THE CHARTERED INSTITUTE
OF LOSS ADJUSTERS

COURSE BOOK

CH4
LIABILITY CLAIMS

Welcome to the CILA CH4 Liability Claims course book.

This learning material has been designed with two main concepts in mind:

1. That it is easily understandable
2. That it engages the learner, promoting questions such as why, who and how does this affect me?

You could simply read and learn the material, but the concept of adding “Activities” and “Putting it into Practice” is designed to help the learner explore the subject to a greater depth. Those who adopt a positive, proactive approach will benefit as they will enhance their learning, becoming ever more useful in the workplace; the resulting rewards for this are immense.

There are deliberately no suggested answers to either the Activities or the Putting it into Practice questions. These are set for you to explore.

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To support your liability claims work and studies we recommend that you register as a member of the CILA Liability SIG on your My CILA account. You can view Liability SIG technical papers in the CILA Technical Library.

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SECTION 1

THE LAW OF TORT, INCLUDING DEFENCES

1. THE LAW OF TORT, INCLUDING DEFENCES

Introduction

It is important to note that policy liability must be engaged before any legal liability is accepted by insurers on behalf of the policyholder.

A liability claims handler is therefore required to consider a two-step approach to liability claims:

- first is there a policy liability and,
- second is there a legal liability to the party making the claim?

Third party claims can arise when damage or injury has been caused by one party to another. The decision as to whether one party is responsible for the injury or damage will be based on whether there is a legal liability.

Chapters 1, 2 and 3 provide an insight into how a legal liability can arise under the legal headings of:

Chapter 1 – Tort (A civil wrong)
Chapter 2 – Contract (An agreement between two or more parties)
Chapter 3 – Statute (Act of Parliament).

Once you have established the basis of a legal liability you are required to consider if there is an option to defend the claim against your Insured. Successfully defending a claim being made against your Insured can be a rewarding experience.

This chapter considers the liabilities that may arise under the following torts:

- Negligence
- Absolute or strict liability
- Nuisance
- Trespass.

It also considers the defences that are available.

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1.1 Definition of Tort

The law of tort concerns the rights that a person has against other persons generally. This includes the right to be protected against various forms of interference, injury or damage to their person, property, financial interests and reputation. A person who suffers interference, injury or damage of any kind will usually be able to claim a monetary award, known as damages.

It is necessary to consider the circumstances in which the law will provide redress for a person whose interests have been adversely affected. The classic definition of tortious liability is "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages." Unliquidated damages means that the value of the damages is not a fixed sum but is at the discretion of the court.

Tort is concerned with duties laid down by law and owed to persons generally. The law of contract, on the other hand, concerns the rights and liabilities established by agreement between two or more parties.

There can sometimes be an overlap between contract and tort. For example, if a railway passenger is injured as the result of the negligence of railway staff, he may treat the matter as the tort of negligence, or alternatively sue for breach of the implied condition in the contract to carry him safely to his destination.

A tortious liability is based on fault, for example, a person is liable if they have deliberately, recklessly or negligently caused harm to the person, property or reputation of another. This generalisation must, however, be qualified as there are many cases in which liability in tort is strict, meaning that a person is liable whether or not he is at fault.

In most torts, the Claimant must prove that he has suffered harm as a result of the Defendant's act or omission, but in some, such as trespass, harm need not be proved. In the latter, there is said to be *injuria sine damno* – a right of action without any harm having been suffered. If there has been no harm, only nominal damages will be awarded.

1.2 Negligence

The classic definition of negligence is that of Alderson B in Blyth v Birmingham Waterworks Co (1856):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

The test of negligence is objective rather than subjective. A person is judged, not by what they themselves consider reasonable nor by what may be reasonable in their particular circumstances, but by what a reasonable person would do in particular circumstances.

Highlight

To succeed in an action in negligence, the Claimant must show that:

(a) a duty of care is owed to them ***(D)***
(b) the Defendant was in breach of that duty, and **(B)**
(c) as a result of the breach, the Claimant suffered damage or injury ***(C)***

You find it helpful to recall the three elements using the phrase "do you know your ***DBC****".*

We will now explore in more detail each element required to succeed in an action in negligence.

Duty of Care

The concept of the duty of care has been developed in many legal decisions, and sometimes by statute, over the years. The most important attempt to lay down a principle that would indicate whether in given circumstances a duty of care exists was that of Lord Atkin in Donoghue v Stevenson (1932):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have

them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

This is known as the "neighbour principle". This case concerned ginger beer that was manufactured by Mr Stevenson and sold to a retailer in opaque bottles. The retailer sold a bottle to a customer, who gave it to the Claimant. After the Claimant had drunk some of the ginger beer, she discovered that the bottle contained the decomposed remains of a snail. She subsequently became seriously ill. It was accepted that the Claimant had no right in contract against either the manufacturer or the retailer as she had not herself bought the ginger beer. However, the House of Lords held that she had a right in negligence against the manufacturer, who ought reasonably to have foreseen that the contents might be drunk by a person other than the customer.

Breach of Duty

Having established that the Defendant owes a duty of care in the circumstances, the Claimant must then prove that there has been a breach of that duty. The test considers what a reasonable person would have done, or omitted to do, in the circumstances.

In making its decision, one factor that the court will consider is the magnitude of the risk. In Bolton v Stone (1951), the Claimant was hit by a cricket ball when she was standing in the road outside a cricket ground. Taking into account that the likelihood of a ball being hit out of the ground was remote (it had happened only six times during the previous 30 years) and the fact that the ground was well fenced, the House of Lords held that the possibility of injury to a person in the Claimant's position was so slight that the Defendant was not liable.

Causation

The final element for the Claimant to provide evidence about is that damage or injury sustained resulted from the defendant's breach of the duty of care.

The Claimant must show that they suffered injury, loss or damage as a result of the breach of duty on the part of the Defendant. This is a matter of fact rather than of law and all that needs to be noted here is that the injury or damage must not be too remote.

Onus of Proof

The general rule is that the onus of proving negligence rests with the Claimant; they must show, on the balance of probabilities, that the Defendant was negligent, otherwise his case will fail.

An exception to this is when the circumstances are such that, without hearing the evidence, a court would take a *prima facie* view that the Defendant has been negligent. In this instance, the doctrine *res ipsa loquitur* (the thing speaks for itself) applies. For the doctrine to apply, the Claimant must satisfy the court that:

a) the causation of the damage or injury was under the direct control of the Defendant, and
b) in the ordinary course of things, the damage or injury could not have occurred without negligence.

In defence, the Defendant will need to show that the damage or injury caused to the Claimant can be explained in a way that does not involve negligence on his part.

1.3 Strict Liability

The general rule in tort is that liability only attaches if someone is at fault. However, in some cases, there may be liability without a finding of fault. This is termed 'strict liability'. The Claimant will only need to demonstrate that the tort occurred, and the Defendant is responsible.

Rylands v Fletcher (1868)

In this case, Rylands employed contractors to build a reservoir on his land. Shortly after it was filled with water, the reservoir burst and flooded a neighbouring mine. The subsequent proceedings led to the development of a new rule that:

"The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

For liability under the rule to arise, there must be "non-natural" use of the land. In Rylands v Fletcher, the Defendant had brought the water onto his land, and the rule would not have applied if the escape of water had been from, say, a natural lake on his land.

The courts have shown an increasing tendency to restrict the consideration of "non-natural" preferring to argue that, as time passes, more uses would be considered natural than had been the case historically.

Strict liability also applies in the following circumstances:

Animals – Any liability that exists under the Animals Act 1971.

Aviation – The Civil Aviation Act 1982, Section 76(2) provides that:

"where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft."

Water – The Water Industry Act 1991 and the Water Resources Act 1991 both place a strict liability on water undertakings and the rivers authorities respectively where there is an escape of water from their pipes or equipment. In Scotland, the position is governed Section 10 of the Water (Scotland) Act 1980.

1.4 Nuisance

Nuisance may be divided into public and private nuisances. The general distinction between the two is that public nuisance is a crime, whilst a private nuisance is a tort and so redressible by civil proceedings.

A commonly accepted definition of a private nuisance is "unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it". Generally, an isolated incident cannot amount to a nuisance; there must be a continual or recurrent state of affairs that substantially interferes with a person's enjoyment of land.

Nuisance is based on the maxim *sic utere tuo ut alienum non laedas* (so use your land as not to harm your neighbour), but occupiers of land must be prepared to tolerate to some degree such things as smells, noise and vibration.

A person may succeed in an action in nuisance even though he would fail in an action in negligence; often, nuisance involves negligence or some other type of fault, but not necessarily so. An occupier is liable for a nuisance that he creates, but he is liable in respect of a continuing nuisance only if he knows or ought to know of its existence and fails to take steps to abate it.

The burden of proof in nuisance differs to that in negligence. Once it is shown that a nuisance exists, the burden of proof rests with the Defendant to show that he is not responsible.

Defences to nuisance

There are particular defences to an action for nuisance. It is no defence, however, to prove that the Claimant came to the nuisance. For example, the Claimant can recover even if the annoyance in a particular area had been going on before his arrival.

'Prescription' is a defence to an action for private nuisance. Quite simply, prescription means that a nuisance has been in force for 20 years or more, and this legalises it.

'Statutory authority' may also be a valid defence, depending on the construction of the particular statute. The general position is as follows:

(1) If the damage resulted directly from the exercise of statutory powers, the Claimant has no redress unless the statute makes provision for compensation.
(2) If the damage is "inevitable", even if work is carried on with reasonable care, the Defendant is not liable, but the burden of showing inevitability is on the Defendant.
(3) If the Defendant has the choice between carrying out the work where it will cause a nuisance, or alternatively where it will not cause a nuisance, he will be liable if he causes the nuisance.

The fact that the Claimant consented to the creation or continuance of the nuisance is also a defence.

1.5 Trespass

Trespass to land is an unjustifiable interference with the possession of land. It is not, despite popular belief, a criminal offence. The familiar notice "Trespassers will be prosecuted" is therefore meaningless, but trespassers may be liable to civil proceedings, whether or not the person

concerned knows that he is a trespasser; it is no defence that he had lost his way or that he thought that the land was his. Generally, however, trespass is committed intentionally or negligently.

Trespass is actionable per se, i.e. whether or not the trespasser has caused damage. In practice, however, actions are not brought against persons who have trespassed unintentionally and who have caused no damage.

An act is not a trespass if it is justified by law. For example, if a local authority has made arrangements for the public to have access to open countryside, a member of the public taking advantage of such an arrangement is not a trespasser, nor are public officials, such as bailiffs and policemen, who enter land or property to arrest persons or seize property.

1.6 General Defences

Detailed below are some of the general defences to actions in Tort.

Contributory Negligence

Contributory negligence is not a full defence. If proven there is an opportunity to restrict the amount of compensation payable to the Claimant.

At common law, contributory negligence was, until 1945, a complete defence. If a Defendant could show that a Claimant had, to even the slightest degree, been himself responsible for the loss or damage that he had suffered, the Defendant was not liable. In practice, the courts often ignored minor contributory negligence in order to provide the Claimant with a remedy, but the law was nevertheless unsatisfactory. In the interests of equity, the law was altered by the Law Reform (Contributory Negligence) Act 1945, which provides as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just or equitable having regard to the Claimant's share in the responsibility for the damage..."

Where the damages are reduced as a result of contributory negligence, the court is required to assess the full amount of damages and then indicate the percentage by which they are to be reduced as a result of the contributory negligence.

Volenti Non Fit Injuria

The defence of *volenti non fit injuria* (to a willing person, injury is not done) states that a person who knows of a risk and willingly consents to run that risk has no cause of action if he is injured as a result. For example, a footballer who agrees to participate in a game impliedly undertakes to run the risk of injury that is necessarily incidental to playing (but not the risk that he may be deliberately injured by an opponent or by the referee continuously failing to apply the rules of the game to prevent injury). Similarly, a spectator at a cricket match knowingly undertakes the risk that he may be injured by a cricket ball and, by attending the match, may be taken to have agreed to run the risk.

