

2009 REPORT ON DEVELOPMENTS AFFECTING THE INSURANCE INDUSTRY

LEGISLATION	Page
Civil Law Reform	1
Dangerous Dogs Bill	1
Companies Act	1
Coroners & Justice Bill	1
Equality Bill	1
Health & Safety (Offences) Act	2
Local Democracy etc Construction Bill	2
Mental Health Act	2
Personal Responsibility Act	2
Regulatory Enforcement Sanctions Act	2
Road Safety Act	3
Third Parties (Rights Against Insurers)	3
Welfare Reform Bill	3
 RULES & REGULATIONS	
Code of Practice for the Protection of Empty Buildings	3
Control of Noise at Work Regulations	3
Costs Capping	4
Environmental Damage (Prevention & Remediation) Regulations	4
European Mediation Directive	4
NHS Injury Costs Recovery Scheme	4
Rome I	5
Rome II	5
Sentencing Guidelines Corporate Manslaughter	5
Solvency II	5
Work at Height Regulations	6
 FOCUS ON ASBESTOS-RELATED DEVELOPMENTS	
Pleural Plaques	6
Pneumoconiosis Regulations	6
Child Maintenance & Other Payments Act	6
 CONSULTATIONS, REPORTS & REVIEWS	
Administrative Redress Against Public Bodies	7
Admiralty & Commercial Courts Guide	7
AIRMIC Statement on Reservations of Rights	7
AIRMIC Statement on Speed of Settlement	8
Animals Act Consultation	8
Claims Process Review	8
Collective Active Reform	8
Commercial Court	9
Consumer Remedies for Faulty Goods	9
Costs from Central Funding in Criminal Cases	9

Damages	9
Electronic Disclosure	10
Electronic Working Pilot Scheme	10
Equality Bill Consultation	11
FSA Statement of Consequential Loss	11
Fit Certificate	12
Insurance Contract Law	12
Jackson Review of Civil Litigation Costs	13
Limitation Reform	13
Mediation Confidentiality	13
Regulating Damages Based Agreements	14
 CIVIL PROCEDURE RULES	
47 th CPR Update	14
49 th CPR Update	14
50 th CPR Update	15
New Supreme Court	16
 CASES	
Animals	17
Causation	18
Contractors	19
Costs	19
Credit Hire	23
Damages	23
Deliberate Damage	24
Disease	24
Electronic Disclosure	29
Employer's Liability	30
Ex Turpi Causa	30
Fatal Accidents	30
Fraud	30
Health & Safety	33
Interim Payments	35
Jurisdiction	35
Limitation	37
Loss Adjusters	39
Negligence	39
Non-Disclosure	40
Periodical Payments	41
Policy Interpretation	42
Practice & Procedure	44
Re-Insurance	44
Road Traffic	45

LEGISLATION

Civil Law Reform Bill

A draft of the Bill is due to be published later this year following on from the announcement by the Office of the Leader of the House of Commons in December 2008. The Bill will bring forward a number of civil law reform measures, encompassing Law Commission recommendations to simplify and update the law. These are likely to include reform of:

- the law of damages (to include dependency claims and bereavement damages under the Fatal Accidents Act 1976);
- the Limitation Act 1980; and
- the law in relation to pre-judgment interest.

Dangerous Dogs (Amendment) Bill

This Bill was introduced on 1 July 2009 under the Ten Minute Rule motion to extend the offence of having a dog dangerously out of control. It would apply to attacks in public and private places, so as to include homes and gardens. There will be a second reading on 16 October 2009.

Companies Act 2006

This Act will be fully implemented on 1 October 2009 and replaces almost all earlier companies legislation. It has been phased in over three years and introduces a wide range of changes to areas such as the formation of companies, shareholders' rights and share capital maintenance. In particular the Act provides for a codification of directors' duties and establishes new directors' duties. It also prescribes the extent to which companies may indemnify directors.

Coroners and Justice Bill

The Bill aims to deliver more effective, transparent and responsive justice and coroner services for bereaved families and witnesses. In addition to containing wide-ranging provisions designed to reform Coronial law, the Bill includes measures to reform and clarify the law on homicide (particularly in relation to partial defences), update the offence of assisting suicide, and introduce a new system of certification of deaths that are not referred to the Coroner. The Bill includes provisions in relation to evidence in criminal proceedings, and also proposes enhanced inspection powers for the Information Commissioner. The Bill was introduced in the House of Commons on 14 January 2009, and continues its passage through both Houses of Parliament. Following the summer recess, the Bill as amended in Committee is scheduled to begin its passage through the Report stage in the House of Lords on 21 October 2009 and will potentially receive Royal Assent later in the same Parliament.

Equality Bill

The Equality Bill, first published in April 2009, has received its second reading in the House of Commons and been considered in Committee. It will receive close scrutiny from the House of Lords in the autumn and is currently expected to reach the statute book in April 2010, its principal provisions coming into force from October 2010. In addition to consolidating the provisions of existing discrimination legislation, the Bill seeks, so far as practicable, to harmonise the approach taken to what are now known as "the protected characteristics" – age, disability, gender reassignment, marital status and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Where there is perceived to be a need to develop and improve upon existing legislation, this has been tackled. In particular, disability discrimination is given an overhaul. Equal pay issues are also addressed, with new and controversial provisions to encourage transparency on pay.

A range of new and revised duties on public authorities is incorporated, with a view to eliminating discrimination, advancing equality of opportunity and fostering good relations between people who

have a relevant protected characteristic and others who do not.

Significantly, a number of important powers are reserved for Ministers to make a variety of regulations in due course. While this will facilitate consultation, before the detail can be worked out, it generates uncertainty and concern in the meantime. For example, the Bill provides that a Minister may "impose duties on a public authority that is a contracting authority within the meaning of the Public Sector Directive in connection with its public procurement function". This is likely to have wide ramifications not only for public authorities but all those in the private sector providing good facilities and services to the public sector. Of perhaps greatest significance is the extension of the existing protection against discrimination beyond the workplace to the provision of good facilities and services, including insurance (see further below under Consultations, Reports and Reviews).

Health & Safety (Offences) Act 2008

The Health and Safety (Offences) Act 2008 came into force on 16 January 2009 and applies to health and safety offences committed after that date. Although the Act does not create any new offences or legal duties, it increases the penalties and provides courts with greater sentencing powers for those who break health and safety law. There is certainly now more scope for a financial sting on an organisation, even for less serious health and safety breaches sentenced in the Magistrates Court. The possibility of imprisonment of individual directors for up to two years may result in more policyholders contesting prosecutions with the associated cost to insurers.

Local Democracy, Economic Development and Construction Bill

The review of the "Construction Act" was first announced in the 2004 budget. Progress has been slow. However, the Local Democracy, Economic Development and Construction Bill has now passed through the House of Lords (without amendment) and the Committee stage in the Commons. The Bill will now move to the Report stage in the House of Commons on 13 October 2009. Part 8 of the Bill will amend both the adjudication and payment provisions in the Construction Act 1996. A key change, which could lead to uncertainty in the future, is the removal of the requirement for contracts to be in writing for the Construction Act to apply. Many of the proposed changes will favour the payee under a construction contract.

Mental Health Act 2007

The majority of the provisions came into force on 3 November 2008 aimed at modernising mental health legislation to bring it in line with changing psychiatric practice and Human Rights law. The key changes are a broader definition of a mental disorder to include "any disorder or disability of the mind", and the proviso that, for a patient to be detained under s.3, "appropriate medical treatment is available" for their mental disorder.

Personal Responsibility Bill

This Private Members' Bill, introduced by Norman Baker MP, is aimed at placing greater responsibility on the individual for the consequences for them of their own actions and of any failure to use common sense. It is due to receive a second reading on 16 October 2009.

Regulatory Enforcement and Sanctions Act 2008

This came into force in two stages on 1 October 2008 and 6 April 2009 and gives Ministers the power to make further legislation granting regulators new civil sanction powers. The provisions aim to streamline and improve the exercise of regulatory powers, reducing the burden on businesses and Regulators by moving enforcements from the courts to the administrative sphere.

Road Safety Act 2006

On 31 March 2009 sections 4 and 5 of the Act came into force introducing graduated fixed penalties and penalty point endorsements for various offences. Penalties vary according to the type, location and severity of offence. Section 9 came into force on 1 April 2009 providing that drivers who disobey traffic laws and cannot prove that they have a valid address in Britain will be required to pay up to £900. The fine is described as a deposit as it can be repaid if the driver is subsequently acquitted. This section of the legislation will impact primarily on foreign drivers, although it will also apply to British residents who cannot prove at the roadside that they have a valid British address. The standard deposit for careless driving is £300. For speeding and the use of hand-held mobile phones the fine is £60, in line with existing fixed penalties.

Third Parties (Rights Against Insurers) Bill

The Third Parties (Rights Against Insurers) Act 1930 applies where a person or company is insured against a liability which they subsequently incur to a third party. If the insured becomes insolvent, the Act transfers the rights against the insurer to the third party once the liability of the insolvent party has been proved. In 2001 the Law Commission published a report and draft Bill, the main reforms including:

- giving the third party a right of action before the liability of the insured has been established;
- avoiding the need to restore a dissolved company to the register where it has been struck off;
- improving rights of third parties to information about the insurance cover; and
- removing some of insurers' defences.

The Bill has been listed as the second of two uncontroversial Law Commission Bills to be passed by a new House of Lords procedure and it is hoped that it will be implemented before the general election.

Welfare Reform Bill

This Bill proposes to reform the welfare and benefit system to improve support and incentives for people to move off benefits into work. It includes measures to increase personal responsibility within the welfare system.

RULES & REGULATIONS

Code of Practice for the Protection of Empty Buildings

As the credit crunch bites, the number of unoccupied properties is likely to increase along with the attendant risks. So it is timely that the Fire Protection Association, in conjunction with the Insurers' Fire Research Strategy Scheme, has published a Code of Practice for the Protection of Empty Buildings. This provides practical advice on the management and protection of unoccupied properties, including details on how best to "put the building to sleep" and fire and security considerations. While not legally binding, insurers should consider raising awareness of the Code among their relevant insureds and brokers at as early a stage as possible and either incorporating compliance with the Code as a condition precedent or converting some of the steps into specific condition precedent endorsements.

The Control of Noise at Work Regulations 2005

The Control of Noise at Work Regulations 2005 were amended from 6 April 2009 to include a requirement that hearing protection supplied for use at work complies with the Personal Protective Equipment Regulations 2002.

Costs Capping

New rules were inserted into the 49th CPR update to codify applications for and variation of costs capping orders on future costs following the comments of the Court of Appeal (CA) in Willis v Nicolson and to reflect existing practice. A costs capping order limits the amount of future costs (including disbursements) allowed. It is, however, only likely to be made in exceptional circumstances where it can be demonstrated there is a substantial risk of disproportionate costs which cannot be controlled by other means available e.g. case management directions or detailed costs assessments.

Environmental Damage (Prevention and Remediation) Regulations 2009

These Regulations came into force on 1 March 2009 and significantly increase the legal requirements as to how companies respond to incidents that involve or pose the threat of environmental damage. They aim to make those who damage the environment legally and financially responsible for the damage (the "polluter pays" principle). Liability is also extended beyond the traditional boundaries of land and water courses to include damage to habitats and species. In the 2006 case of Bartoline v Royal Sun Alliance it was held that the claimant's liability to the Environment Agency and its own costs of complying with a statutory notice to carry out clean up works were not covered by the PL policy, as they were not capable of being a legal liability for damages. Businesses will need to consider carefully their approach to insurance cover in respect of environmental pollution and environmental impairment liability is set to become a big growth area for insurers. However, calls are increasing for trade organisations to set up their own mutual insurance programmes to help reduce premiums that are beyond the financial capabilities of small businesses e.g. dry cleaners and independent petrol stations. The Regulations will also require fresh skills in calculating the cost of much broader possible remediation requirements, such as encouraging a new environmental area to develop.

European Mediation Directive

The EU Mediation Directive was formally adopted by the European Parliament and Council on 21 May 2008. The Directive is aimed at encouraging the use of mediation as a cost-effective and quick alternative to litigation in cross-border commercial disputes. The Directive obliges Member States to introduce a mechanism by which agreements made as a result of mediation can be enforceable, giving such agreements a status similar to that of a court judgment. If a mediation attempt fails, parties should still have recourse to the courts and rules on limitation should be suspended while mediation takes place. One of the characteristics of the mediation is its confidentiality: mediators cannot be asked to provide a national court or arbitrator with evidence produced during the mediation. This provision is thought to be essential to giving parties confidence in the mediation process and to encourage open discussion. Though several Member States, including Germany, Italy and Portugal, have already implemented the Directive into national law, (it does not require implementation until June 2011) it is too early to highlight findings of the application of the new rules. As mediation is already widely used in the UK, it is unlikely that the Directive will have significant impact on companies operating in the UK. Unlike the rest of the EU, the UK court system already encourages parties to use Alternative Dispute Resolution (ADR).

NHS Injury Costs Recovery (ICR) Scheme

The tariff and ceiling on charges payable by compensators for the recovery of NHS charges under the ICR scheme increased on 1 April 2009. The increases apply only to injuries sustained on or after that date. In addition, the Regulations have also sought to amend the legislative anomaly whereby the compensators of overseas visitors who have had to pay for their NHS treatment are still liable for ICR recovery. This uplift in the level of charges is an annual event to reflect Hospital and Community Health Services (HCHS) inflation. The latest available figure for HCHS inflation is 3.4% for 2008/09. Therefore, where the injured person is provided with NHS ambulance services, the charge is

increased from £165 to £171 for each occasion. Where the injured person receives NHS treatment, but is not admitted to hospital, the charge is increased from £547 to £566. The daily charge for NHS in-patient treatment is increased from £672 to £695. The maximum charge in respect of an injury is increased from £40,149 to £41,545.

Rome I

Rome I deals with the law applicable to cross-border contracts and determines how EU courts decide which country's law applies to a contract. It comes into force in all EU countries (except Denmark) from 17 December 2009. In broad terms, Rome I starts from the premise that the parties are free to choose which country's law should apply to their contract. If no choice has been made, Rome I details rules for specific types of contract. For contracts not listed, either the country of the party effecting characteristic performance or the country with which the contract is most closely connected will supply the applicable law.

Rome II

Rome II came into effect on January 2009. It applies in situations involving a conflict of laws, to non-contractual obligations (i.e. tort claims) in civil and commercial matters. The general rule under Rome II is that the applicable law will be that of the country in which the damage occurs. Where, however, the claimant and defendant are habitually resident in the same country, the applicable law will be the law of that country. There is also be an exception to the general rule where "*...it is clear from all the circumstances of the case that the tort...is manifestly more closely connected with [another] country*", when that country's law will apply. There are specific provisions for product liability claims, where the general rule is that the applicable law is that of the country where the claimant is habitually resident. The real difference posed by Rome II may be the move from national courts determining applicable law according to their standards, to a standard approach across the EU - although, with Rome II only coming into force in January, the courts have not yet had to get to grips with its scope. Anecdotally there may be an issue between different EU countries as to whether Rome II applies to accidents pre-January 2009 (the accepted wisdom in the UK), or only to those post the date of its introduction.

Sentencing Guidelines for Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force in April 2008 creating the new statutory offence of corporate manslaughter. The sentencing guidelines to accompany this are due to be published in September 2009. The guidance will assist judges in how to determine the appropriate fine and when to impose remedial and publicity orders. Whilst details of convictions are already published on the HSE's website there is now potential for much greater publicity under the Act. Sanctions available to the court include: an unlimited fine, remedial or publicity orders, whereas previously only an unlimited fine and a remedial order were available under the Health & Safety at Work Act 1974 (HSWA).

