18 September 2015

Personal Injury Brief

Welcome to the first edition of the newly named Brief, formerly published as Liability Brief.

Innovation of insurance and legal services is of great importance to Kennedys. Understanding the way our clients do business is central to our core principles. To achieve that, it is, of course, vital to stay abreast of developments and review the power they may have to reshape the industry. It is also necessary for Kennedys to adapt and grow to help meet the needs of our clients.

With these factors in mind, we are delighted to launch the rebadged Brief. Whilst retaining a personal injury focus, it reflects the growth in services we now offer - including, in particular, in the travel and product liability arenas.

Headlines in this edition include:

- Ministry of Justice calls for evidence about the success of MedCo portal
- AXA publishes case studies in the fight against fraud
- Further increases in court fees
- Civil courts structure review
- New bill of costs consultation
- First fine issued by claims management regulator over nuisance calls
- Two consultations for clinical negligence claims to bring in line with Jackson.

Please see our market insights article for further details.

As always, we hope you enjoy reading this edition and welcome your feedback.

Richard West
Head of Liability
**Market insights**

A summary of key developments including fraud, civil justice reform, proposed reforms to clinical negligence claims and enforcement of rogue claims management companies.

**Weapon against fraud: AXA fight on fraud: fundamental dishonesty**

AXA Insurance has announced success in two fraudulent injury claims. Following investigation for fraud, one case resulted in a finding of fundamental dishonesty (and was subsequently withdrawn with court costs awarded in the insurer’s favour) and the second case ended with a prison sentence.

AXA’s approach shows how a proactive strategy can yield positive results. The outcome reflects the general approach taken by the courts to be alive to making such findings where the final evidential picture in a case permits it - whether pleaded or otherwise. If sufficient evidence allows explicit allegations of fraud to be made in a defence, doing so will set the agenda for the litigation.

The reference to fundamental dishonesty in both the Civil Procedure Rules and legislation appears to have assured both the courts and defendants that, where any doubts lingered, claims fraud does exist and can and should be dealt with.

In a related step, the Insurance Fraud TaskForce is looking to engage with wider stakeholders about potential recommendations made by the TaskForce. Two roundtable events are due to take place on 23 September 2015 and next month.

**Court fees: further increases**

The Government has confirmed that it will introduce enhanced fees in possession claims and general applications in civil proceedings. Despite the majority of consultation responses objecting to the proposals, the policy (when implemented) will mean increasing the fee for uncontested and contested general applications by £50 and £100, respectively.

The Government is also proposing to increase the maximum fee for money claims to £20,000 (subject to further views sought). Personal injury claims will be excluded from the higher cap, with the maximum court fee remaining £10,000 (as announced on 9 March 2015). The revenue sought from such increases aims to raise an extra £120m a year to run the court system.

**Bill of costs consultation**

Pursuant to the Jackson Report, Alexander Hutton QC is leading the charge on the new bill of costs project, ahead of the planned Practice Direction due to come into force from the start of October 2015. This will enable parties to use the new bill of costs in cases in the Senior Courts Costs Office instead of the existing model. Comments on the draft new bill of costs are sought by 18 September 2015.
From an insurer’s perspective, the new bill of costs is the long-awaited tool to give proper effect to the costs management regime. An instant comparison between incurred and estimated costs for all phases will be possible, with challenges focused in future upon incurred costs and any areas where the estimated costs exceed those approved without good reason.

Getting the right result at the costs case management conference will become even more important, as this will effectively determine the level of costs likely to be recovered. The indications are that paying parties will require ‘good reason’ to argue that approved costs should be reduced, just as receiving parties will struggle to maintain claims in excess of the approved costs.

Courts structure review

Lord Justice Briggs has been asked to carry out an urgent review of the structure of the courts. The review will consider how to deal with budget cuts, an increase in litigants in person and the proposed closure of some county courts. It will also review the boundaries between the civil courts and the family court, tribunal services and other private providers of civil dispute resolution services. His interim report is due by the end of 2015.

First fine issued against rogue claims management company

The Hearing Clinic has been fined £220,000 by the Claims Management Regulator (based at the Ministry of Justice (MoJ)) following complaints from members of the public who have received speculative calls about claims for noise induced hearing loss. The MoJ said that the firm has made “millions of nuisance calls” and, in addition to the fine, has received additional conditions including restrictions on calling numbers registered on the telephone preference service and using data from third-party companies. New figures also show that 105 claims firms have had their licences removed since 2014.