Self-Defence or Necessity

A person is entitled to defend themself or members of their family and they may also take any necessary action to protect their land and personal property. In every instance, the harm that they are entitled to cause in defence must be reasonable in relation to the harm that they would otherwise suffer.

Act of God

The defence of Act of God, or vis major, was defined in Greenock Corporation v Caledonian Railway Co (1917), as "circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility", and includes such occurrences as winds, storm, lightning and earthquake.

Statutory Authority

It is a defence if the Defendant has statutory authority to perform some act that, in the absence of such authority, would constitute a tort. For example, continual excessive noise or vibration that causes inconvenience or discomfort in general constitutes the tort of nuisance. At common law, the operation of what are in modern society essential services, such as railways and airports, would carry the risk of actions for nuisance. Therefore, the operators of such services are, by the statutes that bring them into existence, permitted to perform acts that, in the absence of statutory authority, would constitute torts.

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1.7 Limitation

It is a defence if an action is statute barred, i.e. the period in which the law allows the Claimant to bring his action has expired. The time limits are governed by the Limitation Act 1980, which provides that time runs "from the date on which the cause of action accrued".

So far as damage to property is concerned, the general rule is that an action in tort must be commenced within six years from the date when the cause of action accrued.

A shorter period of three years applies to actions for damages arising out of negligence, nuisance or breach of duty, where the damages claimed consist of or include damages in respect of death or personal injury.

An action for contribution against a joint tortfeasor (two or more persons whose collective negligence in a single incident causes injury or damage to another) must be started within two years.

The Latent Damage Act 1986 sets out time limits for negligence actions in respect of latent damage not including personal injury. The primary limitation period in a negligence claim remains at six years, running from the date of the damage. The Act introduced a three-year period running from the date of discovery of the damage or reasonable discoverability of it. There is also an overriding 'longstop' which operates to bar all negligence claims involving latent defects or damage that are brought more than 15 years from the date of the Defendant's breach of duty.

Summary

In this chapter you learned about the different types of torts and the defences that can be used to avoid liability on behalf of the Insured defendant.

This is important as Tort is one of the most common legal headings under which liability claims are made.

Liability claims can also be presented under the legal heading of Contract and Statute.

Continue to Chapter 2 to explore the legal heading of contract.

CONTRACT LAW

2

SECTION 2

CONTRACT LAW

2. CONTRACT LAW

Introduction

In this chapter we continue to consider the basis on which a legal liability may arise in this instance under the terms of a legally enforceable contract.

It is therefore important to understand the requirements of a legally enforceable contract. This will enable you to investigate a claim made against your Insured under the terms of a contract.

This chapter considers the legal liabilities that may arise under contract:

- Formation of a legally enforceable contract
- Limitation
- Privity of contract
- Unenforceable contracts

It also considers the defences that are available.

Contracts range from simple everyday transactions, such as between train operator and passenger, to complex business deals, such as the purchase of a large office block by several buyers.

It should be noted that a contract does not have to be in writing.

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2.1 The Formation of a Contract

The following elements are essential:

- Intention
- Offer
- Acceptance
- Consideration.

Intention

There must be an intention to create legal relations. If a pet owner agrees with their neighbour that they will pay him £50 to feed his cat while he is on holiday, this is a domestic or social agreement where neither party contemplates going to court if one of them refuses to honour the arrangement. However, if a document is drawn up to confirm the agreement and it is signed by both parties, this could arguably be evidence of an intention to create legal relations.

Offer

There must be an offer from one party met with an exact acceptance from the other party.

Putting this into practice

John tells George he is selling his car. George says he will pay him £5,000 and John agrees to sell the car for this price. George makes an offer to John (to buy the car for £5,000) and John accepts this offer.

However, if John tells George that he can buy the car for £5,500, there is no acceptance of the offer and no contract. John has now made George a counteroffer. If George agrees to pay £5,500 for the car, there is then an exact acceptance.

Acceptance

It is important to remember that there must be an exact acceptance. If John tells George he can buy the car for £5,500 as long as he pays within 3 days, this is not an exact acceptance, and the process is started again by this counteroffer.

A party making an offer can withdraw it at any time before acceptance, but once accepted the party is bound by the offer.

Putting this into practice

John emails George to tell him he will sell the car to him for £5,500. 30 minutes later, Paul offers to buy the car for £6,500. John immediately phones George to withdraw his offer, but George says he has already emailed his acceptance. John is therefore bound by his offer to sell the car to George for £5,500.

Activity

Consider three examples where there may be offers and acceptances on a day-to-day basis. What is required to establish an enforceable contract rather than a social or domestic agreement? Consider also how counteroffers and acceptances might arise.

Consideration

An agreement between parties (matching offer and acceptance) does not become a contract unless and until it is made in a deed or otherwise supported by consideration.

In Currie v Misa (1875), it was held that “Consideration is some right, interest, promise or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”

Both parties must exchange something of value.

Putting this into practice

Michael offers Keith a job in his factory for £500 a week and Keith accepts. Michael’s consideration is his payment to Keith of £500 for his work at the end of each week. Keith’s consideration is the provision of his services.

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Consideration can also be the promise of future service.

Putting this into practice

Keith owes Michael £2,000. Michael offers to wipe out the debt if Keith works in his factory for 4 weeks. The offer to work is the consideration for the agreement.

2.2 Privity of Contract

Once a contract is formed, only the persons who are party to this contract can be sued or can sue under the contract.

Putting this into practice

Paula employs Peter to lay carpet in her first floor flat. Peter punctures an underfloor water pipe with a nail. Water damage is caused to the flat below owned by Chris. Chris cannot sue Peter under the contract between Paula and Peter. Chris can however sue Peter for the damage in negligence.

In contrast, Roger could sue Peter under the contract for any damage within his flat.

2.3 Unenforceable Contracts

In the following circumstances, a contract will not be enforceable even if the elements in Section 2.1 are all met:

1. A minor (anyone under the age of 18 years) is not bound by contracts entered into unless ratified upon reaching 18.
2. A person lacking mental capacity will not be bound by any contact entered into with another person who knew of this incapacity. This is also the case where a person is in a state of such drunkenness that he doesn't know what he is doing, and the other party is aware of this.
3. As a general rule, the court will not enforce a contract that is illegal or contrary to public policy.
4. Where a contract has been entered into by one party under duress or unreasonable pressure (undue influence) from the other, it will not be enforceable.
5. Where there is a common mistake on the part of both parties to the agreement, it can be set aside as if it never existed.

In Williams v Bayley (1866), a father attempted to cancel a mortgage on his home that he had executed in favour of a banker. He proved to the court that he had only agreed to this mortgage because the banker had threatened to prosecute his son for forgery. The court agreed that the mortgage could be cancelled on the grounds that it was an agreement secured by undue influence.

Putting this into practice
Duress or undue influence:

A forceful salesperson persuades an elderly customer, against their better judgement, to have an intruder alarm installed in their house. The salesperson frightens customer with examples of crime in the local area and won't leave their house until they sign an agreement to pay £5,000 for the system.

Putting this into practice
Common mistake:

Joel agrees to buy a painting from Jasmine. Both believe it is a genuine Turner painting. However, a professional valuer then confirms the painting is in fact a copy. As both parties believed it was a Turner painting, the agreement can be set aside.

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2.4 Misrepresentation

In most contractual negotiations, the law does not impose a duty on the parties to disclose all known material facts to each other. The requirement is to avoid making active misrepresentations. In other words, a negotiating party is not compelled to give the other party information but, if he does so, he must do so truthfully.

Misrepresentation is defined as:

'An unambiguous false statement of fact which is addressed to the party misled and which materially persuades the misled party to enter into a contract with the other party.'

This general rule is known as 'caveat emptor' or let the buyer beware. For example, when a second-hand car is purchased, the buyer must satisfy himself that he has all of the relevant information regarding the condition of the car before making the purchase. The seller does not need to volunteer information on the condition or history of the car but, if the buyer asks a question, he must receive a truthful answer.

Some contract negotiations are subject to utmost good faith, which means that the parties must provide all relevant information. A good example is an insurance policy. The person wishing to buy the insurance must inform the insurer of all information, known as 'material facts' that the insurer will need to decide whether it wishes to accept the presented risk and at what premium.

If one party to a contract makes an untruthful comment and the other party relies on this to their disadvantage, this is misrepresentation.

It should be recognised that sales talk using expressive language is not a misrepresentation, even if the salesperson, perhaps describing a car as 'going like the wind' is overenthusiastic.

Putting this into practice
Misrepresentation:

Kelly agreed to buy a flat from Andrew, having been assured there was planning permission to build a garage. It would be negligent misrepresentation if Andrew didn't know but assumed that there was planning permission. It would be fraudulent misrepresentation if he knew there was no planning permission granted.

Section 1.4 considered contracts that are unenforceable and in effect never existed. Where there is misrepresentation, the contract is in existence but the party suffering from the misrepresentation can apply to have it rescinded (as if it never existed) and in the process can claim damages where he has suffered financially as a result of entering into the contact.

2.5 Contract Construction

There are rules that govern the way in which a written contract is constructed.

Ambiguity

The *contra proferentum* rule states that a clause or section within a contract must be clearly written. If there is ambiguity as to the meaning of the words used, then a decision on the correct or most appropriate meaning will be to the detriment of the party producing the contract wording and in favour of the other party.

There is a presumption that words within a contract should be construed in their ordinary and proper sense. Exceptions include words or phrases with a recognised technical meaning in law, such as 'theft', or with a particular meaning within the trade or business to which the contract relates.

Contract Terms

A contract will comprise a number of Terms. These are the basis of the contract and detail the intention of the parties to the contract. A contract term can be stated verbally, or it can be communicated in writing. An example is where a buyer purchases goods from the seller and the seller specifies the contract term that payment is required within 30 days of delivery.

Where terms are specifically stated verbally or in writing, they are express terms.

There may also be terms that are not expressly stated or written but which are implied by operation of law or by custom of trade. An example of an implied term in a contract for the sale of goods is that the goods must be of satisfactory quality and fit for the buyer's purpose. This is an implied term arising from the Sale and Supply of Goods and Services Act 1994 and more recently the Consumer Rights Act 2015. An implied term arising from law or from custom will be a term that should be familiar to the parties to the contract.

Condition and Warranty

A contract term can also be classified as a condition or a warranty.

A condition is an essential term of the contract that is said to go to the root or the heart of the contract.

Putting this into practice
Contract condition:

In Couchman v Hill (1947), a heifer was put up for sale at an auction. The buyer told the seller that he was not interested in purchasing the heifer if it was in calf. He was told that it was not in calf, and he proceeded with the purchase. Approximately 7 weeks later, the heifer suffered a miscarriage and died. The statement that the heifer was not in calf was held to be a condition of the contract because of the importance attached to it by the buyer.

A warranty is a lesser subsidiary term of the contract.

The important difference is that a breach of a condition enables the innocent party to terminate the contract and claim damages, or to decide to go ahead with the contract and claim damages for any losses suffered. Breach of a warranty only entitles the innocent party to claim damages.

Indemnity and Exclusion Clauses

A contract will probably include indemnity and exclusion clauses.

An indemnity clause is where one contracting party imposes an obligation on the other to provide an indemnity against the consequences of a particular event.

An exclusion clause is where one party to a contract attempts to exclude or restrict a liability or a legal duty.

Putting this into practice
Indemnity & exclusion clauses:

In a contract for the sale of a product, the buyer might include an indemnity clause as follows:

'The seller warrants that the products supplied are free from defect. The seller will hold the buyer harmless against any product defect and indemnify the buyer against all costs, claims and liabilities arising from any defect in the products supplied.'

