

Update

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Damages for late payment: Section 13A of the Insurance Act 2015

Ben Crook and Neil Beresford are holding a Breakfast Briefing on Wednesday 26 April 2017 to highlight for insurers the issues arising and practical steps needed in advance of the introduction of a new right for insured's to claim damages from insurers for late payment from 7 May 2017.

Why is this change significant?

From 7 May 2017, insurers and reinsurers who do not investigate and pay valid claims "in a reasonable time" may be obliged to pay damages to their (re)insured. That is damages, in addition to the insured's valid claim and interest. An award of damages in addition to the claim and interest could mean insurers are obliged to pay more than policy limits. There will also be reputational risk for the insurer of an adverse finding. This is a significant change to insurance law and we expect property and liability insurers in particular will be taking note.

How is this change made?

This change in the law is made by insertion of Section 13A into the Insurance Act 2015 and comes into force on 7 May 2017. Section 13A incorporates into every contract of insurance and reinsurance an implied term such that, following a claim, the (re)insurer must pay sums due under the policy/contract "within a reasonable time". If they do not, an insured can claim for damages caused by that breach of contract. It reads: "It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time."

How can an insurer avoid liability for damages under the new rule?

To avoid having to pay damages an insurer must either:

- pay any sums due "in a reasonable time"; or
- if the claim is disputed, handle the claim in a reasonable way.

What is a "reasonable time" and what is required to show a claim has been handled in a reasonable way?

While there is guidance as to the topics to be considered, the Act does not specify what would qualify as a reasonable time for payment of a claim, nor does it specify what would constitute reasonable grounds for disputing a claim

With this in mind, at the Breakfast Briefing we will be considering with you:

- the latest judicial comments as to what the Court should consider "reasonable" in these circumstances and guidance that can be inferred from the experiences in other jurisdictions;
- the types of policies, claims and insureds who are more likely to give rise to such claims;
- practical steps insurers should consider to mitigate the risks (including how to contract out of the change for non-consumer policies); and
- the time limits for such late payment damages claims to be brought by an insured;
- how, for non-consumer policies, insurers can contract out of the new rule.

The Breakfast Briefing will be on Wednesday 26 April 2017.



Wilkes v DePuy (2016) – QBD departs from previous authorities on “Defect” claims under the Consumer Protection Act 1987 and confirms no requirement of absolute safety in all circumstances

Mr Justice Hickinbottom’s seminal decision in *Wilkes v DePuy* (2016) EWHC 3096 (QB) marks a substantial departure from Burton J’s controversial approach to “defect” under section 3 of the Consumer Protection Act 1987 in *A v National Blood Authority* (2001) 3 All E.R. 289.

The decision provides clarity on the circumstances which may be taken into account when assessing the level of safety that persons are generally entitled to expect. Crucially, it confirms that there is no requirement for absolute safety in all circumstances and will provide useful ammunition when defending many product liability claims.

Background

Mr Wilkes received a total hip replacement in January 2007. The prosthesis, manufactured by DePuy, comprised of a steel femoral stem connected to a metal femoral head. In January 2010, only three years after implantation, the prosthesis suffered a fatigue fracture at a grooved area on the neck of the stem requiring Mr Wilkes to undergo replacement surgery.

Mr Wilkes brought a claim against DePuy in negligence and under the 1987 Act. Whether Mr Wilkes could properly claim under the 1987 Act was determined by way of a preliminary issue:

- Mr Wilkes contended that the product contained a “defect” as defined in s3 of the 1987 Act. He alleged that the design, in particular the presence of the groove, made it susceptible to failure which should have been eliminated by adopting a different design. He argued that the groove was unnecessary for connecting the metal femoral head, that it created an unsafe stress concentration and he was entitled to expect that there would be no risk of fatigue fracture in the prosthesis.

