Browne Jacobson

Casualty

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Reflecting on the past year and looking ahead in the world of casualty risks, it is clear that we are in a time of significant change with emerging risks mirroring the challenges we are experiencing globally.

As consumerism continues to evolve through advances in technology, and there is a greater understanding of the dangers inherent in manufactured goods, it will be necessary for insurers to adapt to these shifting risks, such as those arising from 'Forever Chemicals' and lithium-ion batteries.

We have also seen key procedural changes that will influence how litigation is conducted, with an increased emphasis on alternative dispute resolution (ADR) in an attempt to reduce the burden on our overstretched judiciary, a welcome change to the Personal Injury Discount Rate, and increasingly innovative attempts by claimants to avoid being captured by the fixed costs regime.

The complex issue of vicarious liability continues to evolve, with the decision in DJ v Barnsley [2024] creating uncertainty and extending the risk for those organisations who engage support from individuals who might not otherwise be considered an employee.

There are real opportunities for insurers and their representatives to take the initiative now, whether by mitigating risk and financial exposure or adopting effective early strategies when managing litigation.

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A move to compulsory ADR?

Author: Herjit Khinda

The decision in **Churchill v. Merthyr Tydfil CBC [2023],** and recent changes to the Civil Procedure Rules, have potentially reshaped the dispute resolution landscape.

Churchill: A change in direction for ADR

The Churchill case marked a pivotal moment, with the Court of Appeal determining that the court can stay proceedings and order parties in litigation to participate in a non-court-based dispute resolution process. While Churchill was a claim brought in nuisance due to the presence of Japanese knotweed, the decision has significant implications more widely, signalling a shift towards proactive judicial encouragement of ADR mechanisms.

Reconciling the decision with Halsey

The Court of Appeal recognised the delicate balance between promoting ADR and safeguarding an individual's right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). However, the power to order ADR was not considered to be incompatible with a right to a fair trial, or deemed to be in conflict with the earlier decision in *Halsey v Milton Keynes NHS Trust [2004].* It was

recognised that while careful consideration of all of the circumstances surrounding a case is required, where the measures were proportionate to the legitimate aim of settling a dispute quickly, and at a reasonable cost, an order that the parties engage in ADR is likely to be appropriate.

The Civil Procedure Rules: A framework for ADR

The significance of *Churchill* was reinforced by amendments to the Civil Procedure Rules (CPR), which came into effect on 1 October 2024. These changes introduced a greater emphasis on ADR, with the overriding objective now promoting the use of ADR and granting courts explicit case management powers to order parties to engage in ADR. This represents a move towards integrating ADR into the case management process.

Sanctions for failure to engage in ADR

The case of **Northamber PLC v Genee World Ltd & Others [2024]** further illustrates a clear expectation that parties will proactively engage in ADR. The decision in Northamber to apply a costs sanction for an unreasonable refusal to participate in ADR in circumstances where the proposal was made late in the litigation process and without any obvious commitment, highlights the growing expectation that parties will make every attempt to narrow issues before trial.

Tactical Considerations

There is an opportunity for parties in litigation to adopt strategies to leverage ADR effectively. During the pre-litigation process, defendants should explore internal complaints procedures and consider if the dispute can be resolved outside of the claims process. Alternatively, the offer of ADR at an early stage in the right case should be made. During litigation, it may be prudent to seek an order for ADR, and at all times, it will be necessary to demonstrate that proper consideration has been given to dispute resolution (in whatever form that may take) to safeguard against potential criticism or sanctions.

Conclusion

The changing landscape presents both challenges and opportunities. The likely increased judicial encouragement of ADR, coupled with the potential for sanctions for non-engagement, requires a strategic approach to dispute resolution. As parties to litigation and overstretched courts continue to navigate the changes, the emphasis on ADR is poised to reshape the resolution of disputes, promoting the amicable settlement of conflicts outside of the court process.

PFAS: ‘forever chemicals’, an emerging risk

Author: James Fawcett

Perfluoroalkyl and polyfluoroalkyl substances (PFAS) are a large and complex group of synthetic chemicals found in a wide range of industrial applications and everyday consumer products. Often referred to as ‘forever chemicals’, PFAS have extreme persistence in the environment and can take over 1000 years to degrade. They have been in production since the 1940s, with their water and oil-repellent properties resulting in them becoming increasingly used in items such as non-stick cookware, cosmetics, cleaning products, food packaging, paints, and water-resistant clothing and equipment. They are also commonly used in firefighting foams and property construction products.