The seller may include an exclusion clause in their contract conditions as follows:

'If any part of the product supplied shall be found to be defective in quality or not in accordance with agreed specification then the liability of the seller will be satisfied by replacing the defective product or refunding to the buyer the sales price of the product. The seller shall in no event be liable for loss of profit, damage or loss sustained by the buyer.'

It is an established legal principle that parties are generally free to negotiate between themselves the terms and basis of a contract. This applies to all terms, whether they are conditions or warranties, and applies to any indemnity or exclusion clauses that might be inserted.

There is a general presumption in law that a person has read a contract before signing it. Indeed, it is very difficult for the party signing a contract to later argue that they were unaware of its content or any part of its content, as decided in L'Estrange v Graucob Ltd (1934).

However, there may be circumstances in which a party hurriedly signs a contract without reading it fully or properly understanding it, perhaps if pressure is put on that party to sign. Contracts are often long, and the wording may need to be read more than once for complete understanding. Consider a person hiring a car at an airport with a lengthy queue behind them.

To ensure that contracts are constructed in a manner that minimises uncertainty, ambiguity and grounds for dispute, as well as to ensure fair play by each of the contracting parties, the following rules apply:

- Contract terms must be communicated at or before the time the contract is concluded
- Reasonable steps must be taken by the party introducing the term to draw it to the attention of the other party. This is particularly the case with onerous terms, such as indemnity and exclusion clauses that could have far reaching consequences for the party to whom they apply
- As a general rule, the more onerous the clause the greater the requirement to bring it to the other party's attention.

2.6 The Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1994

Exclusion clauses must satisfy the requirements of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994.

The Unfair Contract Terms Act 1977 significantly affects the ability of the parties to exclude or limit their liability by their contract terms (exclusion clauses). In some circumstances, the Act can render an exclusion clause totally ineffective, or the clause will only be acceptable if it satisfies a test of reasonableness.

The Act renders ineffective any contract term or exclusion clause that attempts to restrict liability in negligence for personal injury or death.

A contract term excluding liability for loss or damage (other than personal injury or death) arising from negligence is permissible provided that it satisfies the test of reasonableness.

It rests with the party relying on the exclusion clause to show that it is reasonable. For example, in a consumer contract, the court applying the Act will take into account the comparative bargaining position of the parties to the contract, the customer's awareness of the exclusion clause, whether or not the customer received a benefit for inducement, and whether or not the products supplied were a special order for the customer.

The Unfair Terms in Consumer Contracts Regulations 1994 apply alongside the Unfair Contract Terms Act.

The Regulations stipulate that a term within a contract that is construed as unfair will not be binding on the consumer. A term will be regarded as unfair if its effect is to produce a significant imbalance between the rights of the parties to the detriment of the consumer.

It is interesting to note that these Regulations apply to insurance contracts, but the Unfair Contract Terms Act does not.

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2.7 Contract Performance and Discharge

Most contracts run for an agreed period of time, such as an annual insurance policy, or they will come to an end when the contract obligations have been met. In such cases, each party can walk away from the contract with nothing left to do or pay. This is known as 'contract performance'.

If a party fails to perform their contract obligations, this is breach of contract, the consequences of which are explained in Section 3.8.

Occasionally, there may be a lawful excuse for non-performance of the contract obligations, or agreement may be reached between the parties that relieves a party from performing their obligations. In these circumstances, there is no breach of contract and no consequences of a breach. This is known as 'contractual discharge'.

Putting this into practice

Joe agrees to decorate Emma's flat for £1,000. He starts the work but advises Emma that he cannot return to complete the redecoration, leaving the bedroom unpainted. Emma agrees that Joe can refund £300, and she will get someone else to paint the bedroom.

A contractual obligation might be impossible to perform due to an event that was unforeseen when the contract was formed. This is known as frustration. The Law Reform (Frustrated Contracts) Act 1943 brings the contract to a close, allowing for the recovery of money already paid and/or the payment of money that should be paid for services already delivered.

The intention is to ensure that neither party suffers due to the contract frustration.

Putting this into practice

Contract frustration:

Jane is contracted by Midshire Council to paint the Town Hall for £5,000 and paid in advance.

She paints the window frames, but the building is then destroyed by fire. Jane is entitled to receive the value of the work completed before the fire which is agreed. The remaining £4,500 will be return to the council. If the work had not started at the time of the fire, Jane would be required to refund the £5,000 paid in advance.

2.8 Breach of Contract

Where there is a breach of contract, several remedies are available to the party who suffers from the breach:

- The affected party may wish to continue with the contract and bring an action for damages and for specific performance. Specific performance is where the affected party seeks a court order requiring the party in breach to perform his obligations under the contract. This is generally sought where the payment of damages is an inadequate remedy.

Putting this into practice

Specific Performance:

Joe agrees to decorate Emma's flat for £1,000. Before he can start the work, he has to agree a wage increase for his employees, with a result that it will cost him £1,500 to decorate Emma's flat. Joe tells Emma he is no longer willing to do the work.

Emma sues Joe for breach of contract. She cannot find anyone else to do the work for less than £2,000 and she doubts that any damages for breach of contract will amount to this sum. By obtaining an order for specific performance, she has her flat decorated for the agreed contract sum.

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- The affected party may seek monetary compensation (damages) to place him in the position he/she would have been in had the contract been performed.
- The affected party may elect to rescind the contract. The effect of rescission is to act as if the contract had never been made. The affected party may benefit from rescission as opposed to damages in certain circumstances. Rescission is where the contract is treated as if it never existed. The contract is not automatically terminated but it becomes void at the option of the affected party.

Damages are the usual remedy for breach of contract. They will be awarded at a figure that seeks to place the party suffering from the breach in the position they would have enjoyed had the breach not occurred.

Summary

In this chapter you learned about the requirements for the formation of a legally enforceable contract and the features that make a contract unenforceable.

The chapter consider aspects of a contract that may be employed to challenge whether a contract is legally enforceable and relevant to potential defence of liability claim presented under the terms and conditions of contract.

It is important to recognise that an insurance policy is evidence of the contract of insurance that relies upon the disclosures and representations made by the Insured when applying for and renewing an insurance policy.

Liability claims can also be presented under the legal heading of Statute.

Continue to Chapter 3 to explore the legal heading of Statute.

STATUTE LAW

3

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SECTION 3

3. STATUTE LAW

Introduction

A statute law is a written law produced by Parliament which originates from decisions made in other courts and the country's written constitution. It is the highest type of law which passes Acts onto the Houses of Parliament where they debate whether the Act should exist or not.

Statute law is a body of legislation comprised of Acts of Parliament.

There are several types of statutes:

- Codifying Acts – these collect and set out the existing law on a given subject within one legal code, for example the Sale of Goods Act 1979 (as amended 1994)
- Enabling Acts – by which Parliament grants an entity the power to take certain actions, e.g. the Highways Act 1980
- Acts that limit the common law liability that would otherwise attach. Examples are the Hotel Proprietors Act 1956 and the Law Reform (Contributory Negligence) Act 1945.

In Chapter 3 you will review a selection of statutes that are commonly encountered when handling legal liability claims. The summary is not exhaustive, you are likely to identify other acts that are of specific relevance to the type of claims you handle.

3.1 Consumer Protection Act 1987

This provides that the producer (manufacturer or importer into the UK) of a product has strict liability for any injury or damage to non-commercial property caused by a defect that affects the product's safety.

3.2 Sale of Goods Act 1979 (as amended 1994)

Where there is a contract for the sale of goods, Section 14 of this Act stipulates that the contract will include implied conditions imposing obligations on the seller. These conditions are that the goods sold are of satisfactory quality and that they are fit for purpose. This purpose is held to be the ordinary intended purpose of the particular goods or otherwise a specific purpose that has been communicated to the seller by the buyer.

Activity

Complete an internet search for information related to the product recall and liability claims faced by Whirlpool related to alleged defects in domestic dryers made between 2004 and 2015.

3.3 Supply of Goods and Services Act 1982 (as amended 1994)

This Act applies where there is a contract for the supply of both goods and services. The Act stipulates that implied conditions will be incorporated into the contract.

In relation to the goods, they must be satisfactory in quality and fit for purpose as required under the Sale of Goods Act. In relation to services, there is an implied condition that these will be carried out with the reasonable care and skill expected from a person carrying out the particular trade or business.

3.4 The Consumer Rights Act 2015

The Act stands alongside regulations to create a simplified body of consumer law. It aims to set out the basic rules which govern how consumers buy and businesses sell goods and services.

The Act provided an update of existing law in relation to consumer rights for faulty goods, unfair contract terms and the powers of public enforces such as Trading Standards.

The legislation also created two new areas of law; consumer rights to the repair or replacement of faulty digital content and what should happen if a service is not provided with reasonable care and skill.

The Act states that where disputes arise they can be resolved more quickly and cheaply through Alternative Dispute Resolution, for example through an Ombudsman.

3.5 Occupiers' Liability Act 1957

This Act codifies the previous law regarding the duty owed by the occupier of premises for the safety of visitors.

Section 2 of the Act states that the occupier of premises must exercise the "common duty of care" to visitors. This is stated as the duty to take all reasonable care to ensure that all visitors to the premises are reasonably safe for the purpose for which they are invited or permitted to be on the premises.

The occupier is generally the person who has control over the premises. A visitor is generally a person who is on the premises with the permission of the occupier. This can include persons going about their business without direct invitation such as postal workers and police officers. It can include customers to premises such as public houses and shops.

The Act states that the occupier has to take particular care when the visitor is a child. If the visitor is a "person of special calling", e.g., a trade professional with particular expertise such as a gas boiler engineer, the occupier is entitled to expect this professional to exercise the required degree of care for his own safety.

The Act states that an occupier may discharge his obligations by displaying a warning notice of a hazard.

Putting this into practice

Jack and Jill are customers at a new restaurant in their town. They are celebrating their wedding anniversary. As they attempt to leave the restaurant at the end of the evening, Jack opens an unmarked door believing this to be the exit. He steps through the door and falls down several steps towards the basement, sustaining injury. Jill complains that the restaurant is unsafe.

The following day, a sign is fixed to the door stating 'DANGER. CUSTOMERS MUST NOT ENTER. STAFF ADMITTANCE ONLY'.

Jack is likely to succeed in his claim, but he would have found it much harder to do so had the notice been displayed.

3.6 Occupiers Liability Act 1984

This Act sets out the duties owed by the occupier of premises to non-visitors, i.e. persons who have not been invited or permitted to be on the premises.

The Act states that an occupier owes a duty of care to a non-visitor and to protect the non-visitor in the following circumstances:

1. Where the occupier is aware that there is a danger to the non-visitor or has reasonable grounds to believe the danger exists.
2. The occupier has knowledge or reasonable grounds to believe that the non-visitor is in the vicinity of the danger.
3. In the overall circumstances of the situation, the occupier might reasonably be expected to offer the non-visitor some protection against the risk.

3.7 Defective Premises Act 1972

Section 1 of this Act imposes a legal duty on persons who take on work in connection with the provision of a dwelling. The duty is owed to every person who acquires an interest in the dwelling. The requirement is to ensure that the work is carried out in a workmanlike and professional manner so that the dwelling will be fit for habitation when completed. The duty applies to builders, designers and all involved in the provision of a dwelling.

Section 4 of the Act applies to landlords who are under an obligation to the tenant for the maintenance or repair of the premises. In these circumstances, the landlord owes a duty to all persons who might reasonably be expected to be affected by defects in the state of the premises, a duty of care to see that these persons are reasonably safe from personal injury or from damage to their property caused by a relevant defect in the premises.

3.8 Landlord and Tenant Act 1985

Section 11 of this Act deals with the obligation of a landlord to keep a tenanted property in good repair and working order. For example, a failure to service a gas fire is a breach of duty. The landlord will be liable for any injury or loss suffered by the tenant as a result of a breach of duty.

As landlords are not normally entitled to enter the premises without giving the tenant notice, it is generally the position under this Act, and also under the Defective Premises Act 1972, that the landlord's duty to repair a defect commences when he is informed of the defect or otherwise should be aware of the defect.