Solvency II

This is a fundamental review of the capital adequacy regime for the European insurance industry. It will establish EU-wide capital requirements and risk management standards to replace the present Solvency I requirements. The framework principles set out in the Level 1 test were adopted by the European Parliament on 22 April 2009 and endorsed by the Council of Ministers on 5 May 2009, concluding the legislative process for adoption. The new requirements will now be implemented on 31 October 2012. In preparation for Solvency II in the UK insurance market, a discussion paper was published in 2008 explaining key elements of the new regime and identifying action insurers should currently be taking in anticipation of its adoption. Part of that discussion paper was an invitation for comment from stakeholders which resulted in a feedback statement published on 6 May 2009.

Work at Height Regulations 2005

These Regulations are to be the subject of an in-depth review by the House of Lords' Merits Committee as part of their study to assess the degree to which Government departments check whether legislation is working as anticipated. Feedback has been invited on the impact of the Regulations by 11 September 2009.

FOCUS ON ASBESTOS-RELATED DEVELOPMENTS

(see also consultations and case law section)

Pleural Plaques

The Scottish Government passed legislation on 17 June 2009 to reverse the House of Lords judgment on pleural plaques in 2007. The Damages (Asbestos Related Conditions) (Scotland) Act 2009 received Royal Assent on 17 April 2009 and a Commencement Order was made on 29 April 2009 bringing the Act into force. A group of insurers has launched a formal challenge to the Act in the Scottish Courts by way of petition for judicial review which has been part heard. There are further dates listed in September 2009 with a judgment expected before Christmas.

In England there have been a number of indications from the government that there would be an announcement on their response to the consultation by the Ministry of Justice (MoJ) on pleural plaques but nothing has been forthcoming, despite questions being put to the government in the House of Commons. Now that Parliament has risen for the summer it will be October at the earliest before any announcement is possible. A Private Members' Bill (The Damages (Asbestos Related Conditions) Bill), sponsored by Andrew Dismore MP, was given an unopposed Second Reading in the House of Commons on 24 April and will now proceed to be considered in Committee some time in October 2009. However not too much should be read into this: the chances of any Private Members' Bill reaching the statute book remain limited, as long as some opposition is maintained to the Bill. Insurers may need to make sure this is happening. Meanwhile the Northern Ireland Assembly has intimated that it too will provide compensation for pleural plaques but the time-table for doing so is currently unclear.

The Pneumoconiosis (Workers' Compensation) (Payment Of Claims) (Amendment) Regulations 2009

These came into force on 1 April 2009 and increased, by 5% in each case, the lump sum amounts payable under the Pneumoconiosis (Workers' Compensation) Act 1979.

Child Maintenance & Other Payments Act and The Social Security (Recovery of Benefits)(Lump Sum Payments) Regulations 2008

In force from 1 October 2008, the Act affects all compensation payments made to mesothelioma sufferers and, if deceased, their relatives, on or after 1 October 2008. Unlike the previous scheme the payment is made regardless of whether an individual was exposed in the workplace. Hence it provides up-front financial support within six weeks to people who were previously not eligible, including those who were:

- exposed to asbestos from a relative (e.g. from their overalls);
- exposed to asbestos environmentally (e.g. lived near a factory using asbestos);
- self-employed; and
- those who can't trace their exposure to asbestos.

Compensators can deduct all 1979 Act and 2008 Act payments from any head of damage but will

have to repay the amounts deducted to the CRU. This will mean higher total payments for defendants in those cases where deductions were made previously, but no increase in the total value of the award. All new CRU certificates issued by the DWP state whether any payments have been made, giving the date of payment, which may be relevant to limitation issues.

CONSULTATIONS, REPORTS & REVIEWS

Administrative redress against public bodies – Law Commission consultation

The Better Regulation Task Force publication "Better Routes to Redress" and the Compensation Act 2006 were introduced to rebalance the propensity for defensive actions by public bodies, seeking to avoid the perceived need for actions such as cancellation of school trips and removal of stress on health and safety grounds. This process has been expanded by the publication of a consultation paper "Administrative redress: public bodies and the citizen". This document puts forward proposals for changes to the manner in which redress can be sought against a public body and to the criteria for the availability of redress, in both public and private law. The paper envisages, in certain limited situations, a new regime for negligence claims against public bodies. In formulating its proposals the Commission has attempted to balance the interests of citizens in obtaining justice against the need for public bodies to be able to perform their roles in the interests of the public as a whole. Responses were sought by 7 November 2008 but nothing further has been heard.

The Admiralty and Commercial Courts Guide (8th edition, 2009)

Published on 18 May 2009, the amendments reflect most but not all of the recommendations made by the Commercial Court Long Trials Working Party. Key changes include the following:

- new provisions which seek to minimise the costs of complying with Pre-Action Protocols, including recognition that there may be cases where it is necessary or proper to commence proceedings without following Pre-Action Protocol procedures;
- limiting statements of case to a maximum of 25 pages;
- making the List of Issues central to case management;
- provisions relating to case management;
- applications for permission to call an expert witness should refer to specific issues in the List of Issues, and the report must be limited to those issues for which permission to call expert evidence was given;
- limiting skeleton arguments to 50 pages if possible.

AIRMIC Statement on Reservations of Rights

In December 2008, AIRMIC released a Statement of Principles in relation to insurers' use of reservations of rights. The key features are as follows:

- It applies to any loss reasonably anticipated to exceed £2.5m, where the policy is issued in England and Wales and is subject to both English law and jurisdiction.
- The fundamental aim is that insurers will not issue a reservation of rights within 90 days of notification of a claim, instead using the time to communicate on a "without prejudice" basis about how the policy may respond, what further information is required and a timetable for resolution.
- An insurer can "conclude at its absolute discretion" that the Statement is not appropriate for a particular loss.
- Where a reservation of rights is to be imposed within the above period, it will be necessary to provide a full explanation.

On a related note, in January AIRMIC also released a claims best practice guide which identified eight components that determine the quality of a claims service. Within that is mention of commitment to adhere to the Statement of Principles on reservations of rights. It is only a matter of time until the FOS looks to the Statement as well.

AIRMIC Statement on Speed of Settlement

In June, AIRMIC also reached outline agreement on a scheme to facilitate the prompt settlement of claims as banks become less willing to provide credit, thereby threatening the existence of some companies. Final agreement is expected this Autumn. It is understood that under the deal a loss adjuster would produce a cash flow model and the insurer would undertake to protect the policyholder's cash flow position by making interim payments.

Animals Act Consultation

A year after Stephen Crabb MP's unsuccessful Private Member's Bill, DEFRA has recently closed a consultation proposing amendment to s.2(2) of the Animals Act 1971. The amendment seeks to clarify the application of strict liability to the keepers of animals that cause harm or damage. The new wording would refer to damage being caused by "unusual or conditional" characteristics of the animal. Where damage is caused by the latter, there would be a defence where the keeper can show that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristics would arise at that time. It is understood that the Legislative Reform Committee of the House agreed that the proposed draft order should go ahead by affirmative resolution. However it still appears to be outstanding.

Claims Process Review

In July 2008 the Government finally published its response to the consultation on the personal injury claims process. The original wide-ranging proposal for wholesale reform was watered down to apply only to personal injury road traffic cases valued between £1,000 and £10,000. The aim of the reform is to ensure the process delivers fair compensation to the claimant as soon as possible. It provides for insurers to have early notification of the claim, with sufficient information to enable them to make a decision on liability, while recognising that there are steps the claimant solicitor has to follow before notification can be given. The aim is for the process to be as clear and well defined as possible and to include fixed time periods and costs so as to reduce the opportunity for satellite litigation. Since publishing its response, the MoJ has continued to work with stakeholders to develop the detail of the new process with a view to their implementation on 6 April 2010. Full details of the scheme and draft rules will be published this Autumn to allow for a sufficient lead in time.

Collective Action Reform

On 20 July 2009 the government published its response to the Civil Justice Council (CJC) report 'Improving Access to Justice through Collective Actions' which made ten key recommendations for reform of collective redress procedures. The most significant proposals were the introduction of a generic collective action mechanism, with an opt-out for group litigation and an endorsement of the retention of the present costs shifting rules. While the government accepts that there may be instances where some cases could be brought more effectively on a collective basis, it rejects the need for a generic class action system. Its preferred option is to proceed by introducing reform on a sector by sector basis only where there is clear evidence of need. In reaching its decision the government placed considerable weight on the concerns about a full opt-out model in mass tort claims involving factually complex claims with different areas of causation.

Commercial Court

Following criticism of the Commercial Court's handling of certain large-scale litigation, the Commercial Court Long Trials Working Party was established in January 2007 to consider all aspects of the management of heavy and complex litigation in the Commercial Court. The report of the working party was considered and adopted by the Commercial Court judges and the working party's recommendations were implemented in a pilot scheme in the Commercial Court. Practitioners were invited to comment on the pilot reforms and the Commercial Court Guide has now been amended in the light of these developments.

Consumer Remedies for Faulty Goods - Law Commission Review

In November 2008, the Law Commission published a consultation paper on consumer remedies for goods which do not conform to contract. BERR (now BIS) referred the project because the current law is considered to be too complex. Goods may not conform to contract because, for example, they are faulty or do not match their description. Where this happens, consumers have at least six possible remedies: rejection, repair, replacement, rescission, reduction in price or damages. Both consumers and retailers are often confused about which remedy is available in what circumstances. The consultation paper provisionally proposed that the right to "reject" goods and receive a full refund should be retained, but the law should provide greater clarity about how long the right to reject lasts (a 20 day normal period is proposed). The legislation should also clarify that consumers may receive a full refund after a repair or replacement has failed. The consultation paper considers the European Commission's proposal for a draft directive on consumer rights to harmonise the law in this area, which would potentially put the right to reject at risk. The consultation period closed in February 2009 and a final report with recommendations is anticipated by the end of the year.

Costs from central funding in criminal cases – MoJ consultation

In November 2008 the MoJ published a consultation paper on 'The Award of Costs from Central Funds in Criminal Cases'. In essence the MoJ is concerned at the current Central Funds (CF) expenditure which runs at over £60 million per annum against an allocated budget of £45 million. It proposes to limit this by introducing changes to the way in which privately paying acquitted defendants in criminal cases are remunerated. As matters currently stand, acquitted defendants can be compensated for their costs from CF under the Prosecution of Offences Act 1985. This is the situation irrespective of whether defendants paid for their defence privately, or did not qualify for legal aid. Companies do not qualify for legal aid in any event but can similarly claim from CF at present. If implemented, the proposals, will have important consequences for both defendants in health and safety cases and also insurers providing defence costs cover to organisations and individuals at risk of prosecution for these offences.

Damages

In July 2009, two years after its original deadline, the MoJ has published its response to the 2007 consultation. The proposals are intended to help provide a fairer and more coherent system of delivering compensation to claimants with valid claims. The response summarises the replies received during the consultation and sets out the government's conclusions and next steps. Among the changes to be introduced is a widening of the category of claimants able to claim under the Fatal Accidents Act 1976, to include any person who was wholly or partially maintained by the deceased prior to death. Bereavement damages will also be made available to more classes of people, including unmarried fathers with parental responsibilities, co-habitees of two years and children under the age of 18 for the death of a parent. The response proposes changes to the law in relation to damages for gratuitous care (care provided by relatives etc) and on aggravated and restitutionary damages. This will potentially result in a significant increase in damages paid in mesothelioma claims.

The proposals for the primary legislation will be included in the Civil Law Reform Bill due for publication later in the year.

Electronic Disclosure

With both the courts and the CPR focusing on electronic disclosure, it is important insurers are aware of the requirements and take necessary action now to try and avoid the significant costs consequences on the horizon. Electronic disclosure relates to the need to ask parties to litigation whether there is any relevant information which is stored in an electronic medium and may need to be disclosed. It is a misconception to think that electronic disclosure only relates to big ticket litigation. It applies across the board. According to recent research, 93% of information is now held in a digital format and 70% of that data is never printed.

The sources of electronically stored information are almost endless, but commonly include emails, Word documents and information on back-up tapes, CDs, DVDs, memory sticks, BlackBerries and mobiles. It is common to be told there are no relevant electronic documents, only to find key discussions in emails or text messages. Another frequent response is that the documents have been destroyed. However, there may be back up tapes or data still stored on a computer's hard drive. While many parties have traditionally skirted the issue when it comes to disclosing documents by ticking the statement on a List of Documents that "I did not search for electronic documents", that is no longer going to be a realistic response.

When Practice Direction 31.2A was introduced in 2005, there was not considered to be any need for a technology questionnaire, but this has been reviewed and a final draft is now in circulation. There is also to be a new stand-alone Practice Direction on electronic disclosure, intended to give the issue more prominence. The purpose of the Technology Questionnaire is to identify the scope of the disclosure of electronically stored information required in an action, against the background of the issues identified by the statements of case and the requirement of proportionality. Lawyers and loss adjusters need to be asking their insureds for electronic documents from the outset. In addition to procedural changes, the judiciary has also been providing useful guidance on what behaviour is now expected of parties.

Electronic Working Pilot Scheme

A Practice Direction (Electronic Working Pilot Scheme) came into force on 1 April 2009 in the Admiralty, Commercial and London Mercantile Courts at the Royal Court of Justice (RCJ) to be used to start Part 7 claims issued in those courts on or after that date. For the first three months the pilot only applied to a small number of the most frequent Commercial Court users but will now apply to all Admiralty and Commercial Court users.

The key benefit of the scheme is that the system will operate 24 hours a day all year round, including weekends and bank holidays, so that court forms can be issued and filed outside normal opening hours. It is also intended that the electronic case file will be available for parties to view online. Other intended benefits include:

- modernisation of the service benefiting court staff and judiciary, plus making it more attractive to customers enabling them to interact electronically with the court;
- improvements to case lifecycle processing time, plus court staff and judiciary effort savings;
- implementation of high levels of automation across the operation to reduce manual effort and reduce errors;
- more efficient operational capability to cope with increasing workload across business courts;
- single source of the truth for case files and performance management information.

The Practice Direction provided for the expansion of the pilot scheme to other courts at dates to be notified and the MoJ policy is that, as from July 2009, work will begin to expand electronic working to other divisions at the RCJ. The pilot has already gone live at the Technology and Construction Court, commencing 20 July 2009. It is intended to go live in the Chancery Division from November 2009 and in the Bankruptcy and Insolvency courts at the RCJ by March 2010.

Equality Bill Consultation

The government has published two consultation papers in relation to proposals contained in the Equality Bill. The first addresses specific duties affecting in particular the public sector (although those providing good facilities and services to public authorities will also be affected). The government proposes to take a "light touch" to achieve its objectives and to facilitate flexibility in practice. It is recognised that a "one size fits all" approach is not appropriate but that public bodies will need clear parameters within which to operate. While admirably embracing the principles of being fair, proportionate, transparent as well as practical and realistic, translating this into effective legislation is a challenge.

