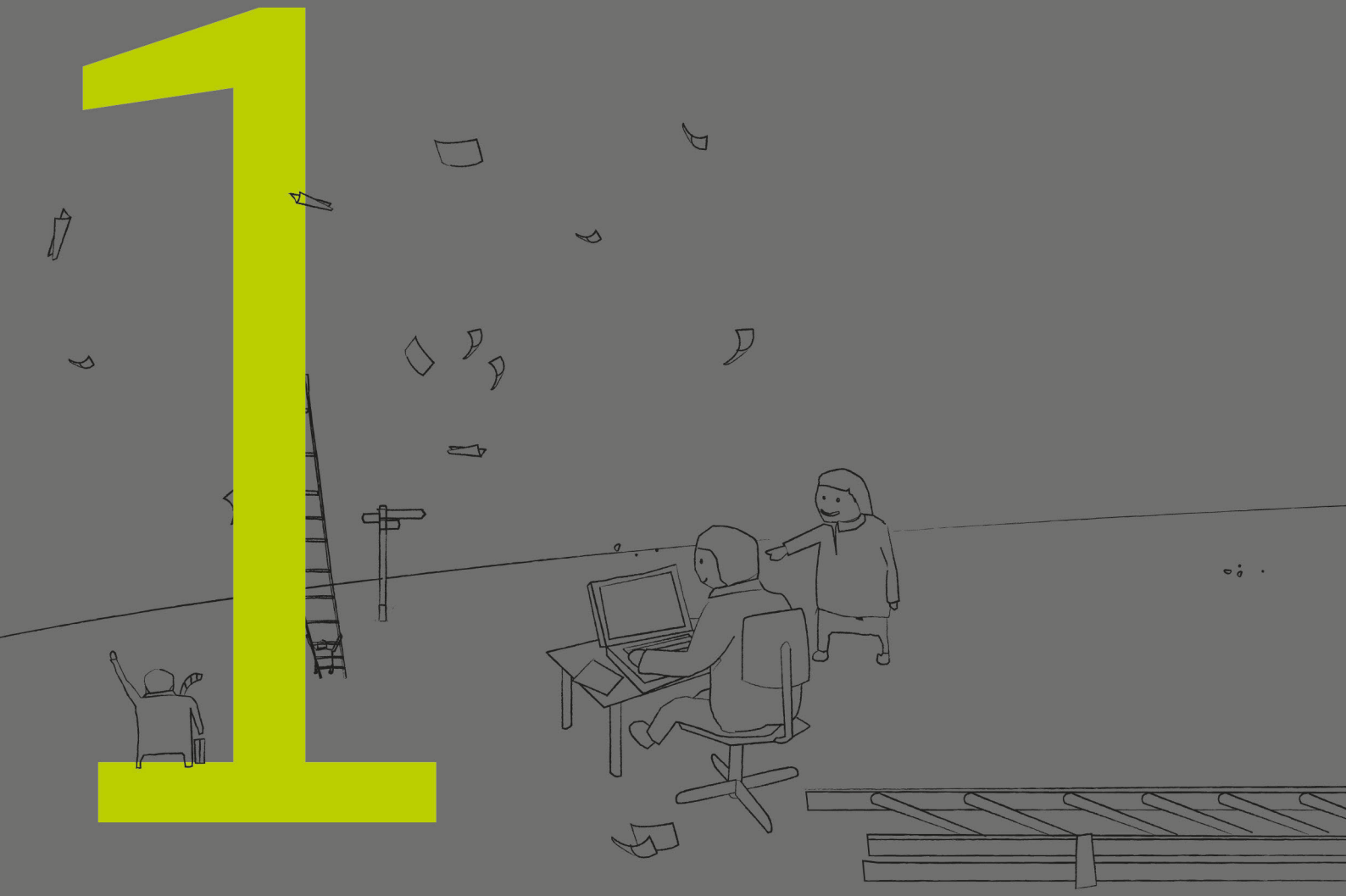
THE CHARTERED INSTITUTE
OF LOSS ADJUSTERS

CH 1 Introduction to the Insurance Industry



INTRODUCTION TO THE INSURANCE INDUSTRY

by

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Introduction

This learning material has been designed with two main concepts in mind:

1. That it is easily understandable
2. That it engages the learner, promoting questions such as why, who and how does this affect me?

The learner could simply read and learn the material, but the concept of adding "Activities" and "Putting it into Practice" is designed to help the learner explore the subject to a greater depth.

Those who adopt a positive, proactive approach will benefit as they will enhance their learning, becoming ever more useful in the workplace; the resulting rewards for this are immense.

There are deliberately no suggested answers to either the Activities or the Putting it into Practice questions. These are set for you to explore.

CILA would like to acknowledge the assistance of Luke Exford, Alison Gamble and Michelle Haynes in the production of this book.

About the Author

Malcolm Hyde BSc (Hons) Dip (Fr) FCII FCILA is the Executive Director of the Chartered Institute of Loss Adjusters. He is a Chartered Loss Adjuster and Chartered Insurance Practitioner. His main loss adjusting experience has been in Property Claims although he has also worked in France on information technology implementation projects. Since 1994 he has been involved in the education and training of Loss Adjusters and considers the passing on of knowledge in a clear and engaging manner to be highly beneficial and rewarding. Malcolm became the Executive Director of the Institute in 2009 and this has provided a further platform to provide learning materials. He co-authored Property Insurance Law & Claims and previously provided the technical approval for a text book produced by the CII.

The author is very grateful to the following people for their contributions and assistance.

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Luke Exford MRICS, FCILA, FUEDI ELAE qualified as a Chartered Quantity Surveyor in 1988 having worked in the construction industry, prior to joining a prominent Loss Adjusters based in London. Luke qualified as a Chartered Loss Adjuster in 1998 and specialises in property and construction losses. Luke has been a representative on Council and a former Chairman of the Property Special Interest Group.

Alison Gamble BA (Hons) has worked in the insurance industry for 15 years in a variety of roles, including claims handling, training and quality management. She has a particular interest in modernising and improving our industry while at the same time retaining traditional standards and technical expertise.

Michelle Haynes BA (Hons) ACII ACILA is a Chartered Loss Adjuster who has worked in the Insurance industry since 2000 and in Loss Adjusting since 2004. Michelle recognised the importance of gaining her chartered status. Firstly she completed an Advanced Diploma in Insurance and then achieved an Associate status with the CII. Michelle then proceeded quickly passing the CILA examinations in under two years before embarking on the Accreditation for Chartered Status. Michelle is keen to encourage others to undertake the examinations and maintain technical competence within the industry, and she was therefore delighted to contribute to this learning material using her knowledge base from her own studies and experience from busy property Loss Adjusting practices.

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RISK AND RISK TRANSFER

1. RISK AND RISK TRANSFER

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Introduction

Risk and risk transfer are at the very heart of insurance.

This section explains what is meant by risk and risk transfer and also considers what risks can be transferred and to whom.

1.1 What is Risk?

Risk is a chance or possibility of danger, loss, injury or some other adverse outcome.

The reality is that everything we do has some risk attached to it. In fact risk is something that frequently prevents us doing things we would like to do. For example, consider a qualified dentist, Anna, who is employed in a dentist's surgery. She considers opening her own surgery but perceives the risk of losses by theft, fire or malicious damage to be too great and therefore decides not to attempt the new venture.

Activity

Make a list of things that you have considered doing but decided the risk was too great.

Some risks prevent us from doing things, but more often we find ways to accept risks. For example, instead of crossing a road we may choose to use a footbridge or subway.

Without taking some risks in life, progress and success would never be achieved. Think of the cricketer batting in the World Cup final. He is bowled a ball that he thinks he could hit for "6" but if he takes that shot he risks being caught out. Taking a risk, he hits the ball and scores the "6". Later when asked about the shot he says, "it was a calculated risk, I knew that it was a risk worth taking".

In the 1600, 1700 and 1800s, merchants took huge risks sailing across the oceans to find new markets, goods and treasures that might make them a fortune. At one time sailors believed they would sail off the edge of the earth, what a huge risk to take!

1.2 Risk Transfer

Having explained what is meant by risk, we can now look at the subject of risk transfer.

Consider Anna the dentist. What might she have done if she had realised that some of the risks associated with her new venture could have been transferred to someone else? Or indeed the merchants, some of whom were unfortunate enough to become shipwrecked rather than finding their fortune. Anna may have decided to take up her venture and the shipwrecked merchants may have been able to recover their losses.

Risk transfer is about recognising a risk and then making arrangements with someone else to either take or share that risk. Risk transfer can often enable us to do things that we did not think possible in the first instance.

Activity

Consider how you share risk with others on an informal basis in your everyday life. For example, you might make an agreement to pick up your friend's child from school in the event that your friend is delayed at work.

Insurance is a form of risk transfer. For example, if Jack were to borrow money to buy a new car there is a risk that he may lose his job and be unable to meet the repayments. However, at the time of borrowing the money, he could transfer all or part of this risk by taking out insurance to cover the repayments should he become unemployed.

Activity

Make a list of ten risks that can be transferred to an Insurance company.

Understandably Insurance companies do not take on risk for free but charge a fee or "premium" for doing so. The amount of premium will be influenced by the likelihood and consequence of the risk occurring. For example, the insurance premium for a sports car driven by an inexperienced driver will be much more than the insurance premium for a family car driven by an experienced driver. It is more likely that the inexperienced driver will have a crash, and damage to a sports car will be more costly to repair.

