors, rather than go directly to the successful claimant. Under the 1930 Act, the rights of the insolvent insured are transferred to the injured third party (to the exclusion of the other creditors) once the third party has obtained judgment against the insolvent insured.



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Streamlining the process, the new Act will enable the injured third party to sue the insolvent defendant's insurer directly, rather than having to obtain judgment against the insolvent defendant first.

Revised procedure

Under the 1930 Act, where there was no issue on policy coverage, an insurer would deal with a third-party claim under the policy whether or not the insured was insolvent. Difficulty arose when there were questions about coverage or a claim under the policy was repudiated or the policy was avoided. In those circumstances, an insolvent insured was unlikely to take any steps to challenge the repudiation or avoidance, leaving it instead to the third party to make the running. Under the old procedure, the third party had to obtain a liability judgment against the insolvent insured before being able to stand in the shoes of the insured to seek indemnity under the liability policy and challenge the insurer. If the policy repudiation or avoidance was not upheld by the court, the insurer would then have little chance of setting aside or varying the underlying liability judgment.

The new Act means insurers as well as claimants should benefit from new streamlined procedures. An insurer will be able to engage directly with the third party/claimant in the underlying liability claim whilst the third party/claimant will be able to include the insurer as a defendant when taking legal action against the insured. If there are insurance policy issues that need to be resolved, the coverage dispute can be dealt with in the same proceedings as the liability claim and so before a judgement is obtained against the insured.

A prudent insurer in the past will have used the Civil Procedure Rules and other procedures to join itself to the legal action as an additional defendant, with the twin aim of applying for a declaration on policy cover and protecting its position in the underlying liability action against the insured. Under the new Act, such an approach is both formalised and simplified as an insurer will now be routinely named as a defendant where an insured is insolvent.

Other changes

The Act also gives the third party various rights to information about the insurance policy. Under the 1930 Act, such disclosure was not required until the insured was insolvent and judgment was obtained. Early disclosure will promote the resolution of potentially contentious coverage issues directly between the third party and insurer.

Finally, if the insolvent insured has been struck off the company register, it will no longer be necessary to restore the company to the register, as the third party now has a direct right of action against the insurer without having to sue the insured.

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Product liability

A look at how the Consumer Protection Act 1987 is working.

The Product Liability Directive – more formally known as Council Directive 85/374/EEC of 25 July 1985 concerning liability for defective products – was transposed into law in the UK by the Consumer Protection Act 1987 (the CPA).

Part 1 of the CPA came into force on 1 March 1988 and it is this part of the CPA that is particularly relevant when dealing with product liability claims.

The CPA renders a “producer” strictly liable for personal injury, death or damage to a consumer’s property caused by defective products. Although fault is not a requirement, consumers must still prove defect, injury and a causal link between the two under the CPA.

Key definitions

The terms “producer” and “product” are both defined in section 1(2) of the CPA.

A “producer” means:

- the person who manufactured the product;
- in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it;
- in the case of a product which has not been

manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process.

And the term “product” means any goods or electricity and (subject to section 1(3) of the Act, which we discuss a little later in this article) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise.

Products covered

The CPA applies to all consumer products including food. It also covers components and raw materials and it is generally accepted that human blood and blood components are also products.

The definition of “producer” sheds further light on the meaning of “product” under the Act. It suggests a requirement that the product must have been “manufactured, won or abstracted” or that its “essential characteristics” should be “attributable to an industrial or other process having been carried out”. On this basis, it is arguable that even human tissues or organs that have been “abstracted” for transplantation/implantation may be regarded as “products” under the CPA.

Who can be liable

Section 2(2) of the CPA explains who can be liable for any damage caused by a defective product:

- the producer of the product;
- any person who, by putting their name on the product or using a trademark or other distinguishing mark in relation to the product, has held themselves out to be the producer of the product;
- any person who has imported the product into a member state from elsewhere in order to supply it to someone else in the course of business.

However, this provision has to be read together with section 1(3) of the Act, which says that “a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised”.

Consequently, under the CPA, an injured person can usually take action against the manufacturer of the product or, in the case of raw materials, the person who obtained them. An injured person can also pursue an action against an importer into the European Community, as well as suppliers who put their own name on the product and portray themselves as the producers.

Retailers are not liable unless they fail to identify the producer, importer or own-brand if asked to do so by an injured person.

Liability under the CPA is joint and several, so a potential claimant can sue all potential defendants.

What is a defective product?

The question of what is a defect is tackled by section 3(1) of the CPA. This provision says there is a defect in a product “if the safety of the product is not such as persons generally are entitled to expect”. This includes “safety with respect to products comprised in that product, and safety in the context of risks of damage to property, as well as in the context of risk of death or personal injury”.

In deciding what it is that people are generally entitled to expect in relation to a product, section 3(2) of the CPA says that all the circumstances must be taken into account, including the following:

- the manner in which (and purposes for which) the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for (or warnings with respect to) doing or refraining from doing anything with or in relation to the product;
- what might reasonably be expected to be done with (or in relation to) the product; and
- the time when the product was supplied by its producer to another.

Nothing in section 3 requires a defect to be inferred “from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question”.

The courts therefore have a very wide discretion – especially as the section 3(2) list of circumstances is not an exhaustive one. The courts will take into account other factors, including the value of the products supplied, the availability of alternative goods, the choice of features between competing products and the relative prices. For example, the court might be entitled to infer that a more expensive – and therefore presumably more heavily researched – product would have been subjected to more extensive safety testing than cheaper, less sophisticated merchandise. As regards long-established and well-known products, the court might well conclude that the public is entitled to expect a considerable degree of safety.

Type of damage covered

Under section 5 of the CPA, “damage” means death or personal injury or any loss of (or damage to) private property (including land), providing the amount or loss or damage is £275 or more.

Defences under the CPA

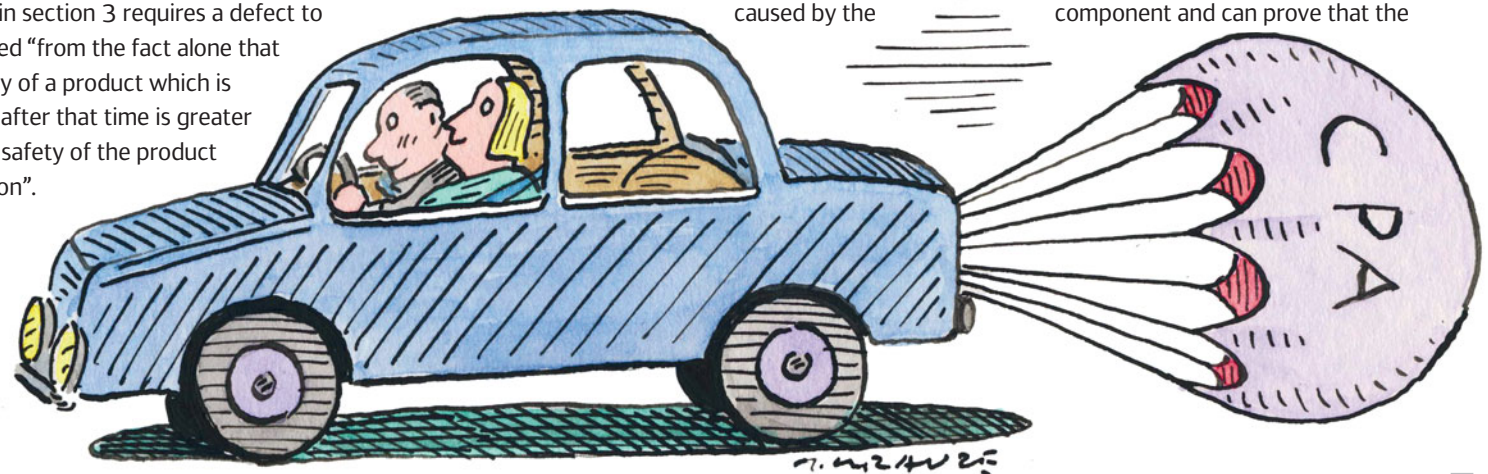
A claimant has to prove that they suffered damage, that the product was defective and that