Clinical negligence: double whammy of reform

The MoJ is seeking to review the current exemption of allowing after the event (ATE) recoverability for expert reports in clinical negligence claims. Abolishing recoverability would bring this type of claim in line with most other injury claims. The review is linked to the announcement made by the Department of Health (DoH) that it intends to review the possible introduction of fixed recoverable costs (FRCs) in clinical negligence cases valued up to £250,000 in October 2016. The NHS Litigation Authority has estimated that it could save around £80m a year if FRCs are introduced for claims up to £100,000. The DoH is expected to launch a formal consultation in November 2015.

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Case reviews

Latest decisions September 2015
A round up of recent and anticipated court decisions raising issues relating to the duty of care for a canoeing accident, fraud, future loss of earning capacity, occupiers’ liability and vicarious liability for intentional torts.

Duty of care: canoeing accident
Wall v British Canoe Union [30.07.15]

Stephen Wall died in a canoeing accident on 2 January 2012. His widow brought a claim against the UK governing body for canoeing. She alleged that, in preparing to undertake the trip, the deceased had relied on the description and guidance for navigating a particular weir in a guide produced by the Defendant. His Honour Judge Lopez struck out the Claimant’s Particulars of Claim as disclosing no reasonable grounds for bringing the claim. There was no relationship of proximity between the deceased and the Defendant such as to make it fair, just and reasonable to impose a duty of care. The Claimant was ordered to pay the Defendant’s costs. Where a claimant’s claim had been struck out, qualified one-way costs shifting did not apply.

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Fraud: Supreme Court to decide whether settlement can be set aside
Hayward v Zurich Insurance Company Ltd [31.03.15]

On 28 July 2015 the Supreme Court granted the Defendant permission to appeal against the Court of Appeal decision. The Claimant brought a claim arising from an injury at work. The defence alleged that the Claimant was exaggerating his injuries. Just before trial, the insurers settled the claim. Two years later the Claimant’s neighbours gave statements confirming their belief that he had recovered from his injuries a year before the settlement. The Court of Appeal held that the settlement stood. By pleading fraud the insurers had shown that they believed that the Claimant’s statements of case were untrue. They had chosen not to have that tested at trial. It therefore followed that they had settled the claim at a reduced level with their “eyes wide open”.

View our case review of the Court of Appeal decision:
http://www.kennedyslaw.com/casereview/fraud-setting-aside-settlement/

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Future loss of earning capacity: multiplier or lump sum?
Billett v Ministry of Defence [23.07.15]

The Claimant claimed that, as a result of exposure to cold weather during his military service, he sustained a minor non-freezing cold injury to his feet. Initially following the injury the Claimant was downgraded. He was subsequently upgraded
to ‘Medically Fully Deployable’ anywhere in the world, served a tour of Afghanistan and left the army in 2011. He then commenced new employment and continued in that employment to the date of trial. The Court of Appeal held that the trial Judge had been entitled to conclude that the Claimant was disabled. However, the Judge’s assessment of future loss of earning capacity, based on the Ogden Tables, was incorrect. The appropriate approach was a general assessment in accordance with Smith v Manchester.


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Vicarious liability: Supreme Court to rule on intentional torts
Mohamud v WM Morrison Supermarkets Plc [2014]

The Supreme Court is due to hear the Claimant’s appeal in this case in October 2015, together with the Defendant’s appeal in Cox v Ministry of Justice [2014]. In Mohamud, the Claimant went to the kiosk of a petrol station to ask if he could print some documents off from his USB stick. He was racially abused by the kiosk attendant, so he walked back to his car. The attendant left the kiosk and dragged the Claimant out of his car, assaulting him on the station forecourt in a brutal and unprovoked attack. The Court of Appeal held that whilst the employer had created the opportunity for the employee to carry out the assault, this was not sufficient.

View our feature article on vicarious liability for intentional torts: http://www.kennedyslaw.com/article/vicarious-liability-intentional-torts/

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**Articles**

**Abuse claims: vicarious liability is on the move**

The law surrounding sexual abuse claims, and particularly the circumstances in which vicarious liability may attach, is rapidly changing. Defendant organisations and their insurers cannot afford to be unprepared for the challenging times ahead.


**Recent decisions**
In our full article we review three recent court decisions and consider the implications for defendants and their insurers. Even though the cases are sexual abuse matters, the changes reflected will apply to all employers’ liability situations:

- The first two cases are A v The Trustees of the Watchtower Bible and Tract Society and others [2015] and JL v Bowen and the Scout Association [2015] which provide examples of claimants successfully widening the definition of ‘akin to employment’. JL also sees the Court making an unprecedented decision on the issue of consent.

- The third case, RE v GE [2015] is a refreshing decision for defendants and insurers alike and is an imperative read for any defendant considering raising a limitation defence.

There is no doubt that the courts are widening the circumstances in which an abuser’s role in a defendant organisation can be found to be akin to employment.

