CILA Future Focus Conference 2013 – Liability, Adrian Foster

Introduction.

These notes should be read in conjunction with Sections 1, 2, 4 & 10 of the CILA Certificate Learning Material (CLM). The CLM provide the basic legal framework and are essential reading. These notes provide some practical comments, examples & case law to illustrate the framework.

Section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has removed the recovery of success fees via Conditional Fee Agreements and Collective Conditional Fee Agreements and claimants and Insurers will now be required to pay their solicitors directly, or enter into a 'Damages Based Agreement' where costs are deducted from damages. It is anticipated that first party adjusters will therefore need to consider any recovery in detail and comment upon its anticipated success.

Legal Liability.

In summary it important to recognise that legal liability can attach in many different ways, for example,

Statute – Parliament determining that society, or a particular group, or 'activity', owes others a duty of care.

Contract – Two parties agree terms & conditions and thus that a duty of care exists between them.

Tort – A duty is owed by members of society to each other – usually because one party acts in a way which warrants such a duty existing. Tort is then split into categories – negligence, nuisance, trespass, defamation etc.

A liability may attach because of breach of single duty (say a strict duty in statute) or it can exist because multiple duties have been breached (say a negligent act also results in a breach contract).

Policy Cover.

Legal liability and policy cover are separate issues. The Insured may only have cover for certain types of loss. It is therefore essential that the mechanism by which defendant is liable is determined and then the policy reviewed it see if cover applies for each breach of duty & loss. For example the Insured may have supplied a product to a third party under a contract with excludes consequential losses but retains liability for product recall. The policy may cover the consequential loss under its financial loss section but as no liability attaches there is nothing to pay. Without product recall cover the Insured may find themselves paying for the recall.

Always ask yourself,

- Legal Liability – Does a liability attach in law and how ?
- Policy Liability – Does the policy provide an indemnity ?

Legal liability can be categorised into certain headings and each claim may involve one or more.

Negligence.

Since the case of *Donoghue* v *Stevenson* [*1932*] *UKHL 100* (the snail in the bottle) negligence has become the dominant tort. It is important to recognise that its influence has expanded greatly in recent years and the case law is still evolving. For liability to attach the claimant will need to prove the following,

- That a duty of care was owed to the person suffering the loss,
- That there was a breach of that duty of care,
- That damage resulted from the breach of the duty (causation).

The CLM gives the straightforward example of a plumber who installs a radiator which then leaks. Another would be a company employed to trace cables on a brown field building site and an excavator driver employed by a sub-sub-contractor of the client then hits a cable which was not identified.

- Was a duty owed ? – Yes but what if the survey was requested to determine the viability of the site for building on and not for construction purposes.
- Was there a breach ? – Evidence may be required to determine the limits of the cable tracing technology and whether the cable should have been discovered.
- Did the damage result from the breach ? – What if the survey was never given to the sub-sub-contractor and what if the survey included a disclaimer stating it was not to be relied upon during construction work. What if the defendant realised the mistake in the survey and informed the claimant, but this was not communicated to the driver.

Case law adopts a variety a 'tests' to find the answers to these questions. For example, is the event reasonably foreseeable and whether the claims and loss is 'proximate'. Understanding the interplay of these tests is a matter for academics and not really adjusters.

Public Policy.

In some cases the Courts have refused to impose a liability because it would be contrary to public policy.

In certain circumstances a liability has been imposed for damage caused through vandals entered one property and causing damage to another; the argument being that the occupier should secure their property to avoid this happening. The Courts however take the view that only in rare circumstances [*Home Office v Dorset Yacht Co Ltd [1970] UKHL 2*] will a duty be imposed for the criminal acts of another; society should be able to rely upon people not acting illegally. The general principal is contained in the case of *Smith v Littlewoods Corporation [1987] UKHL 18*.

Defences.

Volenti Non fit Injuria – The claimant in fact consented to the risk. This often used in claims for personal injury as in property claims one would assume the breach did not cause the loss. It is important to recognize that the consent must relate to the duty owed. In *Watson v British Boxing Board of Control [2001] QB 1134,* whilst Micheal Watson consented to the risk associated with boxing he did not consent to the poor medical treatment present ringside.

Contributory Negligence - Contributory negligence is where the claimant's negligence has contributed to the loss. Note that if the claimant's negligence is the sole cause of the loss there is no "causation" and the claim fails.