the damage was
caused by the

defect. However, a defendant can avoid liability if they can establish any of the following defences provided under section 4 of the Act:

- The defendant did not supply the product to another – for example, the product was stolen or is a fake copy of the product.
- The defect did not exist in the product at the time of supply – for example, the goods were rendered defective through the careless handling by the retailer or the user.
- The product was not supplied in the course of a business – for example, it was a charitable gift or acquired at a car-boot sale.
- The damage is purely economic and therefore does not constitute damage to private property or personal injury caused by a defective product.
- Given the state of scientific and technical knowledge at the relevant time, no producer of the goods in question could have been expected to have discovered the defect (this is known as “the development risks defence”).
- The defect was caused by complying with the law. However, the defendant will have to show that the defect was the inevitable result of the compliance.

• The defendant is a producer of a component and can prove that the



defect was due either to the design of the finished product or to defective specifications given to the defendant by the producer of the finished product.

The courts have, on a number of occasions, examined the meaning of “defective product” and the applicability (or otherwise) of the development risks defence. A review of these cases, however, is beyond the scope of this article.

Limitation and substitution

A claimant must issue proceedings against a defendant within three years of the date of the cause of action or the date of knowledge, whichever is the later. However, a claimant cannot sue under Part 1 of the Consumer Protection Act (and the Limitation Act 1980) if 10 years have elapsed since the defective product was first supplied by the producer. This rule has recently been examined in depth in the *O’Byrne v Aventis Pasteur SA* case.

The O’Byrne v Aventis Pasteur SA case

In September 1992, a French manufacturer of pharmaceutical products – Aventis Pasteur SA (APSA) – sold products to its English subsidiary Mérieux UK Ltd (Mérieux), which later changed its name to Aventis Pasteur MSD Ltd (APMSD). Mérieux acted as distributor in the UK of a consignment of anti-Haemophilus influenzae Type B vaccine units (the Hib vaccine). Part of the consignment was sold by Mérieux to the Department of Health, and this in turn was sent to a medical surgery.

In November 1992, Declan O’Byrne was given a unit of the Hib vaccine at the medical surgery.

He subsequently suffered brain damage, which he claimed was caused by a defect in the Hib vaccine.

Eight years later, in November 2000, Mr O’Byrne brought a personal injury action under the CPA against the subsidiary APMSD, in the mistaken belief that it was the manufacturer of the vaccine. In October 2002, he brought an action against APSA, which defended the action on the ground that the claim was time-barred.

In March 2003, after the expiry of the 10-year limitation period specified in article 11 of the EU Product Liability Directive 85/374, Mr O’Byrne applied for an order that APSA should be substituted for APMSD as the defendant in the November 2000 action. The question was whether the substitution was permitted.

The first ECJ judgment

In February 2006, in its first judgment, the European Court of Justice ruled that it was for national law to determine the conditions under which one party may be substituted for another in such an action. However, the national courts must have regard to the definition of the term “producer” in articles 1 and 3(1) of the directive.

Article 1 of the directive says that “the producer shall be liable for damage caused by a defect in his product”. Article 3 (1) says that the term “producer” means “the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer”. And under article 3(3), where the producer of the product cannot be identified, “each supplier of

the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product”.

Following this judgment, the Court of Appeal ordered the substitution of APSA, who then applied to the House of Lords for the point to be referred back to the ECJ. The House of Lords sought a preliminary ruling from the ECJ on whether, under the Product Liability Directive, national legislation could allow the substitution of a new defendant after the expiry of the 10-year period, when the only person named as defendant in the proceedings started within that period was not covered by article 3 of the directive.

The second ECJ judgment

In December 2009, the ECJ ruled:

- Article 11 of the Product Liability Directive does not allow the producer of allegedly defective goods to be substituted as the defendant if the proceedings were not issued within the 10-year period against a person who is a “producer” as defined by article 3 of the directive.
- However, where the action is brought against a wholly-owned subsidiary of the producer supplying the goods, the domestic court can conclude that the supplier must have known who the producer actually was and treat that supplier as the producer.
- Where the person injured by an allegedly defective product was not reasonably able to identify the producer of the goods before exercising their rights against the supplier of the product, the supplier should be treated as

the “producer” for these purposes. This is particularly the case where the supplier does not inform the injured person, on its own initiative and promptly, of the identity of the producer or its own supplier. It is for the national court to decide whether or not this particular test is met in any particular case.

Comment

Arguably, the latest ECJ judgment gives UK manufacturers greater certainty about the period of time for which they may face liability under the Consumer Product Act and the Product Liability Directive. It also helps to prevent potential defendant manufacturers from being exposed indefinitely to legal actions for allegedly defective products. Nevertheless, the European Court of Justice has clearly still left scope for a UK court to allow substitution outside the 10-year period in certain factual circumstances.

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Employment law: past and future

A review of the major cases of 2009 and a preview of the critical legal developments of 2010.

If there is one thing that can be guaranteed about employment law, it is that it is an area of rapid and constant change with potentially dangerous (and expensive) pitfalls for the unwary. To help pick your way through this legal minefield, we highlight below some of the significant cases from the past year. We then go on to look at some of the most anticipated cases and legislation changes for 2010.

Key cases in 2009

Religious discrimination

After a fairly slow start, the relatively new anti-discrimination regulations on religion and belief have seen a flurry of cases over the past year.

In a case that has been much reported in the press, *Eweida v British Airways* [2010] EWCA Civ 80, the Court of Appeal recently confirmed that British Airways' staff dress code prohibiting cabin crew from wearing a visible neck adornment did not discriminate against a Christian employee on the grounds of her religion. Ms Nadia Eweida complained that the dress code prevented her from wearing a visible cross on a neck chain, which amounted to indirect discrimination. She argued that the dress code, although it applied equally to all employees, placed followers of the Christian faith at a disadvantage. The Court of Appeal ruled that Ms Eweida's view was an entirely

personal one – and a recently held view at that, given that she had previously complied with the company dress requirements for some years without objection. The court also ruled that her view did not arise from any doctrine of her faith, nor did the company's dress policy interfere with her observance of it.