- DePuy denied that the stem was defective as fatigue fracture of the femoral stem is a rare but recognised risk. An express warning was given in the instructions for use provided with the prosthesis to the surgeon. The groove provided a considerable benefit as it allowed the same stem to be used with both ceramic and metal femoral heads. The prosthesis had received UK and European regulatory approval, been tested to a level in excess of the relevant British Standards and been given a CE marking.

The Court held that there was no “defect” in the product and Mr Wilkes could not therefore bring a claim against DePuy under the 1987 Act.

Approach to the 1987 Act

Under s3 (1) of the 1987 Act there is a “defect” in the product if its safety is “not such as persons generally are entitled to expect”. In a departure to the approach adopted in *A v National Blood Authority*, the Court held that the focus must first be on whether the product suffered from a “defect” and not on identifying “the harmful characteristic which caused the injury”.

The latter circular approach was rejected by the Court as it prematurely considered the issue of causation before properly identifying the defect. The Court also confirmed that the test as to the level of safety is objective. The level of safety persons “generally are entitled to expect” is not what a person or persons actually expect or generally expect, but what, as a matter of law, they are entitled to expect.

The Court rejected the approach adopted in *A v National Blood Authority* which considered the “legitimate expectation” of persons generally in dealing with this question. This was held to be an “unnecessary and unhelpful gloss on the Act”.



Circumstances to be taken into account

Pursuant to s3 (2) the 1987 Act “all the circumstances shall be taken into account” in determining “*what persons generally are entitled to expect in relation to a product*”. The Court confirmed there is no restriction on the considerations that may be taken into account and a flexible approach is required. The relevant circumstances and the weight to be given to each will vary from case to case depending on the particular facts.

Some of the key points arising in *Wilkes v DePuy* when considering the appropriate level of safety of a product are as follows:

1. The rigid categorisation of products into “standard” (when the product performs as the producer intended) or “non-standard” (when it does not perform in that manner) adopted in *A v National Blood Authority* is “*unnecessary and undesirable*” and “*positively unhelpful and potentially dangerous*”. Following that approach is too rigid as it means that a risk-benefit analysis cannot be considered for “non-standard” products.
2. A product’s risk-benefit balance, including the issue of cost in appropriate cases, is a circumstance that can be taken into account under the 1987 Act. The Court did however exercise some caution. On the one hand the 1987 Act, in imposing liability without fault on the part of the producer, focuses on the product rather than the acts or omissions of the producer.

On the other, conducting a risk-benefit analysis will inevitably involve consideration of the practicability of the producer adopting a different design. As such, the Court held that “*detailed consideration*” of whether a risk is avoidable “*is unlikely to be fruitful*”, but “*the ease and extent to which a risk can be eliminated or mitigated may be a circumstance that bears upon the issue of the level of safety that the public is generally entitled to expect*”.

This view again runs contrary to that which was expressed in *A v National Blood Authority*. At the same time, the Court also confirmed that the latter part of s3 (2) of the 1987 Act means that “*the fact that a safer design can be envisaged does not mean that a current product is defective*”. Being able to eliminate one risk in a design does not necessarily make it defective as it may “*result in disbenefits that would outweigh the benefits*”.

3. Compliance with appropriate mandatory standards and the grant of regulatory approval are relevant circumstances to be taken into account. Whilst compliance did not provide a complete defence to a claim, in an appropriate case it would be “*powerful evidence*” of meeting the required level of safety under the 1987 Act and “*it may be challenging*” for a claimant to prove that a higher level of safety is required. Conformance with a manufacturer’s own specification and relevant standards could also be a relevant circumstance in an appropriate case.
4. Any warnings provided with the product will be a relevant circumstance under the 1987 Act.

Conclusions

Mr Justice Hickinbottom concluded that the loading to which the stem was exposed was clearly greater than it could withstand, and for which it had been tested in accordance with the relevant British Standard, but this was the result of “*a constellation of factors, each variable, which came together in a manner such that the neck of the stem fractured*”. The decision provides welcome clarification as to the correct formulation of “*defect*” under the 1987 Act, following the much criticised decision in *A v National Blood Authority*.