3.9 Limitation Act 1980

The law does not encourage persons to bring claims in cases where a significant period of time has passed since the incident causing the injury, damage or loss. Amongst other reasons, the parties' knowledge and recollection of the events will diminish with time and witnesses may no longer be available to give evidence.

There have been a series of Limitation Acts from 1939 until 1980. The Acts limit the amount of time a party has in which to bring a legal action against another. The reader should be aware of the follow limits:

1. Where a claim is pursued in tort (negligence, nuisance, etc), the time period for bringing a personal injury claim is 3 years from the date of the tort, e.g. the date of the breach of legal duty. The time period for a property damage claim is 6 years from the date of the tort.
2. If a claim is pursued for breach of contract, the time period for a personal injury claim is 3 years from the date of the breach. The time period for property damage claims is 6 years from the date of the breach.

Putting this into practice

ABC Contractors construct a boundary wall in a storage yard owned by XYZ Ltd. The wall is badly constructed and part of it collapses, causing damage to materials stored in the yard that are the property of DEF Ltd.

If XYZ pursue a claim in contract against ABC for the cost of rebuilding the wall, there is a 6-year limitation period starting from the date when the wall was defectively built. If DEF bring a claim in tort for the damage to their materials, the 6-year limitation period starts from the date the wall collapsed and caused the damage.

3.10 Latent Damage Act 1986

Whilst retaining the 6-year limitation period for property damage claims, this Act deals with the difficulties arising from concealed damage. For example, there may be gradually worsening damage that is affecting a roof or high-level structure. The damage might not become evident until after 6 years when part of the structure suddenly collapses. In these circumstances, the Act allows there to be a limitation period of 3 years from the date the Claimant first became aware of the damage, up to a maximum period of 15 years from the date the damage first originated. The provisions of this Act apply only to claims pursued in negligence.

3.11 Water Industry Act 1991

Section 209 of this Act creates a strict liability on a water undertaker where loss or damage is caused by an escape of water from a pipe or main under the control of the water undertaker howsoever this escape is caused. It is important to note that the strict liability applies to the escape of water and not to the escape of sewage.

The term Water Undertaker means a company which has been appointed to be the water or sewerage undertaker for any area in England and Wales

Activity

Refer to a colleague to identify and review a water damage liability or recovery claim involving an incident for which a water undertaker is alleged to be liable.

3.12 Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1994

Please see the section on Law of Contract.

3.13 Carriers Act 1830

In common law, a carrier has strict liability for the safekeeping of the goods he is contracted to carry on behalf of his customer. This Act limits the carrier's legal liability to a specified sum per article carried.

3.14 Hotel Proprietors Act 1956

In common law, a hotel proprietor has strict liability for the property of a hotel guest who has booked hotel accommodation. Under the Hotel Proprietors' Act 1956, a hotel proprietor may in certain circumstances be liable to make good any loss of or damage to a guest's property even though it was not due to any fault of the proprietor or staff of the hotel. This liability however extends only to the property of guests who have engaged sleeping accommodation at the hotel.

The Act limits the liability of the hotel proprietor to £50 per item and £100 per guest (£750 per item and £1,500 per guest in London), provided the hotel displays a copy of the Hotel Proprietors Act 1956 in a prominent position within the hotel and provided the guest has not deposited the items with the hotel for safekeeping, the guest has not been refused safekeeping facilities and the hotel staff have not been negligent or dishonest.

3.15 Law Reform (Contributory Negligence) 1945

In common law, if an injured person is in any way at fault for his accident, their entire claim against the party responsible for the accident is defeated.

For example, if a pedestrian falls down an unmarked trench whilst walking along a public footway, their claim against the party responsible for the trench would fail completely if it was shown that they were not paying proper attention, and this contributed to the accident.

Under the Act, the injured person's entitlement to damages from the party responsible for the accident is not excluded by the contributory action but is reduced to the extent the action contributed to the injury.

There is generally a 25% reduction in damages awarded to persons injured in motor vehicle accidents where it is shown that their injuries would have been less severe had they been wearing a seatbelt.

Summary

In this chapter you learned about the opportunities to substantiate a legal liability based upon a party's legal obligations under statute. In many instances the establishment of a legal liability based on a statutory obligation can create a robust position.

In Chapters 1, 2 and 3 you have gained an insight into how a legal liability can arise under the legal headings of:

Chapter 1 – Tort (A civil wrong)

Chapter 2 – Contract (An agreement between two or more parties)

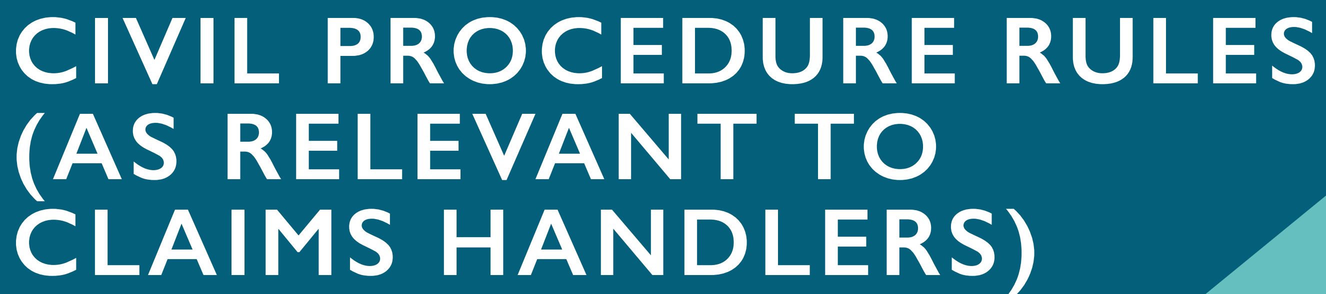
Chapter 3 – Statute (Act of Parliament).

Continue to Chapter 4 to learn about the rules and processes for the resolution of civil disputes and the associated conduct in the civil courts in England and Wales

CIVIL PROCEDURE RULES (AS RELEVANT TO CLAIMS HANDLERS)

4

SECTION 4



CIVIL PROCEDURE RULES (AS RELEVANT TO CLAIMS HANDLERS)

4. CIVIL PROCEDURE RULES (AS RELEVANT TO CLAIMS HANDLERS)

Introduction

The Civil Procedure Rules (referred to as the Woolf Reforms after the originator, Lord Woolf) were introduced into the civil justice system in England and Wales in April 1999. They were introduced to replace the previous, more complex rules governing the courts. The intention was to eliminate complexity and reduce cost by shortening the time limits for a case, promoting earlier settlements between the parties and transferring control of cases to the judges rather than the solicitors and barristers representing each party. Cost penalties were introduced for non-compliance and unreasonable behaviour by any party.

It is important to be aware that the overriding objective of the Rules is to enable the court to deal with all cases justly. Rule 1 explains that dealing with a case justly involves ensuring that each party is on an equal footing and that the case is dealt with expeditiously, fairly and in proportion to the importance and complexity of the case and the amount of money involved. One of the problems the Rules were introduced to address was the time (and therefore cost) it took to bring a case to court. By stipulating that proportionate time should be allocated to low value and non-complex cases, the Rules help ensure that all parties with civil disputes have access to justice in the shortest time possible.

Since April 1999, there have been numerous revisions to the original Rules. This is a natural consequence of the Rules being put into practice and certain areas requiring clarification or correction. As with all aspects of the civil law, the Rules will be the subject of ongoing periodic revisions, where ambiguities or the need for clarification is identified by actual cases. However, the concept of the overriding objective, which all parties are expected to observe, will remain.

There have been several important revisions to the Rules since their introduction. In total, as of 1 August 2022, there have been 140 updates, The updates that should be familiar to a loss adjuster handling a personal injury liability claim are outlined at the end of this chapter.

4.1 The Civil Procedure Rules

The Rules govern the operation of our civil justice system and consequently their scope is extremely wide. This section outlines the most important Rules for loss adjusters and claims handlers. These relate to:

- The Letter of Claim or Claim Notification Form (CNF) and the time limits for a response
- The decision on legal liability
- Document disclosure and witness evidence
- The appointment of experts
- Part 36 offers
- Case management and allocation
- Costs.

It should be noted that the Rules are not strictly enforceable within the Scottish legal system (or the systems within the offshore islands of Great Britain). They are however followed in principle only.

An important feature of the Civil Procedure Rules was the introduction of pre-action protocols. Prior to the Rules, a party could immediately commence legal proceedings against another without any warning. The protocols stipulate a pre-action (before commencement of litigation) procedure that each party must follow.

For claims handlers and loss adjusters concerned with personal injury, clinical negligence, disease and illness, and construction liability claims, specific protocols are in place.

4.2 Letter of Claim

The Rules and protocols specify that the Claimant must send a letter of claim to the proposed Defendant in a case. The letter must contain a clear summary of the facts of the case on which the claim against the Defendant is based and it must also include particulars of any injury suffered by the Claimant, sufficient to allow the Defendant (or the Defendant's insurer) to reasonably assess the value of the case (and a claim Reserve).

It is important that the claims handler/loss adjuster informs the Claimant (or the Claimant's solicitor) if the Letter of Claim fails to include a clear summary of the facts and sufficient information regarding the Claimant's injury or loss. If the Letter of Claim is sufficiently worded, the Defendant (insurer/claims handler/loss adjuster) becomes subject to the following time constraints:

- The Defendant must reply within 21 days of receiving the Letter of Claim, confirming receipt, and identifying the insurer concerned
- The Defendant then has a maximum of 3 months from the date the Letter of Claim was acknowledged (or from 21 days after receipt of the letter, if there has been a late acknowledgement) in which to investigate the case and respond with a decision on legal liability

Prior to the Rules and Protocols, Letters of Claim were often extremely brief and uninformative, for example:

"On 1st January 1999, our Client was injured when working for your Policyholder and damages are claimed."

If a Letter of Claim is rejected as non-compliant with the Protocol, the above time limits do not commence until a compliant Letter of Claim is received by the Defendant.

4.3 Admissions of Liability

If the claim is investigated and a legal liability on the part of the Defendant is identified, an admission of legal liability should be communicated to the Claimant as soon as possible. The Claimant's solicitor should not be incurring any costs between the date of the Letter of Claim and the expiry of the investigation period, but in practice the admission should be made as soon as possible.

It is vitally important that the admission is made with certainty and with all necessary authority obtained. Where an admission of legal liability has been made, before the commencement of legal proceedings (a pre-action admission), this can only be withdrawn, if the person to whom the admission was made agrees. After the commencement of proceedings, a pre-action admission can only be withdrawn with the permission of the court and after the Judge has considered several factors including the circumstances for the withdrawal of the admission and whether any new factors have since come to light.

Each application to withdraw an admission will be considered on its merits. However, as a general rule, consent to withdraw the admission is unlikely to be given without the Defendant demonstrating that new evidence has come to light that was not available at the time the admission was made.

It will be appreciated that the Rules require the Defendant to make an admission of legal liability in a personal injury case without first seeing the Claimant's medical evidence.

As a safeguard, it is generally good practice to state that the admission of legal liability is subject to medical evidence. The actual claim settlement offer in monetary terms is then made after consideration of the medical report and the Claimant's special damages schedule.

4.4 Document Disclosure

If legal liability is denied in a personal injury claim or if contributory negligence is pleaded, the denial or pleading must be supported by documentary evidence. In many cases, all of the documents to be disclosed to the Claimant's solicitor in support of the denial are listed within the Pre-action Personal Injury Protocol – Standard Disclosure lists. However, the documentation required to support a denial of liability depends on the facts of the particular case.

Examples of documents supporting a denial of liability include evidence of employee training and the employer's risk assessment for the task the employee was undertaking when injured. The Claimant's solicitors can only insist on receiving documents that are relevant and proportionate to the claim and the denial of liability. For example, the injured employee's training record is disclosable, but the entire employer company training manuals for all employees would be disproportionate in the majority of cases.