When an individual decides to transfer a risk by taking out an insurance policy, the Insurance Company will often ask numerous questions about the risk in order to decide whether to accept it and, if yes, the appropriate fee to charge.

Activity

Look at an insurance proposal form and the type of questions asked by the insurance company in order to understand the risk that they are accepting.

As part of the handling of a claim, the Insurance Company may ask you to check that the actual details of the risk match the details that were provided at the proposal stage. For example, Loss Adjusters are often asked to estimate the total value of contents within a home when attending the property to deal with a contents claim. If the actual value of the contents is significantly more than what was suggested by the Policyholder at the proposal stage, the Insurance Company may question whether they would have accepted the risk or charged a higher premium.

It should be noted that most insurance cover is not a legal requirement and we can decide whether or not to take the risk ourselves. For example, Victoria buys a new racing bicycle. She could decide not to insure it, save money and take the risk herself, or she could decide to purchase insurance and allow the Insurance Company to take the risk.

We can therefore adopt different approaches when faced with risk:

1. Decide that the risk prevents us from doing what we had considered
2. Accept the risk or part of the risk ourselves
3. Accept the risk ourselves but take measures to reduce the likelihood and impact
4. Share the risk with others
5. Transfer the risk by purchasing insurance.

Activity

Consider how climate change is influencing the number and type of property claims that are made. Can you identify any risks that Insurance companies may not accept in the future if climate change continues?

Having considered risk transfer, we can now take account of the cost of risk transfer. Insurance Underwriters consider each risk before they agree to accept the risk and, if so, at what price (premium) and on what terms (conditions, excess, exclusion and warranties). Only by understanding the risk presented can an Insurer assess what should be charged to take on the risk.

Activity

Make a list of features of a house, its occupants and location that you believe would mean that the risk of fire, flood, theft and escape of water is lower. Now make a list of features that you would expect would make the risk of the same things higher.

1.3 Key Points to Remember

- Risk is a chance or possibility not a definite outcome. Insurance policies are not intended to cover events that will happen but rather events that could happen.
- The insurance industry exists because individuals and businesses often want to share or transfer risks to another party.
- Insurance companies charge a fee or "premium" to accept risks. They use their experience of claims to determine whether they will accept a risk and the appropriate premium to charge.
- Claims handlers are expected to be aware of the factors that can influence an Insurance company as to whether to accept a risk and what premium to charge. If the actual risk differs from that described at the proposal stage, the Insurance company may be entitled to reduce the amount paid or indeed decline the Policyholder's claim altogether.
- By accepting the risks of many individuals, insurance companies are in effect spreading their non-exposure to risk. If an insurance company accepts Anna's premium for her new dental practice, along with premiums from a further 1,000 dentists, should she suffer an adverse event that is insured, the payment required to be paid to Anna will be made from all the premiums collected. You can see from this example how the insurance company reduces its own exposure by calculating the correct premium.

2 THE PARTIES

2. THE PARTIES

Contents

Introduction

While working in the insurance industry, you will undoubtedly encounter different types of people and organisations. This section lists the main parties that operate within the insurance industry and provides an overview of each role. Parties may have different legal status depending on their role. Consumers are an example of this. This means that Mr Miggins may have the role as a Consumer in his private life and all the protection that this brings. However, as the Chief Executive of Miggins Corporation, he may not have the role of a Consumer.

2.1 The Policyholder (Usually Referred to as the Customer)

The Policyholder or Insured is the party or parties whose interests are insured or covered by the Policy. Policyholders can be individuals, partners, limited companies, public limited companies, trustees, government bodies, local authorities etc.

Certain types of Policyholders (or *Consumers)* have different levels of legal protection in the event of a dispute about their Policy. The FCA defines a *Consumer* as "Any natural

person acting for purposes outside his trade, business or profession". We will look at this subject in more detail when we consider the FCA.

The principle of *Privity of Contract* means that the contract of insurance is between the Policyholder(s) and the Insurers. When handling a claim, you must identify the legal identity and entity of the Policyholder. The two main reasons for this are:

a. Insurable Interest (to be considered later) must be established

b. Payment of claims must be made either to the Policyholder(s) or as directed by the Policyholder(s). Care must be taken here. The promise to indemnify is to the Policyholder and payment to any other party without a clear mandate may result in a dispute and the need to pay out again.

Putting this into practice

Phil Archer takes out an insurance Policy for his home which he owns outright. He marries Jill and Jill's name is added to the deeds of the house. The insurance Policy is then changed by an endorsement to be in the names of Jill and Phil Archer.

Phil decides that a new bathroom and kitchen are required and the Archers obtain a mortgage to pay for the home improvements. The mortgage company therefore have an interest in the property and require that their name is also added to the insurance Policy. The Policy is now in the name of Mr P and Mrs J Archer with the Ambridge Building Society's interest noted as mortgagees.

Activity

Nigel submits a claim for a watch that he broke when he fell off a roof. The claim is covered and is to be paid. Elizabeth, Nigel's wife, telephones you and says she has bought Nigel a replacement watch as a gift and so the money should be paid to her bank account. Decide what you believe you should do and verify the procedure with a senior colleague.

2.2 Insurers/Insurance Companies

Insurers or Insurance companies provide and sell insurance Policies. They accept risks for a premium and make payments, in accordance with Policy cover, for claims associated with those risks. All UK Insurance companies are regulated by the Financial Conduct Authority (FCA).

Activity

Identify the five largest Insurers in the UK or within your jurisdiction and find out the different types of insurance cover they provide. Seek to find out how much money is paid out each year in claims.

2.3 Co-Insurers

Co-Insurers are those who take a share of the risk. This means that the risk may be shared by a number of insurers all taking a percentage of the risk. Claims handling will usually be managed by the Lead Insurers, but care should be taken concerning the agreement in place.

2.4 Insurance Brokers

Insurance Brokers arrange Policies and provide advice to their Clients on insurance matters. Brokers will typically have relationships with a range of Insurance companies and will have a good understanding of the Policies they offer. This enables Insurance Brokers to find the most appropriate Policy for their Client and to negotiate an agreeable price.

A Broker acts for the insured and is remunerated by a fee or commission. The commission is usually referred to as brokerage.

All Insurance Brokers, since January 2005, must be registered with and are regulated by the FCA. Some Brokers are Chartered as they meet the requirements of the Chartered Insurance Institute (CII) who grant this title.

Activity

Look at the website of an Insurance Broker and identify the key benefits that they promote to potential customers.

Consider what role a Broker might play if one of their Clients wishes to make a claim.

2.5 Lloyd's Broker

A Lloyd's Broker is a broker who has been approved by the Council of Lloyd's and is therefore entitled to enter the underwriting room at Lloyd's.

2.6 Lloyd's of London

This is a society that was incorporated under an Act of Parliament in 1871. Lloyd's provide facilities and services such as administration support. In this way Lloyd's of London ensure that the Lloyd's market can trade effectively. Lloyd's as an organisation do not transact insurance business; they provide facilities so that others may do so.

2.7 Underwriter

The Underwriter is the person who accepts risks on behalf of an Insurance company or Lloyd's Syndicate. Additionally the Underwriter will impose certain terms and conditions according to the risk. Within an Insurance company there will be Underwriting Departments that take on this role.

Activity

In the handling of claims you may hear the phrase "referred to Underwriters".

Speak to your colleagues and ask them for examples of claims that have been referred to Underwriters. Find out why they were referred and the outcome.

2.8 Underwriting Agency

An Underwriting Agency in effect underwrites business and places the risk with Insurers or with Lloyd's Underwriters. The Underwriting Agency does not hold the risk but will

frequently be a specialist in niche areas so be able to provide expertise in their particular market.

2.9 Financial Conduct Authority (FCA)

The Financial Services and Markets Act 2000 was amended by the Financial Services Act 2012 leading to the formation of the Financial Conduct Authority (FCA). The FCA regulates the financial services industry in the UK and has three operational objectives:

- To secure an appropriate degree of protection for consumers
- To protect and enhance the integrity of the UK financial system
- To promote effective competition in the interests of consumers.

The FCA has replaced the Financial Services Authority (FSA).

2.10 Financial Ombudsman Service (FOS)

As stated under "Policyholder", Consumers are defined by the FCA, and this definition has relevance when considering the FOS. The FOS is an organisation set up to settle individual complaints between consumers and businesses providing financial services. In effect the FOS will take up the complaint on behalf of the consumer. In general the complaints come from those who fall within the following:

- Private individuals
- Certain businesses with an annual turnover of under £6.5m and either fewer than 50 employees or an annual balance sheet below £5m, although restrictions can apply
- Charities up to prescribed limit
- Trusts up to prescribed limit.

In some circumstances the FOS may take up complaints on behalf of someone who is neither a customer nor a potential customer. This might include an employee covered by a Policy in the name of their employer.

Activity

Find out who handles complaints within your organisation. Ask for their advice on what you should do if a Policyholder says that they intend to complain to the Financial Ombudsman Service.

2.11 Chartered Loss Adjusters

A Chartered Loss Adjuster can be appointed by the Insurer or Lloyd's Underwriter to investigate the cause of a loss, ascertain whether the loss is covered by the insurance Policy and, if so, calculate the financial liability of the Insurer/Underwriter. Loss Adjusters will also frequently oversee the repair or replacement of items if that is the agreed settlement method.