Contributory negligence does not apply to claims presented solely in contract because the defendant has expressly promised to do something irrespective of the claimants' own actions. It can however apply where allegations are raised in both contract & tort and this it is again important to determine how liability arises. See also the recent case of *Smith v Finch [2009] EWHC 53*. The claimant was riding his bicycle when he fell off due to the defendant's negligent riding of his motorcycle. Whilst the claimant could be found contributory negligent for not wearing a helmet in that case the defendant did not present any medical evidence to show a helmet would have made any difference and thus no deduction was made to the damages awarded.

Limitation.

The limitation Act 1980 (plus various amendments) stipulates the time period within which proceedings must be issued against a defendant. If the claim is not issued "in time" then it can be struck out; giving rise to a potential professional indemnity claim against the adjuster. There are a wide variety of limitation period however the general rules are as follows,

Tort (other than personal injury) – 6 Years or 3 years from date of knowledge (Latent Damage Act)
Personal Injury - 3 years from the act or date of knowledge.
Contract – 6 Years from the date of breach or 12 years if the contract is under seal.
Contribution – 2 years from the right accruing.

Nuisance

Nuisance involves the ownership of land and damages occurring over time; a continuing state of affairs. The most common claim adjusters encounter is the encroachment of tree roots into a neighboring property - see for example *Denness v East Hampshire District Council [2012] EWHC 2951 TCC.*

The tort used to be one of strict liability – that is if the defendant committed a nuisance (which the court would decide by balancing the activity with the area involved) he was liable for the damage. In recent years however a test of reasonable foreseeability has been incorporated to the tort so a claim in nuisance often has similar consideration to the tort of negligence; see for example *Cambridge Water Co Ltd v Eastern Counties Leather plc [1994].*

Rylands v Fletcher.

The case of *Rylands* v *Fletcher [1868] UKHL 1* was a offshoot of nuisance, with strict liability (without any balance of what was reasonable in the area/community concerned) being imposed because the activity was fundamentally dangerous; in that case the storage of a high volume of water which escaped to neighboring land.

Following the Fire Prevention (Metropolis) Act 1774 (s.86) there has been no strict liability for the accident spread of fire (the word accidental being key). Insurers often attended to get round s.86 by pleading *Rylands v Fletcher* and arguing that dangerous items were stored, these caught fire and the fire spread. Following the recent case of *Mark Stannard v Wyvern Tyres [2012] EWCA 1248* it is now clear that it is the dangerous thing itself which must escape and not fire caused it (that case waste tyres). Given this, the application of Rylands v Fletcher will now be quite limited.

Contract.

A contract is an express agreement between two parties; invariably one party agrees to provide goods or services to another for payment (though any form of 'consideration' is acceptable).

It important to determine what the terms and condition of contract are, and that these were communicated between the parties. In some cases 'standard' terms and conditions apply, for example the JCT contract terms used in construction contracts – however these standard terms are often subject to alteration and amendment.

It is also important to recognize that as the defendant has agreed to do something for payment the Court will award damages to put the claimant in the position he would have been had the contract been performed (including any profit). This contrasts with claims in tort where damages are awarded to put the claimant in the position he would have been had the tort not occurred.

It is because the measure of damage (and arguments of contributory negligence and limitation) are different in contract and tort that allegations of both are made.

Statutory Duty.

Statutory duty arises via a statute or regulations which imposes an obligation upon a particular party to act in particular way. Such obligations are usually imposed when there is a clear recognized relationship between the parties and clarity of legal obligations is required. Often the defendant elects to do something which results in the duty being owed (e.g. choosing to own a dog results in duties under The Animals Act 1971). In some cases the duty is strict and in other cases the statute (or regulations) provides qualifications and/or a defence (for example s.42 of the Highways Act 1980 creates the duty and s.58 provides a defence).

It is important to note that if a liability is to be imposed the Courts expect the wording of a statute or regulations to be clear. In many cases statutes create obligation but these are enforcement by other means (criminal charges or judicial review for example). S.209 of the Water Industry Act 1991 creates a civil liability for water escaping from mains pipes, yet s.94 does not because the wording is different, lacking the clarity of s.209, and s.94 refers to other remedies within the Act (see *Marcic* v *Thames Water Utilities, [2003] UKHL 66*).