The second consultation paper, addressing the ending of age discrimination in services and public functions, contains proposals for a number of sectors, most notably health and social care, and financial services. Of key interest to insurers will be the three options for the use of age related criteria in the provision of insurance. Option 1 would permit the use of age criteria only where objectively justified. Option 2 would provide a tailored and specific exception, allowing age to be taken into account, provided that it is proportionate to risk and costs. The third option is a wide and specific exception which would enable all current practices to continue. The second of these is favoured by the government. The closing date for responses to these consultation papers is 30 September 2009. Meanwhile, the government has announced that it proposes to review the default retirement age in 2010. Its consultation paper "Building a Society for all Ages" sets out the government's strategy for tackling various issues arising out of the UK's ageing population, including health and social care, financial well-being, employment, retirement and community engagement. This may raise the default retirement age from 65 to, perhaps, 70, if not the abolition of the provisions (contained in the Employment Equality (Age) Regulation 2006) which currently enable employers to require employees to retire at 65. These provisions are the subject of a challenge in the High Court (the "*Hay Day*" case) and judgment is expected at the end of September 2009.

FSA Statement on 'Consequential Loss'

In 2009 the FSA published a statement on using the words "consequential loss" in consumer general insurance contracts. The words are commonly used to exclude insurers' liability for losses that are indirectly caused by an insured event. The FSA has stated that, contrary to the Unfair Terms in Consumer Contracts Regulations 1999, a term which includes such words is not written in plain, intelligible language as it refers to an expression that has a legal meaning and it may also be unfair, causing a significant imbalance in the party's rights. If a court deems a "consequential loss" exclusion unfair under the Regulations, it would not be binding on the consumer and insurers would be liable to pay out for the losses they had sought to exclude.

Travel insurance policies offered by Royal Bank of Scotland Group companies and by other companies where they are responsible for the wording, have been challenged by the FSA and amendment required. Illustrative alternative wording provided by the FSA includes "We will only pay costs which are incurred as a direct consequence of the event which led to the claim you are making under this policy". While it is questionable whether these wordings are any more intelligible for

consumers, there is clearly an overlap with Treating Customers Fairly and it is therefore crucial that insurers review their wordings both now and regularly in the future.

'Fit' Certificate

The Department for Work & Pensions has published details of its proposals to replace paper GP sick notes with an electronic 'fit' note as from April 2010. A 12 week consultation was launched on 29 May 2009, and ended on 19 August, to consider the design and content of the new certificate. The intention is that the new note will allow GP's to classify a patient as "may be fit for some work now". The GP may also be able to suggest whether there should be a phased return to work, altered hours, amended duties and/or workplace adaptations. The aim of the proposals is to encourage discussions between employer and employee, reduce sickness absence and support employees in their return to work.

Insurance Contract Law - Law Commission Review

The Law Commissions of England and Scotland continued their review of insurance contract law in 2008/9. In October 2008, they released their summary of the responses to the first consultation on non-disclosure, misrepresentation, warranties and intermediaries in as far as "business" reform is concerned. Key proposals for business reform included retaining the duty of disclosure, unlike for consumer insurance. As for consumers, however, the test for materiality for non-disclosure/misrepresentation would be that of the "reasonable insured" and the consequences for breach would depend on the policyholder's state of mind. Basis of the contract clauses would also be abolished. However, unlike consumer insurance, the proposals would form a default regime, out of which insurers could contract (except in relation to basis of the contract clauses). In relation to intermediaries, they would be regarded as acting for an insurer when obtaining pre-contract information where they only dealt with a limited number of insurers and did not search the market on the insured's behalf. It was this proposal that received the most opposition from the market.

In March 2009 the Law Commission published a policy statement on intermediaries following the concerns raised above. This sets out a new statutory code for deciding for whom the intermediary acts when it passes pre-contractual information from the consumer to the insurer. Such provisions would be incorporated into the draft Consumer Bill. At the same time, the Law Commissions published a memo on section 83 of the Fires Prevention (Metropolis) Act 1774, asking whether the provision was in need of reform. The provision gives interested persons the right to demand that insurance money is used to reinstate a building damaged by fire, rather than being paid to the policyholder. The tentative conclusion was that no reform is required.

In April, the latest issue paper was released on micro businesses. Despite earlier statements that there was no need for extra protection for small businesses, these proposals suggest that micro businesses should be treated as consumers, crucially removing the need for them to volunteer information. It is suggested that a micro business should be defined by one of the following tests:

- fewer than 10 employees;
- turnover of less than a specified amount, perhaps £1million, at the time the risk is placed; or
- the FOS jurisdiction, currently turnover of up to £1million.

Further issues papers are outstanding on damages for late payment and possibly post contractual good faith to be dealt with by a second consultation paper dealing with these issues. Of more significance, however, is the draft Consumer Bill which is currently expected at the end of this year.

Jackson Review of Civil Litigation Costs

This review started in January 2009 with phase one concluding in the publication of the preliminary report on 8 May 2009 and forming the basis for a public consultation which closed on 31 July. The findings are due to be presented to the new Master of the Rolls in a report at the end of the year. All options will be considered including abolishing the recovery of success fee and after-the-event insurance premiums, contingency fees, tighter costs management and fixed fee models. Lord Justice Jackson has already compared the costs regime in England and Wales with that in other countries, following a whistle-stop world tour during phase one. The remit of the review is "To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost". The report is likely to be an unbiased attempt to solve the problems associated with costs recovery in this country: the key factor will be whether the proposals are capable of acceptance either by this government or more likely by the next one.

Limitation Reform – Impact Assessment

In 2001 the Law Commission published proposals to reform the law of limitation of actions following its consultation on the Limitation Act 1980. The government announced in the Queen's Speech on 3 December 2008 that it now intends to incorporate these new provisions in the Civil Law Reform Bill, due to be published for pre-legislative scrutiny later this year. It is too early to say when (if at all) legislation will be introduced into parliament. The Bill will be accompanied by a provisional Impact Assessment describing the effects of the proposed reforms. The MoJ has invited selected stakeholders to participate in a consultation paper in respect of the impact of the proposed changes to limitation periods for personal injury actions. The closing date for responses is 11 September 2009. Following the decision in A v Hoare the main change (ie. the removal of the fixed 6 year period for injury consequent upon assault) has already occurred. The consultation suggests that for the purposes of date of knowledge there will be wider consideration of the claimant's personal characteristics. There is also an attempt to clarify issues relating to the exercise of s.33 discretion.

Mediation Confidentiality

On 8 July 2009, the Civil Mediation Council (CMC) published Guidance Note No1 on Mediation Confidentiality, following the decision in Farm Assist Ltd v DEFRA (no 2) (2009). It is clear that the courts are developing the law in this area on a case by case basis and the following principles have emerged:

- Mediation agreements should continue to specify that the mediation proceedings are conducted on a "without prejudice" basis. (This is a privilege of the parties, not the mediator. The parties can agree to waive it or it may be overridden in exceptional circumstances, e.g. fraud, duress.)
- Mediation agreements should continue to make it clear that what is said during mediation proceedings will be confidential. (This confidentiality extends to the mediator as well who can seek to maintain it even if the parties are willing to waive it. The court will generally uphold confidentiality unless it is necessary to override it in the interests of justice.)
- Mediation agreements should not restrict the circumstances in which a mediator cannot be compelled to give evidence in court. (In Farm Assist, the wording only referred to litigation or arbitration "in relation to the dispute" and therefore did not extend to the different dispute as to whether duress had been deployed by one of the parties during the mediation.)

It is therefore important that mediation agreements are considered in detail before they are agreed.

Regulating Damages Based Agreements ('DBA')

An MoJ consultation published on 1 July 2009 seeks views on requirements to be introduced for the

statutory regulation of DBAs, a type of no win no fee agreement commonly referred to as 'contingency fees'. The proposed statutory provisions focus on the current use of DBAs and how they can be regulated to safeguard consumers. While there are no plans at present to extend the use of DBAs (mainly in employment tribunals, as they remain illegal in litigation), the intention is to make provisions for this in the future if deemed in the public interest. Any decision to extend their use would require a full consultation process and approval of both Houses of Parliament. The consultation closes on 25 September 2009.

CIVIL PROCEDURE RULES

47th CPR Update - 1 October 2008

One of the major changes to be introduced by the 47th update was to the rules on service. This followed an MoJ consultation and a comprehensive review of Part 6 by the Civil Procedure Rule Committee, aimed at simplifying the rules. Part 6 was revised, with the exception of service out of the jurisdiction, and the most significant changes were to the calculation of deemed service dates whereby the date for e-mail, hand delivery and personal service were aligned with the approach for fax. All deemed service is now on a business day. Also the rules for service of a claim form, where a new concept of "dispatch" was introduced, were distinguished from the rules for service of other documents. The claim form now has to be dispatched within four months of issue, rather than served within this time as under the old rules, and it will be deemed to be served two business days after it has been dispatched.

49th CPR Update - 6 April 2009

The key changes were:

- raising of the financial limit of fast track from £15,000 to £25,000 applicable to proceedings issued on or after 6 April 09;
- codifying of rules for cost capping orders limiting the amount of future costs a party can recover;
- a new Practice Direction (PD) for pre-action behaviour in claims not already subject to a pre-action protocol;
- change of terminology from "letter of claim" to "letter before claim" in Part 14.

Admissions before proceedings

Rule 14.1A(2)(a) was amended whereby the term "letter of claim" was replaced by "letter before claim" to reflect the use of this term in the new Pre-Action Conduct PD above. The MoJ felt that the use of the term "letter of claim" was confusing, especially to litigants in person, as the term "claim" is used for court proceedings. However, not all references to "letter of claim" in existing protocols have been amended and in order to avoid any confusion a Memorandum of Understanding has been agreed between the ABI, APIL, FOIL and MASS whereby it is agreed that for the purposes of the personal injury, disease and illness and the clinical disputes pre-action protocols, the phrase "letter before claim" in CPR 14.1A is to be interpreted as a reference to the "letter of claim" sent in accordance with these protocols.

Pre-action behaviour - Practice Direction

A new PD (49th CPR update – Part 3) has been created to govern the pre-action conduct of parties. The PD sets out the principles intended to apply to all claims not already governed by an existing pre-action protocol e.g. contractual and commercial disputes. The two main principles are the timely exchange of sufficient information and consideration of the use of ADR. (Section III)

Other key points to note are as follows:

- sanctions for non-compliance include staying proceedings and various costs orders including depriving a claimant of interest and requiring a defendant to pay interest up to 10% above base rate;
- what amounts to a reasonable amount of time for responding to a letter before claim depends on the type of claim. Where a matter involves insurers, 30 days are allowed. There is a longstop for complex matters of 90 days, except in exceptional circumstances.

Section IV of the PD contains requirements that apply to all cases, including those already governed by a pre-action protocol, unless the relevant pre-action protocol contains a different provision. It requires a claimant now to state in their Particulars of Claim whether they have duly complied with Sections III and IV of the new Practice Direction or any relevant protocol.

CPR 50th Update - 1 October 2009

The Civil Procedure (Amendment) Rules 2009 have been signed off and are due to come into force on 1 October 2009. There are several main changes of note:

Experts – Part 35

Following a review by the CJC, a number of amendments to Part 35, the PD and the Protocol for the Instruction of Experts to give Evidence in Civil Claims are to be introduced and are intended to:

- clarify the definitions of Expert and Single Joint Expert (SJE) and minimise the scope for ambiguity between SJE's and other situations where there is only one expert;
- provide guidance on the appointment of SJE's in PD 35 to promote greater consistency between different judges and courts (as recommended by the CJC);
- ensure that questions posed to experts are proportionate and appropriate.

In addition, the wording of the expert's statement of truth, as set out in the PD and in the Protocol, has been amended, some subsections have been removed from the PD where they did not add anything to the rules, and the PD includes a substantial redraft of the section on discussions between experts.

PD 52 Appeals

The CPRC has decided to restructure substantially the existing PD 52 and to introduce some changes of substance. The restructuring involves splitting PD 52 into five distinct PDs covering:

- general provisions common to all levels of appeal (in addition to an introduction, this sets out routes of appeal);
- appeals in the County Court and High Court ;
- appeals to the CA ;
- statutory appeals/appeals by way of case stated ; and
- specific appeals .

It is worth noting that in the CA alone, there are significant changes to the time limits applicable for production of skeleton arguments and bundles. In a move designed to reduce the incidence of late settlement, these will now be calculated back from the hearing date rather than forward from the start of the appeal.

Automatic Orders Pilot Scheme

Since 1 October 2008, an automatic orders pilot scheme has been running in the County Courts at Chelmsford, Newcastle, Teesside, Watford and York. This scheme is to be rolled out to all County Courts and the High Court from 1 October 2009 with the aim of reducing the burden on District

Judges. It allows court staff to issue automatic orders where:

- a party has failed to file an allocation questionnaire;
- (in fast track claims where there is only one claimant and one defendant) a party has failed to file a pre trial checklist;
- all parties to the proceedings have requested a one-month stay.

In the first two scenarios, the orders will provide that the defaulting party's claim, defence or counterclaim will be struck out without further order if they do not file the relevant document within seven days.

Costs Information – Part 44

This is amended to make it clear that insurance premiums for an after-the-event (ATE) insurance policy in any type of case cannot be recovered for any period if the information about the insurance policy required elsewhere was not given – this provision was in the CPR previously but in a less strict form and was not universally followed by the courts. Notification of ATE must be given at the start of all claims, including information on the level of cover provided by the insurance and whether premiums are staged (and if so the points at which an increased premium is payable).

In publication proceedings (defined as claims in respect of defamation, malicious falsehood or breach of privacy) there is now provision for a cooling off period after notice of ATE is given. An ATE insurance premium cannot be recovered in costs-only proceedings by a party if an admission of liability leading to settlement was made by the other party within 42 days of being given notice of the funding. This will only apply to cases where the damages claim is settled pre-issue. There is also to be a pilot scheme for costs budgeting in all defamation cases started in the High Court or in Manchester after 1 October.

Other

New Supreme Court

The new Supreme Court is scheduled to open for business on 1 October 2009. The creation of the Supreme Court will result in the separation of most senior judges from the parliamentary process. The Supreme Court will:

- hear appeals on arguable points of law of general public importance;
- act as the final appeal court in England, Wales and Northern Ireland;
- hear appeals from civil cases in England, Wales, Northern Ireland and Scotland;
- hear appeals from criminal cases in England, Wales and Northern Ireland;
- assume the devolution jurisdiction of the Judicial Committee of the Privy Council, while the Commonwealth jurisdiction of the Council will remain unchanged.

The Supreme Court Rules were laid before Parliament on 1 July 2009. There are few substantive differences between the new rules and the existing rules. Some of the more noteworthy changes include the following:

- The new rules no longer refer to "petitions" but to "applications for permission to appeal" and to "notices of appeal".
- The new rules are less prescriptive about how the parties should frame their cases and the presentation of documents for appeal hearings.
- The Supreme Court will be able to appoint, or request the Attorney General to appoint, an

advocate to assist the court with legal submissions. It will also be able to appoint one or more independent, specially qualified advisers to assist the Court as assessors on any technical matter. The costs of any such advocate or assessor will be costs in the appeal.

The new rules will come into force on 1 October 2009 and will apply, with any necessary modifications, to appeals which were proceeding, and petitions for leave which were lodged in the HL, before 1 October 2009. New fees will also apply in the Supreme Court from 1 October e.g. the fees payable on filing an application for permission to appeal and a notice of appeal are increased to £800 and £1,600 respectively.