Loss Adjusters may also be appointed by a Policyholder to handle either an uninsured loss or to present and negotiate the claim with an insurer on their behalf. When presenting claims on behalf of a Policyholder, the Loss Adjuster must be registered with the FCA. Registrations can be checked via the FCA website.

2.12 Chartered Institute of Loss Adjusters (CILA)

The Chartered Institute of Loss Adjusters was founded in 1941 and was granted a Royal Charter in 1961. The Royal Charter and the CILA Code of Conduct ensure that the Institute is able to control the professional conduct of its members.

The Chartered Institute of Loss Adjusters elects members as Associates (ACILA) or Fellows (FCILA) once they have completed examinations, have a required level of experience and are able to demonstrate to a panel that they are competent to the required level.

All members are bound by the rules and regulations contained within the CILA Royal Charter, Bye Laws and Code of Conduct to ensure the highest possible standards in claims handling are maintained.

The CILA website can be found by following this link: http://www.cila.co.uk

2.13 Loss Assessors

A Loss Assessor is appointed by a Policyholder to assist in the presentation of their claim. Loss Assessors are regulated by the FCA and are often members of the Institute of Public Loss Assessors.

2.14 British Damage Management Association (BDMA)

This is an association set up to promote the interests of individuals or firms providing damage mitigation services, such as recovery and restoration contractors. They promote best practice in this area and represent their members to the public and the insurance industry.

2.15 Association of British Insurers (ABI)

The ABI represents the collective interests of the UK's insurance industry. The Association speaks out on issues of common interest, helps to inform and participates in debates on public policy issues, and also acts as an advocate for high standards of customer service in the insurance industry. The Association has around 400 companies in membership. Between them, they provide around 90% of domestic insurance services sold in the UK.

2.16 Chartered Insurance Institute (CII)

The CII is a Chartered body representing the interests of all those working in the Insurance Market. It provides examinations and qualifications to demonstrate high levels of competence and strives to promote excellence within insurance.

2.17 European Federation of Loss Adjusting Experts (FUEDI)

The FUEDI aims to promote the independent and impartial profession of loss adjusting in Europe recognising the importance of high standards of professional conduct and competence as well as co-operation amongst professional associations in member states.

2.18 International Federation of Adjusting Associations (IFAA)

The IFAA is the worldwide organisation representing the interests of Loss Adjusting Associations throughout the world.

2.19 British Insurance Brokers Association (BIBA)

The BIBA represents the interests of Insurance Brokers and Insurance intermediaries within Britain and has a membership of around 1,700 regulated firms.

2.20 Other Parties

The foregoing are the principal parties but, within the Insurance world, there are many other important parties, re-insurers, co-insurers and actuaries to name but three.

2.21 Agency

While the law of agency goes beyond the scope of this section, the reader should appreciate that, in certain circumstances, one party may act on behalf of another. This immediately brings two issues to the fore. Firstly, when handling a claim, the handler should be sure of who they are dealing with and in what capacity. Secondly, when acting on behalf of another party, the handler might be creating liabilities for other parties. For example, Delegated Authority is often given to Brokers, Loss Adjusters and Damage Mitigation companies. When acting in such a capacity, the handler may incur liabilities on behalf of the Insurers.

Activity

Check what Delegated Authority the company you work for grant or have from other companies. It is important that you understand the nature and extent of the Delegated Authority. Verify with others what processes are in place to ensure Delegated Authority arrangements are not breached.

2.22 Key Points to Remember

- There are numerous parties that operate within the Insurance industry, each performing a different role and with different interests. If you do not understand the nature of the person you are speaking to or dealing with, find out!
- The majority of Policyholders will be unfamiliar with the different parties that may become involved in the handling of a claim. This can lead to confusion, and sometimes distress, when multiple parties are engaged. You must therefore be able to clearly communicate your role to Policyholders and assist in explaining the role of others.

3

CONTRACT LAW

3. CONTRACT LAW

Contents

First of all it is important to understand that there are two main areas of the law, namely criminal and civil. Criminal law concerns matters that would ordinarily be dealt with by the Police, such as murder, rape, assault and theft. Civil law relates, generally, to matters of dispute between two or more parties. The disputes need not amount to a crime.

For instance, if Sheena walks into a room and accidentally knocks a cup of coffee over Henry, this may be a civil wrong. Sheena may have a liability to Henry but it is unlikely to be considered to be a criminal offence.

However, should Sheena have an argument with Henry and let's say the argument spirals out of control and Sheena throws the coffee over Henry, this may now amount to a criminal wrong.

Generally in insurance we are concerned with civil law, but to complicate matters we sometime use criminal law to provide meaning within our civil context. For instance, theft is an insured Peril and the Theft Act 1968 provides a definition of theft.

As a general principle, English law has developed over centuries through systems known as common law and Equity. This law is not written down as such and in essence comes from established cases. Principles of cases are referred to for guidance and you will see cases in the text in the format *'Mitchell v Branning (2011)'*. Statute law is written law and is referred to by the name of the Act of Parliament.

This section deals with contract law, which falls within the domain of civil law.

An Insurance Policy is a contract and so the Law of Contract is fundamental to Insurance. An understanding of the Law of Contract is important not just to understand the Policy of Insurance but also to understand contractual relationships that affect the Insurance position.

So what is a contract? In effect it is an agreement. Not all agreements are contracts so we have to understand what turns an agreement into a contract. A contract is an agreement made with the intention that it is **legally binding**. Contracts do not have to be in writing. They can be **oral, written or made under seal.**

This section outlines the following:

- Offer, Acceptance and Consideration
- Privity of Contract
- Express and Implied Conditions
- Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999

- Void and Voidable Contracts
- Interpretation of Ambiguous Terms
- Contracts of Utmost Good Faith.

3.1 Offer, Acceptance and Consideration

The essential elements of a contract are:

1. Offer
2. Acceptance
3. Consideration.

1. Offer

An offer must be made, such as "I offer to pay £25 for this object". The offer must be stated clearly and a vague statement will not be held by the Courts to be enforceable. An example of a vague statement that was not upheld was found in the case of *Guthing v Lynn (1831)*. The buyer promised to pay the seller an extra £5 *"if the horse is lucky for me"*. The court decided that this was too vague to be enforceable. No indication was given of what the promise really meant. An example of a clear offer could be that £5 extra will be paid *"if the sale is completed by the 9th June this year"*.

2. Acceptance

Acceptance in simple terms is an agreement to the offer. The acceptance must be identical to the offer and must not try to introduce new terms. For example, in Jones v Daniel (1894) the court held that when the person to whom the offer was made responded by sending out a contract with additional terms this amounted to a counteroffer rather than acceptance.

3. Consideration

Each party to the contract must receive something of value. Consideration is the price paid for the other's promise. It is usually money, but could be something else such as a person's labour or perhaps an item.

Putting this into practice

Jill advertises her car for sale in a local paper. Mick views the car and says "I like it and I will pay you £4,000 for it". ***An offer is made****. Jill says "I accept if you pay £4,500".* ***This does not amount to acceptance as Jill has altered the terms****.*

Mick says "That's too much but I'll pay you £4,250 if you promise the car will be nice to me." ***The reference to the car being nice to Mick is too vague and is not enforceable****. Jill does not accept this offer.*

Mick then says, "Okay, I really like the car. I will offer £4,300". ***This is a clear offer****. Jill says "Yes I accept that".* ***There is now Offer and Acceptance****. The car and the money are the* ***Consideration****.*

Activity

Consider how insurance policies are sold and the steps that are taken to explain and agree the contract from the offer stage through to the acceptance and consideration.

Think about the differences between purchasing an insurance policy via a Broker, direct from an Insurer, over the telephone or via an internet site.

3.2 Privity of Contract

Privity means that only people who are party to the contract can sue or be sued under the contract.

Putting this into practice

Your landlord engages a flooring company to recarpet your flat. After a month, the carpets start to wear very badly. You are unable to take direct action in contract against the flooring company as you are not a party to the contract which is between your landlord and the flooring company.

3.3 Express and Implied Conditions

Express conditions are conditions that are stated in the contract. For example, an Insurance Policy might state that all claims must be reported to the Insurer within a given time frame.

Implied conditions need not be stated in the contract, but as the name suggests are simply implied. Using the example above, reporting a claim by Morse code, carrier pigeon or telepathy would not normally meet the terms of the contract but this does not need to be stated. The implied condition is that reporting a claim means contacting the Insurer by a commonly accepted method of communication, ie telephone, e-mail or letter.

Activity

Consider the appointment of a glazing company to make secure a property that has been broken into. What might be the express conditions and the implied conditions of such a contract?

3.4 Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999

The Courts and Parliament recognise that while we are free to contract with anyone we choose (with some exceptions) the relative bargaining strength of each party is not the same.

Consider your bargaining strength as a private individual when you purchase something from a mobile telephone company. The company will have standard terms and conditions when you take out a “contract phone”. They will not let you change certain terms when making the contract.

The above Acts are intended to protect weaker parties in a contract. If contract terms are deemed to be unfair, the Courts are likely to rule that the terms are unenforceable.