Note that much of the civil liability created by statute involves employer's duties to its employees. There is a general assumption that where legislation is enacted for the purposes of health safety, whilst it is fundamental criminal in nature (and enforced for example by the HSE) and co-existing civil duty is intended; see the discussion in *Solomons v R Gertzenstein Ltd [1954] 2 All ER 625 CA.* Note the potential impact of the *Enterprise & Regulatory Reform Bill*.

Subrogation.

Subrogation derives from case law, as per *Castellain v Preston [1883].* Often the principal is confirmed by a claims condition allowing the insurer to pursue a recovery in the name of the Insured.

Note the application of excesses & deductibles when settlement is achieved. The following provides a good working example.

The claim suffers losses of £40,000. After the deduction of £10,000 to reflect items not covered by the policy the first party insurers settle their insured's claim settled at £30,000 which is subject to 50% underinsurance and £1,000 excess resulting in a payment of £14,000. After deduction of the £1,000 excess results in a payment of £14,000.

Uninsured Losses - £10,000.
Insured Losses - Paid £15,000 subject to £1,000 excess = £14,000.
Unpaid £15,000 as a result of underinsurance.

- Any money recovered for the uninsured items is payable to the Insured.
- Any money recovered for the Insured items is split in accordance with the underinsurance (in this case 50/50). The Insurers receive their money first and only then is the Insured able to recover the excess.

In summary therefore, if £25,000 is recovered of which £7000 is for the uninsured losses, and £18,000 insured, the parties receive the money as follows,

Insurers - £9,000 (reflecting 50% of the insured claim after average).

Insured - £16,000 reflecting £9,000 (50% of the claim subject to average) plus the £7,000 for the Uninsured claim.

There are a couple of points to note,

As a single claim is presented in the name of the Insured then it does not matter whether the Insurer has correctly paid the claim under the material damage policy (see *King v Victoria Insurance Co. Ltd (1896)*). Also the liability adjuster is not concerned with how the money is split between the Insured and Insurer but should understand entirely the principals above.

If the actions of the material damage insurers have increased the loss (because of decisions they took or the extent of policy cover) then again this can be argued in any subsequent liability claim (for example there is no liability to pay for "new for old" policy cover). Also It does not matter to the defendant that elements of the claim are 'uninsured' or 'uninsured' and only one firm of solicitors can be used as there is only one claim.

Secondly, the Court will tend to accept that the material damage adjuster correctly assessed and valued the property damage however if there is evidence that assessment was flawed the court will look into it carefully – See *Brit Inns [2012] EWHC 2143 (TCC)*.

Damages & Injury Claims.

The handling of injury claims can be separated into their investigation and handling. The settlement of injury claims is a specialised area of liability adjusting, however as many property losses can include an injury or death, it important to have a good understanding of injury quantum. The following key points should be noted,

General Damages are awarded for the injury itself using medical evidence and The Judicial Studies Board (JSB) publication "*Guidelines for the Assessment of General damages in personal Injury Claims Cases*".

Special Damages - If the claimant is unable to work then loss of earnings (and pension) can be claimed. In serious injuries this can become a significant sum, and if promotions and future prospects are open to debate, much dispute. Generally an average loss per year is assessed (the multiplicand) and this is multiplied by a number (the multiplier) reflecting the years of lost earnings with a discount for future receipt. In addition to earnings itself, claims can be made for domestic work which would have been done but now needs to be paid for (decorating, gardening etc). In

addition with serious injuries specialist equipment or alteration to a house may be required and these may need to be renewed over time.

The Social Security (Recovery of Benefits) Act 1997 allows the government to recovery benefits payable as a consequence of the incident. These can (usually) be offset against special damages.

A variety of regulations allow the NHS to recovery hospital costs (including the emergency A&E) from the defendant up to a maximum of £45,153 (to 1/4/2013).

In addition costs can be recovered though note the effect of LASPO as detailed above in that success and ATE premium are no longer recoverable.

The CLM provides some useful examples of how personal injury reserves are calculated. In addition to this the following is a useful investigation/reporting checklist for reserving claims where a personal injury is incidental to a material damage loss,

1. Injured parties' name, address, occupation, date of birth and NI number.
2. Nature & extent of injuries and prognosis (if known).
3. Average earnings (per week or month with details of any bonuses etc. If the injured party is still off work, details of any payments made whilst absent).
4. Date of return to work (if known)

In the event of a fatality those who were dependent upon the deceased can claim that dependency via The Fatal Accidents Act 1976. Further, statutory amounts for bereavement can also be claimed were a specific relationship exists (a spouse, child etc). The current figure is £12,980 (from 1/4/2013).