With the use of PFAS increasing, so has scrutiny and understanding of the potential harm they pose. This has sparked increasing litigation worldwide, raising questions about whether similar legal challenges will emerge in the UK.

Risks

While we still do not yet understand the true impact of PFAS, there is growing scientific consensus that the durability which makes PFAS so appealing in production also creates significant risks to the environment and human health. Research undertaken by the Environment Agency in 2021 reached a fairly stark conclusion: “Their stability and resistance to degradation results in almost indefinite environmental contamination, leading to long-term continuous exposure of people and wildlife.”

The prevalence of PFAS in drinking water and various products continues to increase the likelihood of human ingestion and therefore exposure – this is of particular concern in light of scientific studies which, although not currently conclusive, have identified links between exposure to PFAS and a range of health conditions, including development delays in children, increased cancer risk, fertility issues, immune deficiency, and obesity.

Ongoing research into the impact of PFAS on human health will inform our understanding. However, industries that use PFAS are undoubtedly now aware of the adverse impact on the environment and human health, and there is an expectation that steps will be taken to mitigate the risk of contamination.

Litigation landscape

There has been an increase in PFAS litigation worldwide, which may well be the precursor to a wave of litigation in the UK.

The most high-profile and large-scale litigation has been in the USA, with class actions brought against DuPont and 3M Corporation following alleged contamination of drinking water, resulting in multi-million-dollar settlements. While the focus of these initial cases was very much PFAS chemical manufacturers, there has been a noticeable shift and more recent litigation in the USA has broadened to target manufacturers of products containing PFAS, where the total liabilities could run into many billions of dollars.

PFAS contamination of drinking water also resulted in civil action in Sweden by a large number of residents of a small town, Kallinge. The claims were successfully pursued against a municipal water company as a result of contamination of water by fire-fighting foam that had been used in fire drills in an area close to the town.

Anticipated changes in PFAS legislation and guidance, together with ongoing scrutiny of the environmental and health impact of the chemicals, point to a continuing trend of litigation. Industries and insurers will want to be ahead of the curve in understanding and reacting to what is likely to come.

Mitigating the risk and insurance implications

While the UK's regulatory framework relating to the use of PFAS is not yet as advanced as the USA or some EU members, it is likely to only be a matter of time before more stringent measures are put in place. It would be wise for chemical manufacturers, as well as those who use PFAS in their production process, to learn from the experience in the USA and put risk mitigation measures in place now. Robust internal policies will be expected, taking into account potential civil action, as well as developing regulations and the likelihood of enforcement action.

With PFAS litigation on the horizon, policyholders will turn to insurers to cover losses. Insurers will want to understand their risk of exposure to PFAS claims and the extent of cover that is currently provided. Insurance coverage has proved to be contentious outside of the UK and there are likely to be similar issues faced here, with careful scrutiny of exclusion clauses within policies. Insurers would benefit from reflecting on policy wording now, in anticipation of what may come.

Personal Injury Discount Rate review: Welcome news for insurers

Author: Nicola Paterson

In line with the approach already adopted in Northern Ireland and Scotland, as of 11 January 2025 the Personal Injury Discount Rate (PIDR) increased from -0.25% to +0.5%, with a move to a dual rate rejected for now. The announcement has been welcomed by insurers and is seen as a reflection of the current economic climate and investment returns available to claimants. Indeed, in reaching the decision with the benefit of input from an independent expert panel, the Lord Chancellor acknowledged that the range for setting the PIDR was between +0.5% and +0.75%, with the final position therefore at the lower end of what was considered reasonable.

The impact of the change will be to reduce the value of lump sums awarded for future losses, particularly following catastrophic injuries which will continue to have a long-term impact on the claimant.

In high-value cases where there are ongoing future losses, the revised PIDR could have a significant effect on the value of the claim. By way of illustration, the life multiplier for a 25-year-old female has moved from 69.32 under the previous rate to 54.32 under the new rate, so a difference of 15. It will be seen that if, for example, there was a continuing claim for care involving a claimant with a normal life expectancy, the influence of the revised rate will be very substantial.