Activity

Examine a contract from a utility supplier, mobile phone company or similar. Read through all the terms. Look for terms that you think may be unfair. Putting yourself in the place of the Court, would you allow these terms?

Your assessment might not be the same as a Judge’s but this activity will highlight how disputes can easily arise in relation to the terms of a contract.

3.5 Void and Voidable Contracts

Void simply means not valid. A contract can be void for various reasons, such as:

a. The contract relates to an illegal activity

b. Fulfilment of the contract is impossible, eg a contract to deliver a star to a customer

c. The contract relates to an event already in the past, eg a contract to admit entry to a show that has already taken place.

Voidable contracts are contracts where one party has the option to void the contract but may choose not to. The option to void a contract occurs frequently in Insurance. For example, there may be a minor breach of a Policy Term so the contract is voidable at Insurer's option. However, Insurers often decide to overlook a minor breach of condition.

Activity

Ask an experienced colleague for examples of where there has been a breach of Policy conditions but the Insurer has agreed not to void the Policy. Ask them to explain the reason for the Insurer's decision in each example.

3.6 Interpretation of Ambiguous Terms

People often complain about the "small print" or the fact that they are unable to understand contracts. While Insurance companies now make strenuous efforts to ensure that Policy wordings (the contract) are clear, there are occasions when there is a dispute about what is actually meant by a term in a Policy.

If a dispute arises concerning a term with more than one possible meaning, the ***contra proferentem*** *rule* is applied. This Latin phrase simply means that where a contract term is ambiguous the meaning that is least advantageous to the writer of the contract will be used.

Putting this into practice

Jane takes out an Insurance Policy. The Policy wording states that telephones are covered against Accidental Damage. Jane drops her mobile phone and as a result it breaks. She attempts to make a claim under the Insurance Policy and is told that "telephones" does not include mobile phones.

If the Policy wording does not clearly state that mobile phones are excluded, it is most likely that, using the contra proferentem rule, any legal decision would be in Jane's favour.

Activity

Review some policy booklets and assess how clear the wordings and definitions are. Look for any ambiguities and consider how the Courts might interpret these on the basis of the ***contra proferentem*** *rule.*

3.7 Contracts of Utmost Good Faith

Insurance Policies are contracts of utmost good faith and so it is important to understand what is meant by this principle. Utmost good faith is covered in more detail later in the course and the following is only an introduction to the subject.

The easiest way to understand this principle is to appreciate the difference between contracts of utmost good faith and what would normally be described as "buyer beware" (caveat emptor). Most contracts, while sometimes subject to statutory requirements, are not of utmost good faith. For example, the sale of a secondhand car is "buyer beware". The buyer can see the car, drive it, have a mechanic look at it etc before purchasing it. The buyer has the opportunity to find out all relevant information. This was demonstrated in the case of *Carter v Boehm (1766)* when the court stated that all material facts needed to be disclosed to an underwriter.

When taking on an insurance risk, an Insurance Company does not have the advantage of being able to inspect each and every risk. For this reason, the principle of utmost good faith arose. It requires the person taking out the insurance to provide to the Insurer all relevant details about the risk. Failure to do so would make the Policy voidable at the Insurer's option.

Putting this into practice

When selling a secondhand car, the current owner does not need to tell the would-be buyer that the car has been modified. However, the owner would have to provide this information to a potential Insurer.

Activity

Make a list of information that you think a potential Insurer would want to know about a house that the owner might not necessarily want to tell a potential purchaser.

3.8 Key Points to Remember

- An Insurance Policy is a contract and as such the law of contract applies.
- The essential elements of a contract are Offer, Acceptance and Consideration.
- Only people who are party to the contract can sue or be sued under the contract.
- Contracts and therefore Insurance Policies can contain both Express and Implied Conditions. Express conditions are stated in the Policy, but implied conditions are not.
- Contract terms that are unfair are unlikely to be enforceable.
- Contracts, including Insurance Policies, can be void or voidable dependent on the circumstances.
- If the wording of a contract is ambiguous, the position that is least advantageous to the writer will be adopted.
- Insurance Policies are contracts of utmost good faith.

4

LEGAL LIABILITY

4. LEGAL LIABILITY

Contents

Introduction

Claims handling can involve handling first party and third party claims. Knowledge of legal liabilities is required for both.

Third party claims can arise when damage or injury have been caused by one party to another. The decision as to whether one party is responsible for the injury or damage will arise if there is a legal liability.

In handling first party claims, it is always necessary to consider whether there is another party responsible for the damage and, if there is, it is likely that you will wish to pursue a claim in "subrogation".

Subrogation as a principle of insurance and a corollary of indemnity is considered later in this book, but it would not be possible to apply the principle of subrogation if the rights of recovery that exist are not at least recognised.

This section provides an insight into how a legal liability will arise. It considers some practical examples when liabilities arise and provides an indication of the nature of the evidence that might be required.

Of course lawyers make a living out of legal disputes and it is not expected that this section will provide you with all the answers but it should give you a start.

Successfully defending a claim being made against your Insured or recognising a potential recovery and succeeding to secure monies due is a rewarding experience. It protects the interest of the insurer and that surely is beneficial to the policyholders.

When exercising subrogation, it should be remembered that the cover provided by the policy may be different from the legal liability that exists. As a result, a full recovery might not always be possible. When handling a recovery, it is important to take this into account and to manage expectations concerning this.

4.1 Legal Liabilities

Legal liability can arise under a number of legal headings:

1. Tort (a civil wrong)

2. Contract (an agreement between two or more parties)
3. Statutory (Acts of Parliament).

4.2 Torts

A tort is a civil wrong. A good way to appreciate a civil wrong is to consider the difference between a civil wrong and a criminal wrong. A criminal wrong might be, for example, a person going to a night club and deliberately kicking another person causing them to suffer a nasty gash in the leg. A civil wrong on the other hand could be where the same injury results but from an accidental incident, for example a visitor to a night club falls on a floor that had been left wet and slippery.

In fact sometimes it is possible to be so careless that a criminal action can also be brought, for example causing death by reckless driving, which can result in a prison sentence. Similarly an employer can be criminally liable for injuries to staff. This criminal liability is beyond this course but it is important to be aware that it exists.

There are a number of torts and these include:

- Negligence
- Nuisance
- The rule in *Rylands v Fletcher (1868)*
- Trespass
- Defamation of character.

Defamation of character is outside of our needs in terms of this course material, but as a matter of interest it concerns situations where a person's character or reputation are maligned. It can however have some impact on what we do, say and communicate when we are dealing with claims. We should not defame someone and therefore the manner in which communications are made should be in contemplation of possible repercussions should someone be defamed.

4.3 Negligence

The first tort we will consider is that of Negligence. The definition of negligence was provided in a case dating back to 1856 in the name of *Blyth v Birmingham Water Works Company (1856)*: *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".*

To succeed in a case where negligence is alleged, it is necessary for the claimant to prove the following three points:

- That a duty of care was owed to the person suffering the loss
- That there was a breach of that duty of care
- That damage resulted from the breach of the duty of care.

Activity

Taking account of the definition of negligence, imagine a plumber had installed a radiator which leaked a few weeks later. List some things that the plumber may have omitted to do, or may have done that perhaps he should not have done. These are the actions or inactions that you would need to consider to establish whether the plumber could be held responsible for the damage arising.

An example of an omission could be, for example, that a plumber fits new water pipes but fails to pressure test them and, as a consequence, after a short period of use the pipes separate resulting in an escape of water. Alternatively, a person might light a bonfire very close to a fence resulting in ignition of the fence. This is something a prudent and reasonable man would not do.

4.4 Duty of Care

This principle relates to the extent of our duties. Effectively, each of us owes a duty of care to anyone who should be in our "reasonable contemplation when we do something or fail to do something that a reasonable person would do".

The question arises therefore as to who should be in our reasonable contemplation at any one time. If a driver is about to drive into the road in London, England does he need to consider the effects of this on someone in Australia? The initial response to this would probably be no. However, imagine that the driver negligently drives into a taxi and injures an Australian tourist. As a result of his injuries, the tourist is unable to return to Australia where he was to perform as a singer. The promoter in Australia loses money as a result of cancelled events. The driver's negligence has resulted in losses around the world. We live in a global market, but would the driver have a music promoter in Australia in their reasonable contemplation at the time of driving into the road, probably not.

A case was heard in court on this topic and from this developed what is referred to as the neighbour test. The case was *Donoghue v Stevenson (1932)* and to put this case into context it should be noted that it is one of the first legal cases most students of English law will learn about.

A crucial part of the decision on this case was a statement made by one of the Law Lords (Lord Atkin) who said that a person should take "... reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. A neighbour is a person so closely connected with and directly affected by (proximate to) my act (or omission) that I should have had them in mind when I committed the act (or omission)".

From this there are two further principles to apply, the first being that the event must be *reasonable foreseeable*, the second being the neighbour test.

The two cases mentioned, *Blyth v Birmingham Water Works Company (1856)* and *Donoghue v Stevenson (1932)*, identify what must be demonstrated to succeed in a case of negligence. *Donoghue v Stevenson (1932)* details to whom a duty of care is owed and *Blyth v Birmingham Water Works Company (1856)* provides the measurement of behaviour to determine whether sufficient care was taken.

4.5 Defences

Defences to negligence include the following:

- Act of God
- *Volenti non fit injuria* (voluntary assumption of the risk)
- Contributory negligence.