It accepts that the risk a product may cause injury may be outweighed by its benefits, even if that risk could have been eliminated by adopting a different design. The decision should also deter speculative claims, particularly when the product has obtained regulatory approval or has met relevant standards.

We will discuss the legal and practical issues arising from the decision in more detail in our upcoming breakfast seminar on 17 May 2017.



Liability insurance of drones under household and commercial policies

Drone use is on the rise. Private individuals and commercial companies are finding new and varied applications for the technology, from Amazon's 'flying warehouse' to Lady Gaga's drone-propelled American flag at the Superbowl.

Analysts have estimated that, by 2022, there will be a global market of \$90bn for drone related business. The affordability and lack of regulation regarding drone use gives rise to new and untested issues for insurers.

Potential Legal Liabilities

Drone users have broadly the same types of legal liabilities as the operators of conventional aircraft: the risk of first party property damage to the drone or its equipment, third party property damage and personal injury to the drone operator or a third party.

Commercial operators also risk incurring liabilities in respect of employees or independent contractors working in the vicinity of the drone. In our forthcoming Breakfast Briefing we will consider the extent to which those liabilities may be covered by existing household and commercial policies.

Household Policies

The liability sections of household policies commonly exclude cover for liability arising from the use of "motorised vehicles" or "aircraft". However, in many policies, these terms are undefined. They are potentially ambiguous when considered in the context of a drone.

One standard wording excludes liability arising from "owning or using any Motorised Vehicle (or) aircraft...intended for the carriage of people". The wording does not define the term 'aircraft' and its definition of Motorised Vehicle excludes "any mechanically propelled vehicle...other than: electrically powered toys (and) model planes...not intended for the carriage of people".

Might a drone qualify as an 'aircraft' or a 'Motorised Vehicle', or is it best described as an 'electrically powered toy'? Might the outcome depend upon the size and type of drone in question, or the purpose of its use?

Commercial Policies

Commercial policies also tend to exclude cover for losses arising from the use of "motorised vehicles" or "aircraft". This has prompted an influx of niche insurance companies dedicated to providing drone specific-policies, onto the market.

What next?

Established liability insurers may need to consider their existing wordings and their risk appetite for insuring drones. The government has begun a consultation on insurance requirements for drones, which will likely have a major impact in this area.

We look forward to discussing these issues in greater detail at our upcoming breakfast briefing on Wednesday 14 June 2017.



News update: Product liability and recall

Liability for defective products

Following the publication of an Evaluation and Fitness Check Roadmap in September 2016, a European Commission consultation seeks views on the application and performance of Directive 85/374 on the liability for defective products. The Directive, in force since 1985, seeks to harmonise the law of member states relating to defective products, imposing strict liability on the producers of defective products.

The purpose of the consultation is to determine whether the Directive is still fit for purpose. To that end, the Commission has posed three online questionnaires seeking, respectively, the views of producers, consumers and public authorities.

In particular, the consultation asks:

- “whether and to what extent the Product Liability Directive meets its objectives of guaranteeing at EU level the liability without fault of the producer for damage caused by a defective product;
- whether it still corresponds to stakeholders’ needs;
- if the Product Liability Directive is fit-for-purpose with regards to new technological developments such as the Internet of Things and autonomous systems.”

Comments are to be submitted by **26 April 2017**.

United Kingdom

Claimant law firm, Marcus Sinclair has applied for a group litigation order (GLO) to bring a case on behalf of c.10,000 British VW car owners. Other firms have been invited to join the action. The Claimants have alleged that:

1. the VW Group misled consumers by claiming that the affected vehicles complied with manufacturing and testing regulations;
2. the vehicles were fitted with a software algorithm that artificially lowered the level of NOx emissions during environmental testing; and
3. as a result of this deceit, consumers who purchased an affected vehicle are entitled to compensation for their loss.