The potential for conflict between the Employment Equality (Religion or Belief) Regulations (the Religion or Belief Regulations) and the Employment Equality (Sexual Orientation) Regulations has also come under the spotlight of late. In *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, for instance, a council worker was threatened with dismissal for refusing to conduct civil partnership ceremonies for same-sex couples. The employee claimed such unions were against her Christian belief. She brought proceedings alleging discrimination on the grounds of her religion.

The Court of Appeal ruled that the claimant could not pick and choose what duties she would perform, depending upon whether they were in accordance with her religious views, particularly in circumstances where her personal stance amounted to discrimination on the grounds of sexual orientation. This type of discrimination was inconsistent with the non-discriminatory objectives which the council espoused both towards its staff and the wider community. The council's clear commitment to that objective would be undermined if it were to allow the claimant to demonstrate her religious beliefs by



refusing to conduct civil partnership ceremonies.

A similar decision was made in the case of *McFarlane v Relate Avon* UKEAT 0106/09. In this case, a Christian counsellor was dismissed for refusing to counsel same-sex couples. He claimed that it followed from Biblical teaching that same-sex sexual activity was sinful and that he should do nothing which endorsed it. Relate's ethos was to provide equality of opportunity for all its clients and offer its services to any person in need. Relate also operated a policy prohibiting

staff from discriminating against clients on the grounds of their sexuality (among other things).

The EAT said that it was justifiable for Relate to require its employees to adhere to principles that it regarded as fundamental to its own ethos and which it had pledged to maintain in its dealings with the public, all the more so where observation of those principles was required by law. If Relate judged that to compromise those principles in its own internal arrangements would be inconsistent with its external stance,

then that judgment must be respected. The lesson from all this is that, although the Religion or Belief Regulations make it unlawful to discriminate against employees because of their religious beliefs, it does not follow that an employee has an unqualified right to manifest their religion in the workplace to the detriment of others.

The Religion or Belief Regulations do not merely prohibit discrimination against members of recognised religions, however. A belief that carbon emissions must be cut in order to avoid catastrophic climate change has been held by the tribunal as capable of amounting to a “belief” for the purposes of the Religion or Belief Regulations (*Grainger plc v Nicholson* [2010] IRLR 4(EAT)).

Age discrimination

Unfortunately for those older employees burdened with massive mortgages or other heavy financial commitments, the long-running *Heyday case* challenging the government’s default retirement age of 65 failed last year (*The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373).

So, for the time being, it remains lawful for employers to retire employees compulsorily when they reach 65, provided that the correct statutory retirement procedures are followed. However, the government does intend to review the default retirement age of 65 at some point this year.

Racial discrimination

Although strictly not in the employment sphere, the Supreme Court has decided that a Jewish

faith school’s admissions policy requiring a school pupil’s mother to be Jewish according to Orthodox teaching (ie children of mothers who are Jews by birth or by Orthodox conversion) was directly discriminatory on the grounds of ethnicity (*R (on the application of E) v The Governing Body of JFS* [2009] UKSC 15).

Disability discrimination

The Disability Discrimination Act must now be interpreted so as to cover direct discrimination and harassment based on a third party’s disability (*EBR Attridge Law v Coleman (No 2)* (EAT 0071/09)). The claimant, Ms Sharon Coleman was not herself disabled but was the carer of her disabled son. She argued that she suffered unlawful treatment from her employers as a result of her son’s disability, causing her to resign and claim constructive dismissal. However, the UK’s discrimination legislation contains no provision for claims for such “associative” discrimination. Ms Coleman said that the EU Framework Directive outlawed such discrimination and so the case was referred to the European Court of Justice to determine the issue. The ECJ ruled that the directive should be interpreted as outlawing discrimination against people who were not disabled, but suffered discrimination or harassment owing to their association with a disabled person.

As a result, the Employment Appeal Tribunal decided that words must be read into the Disability Discrimination Act to cover associative discrimination. The employers felt this to be stretching things somewhat, and appealed the decision. The case is currently listed for appeal in the Court of Appeal. However, the appeal may well be academic, as this unsatisfactory state of affairs is soon to be rectified in the new single equality legislation, of which more below.

Cases to look out for in 2010

Stockton-on-Tees Borough Council v Aylott

The issue of selecting and identifying appropriate comparators in discrimination claims is one that excites lawyers but rarely anyone else. However, this case is important in that it will determine whether the House of Lords’ decision in *London Borough of Lewisham v Malcolm* [2008] UKHL 43 – which severely restricts the comparators that can be used in disability-related discrimination cases and therefore limits the potential for successful claims – will apply to employment cases. The case is due to be heard at the end of April.

Seldon v Clarkson Wright and Jakes

Partners in law firms and in other professional services organisations will be paying close attention to this case, in which the Court of Appeal will be determining whether a law firm’s

The rules permitting employers to retire staff compulsorily at 65 do not apply to partners, however, so requiring partners to retire at a particular age will constitute age discrimination unless it can be justified objectively.

mandatory retirement age of 65 is objectively justified, on the basis that performance tends to decline at that age. The rules permitting employers to retire staff compulsorily at 65 do not apply to partners, however, so requiring partners to retire at a particular age will

constitute age discrimination unless it can be justified objectively.

Power v Manchester Police Authority

Mr Power, a police trainer, claimed that he was sacked because he believed that psychics could assist with police investigations. He claimed that this belief was capable of amounting to a “religious belief” for the purposes of the Religion or Belief Regulations. The Employment Appeal Tribunal agreed. The case was remitted to the employment tribunal to determine whether Mr Power was dismissed because of his beliefs, and the tribunal decided that he was not. Mr Power is now appealing against that decision.

Woodcock v Cumbria Primary Care NHS Trust

Mr Woodcock was dismissed for redundancy without adequate consultation so that his notice period expired before he qualified for enhanced pension benefits that accrued at age 50. A tribunal held that his dismissal was not directly discriminatory on the grounds of his age because the trust could justify its decision on the basis that it would avoid the additional cost that the enhanced pension benefits would incur. Mr Woodcock is appealing against this decision, which will be of interest to employers given that previous authorities indicated that the avoidance of cost could not, on its own, justify an act of discrimination.

Briggs v Nottingham University Hospitals NHS Trust

The Court of Appeal has recently published its judgment in this appeal by a group of NHS

supervisors against the EAT's decision that they were not entitled to receive a recruitment and retention premium that was paid to staff that they supervised. The staff were "Qualified Maintenance Craftspersons", which under collectively agreed NHS terms and conditions (Agenda for Change) were eligible for a recruitment and retention premium. The supervisors argued that they should also be categorised as "Qualified Maintenance Craftspersons". Although the decision was finely balanced, the Court of Appeal held that the EAT and Tribunal before it were entitled to interpret the meaning of "Qualified Maintenance Craftspersons" as not including the supervisors. In particular, if it was intended that supervisors be eligible for recruitment and retention premiums, then the terms and conditions would have said so.