Act of God provides a defence in situations where the cause of loss or damage resulted from a "freak of nature" that could not be anticipated or expected. An example of this could be tiles that are blown from a roof (belonging to Bert) causing damage to a neighbour's car.

Imagine that Bert knew that there were loose tiles and did nothing about it. If a storm within normal expectations blew the tiles off the roof, this would not amount to an Act

of God. By contrast, had the roof been fixed and it was sound before the storm and the storm was of unprecedented force such that it could not have been imagined or expected, the defence of Act of God may well apply. As you will have noted, the defence relies on something that is beyond expectations, and judgment as to whether the event amounts to an Act of God can be difficult.

Volenti non fit injuria (voluntary assumption of the risk) relates to situations where the injured party has accepted the risk voluntarily. An example of this could be a boxer voluntarily accepting the risk of an injury during a boxing match or a footballer during a football match. However, this is not an absolute defence, as demonstrated by the contrasting circumstances of the following examples.

In the first case, Simone is hit by a cricket ball. She is attending a one day international where runs are scored rapidly and the batsmen try hard to hit the ball as far as possible, frequently into the crowd. Simone is hit during the match when a batsman hits a "six" into the crowd. Contrast this to a case where Jo is hit by a ball before the match when the players are having catching practice. In the first case, it can be argued that Simone would have consented to the risk as it was a known possibility that during the match a cricket ball may land in the crowd. However, in the second incident, Jo might argue that she was not paying attention to the catching practice and that the danger of the practice going wrong and the ball going into the crowd was not a risk that she voluntarily accepted.

Contributory negligence is where the injured party in some way contributed to the cause or extent of the loss, damage or injury. A good example of this would be a motorist not wearing a seat belt who is injured as a result of negligent driving by another motorist. The injuries are made worse due to the fact that no seat belt is being worn but an injury would have still been occasioned had a seat belt been worn. In the past, contributory negligence was a complete defence. In other words, if you could show that the loss, damage or injury was partially contributed to by the injured party, the entire action failed. This is no longer the case. In the interests of equity, the law was altered by the Law Reform (Contributory Negligence) Act 1945. The courts will now simply reduce the amount of damages in proportion to the degree of contributory negligence.

4.6 Nuisance

The law surrounding Nuisance has converged with Negligence over the years. There are two types of Nuisance, Public and Private. A public nuisance is one that affects the public as a whole. To succeed in an action for public nuisance, it is necessary to prove that you suffered beyond the extent of the public in general. An example of public nuisance is selling food unfit for human consumption. Most public nuisances are considered to be a crime and are beyond the scope of this material.

A private nuisance is associated with an ongoing action that causes disturbance to adjoining property. It has been defined as an "unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it".

The important point is that the damage must be suffered by occupants of adjoining land.

Over the years, the Courts have put more emphasis on the cause of the nuisance resulting from negligence, but the basic principal is that you should "so use your land as not to harm your neighbour".

4.7 The Rule in *Rylands v Fletcher (1868)*

This legal case created a "strict liability" which apply to subsequent similar cases. Strict liability means that liability does not depend on proof of fault against the Defendant.

The case of *Rylands v Fletcher (1868)* concerned the building of a reservoir on land above a coal mine. The water escaped, flooding the mine and causing damage so significant that the mine had to be abandoned. It was decided that the defendant was liable.

The judge stated "A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape" – Lord Blackburn J.

The precedent has been reviewed in a subsequent case, *Cambridge Water Co v Eastern Counties Leather plc (1994)*. In this case, it was held that to be liable there was a need for the type of damage caused by the escape to be foreseeable.

Possible defences to this strict liability are as follows:

- Act of God
- Act of stranger
- Default of claimant
- Consent of claimant
- Statutory authority.

4.8 Trespass

Trespass is for our purposes the intentional or negligent interference with the possession of goods of another. The remedies for trespass are:

- Damages – the amount by which the value of the property is diminished, NOT the reinstatement cost
- Injunction – a legal device to prevent the continuance or repetition of the act of the trespasser
- Ejection – reasonable force only may be used to eject a trespasser, and any more than reasonable force could result in a charge of assault
- An action of ejectment to recover the land.

4.9 Contract

Liabilities can arise from a breach of contract. This could be a breach of a specific term of the contract or could be as a result of the breach of an implied contract term.

The remedies for a breach of contract are:

- Refusal of further performance
- Action for damages
- Quantum meruit – the amount that is paid is the value of the work completed
- Specific performance – an enforcement of the contract
- Injunction
- Rescission – cancellation/annulment.

An example of breach of contract is where a supplier has contracted to provide raw materials of a certain quality and instead supplies inferior materials. As a consequence, the final product that is manufactured is not satisfactory. The manufacturer will suffer losses that arise from the supplier's breach of contract in failing to supply what he had contracted to supply.

4.10 Statutory

A statutory liability exists where a statute is in force which provides that there is a liability as a result of the provisions of the statute. Examples of this are the Water Industry Act 1991, the Supply of Goods & Services Act 1982, the Sale and Supply of Goods Act 1994, and the Sale of Goods Act (1979).

Consider the example of a fire caused by a faulty appliance. The Sale and Supply of Goods Act 1994 requires that goods sold in the course of business must be of satisfactory quality. This means that they should be fit for purpose and safe. Therefore, if the appliance was sold in the course of business there may well be a liability for damages resulting from the goods being unsafe.

The Water Industry Act 1991 provides that, other than in certain situations, a water provider is responsible for damage caused by the escape of water from their pipes however this arises.

In Employers Liability claims, many of the responsibilities of the Employer arise from statute. Following the Health and Safety at Work Act 1974, a whole set of statutes were put in place to protect people in the workplace. These include (among others):

- Manual Handling Operations Regulations (1992) (amended 2002)
- Workplace (Health, Safety and Welfare) Regulations 1992
- Provision and Use of Work Equipment Regulations 1998 (PUWER)
- Lifting Operations and Lifting Equipment Regulations 1998 (LOLER)
- Work at Height Regulations 2005.

These Regulations govern the health and safety of those at work. A liability can arise on the part of the employer if an injury occurs at work in a situation where these Regulations have been breached.

Activity

Having studied this section, identify parties who may have a legal liability in the following cases:

1. *A leak from a pipe causes damage following work carried out by a plumber*
2. *A motorist crashes a car into a wall*
3. *Peter buys a television. The following day the TV catches fire resulting in damage to furnishings*
4. *Trevor stores diesel for his motor vehicles in his garage. One day the diesel escapes causing damage to the neighbouring building.*

Think of some possible defences to the following:

1. *An aerial falls from a roof damaging the neighbour's house during strong winds*
2. *Jane suffers damage to her hockey stick during a hockey match*
3. *Sarah is injured in a car crash. Sarah is a passenger in the car and at the time of the accident she was not wearing a seat belt.*

5

INSURABLE INTEREST

5. INSURABLE INTEREST

Introduction

This section outlines the fundamental principles of Insurance. When faced with difficulties in deciding whether or not cover exists, these principles generally provide, if not the answer, a very good indicator as to where else to look.

Activity

Make a list of items that you have financial interest in, for example your clothing and personal effects.

Think also of items that you use on a regular basis but in which you have no financial interest.

Try to think of items that may belong to you but should they get damaged you would be expected to keep making payments for them perhaps because of the terms of a contract.

A policy document will show the physical property insured by the policy, but what is actually insured is the policyholder's **financial interest** in that property.

Insurable interest must exist before insurance can be taken out.

In the case of *Castellain v Preston (1883)* the question was asked:

> *"What is it that is insured in a fire policy? Not the bricks and materials used in building the house, but the interest of the insured in the subject matter of insurance".*

Lucena v Craufurd (1806) states the definition of insurable interest:

> *"To be interested in the preservation of a thing, is to be so circumstanced with respect to it, as to have benefit from its existence, or prejudice from its destruction".*

The Marine Insurance Act 1906 also defines insurable interest as:

> *"In particular, a person is interested in a marine adventure where he stands in a legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by damage thereto, or by the detention thereof or may incur liability in respect thereof".*

Insurable interest arises if a person or company would:

- Benefit from the continued existence of the property insured, or
- would be prejudiced by its loss, damage or destruction.

The four essential elements of insurable interest are:

- There must be a physical object which is capable of being lost, destroyed or damaged
- The physical object must constitute the subject matter of the insurance
- The policyholder must have some legal relationship with that object
- The value of that insurable interest must be measurable in monetary terms.

There must also be insurable interest at the time of the loss. The extent of the policyholder's interest is the extent to which he can insure and the extent to which he can recover under the policy.

Insurable interest can arise in the following ways:

- Ownership, mortgagor or mortgagee
- Bailees - A bailee is a person who holds the property of others, either gratuitously (without payment) or for reward (for payment). Examples of bailees include warehousemen, repairers and the like
- By statute - For example, the Hotel Proprietors Act 1956 which, although limiting the liability of the hotel proprietor, creates a statutory obligation in return for the limited liability imposed
- Insurers - Insurers have an insurable interest in the property they are insuring enabling them to reinsure
- Tenants - Clearly a tenant would be prejudiced if his home or business premises were destroyed.

Activity

Put yourself in the position of dealing with an Insurance Claim. How might you identify that Insurable Interest exists and what documentation might you request to demonstrate this.