CASES

Animals

Freeman v Higher Park Farm [2008]

This case is a good illustration of the difficulties raised by s.2 of the Animals Act 1971 and the need to analyse each element of that section carefully. The claimant, an experienced rider, was injured while riding a horse provided by the defendant equestrian centre when it bucked and went into a canter causing her to fall. The defendants were held not liable under s.2 as there was insufficient evidence of unusual characteristics: in particular that bucking was not a normal characteristic of horses generally. In respect of the second limb of s.2(2)(b) there was no evidence that horses generally bucked at particular times or in particular circumstances so the burden of proof was not discharged. Even if this analysis was incorrect, the defendant was exempted from liability under s.5(2) of the Act by the claimant's voluntary assumption of risk, having been warned of the horse's inclination to buck.

Whippey v Jones [2009]

The claimant was running along a footpath in a parkland when he sustained an injury arising from an encounter with a Great Dane. The dog leapt out from a bush, knocking the claimant and causing him to fall down a slope breaking his ankle. The claimant brought a claim for damages under s.2(2) of the Animals Act 1971. It was accepted that the owner only unleashed his dog when satisfied that nobody was in the vicinity and that, although he had checked on this occasion after unleashing the dog, he lost sight of him for a period of time. It was a large dog and had a tendency to approach strangers and occasionally bark from a distance, but importantly he had no tendency to jump up at people. He was, in fact, an RSPCA mascot who worked with children. He was known to be extremely good natured. It was held that, before deciding whether a dog owner had been negligent in unleashing a dog, a court had to be satisfied that a reasonable person in the owner's position would consider that the injury caused by the dog was likely to follow from his acts or omissions. On the facts there was no reason why the owner should have anticipated his dog would bound up to a stranger in this way and cause him injury. These cases are very fact sensitive and the dog was undoubtedly saved by his proven good nature. The judgment provides a good review of the issues of foreseeability.

McKaskie v Cameron [2009]

The claimant was attacked by a herd of cows while crossing a field with her dog on an unmarked footpath. As the path was obstructed with nettles she had deliberately strayed off the designated route. The farmer was held liable under the Animals Act as the damage was due to characteristics not normally found in cattle, except in particular circumstances such as when the cows had calves. In addition he was liable for breach of a duty of care by failing to take steps to avert the risk, either by fencing off the footpath, or by moving the cows to a different field. The farmer was estopped from

contending the claimant was a trespasser as he had acquiesced in walkers using that route.

Causation

Fosse Motor Engineers Ltd & Others v Conde Nast (Comag) & Anor [2008]

A fire destroyed the claimant warehouse owner's property and they sought damages in negligence against the first defendant tenant (who occupied the premises along with the claimant) and the second defendant, an employment agency that had employed four workers seconded to the first defendant. The claimant alleged that the fire was caused by the agency workers who had either smoked inside the warehouse in breach of rules and carelessly discarded a cigarette, or who had allowed an intruder into the building by leaving the door open when they went out to smoke. The defendants argued that there were other possible causes to explain the outbreak of fire, including intruder entry not caused by agency workers, a lawful visitor or an electrical fault. Forensic experts were unable to agree on the most likely cause of the fire and the issue before the court was whether the evidence available enabled the judge to find, on the balance of probabilities, what had caused the fire and therefore whether or not the defendants were liable.

It was held that it was for the claimant to prove, on the balance of probability, that the fire was caused in the manner which they had alleged. Just because the court might eliminate all but one of the possible causes did not mean that it was bound to conclude that the remaining one was the probable cause. The court was not able to rank all possible explanations and select the possibility with the highest percentage as the probable cause. The claimants failed to prove their case on the balance of probability. This is the latest in a long line of recent cases on causation (see Lexus v Russell and Drake v Harbour) highlighting the importance of obtaining reliable expert evidence and credible witness evidence.

Sanderson v Hull [2009]

The CA considered the practical application of the relaxation of the orthodox causation test as set out in Fairchild v Glenhaven Funeral Services Ltd, which permits an exception to the 'but for' test of causation in certain circumstances. The claimant alleged that, during her employment as a turkey plucker, she had contracted campylobacter enteritis as her employer had failed to protect her from the risk of infection from dead poultry. The court did not accept that this was a case where it was impossible to show that 'but for' the negligence of the employer there would have been no injury. Caution should be exercised before any development of the Fairchild exception is permitted. To come within the exception the crucial issues on causation needed to be incapable of proof, not merely difficult. The fact that there were several ways in which the claimant could have come into contact with the bacterium was not sufficient to bring the case within the exception. Fairchild is not necessarily limited to disease cases but the circumstances in which it might be applied to other situations will be strictly controlled by the courts following this decision.

Contractors

Biffa Waste Services Ltd And Anor v MEH & Ors [2008]

The CA reversed the first instance decision, holding that the high court had been wrong to make a finding of vicarious liability and to criticise the decision in Honeywill v Larkin (1934). This states that you can be vicariously liable for contractors who carry out "extra-hazardous" operations, an exception to the usual rule that you are not liable for contractors' negligent acts. The CA has restricted the

application of the principle, stating that Honeywill only applies to activities that are exceptionally dangerous whatever precautions are taken. In this case, there was a fire at a recycling plant caused by a welder's spark. The dangerous activity to be assessed was the welding itself, not welding in the vicinity of un-wetted combustible material. Separately, vicarious liability could not be established on the basis of the welders being "borrowed employees". The contractor did not have sufficient control over the manner in which the subcontractors carried out the welding work. It was wrong to equate supervision with control, especially in the context of skilled labour. The work had also been very temporary, taking place over a couple of days.

This case is good news for large contractors, construction companies and their liability insurers but less good for property insurers trying to recover their outlay through subrogation where the negligent subcontractors may not have insurance. It does not however appear to affect the common law rule that an occupier is liable for fire spreading to neighbouring property through contractors' negligence (Balfour v Barty King).

Costs

(a) CFAs & Compliance

The Accident Line Protect Test Cases [2008]

The CA considered three linked cases known collectively as the Accident Line Protect (ALP) test cases. The case was the next step after Garrett. In finding that the ALP scheme was not like the "claims farmer" type scheme that had been considered in Garrett, the court set out a test to define the meaning of an "interest" in terms of the Conditional Fee Agreement Regulations 2000. The test as formulated is: *For the purposes of Regulation 4 a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client.* In finding that there was no declarable interest in the three cases, the court went on to state *obiter* that:

- 1) if there is an interest it must be adequately disclosed to the client;
- 2) a solicitor must disclose the true nature of his interest in a policy - not just his reasons for recommending it;
- 3) any disclosure must be clear and there should not be contradictory statements; and
- 4) if there is an interest, failure to disclose it will be a material breach and is therefore unlikely to ever be *de minimis*.

Birmingham City Council v Forde [2009]

A retrospective success fee in a retrospective conditional fee agreement (CFA) was not contrary to public policy. A letter explaining the legal costs to date formed part of the retainer. It invited acceptance of a second CFA and contained provisions intended to be part of the agreement. As the second CFA had been entered into under the regime applicable after the 2005 Regulations, it was not necessary for the letter to be signed to have contractual effect nor did a CFA have to be contained in one document. Permission to appeal was granted by the CA, but the appeal has now settled.

(b) Third Party Funding

Moore Stephens v Stone & Rolls Ltd (in liquidation) [2009]

The HL confirmed that the courts will not allow a claim by a "one-man company" (via its liquidators)

where the basis of the claim arises from the company's own fraudulent or illegal conduct. The claim involved an alleged failure by Moore Stephens, acting as auditors of Stone & Rolls Limited (S&R), to detect that frauds had been committed by S&R, a "one-man company" controlled and directed by Mr S. The liquidator of S&R issued a £89 million negligence claim against the auditors. By a 3:2 majority the Lords decided that it was correct to strike out the claim on the basis of *ex turpi causa*. Lords Walker and Brown held that the Hampshire Land exception (which provides that where the company itself is the victim of the agent's or officer's fraud, then the fraud will not be attributed to the company) had no application to this case. S&R, as embodied by Mr S, was the perpetrator of the fraud and not an honest or innocent victim which needed protection. Lord Phillips considered that the courts must look behind the company to see whose interests the third party's duties were intended to protect. In this case, the sole person for whose benefit the auditors' duties were owed was Mr S, who was responsible for the fraud. As all those to whom the auditors owed a duty were party to the illegal conduct, *ex turpi causa* provided a full defence. It was not an exception to the defence to argue that fraud was '*the very thing*' that the auditors were meant to detect.

Dissenting judgments from Lords Scott and Mance demonstrate that there is significant disagreement among the Law Lords as to the application of the Hampshire Land principle, as well as the scope of auditors' duties and whether these duties extend to creditors. While this case will be welcomed by auditors and their professional indemnity insurers, the Lords were keen to emphasise that the facts of this case were extreme. It is therefore likely that the courts will remain reluctant to strike out claims at such an early stage unless the company is very clearly solely controlled by a fraudster. The litigation is significant, not only due to the legal principles being considered, but also because S&R's claim is one of the largest and most high-profile in the UK to be funded by a third party.

(c) Success fees

C v W [2008]

This is a CA decision on the level of recoverable success fees in a high value RTA case where liability had been admitted before the CFA was entered into. It is significant in that it is the first time that the court has considered the appropriate level of success fee in a high value case and where the only relevant risk is that following a Part 36 offer. The success fee was initially claimed at 83%. In reducing the success fee to 20% the court found it difficult to see how the claimant could have failed in the circumstances to have recovered substantial damages. It also confirmed that the greater complexity involved in higher value cases does not of itself increase the risk of losing. The court found that the complexity around calculating the level of risk associated with Part 36 was such that it may make sense for solicitors in such circumstances to agree a two stage success fee, very low at the outset and reviewed if and when an offer is made and a risk arises.

Thenga v Quinn [2009]

The claimant's solicitors sought to maximise their success fees by claiming that if a matter proceeds to assessment of costs then that constitutes a 'trial,' attracting the 100% success fee, even if the substantive claim settles pre-trial. Judgment had been entered in default for the claimant and the matter listed for an assessment of damages hearing. However quantum was agreed before the hearing and the defendant agreed to pay the claimant's costs. At a summary assessment hearing the judge was persuaded this amounted to a 'final contested hearing' applying the 100% success fee. The CA confirmed that the summary assessment was not part of the 'final contested hearing' which relates to the substantive claim; the claim had settled before a trial had commenced and the success fee was limited to 12.5%. Permission to appeal was refused.

(d) Indemnity Costs

Colour Quest & Others v Total & Ors [2009]

The court was required to determine costs following its finding that the first and second defendants were vicariously liable for the negligence which led to the Buncefield explosion. The claimants argued that the conduct of the defendants justified an award of indemnity costs as they had unreasonably contested the issues of negligence and foreseeability for some two years after the service of their defence. It was held that the continued denial of fault in regard to the issue of negligence was unreasonable to a marked degree sufficient to justify the award of indemnity costs. Such costs to be recovered until responsibility was finally confirmed. Separately, however, although the foreseeability issue was abandoned on the third day of trial, that of itself did not constitute recognition that the point was hopeless. While the claimants had put forward an arguable case that the issue was bound to fail, it was not so manifestly weak as to justify indemnity costs. Therefore indemnity costs were awarded on the negligence issue but not on the foreseeability issue.

(e) Disclosure

Barr & Others v Biffa Waste Services Limited [2009]

The claimants consisted of more than 100 households in a particular area who claimed in nuisance and negligence against the defendant in relation to odour omissions. A Group Litigation Order (GLO) was granted and the defendants sought as a condition of the GLO the disclosure of the claimants' ATE policy. Coulson J held that the ATE policy should be disclosed. It had been mentioned in two of the claimants' witness statements and therefore CPR 31.14 applied. The policy was not covered by litigation privilege and it was clearly relevant for a number of reasons. While the claimants had argued that an insurance policy can never be a disclosable document, the judge differentiated between liability insurance which may have been in place years before the events which give rise to the subsequent litigation and ATE insurance, especially in the context of group litigation, which will often have been taken out solely for the purpose of allowing a claimant to pursue litigation which would otherwise not have been possible. In any event, the policy should be disclosed pursuant to the court's general case management powers. This appears to be the first reported case dealing with an application for the disclosure of an ATE policy. It may open the floodgates to all defendants asking to see such policies but the judgment given was emphasised as being fact sensitive.

(f) General

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008]

The court had to determine costs following its decision on a claim by Multiplex, the main contractor for the construction of Wembley, against Cleveland Bridge, its steelwork sub-contractor, for breach of contract. The CA had previously held that the defendant had repudiated the sub-contract and Multiplex was awarded £6.1 million. Multiplex proposed that Cleveland Bridge should pay all outstanding costs of the action, including the costs of a preliminary issue. Cleveland Bridge, on the other hand, proposed that Multiplex should pay its costs in relation to certain aspects of the claim on which it had won points.

Mr Justice Jackson, in his final judgment before joining the CA and starting his Review of Civil Costs, referred to the CA authority in Carver v BAA Plc and derived eight general principles:

1. In commercial litigation where each party has claims and asserts that a balance is owing in its favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
2. In considering how to exercise its discretion, the court should take as a starting point, the general rule that the successful party is entitled to an order for costs.
3. The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
4. Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).
5. In many cases the judge should reflect the relative success of the parties on different issues by making a proportionate costs order.
6. In considering the circumstances of the case, the judge will have regard not only to any Part 36 Offers made but also to each party's approach to negotiations (insofar as are admissible) and the general conduct of the litigation.
7. If (a) one party makes an offer under Part 36 or an admissible offer within Rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
8. In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won, but also the common costs.

This case is a reminder that insurers must be alive to the fact that in considering costs the courts will take a "more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of litigation, was worth the fight".

Sherred v Carpenter [2009]

This case arose from a straight forward road traffic accident (RTA) involving a minor which settled for £1750. In ordinary circumstances, the defendant would be liable to pay counsel's fees for attending an infant approval hearing as part of the predictable costs calculation. In this instance however, the judge considered counsel's attendance was unnecessary, concluding the solicitor should have attended instead rather than outsource work he could do himself.

Jones v Environcom [2009]

Insurers sought a declaration that they had validly avoided insurance policies for non-disclosure of the use of plasma guns at the insured's recycling facility premises where a fire had occurred. The insured counterclaimed for an indemnity of nearly £3 million. Insurers applied to the court for an order for security for costs in defending the counterclaim under CPR 25.13, the amount of security sought being nearly £150,000 which was an estimate of the insurers' total costs in the proceedings and not simply those relating to the counterclaim. There was reason to believe that Environcom would not be able to pay insurers' costs if it was ordered to do so. It was held that insurers were entitled to security for their costs, not limited to the additional costs of the counterclaim, on the basis that:

- (1) the real substance of the case was the insured's claim to an indemnity; or
- (2) the counterclaim could be characterised as having an independent vitality of its own.

Credit Hire

Copley v Lawn and Maden v Haller [2009]

In reaching its decision the CA provides useful guidance on mitigating credit hire claims. In the conjoined appeals the claimants had both refused offers of replacement vehicles from the defendant insurers following an RTA, choosing instead to hire vehicles on credit. The decision confirms that it is not unreasonable for a claimant to reject or ignore an offer from a defendant if the offer does not make clear the costs of hire to the defendant, preventing any realistic comparison. Secondly, if a claimant unreasonably rejects or ignores a defendant's offer of a replacement car, he is entitled to recover the costs the defendant can show he would reasonably have incurred: the claimant does not lose his damages claim altogether. Lastly the claimant will recover the 'spot' or market rate for his loss of use claim, unless a defendant can show that, on the facts of a particular case, a car could have been provided more cheaply. Insurers offering a replacement vehicle will need to be more explicit in setting out the cost of the replacement vehicle to them if they wish to demonstrate that they can provide a replacement vehicle more cheaply and reduce their potential liability. A petition to appeal has been lodged.