VW: An update on consumer claims

VW faces numerous legal actions relating to the emissions scandal. In addition to several regulatory and criminal actions being pursued by governments in various jurisdictions, VW faces claims from consumers, dealers, finance houses and investors. Below is a brief update on the status of some of the consumer class actions that have been filed:

United States

In February 2016, attorneys on behalf of consumers filed proposed class action suits in the District Court in California alleging VW engaged in widespread fraud in marketing its vehicles. Several class actions were consolidated and, on 25 October 2016, a California judge gave final approval for a USD 14.7 billion settlement with consumers and the federal government. Car owners will be able to either sell their cars back to VW at a price pre-scandal or obtain a free fix from VW. In addition, owners will also be able to claim compensation of between USD 5,000 and USD 10,000. In December 2016 an agreement in principle was reached regarding 3 litre engine vehicles. This deal was approved by the courts in February 2017.

It is alleged that the VW Group committed the tort of deceit (which is a type of fraudulent misrepresentation), and breached the Consumer Credit Act 1974 (where financing was provided by VW for the car purchase). Claims will likely include financial losses due to the affected cars depreciating in value and/or incurring higher running costs than those advertised.

The GLO application has been adjourned until October 2017:

Another claimant law firm, Leigh Day, intends to seek a separate GLO for consumers claiming under the Consumer Protection from Unfair Trading Regulations 2008 (CPUT), which makes it unlawful for businesses to engage in various kinds of “prohibited practice”. Consumers would not need to prove that they have suffered financial loss.



Belgium

In June 2016, the consumer organisation, Test-Aankoop/ Test-Achat started a collective action on behalf of over 7000 consumers against VW and the Belgian distributor, alleging fraudulent practices and demanding full refunds without return of the vehicles. Only vehicles purchased after 1 September 2014 (when the relevant law to bring a class action came in force) can be included in the claim. In January 2017, the Court decided to postpone the pleadings on the admissibility of the collective action brought by Test-Achats against Volkswagen.

Ireland

Law firms are representing hundreds of clients and have filed several claims for breach of contract under the Sale of Goods and Supply of Services Act. The claims state that they have suffered loss, damage, inconvenience and expense. The claimants also demand an assessment of vehicles before and after the refit.

Canada

Class actions were filed in the Ontario Superior Court and the Superior Court of Quebec alleging that VW wrongfully fixed admissions tests and misled consumers into buying certain VW vehicles. It argued that "by manufacturing, testing, distributing and selling affected vehicles with defeat devices that allowed for improper levels of emission, VW violated the common law and legislative standards, was negligent, defrauded its customers, and engaged in unfair competition." On 19 December 2016 it was announced that VW Canada had reached a \$2.1bn settlement deal with drivers in both actions where they will receive compensation and be able to sell their cars back to VW or opt for a repair. The Courts are expected to issue final approval of the settlement in March 2017.

France

We understand that several actions have been attempted. In October 2015, French consumer association CLCV filed a claim for 'aggravated fraud' and disloyal commercial practices but progress has been slow. CLCV also is advising consumers how to bring their own individual claims.

Italy

Italian consumer protection organisation Altroconsumo has succeeded in getting an appeals court in Venice to accept a class action suit against VW. We understand that it is seeking a 15% refund of the affected vehicles.

Spain

The Consumers and Users Organisation (OCU) filed a class action on 22 July 2016 with Madrid's Commercial Court against the Volkswagen-Audi S.A. Group demanding monetary compensation for consumers. The group represents more than 6,500 affected consumers and is seeking repairs and compensation of at least EUR 2,000.

Germany

On 3 January 2017, an internet-based consumer rights group, Myright, brought an action in Germany seeking the repurchase of affected vehicles, rejecting that VW's fix (approved by Germany's federal motor authority, KBA) is sufficient. Myright has filed the case on behalf of a single person but claims that, if successful, it should apply to the owners of all affected cars.