Spencer v Lehman Brothers Ltd (in administration)

In a decision that will be of interest to insolvency practitioners, the Employment Appeal Tribunal is due to consider whether the administrators of a company in administration can be held personally liable for discrimination on behalf of the insolvent employer. The appeal was heard on 10 February 2010 and judgment is anticipated shortly.

New & forthcoming legislative changes

Equality Act

The most wholesale change to discrimination law since the first discrimination legislation was introduced in the 1970s, the Equality Act, has recently been passed by the House of Commons and is expected to come into force in October 2010. This new statute has two main purposes:

to harmonise discrimination law and to strengthen the law to support progress on equality. It will unify all the various existing discrimination legislation relating to sex, race, disability, sexual orientation, religion or belief and age into the one statute, and seek to adopt a single approach where possible.

The new legislation will also introduce a number of important changes to the law:

- "Associative" and "perceptive" discrimination will be unlawful. For example, a person who is dismissed for having to take time off work to care for a disabled child will be able to claim disability discrimination. Similarly, a heterosexual man who is subject to homophobic abuse because colleagues believe him to be gay will be able to claim sexual orientation discrimination.
- The statute will introduce the concept of "combined discrimination", based on a combination of no more than two protected characteristics (for example, a combined claim of race and sex discrimination by a Bangladeshi woman).
- No comparator will be required in victimisation cases.
- Employers will be expressly liable, in some circumstances, for harassment by third parties in the workplace.
- The legislation gives the government the power to enact anti-caste discrimination laws in the future.

However, the Conservative party has announced that, should they win the forthcoming general election, they will drop some aspects of the legislation and so the picture is yet unclear as to precisely what will be brought into force come October.

Mamas and papas

New legislation has been introduced in April 2010 to allow up to six months of a mother's maternity leave to be transferred to fathers and partners (the Additional Paternity Leave Regulations 2010).

At present, women are entitled to 52 weeks' maternity leave. Fathers and partners (whether of a different sex or the same sex as the mother) are currently entitled to two weeks' paternity leave. These existing rights will not be affected by the new legislation.

Under the new regulations, the father (or partner) will be entitled to take up to six months' paternity leave provided the mother has returned to work.

The new scheme is intended to offer families greater flexibility by allowing mothers to transfer the last six months of their maternity leave to the father. The right will also be granted to partners (whether of the same or different sex to the mother) and also to adopters where there is an entitlement to statutory adoption leave.

Under the new regulations, the father (or partner) will be entitled to take up to six months' paternity leave provided the mother has returned to work. If any part of this leave is taken during what otherwise would be the mother's 39 week Statutory Maternity Pay period, it will be paid at the same rate and in the same way as Statutory Maternity Pay. To be eligible, fathers (or partners) must be continuously employed by the same employer for 26 weeks before (in the case

of childbirth) the 15th week before the baby is due or (in the case of adoption) the week that the child is placed for adoption.

To allow employers the chance to get to grips with this new entitlement, it will apply only to parents of children due on or after 3 April 2011.

Sick note to fit note

New regulations came into force on 6 April 2010 to replace the existing system of GP's Med 3 certificates with a new regime of medical statements, despite concerns that this will not allow time for employers and medical professionals to familiarise themselves with the new requirements (see the Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010).

Under the new system:

- The statement will invite the employee's GP to identify whether a phased return, altered working hours, altered duties or workplace adaptations could be made to help facilitate the employee's return to work. Where a doctor considers another option may be more appropriate, they will have the opportunity to state this in a comments box.
- There will be an option for the doctor to say that an individual "may be fit for work taking account of the following advice". This acknowledges that it is not the doctor but the employer, in consultation with the employee, who is best placed to make the decision as to whether the employer can accommodate any changes to facilitate a return to work.
- The maximum duration for which a medical statement can be issued will be reduced from six to three months during the first six months of a health condition.

- If an employer is not able to implement the changes suggested in the statement to enable the employee to return to work, it will not be necessary for the employee to obtain a revised statement. The existing statement will be evidence that an individual has a health condition preventing them from returning to work.

The government has published guidance on the new scheme which can be found at www.dwp.gov.uk/fitnote. Employers are urged to familiarise themselves with it.

Right to request time off for training

As of 6 April 2010, employees working for large employers (over 250 staff) now have the right to request time off to undertake study or training (see the Apprenticeships, Skills, Children and Learning Act 2009). This right will be extended to all employees, regardless of the size of their employer, on 6 April 2011.

The scheme is subject to certain conditions:

- It is only open to employees, so contractors, consultants and agency workers are ineligible.
- The employee must have 26 weeks' service with the employer.
- The request must be for study or training that is intended to improve an employee's effectiveness at work and the performance of the employer's business, although it need not result in a formal qualification.
- Only one application may be made in any 12-month period.

The scheme is subject to a stringent regime that mirrors the process currently required for flexible working requests. This process has been

criticised for being unnecessarily onerous and procedure-driven. The employee must submit an application containing prescribed information, including details of how the study or training would improve the employer's business and the employee's effectiveness within it. Employers must then hold a meeting with the employee to discuss the application, and provide a right of appeal if the application is refused.

Employers are permitted to refuse a request. However, a refusal can only be on one of the following grounds, otherwise employers risk an employment tribunal claim:

- where they thought that the training would not improve the employee's effectiveness or improve the performance of the business;

Employees will be permitted to bring a claim in the employment tribunal if employers fail to adhere to the correct consideration procedure or reject the employee's request for a reason other than the permitted grounds.

- the study or training would impose a burden of additional costs on the business;
- the business could not service its customers properly;
- work could not be reorganised among existing staff;
- there would be a negative impact on the quality of the output and/or performance of the business;

- there would not be enough work for the employee during the periods during which the employee proposes to work; or
- the business has planned structural changes which may possibly result in the employee's redundancy.

Employees will be permitted to bring a claim in the employment tribunal if employers fail to adhere to the correct consideration procedure or reject the employee's request for a reason other than the permitted grounds.

New whistleblowing powers

The Public Interest Disclosure Act 1998 gives protection against victimisation or dismissal to whistleblowers who raise concerns about (among other things) fraud or malpractice at their place of work. As of 6 April 2010, employment tribunals have had new powers to forward whistleblowing claims to the relevant regulator so that the underlying issues can be investigated by the regulator and appropriate action taken. However, employees must consent to their claim being forwarded.

The tribunal will still decide the whistleblowing claim in the usual way, but the relevant regulator may, as part of its normal processes and in line with its usual powers, investigate and take action. The list of regulators is lengthy and includes (among others) the Financial Services Authority, the Independent Regulator of NHS Foundation Trusts, the Health and Safety Executive, the Environment Agency, and the Information Commissioner.

Agency workers

Although not now anticipated until 2011, new agency workers regulations are to be introduced

to give agency workers the right to be treated equally with permanent employees. These new regulations will mean that the basic working and employment conditions of agency workers must be the same as for directly recruited employees – including terms relating to pay, bonuses, holidays, weekly working time, and rest periods. Agency workers will obtain this protection after working for 12 weeks for the same company.

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Knowing one's limitations

When are compensation claims about long-term pension investments time-barred?