Damages

Bole & Anor v Huntsbuild & Anor [2009]

A family home was built with inadequate foundations, given that trees had been removed from the site before the construction began. The property purchasers successfully claimed against both the builders and the structural engineers. The builders were liable both for breach of contract and under s.1 of the Defective Premises Act 1972. It was also found that a structural engineers' advice fell below the professional standard to be reasonably expected of them. In order to assess whether the property was unfit for habitation, the court advised that it was a matter of fact in each case and that s.604(1) Housing Act 1985 provided a useful checklist.

An engineering appraisal report set out three possible remedies for the cracking which had resulted:

- (1) structural cracking repairs and redecoration at £80,000;
- (2) localised underpinning with superstructure repairs at £130,000;
- (3) a piled raft to the full ground floor footprint at £210,000.

The parties' experts gave different opinions on the appropriate solution but agreed that only the piled raft solution would stop the effects of heave conclusively and immediately. The court found that the piled raft solution was the appropriate remedy and that it was reasonable for the claimants to demand a permanent solution regardless of the extra cost. Further relevant factors were that the claimants had already endured seven years of superstructure repairs; they had a young child; and they would be required to move out of the house for the works to be completed.

It is important for insurers to consider whether it might be more economic to accept the costs of a conclusive solution at the outset rather than initially approving minor remedial works and subsequently also paying for a fuller solution as well as general damages for distress and litigation costs.

Deliberate Damage

Porter v Zurich [2009]

The claimant attempted to kill himself by setting fire to his property. However, once the property was ablaze he changed his mind and escaped. He brought a claim against Zurich for indemnity under his property policy. Insurers defended the claim on the grounds that he started the fire intentionally and

could not recover under the policy as it would be contrary to public policy and there was an exclusion for "any wilful or malicious act by a member of the family or by a person lawfully at or in the home". The claimant responded that he was suffering a mental illness at the time of the fire so his "thoughts and judgment were grossly impaired and that he was not acting as a free agent". While the claimant had suffered a series of disastrous events in both his business and personal life, the judge concluded that it was necessary for him to prove on the balance of probabilities that he was insane within the meaning of the M'Naghten Rules. This required establishing either that he did not know the nature and quality of his act or, if he did, that he did not know that what he was doing was wrong. In light of the factual and medical evidence, the claimant knew what he was doing and that it was wrong; the test of insanity was therefore not satisfied. The claimant had acted wilfully and maliciously and the defence also succeeded on public policy grounds.

Disease

(a) Asbestos/Mesothelioma

Harrington v DBERR [2008]

This decision concerned a bricklayer's claim for damages for mesothelioma allegedly caused by asbestos exposure in 1956-58. The only factual evidence of exposure was from the deceased. The judge held that, on the evidence before him, the defendant had no reason to suppose that an apprentice bricklayer working on the surface at a colliery at the time he did, would, in his employment, be exposed to significant or substantial amounts of asbestos. While a first instance decision based on its facts, it shows that there may be cases where a challenge can be successfully made to the almost overriding presumption that if there is mesothelioma and even the possibility of any asbestos exposure, then the employer will be found liable. In Harrington there was insufficient evidence on the facts to establish exposure.

Treble v Rio Tinto Ltd [2008]

On the facts it was held that the claimant's exposure to asbestos exceeded 25 fibre/ml years. The Recorder considered the tension between the Helsinki Criteria in respect of asbestos fibre/body counts and the Industrial Industry Advisory Council (IIAC) view that a significant history of asbestos exposure is sufficient to be confident in a diagnosis of asbestosis. He accepted that while the rapid deterioration of the fibrosis in itself is insufficient to question the diagnosis of asbestosis, when combined with other factors it *can* have evidential weight. In terms of the clinical evidence he also accepted that the medical records provided objective evidence of a positive response to steroids. If the IIAC Review was followed to the letter he would have been compelled to find asbestosis, having found as a fact there was exposure at 25 fibre/ml. However he preferred the Helsinki Criteria which, combined with an absence of other clinical or radiological features to support a diagnosis of asbestosis, made Cryptogenic Fibrosing Alveolitis the more likely cause.

It has long been believed that the Helsinki Criteria represent the "gold standard" in diagnosing asbestosis, although there are no reported cases to support this. In Treble the claimant sought to depart from that. Had that approach succeeded, defendants would be left with no real defence to an asbestosis claim where the claimant provided a significant exposure history in his witness evidence, which he inevitably will do. This would be the case even where there is no evidence of asbestos in the lungs, a positive response to steroids and a rapid deterioration of the fibrosis. In effect a claimant's evidence would become the sole determinative factor, overriding medical evidence as to the quantities of asbestos observed via Transmission Electron Microscope, and leaving little room within the courts

for histopathology evidence. Interestingly the judgment specifically rejects the call for the issue of diagnosis to be simplified for the courts, as it has been for the state benefits administration system.

EL Policy Trigger Litigation [2008]

The proceedings in these landmark claims arose out of six consolidated actions in which employees died of mesothelioma resulting from the inhalation of asbestos fibres during their employment. The issue for determination before the court was whether the insurers liable to meet the claims were those who insured the employers at the time the employees were exposed to or inhaled the asbestos fibres, or those who insured the employer up to 40 or more years later when the tumour developed. In light of the medical evidence, it was held that no injury or disease is suffered at the date of inhalation, and the question of actionability does not arise at that point. As to the question of when an injury occurs, the judge departed from the "10 year rule" and concluded that this is five years prior to diagnosability, unless there is evidence in a particular case that the tumour growth was faster or slower than normal, in which case a factual investigation would be necessary. The experts agreed that it is probable that, by then, angiogenesis (a process whereby the tumour will have developed its own blood supply) will have taken place. This was a significant piece of litigation, restating the position on the interpretation of the relevant EL "trigger" as it was understood prior to the decision in Bolton. The matter is now due to go to the CA for an appeal hearing on 9 November 2009 and is expected to last for up to three weeks.

Beddoes, Cooksey, Dixon & Minnikin v Vinters defence Systems Ltd & Ors [2009]

The court was asked to consider whether the HL ruling that symptomless pleural plaques are not actionable in law applied equally in relation to symptomless or minimally symptomatic asbestosis. Contrary to expectations, the judgment did not provide a formula for ascertaining when a claim might be actionable, as the judge concluded each case must be treated on its individual merits. It is for a claimant to prove the impact of the defendant's wrongdoing on his body was more than minimal, and the question to be considered was whether a claimant was appreciably worse off as a result. It is not sufficient to show a disease process which is abnormal and irreversible but if it can be proved that there is an effect on the claimant before he is aware of a symptom, that can amount to damage provided it is more than minimal.

In a separate judgment the judge has assessed quantum in the successful cases, using as a starting point the judgment of Lady Justice Smith in the pleural plaques test case of *Rothwell*. The level of final award assessed by the judge is surprisingly high, leading some to conclude that more claimants would opt for a final award. It is not known whether either judgment will be appealed.

Abraham v G Ireson and Ors [2009]

Despite the introduction of the Compensation Act, it is clear that the development of a 'mesothelioma jurisprudence' referred to in the 2008 Employers' Liability Policy Trigger Litigation judgment is a reality. This is one of five cases which arose in the space of two months, dealing with disputed issues of liability and quantification of damages. In Abraham it was determined that the claimant had suffered exposure to asbestos during his employment, and even though that exposure was modest, it was likely to have been the cause of his mesothelioma. However, given that the key trigger date for date of knowledge in such cases was 1965, it was highly unlikely that an employer would have foreseen an injury arising during his employment with the defendants between 1956 and 1965. Given the lack of knowledge by the employers at the time, it was not reasonable or practicable for them to have taken steps to prevent exposure. The court refused, therefore, to extend mesothelioma jurisprudence to, in effect, a position of strict liability.

Watson v Cakebread Robey Ltd [2009]

This case proceeded to trial for determination of quantum, where the court awarded the claimant £75,000 for pain, suffering and loss of amenity, to take into account the fact that he had lived longer than predicted and suffered considerably during that time. Of particular interest is the court's response to the inclusion of a claim for the cost of funeral expenses inevitably arising on the claimant's death. This element of the claim was rejected on the basis that:

- the entitlement of the estate to claim funeral expenses pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 was a new cause of action which could only arise on death; and
- if LW was able to obtain a sum for funeral expenses then *"in every case in a personal injuries action in which a claimant has a reduction of life expectation...then, as a matter of principle, the claimant would be entitled to make a claim for his funeral expenses. That would be the case irrespective of the extent of the reduction in life expectation."*

The judge also noted that if there was to be an award made where there was only a short life expectation how would the courts determine what was short enough?

(b) Deafness

Baker v Quantum Clothing Group Ltd [2009]

This decision on the Nottinghamshire & Derby Deafness Litigation appeals concerned the date of knowledge for noise induced hearing loss in the knitting industry. The appeal considered a defendant's statutory duty under s.29 Factories Act 1961 to ensure as far as reasonably practicable that a place of work is safe for employees. This duty is distinct from common law liability. The court confirmed that the test should be judged objectively and what was objectively safe cannot change with time. The test for determining breach of s.29 is to consider i) whether the claimant has proved that his place of work was unsafe and ii) if so, the employer must show that it was not reasonably practicable for him to eliminate the risk of harm. While the decision relates specifically to the knitting industry there is clear scope for cross over into any industry/employer with noise levels in the 85-89dB(A)lepd range. The defendants are seeking leave to appeal to the House of Lords.

The decision also arguably restricts liability for noise exposure in industries not traditionally seen as noisy. The CA set the date of knowledge in such industries as only after 1972 (the previous date of 1963 for noisy industry has been widely applied for many years).

(c) Harassment

Allen v Southwark LBC and Lipscombe v FC Ltd [2008]

Parliament's intention in introducing the Protection from Harassment Act 1997 (PHA) was to provide a solution to stalking in criminal and civil law. However the PHA has subsequently been relied on in many wider situations. The PHA gives no definition of harassment inevitably resulting in litigation. In seeking to determine what harassment is in the context of civil claims for damages for injury, the courts have held to date that it must:

- occur on at least two occasions;
- be targeted at the claimant;
- be calculated in an objective sense to cause distress; and
- be objectively judged to be oppressive and unreasonable.

In addition, the decision in Conn v Sunderland City Council suggested that to succeed the behaviour

must cross a line so as to amount to criminal conduct within the context of the PHA. This issue arose again in these two cases. In Mr Allen's case the CA had to determine on an application to strike out, whether repeated litigation by the defendant could possibly constitute harassment. This was not a claim consequent upon a contract of employment but based on Mr Allen being a tenant of the defendant. It was held that he did have an arguable case and his claim was allowed to proceed. The lead judgment noted that harassment is a criminal offence, implying that in civil claims the behaviour also had to be criminal for the claim to succeed. However the boundary between unattractive and unreasonable conduct, and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs.

Meanwhile Mr Lipscombe's claim against his employer was dismissed as there was no evidence of conduct targeted at him calculated to cause distress. The judge concluded therefore that he had no basis on which to embark on an enquiry into criminal conduct. Both these cases were brought by litigants in person. This may suggest that the ongoing uncertainty is limiting the number of claims being pursued with the support of legal representation. The costs of those claims which do proceed will be high.

Ferguson v British Gas Ltd [2009]

In a highly-publicised case British Gas (BG) lost an application in the CA to strike out a claim against it for harassment after repeatedly sending a former customer unjustified bills and threatening letters generated by computer. The CA accepted that conduct must be grave before the offence or tort of harassment is proved. But the only tangible difference between the crime set out under s.2 and the tort under s.3 is the standard of proof: the identical elements must be proved but to a different standard. Having clarified the legal test concerning gravity, the court was unable to accept the conduct was incapable of satisfying the test; in fact it was strongly arguable that it did. In contrast to the Conn decision, the persistent and protracted conduct appeared to cross the line of what amounted to 'oppressive and unacceptable conduct'.

The fact that F knew the threats were unjustified did not mean she was not entitled to take them seriously. The PHA is in place to protect people from unjustified harassment. The court also roundly rejected the arguments that the computer generated nature of the threats meant that they should not be taken seriously. The judgment confirms that there are no obvious policy reasons why big corporations should be exonerated for conduct which would amount to harassment if carried out by an individual. It was sufficient for the claimant to demonstrate that BG knew, or *ought* to have known, that the conduct complained of amounted to harassment. As a matter of construction, a company must be taken to have knowledge of material within the knowledge of its employees, even if top management are unaware of it. The real difficulty facing a claimant is showing knowledge that the conduct amounted to harassment. The court expressed the view that the claimant was likely to succeed on actual knowledge if it was shown that this type of incident happened regularly.

S & D Property Investments Ltd v Nisbet & French [2009]

Possibly the first reported case on a claim for anxiety in the absence of actual psychiatric injury. The claim under the PHA arose out of the pursuit of a debt, which involved aggressive communications from the company director, Mr French. The court found that the emails and text messages crossed the threshold of gravity necessary for harassment once they alluded to the sender's previous violent past. This could constitute a course of conduct under the PHA and amounted to harassment. Although there was no medical evidence to suggest a claim for anxiety it was suggested that it could be proved by the evidence of lay witnesses. Somewhat surprisingly, given the duration of the harassment was relatively short (one month), the decision in Majrowski and the JSB Guidelines, an

award of £7,000 was made. The judge also confirmed that in the appropriate circumstances the PHA did not preclude a claim for a loss of chance.

(d) Stress

Dickins v O2 Ltd [2008]

The CA provided further guidance on the correct interpretation of the Hatton guidelines in stress cases, highlighting in particular that each case must be considered on its own facts. The defendant company was held liable for the psychiatric injury of a former employee, as it had been put on notice that the employee had become excessively stressed during her employment and that appropriate action was needed, but it had failed to act. Clarifying the position in Daw v Intel Corporation, the CA confirmed that the provision of a counselling service is not a defence to a workplace claim. Employers need to take care when an employee expresses difficulty in coping which may not necessarily refer to current problems with their work. The decision also suggests that employers should consider whether an employee should be sent home pending investigation by Occupational Health. Departing from the Hatton view that the employee is in the best position to decide whether to continue to work, it appears some responsibility will now pass to the employer. Consideration needs to be given to the *obiter* comments on the issue of apportionment. Apportionment in the context of a stress at work claim is a complex matter and further guidance by the CA on the issue can be expected.

Connor v Surrey Ltd [2009]

In this significant stress claim, a head teacher was successful following a 'first absence' due to stress. Having rejected the harassment element of the claim the court upheld the claim in negligence, in part no doubt due to the relative credibility of the witnesses. It was held that a combination of comments by email and in person by the claimant was sufficient to put the LEA on notice of the risk of psychiatric injury. The fact that she had not been absent with the injury before was not relevant: the risk was apparent and action should have been taken in response. By failing to respond the LEA was in breach of its duty of care to the claimant. This decision is important, particularly for the comments that if an employee is exhibiting signs of stress then a higher duty exists towards that employee to ensure that psychiatric injury does not ensue. This suggests employers need to be more proactively involved in responding to comments made by employees (or their colleagues) indicating stress. The case is also noteworthy as a departure from Hatton in suggesting that a greater risk of stress exists as an integral aspect of teaching and that risk is one of which an employer should be aware. The case proceeds to a hearing in the CA in November. The claimant recently appeared on Panorama during an episode about the spread of PTSD.