Practical implications of the revised PIDR

For insures holding reserves under the -0.25% rate it will be necessary to revisit and adjust those reserves downwards to reflect the revised rate.

It will be essential for defendants to review settlement strategies and offers made having regard to the previous rate, which may now over-compensate the claimant. Decisions will need to be made on whether to withdraw offers or seek to vary them to reflect the rate change to maintain cost protection. Where there are impending settlement meetings or trials, it is crucial to urgently reflect on strategies and settlement parameters in light of the change. We will undoubtedly see a surge of activity on the part of both claimants and defendants.

Looking ahead, we are likely to see an increase in periodical payment orders in claims involving significant future losses as claimants seek to mitigate the impact of the rate change on lump sum awards.

Vicarious liability: Navigating the evolving landscape post-Barclays and DJ v Barnsley

Author: James Arrowsmith

The legal principle of vicarious liability, which holds entities responsible for the actions of their employees or individuals in employment-like relationships, has been a subject of considerable evolution and debate in recent years. The recent decision in *DJ v Barnsley Metropolitan Borough Council [2024]* illustrates the ongoing progression of vicarious liability and its implications for organisations and their insurers.

The Barclays Bank turning point

In the landmark case of *Barclays Bank plc v Various Claimants [2020]*, the Supreme Court moved away from the broadening approach to vicarious liability, finding that Barclays Bank could not be held vicariously liable for alleged sexual assaults committed by a doctor, who was an independent contractor, during health checks for the bank's potential employees. The court's decision emphasised the distinction between employees (or those in similar relationships) and independent contractors – vicarious liability does not extend to those who are conducting their own independent business.

The court also recommended a ‘course correction’ in how the nature of the relationship that gives rise to vicarious liability has been assessed. Numerous cases leading up to Barclays Bank had highlighted various policy reasons for imposing vicarious liability in different circumstances. While these judgments stressed that "the policy reasons for a rule are not the same as defining the criteria for its application," they had become an increasing focus for claimants aiming to establish new legal precedents in vicarious liability claims.

The Supreme Court considered that the correct test would be “whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant”, with the policy reasons only relevant to the determination of doubtful cases. This suggested a return to the more conventional approach to vicarious liability, namely examining whether a case fits within the established set of circumstances in which vicarious liability would be imposed.

The evolution continues: DJ v Barnsley

The recent case of **DJ v Barnsley Metropolitan Borough Council** demonstrated that the doctrine of vicarious liability remains on a path of evolution. The case involved a local authority's vicarious liability for the actions of kinship foster carers, a scenario not directly addressed in previous jurisprudence. The closest comparable scenario was that in **Armes v Nottinghamshire County Council [2017]** in which vicarious liability was found in relation to a foster carer unrelated to the child. It appeared following the Barclays Bank case that this may have been the limit of vicarious liability in a fostering context, but not so.

DJ v Barnsley involved a family member taking on responsibility for a child, which was supported as a fostering arrangement (rather than a third party previously recruited by the local authority to provide care), so there is little doubt that the facts were less akin to employment than those in Armes. The Court of Appeal's decision to hold the local authority vicariously liable, based on the specific facts and the employment-like relationship between the local authority and the kinship carers, therefore indicates a willingness to continue the development of vicarious liability through comparison with previously decided cases.

Uncertainty and implications

These recent developments highlight the significant uncertainty surrounding vicarious liability, as it was found to apply to relationships beyond traditional employment. Barclays Bank clearly excludes a true independent contractor engaged in an enterprise of their own, but between employment and independent contractors, there is a range of volunteering, workforce sharing, training placements and others who may be exposed to vicarious liability now, or in the future.

The case-specific approach taken in DJ v Barnsley, while flexible, offers limited comfort to defendants who face the prospect of litigating each case to determine the applicability of vicarious liability. This uncertainty is particularly challenging for organisations and their insurers, as it complicates the assessment of potential liabilities and decisions as to insurance coverage.

Mitigating risks

In this evolving legal landscape, organisations must examine their workforce beyond traditional employment relationships to identify potential vicarious liability risks. Those who rely heavily on non-employee workers may be particularly exposed to such risks.