The ways in which people in the UK have provided for their old age have changed significantly since the 1980s. At that time, many were content to rely on state or occupational pensions. But over the last 20 years or so, we have seen a greater willingness (even eagerness) among investors to rely on stock market performance and other types of investment in order to buy the annuities needed to fund their retirement.

Investment risks

A great deal has been written about the historical performance of different types of investment, many of which are fraught with uncertainty about future performance. When saving for their retirement, investors are often excited by the potential for significant returns on stock-based investments, but they are not perhaps always fully aware of the risks that constitute the flip side to those exciting potential returns.

There are many dangers. Perhaps the most obvious one is opting out of a (relatively safe) occupational pension scheme and into a risky, volatile investment-based one. The investment may also be in funds where the risk of loss is unusually high. There can be problems too where

an investor opts out of the state earnings-related pension scheme in circumstances when they should, in fact, remain in Serps.

Contract and tort limits

Financial advisers often owe contractual and tortious duties to their clients. Breaches of such duties can result in investors seeking compensation, through the Ombudsman schemes, the courts, or both. However, given the nature of long-term pension investments, problems and compensable losses are not always apparent until many years after the investment advice has been given.

When are compensation claims in such cases time barred?

Under the Limitation Act 1980, there is a six-year primary limitation period for claims in contract – other than contracts under seal, where a 12-year period applies – and tort (including negligence).

For claims in contract, the six-year period runs from the date when the contractual duty was breached. This is likely to be the date when the financial consultant gave what turned out to be erroneous advice as a result of failing to exercise the requisite degree of skill and care.

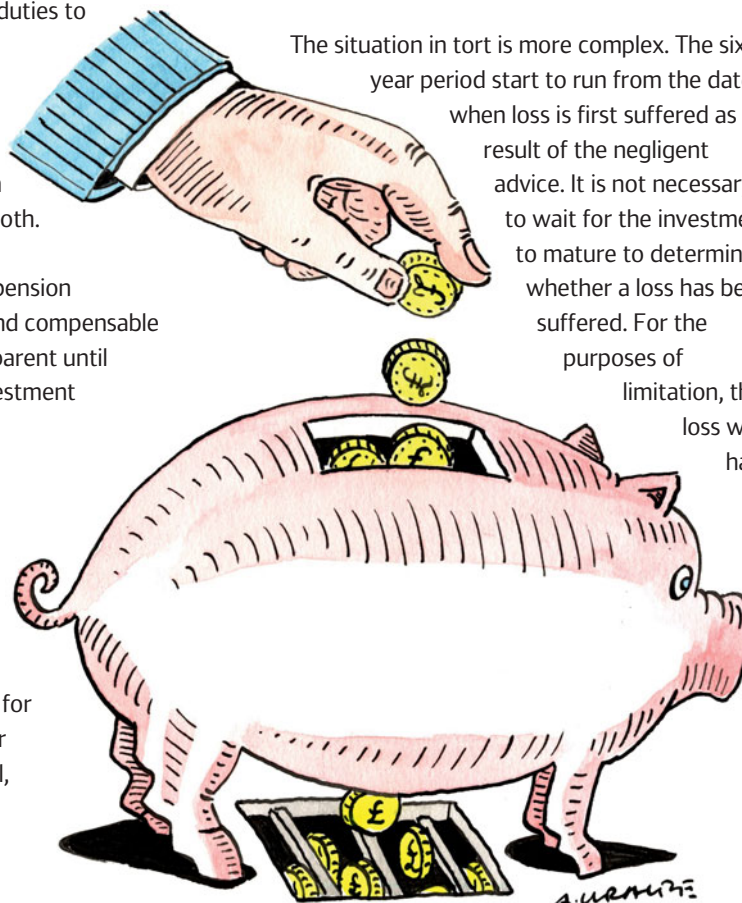
The situation in tort is more complex. The six-year period starts to run from the date when loss is first suffered as a result of the negligent advice. It is not necessary to wait for the investment to mature to determine whether a loss has been suffered. For the purposes of limitation, the loss will have

been suffered when an investment with an excessive or inappropriate level of risk has been made, even if that risk might not eventually manifest itself as a loss. This was the principle followed in *Martin v Britannia Life Ltd* [2000] and, more recently, in *Shore v Sedgwick Financial Services Ltd* [2008], a case which concerned a transfer from an occupational scheme to an investment-based scheme with a higher risk profile.

Risk profiling is complicated, though. Having been advised to invest in a particular way, many investors are unlikely to question that advice until their investments are reviewed or they receive statements of investment performance or the investment return is disappointing – for example, when the time arrives to purchase annuities. This is often more than six years after the date on which the investment was made.

Secondary limitation period

The Limitation Act 1980 has tried to tackle this injustice by incorporating the Latent Damage Act 1986. A claimant now has a secondary limitation period of three years from the earliest date on which they “or any person in whom the cause of action was vested before [them] had both the knowledge required for bringing an action in respect of the relevant damage and a right to bring such an action”. This date will be reached when an investor:



- has such knowledge of their loss;
- knows that it is attributable to an act or omission of a financial adviser; and
- knows the identity of the party at fault and (if different) the identity of the party against whom a claim could be made.

It is not necessary for a prospective claimant to appreciate the possible legal significance of these basic facts. Knowledge can be imputed if the investor could reasonably have learnt the requisite facts with expert assistance.

This secondary three-year period is subject to a 15-year longstop. This means that, regardless of the date of discoverability, a disappointed investor will be out of time if they bring a claim more than 15 years after the date when the duty of care was breached.

Deception

If a claimant alleges deliberate concealment or fraudulent misrepresentation by a financial adviser, they have six years from the date when they discovered (or could, with reasonable diligence, have discovered) the concealment or fraud.

Winding-up of a company

There is a further exception to the standard limitation periods when it comes to the winding-up of a company. According to the *Re General Rolling Stock Company Ltd* [1872] case, the limitation period will cease to run if two conditions are met:

- (1) there is a claim that falls within the winding-up (for example, claims by an unsecured creditor or claimant); and
- (2) that claim was not out of time when the winding-up began.

It is important to note, however, that this decision does not extend to claims that fall outside the winding up, such as claims by secured creditors. In these circumstances, the court in *Cotterell v Price* [1960] said, the limitation periods continue to run in the normal way.

The Larnell case

A professional indemnity insurance policy held by a company that has been wound up does not form part of the assets of the company to be distributed to unsecured creditors. So for many years, insurers thought that any claim to gain access to the benefit of the insurance policy under the Third Party (Rights Against Insurers) Act 1930 (the 1930 Act) was outside the winding up, and therefore (following *Cotterell v Price*) limitation continued to run in the normal way. However, the Court of Appeal disagreed with that view in its decision in *FSCS Ltd v Larnell (Insurances) Ltd (in liquidation)* [2005].

In that case, it was alleged that Larnell had given negligent pension advice that was also in breach of contract. Larnell had started the winding-up process six days before the three-year “date of knowledge” limitation period expired. Under the *Re General Rolling Stock Company* rule, any later claim would be in time, as limitation would have ceased to run. The Financial Services Compensation Scheme (FSCS) wanted to establish Larnell’s liability so that it could subsequently bring a claim against Larnell’s professional indemnity insurers under the 1930 Act. The Court of Appeal judges were evidently aware of the purpose of the FSCS’ claim.