(e) Vibration White Finger

White v EON & Ors [2008]

This case considered constructive knowledge when determining limitation in the context of a vibration white finger (VWF) claim. The CA confirmed that the trial judge had applied the correct test and his finding was viable on the evidence before him. The correct date to assess knowledge was the last date by which the claimant might reasonably have sought advice given the stage of his symptoms. Where there is appropriate evidence as to the development of symptoms, a claimant cannot then simply rely on the date he actually connected them in his own mind with any potential negligence by the defendant. The case will have particular application to increasingly familiar situations in which claimants seek to rely on the expert evidence in support of a claim as being their date of knowledge.

(f) Other

The Corby Group Litigation [2009]

This landmark decision centred on whether a duty of care was owed by a local authority to mothers and their unborn children not to expose them to foreseeable risk of injury and exercise reasonable care and skill when preventing the dispersal of dust carrying toxic chemicals. It was held that the defendants were in breach of their duty of care between 1985 and August 1997 due to their negligent control and management of various contracts. From 1 August 1992 there was also a breach of statutory duty under the Environmental Protection Act 1990. The breaches led to the dispersal of dust and mud over Corby, and airborne teratogenic substances during that period. These chemicals were of the type which could cause birth defects. However, it was held that claimants conceived after August 1997 could not fall within the injured category because there were no breaches after that date. The local authority was also liable for public nuisance in causing and permitting the dispersal. The defendants have indicated they will lodge an application for permission to appeal. In the meantime they have been ordered to make an interim payment towards the claimant's costs of £1.6million.

Electronic Disclosure

Digicel Ltd v Cable & Wireless [2008]

The lead case in this area. While it makes no new law, it focuses on what amounts to a reasonable search, the need for co-operation at an early stage and promises proactive and innovative judicial involvement in applying the rules to the practical problems. The claimants applied for disclosure of certain classes of document, specifically the restoration of back-up tapes so they could search the email accounts of former employees, and for additional keyword searches across all documents. The disclosure exercise, already carried out by the defendants' solicitors, had reduced over 1.1 million documents to some 5,000 for disclosure, at a cost of £2 million in fees and 6,700 man hours. Nevertheless, the court still ordered that significant further disclosure exercises be undertaken. The court also took the opportunity to set out some clear guidelines on the scope of electronic disclosure. The anticipated Technology Questionnaire and associated Practice Direction will ensure that parties agree the scope of electronic disclosure before the task of exchanging lists takes place.

Digicel was subsequently relied on in Abela v Hammonds Suddards (2.12.08) where the judge also ordered the disclosure exercise, that had already been carried out, to be extended. In particular, it was not sufficient to rely on the defendant's practice of filing hard copy emails and electronic documents in order to avoid searching electronic databases.

It is clear that searches of electronic documents are going to incur greater costs than is currently the case. While there are no significant changes to current requirements, parties will no longer be able to evade them. There is also a risk of duplication of costs if the exercise is not carried out comprehensively first time around.

Employers' Liability

Hopps v Mott MacDonald & MOD [2009]

This case concerned a claim for damages by a civilian engineer injured as a passenger in an MOD vehicle in Basra while working on a regeneration project. It was held that his employers and the MOD were not in breach of their duty of care, as it was not unreasonable for the claimant to have been transported in an unarmoured vehicle at the time of the attack. A written risk assessment of the

situation would only have been relevant, had it been made, if it would have determined either that armoured vehicles should have been provided or the situation was so dangerous that personnel should have been confined to base. The case is most significant for being one of the first reported decisions to consider the application of s.1 of the Compensation Act 2006, and somewhat surprisingly applying it in an employment situation. It confirms that the Act applies to situations beyond the provision of sports, public amenities and general pastimes, referring as it did specifically in s.1 to “a court considering a claim”. Besides confirming a wide application, which in this case covers an employment situation, the decision demonstrates the Act’s retrospective nature as the date of the claimant’s accident which caused the injury arose prior to the Act coming into force. The judge concluded that the defendants’ activity in reconstructing a shattered infrastructure after a war in a territory occupied by HM Forces was desirable within the meaning of the Act.

Ex Turpi Causa

Gray v Thames Trains [2009]

The HL considered the public policy defence of *ex turpi causa* confirming the applicable test in tortious actions. Allowing the appeal the Lords took the view that the claimant’s act of manslaughter was ‘voluntary and deliberate’, which served to intervene in the casual relationship between the defendant’s negligence and the damage complained of (loss of earnings). In reality what prevented the claimant’s recovery of loss of earnings was his detention in prison for manslaughter, which he had tried to argue had been caused by the defendant’s negligence.

Fatal Accidents

Roach v Home Office [2009]

This important decision confirmed that the costs of representation at an inquest are not incapable of being recoverable as costs incidental to subsequent civil proceedings. The judge referred 100% of the inquest costs back to the costs judges for assessment, subject to the tests of reasonableness and proportionality. Declining to provide guidelines on what may be recoverable, Davis J preferred to leave the matter to the costs judges to decide on the facts of the case. While this is a decision based on its facts, it does open the door for the potential recovery of inquest costs in full.

Fraud

AXA v Jensen [2008]

The defendant reported to her insurers and the police that her vehicle had been stolen. After a payment for the value of the vehicle had been made the police subsequently discovered the vehicle in the possession of a third party who had legitimately purchased it from a trader. The claimant admitted the theft claim had been fabricated. She had given her vehicle to a trader to sell who went into liquidation before paying her. She fabricated a theft claim to recoup her money. The claimant was cautioned by the police but there were no further criminal sanctions.

The claimant successfully brought a claim for damages, exemplary damages, interests and costs. As the defendant had clearly intended to defraud the insurers, exemplary damages were found to be appropriate. This is believed to be the first tort of deceit case where an award of exemplary damage has been made. Previously, the judiciary has tended to shy away from making the punitive award. In AXA v Thwaites the court considered making such an award but declined to do so where exemplary

damages would be in addition to a criminal sanction imposed. This judgment implies that there are now real financial consequences for fraudsters making such claims. Not only is there a risk that the claim may fail, or worse that they may be ordered to repay any monies received, but there is also the additional risk they will be ordered to pay extra by way of exemplary damages and of course costs. In this instance the costs amounted to almost as much as the sum initially at stake.

R v Gul [2008]

A rare example of individuals guilty of insurance fraud facing criminal sanctions. In a ground breaking case which saw collaborations between the Hereford Constabulary and the Insurance Fraud Bureau, 13 defendants were sentenced to a total of 10 years for staging bogus road traffic accidents. The investigations discovered that the gang had made dishonest insurance claims totalling in excess of £250,000. The gang used 12 drivers to stage accidents in numerous locations as well as making claims for accidents which had never occurred. In raids across the UK investigators discovered forged and fabricated documents relating to recovery company GSK Motors who were found to have colluded with the Guls in numerous scams. The decision has given a clear message that fraudulent activities are being scrutinised by police and specialist organisations.

Shah v Ul-Haq & Ors [2009]

Three claimants issued negligence claims for injury against the driver who admitted liability for the accident. However, the driver objected that the other vehicle had had only two occupants at the time of the collision, suggesting one was a phantom passenger. An application to strike out all three claims succeeded only in striking out the phantom claim, although the other claimants were penalised heavily in costs. On appeal it was confirmed that the phantom passenger had not been in the car and the other passengers had conspired with her to support her fraudulent claim. It was accepted that the two real passengers had sustained genuine injuries in the collision. The CA confirmed that the two genuine claims should not be dismissed. They did not accept that CPR 3.4(2) provided a discretion to 'deprive a claimant of his substantive rights' in respect of a cause of action or to strike out a claim following the final determination at trial. The discretion is primarily designed to strike out a case before the commencement of trial. A strike out during trial is only appropriate where the dishonesty is such that a fair trial cannot be achieved.

Where a claim has been dishonestly exaggerated a judge will award a claimant the damages to which he was indisputably entitled. The court could find no logical justification for suggesting that a claimant who had lied about another person's claim should be treated any differently than someone who had lied about his own claim. While not closing the door to interim applications under CPR 3.4(2), the judgment confirms that the discretion was not designed to deprive a party of his legal right to damages by way of punishment, deterrent or a general desire by the court to highlight its disapproval of a party's fraudulent conduct. This compares rather starkly with the doctrine of utmost good faith which applies to insurance policies and the ability to *void ab initio* the entire policy based on individual breaches.

Direct Line v Fox [2009]

The insured had submitted a fraudulent invoice for costs that had not been incurred following damage by a kitchen fire. It had been agreed that the insured would arrange the repairs himself as he had various interests and contacts in property development which would allow him to beat the lowest tender presented to loss adjusters. This was recorded in a written agreement. On discovering the fraud insurers sought to recover their outlay, relying on the express fraud condition in the policy. This failed on the basis that the written settlement agreement, as a contract compromising a claim under an insurance policy, was not a contract to which the principles of utmost good faith applied, as set out *obiter* in Baghbadrani v Commercial Union Assurance. The settlement agreement effectively resolved

the claim and replaced it with a new agreement, in relation to which the insured had simply failed to meet the condition necessary for payment of the VAT. If the insured had simply provided the invoice in support of a claim for payment under the policy, he would have forfeited the whole claim. This decision highlights that insurers must take care with the mechanism they use to settle claims in order to preserve their rights in relation to fraud.

US Trading Limited v AXA Insurance Company Limited [2008]

Following a fire at the insured's food processing company, insurers rejected the claim on the grounds of non-compliance with a warranty alleged to have been incorporated into the policy obliging the insured to clean the whole cooker extraction system every three months. Loss assessors sent two letters to insurers detailing how the extraction system had been cleaned by two separate contractors in accordance with the warranty. Insurers, however, contended that these representations were made dishonestly and falsely as the first contractors had not included the extraction system in their cleaning and the second had never attended the premises.

It was held that the warranty had not been incorporated into the insurance policy as insurers were unable to produce any evidence pre-dating the fire stating that the warranty formed part of the policy. The warranty was particularly onerous and not one of the insurers' normal terms and would therefore only be incorporated if it was brought fairly and reasonably to the insured's attention. Secondly, had the warranty been incorporated, it had been complied with as it was to be construed as meaning that the insured had to have the cleaning done, not that it had to be done properly. Finally, on the evidence, the insured had honestly believed that the contract with the first contractor had included the instruction to clean the extraction system even though that belief was erroneous. In relation to the second contractor, it was clear that they had attended the factory and undertaken some cleaning work. Accordingly, the representations were not falsely made and the fraud allegation failed.

Walton v Kirk [2009]

This highly significant case broke new ground in respect of an insurer's ability to bring successful contempt of court proceedings in the remit of personal injury claims. The claim arose from an RTA in which the claimant sustained injury resulting in a £800,000 claim for compensation. The claimant's statements were verified by statements of truth. Her witness statements and schedule of damages depicted a woman of severe disability. But the defendant's medical expert concluded that the claimant had not developed, as claimed, fibromyalgia and was in fact deliberately exaggerating her condition. Video evidence was obtained which supported this finding. The claimant subsequently accepted an earlier payment into court of £25,000. Following that acceptance, the insurer successfully applied for permission to bring contempt of court proceedings.

The court set out three elements which need to be proved beyond reasonable doubt to establish contempt of court:

1. the statements is false;
2. the statement has or would have interfered with the course of justice; and
3. when the statement was made, the maker had no honest belief in its truth.

Any genuine doubt must be resolved in the respondent's favour and exaggeration is not automatic proof of contempt. When looking at exaggeration, the degree of exaggeration and/or the circumstances in which it is made are relevant. In this case contempt was proved and the claimant was fined.

Health & Safety

R v Chagot Ltd [2008]

The HL judgment re-iterates established principles by confirming that the prosecution need only prove the existence of a risk of injury to employees arising from a breach of statutory duties, rather than identifying and proving specific breaches of duty. It suggests however that there may be cases where the distance between the duty-holder and the breach of duty was such that the prosecution ought to set out allegations of breach as a matter of 'fair notice' allowing the defendant to prepare his defence. The judgment suggests that a test of reasonable foreseeability applies to the requirement for the prosecution to prove the existence of a risk. This may prove the most useful aspect of the judgment when defending prosecutions under the HSWA.

Smith v Northamptonshire Ltd [2009]

The HL was asked to consider the construction of the Provision and Use of Work Equipment Regulations 1988 (PUWER) and clarify whether an employer can be strictly liable for defective work equipment on a third party's premises visited by an employee during their employment. The claimant was injured when using a ramp installed by the NHS as access at the home of someone in her care. If PUWER applied the employer council would have been strictly liable for her ensuing injuries. The Lords made it clear that for liability to attach to 'equipment', the employer must have some responsibility for its construction or maintenance. If the meaning was interpreted too widely, an employer could be liable for an item used by an employee when the employer did not even know it existed. An employer can only be responsible for those items of which they are (or should be) aware. There is in effect a two-stage test: is the item work equipment under Reg. 2(1), and do the Regulations apply to the equipment as per Reg. 3(2)? The second limb of the test hinges on an analysis of an employer's level of control. The defect in this instance was latent and not observable on inspection. The Regulations were not intended to be an all-embracing protection rendering common law duties of care under the Occupiers' Liability Acts superfluous.

R (MHRA) v Guy's and St Thomas' Ltd [2008]

Prior to this CA decision, there has been little guidance on sentencing not-for-profit organisations for regulatory offences. Here, the Trust was prosecuted for breaching s.64 of the Medicines Act 1968 – selling a medicinal product which is not of the nature demanded by the purchaser - and was fined £75,000. It appealed. The court accepted that, as a matter of principle, where a not-for-profit organisation exists to carry out work for public benefit and a failing occurs without actual fault of that body, but an act or default of an employee to whom a task has been properly delegated and who has been properly trained, the court should not punish a body by imposing a financial penalty. Such a penalty would have a material impact on its ability to discharge its public duty which would not be in the public interest. While the CA was invited to consider discharging the Trust, given the fact that this was effectively a strict liability offence and the Trust was being sentenced for its vicarious liability, the court was not persuaded that this was appropriate, because this was still a serious matter. Whether or not the door remains open for discharges to be an appropriate penalty for regulatory breaches is questionable.

In considering how to impose the correct level of fine, the CA considered that looking at the average cost of staff was a potentially helpful way of assessing the impact on the Trust of the penalty to be imposed. The Trust's average wage cost is £30,000 and the fine in the lower court of £75,000 had been equivalent to 2.5 members of staff. In balancing the potential benefit to the public by way of fine to the Trust and the negative impact to patient services, the court concluded that the £75,000 fine was excessive and reduced it to £15,000. The CA's reasoning in this case will assist with assessing

financial penalties faced by public sector organisations in the future.

Couzens v T McGee & Co Ltd [2009]

The claimant used his own 'tool' (a piece of angle iron) to clean his driver's cab as the shovels provided by his employer were not sufficient for the task. The defendant employers were aware that drivers provided their own equipment for this task but were unaware of the claimant's specific tool. The iron did not fit into the cab's door properly and on one occasion prevented the claimant from braking causing his lorry to overturn at speed. After reviewing the authorities on the appropriate test for 'work equipment' the CA held that the iron was not "provided for use... at work" as "work equipment", under Reg. 3(2) PUWER. The employer did not know the scrap metal was being used and had not given permission for its use. On this basis the Regulations did not apply and the claim that the employer had failed to provide a suitable place to store a tool did not succeed. Leave to appeal to the HL has been refused.