Australia

On 30 October 2015, claimant law firms commenced a class action in the Federal Court of Australia under Australia Consumer Law on the basis that the vehicles purchased by the class were not fit for purpose or free from defects. The class action is seeking a full refund of the purchase price or the diminished value of the vehicle. The proceedings began on 27 November 2015 and a case management hearing took place in December 2016, in which it was decided that the class actions would be scheduled for a stage one trial in the Federal Court of Australia commencing on 30 October 2017.



News update: Property

Floods

With Flood Re in operation for nearly a year, homeowners in flood-risk areas have been provided with some comfort. However, Flood Re does not come without its issues – although it is designed to cover properties in high risk areas of flooding, some properties are excluded, such as certain commercial properties; apartments in blocks of 4 or more properties; buildings split into 3 properties where the freeholder is not resident; buy-to-Let properties; and properties in high-risk areas built after 1 January 2009. This excludes a vast number of properties based on their ownership rather than on the physical risk of flooding.

In December 2016, the British Insurance Brokers' Association (BIBA) announced an insurance scheme that will include flood cover for many commercial premises and let properties in flood risk areas that are ineligible for Flood Re. However, it should be noted that the product is exclusively for BIBA members.

Floods continue to be a problem in the UK. In an attempt to recognise the extent of the risk, the Environment, Food and Rural Affairs Committee (EFRA) published, in October 2016, a report proposing a new model for managing flood risk, which involves setting up a National Floods Commissioner for England, regional flood and coastal boards, and an English Rivers and Coastal Authority. EFRA also seeks a revision of building regulations to provide for the flood proofing of properties and calls for developers to be liable for costs of flooding if they do not comply with planning laws.

News update: Construction

Pre-Action Protocol for Construction and Engineering Disputes, 2nd Edition

November 2016 saw the launch of the revised Pre-Action Protocol for Construction and Engineering Disputes, 2nd Edition (the "Protocol"), jointly prepared by The Technology and Construction Solicitors Association (TeCSA) and The Technology and Construction Bar Association (TECBAR).

The original protocol was introduced in October 2000 (later revised in 2007) in order to try and resolve disputes without litigation so far as possible. Over the years, it was identified by many that the protocol frontloaded costs for the parties and substantially increased the time and cost of proceedings, by requiring parties to carry out work in the protocol phase that would then be duplicated after proceedings were issued.

In line with the overriding principle of the Civil Procedure Rules, the clear emphasis of the new Protocol is for a simpler, more efficient and cost-effective process. To achieve this, the Protocol has been amended so that the parties now need to provide "sufficient" rather than "full" information "for each party to know the outline nature of the other's case". The Protocol also encourages proportionality with the complexity of the case, seeking to avoid costs racking up unnecessarily. This includes modifying the requirements for the Letter of Claim to contain a "brief summary" of the claim; removing the requirement for a detailed Response by the defendant and instead providing for a "brief and proportionate summary... and, if the Defendant intends to make a Counterclaim, a brief summary of the Counterclaim"; broadening the requirement to keep the letter of claim simple and the costs of both sides modest from lower value claims to "many cases, including those of modest value"; confirming that the use of experts is not expected unless "succinct and central" to the claim; removing the previous requirement, following a pre-action meeting, to agree how unresolved issues are defined.

The parties can expressly agree in writing to not comply with the Protocol or agree flexibility for compliance. There is also a new protocol referee procedure, which the parties can agree to utilise for a fee of GBP 3,500 plus VAT, introduced "for the purposes of assisting the parties in participating in and complying with the Protocol".



News update: Cyber

PRA consultation on cyber risk

The PRA recently published a document setting out its concerns and expectations of firms in relation to cyber risk (see CP39/16 “Cyber Insurance Underwriting Risk”). Attached to the consultation is a draft supervisory statement which is split up into three main areas.