Impact

The impact of these decisions is likely to be an increase in the number of civil claims being made in which liability for sexual abuse is alleged. This is compounded by the strong possibility that defendants will begin to see claims brought where there is a more tenuous link between the abuser and the role of ‘employment’.

It would be unwise for defendants, insurers and organisations to ignore the lessons that are there to be learned from these recent judgments. Those organisations that once thought they were not at risk of such a claim, may now be the very organisations that find themselves the subject matter of the next court ruling on vicarious liability.

This area of law is on the move, it is expanding, and we are seeing exceptional judgments being made which will have tremendous implications for defendants.

In our full article we:

- Set out in detail the circumstances in which vicarious liability is likely to apply.

- Give guidance on the types of cases that defendants should still feel confident to contest.

- Provide strategic guidance on the advice that should be provided to groups and organisations working with children.

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**Innovation - the worm that is still turning?**

In 2009, Kennedys' Head of Liability, Richard West wrote an article entitled “Innovation - opening a can of worms” ([http://www.kennedyslaw.com/article/innovation/](http://www.kennedyslaw.com/article/innovation/)). Six years on, Richard revisits some of the ideas that he presented, against a background of the seismic changes that have occurred in the legal market since that time.

In 2009, I argued that lawyers were rather missing the point when suggesting to their clients that as lawyers, they wished to work more closely in a partnership with them in order to solve problems; without realising that they were a part of the problem themselves. The stark reality is that lawyers’ clients regard the instruction of their own lawyers (as one on my partners succinctly describes it) as ‘a distress purchase’. It seems far more likely that the reality is that lawyers’ clients do not want to instruct lawyers at all. Lawyers who have set their pricing models based on ever-increasing claims volumes or greater levels of attritional work are, therefore, rather missing the point, and missing it by some distance.

Further, I hinted that lawyers had begun to understand that they have to demonstrate value and not solely advertise the lowest price when seeking work from clients or prospects. I explore that further below.

In addition, I suggested that lawyers should recognise that their clients were beginning to see legal services as a product rather than a professional service; albeit a product that was required to be professionally delivered. I offered that clients wished to price in that way and rewarded outcomes in the same way as they did when consuming other products in their lives. Why should legal services be any different?

I also proposed that lawyers needed to stop telling clients what they (the lawyers) could do for them, but rather, stop and listen to find out what it was that the clients wanted. How often have lawyers’ clients been subjected to the 30 minutes of “concise” sales pitch, without once being asked what it is that they want?

Finally, tying up some of the points I make above, I advocated that a realistic goal for clients and their lawyers would be to deal with claims and any litigation arising efficiently together. Doing so would then significantly reduce legal spend and, in the right circumstances, clients’ indemnity spend.

**The intervening years**

The intervening years have indeed seen a profound shift in the provision of legal services and their delivery. Back in 2009, we could see that external investment in law firms was coming. That has had mixed success. Had I been writing this article four years ago, I would have said that such investment could be judged as a significant success. That is now much less certain.
The introduction of government driven online claims portals and medical reporting criteria for the vast majority of personal injury cases has forced a reduction in the proportion of those claims heading into litigation.

However, the arrival of that ‘portal-pressure’ on compensators to choose to settle rather than litigate has run in tandem with the creation of alternative business structures by a number of insurers in order to offer an improved, broader service to innocent customers in need of legal support. The corollary of that additional customer support is that the numbers of claims have increased, notwithstanding the general downward pressure that I refer to above. Litigation numbers have broadly stabilised because more claims have been generated to begin with, notwithstanding increased settlement percentages, (particularly in the motor arena).

In my view, therefore, there is still an important role for the defendant lawyer to perform when representing their client.

As I suggest in my opening however, such a role does not mean on insisting on an ever greater number of instructions. Nor does it mean being involved when they should not be needed at all, or basing their pricing on an absurd race to the bottom, which then damages the service to the very customers that their clients are simultaneously seeking to enhance.

In my view, such a role should mean helping clients to reduce their reliance on lawyers rather than increasing their dependence upon them. A successful defendant legal services provider will be one that at the end of a contract, all things being equal and for all of the right reasons, is receiving less work than it was at the beginning.

The way forwards?

It is, more than ever before, vital for lawyers to ensure their clients understand the full picture - based on legal, industry and political developments. In order to provide true value to their clients, lawyers must make their client less reliant on all of their lawyers and encourage greater self-sufficiency. That means predicting and then solving problems for clients before they arise, not afterwards. It means reporting valuable business information in order to help claims teams, underwriters and each client’s business as their trusted advisor.

To become a trusted advisor means, to my mind, being far more than just technically competent on resolving each legal problem that arises, or offering an ever more cheaply provided legal product. Rather, one mark of a modern lawyer means providing clients with unique insights that will allow them to develop their investment plans and recognise opportunities for business areas. A modern lawyer needs to understand and be able to predict the challenges that their clients will face in the years to come and assist them in taking proactive steps to future proof their business.

