

# Liability Round Up – Risk Manager's Forum

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- 2001 Crystal ball gazing – how did we get on?
- ELTO / ELID / ELIB – acronym soup
- Asbestos update
- Deafness developments
- Public liability news
- What next for legal costs after Jackson?
- Corporate Manslaughter – guidelines for sentencing
- Scotland civil law reform
- Predictions – deficit based initiatives
- Insurers duty to pay valid claims!

# 2001 predictions - Emerging disease?

2001 - Predicted problem	Score – out of 10 (so far)
Mobile phones	1
Acoustic shock	0
Toxic anxiety	0
Passive smoking	1
Deep vein thrombosis	2
Organo-phosphates	2
Beat knee	3
Bronchitis	3
<b>Total</b>	<b>12 / 80</b>

# Law reform 2001 predictions timeline



Reform	Prediction	Reality
Bereavement damages reform	2002/3	o/s
Fatal injuries compensation assessment	2002/3	o/s
Corporate Manslaughter	2003/4	2008
Costs reform	2003/4	2005 & 2010/11
CRU treatment recoverability	2004	2007
Violence – strict liability	2007/8	o/s

# Predictions 2001 - Injury claims world

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- Public - increased readiness to claim
- C2DE shift to ABC1 – more posh claimants
- Accident intermediaries - change in market
- Shake out of players
  - Solicitors
  - Intermediaries
  - Insurers move in?
- Success for intermediaries who are efficient / ethical
- Solicitors likely to form support networks

- New illness types and claims – situational, industry and process specific
- Lots of “noise” as to in vogue ailments - may have little or no practical impact
- Established illness (deafness, HAVS) – manifesting in existing employments but also in new contexts
- Govt projected law reform – often diluted and delayed
  - Case law impacts are more immediate
- Changes to business models are more predictable as to impact on claims received

## ***“Accessing Compensation – Supporting people who need to trace Employers’ Liability Insurance” - Consultation closed 5 May***

### **Two limbs**

#### **1. Employer’s Liability Tracing Office (ELTO) – Effective April 2011**

- Requiring disclosure of all employing subsidiaries details, to include Employer’s Reference Number (ERN)
- Transferred to an Employer’s Liability Insurance database (ELID)
- Historic policy records on a claim by claim basis

#### **2. Employer’s Liability Insurance Bureau (ELIB)**





- Pay claims from disease victims unable to trace employer’s insurers
  - Funded by current EL premium payers
  - Questions as to scope – for instance just Mesothelioma victims? Quantum, Cut Off dates
- QBE response to consultation...
  - Likelihood of implementation?

- Pleural Plaques
  - England: limited extra-statutory payment - £5000 to approx. 6,500 sufferers
  - Scotland: legislation for full compensation with retrospective effect
- Asymptomatic Asbestosis
  - No general formula but damage must be more than minimal – Beddoes & Ors. v Vintners & Ors.
- EL Trigger litigation
  - “Sustained” or “Contracted” EL wording = Causation or Occurrence
  - Court of Appeal heard in November 2009 – judgment pending
- HSE Asbestos survey
  - British mesothelioma death rate is world’s highest – over 2,000 people a year
  - Peak of mesothelioma deaths yet to come
- Date of knowledge example
  - Abraham v Ireson 2009 High Court
  - Plumber, light exposure 1956 – 1965
  - No liability = No knowledge prior to Newhouse and Thompson....

- Quantum v Baker – Court of Appeal
- Noise exposure 1971 – 1991 – below 90 but above 85 dB(A) to 1989 then using protection to attenuate
- Risk of injury from 85 dB(A) known from 1973
- Practical to issue hearing protection from 1978
- Liable
  - Section 29 Factories Act 1961 – unsafe place of work, not a test of reasonable foreseeability
  - Defendant had actual knowledge from 1983
  - Knitting industry generally from 1978
- Supreme Court – Appeal 23 November 2010

- Trend to more robust judgments – both employees and members of the public
- Especially in public interest scenarios - the Compensation Act in action?
- Cole v Davis-Gilbert & Others – (2007) Court of Appeal
  - Maypole hole – Community spirit - Blameless claimant but no liability
- Perry & Perry v Harris (2008) - Court of Appeal
  - Bouncy castle – Parental inattention – No duty of constant supervision
- Poppleton v Trustees of the PYAC (2008) - Court of Appeal
  - Climbing wall – Obvious risk – No duty to warn of that risk
- Parker v TUI (2009) – Court of Appeal
  - Tobogganing – Simple warnings given – Injury doesn't necessarily mean blame
- Hopps v MM Ltd & MOD (2009) – Court of Appeal
  - Contractor in Iraq – Reconstructing infrastructure a desirable activity
- Uren v Corporate Leisure UK Ltd & MOD (2010) – High Court
  - It's a Knock Out – Risk of sporting activities – Balance the benefits and risks