(1) Silent cyber risk

The PRA has significant concerns about the loss potential of ‘silent’ cyber risk – the cyber risk inherent in policies insurers underwrite, aside from cover expressly provided for such in cyber insurance policies – and the management of this risk. In particular, the PRA notes that casualty (direct and facultative), marine, aviation and transport (MAT) lines of business are potentially significantly exposed to ‘silent’ cyber losses.

The PRA proposes that firms review how they underwrite risks in order to mitigate the ‘silent’ cyber risk effectively. Various suggestions are made as to how to achieve this, such as: making adequate capital provisions linked with the risk; adjusting the premium to reflect the additional risk and offer explicit cover; introducing robust wording exclusions; attaching specific limits of cover; and offering cyber cover at no extra premium when the board has confirmed that a particular line of business does not carry material ‘silent’ cyber risk and is in line with the stated risk appetite.

(2) Cyber risk strategy and risk appetite

The PRA further proposes that firms establish, and regularly review, strategies from the top down as to how to manage the risk and that firms clearly demonstrate risk appetites. This should all include producing internal management information approved by the board.

(3) Cyber Expertise

The PRA also expects firms to demonstrate that they are committed to understanding and developing their knowledge of cyber insurance risk and to invest in developing cyber risk talent.

Comments on the draft supervisory statement were invited and the PRA will publish their responses soon.

News update: Data Protection

General Data Protection Regulation (GDPR)

Karen Bradley MP, the Secretary of State for Culture, Media and Sport, recently confirmed that the UK will be implementing the General Data Protection Regulation (GDPR), in force from May 2018.

To help businesses prepare for the new regime - which introduces reporting/notification requirements for the first time in the UK and can see businesses fined up to 4% of the company’s worldwide annual turnover for breaches - the Information Commissioner’s Office (ICO) and the EU Article 29 Working Party (WP29) are beginning to publish guidance on how to interpret the GDPR.

In October 2016, the ICO published a new code of practice on privacy notices, titled ‘Privacy notices, transparency and control’ aimed at “all organisations that collect information about people, whether directly or indirectly” providing guidance on: gaining and recording consent; the content of a privacy notice, including how the privacy notice should be written and presented; how to communicate privacy information for individuals. It also provides guidance on complying with Articles 12, 13 and 14 (which relate to the provision of privacy information to data subjects).

The WP29 has also published its first set of guidance (including FAQs) on the GDPR focussing on the following:

- Data portability (the right for data subjects to receive the personal data, which they have provided to a data controller, in a structured, commonly used and machine-readable format, and to transmit that data to another data controller without hindrance)
- Data Protection Officers (when a DPO is required)
- The identification of the lead supervisory authority (where the controller or processor is carrying out the cross-border processing of personal data).

WP29 intends to produce guidance documents on:

- | | |
|---|--|
| – Administrative fines | – Consent |
| – High risk processing and Data Protection Impact Assessments | – Transparency |
| – Certification | – Notification of personal data breaches |
| – Profiling | – Tools for international transfers |



Meet the authors

The topics will be examined in further detail at the breakfast seminars at Clyde & Co's offices on the following dates.

Chairman

**Neil Beresford**

Partner

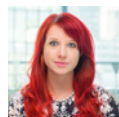
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Liability insurance of drones under household and commercial policies

14 June 2017

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**Damages for late payment:
Section 13A of the Insurance Act 2015**
26 April 2017

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Wilkes v DePuy (2016)
17 May 2017

Presenter

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Attendance is free of charge.

Those wishing to attend should contact: chloe.davies@clydeco.com or mita.mistry@clydeco.com.

If there is a topic you would like to see covered in the next Property and Liability update, please contact: caroline.hedley@clydeco.com.

**Further advice should be taken
before relying on the contents
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