If the Defendant fails to provide a response to the Letter of Claim within the stipulated time period or fails to support a denial of liability or contributory negligence pleading with the appropriate documentation, the Claimant's solicitor can commence a pre-action disclosure application. This should be avoided by the Defendant claims handler/loss adjuster as the costs of the application will be payable by the Defendant even if a properly supported response to the claim is belatedly submitted.

The duty to disclose documentation under the Rules is limited to documents that exist within the possession of the Defendant or that can be obtained or found following a reasonable effort or a reasonable search by the Defendant. If any documents are not available to the Defendant or simply do not exist, a disclosure statement to this effect should be signed by an appropriate representative of the Defendant and submitted in place of the documents in question.

4.5 Experts and Witness Evidence

Generally, the Rules only allow the appointment of one expert in each case for each specialist field. An orthopedic consultant and a psychiatric consultant could both present expert reports in a personal injury claim involving these issues. A forensic or metallurgist report could be submitted regarding the cause of an accident or injury. The expert is generally chosen by the Claimant's solicitor, and the Defendant then has 14 days in which to submit any reasonable objection to the particular expert. It is extremely rare for a court to agree to the appointment of more than one expert (i.e. Claimant's expert and Defendant's expert) in a case.

The Rules do not require the disclosure of witness evidence as part of the document disclosure process mentioned above. However, the overriding principle should be kept in mind. Therefore, in appropriate cases, it may be pertinent to disclose an obtained witness statement that significantly supports a communicated denial of legal liability. Note, however, that in these cases an exchange of witness statements should be sought rather than unilateral disclosure.

4.6 Part 36 Offers

Under the Rules, it is open to both the Claimant and the Defendant to offer to settle the claim at a particular monetary sum. This procedure is termed a Part 36 Offer as it falls within Part 36 of the Rules.

There are a number of requirements. The offer must be made in writing and the communication must expressly state that it is a Part 36 Offer. The basis for the offer must be clear. It must be stated that the offer will remain open for 21 days from the date of the communication. It must also stipulate that, after 21 days, the party to whom the offer is made may only accept the offer if the parties to the case can agree on costs or if the court gives permission.

The response or a failure to respond to a Part 36 Offer has a significant bearing on the costs aspect of the claim. For the purposes of this section, it is sufficient to be aware that, if the party to whom the offer is made refuses to settle the claim at the figure offered and then receives a lower monetary settlement at a later stage in the proceedings or when the case proceeds to trial, the declining party will incur a much greater costs burden, possibly extending to payment of the costs of the party making the offer, from the date of the offer to the date the case was settled.

4.7 Case Management and Allocation

The Rules provide that, once a claim becomes the subject of legal proceedings, the court must actively manage the case. The Rules and principles governing case management are essentially matters for lawyers who will almost certainly handle litigated claims. It is, therefore, sufficient in this section to state that the claim will progress through a series of case management conferences so that the claim is resolved as promptly as possible with costs consequently kept to a reasonable level. As part of the case management process, the courts encourage the parties to use alternative dispute resolution such as mediation.

When a case is litigated and it becomes clear it is to be defended, an early stage of the case management process is to allocate the case to one of three case management tracks. These are the small claims track, the fast track and the multi-track. The allocation takes into account the nature and financial value of each case.

In this section, the important consideration for claims handlers and loss adjusters is that the small claims track is the normal track for any claim where the financial value of the claim is not more than £10,000 and the financial value of any claim for damages for personal injuries is not more than £1500 for non-motor accident injuries and £5,000 for motor accident injuries. Although it is unlikely that any claim for personal injuries will have a financial value (or potential financial value) of not more than £1,500, property damage liability claims with a value (or potential value) of not more than £10,000 are common.

The general rule for cases falling within the small claims track (and this includes non- litigated cases) is that each party is responsible for its own legal costs, except for the fixed cost of issuing a Claim Form and any reasonable disbursements incurred.

4.8 Costs

In many cases, costs are dealt with by specialist departments or consultants due to the complexity of the Rules. Accordingly, the subject is primarily outside the scope of this section.

As a guide only to claims handlers and loss adjusters required to consider costs in any case, an awareness of the following is essential:

- The non-recoverability of costs under the small claims track
- Conditional fee agreements and in particular the rules and practices governing success fees and after the event insurance premiums
- That success fees on employers' liability cases are fixed at 25%, or 27.5% if the case is funded by a union

4.9 Updates to the Rules

The 60th and 65th updates to the Civil Procedures Rules are commonly referred to as the Jackson Reforms (after Lord Justice Jackson whose work and proposals led to the changes) or alternatively the MOF reforms. The impact of these reforms on the handling of Personal Injury Claims is outlined in the following paragraphs of this chapter.

4.9.1 60th Update

The 60th update was effective from 1st April 2013 and the important changes introduced were:

- The abolition of recoverability of success fees and after-the-event insurance premiums from the losing party in relation to any conditional fee agreement signed on or after 1st April 2013
- Amendments to Part 36 of the Rules and Part 36 Offers
- The introduction of an alternative funding procedure to conditional fee agreements known as damages-based agreements
- The introduction of qualified one-way costs shifting (known as QOCS), which essentially means that, whilst a winning Claimant recovers costs from a losing Defendant, a winning Defendant does not recover costs from a losing Claimant except where the Claimant has failed to beat a Defendant's Part 36 Offer or where there is fraudulent or dishonest conduct on the part of the Claimant.

The reader should be aware of the changes from a practical perspective. For study purposes, the importance is that Claimant's costs claims can no longer include a success fee or after-the-event insurance premiums and that the counter to this is that the Defendant is most unlikely to recover costs even if successful.

Of relevance to non-personal injury claims, the 60th update included an increase in the small claims limit for property damage claims from £5,000 to £10,000.

4.9.2 65th Update

The 65th update was effective from 31st July 2013 and the following changes resulted.

The Employers' Liability and Public Liability Portal was introduced. This new portal applies to employers' liability and public liability injury cases where the cause of action arises on or after 31st July 2013 or for employers' liability industrial disease cases where the date of the Letter of Claim is 31st July 2013 or later. Note that mesothelioma claims, and public liability industrial disease claims are excluded.

The portal is limited to claims where the valuation of damages (excluding interest) is no less than £1,000 and no more than £25,000 on a full legal liability basis.

Under stage one of the portal process, an electronic notification of a claim (known as a claim notification form – CNF) is posted onto the portal by the Claimant's solicitor.

The Defendant/insurer must acknowledge the CNF within one day of receipt.

The Defendant then has 30 business days to investigate and admit liability for an employers' liability claim or 40 business days if it is a public liability claim.

If there is no admission of full liability within the time period, the claim leaves the portal process. For the claim to stay in the process, the admission must not be subject to contributory negligence or subject to evidence that the claimed injury has resulted from the stated accident or breach of duty/regulation. However, the admission can be withdrawn within 15 days of receipt of a medical report if this shows the injury was not a consequence of the accident. This concludes stage one of the portal process.

Under stage two, the Claimant's solicitor then secures medical evidence regarding the Claimant's injury. Within 15 days of final medical report approval, the Claimant's solicitor must provide the Defendant with a settlement pack comprising the medical report, evidence of pecuniary loss, evidence of disbursements, any non-medical expert report, any witness statements and the Claimant's settlement offer.

The Defendant then has 15 days to consider the settlement pack and the offer and to respond to the offer. Non-compliance with this time limit results in the claim leaving the portal process. If unsuccessful, the claim moves to stage three.

If an offer is made within the 15 days, the parties have a further 20 days in which to negotiate final settlement.

Stage three of the portal process concerns legal proceedings. This stage governs the process of the claim form and the final settlement offer from the Claimant. A District Judge normally then decides the value of the claim.

If a claim remains within the portal throughout its duration, there are stipulated costs payable to the Claimant's solicitors, as shown in the following table. VAT and the cost of disbursements are added to the figures shown in the table.

	Claims of £1k to £10k			Claims of £10k to £25k		
	Stage 1	Stage 2	Total	Stage 1	Stage 2	Total
RTA claims	£200	£300	£500	£200	£600	£800
EL/PL claims	£300	£600	£900	£300	£1,300	£1,600

Looking at Case Study 2 (Section 7.1.5 Example Reserve Calculations) example reserve calculation in the previous chapter, costs under a portal claim settled at £9,000 in damages would be £900 (plus VAT and disbursements) compared to the Reserve calculated prior to the reforms at £8,000. This costs figure was based on solicitors' hourly rates and expended time together with a recoverable success fee and after-the-event insurance premium.

If the claim falls out of the portal and it is an employers' liability or public liability claim, fixed recoverable costs are payable as follows:

	Pre issue £1,000–£5,000	Pre issue £5,001–£10,000	Pre issue £10,001–£25,000	Issued – Post issue Pre Allocation	Issued – Post allocation Pre listing	Issued – Post listing Pre trial	Trial – Advocacy Fee
	Case settles before issue	Case settles before issue	Case settles before issue				
			Road Traffic Accident				
Fixed Costs	Greater of £550 or £100 + 20% of Damages	£1,100 + 15% of Damages over £5k	£1,930 + 10% of Damages over £10k	£1,160 + 20% of Damages	£1,880 + 20% of Damages	£2,655 + 20% of Damages	£500 (to £3,000) £710 (£3-10,000) £1,070 (£10-15,000) £1,705 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
			Employers Liability				
Fixed Costs	£950 + 17.5% of Damages	£1,855 + 12.5% of Damages over £5k	£2,500 + 10% of Damages over £10k	£2,630 + 20% of Damages	£3,350 + 25% of Damages	£4,280 + 30% of Damages	£500 (to £3,000) £710 (£3-10,000) £1,070 (£10-15,000) £1,705 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
			Public Liability				
	£950 + 17.5% of Damages	£1,855 + 10% of Damages over £5k	£2,370 + 10% of Damages over £10k	£2,450 + 17.5% of Damages	£3,065 + 22.5% of Damages	£3,790 + 27.5% of Damages	£500 (to £3,000) £1,070 (£10-15,000) £1,705 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na

Looking again at the reserve calculation in the previous chapter, the costs under the fixed recoverable costs scheme would be £2,355 plus VAT and disbursements. This figure is calculated as:

	£1,855
	£500 (10% of damages over £5,000)
Total	**£2,355**

However, if it is an industrial disease claim, the Claimant's solicitors' costs are submitted on the traditional hourly rate and time basis once the case leaves the portal.

Where employers' liability and public liability cases, also Industrial Disease Claims, exceed £25,000 damages, they are outside the portal from the outset, and they are dealt with subject to the Civil Procedure Rules.

Summary

In this chapter you have learned about the rules that govern the conduct of legal actions to ensure the appropriate use of resources and to reduce costs.

When handling liability claims it is important to understand the requirements and timescales of the Civil Procedure Rules to ensure that you act in the correct and timely manner to ensure that you protect your principal's position and avoid penalties and/or financial cost because of non-compliance.

In the next three chapters you will learn about the assessment of damages and calculation of reserves for both personal injury and property damage liability claims.

PERSONAL INJURY CLAIMS – DAMAGES

5

SECTION 5

5. PERSONAL INJURY CLAIMS – DAMAGES

Introduction

The basic principle behind any award of compensation is to put the injured person back in the financial position he would have been in had the injury not occurred.

There are two main elements for personal injury, namely compensation for the effects of the injury (i.e. pain, suffering and loss of amenity) and compensation for any financial losses incurred.

An award of compensation is made up of different categories, known as 'heads of damage'.

In this chapter you will learn about the terminology used and the different categories of damages that may be included as compensation for a personal injury claim.

5.1 General Damages

General Damages are awarded to compensate the Claimant for physical pain, the effect (if any) on his life resulting from the sustained injury and also injury to feelings (psychological injury). General Damages are not determined by any precise financial calculation and can, therefore, be difficult to quantify.