Insurable Interest has been a cornerstone of Insurance for a long time but, in an unforeseen recent development, it would appear that the requirement for insurable interest has been removed, at least in respect of property insurance. In order to improve the gambling laws in light of new technology, the Gambling Act 2005 (which came into effect on 1 September 2007) repealed Section 18 of the Gaming Act 1845. Section 335 of the Gambling Act 2005 states that:

> *"The fact that a contract relates to gambling shall not prevent its enforcement".*

The effect is that, for policies taken out or renewed after 1 September 2007, the policyholder no longer needs to show an insurable interest, but they will still need to prove the loss they have suffered under the common law indemnity principle.

However, indemnity remains as a principle and you should ensure that you fully understand it and consider Insurable Interest with Indemnity in mind.

6 THE DUTY OF FAIR PRESENTATION

6. THE DUTY OF FAIR PRESENTATION

Contents

Introduction

Most contracts are based on the principle that all parties have an equal opportunity to understand what the effects of the contract will be. For example, if I arrange for my newspaper to be delivered to my house, I understand what will happen and the newspaper seller also understands what is expected.

Insurance is different because the proposer of the risk (the policyholder) is likely to know far more about the risk to be insured than the insurer. This is recognised in law by both the **Consumer Insurance (Disclosure and Representations) Act 2012** and the **Insurance Act 2015**.

The Insurance Act 2015 requires the proposer to provide a "fair presentation of the risk". This chapter explains what is meant by a fair presentation by the policyholder, the insurer's duties and what penalties may be imposed by the insurer where the policyholder has not provided a fair presentation of the risk.

The Consumer Insurance (Disclosure and Representations) Act 2012 legislates that representation is less onerous on consumers.

The Insurance Act 2015 was given Royal Assent on 12th February 2015 and the industry has welcomed and embraced the changes. As the statute is new, there is no case law to provide examples of its interpretation.

6.1 The Principle

Contracts, in general, are subject to the doctrine of caveat emptor (let the buyer beware). This means that each party must ask questions to ensure that they have all the information they need before signing the contract. Statutes such as the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977 provide protection.

Insurance contracts are subject to the principle of fair presentation and not caveat emptor.

Activity

Think about the type of information that might be relevant to an insurance company when deciding whether to accept a risk or calculating the premium to charge.

Consider a home buildings policy which provides cover against Fire, Theft and Flood. What features of the building would be relevant to the insurance company and why?

6.2 The Legal Position – Statute Law

The principles of fair presentation are set out in the Insurance Act 2015 and in the Consumer Insurance (Disclosure and Representations) Act 2012.

6.2.1 The Consumer Insurance (Disclosure and Representations) Act 2012

This Act relates to consumer insurance only.

Consumer insurance is defined as:

> *"insurance entered into by an individual wholly or mainly for purposes unrelated to the individual's trade, business or profession."*

Prior to this legislation, Consumers had to tell an insurer anything that would "influence the judgment of a prudent insurer" in fixing the premium or deciding whether to take the risk.

Non-disclosure and misrepresentation

In effect, this legislation encompassed the market practice already adopted towards non-disclosure and misrepresentation in consumer insurance.

The Act requires the consumer to take reasonable care to answer the insurer's questions fully and accurately.

6.3 The Insurance Act 2015

The duty of fair presentation

It is important to understand that this new duty of **fair presentation** applies to **non-consumer** insurance contracts only. "Consumer insurance contract" has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012, ie:

> *"consumer insurance contract" means a contract of insurance between:*
>
> *(a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and*
>
> *(b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000).*

The 2015 Act defines fair presentation as follows:

> *"(3) A fair presentation of the risk is one:*
>
> *(a) which makes the disclosure required by subsection (4),*
>
> *(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and*
>
> *(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.*
>
> *(4) The disclosure required is as follows, except as provided in subsection 5:*
>
> *(a) disclosure of every material circumstance which the insured knows or ought to know, or*

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if:

(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information."

Remember this only applies to non-consumer insurance contracts as consumer contracts are dealt with under the Consumer Insurance (Disclosure and Representations) Act 2012.

Activity

Taking note of the above, consider a restaurant policy which provides cover for contents, fixtures and fittings, and stock. Which of the following facts must the restaurateur disclose to his Insurers:

1. *The neighbouring properties are a hardware shop and a Post Office*
2. *The restaurant suffered a fire 2 years ago*
3. *A sprinkler system was installed after the fire*
4. *The value of the wines and spirits held on the premises*
5. *Agency waiting staff are used on a regular basis.*

Contracting out of the Insurance Act 2015

Section 15 of the 2015 Act states that any term within a contract that puts a consumer in a worse position than they would have been in under section 3 is effectively null and void. With regard to non-consumer insurance contracts, it is possible to "contract out" but only where the insurer satisfies section 17 of the 2015 Act, which requires compliance with the "transparency requirements".

Under these requirements, the insurer must bring the disadvantage of the contracting out term to the attention of the insured and this must be in a clear and unambiguous manner.

6.4 Knowledge of Insured

The 2015 Act breaks down the information the insured is deemed to know or ought to have known and which should therefore be considered as part of the fair presentation. Remember the insured is to make a fair presentation but he cannot present facts he does not know.

By way of example, an insured who is an individual as distinct from, say, a company is deemed to know what is known to the individual himself and what is known to one or more of the individuals who are responsible for the insured's insurance.

An insured who is not an individual, for example a company, is deemed to know what is known to the insured's senior management team or those who are responsible for the insured's insurance.

The type of information known includes what the insured should have known following a reasonable search of information available to the insured.

The insured is deemed to know information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance).

Activity

Obtain an insurance proposal form online and review the questions asked by insurers. Look for any additional statements that ask the proposer to provide any further information that is material or relevant.

6.5 Knowledge of Insurer

The insured is not required to present information known to the insurer. It is important to understand who at the insurer company needs to know the information and what information the insurer would be deemed to know.

The Act states under subsection (1) of section 5 that an insurer knows something "*only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity)*". This would usually be the underwriting department or persons at the underwriting agency.

Further, the Act states that an insurer ought to know something only if:

> "*(a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or*
>
> *(b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).*"

Parliamentary guidance notes advise that this is intended to include, for example, information held by the claims department or reports produced by surveyors or medical experts for the purpose of assessing the risk.

The question therefore arises as to whether a loss adjuster would be considered an agent. Should the loss adjuster identify an underwriting feature if the insurer would be deemed to be aware of the feature? It would seem that information given to the claims department, for example in a loss adjuster's report, would fall within the information deemed to be known.

Activity

Consider the handling of a claim and how the process may reveal facts that were not disclosed at proposal stage. In particular, think about the type of information you obtain from a policyholder whilst considering a claim, either on the telephone, via correspondence or during a visit to their property. How would you check whether this information had previously been disclosed?

Ask your colleagues for examples of non-disclosed material facts. Find out how they dealt with the issue and whether it had an impact on the claim.

6.6 Remedies for Breach

Insurers only have a remedy for breach if:

1. They would not have entered into the contract of insurance at all, or
2. Would have done so on different terms.

The remedies depend on the type of breach.

Deliberate or reckless breaches

1. If a breach was deliberate or reckless, the insurer:
   (a) may avoid the contract and refuse all claims, and
   (b) need not return any of the premiums paid.

Other breaches

2. If, in the absence of the breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.
3. If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.
4. a) In addition, if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.
   b) "Reduce proportionately" means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 3), where:

$$X = \text{Premium actually charged} / \text{Higher premium} \times 100$$

Summary

This chapter has looked at two important UK statutes which have changed the requirements for disclosure of information that would affect whether an insurer would accept a risk and if so on what terms.

The Insurance Act 2015 is of particular interest as it introduces the concept of "fair presentation". In addition, the Act specifies that the insurer will be deemed to know information in certain circumstances. This could include observations by, say, a loss adjuster acting in the investigation of an insurance claim.

7

INDEMNITY

7. INDEMNITY

Contents

Introduction

Indemnity is one of the fundamental principles of insurance and it is also a critical to claims handling. This section explains the principle of indemnity and provides practical guidance in its application.

7.1 The Principle

The principle of indemnity is that settlement of a valid claim puts the Policyholder in the same financial position as they were in immediately prior to the loss. Remember that the Policy wording will specify how Insurers might indemnify the Policyholder, for example replacement, repair or a cheque/cash.

7.2 The Legal Position – Case Law

The leading case is *Castellain v Preston (1883)*. This case defined indemnity as follows:

> *"The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, namely, that the contract of insurance, contained in a marine or fire policy, is a contract of indemnity and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward that is at variance with it that is to say which either will prevent the assured from obtaining a full indemnity or which will give the insured more than a full indemnity that proposition must certainly be wrong".*

Under a policy covering property, the policyholder can only claim the loss suffered. The insurers will undertake to make good the loss by payment of money or, increasingly, by reinstatement or replacement. However, insurers' liability can be amended by the policy and will, in particular, be limited to the sum insured. The policy conditions can result in the policyholder receiving less than an indemnity (eg application of average, excesses, etc).

7.3 Indemnity – The Policy

The principle of indemnity is also maintained by the policy conditions. For instance, it is a requirement that the policyholder passes to the insurers any rights of recovery against a third party. This is considered in more detail under Subrogation.

