KENNEDYS

CLAIMS HANDLING LAW AND PRACTICE

A Practitioner's Guide

Third edition

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Claims Handling Law and Practice

A Practitioner's Guide

To Fred and Kieron
with thanks for your wisdom and guidance.

Law is accurate to the date of writing on 1 February 2018.

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Richard West

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Foreword

This is effectively the fourth edition of this book. The first, and altogether much smaller, version was first published in 2000. In almost every way since the turn of the millennium, the legal and insurance world has changed beyond the predictions of all but the most wildly imaginative. The rise of the machine has maintained its trajectory with the continued advance and adjustment of Ministry of Justice (MoJ) online claims portals. A modern online court system is currently being developed by the MoJ with the express intent of allowing parties to litigate cases without necessarily needing a lawyer. Concepts that were science fiction back in 2000 are now a growing reality with the rapid advance of machine learning, predictive analytics and artificial intelligence.

One aspect that has thankfully not changed during the last 18-year period is the vision and drive demonstrated by Kennedys. That drive and vision has resulted in Kennedys now being a global insurance specialist, with (at the time of writing) almost 1,900 staff and 37 offices worldwide. In the months prior to the publication of this book, Kennedys was named 'UK Law Firm of the Year' at The British Legal Awards 2017 and won its second innovations prize for 'Technology Initiative of the Year 2017' at The London Market Awards.

That we have continued to grow successfully is also a result of our Core Principle – to help our clients to only use lawyers when they truly need to do so and to help break the twentieth-century 'addiction' to lawyers, peddled by some of our peers. This book, along with our technological innovations and broader global thought leadership, underpins that Core Principle.

This edition now spans 42 chapters. My colleagues and I have updated chapters covering important areas including road traffic accident and third-party liabilities, catastrophic injury, occupational disease, clinical negligence and professional indemnity. As a result of client demand, we have introduced new chapters on marine, aviation, property and environmental claims, as well as counter-fraud and crisis management. The aim of this book continues to be

to support our clients and claims handlers on a day-to-day basis. It has been written to be both an aide memoire for the experienced and a training aid for the novice. It is our ambition that this edition will prove to be ever more beneficial and empower our readers to use lawyers less.

My thanks to the very large number of expert authors and editors from within Kennedys who have contributed to and promoted the publication of this now not-inconsiderable guide. We continue to welcome any and all suggestions that you may have as to how the book may be improved.

In the meantime, I look forward with genuine fascination to the next few years in the legal and insurance professions. We predict yet further consolidation in the legal sector, alongside the failure of any legal services provider who does not innovate and truly differentiate.

Richard West
Partner, Divisional Head and Head of Innovation
Kennedys

Foreword

(Reproduced from the 2008 edition)

Too often lawyers are guilty of clouding issues whilst attempting to provide explanations. That is something that we try not to do at Kennedys and in many ways I feel this book exemplifies our approach to providing legal services to our clients.

I am sure that all involved in claims have from time to time wished for access to a simple guide to the areas of law with which we most commonly deal, to ideally refer to one book only and not have to trek to a law library or open a number of tomes to find the answer. The practitioners' guide, written by a number of my colleagues at Kennedys, seeks to deliver such a book covering a wide variety of disciplines within one pair of covers.

This user-friendly guide covers fields as diverse as clinical negligence, health and safety, occupiers' liability, child abuse, manual handling, the Road Traffic Act, disease and highways law. In addition, reflecting the trend of insurers to turn to external cost providers to advise on the issue of third party costs, there are two chapters on funding.

The book's aim is to assist claims handlers with those areas of law with which they have to deal on a day-to-day basis. It is an aide memoire for the experienced but also sets out the basics for the novice. Our clients have told us that it is a helpful core text for in-house training.

The authors of this book are all leaders in their own fields but they and I would welcome any and all suggestions that you may have as to how the book may be improved for the fourth edition.

Nick Thomas
Senior Partner
Kennedys

September 2008

Introduction

Here is the latest, expanded edition of a work which I described as "achingly useful" in my introduction last time round.

If anything, that view is held with even greater fervour today, for the law refuses to settle down. On the contrary, vicarious liability, to take one specific example, has broken through earlier judicial constraints and runs amok, flattening hapless defendants.

I would like to say something about the mechanics of claims and how they are managed by the legal system. Within this fine work you will find a distillation of the applicable legal principles. However, we have an amazingly complex set of Court Rules and orders which dictate how those very legal rights and obligations are determined where a dispute arises.

The bible is 'The White Book'. It is indeed white but so complex that it occupies 6,373 pages (with the bulk of text set in minuscule print) and occupies not one book but two. If one were to stand upon the two volumes it is arguable that the Work at Height Regulations 2005 might come into play.

Given that it takes 51 editors to keep the blasted thing up to date you will forgive me if I do not attempt to summarise the contents. However, what I will do is point to a few major movements that every insurer or claims handler needs to be aware of. All are recent shifts.

Compliance with court orders given in a matter and the underlying Rules of Court is of the greatest importance today. In the not too distant past breach would provoke a yawn and a mild slap, if that. No more is that the case. The 2013 Jackson reforms enjoined everyone to comply and to behave.

Take *Gentry v Miller* [2016]. The defendant's insurer sadly dithered with handling a claim that had been issued. This enabled the claimant to secure a judgment in default of the requisite defence not having been delivered when due. The Court of Appeal refused to let the defendant off the hook – despite evidence that the claim

might have been tainted by fraud. Astonishing. The Court made it abundantly clear that it expected insurers, who knew the ropes, to behave in accordance with the standards of lawyers.

Another frightener was *Eaglesham v Mod* [2016] where, in a difficult case for the claimant on liability, he secured a judgment without trial because the defendant had not disclosed key documents despite having been given one last chance to do so. Since the claim was worth arguably £6 million, one can see how exorbitantly expensive slippage can be.

Alternative dispute resolution (ADR) is adored by the most powerful judges within the civil process today. Their view is that, even if a case does not look promising, it is incumbent upon the parties to try and do some sort of deal. It is strange but true to say that judges do not want to try cases. They would much prefer them to be resolved quickly, cheaply and amicably. Reject ADR at your peril and do not think that if ultimately your stance was justified, as where the other side collapses at court, you will be lauded. More likely a costs sanction will be applied against you.

One welcome and evolving concept is proportionality. It is a matter of common sense that one ought to pursue a claim at a cost and in a manner commensurate with value. That wisdom has at last been enshrined in the Rules and should transform litigation activity. Quite how one actually arrives at a proportionate sum is still, as I write on a wet Sunday in January 2018, elusive. This is a bit of a blow since the new test has been with us since Easter 2013.

The hardest pill to swallow is the obligation to be nice and friendly to your opponent. Parties must cooperate and seek to agree as much as possible. Reasonable requests for more time should be granted. Cheap, technical challenges are now taboo. Litigation is not what it was.

Those are absolute principles which the reader of an earlier edition of this fine book would snigger at. Trust me, they have arrived and, like you and claims, are not going away.

Dominic Regan
Professor of Law and adviser to Lord Justice Jackson

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