5.1.1 Pain, Suffering and Loss of Amenity (PSLA)

This head of damage compensates a Claimant not only in respect of pain and suffering caused by the injury, but also the impact the injury has had on the Claimant's enjoyment of life. Damages for PSLA are known as 'general damages'.

When assessing damages for pain, suffering and loss of amenity, whilst case law can be a guideline, most awards are determined by reference to the Judicial College Guidelines. The current Guidelines (14th Edition) were published on 14th September 2017. The Guidelines present a range of damages for listed injuries, to include psychological and cosmetic ranges of damages.

Some key points to note are:

- The new Guidelines no longer differentiate between gender on damages for scarring, but the subjective view on the psychological effect of the scarwwring will remain a key issue in any valuation.
- There is no award for shock/anxiety in the absence of any physical or recognised psychological injury.
- The JC Guidelines Committee has recognised the move away from assessing damages based upon the duration of any symptoms in minor injuries and there should be a more holistic and analytical approach when assessing quantum.

The Judicial College Guidelines are not intended to be strictly interpreted; not all injuries fit neatly within a given category and it is possible for awards, particularly in claims involving multiple injuries, to reflect increased levels of compensation. It is, however, unusual for damages to be awarded below the Judicial College Guidelines, albeit, as commented previously, case law can be used as a means of reference.

For example:

- Fracture of one finger, depending upon recovery time – £1,900 to £3,000
- Minor back sprain from which a full recovery has been made without surgery, within about 2 years – up to £5,000.

Again, most claims handler/loss adjuster offices have access to the Guidelines. It should be noted that, while the case reports reflect actual judicial decisions, the Guidelines are precisely that, a guide for claims handlers/loss adjusters (and others).

5.2 Special Damages

Special Damages are awarded for provable financial loss, such as the Claimant's loss of earnings, the cost to repair a damaged vehicle, the amount paid by the Claimant for medical expenses and expenditure directly due to the accident (e.g., travel costs to attend hospital).

The more complex injury cases may include claims for future loss of earnings and pension losses, but these do not fall for consideration in this section.

Putting this into practice

Below is an example of a Special Damages Schedule involving less severe personal injury to the Claimant.

For example:
SCHEDULE OF SPECIAL DAMAGES

Name – Mr David Jones
Date of accident – 15.01.11

Loss of earnings	
3 days @£100 per day	*300.00*
Travel expenses	
Bus fares to hospital appointments, 3 return trips @ £6.00 each	*18.00*
Medication	*12.00*
Damage to clothing	
Cycling helmet	*25.00*
Jeans	*40.00*
Repairs to bicycle	*150.00*
TOTAL	*£545.00*

5.2.1 Financial Losses

Financial losses incurred to date (past financial losses) or in the future (future financial losses), and which can be shown to be directly attributable to the injury, can be included in a claim for compensation. These are termed 'special damages'.

Losses may range from quite modest losses, e.g., the cost of clothing damaged at the time of injury, travel expenses and prescription charges, to more substantial losses such as loss of earnings during the period the Claimant is off work. In cases where the Claimant is permanently disabled, losses will need to reflect the loss of future earning capacity and the cost of adaptations in the home, motor vehicle changes, etc. In loss of limb claims, prosthetic costs can be considerable.

5.2.2 Loss of Earnings

For PAYE claimants, it is usual to obtain 13 weeks' pre-accident earnings details, compare the payments received during the period of absence and calculate a net loss of earnings.

For self-employed claimants, loss of earnings may be calculated by reference to their last three years' tax returns. It is sometimes the case that self-employed persons do not disclose the true measure of their pre-accident earnings to the authorities, but they are only entitled to receive losses that have been disclosed and any shortfall will be to their account.

5.2.3 Compensation Recovery Unit (CRU)

If a Claimant is injured through accident or disease and makes a successful claim for compensation, the CRU must be notified of the details of the claim by the party paying the compensation. The CRU records all welfare benefits a Claimant receives and, when damages are paid, the compensator is liable to repay the DWP for any injury-related benefits received.

Notification of a claim is lodged by the compensator upon receipt of a formal claim. Before paying an award (to include interim payments), the compensator will apply for a certificate from the CRU setting out the benefits paid and the amount to be repaid to the DWP.

The injury-related benefits are deducted from the compensation received. They cannot be deducted from general damages. Benefits may be deducted from special damages, but only from past financial losses, e.g. lost earnings, travel expenses for attending hospital, medical expenses and prescriptions. Benefits may not be deducted from future losses, e.g. future care costs etc.

Contributory negligence can be reflected when discharging the Certificate of Benefits. Copy correspondence confirming the liability apportionment should be disclosed to the CRU in support.

Benefit recovery is governed by the Social Security (Recovery of Benefits) Act 1997.

If the claim is settled for general damages only, the compensator is still liable to repay the full amount of listed benefits and/or lump sum payments as shown on the CRU Certificate. Lump sum payments are offset against general damages first.

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The period over which liability for repayment of benefits runs is the date 5 years after the day following an accident or injury or, in disease cases, the date a listed benefit is first claimed in consequence of the disease.

5.2.4 Recovery of National Health Service (NHS) Charges

The recovery of NHS charges following injury that results in compensation is administered by the CRU on behalf of the Department for Work and Pensions (DWP).

The charges are based on a tariff and include ambulance charges and inpatient and outpatient charges. Outpatient charges are £665 and inpatient charges are £817 daily. Ambulance charges are currently £201 per person per journey.

These charges relate to England, Scotland, Wales and Jersey. NHS cases involving Northern Ireland are handled differently, but along similar lines. NHS charges are administered by the CRU (GB), but the CRU (NI) handles the benefits recovery.

A personal injury liability claim may result from a particularly serious injury sustained by a Claimant that has significant life-changing consequences for that Claimant. In these cases, it may be necessary for the claims handler/loss adjuster to assess possible claims under the headings of future loss of earnings, loss of pension benefits, long-term care and mobility, and long-term medication or treatment costs. These are part of the "Special Damages" and are summarized below.

5.2.5 Future Financial Loss

When calculating a claim for future loss, the approach adopted is to assess what lump sum is needed to compensate the Claimant for the alleged future loss.

The starting point is the annual net loss the Claimant will incur in the future. This is known as the multiplicand. In a claim for future loss of earnings, this will be the annual loss of earnings.

The multiplier is then calculated by reference to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this would be the date when the Claimant would, but for the injury, have retired. However, in a claim for the future costs of providing care, i.e. cases involving seriously disabled persons, the multiplier would be based on the Claimant's life expectancy.

The discount rate is applied to calculate deductions from an injured person's compensation payments to reflect the interest those payments are assumed to earn.

Historically, future financial loss lump sum payments were made on a one-off basis using the multiplicand and multiplier approach. The court now has the power to order the whole or part of the award to be paid by way of periodical payments as opposed to a lump sum figure.

In practice, it is generally the case that an initial lump sum payment is made and the residual award then paid by way of periodical payments. The use of periodical payments is generally only appropriate and sought in relation to larger awards of several million pounds.

With regard to future loss of earnings, a Claimant may be able to resume gainful employment, but in a restricted and/or different capacity, resulting in a partial loss of earnings potential. Equally, the injuries sustained may deteriorate at some future date so that the Claimant has to cease working. In these cases, a Claimant can pursue a claim for future loss of earnings based on the above principles, i.e. calculate an agreed annual net loss sum and apply an appropriate multiplier to reflect the potential for future loss of earnings.

5.2.6 Smith v Manchester Damages

A Claimant is entitled to recover damages for his handicap on the open labour market where he can show that, as a result of the injury, there is a real risk they will be out of work and it will be difficult to obtain similar employment.

Damages under this heading range from 3 months' net loss of earnings but rarely exceed more than 2 to 3 years' net loss of earnings.

Smith is used where there is a lower level of disability, not one that fits with the Ogden definition. See Billett v MOD (Court of Appeal 2015).

There is unlikely to be a case where both a Smith award and a future loss of earnings claim are awarded.

5.2.7 Cost of Nursing Care

In the more severe injury cases, in particular severe brain damage, the impact may be such that a Claimant requires 24/7 professional nursing care and this loss will be included in any Schedule of Claim presented. Indeed, in the most severe cases with a significant life expectancy, this may well be the biggest element of the claim submission.

In the less severe cases, it is not unusual for a head of claim to be included for short-term nursing care provided by the Claimant's family, which will attract a claim based on the National Living Wage rates. This aspect is often referred to as gratuitous care.

5.2.8 Loss of Congenial Employment

If a Claimant has to give up a career that they enjoy as a result of the injury sustained, it may be possible to obtain a sum of money to reflect the loss of job satisfaction and fulfilment. A sum can be claimed in addition to the financial loss arising from the Claimant's chosen career being curtailed.

5.2.9 The Rehabilitation Code 2015

This Code is intended to promote the use of rehabilitation and early intervention in the compensation process. Its aim is to assist the injured Claimant to make the best and quickest possible medical, social, vocational and psychological recovery.

The Code recognises that the requirements of smaller injury cases are different to those of more significant effect and a separate process is set up for claims below £25,000 (the current Portal limit). There is also separate provision in respect of low value personal injury claims in road traffic accidents (whiplash claims, which are in any event receiving governmental attention to reduce the significant numbers of claims in the RTA Portal process).

The Code does not impose a responsibility upon the Defendant insurer to participate. If legal liability is in dispute, a Defendant is unlikely to engage in additional costs that will be incurred if the assessment process under the Code is agreed, as between the parties. Nothing in the Code alters the legal principles that:

- Until there has been a liability admission by a compensator, the Claimant can have no certainty about the prospect of recovery of any treatment sums incurred
- Until the compensator has accepted a treatment regime in which the number and price of sessions have been agreed, the level of recovery of any such sums will always be a matter for negotiation unless the subject of a court order
- Where a Claimant has decided not to take up a form of treatment that is readily available in favour of a more expensive option, the reasonableness of that decision may be a factor that is taken into account on the assessment of damages.

The Code recognises the following 'markers' that should be taken into account when assessing an injured person's rehabilitation needs:

- Age (particularly children/elderly)
- Pre-existing physical and psychosocial co-morbidities
- Return to work/education issues
- Dependants living at home
- Geographical location
- Mental capacity
- Activities of daily living in the short term and long term
- Realistic goals, aspirations and attainments
- Fatalities/those who witness major incidents and trauma within the same accident
- Length of time post-accident.

In lower value injuries, £25,000 or below, the process (absent a medico-legal report containing full recommendations for rehabilitation) would be as follows:

- Initial Triage Report – establish the type of treatment needed
- Assessment Report – provided by the healthcare professional treating the Claimant
- Discharge Report – provided by the healthcare professional to summarise the treatment provided.

In cases of medium, severe and catastrophic injuries, the need for and type of rehabilitation assistance will be considered by means of an Immediate Needs Assessment carried out by a case manager or appropriate rehabilitation professional.

A rehabilitation provider's overriding duty is to the Claimant. Their relationship with the Claimant is therapeutic and they should act totally independently of the instructing party.

The Immediate Needs Assessment Report (INAR) will not provide a medical prognosis or diagnosis, nor will it deal with issues relating to legal liability. Copies of the case manager's INAR should be issued simultaneously to the Claimant's solicitor and the Defendant insurer.

The compensator must pay for the INAR within 28 days of receipt.

The overriding purpose of the INAR should be to assess the Claimant's medical and social needs with a view to recommending treatment rather than to obtain information to settle the claim.

5.2.10 Distress and Inconvenience

With regard to distress, the general rule is that this head of claim is not allowed (in addition to PSLA) unless a recognised psychiatric illness is proven. In practice, the court takes this aspect into account when making an award for PSLA.

With regard to inconvenience, the Claimant can recover out-of-pocket expenses relating to household assistance (e.g. gardening, dog walking fees), taxi fares, prescription charges, increased telephone calls, etc, subject to the alleged costs being directly attributable to the injury sustained.

Summary

You have learned about the difference between general damages and special damages and the basis upon which each are calculated.