Activity

You will be studying Subrogation as part of this course, but take a moment to think about circumstances where someone may cause damage and there may be a right of recovery.

Additionally, when the Policyholder has more than one policy covering the loss, the loss is shared by the Insurers. The Policyholder cannot gain more than the loss by claiming from both policies.

Activity

Discuss with experienced colleagues circumstances where dual insurance often exists. When dealing with such claims remember the possibility and check for dual insurance.

It is very important to check the Policy wording to verify how it specifies that the Policyholder will be indemnified, eg by replacement as new, repair, reinstatement etc. You should also check what the position is in the event that the Policyholder does not wish to replace an item under a New for Old Policy. Quite often the Insurer imposes restrictions on the payment that is due in such circumstances and the correct restrictions must be applied. When considering this, it is important to take account of the need to treat the customer fairly. The options under the Policy should be discussed and the Policyholder should understand what the options are and how they will be affected by decisions that are made.

7.4 Indemnity – Financial Interest

In calculating an indemnity, the extent of the Insured's financial interest must be taken into account. Just because something is insured by someone does not mean that they suffer a financial loss. For instance, a Policyholder might have a Policy that covers the contents of their home. An item may be damaged but it belongs to someone else. Unless the Policyholder has suffered a financial loss, any payment would be in excess of an indemnity.

Activity

Review a Policy wording and identify where it states how the claim will be settled. What options are available to the Insurer? Whose option is it as to how the claim is settled?

8

THE PRINCIPLES OF INSURANCE – PROXIMATE CAUSE

8. THE PRINCIPLES OF INSURANCE – PROXIMATE CAUSE

Contents

Introduction

Insurance Policies only provide cover for loss or damage if it is as a result of one of the perils listed in the Policy. Determining the actual cause of loss or damage is therefore a fundamental step in the consideration of any claim.

Proximate cause is a key principle of insurance and is concerned with how the loss or damage actually occurred and whether it is indeed as a result of an insured peril.

This section provides a definition of proximate cause and explains how it should be determined in practice.

8.1 Proximate Cause Definition

Proximate cause was defined in the case of *Pawsey v Scottish Union & National Insurance Company (1908)* as:

> *"the active and efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source".*

Activity

Use a dictionary to look up the meaning of the word Proximate. Look for other words in a thesaurus that might assist you in explaining the term proximate cause to a Policyholder or colleague.

The important point to note is that the proximate cause is the nearest cause and not a remote cause.

Unfortunately when a loss occurs there will often be a series of events leading up to the incident and so it is sometimes difficult to determine the nearest or proximate cause. Let us consider the following scenario:

Jim, a guitar player in a local band, **plays at a gig on a Sunday evening**. The gig goes well and an **encore is demanded** by the crowd. The encore is played but as a result Jim finishes later that he expected and **misses the train home**. Jim then has to take a bus home and **does not get to bed until 01:30 am.** In the morning he oversleeps due to tiredness and because he had **forgotten to put his alarm on**. Jim is now in a hurry and quickly makes his breakfast, including toast which **he puts under the grill. The postman then arrives** and rings the bell (Jim has normally left long before the postman arrives.) The postman engages in **a long conversation** with Jim who eventually returns to the kitchen to find that the **toast has ignited setting alight a tea towel.** The tea towel in turn has **scorched the kitchen table**.

Jim is not worried about the tea towel or the toast but submits a claim for the table. Fire is covered by the Policy and the proximate cause of the loss must be established. The cause of the loss could be:

1. Playing at the gig
2. The fact the encore was demanded
3. Missing the train home
4. Going to bed late
5. Omitting to set the alarm
6. The arrival of the postman
7. The long conversation with the postman
8. The ignition of the toast
9. The ignition of the tea towels.

Referring back to the definition in *Pawsey v Scottish Union (1908)*, we have to find the *"active efficient cause that sets in motion the chain of events"*. Arguably, playing the gig (1) set in motion the chain of events. Playing a gig is not normally an insured peril and so if that was determined to be the proximate cause there would be no cover for the damage to the table.

However, the definition in *Pawsey v Scottish Union (1908)* goes on *"without the intervention of any force acting independently from a new and independent source"*. All causes from 2 to 7 are new forces acting independently from new and independent sources so we can forget all prior causes in the chain. The ignition of the toast (8) and the ignition of the tea towels (9) are the closest causes and therefore appear to fit most comfortably with our definition in *Pawsey v Scottish Union (1908)*. They are not remote causes.

The decision now is whether the ignition of the toast and tea towels constitutes fire as meant by the Policy and, if yes, whether there are any relevant exclusions. (The definition of fire will be discussed later in the course but it can be noted that the fire peril has operated in this instance.)

Activity

Review a sample of claims and look at the sequence of events leading to the loss or damage. Decide what the remote causes are, highlight new and independent forces and identify the closest cause. This will be the proximate cause.

8.2 Other Considerations

It is important to note that the proximate cause need not be the cause immediately before the loss or damage occurs. The last cause could simply be a link in the chain connecting the event with the proximate cause. For example, a fire might cause a water pipe to burst. Despite the resultant loss being water damage, the fire would still be the proximate cause of the incident.

8.3 Burden of Proof in Relation to Proximate Cause

In the majority of claims, the cause is obvious and so it is relatively easy to establish whether it is a peril covered by the Policy. Difficulties arise when there are exceptions in the Policy or when more than one cause has operated and not all are covered. As already

discussed, the proximate cause must be identified before it is possible to decide whether the loss or damage is covered by the Policy.

There is a general rule that applies to the burden of proof. The Policyholder must demonstrate that an insured peril has caused the loss or damage and, having done so, it is then for the Insurer to demonstrate the operation of any exclusion (if they wish to deny policy liability).

The situation is slightly different with an All Risks Policy. In this instance, the Policyholder need only demonstrate that damage has occurred to the insured property during the period of insurance. If an Insurer wishes to apply an exclusion, the Insurer must then prove that the cause was one of the excluded events.

If one or more perils have operated and one or more of these perils are covered by the Policy, the resultant loss or damage will be covered. However, in some cases that is not the end of the matter as different excesses may apply to the various perils concerned. You will then need to make a decision as to under which peril to pay the claim (and therefore which excess to apply). Be aware that your choice of peril can have repercussions for reinsurance or dual insurance matters.

Activity

Consider an escape of water claim. What types of proof could an Insured provide to demonstrate that the damage is as a result of an escape of water? Now do the same exercise for a storm claim.

8.4 Key Points to Remember

- You must establish proximate cause in order to decide whether a claim is covered by the Policy.
- Proximate cause is defined as *"the active and efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source"*.
- The Policyholder is required to demonstrate that an insured peril has caused the loss or damage claim. If the Insurer then wants to reject the claim, they must demonstrate that an exclusion applies.

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THE PRINCIPLES OF INSURANCE – CONTRIBUTION

9. THE PRINCIPLES OF INSURANCE – CONTRIBUTION

Contents

Introduction

Sometimes a claim may be covered by more than one policy and in such instances each Insurer may only be required to make a partial contribution to the Policyholder's overall claim.

This section explains what is meant by contribution and when it arises. It also discusses the policy position and outlines the methods for calculating contribution.

9.1 Definition

Contribution arises when two or more policies exist covering the same subject matter, ie the same item, against the same peril causing the loss or damage, at the same time and providing cover to the same person or legal entity. The principle of contribution flows naturally from the principle of indemnity. You should not profit from an insurance claim and so if you have two or more policies covering the same item you cannot claim from all the policies and therefore recover more than your loss.

People are sometimes confused about the principle of contribution and often think it relates to those situations when the Policyholder is required to contribute to a loss. This is not the case. The principle of contribution relates to situations when two or more Insurers contribute to the loss.

Activity

Reflecting on the information provided above, consider the following claim scenario:

Mrs Miggins has submitted a claim for the loss of a watch. She tells you that she has another policy in force covering the watch and describes how pleased she is that she will be able to get more than she paid for. Her comments are innocent but you need to explain to her that this will not be the case.

Think about how you would explain the principle of indemnity and how this leads on to the principle of contribution.

The Legal Position

The legal position concerning contribution has been set out in several legal cases. The most referred to case is *Godin v London Assurance Co (1758)* in which it was stated:

> *"If the insured is to receive but one satisfaction natural justice says that the several insurers shall all of them contribute pro rata to satisfy that loss against which they have all insured".*

In another leading case, *Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co (1883)*, the following was said:

> *"That principle (ie contribution) or rather that rule of practice depends on the doctrine - one not of law only but of common reason - that a man who insures his interest in property against loss by fire whether that interest be that of a proprietor or creditor, cannot recover from the insurer a greater amount than he has lost by the contingency insured against. So, in the case of double insurance of the same interest with different insurance companies, the assured will not be entitled to recover more than the full amount of the loss he has suffered".*

Contribution is also addressed in the Marine Insurance Act 1906. It is accepted that the principles outlined in the Act have application to insurance generally:

> *"The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to recover any sum in excess of the indemnity allowed by this Act".*

As already discussed, contribution occurs when there is more than one policy covering the same subject matter. However, the policies do not need to cover exactly the same perils or property. They need not be identical but there does have to be an overlap in the cover provided.