In order to bring value to their clients’ businesses, lawyers need to accept that they too must seek to create and realise a USP that allows them to offer genuinely
innovative and truly unique service products, many of which may fall well outside of the “traditional”.

Kennedys has designed a range of products to meet that goal and reflect the challenges faced by clients today, of which I am immensely proud. Such tools are based, for instance, on improving risk management, investigation techniques and fraud detection. By equipping clients with the means to make their own legal decisions and to do so sooner, as well as with the capability to learn from and improve their own dispute resolution and litigation processes, we aim to be there for our clients only when they truly need a lawyer. We do not seek, as others do, to create an interdependence that encourages greater numbers of instructions handled at an ever decreasing level of service as a result of ever reducing pricing.

Kennedys has even created a virtual lawyer that does away with our clients’ need to instruct a lawyer at all in many cases. Indeed, I would urge clients to reject those lawyers who do not see themselves as part of the problem.

The execution of innovation and the resultant evolution into a valued, trusted advisor to a client’s business is only a part of the process. Another key is the effective delivery of the product and how that engages and rewards each client. And that reader is a subject for a future article.

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**Portal claims: Kennedys warns government over MedCo ‘gaming’**

The last 12 months have seen significant changes to the RTA Portal, including the introduction of accredited experts for whiplash claims, which may in time pave the way for similar developments throughout the Portal system. We highlight key points from our response to the government’s call for evidence on the operation of MedCo.

The MedCo portal system of commissioning medical reports needs to be transparent and uncomplicated, and eliminate any incentives that encourage those acting for claimants to ‘game’ the process, Kennedys has told the government.

As part of this, the government needs to ensure there is robust auditing of medical reporting organisations (MROs) in tandem with openly available management information of which law firms are instructing which experts.

Such measures should help ensure MedCo achieves its goal of breaking the financial links between solicitors and experts/MROs and, as importantly, provide a source of good-quality experts for claimants.

In our response to the Ministry of Justice’s call for evidence on the operation of MedCo, we have said: “Unfortunately, it may always be difficult to prevent a minority of organisations or individuals from developing unhealthy practices around what they see as an opportunity to exploit a situation and generate revenue.
“This has been proven again and again in the context of whiplash claims. The low-value, high-volume nature of these claims has attracted bad behaviours - hence the ongoing need for robust and flexible regulation and policing.”

Our response predicts that the market will continue to adapt to the introduction of additional safeguards, not least because of the adoption of alternative business structures that can be used to cloud the nature of relationships between different organisations in the supply chain. This is why proper audit procedures and the capture and application of meaningful performance data are vital to the success of MedCo.

Different payment levels depending on the size of MRO and nature of medical expert also risk over-complicating the process and creating incentives that can ultimately affect the quality of report.

Niall Edwards, partner and head of Kennedys’ motor practice, says:

“Until we have proper audit procedures in place and good management information, the danger is that unhealthy behaviours will go unaddressed. It is vital to consider MedCo’s operation against a background of an ongoing desire by claimant firms to maximise the reward for agencies linked to the claims process.

“There is a growing tendency to plead psychological damage in the claim notification form with an indication that agents will be appointed to assess and provide treatment in the absence of a seven-day response. In practice, treatment is often underway - effectively ambushing the defendant and denying an opportunity to respond in a meaningful or fair way and, at the same time, generating an additional level of costs.

“Like any system, the more complicated it is, the greater the risk that ways will be found to undermine its objectives and create undesirable effects. MedCo needs to be kept simple and have a mirrored auditing procedure in place.”

Among the other practical recommendations in our response are:

MROs should be required, when renewing their MedCo registration, to provide information about the number of instructions received from particular firms; law firms should have to keep similar records of who they have instructed;

Claimants should have a choice of three MROs, rather than the current seven, which muddies the selection process too much. The smaller the number of MROs, the easier it is to track the activity between them and claimant firms;

Accredited experts should be registered members of no more than one Tier 1 MRO and one Tier 2 MRO to keep the system sufficiently transparent;

In the desire for additional simplicity, the MoJ should keep in mind the prospect of consolidating Tier 1 and Tier 2 MROs into one tier of MRO only, ensuring the
application of robust criteria across the board; such a consideration should follow after at least one year's of proper management information has been generated; and

The practice of carrying out multiple searches but then only proceeding when certain experts appear needs to be curtailed.

Niall Edwards concludes:

“By taking action now, the Ministry of Justice has shown its intention to ensure MedCo is fit for purpose, and that there is scope to minimise the risk of unhealthy activity.”

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