Ammah v Kuehne & Nagal Logistics Ltd [2009]

Where the risk associated with an act had been identified by the employer and adequate instruction/warning given, an employee who proceeded to carry out that act was to blame for the ensuing accident. Contrary to company policy the claimant stood on a storage box to reach a high shelf. Staff wishing to access higher shelves were instructed to use a "man-riser", portable steps or a forklift truck to gain access and were told they must not stand on a box. The CA found that the employer had complied with its duty of care to ensure a safe system of work. Suitable equipment was available which employees were instructed to use. The risk associated with standing on a box had been identified but had been adequately guarded against by the instruction given. Standing on boxes was not a common practice and it was not condoned. The employee was to blame for his injury.

R v Norwest Holt Construction Ltd & Costain Ltd [2009]

A useful example of the type of case where the prosecution are likely to be faced with a significant obstacle when attempting to secure the conviction of a company under the HSWA. It confirms that if the risk assumed by an employee cannot be foreseen, then it cannot be said that the defendants exposed the person to that risk. Accordingly there is no shifting of the burden to the defendants to prove that they had ensured, so far as reasonably practicable, that the employee was not exposed to health and safety risks. The judge allowed a submission of no case to answer after hearing the evidence of the prosecution and recorded verdicts of not guilty. This decision usefully highlights the importance of producing strong evidence of adequate method statements, signed acknowledgments of attendance at inductions together with good witness evidence detailing the clear instructions that were given to enable the court to make appropriate findings of fact favourable to the defence case.

R v Pola [2009]

The CA confirmed that employers cannot assume that by taking on casual workers they can avoid duties under the HSWA. The fact that the casual workers did not have to report for work one day to the next did not mean they fell outside the definition of 'employee' for the Act. The issue to be addressed was whether, on the evidence, a casual worker is obliged to remain at work for the duration of the day to carry out work for which he expects to be paid. The court's intention when enforcing the legislation is to protect all categories of workers, whether they are casual, agency or permanent employees.

First Corporate Manslaughter Prosecution

Cotswold Geotechnical Holdings is the first company to be prosecuted under the Corporate Manslaughter & Corporate Homicide Act 2007 following the death of an employee geologist in

September 2008. The company also faces charges contrary to s.2 HSWA for failing to ensure the health and safety of an employee. Under the Act an organisation is guilty of corporate manslaughter if the way in which it manages or organises its activities causes a person's death and amounts to a gross breach of a relevant duty of care to the person who died. A substantial part of the failure must have been at a senior level. At a hearing at the Crown Court on 19 August the judge set a plea hearing for a date to be fixed in the second half of October and a trial date for 23 February 2010. The trial is expected to last between 4-6 weeks.

Interim Payments

Eeles v Cobham Hire Ltd [2009]

This case gives guidance as to the correct approach to making an interim payment in a personal injury claim where the final damages award is likely to include a Periodical Payment Orders (PPO):

1. the judge should assess the likely amount of the final judgment;
2. the assessment should be carried out on a conservative basis permitting the judge determining the interim payment application to award a reasonable proportion of the capital sum, which may well be a high proportion;
3. the capital sum does not include the value of the PPO;
4. providing the claimant is of full age and capacity the judge need have no regard to what they intend to do with the money; and
5. additional elements of future loss could be included in the assessment of the likely amount of the final judgment where the judge can confidently predict that the trial judge would wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone.

The judgment preserves the trial judge's ability to order a PPO for all heads of future loss, apart from those related to accommodation claims. A claimant needing accommodation before the close of trial could still recover an interim payment to do so providing there is proof of a real need and that the amount was reasonable.

Jurisdiction

Allianz SpA & Another v West Tankers (ECJ) [2009]

This dispute arose out of the collision of a vessel with a jetty in Italy. The charterparty was governed by English law and contained an arbitration agreement providing for arbitration in London. Allianz, the charterer's insurers, brought subrogation proceedings in Italy against the owner. The owner challenged the proceedings before the English court, claiming that the claim was governed by the arbitration agreement. The HL referred the issue to the ECJ.

The ECJ held that it is incompatible with European Council Regulation 44/2001 (which governs the recognition and enforcement of civil and commercial judgments) for one EU member state court (which, due to an arbitration agreement, has supervisory jurisdiction over an arbitration) to order the court of another member state to halt proceedings issued there in breach of the arbitration agreement. It is for the court seized of the proceedings, rather than the supervisory court in the seat of arbitration, to decide whether to continue or halt the action in favour of the arbitration agreement. It does not follow from this that the arbitration cannot be continued to an enforceable award and it is to be hoped that other EU courts would be similarly supportive of arguments based on an arbitration agreement.

Lauren B v Mark B [2008]

English passengers sued their English driver following a serious accident in Spain with a Spanish vehicle. Their vehicle had been hired through an English firm based in Norfolk but the contract of hire may ultimately have been with a Spanish company. The vehicle was covered by Spanish insurers and governed by Spanish law. The question was whether the applicable law was English or Spanish which was significant as to the heads of damage which could be claimed. Under s.11 of the Private International Law (Miscellaneous Provisions) Act 1995 the general rule is that the applicable law is the law of the country in which the event occurs. However, that can be displaced if, in all the circumstances, it is substantially more appropriate for the law of another country to apply due to the significant factors connecting the tort with that country. It was held that the factors connecting the matter to England, namely a tortious act by an English national and the consequences being visited upon English nationals, meant that the consequences of the tort would be felt for a significantly longer period in England than in Spain. The Spanish factors were not immediately connected to the tort and the question of who was liable to pay for the damage through a contract of insurance was one step removed.

The implications of this case may need to be revisited following the introduction of Rome II (see above). However, under Article 4(2), where the person liable and the person suffering damage are both habitually resident in the same country, the law of that country shall apply.

Youell v LRA [2009]

An insured who made helicopter parts was insured for third party liability by a policy where the insurance was placed partly with insurers in France and partly with insurers in England. The French market settled a claim and sought the English market portion, taking an assignment of the insured's rights against the English market. The English market refused to settle on the basis that the policy did not respond to the claim which had been settled. The English market sought a negative declaration against French insurers. The insurance contract was governed by French law under which a creditor must seek out its debtor (the opposite to the position under English law). On such a basis England was the place of performance for the obligation, giving jurisdiction to the English courts under Article 5 of the Brussels Regulation. French insurers argued that Article 8 should apply, providing different jurisdictional provisions "in matters relating to insurance". It was held that as the provisions in Article 8 were designed to protect the insured as a weaker party, they do not apply when two insurers fall out between themselves and the provisions do not even apply when one of the insurers sues the other as assignee of the insured. The English court had jurisdiction.

Frampton v Allianz Suisse Assicurazioni [2009]

This case arose out of an RTA in Switzerland when the claimants' motorbike collided with the defendant's car. The car was insured with a Swiss insurer. Relying on the 4th Motor Directive and the decision in FBTO v Odenbreit, the claimant issued proceedings in England directly against the insurers ASA. However the court confirmed that the English courts did not have jurisdiction and service of the claim form was set aside. Under Article 2 of the Lugano Convention, the general rule is that persons domiciled in a contracting state should be sued in the courts of that state. Further, the case of Odenbreit did not apply as it dealt with jurisdiction in EU claims and Switzerland is not an EU member state. A claim can only be brought against an insurer direct if they are domiciled in an EU member state and ASA was not. The 4th and 5th Motor Directives do not apply to non EU members, nor do they deal with jurisdiction. This decision highlights the complexity of recovering damages for accidents overseas, something which Rome I and Rome II are seeking to simplify.

Maheer v Groupama [2009]

The court considered whether the fact that a claim was issued against an insurer direct made a difference to the applicable law where the claimants were injured by a Frenchman in France in 2005. Had the accident occurred after 20.8.07 Rome II would have applied, so French law would have determined the assessment of damages. Although the jurisdiction of the English court was not in dispute, there was an issue as to whether damages and pre-judgment interest should be calculated under French or English law, as there resulted a practical difference. It was held, that under the English conflict of laws rules, the assessment of damages was a procedural matter governed by the law of forum i.e. the English court. For the assessment of damages an insurer's liability should also be seen as a liability arising in tort so procedural and to be determined in accordance with English law. Both English and French law have potential relevance to an award of pre-judgment interest depending on the facts of the case. This case is proceeding to appeal on 19 October 2009.

Limitation

Since publication of the last Market Conditions Report in 2008 the courts have handed down judgment in a series of cases in which issues had arisen regarding limitation, highlighting that application of the Limitation Act 1980 still remains highly contentious.

Cain v Francis and McKay v Hamrani [2008]

These joined appeals provide authoritative guidance that the loss to a defendant of a limitation defence is not to be considered a head of prejudice in terms of exercising discretion under s.33 of the Limitation Act 1980 (the Act). The CA expressed concern that, whilst discretion is unfettered, s.33 should not be a lottery for litigants. The accrual of a limitation defence in such circumstances should be regarded as a windfall, and the prospect of its loss to the defendant by the exercise of s.33 discretion should be regarded either as no prejudice at all, or only slight prejudice. The issue which should influence a decision to exercise discretion was whether the defendant had suffered evidential or other forensic prejudice. The fact that a claimant had an alternative source from which to recover damages (i.e. his solicitor's insurers) was relevant but not determinative. The overriding consideration in exercising s.33 discretion is whether it would be equitable (i.e. fair and just) to allow the action to proceed. On the facts the CA overturned the trial judge's decision not to disapply the limitation period as it was an error of law. It should be noted that proceedings had been issued one day outside of the limitation period.

TCD v Harrow Council & Ors [2008]

This was a claim for damages arising out of alleged child abuse brought when the claimant was 42 years old. For the purpose of s.14 of the Act, the critical question was the nature of the claimant's knowledge and whether she knew that the local authority owed her a duty of care by reason of their child welfare responsibilities. The judge held that the claimant was fixed with knowledge that she has sustained a significant injury by her 18th birthday and knew enough for it to be reasonable to commence investigations on whether she had a case. The claim was statute barred and the judge declined to exercise s.33 discretion as there was insufficient justification for imposing on the council a trial relating to historic allegations when information had been significantly depleted. The long delay would mean it was not possible to have a fair trial and there would be serious prejudice to the defendants. The discretion may be unfettered but it had to be considered in all the circumstances including public policy considerations. It is important to protect the public interest in legal certainty and finality.

Pierce v Doncaster Metropolitan Borough Council [2008]

The claimant pursued damages against his local authority for injury sustained as a result of a failure to take him away from the neglect and periodic violence of his parents. It was accepted that the negligent act was returning him to his parents in 1977 but as he was only 18 months old he could not have gained actual knowledge at that time. The claimant said knowledge could only have arisen when his solicitors saw the local authority records in 2004. The CA held that his knowledge was at an earlier date when he had requested the records himself but had not actually seen them, therefore his claim was out of time. The case was remitted to the High Court to consider whether the claim should proceed under s.33. However it was subsequently settled.

Raggett v The Society of Jesus Trust Pierce & TDC [2009]

A high earning solicitor claimed that his legal career had been blighted by child sex abuse, valuing his claim at £5 million. The main issue before the court was limitation, as the events complained of were in the 1970s. The test for when a claimant has the requisite date of knowledge is now accepted to be an objective test by reference to the reasonable man. Factors specific to a claimant (in this instance a litigation solicitor who would know about time limits etc) which may have impacted on a decision to proceed with a claim, are relevant to a consideration of discretion, not date of knowledge. It was held that he had known from the time of the abuse the nature of those acts and, viewed objectively, a reasonable person would have recognised they were sufficiently serious to bring proceedings. The claim had therefore been issued out of time. The claimant maintained that he had blocked out his memories of the abuse and once he appreciated the impact they had had on him, he acted promptly to commence proceedings. The judge agreed discretion should be exercised noting that as far as liability was concerned the cause of action was vicarious liability. This made the determination of liability more straight forward than claims involving systemic negligence where documents and oral evidence as to contemporaneous practice and procedure may be required.

MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2009]

This decision is a useful update on limitation particularly relating to claimants under a disability. It is also one of the first judgments to have tackled the thorny issue of what amounts to closeness of connection of employment in abuse cases. The claimant, who had a learning disability, claimed that he had been sexually abused by a priest employed by the defendants. Whilst the defendants accepted that they could be vicariously liable for sexual assaults in circumstances related to the priest's employment, they denied that was the case here. The court agreed, even though the position of priest provided the opportunity for abuse, that was not sufficient. As their contact mainly arose through non-church activities the assaults were not so closely connected with the priest's employment that it would be fair and just to hold his employer liable. With regards to the limitation issue, the judge accepted that the claimant was of unsound mind prior to the issue of proceedings. Although it was not therefore necessary to consider date of knowledge, the judge did so and further confirmed that if there had been a need to consider an exercise of discretion for the claim to proceed he would have granted it. An appeal is proceeding to the CA in the Autumn.

AB & Ors v Nugent Care Society & Anor [2009]

These joined appeals arose from claims of historic sexual abuse requiring the CA to consider the correct approach to the application of s.33 in view of the decision in Hoare. The judgment provides a useful overview of the relevant principles noting the developing law with claims of this nature and, in particular, the impact of the decisions in Bryn Alyn, Lister and Young. Following the principles established in Lister a claimant now has to show:

- he was assaulted (that is the abuse occurred);

- the defendant was vicariously liable for the abuse;
- the abuse caused the alleged damage; and
- the quantum of that damage.

Following Hoare the issue of the claimant's psychological state as a consequence of the injury, and its impact on his ability to pursue a claim, is to be considered by the court in deciding whether to exercise discretion, rather than being a factor to consider in respect of the claimant's date of knowledge. The CA considered that decisions to exercise s.33 discretion required oral evidence from the claimant in preference to referring to the pleadings, written witness statement and discovery (as suggested in Bryn Alyn). Where all the issues are being heard together, then the first issue to be determined must be limitation. The CA hoped that if a claimant gave evidence on limitation then it would not be necessary for them to give evidence again on the issue of liability, suggesting a move away from limitation being determined as a preliminary issue.

Loss adjustors

Cuthbert v Gair [2008]

The court was required to consider what costs incurred by loss adjusters in respect of pre-action work (including investigation and witness statements) were recoverable by an insurer when no solicitors had been instructed. It was held, on appeal to the Supreme Court Costs Office, that the costs could not be recovered as a disbursement as the work would normally have been carried out by solicitors. Costs incurred after solicitors were instructed were also not recoverable as there was no relationship of principal and agent between the solicitors and adjusters with the solicitors specifically instructing the adjusters to act on their behalf. The exception of "expert assistance" could also not be relied on in the circumstances as the work was of a type that an insurer could normally conduct in-house and insurers had merely chosen to contract it out. This case provides clarification on the question of recovery of loss adjuster fees. Insurers will need to consider its impact on their current claims investigation/handling procedures.

Negligence

Vicar of Spalding v Chubb [2009]

In this case children entered the church and deliberately discharged a number of fire extinguishers, causing a cleanup and repair bill of £300,000. Particles of the powder from some extinguishers settled on almost every surface and also mixed with water from other extinguishers to form an acid paste which corroded many of the fabrics in the premises. It was not worth pursuing a subrogated recovery against the children but investigators unearthed that it was well known within the industry that dry powder extinguishers could damage this type of building and that there were other equally effective extinguishers that had a less damaging effect when discharged. Proceedings were successfully brought against the suppliers of the fire extinguishers and it was held that they had been negligent. They had not explained to the church the possible result of the discharge of the dry powder or provided other options. This case opens the door for a new target for subrogated actions and may also prompt insurers to question insureds about the type of extinguishers used and their locations. The decision is being appealed.