This chapter explained the additional obligation, where legal liability has been established, to reimburse benefit payments and NHS charges related to the incident giving rise to the injury.

In chapter 6 you will learn about the framework and components of a personal injury reserve.

PERSONAL INJURY CLAIMS – RESERVING

6

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SECTION 6

PERSONAL INJURY CLAIMS – RESERVING

6. PERSONAL INJURY CLAIMS – RESERVING

Introduction

This section provides claims handlers and loss adjusters with guidance regarding the assessment of a Reserve for a personal injury liability claim. It looks at the components of a typical personal injury claim that need to be assessed when determining the Reserve.

As with all businesses, insurance companies seek to invest their funds to secure profit for the company and its shareholders. However, insurance company business is the payment of its policyholders' claims and it must ensure that sufficient funds are available to meet this requirement. Therefore, whenever a claim is notified to an Insurer, an adequate Reserve must be allocated to that claim with this amount of money set aside and held in reserve.

It is extremely important that the Reserve is always accurate. If the Reserve is too high, funds will have been unnecessarily held in reserve, rather than invested to improve the insurance company profitability. If the Reserve is too low, and this is a more serious situation, there will be inadequate funds held in reserve against the claim and there will be a need to move funds from the Insurer's investment portfolio, affecting the business profitability calculations.

It may be more difficult to determine an accurate Reserve when a claim is first notified to an insurer. It is vitally important that the Reserve is assessed as accurately as possible based on available information and that the Reserve is then regularly reviewed throughout the progression of the claim as more particulars are clarified or become available.

6.1 Personal Injury Reserving

When assessing a Reserve under a liability policy, the claims handler or adjuster must attempt to assess the policyholder's legal liability for the particular incident as well as attempting to determine the extent of such legal liability.

While this section looks only at the measurement of a personal injury liability claim, it is strongly recommended that all Reserve calculations are based upon the worst probable legal liability scenario evident from the information available at the time of assessing the Reserve. In other words, the Reserve should be determined on the basis that the policyholder is probably legally liable until firm evidence to support a defence is established. The Reserve should not reflect any suspected contributory negligence on the part of the injured Claimant until evidence to support a contributory negligence pleading is established.

If a claims handler/loss adjuster is working for a range of clients, it is possible that these clients may adopt differing reserving philosophies. Some may want to reserve on the "worst case" basis while others might assume "best case" as a philosophy. It is, therefore, recommended that, in such circumstances, the claims handler/loss adjuster sets out the recommended Reserve as detailed in this section and then reflects the particular client's philosophy by amending the figure calculated. By using this method, the claims handler/loss adjuster makes it clear that he has calculated the Reserve in a consistent and professional manner, acknowledging that the client will expect their philosophy to be reflected.

6.2 Heads of Claim

The majority of personal injury liability claims involve less severe consequences for the Claimant and this section provides guidance regarding these cases.

It is likely that all personal injury liability claims, regardless of their complexity, will include the following components requiring the claims handler/loss adjuster's consideration:

1. General Damages
2. Special Damages
3. Repayable CRU benefits & NHS Charges
4. Claimant's costs
5. Claims handler/loss adjuster expenses.

For the definition and details related to General Damages, Special Damages and Repayable CRU benefits and NHS charges please refer to Chapter 6.

6.3 Claimant's Costs

When assessing a claim Reserve, consideration should be given to the Claimant's costs. In a personal injury liability claim, the Claimant will almost certainly be represented by solicitors.

There is, unfortunately, limited reference material to provide assistance when determining a costs Reserve. An assessment of the likely complexity of the claim and the likely time required to conclude the case are required when assessing a costs figure. For the purposes of this section and the incorporated case examples only, an "average" costs figure of £6,000 to £8,000 has been applied.

Significant amendments to the Civil Procedure Rules were introduced in April and July 2013. Some of these amendments have a bearing on costs. Without going into unnecessary detail in this chapter, it is likely that the costs reserve suggested in the examples below would be notably lower if assessed after 31st July 2013.

6.4 Claims Handler/Loss Adjuster Costs

Allowance should be made when calculating a Reserve for any costs or fees payable to the claim's handler/loss adjuster. As with the Claimant's solicitors' costs, the level of fee will depend upon the complexity of the case and the time required to bring the matter to a conclusion.

6.5 Example Reserve Calculations

The following cases illustrate the calculation of a Reserve following notification of the case and initial investigations.

Putting this into practice

Case Study 1

Two employees working for the Insured were attempting to lower a heavy gas cylinder from a pick-up truck to the ground, when one of the employees allowed the cylinder to fall and it trapped the other worker's finger against the side of the pick-up truck causing personal injury. Investigations suggested a legal liability would attach to the Insured without any contributory negligence on the part of the injured employee. In any event, the initial Reserve was assessed on a worst probability basis.

The injured employee suffered a crush-type injury to the tip of his little finger on his left hand. It was established that he was taken to the local hospital by ambulance for medical attention. It was believed that the injury would not result in any permanent disability or impairment.

Investigations determined that the injured employee was absent from work for a three-week period and that the Insured paid him in full during his absence.

The calculated Reserve was as follows:

General Damages	*3,000*
Special Damages	*1,000*
CRU	*750*
Costs	*6,000*
Claims handler fee	*500*
TOTAL	***£11,250***

When assessing General Damages, reference was made to the JCG, which suggested damages for a fractured finger would be £3,125. The loss of part of a little finger was valued at £2,600 to £3,850. The Guidelines did not incorporate the exact injury suffered by the Claimant and therefore the closest entries to the actual injury were taken and then adapted to reflect the injury suffered. A figure of £3,000 was therefore determined.

The information at the time of assessing the Reserve was that the Claimant would not suffer any loss of earnings. An assessment was made for possible medical expenses, travel costs to attend a hospital examination and the possibility that some care/ assistance might be required with domestic duties on account of the hand/finger injury. A Reserve of £1,000 was therefore established.

As there was no apparent loss of earnings, it was unlikely that the Claimant would have secured any benefits from the DWP. A claim for Recoverable Benefits from the CRU was therefore unlikely. However, it was known that the Claimant was taken to hospital and therefore that NHS charges were likely. A Reserve of £750 was therefore established.

The indications when establishing the Reserve were that this was a short duration claim, given that legal liability was not disputed. Accordingly, a costs Reserve was determined at £6,000.

An allowance for claim handling fees was assessed at £500.

Putting this into practice

Case Study 2

A public liability personal injury claim resulted from an accident in which a contractor's employee tripped due to a defect in the car park of the Insured's premises, sustaining injury. The suggestion from progressive enquiries was that the car park may have incorporated a number of trip hazards, but as yet no witnesses to the accident had been identified.

The Claimant suffered a broken metatarsal in his left foot. At the time of assessing the Reserve, it had not proved possible to determine the Claimant's wages information and it was not known whether he had received his full pay during his absence from work.

The following initial Reserve was established:

General Damages	*5,000*
Special Damages	*4,000*
CRU	*1,600*
Costs	*8,000*
Claims handler fee	*750*
TOTAL	*£19,350*

The General Damages Reserve was assessed following reference to the JCG. These outlined suggested damages for a simple metatarsal fracture at a figure up to £8,750 but limited to £4,250 or less where a complete or near complete recovery is made. Without medical evidence at the particular time, a reserve of £5,000 was established, anticipating a complete recovery from the injury but allowing for possible prolonged symptoms.

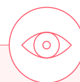
Although the Claimant's earnings information was not available, it was known that he was a semi-skilled labourer and his annual salary, in the particular geographical area of the UK, was in the region of £20,000. Information from his employers suggested an 8-week absence from work. There was no confirmation that the Claimant had been paid during the period and therefore a loss of earnings figure was assessed at £3,000, based on 8/52 × £20,000.

Allowance was made under the heading of Special Damages for medical costs, travel expenses and possible care/assistance with mobility following the accident. An allowance of £1,000 was determined, producing an overall Special Damages Reserve of £4,000.

At this stage of the claim, it was not known whether the Claimant would be receiving benefits from the DSS relative to the accident, for example Income Support. An allowance of £1,000 was determined regarding possible benefits repayable to the DWP. A further allowance of £600 was made regarding NHS charges, noting the nature of the accident and the likelihood that the Claimant was taken to hospital. The CRU Reserve was, therefore, £1,600.

With regard to costs, the circumstances of the claim meant that the legal liability outcome was uncertain at the time of establishing the Reserve. Accordingly, allowance was made for the work the Claimant's solicitors would undertake in their efforts to prove the Claimant's case. The time expended by the solicitors and the possible difficulty in proving the Claimant's claim were necessary factors to be considered when establishing a cost Reserve of £8,000.

The claims handler/loss adjuster's fee was established at £750.



Activity

The claims handler/loss adjuster dealing with this type of case will, undoubtedly, benefit from viewing a wide range of cases within their office to appreciate the different considerations that apply to each and every case.

Summary

In this chapter you have identified the costs that you need to consider when compiling a reserve for a personal injury claim.

The learning from this chapter will enable you to create a robust personal injury reserve. It is important to ensure you review the reserve throughout the lifecycle of the claim and consider the accuracy of the reserve, as more information becomes available.

Having considered the different damages and costs related to a personal injury claim, in the next chapter, we consider the damages and quantum for property damage claims.

THIRD PARTY PROPERTY CLAIMS – DAMAGES AND QUANTUM

SECTION 7

7. THIRD PARTY PROPERTY CLAIMS – DAMAGES AND QUANTUM

Introduction

Quantum is the Latin word for "amount" and is the amount of money legally payable in damages.

In the context of property damage claims "damage" is defined as 'physical harm that impairs the value, usefulness or normal function of something'.

In this chapter we are concerned with damage to property owned by a third party. This chapter focusses on different types of property including buildings, machinery and contents.

Third Party property damage claims are usually founded in contract and/or tort, e.g. negligence/nuisance.

The chapter initially focusses on liability claims founded in contract before highlighting the key aspects to be consider when handling claims founded in Tort and a claimant's entitlement to financial loss.

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7.1 Claims in Contract

The general principle concerning claims in contract is that the Claimant should be placed in the same position as if the contract had been performed.

Contracts may be formal, e.g. the JCT Form of Building Contract, or subject to a specific agreement between the contracting parties, and/or subject to attempts by the parties to impose their own terms and conditions of trading. In the absence of any supporting contractual documentation, a 'simple' contract exists whereby each party is responsible for exercising reasonable skill and care in the execution of their respective obligations.

Damages in contract are intended to cover losses that flow naturally from the breach of contract or are in the contemplation of the contracting parties.

7.2 Claims in Contract – Buildings

The main authority remains Harbutts Plasticine Ltd v Wayne Tank & Pump Co Ltd (1970). In this case, the Claimant's factory in an old mill burned down due to negligent workmanship by the Defendant. To keep the business going, the Claimant had no choice but to build a new factory. The court had to decide whether the Defendant was liable for the full cost of building the new factory or just the value of the old factory. The Court of Appeal refused to make betterment deductions and stated that reinstatement was a reasonable course of action. The Claimant had not incorporated extras in the new factory. Although a new design had been adopted, this was no more than necessary to replace the old structure.

The 'test' for deduction for betterment in contract cases considers:

- Whether the original property is earning income
- Whether the decision to replace was reasonable
- Whether more was spent on replacement than was necessary and betterment was inevitable in the circumstances.

Where a Claimant incorporates enhancements into a building reinstatement and exceeds the test parameters, appropriate deductions may be made from any subrogated claim submission presented.

7.3 Claims in Contract – Machinery

The main authority is Bacon v Cooper (Metals) Ltd (1982), a case concerning replacement of a rotor of a fragmentiser. The new part had a lifespan of nearly 4 years more than the damaged part. It was held, however, that no deduction should be made for betterment because that there was no second-hand substitute of equivalent lifespan. Specifically, the court held that a Claimant can recover the cost of a new item whenever this would not cause an 'absurdity'.