Civil Procedure.

The Civil Procedure Rules (CPR) determine how the litigation proceeds is carried out. These will be applied by solicitors involved for both parties and it is not necessary for an adjuster to understand them in detail.

Prior to the issue of proceedings the Pre Action Protocols apply and there are a wide variety applicable to different type of dispute; they can be downloaded at http://www.justice.gov.uk/courts/procedure-rules/civil/protocol. Of importance are those applicable to injury claims and construction disputes and I would suggest electronic copies of both are retained. These should be understood. The purpose of the protocols is to enable the parties to agree the issues in dispute so that claims can be either settled or litigated with minimal cost and they impact on the day to day work of adjusters.

The protocol is started by the issuing of a letter of claim in a specified format. The protocol is flexible enough to allow the defendant to thereafter ask for more information or evidence to support the allegations, particularly if they go to the root of the claim (see *Webb Resolutions v Waller, Needham & Green [2012] EWHC 3529 Ch*). Time limits then apply to when a response on liability is required; strictly speaking the response need only deal with the allegations raised. In addition where a denial (or arguments of contributory negligence) is made with some protocol (specifically that for Personal Injury) documents must be disclosed to support the denial. It is important that these time limits are monitored to avoid court proceedings being instigated (either in full or for the disclosure of documents) – see *Connaughton v Imperial College Healthcare NHS Trust [2010] EWHC 90173*.

Disclosure.

Any disclosure must be specific to the case – e.g. disclosure of the accident book entry applicable to the incident is required by the protocol but disclosure of the accident book in general is not relevant. Disclosure must also be proportional in terms of the documents requested and time taken to collate them. In addition the disclosure must be relevant to allegations or defense otherwise it is merely a fishing trip; see the Courts 'refusal' of a fishing trip in *Assetco Plc v Grant Thornton UK LLP [2013].*

Expert & Witness Evidence.

Experts provide technical opinion. Ensure that the expert does so within his expertise and experience. Experts are not there to determine liability. Also liability is not determined by reference to standards etc (such as British Standards or the Highway Code) albeit it maybe good evidence of good practice and failure to follow them evidence of negligence (see *Medivance Instruments Ltd v Gasline Pipework Services Ltd [2002] EWCA 500* and also *Smith v Finch [2009] EWHC 53* noting, with the latter, it is not a legal required to wear a helmet).

The expert owes a duty to the court but certain experts (particularly medical experts) will be pessimistic or optimistic and thus favour the claimant or defendant accordingly.

It is important to determine the experts remit, ensure they have only documentation which you are willing to disclose (as this will be referred in their report and such must be included in any report). In addition always remember an expert can only give opinion on the information he has; often reports will be in draft until all evidence has been disclosed and they can be finalized.

It is crucial to obtain early and complete witness evidence. The CPR provide rules (in Part 32 and its associated Practice Direction) for the correct format of witness statement but the CPR also allows this to waived at the discretion of the Court; a statement can always be typed up into the correct format but if the witness ceases to be available (or changes their story) the evidence is lost.

Part 36

Part 36 of the CPR provides a formal system whereby offers can be made to the opposing party. If the offer is not subsequently beaten in Court, Pt36 provides for costs penalties which a Court must apply. The wording of Part 36 has been subject to much litigation and must be followed exactly such that *Calderbank* offers (where the letter is marked "Without Prejudice Save as To Costs") have again become a less formal alternative. Pt36 does however focus the other side into valuing their claim and provides good protection when costs are expected to escalate.

Claims Handling & Costs.

Be objective about the claim. There is never any harm in drawing up a spreadsheet which lists the follow,

Issue in dispute, evidence available (strengths), evidence required (weaknesses), cost to obtain further evidence, objective settlement value, and comments.

It is important to recognize that whilst you may want to have further information, during the litigation process it may take some time (and cost a lot of money) before this is made available to you. As such it is important to recognize the

strengths & weaknesses of any claim and the impact they have on the overall settlement figure; no insurer will thank the adjuster for incurring more in costs arguing a worthless point.

Often it is important to recognize when there is a settlement opportunity and if it is turned down how much in costs and time it will take to get to the next one (when the further information you want is available). Once a case is litigated settlement opportunities normally arise when statements are exchanged and disclosure occurs. Significant costs can be incurred at these stages.