Non-Disclosure

Limit Number 2 Ltd v AXA [2008]

When placing reinsurance, brokers stated that the syndicates "would not normally write construction risks unless the original deductible was at least £500,000". At first instance, it was held that the two contracts of reinsurance, in 1996 (subsequently extended for a further seven months) and 1998, were validly avoided as the statement of "policy" was a misrepresentation. On appeal, it was held that the above quoted words were a statement of present intention and representation of existing fact. They were not merely a statement of opinion, belief or expectation. This was important as only a statement of fact can ground a misrepresentation for these purposes. However, the 1998 renewal was a new contract and the trial judge was wrong to hold that the representation made in 1996 continued to be effective. This decision highlights that an initial misrepresentation does not automatically allow an insurer to avoid all subsequent renewals.

Malik v Moneywise Investments [2008]

The claimant operated a public house and instructed defendant insurance brokers to arrange insurance cover for him. Following a fire, insurers avoided the policy on the ground that the insured had failed to disclose in response to an express question that they charged for admission on Fridays and Saturdays. Proceedings against insurers were struck out. Proceedings were then brought against the brokers. The court held that, on the facts, the claimant had informed the brokers that there was no charge for admission and accordingly that the brokers had not been in breach of duty.

HLB Kidsons v Lloyd's Underwriters [2008]

Underwriters denied professional indemnity cover to a firm of accountants on the basis of both the scope and timing of the four notifications given by Kidsons. The judge found that the first notification was ineffective as it did not make it sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt that it was purporting to notify of circumstances that might give rise to a claim. This finding was not appealed.

The second presentation was found, on appeal, to be "on all objective criteria intended to be a notification of circumstances". However, the question was the scope of the notice and it was found that the notification was in respect of possible claims in relation to the implementation of some of the schemes but not the schemes themselves. The third presentation extended the notification to the company market. With regard to the fourth presentation, the CA agreed with the trial judge that this was not made "as soon as practicable" as required by the general conditions. Whilst the notification provision did not state it was a condition precedent, it was found to be an effective condition precedent as to find otherwise could have resulted in a claims made policy becoming entirely open ended. The fourth presentation was therefore ineffective. The leading judgment in this decision is very specific to the facts. However, the finding that the notification provision was a condition precedent can only be good news for insurers. Insurers of claims made policies should not as a general principle be on risk for post policy notifications.

Quantum Processing Services v AXA [2008]

The CA overturned the first instance decision that a failure specifically to mention cave diving, which was more hazardous than scuba diving, enabled insurers to rely on a hazardous activities exclusion in the General Conditions. The CA held that, once a disclosure of scuba diving as a hazardous activity was made by the insured and accepted by insurers, the policy only made sense if the General Conditions were read as covering that hazardous activity. Insurers knew about the scuba diving and had not suggested any limitation on what the insured could do as a diver. Diving in caves was a form of scuba diving and it was for insurers to advise if the insured was not covered for undertaking such diving.

Laker Vent v Templeton Insurance [2009]

Insurers failed at first instance in relation to their defences that they were entitled to avoid the policy for non-disclosure of a pre-existing dispute and that there had been breach of the claims condition in failing to notify them immediately of the likelihood of arbitration. The CA upheld the first instance decision, stating that the issues were factual and that the CA should be slow to overturn inferences drawn by the trial judge from factual findings. There was no non-disclosure as at the time of renewal, the dispute had not showed a real risk of escalating into requiring formal dispute resolution. Further, insurers had produced no evidence from their underwriters and so had been unable to establish inducement under the second limb of Pan Atlantic v Pine Top (see Lewis v Norwich Union below). Secondly, the claims condition had not been broken as there had to be an objective likelihood of a claim to trigger the notification obligation and, on the facts, there was no such likelihood.

Lewis v Norwich Union [2009]

The claimant took out a permanent health insurance policy with the defendant but failed to disclose a visit to his GP about knee pain, although nothing untoward was found. Subsequently, the claimant was forced to give up work due to incontinence and insurers relied on the non-disclosure. The court found that the visit was material (i.e. that a hypothetical prudent underwriter would have taken it into account) but that insurers had not proved inducement. The underwriter responsible for writing the risk had not given evidence and the court was not satisfied by the evidence of another underwriter together with insurers' general practice that the underwriter in question would have refused the risk or imposed an exclusion, particularly as it had been shown that the underwriter had not acted prudently in other respects. This case highlights that, in order to succeed on non-disclosure and comply with the second limb in Pan Atlantic v Pine Top, it is vital to obtain witness evidence from the actual underwriter even if they have left the company, provided that they are still available to give evidence.

Periodical Payments

Rowe v Dolman [2008]

The CA had to decide whether to impose periodic payments on a severely injured man who was only 80% successful on liability. The claimant's main reason for preferring a lump sum was that since he was to receive only 80% of his damages, a periodic payments order (PPO) reduced on that account would not cover his annual continuing care and other needs. The appeal on periodic payments failed as the judge had properly considered the CPR 41.7 factors and had exercised his discretion correctly. On the facts the scale of the annual payments and the deduction for contributory negligence would have left the claimant with the prospect of having to leave his own home. If there was a PPO he would not be able to live his life as he wished and with the benefit of the significant improvements noted by the experts. It would have been interesting to see the court's decision had the claimant been entitled to 100% of his damages. The indication was that the decision would, in those circumstances, have been more finely balanced, although May LJ commented that the life expectancy issue had already been determined by the judge and should "not of itself necessarily suggest periodical payments".

Policy interpretation

Allianz Insurance Co Egypt v Aigaion Insurance Co [2008]

Reinsurers expressly stipulated that a warranty should be included in the reinsurance contract and this was agreed in negotiations between parties. The warranty was not however referred to in a slip

recording the parties' agreement. Reinsurers responded to this slip by email saying that "cover is bound ...as we had quoted". On appeal, it was confirmed that it was impossible to read the warranty into the slip offer. The slip was intended to be the definitive reference point and the warranty was not mentioned in it. The mutual indications of finality about the email exchange were so strong that it was wrong to interpret the email chain as ending in a mere offer and counteroffer.

Aspen & Others v Pectel [2008]

Claimant insurers relied on a notification condition precedent to refuse policy cover following a fire which was not notified to them until three years later. The defendant, a contractor specialising in the removal of asbestos, was working on the Channel tunnel at the time the fire broke out. It was held that the insured should have given notice straight after the fire. It was not fanciful to suppose the fire was in some way connected with the work carried out by the insured, even though no one was expressly blaming the insured at that time. Even if he was wrong, the judge said that notice should have been given six months later when the insured first became aware that the property owners were investigating whether the insured had caused the fire.

Clause 4 provided that "(a) the Assured shall give immediate written notice with full particulars of any occurrence which may give rise to indemnity under this insurance (b) Every letter, Claim, writ in connection with any occurrence which may form the subject of indemnity hereunder shall be notified or forwarded to Underwriters immediately on receipt".

Clause 13 also provided that "the liability of Underwriters shall be conditional onthe Assured paying in full the premium demanded and observing the terms and conditions of this insurance".

Using a purposive construction, it was held that it did not matter that clause 4a was not expressly stated to be a condition precedent as clause 13 had that effect. What had to be found was "a conditional link" between the insured's obligations to give notice and the underwriter's obligation to pay the claim. The conditional link was clear when clause 4a and clause 13 were read in conjunction. The commercial purpose behind clause 4a justified it being a condition precedent. The use of the term condition precedent elsewhere in the policy did not prevent the conclusion that clause 4a was a condition precedent. It is of interest that the judge declined to decide whether 4(b) could also be classified as a condition precedent. He did note, however, that it would be necessary to consider in relation to each term whether the objective commercial purpose justified compliance being regarded as a condition precedent.

Markel v Gav & Ors [2008]

The claimant sought a declaration of non-liability on the ground that a notification condition precedent in a claims co-operation clause had not been satisfied. The court was asked to determine the issue by way of summary judgment but the judge did not accept the issue should be decided summarily. One issue concerned whether knowledge of a third party (the manager of the reinsurance pool) who had acted for the defendants in the placement of the reinsurance contract triggered the condition precedent. Markel argued that the description of "Reinsured" in the slip as the defendants "as per" the third party was the definition of "Reinsured" that should be applied throughout the reinsurance contract. Therefore, knowledge of the third party was knowledge triggering the condition precedent. The Reinsured submitted that the words "as per" in the description of the "Reinsured" referred only to the fact that the third party acted for the reinsureds in connection with the placement of the reinsurance contract. The judge refused to accept the claimants' interpretation as such a meaning did not fit some of the uses of "Reinsured" in the contract.

Pratt v Aigaion Insurance [2008]

The claimant insured his fishing trailer under a policy which included a warranty that the owner and/or skipper would be on board and in charge at all times, together with one experienced crew member. The vessel was destroyed by fire when nobody was on board. At first instance insurers were held to be entitled to rely on the warranty which was to be construed literally. Although there were common sense limits on the wording, there was a breach in the circumstances. However, on appeal, it was held that the primary purpose of the warranty was to protect the vessel against navigational hazards but at the time of the fire the ship was not at sea but held fast at port. The clause could also not be read literally to mean at all times as there were clearly going to be periods when the owner/skipper could not be on board. As the phrase was therefore ambiguous, it should be construed against insurers. Whilst this is a marine case, it serves as a reminder that insurers cannot always rely on the strict terms of a warranty, especially when there is an ambiguity.

Reilly v NIG [2008]

The insured installed a fire detection and protection system at a client's premises which failed to operate during a fire which damaged various equipment. It was held at first instance that the exclusion relating to "the failure of any fire or intruder alarm switchgear control panel or machinery to perform its intended function" did apply, the policy being designed to protect against damage caused by defective equipment and not against failure by the equipment to fulfil its function. On appeal, it was held that the judge was correct in concluding that the words "fire or intruder alarm" did not govern the rest of the clause. However, the judge was wrong to hold that the equipment as a whole in the particular circumstances could properly be described as "machinery"; rather it was equipment which incorporated various components, some of which could be described as machinery. The master cylinder itself was not machinery and if the system as a whole failed because the cylinder had been incorrectly filled or pressurised, it was not because the cylinder failed to perform its function. Similarly if the cause was insufficient pressure in the cylinder resulting from leakage from the discharge valve, the claim would not be excluded. This matter was determined as a preliminary issue and there was not sufficient evidence before the court as to the cause to make a final decision. It appears that as a rule of thumb those components that are complex and rely on moving parts would be classified as machinery.

Global Process Systems Inc & Another v Syarikat Takaful Malaysia Berhad [2009]

The claimant insured held an All Risks policy with the defendant insurer and claimed when three legs from one of its oil rigs fell off as the rig was being towed from Texas to Malaysia. Insurers claimed that the loss was an inevitable consequence of the voyage and therefore outside the policy indemnity; alternatively that the cause of the loss was inherent vice, excluded under the policy, as the legs were not capable of withstanding the normal incidents of the tow. The insured contended that the loss was fortuitous, and so within the terms of the All Risks cover, and that the proximate cause was the failure to carry out adequate repairs during the voyage. It was held that to show a loss as fortuitous was a low hurdle for the insured and that probability, however high, did not bring a case within the ambit of inevitability. The failure of the legs, as the rig was towed, was very probable but it was not inevitable. However, damage could be caused by inherent vice without it being inevitable and, on the facts, the rig was fundamentally unable to withstand the voyage. The proximate cause was, therefore, inherent vice and the claim was dismissed.

Ansari v New India Assurance [2009]

The claimant correctly represented in his proposal that the property was protected by sprinklers. However, the sprinklers were subsequently deliberately isolated during the period of indemnity. A fire occurred and insurers declined indemnity for breach of a condition which provided that the insurance

would cease to be in force if there was "any material alteration to the Premises... or any material change in the facts stated in the Proposal".

The CA upheld the first instance decision that insurers were not liable and provided guidance on the meaning of "material". In this context, it does not mean the same thing as in a non-disclosure context. Here, a material alteration is one which would "have a significant bearing on the risk". The facts would have to change to such an extent as to take the risk outside that which was contemplated at inception. Whilst temporarily isolating sprinklers for maintenance would be contemplated, permanent disablement presented a completely different risk. The CA therefore concluded that the facts stated on the proposal and the very subject matter of the insurance had been materially altered and as such the policy had come to an end. The declaration that the premises were protected by an automatic sprinkler installation was also interpreted as meaning the system was operative and not just installed. The claimant was aware that the sprinkler had been turned off and therefore could not rely on the non- invalidation clause. This case is very helpful to insurers as it effectively creates a continuing warranty during the currency of the policy with which the insured must comply.

Practice & Procedure

Sodastream v Coates & Ors [2009]

This provides a firm reminder to claimants of the matters which will be taken into account when considering applications to extend time for service of a claim form. The applicant had made five applications to extend time for service on a without notice basis. No reference was made in subsequent applications to the previous extensions granted and the reasons for a further extension were largely the same. The extensions totalled 12 months before service was eventually effected. It was held that there were no good reasons to justify the extensions or the delay, particularly bearing in mind the limitation period expired just days after the claim form was issued.

Re-insurance

Wasa International Insurance Company v Lexington Insurance Company [2009]

In this long awaited decision the HL unanimously ruled in favour of reinsurers and reaffirmed fundamental reinsurance principles underpinning "follow the settlements" provisions which had been cast into doubt by the CA. The Lords held that the "full reinsurance" clause in this case, and "follow the settlements" clauses in general, did not have the effect of bringing within the reinsurance cover risks that, on the true interpretation of the reinsurance contract, would not otherwise be covered. On the facts of the case, reinsurers Wasa and AGF were not bound to follow a settlement against the insured Lexington who, under Pennsylvania law, was liable for damage occurring outside the period of cover, despite the insurance and reinsurance being ostensibly back-to-back.

Road Traffic

Smith v Finch [2009]

This High Court judgment confirms for the first time that cyclists who fails to wear a helmet may be guilty of contributory negligence if the helmet would have prevented all of the injuries or made them a good deal less severe, potentially extending the principles set out in Froom v Butcher. The judge considered that the time has come when a failure to wear a cycle helmet may amount to negligence, despite the absence of any legal requirement to do so. He accepted that individuals were free to

choose whether or not they wore one. But failure to do so may expose riders to a greater degree of injury for which they may be regarded as being contributorily negligent, subject to the issue of causation. The case is also significant for highlighting the importance of medical evidence in RTAs. The failure by both parties to call medical expert evidence amounted to a 'fundamental omission'. The defendant could only persuade a court that an injury would not have occurred (or would not have been so serious) with supporting evidence.

Wilkinson v Fitzgerald & Churchill Insurance Co Ltd [2009]

This confirms an insurer's right of recovery under s.151 of the Road Traffic Act 1988 (RTA). The claimant had permitted a friend to drive his vehicle whilst he was a passenger, knowing he had no insurance. A collision occurred as a result of the driver's negligence causing the claimant serious injury. A claim was commenced against the driver, with an indemnity sought from his insurers Churchill. Churchill rejected the claim on the basis that s.151(8) allowed them to recover compensation from the injured person who had permitted use of the vehicle. The court found that to invoke this section would be a breach of the 1st and 2nd EU Motor Directives which guarantee compensation to victims of road traffic accidents. An insurer could not recover from an injured policyholder compensation paid by way of an indemnity as a consequence of an uninsured driver negligently driving their vehicle. This is the case even where the policyholder gave the uninsured permission to drive. Otherwise the claimant would have been in a worse position with effective insurance cover than none at all as in the latter situation he could have relied upon the MIB Uninsured Driver's Agreement. The insurers have indicated that they intend to appeal.

Beachcroft LLP
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