Was the claim out of time? Larnell’s insurers argued that it was, on the grounds that the claim

had been brought outside the winding-up (and so limitation periods continued to run, as in the case of claims by secured creditors), and therefore it was time-barred in that it had been started:

- more than nine years after the expiry of the primary six-year period under the Limitation Act;
- more than a one year after the three-year “date of knowledge” period under the Latent Damage Act; and
- more than three months after the 15-year longstop period under the Latent Damage Act.

The trial court judge agreed with insurers and struck out the claim on the basis that it had been brought out of time. The Court of Appeal reversed that decision. Applying different limitation periods (for the claim directly against Larnell and then the action designed to establish liability under the 1930 Act) would cause both conceptual and practical difficulties. The Court of Appeal asked how could a single claim, in respect of one cause of action, against one defendant be bound by limitation for one purpose but not another?

The impact of the *Larnell* decision is dramatic in that it leaves a long-tail of potential liability for insurers of insolvent companies in cases where, at the date of the winding-up, the limitation period on the original underlying claim has not expired. As mentioned earlier, individuals may not appreciate that they have suffered any shortfall on their pension until some considerable time after the pension transfer has taken place. There remains a real possibility that claimants will seek to bring claims against insurers under the 1930 Act.

Arjo Wiggins and beyond

In the recent decision of *Arjo Wiggins Ltd v Ralph and Pensions Ombudsman* [December 2009], the court considered a claim made by the Ombudsman in favour of Ralph and against Wiggins. Ralph, on the advice of Wiggins, had transferred from his occupational pension scheme to an investment-based scheme offered by an insurance company. That investment scheme disappointed and Ralph referred the matter to the Ombudsman. Had Ralph gone through the courts, a limitation defence would have been available to Wiggins. The Ombudsman believed himself not bound by the law of limitation and found in favour of Ralph. Wiggins challenged that decision and the court ruled that the Ombudsman could not disregard limitation defences available in these circumstances.

One intriguing question which arises from this decision is whether, if reconsidered, a number of the Ombudsman’s other decisions could be vulnerable to judicial review.

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What causes Ormond's disease?

The Industrial Injuries Compensation Authority is strongly encouraging new research into the illness.

Retroperitoneal fibrosis (RPF – also called Ormond's disease, after the doctor who discovered it) is a rare disorder in which the tubes that carry urine from the kidneys to the bladder are blocked by a mass in the area behind the stomach and intestines.

In the early stages, symptoms typically include pain in the abdomen and legs, with a change of colour in both legs and swelling in one of them. As the condition develops, the patient may suffer decreased or no urine output, nausea, vomiting, mental confusion (as a result of kidney failure and the build-up of toxic chemicals in the blood) and severe abdominal pain with haemorrhaging.

The prognosis depends on the extent of the fibrosis and the level of damage to the kidneys – which may be temporary or permanent.

RPF occurs most commonly in people aged 40 to 60. Men are twice as likely as women to develop the condition.

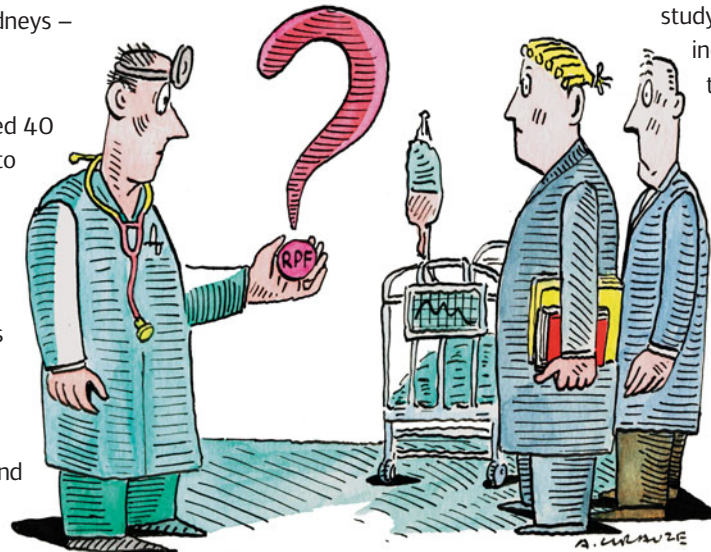
Causes

Essentially, doctors do not know the cause of this disease. In approximately two-thirds of cases, it appears to arise spontaneously, while, for the remaining one-third, it is secondary to events such as tumours, infections, trauma, radiotherapy, surgery and the use of certain drugs.

Some people believe that RPF can be caused by exposure to asbestos. As far as is known, there have only been two litigated cases. One was settled prior to trial.

In the other case, in which Kennedys was instructed, the claimant had undergone chemotherapy and taken drugs (such as Vincristine). Because there is an association between the drugs used in chemotherapy and the development of RPF, we successfully advanced arguments as to causation and secured a discontinuance.

In addition, the defendant was no longer trading and there was no trace of employers' liability. In any event, therefore, no judgment could have been enforced against our client. The claim proceeded against the other defendant.



The claimant had instructed a medical expert who was very keen to promulgate a connection between asbestos exposure and the development of RPF – a link which is seen by some to be an emerging area of law.

Evidence of asbestos link

Two years ago, the Industrial Injuries Compensation Authority (IICAC) was asked to consider the case for prescription of RPF as an occupational disease associated with exposure to asbestos. On 12 June 2008, the IICAC responded by publishing a position paper.

In the paper, the IICAC said that it normally looks for strong and consistent evidence from several independent studies to support a case for prescription. Although the IICAC had been presented with the results of a case control study conducted in Finland in 2004 – which indicated that the risk of RPF was more than double in those previously exposed to asbestos – this was not enough.

The case-control study conducted in Finland involved 43 cases (out of 50 identified) treated for RPF in 3 hospital districts between 1990 and 2001. The study concluded that after adjustment for other risk factors (medication use, abdominal aortic aneurysm, and smoking for more than 20 pack years) exposure to asbestos was strongly associated with RPF. A case series was also conducted by

Sauni et al (1998). The authors argue that the rate of bilateral pleural plaques (a radiological feature of asbestos exposure) in these male RPF patients was 8 times greater than that in the Finnish male population which suggests at least that asbestos exposure should be considered an important aetiological factor in RPF.

And the study's results showed that the average length of time between the first contact with asbestos and diagnosis was 30.8 years when the exposure had been slight, and 33.3 years where there had been moderate to high exposure.

The current position is that RPF is not recognised as a prescribed occupational disease, on the grounds that there is insufficient evidence of causative links; but the IICAC has confirmed that it will review the position if other relevant epidemiological evidence emerges in the future.

The IICAC said that it strongly encouraged further high-quality research in an area where evidence is very limited and made clear that it would monitor new research reports closely. Insurers should take note.