The factors to be considered are:

- Whether there is normally a second-hand market available that can be used as the basis of settlement
- Whether the second-hand market exceeds the cost of obtaining new
- If the replacement part provides greater efficiency, damages can be reduced by the resulting savings (see British Westinghouse v Underground Railway Company (1912)).

7.4 Claims in Contract – Contents

Subject to the comments regarding machinery, generally it will be possible to settle contents losses on an indemnity basis, i.e. deductions are made for wear and tear or increased lifespan or equivalent benefit.

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7.5 Claims in Contract – General

The measure of damages recoverable for breach of contract is enshrined in Hadley v Baxendale (Court of Exchequer 1854). This case has stood the test of time and it establishes the general principles for awarding damages for breach of contract:

- Damages recoverable for a breach of contract are such as may fairly be considered as arising naturally from the breach or such as may be reasonably supposed to have been in the contemplation of both parties at the time that the contract was made
- Where the contract is made under special circumstances that are communicated by one party to the other, the damages for breach are such as the parties might have reasonably contemplated as flowing from such a breach in those circumstances.

A breach of statutory duty will support a claim for breach of contract. The relevant statutes are:

- The Sale and Supply of Goods Act 1994, which requires goods supplied under the contract to be of satisfactory quality
- The Supply of Goods and Services Act 1982, which similarly imposes a duty of satisfactory quality of fitness for the supply of goods. This is essentially a strict liability. For the supply of services, there is an implied term that the supplier will carry out the service with reasonable care and skill, i.e. a duty of reasonable care as opposed to strict liability.

7.6 Claims in Tort

The most common torts in third party property damage claims are:

- Negligence – a failure to take due care
- Nuisance – the interference with a right, usually on a continuing basis
- Trespass – to land or person.

The main authority regarding claims in tort is Dominion Mosaics Ltd v Trafalgar Trucking Co Ltd (1990), in which the Claimant's business premises were destroyed by fire due to the Defendant's negligence. The Claimant leased new premises and claimed for both the rental and the new building and the market cost of replacing the destroyed machinery. Importantly, both categories of property (buildings and machinery) were income earning and the Claimant had acted quickly to mitigate loss of profit.

The Defendant argued that the new lease gave the Claimant better premises than before the loss.

The Court of Appeal followed the Harbutts' judgment and no deduction was awarded. Comment was made that the Claimant had reasonably sought to find existing premises matching their requirements. They had gained increased floor space, but this was balanced against saving in loss of profits and the cost of the new lease compared moderately with the annual loss of profits the Claimant would have sustained (see the test in Harbutts above).

In the context of machinery, the Defendant contended that the special reduced price paid by the Claimant prior to the loss should be the measure of damages. This was rejected. In respect of the measure of recovery for a second-hand chattel, the test to be adopted is the cost of replacement in an available market.

In this case, the original machinery cost £13,000 and was only a few months old. Its replacement cost was £65,000 and this figure was awarded.

In claims for third party building losses in tort, there is generally no reduction for betterment/wear and tear, subject to the decision to replace/reinstate being reasonable. With regard to machinery, chattels and contents, generally a reduction is warranted to reflect wear and tear/increased lifespan/equivalent benefit.

Claims in nuisance can be limited purely to financial loss if there is an absence of damage to third party property as defined under a standard public liability/products policy. In such cases, coverage issues should be considered when reporting to Insurers.

In summary damages in tort, are based on the test of reasonable foreseeability.

In practice, however, there is no reduction for betterment/wear and tear in respect of buildings where replacement was necessary, and betterment was inevitable in the circumstances. This still leaves open arguments that a settlement can reflect enhancements/improvements in the premises.

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With regard to chattels/contents/machinery, each case is judged on its merits, but generally a reduction is warranted. It may be possible to recover the cost of a new item if this would not cause an 'absurdity' and if market availability reflects that this course of action is reasonable in all the circumstances.

7.7 Financial Loss

English Law divides financial loss into:

- situations where there has been physical injury or damage; and
- situations where there has not.

Financial loss as understood by insurers exists only in the second situation.

Two main strands have developed in the law of tort:

- physical injury or damage cases – e.g. Donoghue v Stevenson (1932)
- special relationship cases – e.g. Hedley Byrne v Heller (1963).

Generally, for there to be a liability for financial loss in negligence, there must be a special relationship.

Where an insured enters into a contract, they may have a liability in tort at the same time. This is known as concurrent liability. This can be a complex area and can be important because:

- many policies restrict cover for liability in contract
- claims in contract usually become time-barred sooner than claims in tort so claims can often only be advanced in tort.

The leading case on concurrent liability is Henderson v Merrett Syndicates Ltd (1994), which established that a party to a contract may bring an action based on a tort committed by the other party as long as doing so is not inconsistent with the express or implied terms of the contract, i.e. are the terms of the contract consistent with the concurrent duty in tort?

An important test in negligence is whether the damage is too remote or whether the type of harm is reasonably foreseeable. Damage may be too remote from part of the loss or there may be no duty in respect of part of the loss. The leading case of Spartan Steel & Alloys Ltd v Martin & Co Ltd (1973) remains good law and differentiates between:

- physical loss and the loss of profit consequent on it, and
- loss of profit that is too remote from any physical damage sustained.

In Spartan Steel, the Defendant damaged a power cable when undertaking roadworks, a quarter of a mile from the Claimant's factory, resulting in them being without power for 14.5 hours. Their claim was for the physical loss of the melt that had to be removed from the furnace, loss of profit on that melt and loss of profit from not being able to produce four more melts while the power was off. The Court of Appeal allowed the first two heads of claim but rejected the third as being too remote, or alternatively there was no duty. Importantly, the damage that caused the loss was damage to the utility's cable, not to property owned by the Claimant.

If the Defendant been working within the boundary of the Claimant's factory, then remoteness would not have arisen and all heads of claim would have been recoverable.

In Conarken Group Ltd and Farrell Transport Ltd v Network Rail Infrastructure Ltd (2011), the Defendants' vehicles caused damage to Network Rail's property. Network Rail claimed:

- the cost of repairing the damage, and
- compensation payments (Schedule 8 sums) made to the affected train operating companies under contractual arrangements between them and Network Rail due to the resultant line closures.

The first head of claim was recoverable. The Defendants challenged the fact that, while the payments to the train operating companies were demonstrably consequential upon the physical damage, these had resulted from separate contracts between the Claimant and a third party. The Court of Appeal held that the fact that such sums were paid through a contract between the Claimant and the third party had no bar to recovery. The Court of Appeal identified four key principles (from a long line of cases) to be the 'test' in such circumstances:

- economic loss that flows directly and foreseeably from physical damage may be recoverable. The threshold test for foreseeability does not require the tortfeasor to have any detailed knowledge of the Claimant's business affairs or financial circumstances so long as the general nature of the Claimant's loss is foreseeable
- one of the recognised categories of recoverable economic loss is loss of income following damage to revenue-generating property
- loss of future business as a result of damage to property is a head of damage that lies on the outer fringe of recoverability. Whether the Claimant can recover for such economic loss depends on the circumstances of the case and the relationship between the parties
- in choosing the appropriate measure of damages for the purposes of assessing recoverable economic loss, the Court seeks to arrive at an assessment that is fair and reasonable as between the Claimant and Defendant.

The overriding principle in respect of pure economic loss is: 'financial loss suffered... which is not accompanied by any physical damage to person or property'.

In this respect, the cost of repair or replacement of the thing that caused the damage is regarded as a pecuniary loss, i.e. financial loss (see Murphy v Brentwood District Council (1991).

It is a general principle of English tort law that a person has a duty to take care to avoid causing his neighbour physical injury or damage but no duty (except in certain limited circumstances) to avoid causing pure economic loss. This may lead to an unfair situation where the same negligent act causes physical loss to one person, which would be a recoverable, but pure economic loss to others, which may not, absent injury and/or damage to third party property.

Where products cause no injury or damage then, in the absence of any contract to which the product manufacturer is party, there is no liability in tort to those parties who suffer economic loss because the product is defective in quality.

Similarly, if a dangerous defect in a product is discovered before it causes injury or damage, the defect is merely a defect in quality. Any loss either by way of repair or disposal is purely economic. Without a contractual liability or a special relationship of proximity, there is no liability in tort.

These broad legal principles apply equally to buildings. If a builder erects a structure containing a latent defect that renders it dangerous to persons or property, the builder will be liable in tort for injury/damage resulting from the dangerous defect. However, if the latent defect manifests before any injury/damage, this will be pure economic loss and is not recoverable unless there is a relevant contractual duty.

The law of contract provides the main cause of action for claims for pure economic loss. Provided such loss is within the reasonable contemplation of the parties (and is not subject to any contractual exclusion/limitation), it will be recoverable, unless it is too remote.

Subsequent cases have refined the rule in Hadley v Baxendale. In Supershield Ltd v Siemens Building Technologies FE Ltd (2010), it was held that pure economic loss was not too remote if it was a loss from which the party in breach may reasonably be taken to have assumed a responsibility to protect the other party.

7.8 Policy Considerations

Policy liability should be considered in connection with recoverable quantum issues.

Financial loss is pecuniary loss that is not consequential on injury or damage. The cover under public and product liability policies is normally given for the consequences of injury to another party or damage to another party's property. Many policies state that the cover is 'in respect of' injury or damage. However, some say (for example) that the cover is 'arising out of' injury or damage. There is a big difference between these two phrases in respect of the extent to which an Insured is covered against third party claims. The first phrase restricts the cover to losses directly caused by the injury or the damage, and the second covers all losses that arise as a consequence of the injury or the damage (assuming that the Insured is legally liable for them).

7.9 Unfair Contract Terms Act 1977

This Act controls the extent to which a Defendant party may exclude their liability to a commercial customer/Claimant in the event that a breach of the sales contract is established. It covers both limitation and exclusion/exemption clauses.

In a claim for injury, a person cannot by reference to any contract term or notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

In the case of other loss or damage, a person cannot exclude or restrict his liability for negligence except insofar as the term or notice satisfies the requirement of reasonableness.

Schedule 2 of the Act concerns application of the reasonableness test, and it is for the Defendant party to establish that the clause in question satisfies this test.

The considerations that a court would follow to determine reasonableness are:

- the relative bargaining strength of the parties – could 'protection' have been obtained otherwise, e.g., insurance?
- Did the Defendant give the Claimant an inducement to agree to the term and could the Claimant have entered into a similar contract with another seller without the term in question?
- Did the Claimant know or should have known that the term existed and what it covered/restricted?
- Is it reasonable for the Claimant to have complied with the term if it excludes or restricts liability, e.g., reporting the alleged defect within a certain number of days?
- If the product(s) were manufactured/processed/adapted to the Claimant's special order, would it be reasonable for the Defendant to exclude or limit its liability if the goods were not fit for purpose?

7.10 Loss of Enjoyment, Stress and Inconvenience

Courts tend to approach these heads of claim conservatively.

In Watts v Morrow (1991) (a surveyor's professional indemnity claim), it was held that: "a contract breaker is not liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party ... But the rule is not absolute. Where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contact is not provided or if the contrary result is procured instead."

Awards in building cases for damages for loss of amenity and stress and inconvenience are rare. This reflects public policy but also what was actually contracted for. For example, in extending a Claimant's property, the contract does not stipulate enjoyment to be had out of the contract. This is also true of a new build property, albeit a reasonable standard of workmanship is expected.

Losses for physical stress and inconvenience are recoverable, but they must be modest and differentiated from the 'worry, anxiety and other problems' suffered, but for which there is no recovery of damages in law.

In negligence/nuisance cases, a sum to reflect distress and inconvenience is based on interference with the Claimant's enjoyment of their property as opposed to any loss of amenity. Again, they are generally limited in value; even in the most exceptional cases, they will rarely exceed £5,000 and many will be within a £2,000 threshold. While a Claimant may have to vacate the damaged property, he will benefit from alternative accommodation.

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