# Legal Costs after Jackson

Recommendation	Impact - Defence Perspective	Implementation Mechanism	Potential Implementation Date	Inflation Direction
Fixed Costs in personal injury Fast Track (claims up to £25,000). Model 1 with Success Fees; model 2 without. Pre-trial costs in non-personal injury cases capped at £12,000.	Model 1 could be implemented first featuring success fees for Motor, EL and PL of 12.5%, 25% and 45% respectively. Greater certainty as to the eventual liability and aid accurate reserving.	CPR	Q4 2010	
Part 36 – where a defendant fails to beat a claimant offer - 10% enhancement of damages.	An inflationary driver on damages spend.	CPR	Q4 2010	
Controls on the costs of litigation – encouraging ADR, robust approach to costs management, controls on the costs of disclosure and witness evidence.	Should help control the costs of litigation.	CPR and Practice Direction	Q4 2010	
A working party to consider a “transparent and neutral” calibration of judicial personal injury damages.	Universal adoption of Claims Outcome Advisor. Should increase certainty, reducing quantum arguments and speeding up settlement.	Stakeholder Working party	Q3 2011	

# Legal Costs after Jackson



Recommendation	Impact - Defence Perspective	Implementation Mechanism	Potential Implementation Date	Inflation Direction
Success Fee uplift to be irrecoverable from paying party.	A significant saving on claims costs. The fallback option is also favourable.	Legislation	Q2 2012	
ATE insurance premium to be irrecoverable from paying party	Significant saving on costs. ATE premiums are often set at a substantial proportion of a claim's full value.	Legislation	Q2 2012	
Judicial valuation of compensation for Pain Suffering and Loss of Amenity to be increased by 10%.	An inflation driver	CPR - in tandem with legislation on SFs and ATE	Q2 2012	
Fixed costs without success fees (model 2). Indemnity Principle to be replaced by Qualified One Way Costs Shifting (Personal Injury litigation only.)	Fixed costs represent a saving on current costs levels. Successful defendants unable to recover costs from claimants who lose/abandon litigated claims. Not a significant financial offset.	CPR – in tandem with legislation on SFs and ATE	Q2 2012	
Encouraging greater take-up of BTE insurance (but not compulsory)	Could facilitate the bringing of claims and so lead to an increase in numbers.	None required	Ongoing	

# Corporate Manslaughter – Sentencing Guidelines

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- Applicable to all relevant sentencing after 15 February 2010
- Percentage of turnover approach not implemented
- Fines for CM seldom less than £500,000
- Fines in respect of lesser charges relating to fatalities - £100,000 plus
- The resources of the defendant are relevant and will be taken in to account
- Publicity Orders

## Reforms to civil justice system – “Anglicisation lite”

- Specialist Personal Injury Sheriff Court
- Court of Session minimum claim value of £150,000
- Creation of District Judges
- Retain juries in personal injury cases and extend this to the specialist court
- The introduction of compulsory pre-action protocols
- Formalised and binding case management procedures
- Encouragement of mediation and other forms of ADR
- Revised rules on offers of settlement akin to English Part 36

- Insurance as an alternative revenue stream
- Examples
  - Fire Brigade charges
  - Compensation for workplace victims of criminal injury
  - Refreshed CRU/NHS benefits charges
  - Absence of Govt funding for new initiatives

- “Damages for Late Payment and the Insurer's Duty of Good Faith”
- Consultation closes 24 June
- Current position in England – insurers not liable – Sprung v Royal Insurance
- Proposals
  - Insurers’ primary contractual duty should be to pay valid claims!
  - If an insurer acts in bad faith in a way that causes foreseeable loss to the policyholder damages should be available as a remedy (in addition to paying the claim)
  - Breach of this duty compensable in damages re foreseeable loss, distress, inconvenience
  - Breach of duty can occur by unjustifiable delay in payment or in wrongful repudiation
  - Mutual duties of good faith (insurer and insured) underpin the insurance bargain
  - The duty of good faith should be non-excludable in contract
- This would align the law to the approach in other jurisdictions

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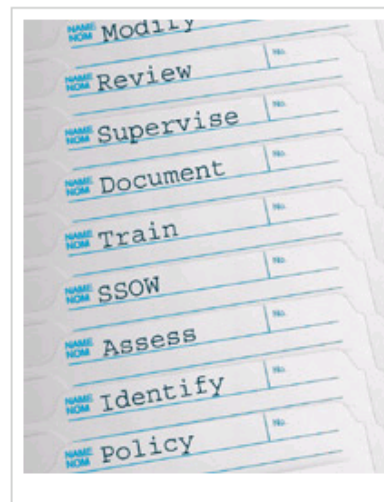
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**Thank you**