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Who's to say who's an expert? – Part 2

Last time (The Key, December 2009), we looked at where and how expert evidence can be used.

Here, we look at how French court experts work.

The appointment **Court experts have no legal training. They are appointed for their special technical knowledge or experience.**

While judges have a discretion to appoint more than one specialist as an expert, a single appointment is more usual: see article 264 of the New Civil Procedure Code (NCPC). An expert can seek assistance from other technicians if their task involves additional specialisations distinct from their own (see article 278 NCPC) – for example, to calculate the value of the damage or in a case where particular technical knowhow is required.

In a construction case in southern France, for instance, glass panels had fallen off a façade. The expert, a structural engineer, asked the court to appoint two *sapiteurs* (expert technicians) – a surveyor to measure movement in the building and a glass technician to deal with the manufacture of the panels.

The judge has total discretion in the appointment of an expert. Where the parties suggest possible specialists, the judge is not bound to take account of them. The expert is appointed from a court list of approved experts, which is compiled on a national basis. Experts are accredited to:

- the *tribunaux de grande instance, administratifs and de commerce* – courts of first instance;
- the *cours d'appel*; and
- the *cour de cassation or conseil d'état*.

Accreditation involves detailed vetting and is reviewed annually. Inclusion in an expert's register is conclusive of expert status; no further demonstration of specialised knowledge is required.

The appointment is formalised in a court order.

The investigation

Whether the investigation is ordered by summary procedure or following the closure of pleadings, the judge defines the issues and scope of the investigation. The judge will set out the circumstances making the investigation necessary, appoint the expert (see article 265 NCPC), and set a time limit for completing the investigation.

The judge has complete discretion in this regard. His or her decision cannot be appealed, even on a point of law.

The scope of the investigation usually authorises the expert to:

- require disclosure of relevant documents relating to the cause and/or quantum.

- carry out examinations, site inspections or tests. For example, in a personal injury case, a medical expert will want to examine the victim's medical condition; where there has been a road accident, an engineer will need to examine the damaged vehicles or inspect the scene of the accident; when dealing with defective products, it may be necessary to make a factory visit to inspect the manufacturing process; or in a defective foundations case, it may be necessary to conduct a survey over a period to establish any excessive movement.

- hold meetings with the parties to ascertain the facts about the case. The parties commonly attend with their lawyers. The expert may summon anyone with information relevant to the investigation. The parties or their lawyers can ask questions but not conduct an extensive cross-examination.

- provide an opinion on the origin and cause of the loss, and any matters relevant to any potential responsibility.
- provide any relevant information, and
- (if appropriate) give an assessment of the probable quantum.

If necessary, the judge ordering the investigation may require the expert and parties to appear before the supervising judge to specify the assignment in greater detail and to draw up a clearly delineated timetable for the investigation:

see article 266 NCPC. The parties will then provide the expert with any documents that may assist the investigation.

In principle, the expert's report should be limited to factual issues. However, they can be asked to determine the origin or cause of the loss and draw the court's attention to evidence considered relevant to the determination of liability. It can be a fine line, though, between fact-finding and influencing the court's determination of legal liability.

When notified of their appointment by the court, the expert must:

- inform the judge of his acceptance without delay;
- begin the investigation as soon as he is told that the parties have deposited funds on account in respect of his fees. However, the judge can order the expert to start immediately.

While the process of notification and acceptance is an important formality, failure to follow the procedure will not render the investigation null and void.

The parties' files or documents relevant to the investigation are initially kept at the court secretariat. The judge may allow the parties to retrieve these papers or to file copies. The

expert has access to the documents and can review them before accepting the appointment.

The conduct of the investigation

Once the scope and timescale have been set, experts are generally allowed to conduct the investigation how they wish. However, there are boxes they must tick to ensure that the investigation is conducted properly:

- Experts must inform the judge of their progress: see article 273 NCPC.
- Although Experts have total discretion to choose the sources of information, they must act in accordance with the *principe du contradictoire* (broadly equivalent to the “hear-the-other-side” principle). This is central to the concept of justice in France and applies to an expert’s investigation as much as to court proceedings.

The principle entitles the parties to be made aware of all matters necessary to pursue or defend the claim. In essence, a party must be informed of any step taken, or any document or evidence relied on by their opponent and have an opportunity to discuss (or argue about) such matters at any meetings called by the expert.

If the expert does not follow this principle, the court’s final decision on the merits of the case may well be overturned on appeal.

- Experts can consult a specialist in a different field if they find that they need that other specialist’s knowhow during the investigation: see article 278 NCPC.
- If experts encounter difficulties that stop them completing their investigation – or which necessitate an extension of the deadline – they must inform the judge: see article 279 NCPC.

Usually, the expert calls a series of meetings. Judges can attend, although this is rare. If they do attend, they record their observations, the expert’s explanations and the statements of the parties (including third parties) on the court file; the judge signs the statement (see article 274 NCPC).

The expert draws up minutes of the matters discussed at the meetings and lists further steps to be taken, sending copies of the notes to the parties and the court.

The parties can be required to send the expert immediately all documents considered necessary to accomplish the investigation (see article 275

NCPC). If the parties default, the expert will inform the judge, who can then order their production or instruct the expert to file their report on the basis that “the court giving judgment can infer any legal consequence from the failure to disclose documents to the expert”. This power is an interesting aspect of French court procedure, going beyond the usual extent of disclosure of



documents in proceedings. Normally, parties only have to disclose the documents on which they rely and do not have to reveal any paperwork that is prejudicial to their case.

Parties can make observations to the expert – known as “*dires*” – during the investigation, either in oral submissions at the meetings or subsequently in writing. The expert must take these observations into consideration and, if they are in writing, attach them to his or her report when the parties request it: see article 276 NCPC.

When experts set a deadline for such observations or claims, they are not obliged to take into account any observations made after this deadline without good reason.

The parties' last written observations or claims must summarise the content of their previous ones. Otherwise, these observations and claims are regarded as having been abandoned. Experts must set out in their report how they followed up any observations or claims put forward.

The parties can, and often do, retain their own technical advisers. These advisers have no particular status and their opinions have no special evidential standing. They can, however, help to formulate submissions, ensuring that the expert deals with the central issues.

However, if the public prosecutor gets involved in the investigation, he or she can also ask for their observations to be included in the expert's report, and a statement of the expert's follow-up on them.

Settlement of the case automatically concludes the investigation. The expert reports any proposed settlement to the judge (see article 281 NCPC)

and the parties can then ask the judge to make the settlement agreement enforceable.

If it is not essential that the expert's opinion is set out in writing, the judge can authorise the expert to give it orally at a hearing (see article 282 NCPC). In that case, the judge drafts minutes of the evidence or (if the case is decided immediately at first instance) refers to the evidence in the judgment.

Otherwise, experts file their reports with the court clerk. A single report is filed, even if there are several experts in a particular case. If there are differences of opinion, the experts give their own individual opinions. If the expert has obtained the opinion of another specialist, this is attached to the report, the minutes of the hearing or the file.

If the judge thinks that the issues demand greater clarification, he or she can interrogate the expert further.