Clear role descriptions, documenting the nature of relationships, and clearly describing the limits of each role can help mitigate these risks. Additionally, where multiple organisations share responsibility for an individual, such as in training placements or workforce sharing arrangements, clarifying the respective responsibilities can be key in managing liability risks.

Conclusion

The ongoing evolution of vicarious liability, as evidenced by the Barclays Bank case and DJ v Barnsley cases, presents challenges in both extending risk and creating uncertainty. Managing risk will continue to require close attention in this developing area.

Insurers and brokers have an opportunity to support their policyholders and manage risk by assisting them in implementing up-to-date and proactive risk assessment and management strategies, while organisations exposed to risk can manage and mitigate this through effective management of their workforce.

Lithium-ion batteries and the risk of fire

Author: Victoria Curran

The growth of lithium-ion battery-powered products will unquestionably continue, with rechargeable batteries powering a huge range of consumer goods, medical equipment, electric vehicles, scooters, and bikes, leading the way in the move to sustainable travel.

While the ease of use and benefits of lithium-ion batteries are well known, there is increasing concern over the risk of fire if the battery fails or is charged incorrectly. There have been numerous product recalls, often due to an identified risk of fire as a result of inadequate systems to prevent the battery pack from overcharging, overheating, and igniting.

Claims risk

As consumers become more aware of the fire risk posed by lithium-ion batteries, the likelihood of third-party claims increases, with insurers often being responsible for covering these claims.

When it is established that a battery was defective and caused damage, there will likely be a strict statutory liability on the manufacturer under the Consumer Protection Act 1987 for personal injury, death or damage to private property suffered by an individual. Subject to contractual exclusions, business loss claims are commonly brought in negligence, or for breach of contract.

The potential exposure to manufacturers of lithium-ion batteries (and by extension their insurers) is therefore significant, with a risk of extensive damage caused by an individual fire, as well as class actions where there is an identified defect with a product.

Mitigation measures

Education is key and insurers have a role to play in educating their policyholders on best practices in managing the risk from lithium-ion batteries, particularly in a commercial context. We are seeing many insurers issuing guidance with practical steps that can be taken to mitigate fire risk and limit damage should a fire occur.

Insurers must understand their policyholders' businesses to assess risks accurately when providing coverage and ensure that insurance policies, including exclusions and 'reasonable precautions' clauses, are fit for purpose. Preventing incidents involving lithium-ion batteries is ideal, but if the worst were to happen, insurers would need certainty about the nature and extent of the risk they are underwriting.

Blurring the lines between clinical negligence and personal injury claims

Author: Susan Slade

We are seeing an increasing trend of claimants presenting claims under the Pre-action Protocol for the Resolution of Clinical Disputes ('the Protocol'), which would historically have fallen directly within the Personal Injury Protocol.

There is an incentive for claimant solicitors to position claims as clinical negligence, as it seems unlikely that fixed costs will be applied to clinical negligence matters in the foreseeable future (with the issue not explored at the latest Civil Procedure Rule Committee meeting in October 2024). Given these circumstances, there is a real motivation for claimants to bring claims under the Protocol, which allows for costs on a standard basis as well as the ability for claimants to recover an after the event (ATE) premium.

The Protocol is clearly intended to apply to all claims against GPs, dentists, and other healthcare providers (both NHS and private), which involve an injury that is alleged to be the result of clinical negligence.

'Clinical negligence' is not defined in the Protocol and so there is scope for application of a wide interpretation of the term, with increasing attempts to expand the definition further. We are particularly seeing this in the private healthcare provider sector, predominantly involving care homes and domiciliary care providers. Very often at the heart of the cases are allegations of inadequate processes and procedures, or failures of staff to prevent service users from falling while using equipment provided to them, rather than negligent medical treatment in a clinical setting.

The issue of how far the definition of clinical negligence can extend within the scope of the Protocol has not as yet been explored in the courts and we could see satellite litigation in the year ahead, as both claimants and defendants seek clarity on what is becoming an increasingly important point with significant cost implications.

For now, insurers and their representatives should be vigilant and put down a marker at the earliest opportunity when they consider a 'clinical negligence' claim is not truly clinical.

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