Filing the report

The expert usually sends the draft report to the parties, giving a deadline for comment. The report is then finalised and filed at court.

If the expert has been appointed in summary proceedings simply to carry out the investigation, then filing the report will bring those proceedings to a conclusion. At that stage, it will be up to one of the parties to decide whether or not to bring a claim based on the expert's report. However, if the investigation is part of a substantive action, the report will then be taken into account in the court's deliberations.

The court is not bound to follow the expert's findings. However, it will usually do so, as it will be hard for the court to contradict its own

accredited expert without the help of another specialist.

If the court is dissatisfied with the expert's report, it can either quiz the expert further about any gaps in the report or order a further investigation of the issues which it feels the expert has not addressed. These occasions are, however, rare.

Challenging the expert

The expert's appointment can only be challenged on certain defined grounds – for example, where there is a pre-existing relationship with one of the parties or the expert has a personal interest in the subject matter of the litigation.

The investigation can be set aside on appeal to the First President of the Court of Appeal if the appellant can show a serious and legitimate reason for doing so. The period for appeal is within one month of the report being filed. The president will decide the appeal summarily. This is independent of the court's judgment on the merits of the case.

A party can seek to challenge the report or have it set aside either because the underlying formalities have been breached or not completed, or for reasons of substance – for example, if an expert has not heard evidence from everyone that the parties have asked to be heard. Again, such challenges are rare.

Alternatively, if the parties are dissatisfied with the report, they can ask the court to order a *contre-expertise*. Again, this does not happen often, as the applicant has to show good reason why the report should not be accepted.

The expert's remuneration

Either the judge ordering the investigation or the

supervising judge will – at the time of the appointment or as soon as possible thereafter – fix the amount to be paid into court on account of the expert's estimated remuneration (see article 269 NCPC). The judge will stipulate a deadline; the proportions due (in cases where several parties are ordered to pay); and when an instalment of the deposit can be applied.

The judge has a discretion when it comes to ordering who should pay the deposit. Usually, it is the party requesting the investigation (who is more likely to be the claimant). The judge is not required to give reasons for the decision.

If the deposit is not made in the period and by the method ordered, the appointment is a nullity, unless the judge extends the period or waives the nullity (see article 271 NCPC).

Once the report is filed, the judge fixes the expert's remuneration (see article 284 NCPC). This is assessed according to the work undertaken, the compliance with time limits and the quality of the work done. The final remuneration can be more than the deposit. However, if the judge proposes to fix the expert's remuneration at a lower sum than the one claimed, then they must invite the expert's observations.

The court can order advance payments to the expert, depending on the complexity of the case (see article 284 NCPC). The expert can apply for additional payments. If they are not paid, the expert files his report.

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Awards Kennedys and its associated offices have won recently

Winner: Law Firm of the Year



“Kennedys is a firm at the peak of its powers and planting roots for further success.”

Winner: Insurance Team of the Year



“A strong performance as a firm and for clients in this core market makes Kennedys a deserved winner.”



Kennedys’ associated India office win ILO ‘Client Choice Award’

Kennedys’ associated offices, Tuli&Co, led by former Kennedys Partner Neeraj Tuli have been announced as winners of the International Law Office (ILO) Insurance & Reinsurance award. The ILO ‘Client Choice Awards’ recognise those law firms and partners around the world that stand apart for the excellent client care they provide and the quality of their service.

Kennedys converts to LLP

We inform you that from 1st May 2010 the practices of the partnerships of Kennedys in England and Wales, Belfast, Dubai and Singapore will be carried on by the following limited liability partnerships, to which the partnerships have transferred their businesses:

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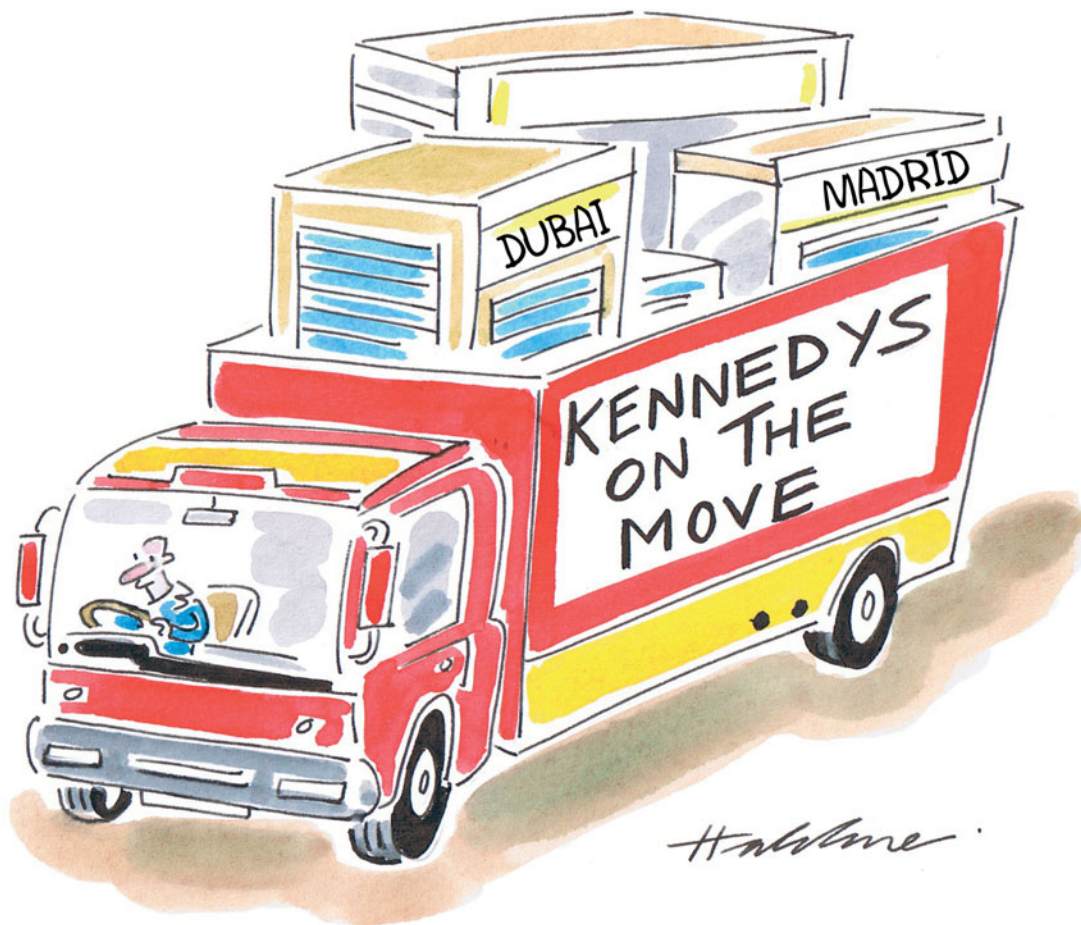
These changes will not affect the services you receive. The same people will continue to handle your work as before, but from today they will do so as members and staff of and in the name of the relevant LLPs.

If there are any matters you wish to raise in connection with the above, please speak in the first instance to your main relationship partner.

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