At common law, contribution will only apply when the following conditions are met:

- There are two or more policies of indemnity
- These policies cover a common insurable interest
- These policies cover a common peril which gave rise to the loss
- These policies cover a common subject matter
- Each policy is liable for the loss arising.

Activity

Ask a senior colleague to describe your company's procedures to ensure that any potential contribution is identified as part of the claim process.

Contribution often arises accidentally as consumers buy insurance policies not appreciating that they already have cover elsewhere. For example, one policy might cover the buildings of their home and when buying cover for their contents they inadvertently buy cover for the buildings too.

Activity

When you go shopping you are often invited to purchase additional insurance for goods and services that you are buying. You may also receive telephone calls inviting you to buy insurance policies. Make a list of the types of cover you have been invited to purchase. You could use this list as a prompt when asking Policyholders about the possible existence of other policies.

There is nothing to prevent a Policyholder having two or more policies covering the same event. It is not illegal. However, should a Policyholder knowingly claim from more than one policy and not tell the separate Insurers it may be considered as fraud.

9.2 Contribution and the Policy

Having established that contribution arises, you have to decide how to share or apportion the loss between the different insurers. Like any form of sharing, the intention is to be fair, but sometimes there can be a dispute about what is considered to be fair. For this reason, there are rules and protocols to be followed. Most important of all is that the Policyholder must not be inconvenienced or penalised.

The method of calculating how much each insurer is to pay will depend on the type of policy and whether there is an agreement in place. It is useful to check whether the policies are subject to average and whether they cover exactly the same property. If they cover the same property, they are called concurrent. If the policies cover some of the same property but not all, they are referred to as non-concurrent.

Activity

Perhaps with the help of a dictionary, find a form of words that you could use to explain what is meant by two concurrent policies.

The insurer's approach to contribution will typically be explained in the policy wording. Policies often exclude all Policy liability if there is another policy in force or alternatively may state that if there is another Policy in force the Policy will only pay a rateable proportion of the loss. In other words, it makes it clear that the Policy will only be liable to share the loss.

However, what happens if both policies say that they will not cover the loss if another Policy is in force? Would this mean that the Policyholder would receive nothing? That would not be fair to the Policyholder and the impact would be that the two exclusions would effectively wipe each other out.

When dealing with contribution issues, you need to examine the policy wording in order to fully understand the position. In the recent case of *National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd (2010)* the court decided that contribution did not apply because of the specific Policy wordings. The case referred to fire damage to a property between exchange of contracts and completion of the sale, and it highlights that contribution is dependent on the precise policy wordings. The detail of the case is beyond the scope of this course, but you may like to search for further information via an internet search engine.

Apportioning payments when Contribution arises

When sharing a loss between policies, different methods can be used to apportion the loss. Some seem fairer than others and it has become industry practice to apply certain methods in certain situations. The method of sharing the loss, known as apportionment, depends on the type of cover and whether a market agreement applies. The different scenarios and methods are listed below:

Non-average, concurrent:	Sums insured
Non-average, non-concurrent:	Independent liability (the mean method can be used as an alternative)
Average concurrent:	Independent liability
Average non-concurrent:	Independent liability
Liability policies:	Independent liability
Alternative accommodation:	Independent liability
ABI and AOA agreements:	Independent liability

The most common method, independent liability, is demonstrated in the example below. Independent liability means the amount that the Insurer would pay if no other policies existed.

Policy A

Sum Insured	£10,000.00
Excess	£100.00
Independent Liability	£6,000.00

Policy B

Sum Insured	£20,000.00
Excess	£10.00
Independent Liability	£6,090.00
Agreed Loss	**£6,100.00**

Policy A Pays

$$\frac{\text{Own Independent Liability}}{\text{Total Independent Liabilities}} \times \text{loss} \qquad \frac{£6,000.00}{£12,090.00} \times £6,100 = £3,027.30$$

Amount payable £3,027.43

Policy B Pays

$$\frac{\text{Own Independent Liability}}{\text{Total Independent Liabilities}} \times \text{loss} \qquad \frac{£6,090.00}{£12,090.00} \times £6,100 = £3,072.70$$

Amount payable £3,072.57
Total **£6,100.00**

It is often the case that one Insurer pays the claim in full and uses the above calculation to recover the contribution from the other Insurer.

On the above basis, the amounts to be paid by each Insurer can be seen. Interestingly the independent liability basis often produces a result so that Insurers pay 50% each.

Other methods of calculation are beyond this course, but using the earlier table you should be able to establish which method to use and to seek guidance accordingly.

Activity

Contribution commonly arises when cover is available for alternative accommodation under both a buildings policy and a contents policy. Think about the types of costs that can be incurred in relation to alternative accommodation and how these items may have been handled during the course of the claim. Now consider how the buildings and contents Insurers might reach an agreement on the apportionment of the alternative accommodation costs. What issues might lead to dispute?

9.3 Key Points to Remember

- The principle of contribution flows from the principle of indemnity, ie a Policyholder should not profit from an insurance claim, but rather should be placed in the same position they were in before the loss.
- In the handling of any claim, it is always important to ask the Policyholder whether there are any other relevant insurance policies in force, either in their own name or perhaps in the name of others.
- Check what the Policy wording says about dual insurance.
- Use the appropriate method of apportionment for the circumstances. If contribution is under one of the market agreements, always check those agreements to see whether any conditions or exclusions apply.
- Should you identify a contribution opportunity you should start discussions with the other Insurers at the earliest opportunity. If you intend to ask another Insurer to contribute to costs that have already been paid, you must be able to justify and support each payment.

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THE PRINCIPLES OF INSURANCE – SUBROGATION

10. THE PRINCIPLES OF INSURANCE – SUBROGATION

Contents

Introduction

This section provides an elementary understanding of one of the central, key principles of insurance, subrogation.

10.1 Definition

Subrogation concerns recoveries where it is the right of one person to stand in the place of the person he has indemnified and pursue that person's legal rights and remedies. A good example would be where a Policyholder's wall is damaged by a negligent motorist. The Insurer indemnifies the Policyholder and then the Insurer has the right to take up the legal rights and remedies that the Policyholder would have had.

Activity

Consider the types of events that lead to claims being made in which subrogation arises.

The Legal Position

The most quoted case supporting Insurers' right to exercise rights of subrogation is *Castellain v Preston (1883)* where it was stated that subrogation:

> *"does not arise upon any terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule (indemnity) which I have mentioned and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason".*

The common law position of subrogation is that it can only be pursued after payment has been made by the Insurer to the Policyholder. However, usually the Policy alters this situation and gives the insurer the right to pursue the recovery before or after payment has been made. This is illustrated by the ABI standard fire policy:

> *"Any claimant under this policy shall at the request and expense of the insurer take and permit to be taken all necessary steps for enforcing rights against any other party in the name of the insured before or after any payment is made by the insurer".*

Activity

What do you think are the advantages of the Insurer being able to commence an action for a recovery before the Policyholder has been indemnified?

Find out what processes are followed where you are employed to ensure recoveries are pursued.

As well as giving insurers the opportunity to pursue subrogation rights before payment has been made under the policy, the subrogation condition also makes it clear that the policyholder is to assist the insurer in any recovery action taken. Any legal action is taken in the name of the Policyholder. This has the advantage that the Insurer's name is not highlighted in the Court action.

10.2 Other Important Features of Subrogation

There are other key features of subrogation that should be taken into account when handling a claim. It is important to remember that the Policyholder may have suffered losses that are not covered by the Policy. Examples of such losses might include:

- The amount of any excess or deductible
- Penalties due to underinsurance
- General inconvenience
- Loss or damage to property not covered by the Policy.

Subrogation arises out of the principle of indemnity. Logically, if the Policyholder is not indemnified for part of the loss, subrogation cannot apply to that uninsured part of the loss. If subrogation does not arise, it would not be fair that the Policyholder is prevented from making a recovery for those uninsured losses.

An important rule is that only one legal action may be brought against the person from whom a recovery is sought. This means that, if either the Insurer or Policyholder were to bring an action without taking account of the other's losses, the other party would be barred from making a recovery.

For this reason, it is of utmost importance that the Policyholder understands the situation. The question therefore arises as to how to deal with uninsured losses when considering the recovery.

In practice, this will depend upon the situation in question. Often an Insurer will be willing to highlight uninsured losses to the party from whom a recovery is being sought. Should it get to the stage that legal proceedings are entered into, it is vital that both the Policyholder's and the Insurers' losses are included in the action.

Activity

Having found out about the processes within your firm to ensure recoveries are dealt with, find out how you should deal with uninsured losses. Think about the advice you might give to a policyholder who is worried that their uninsured losses might be overlooked.

Another feature of recoveries is how the money recovered should be allocated between the Insurer and the Policyholder. In practice, it is the Policyholder who has first call on the money that is recovered as follows:

Agreed loss	£15,000.00
Uninsured loss	£1,000.00
Amount paid by Insurer	£14,000.00
Amount recovered	£14,500.00

In this situation, the Policyholder would receive £1,000.00 and the Insurer £13,500.00. In other words, the Policyholder is paid first.

10.3 Subrogation Terminology

There is some terminology or jargon associated with subrogation:

Third Party	The person from whom a recovery is sought
Pre Action Protocol	Rules which recovery actions should follow
Third Party Claimant	Someone who is making a claim against a Policyholder
Quantum	The amount of money involved
Statute Barred	A legal action that cannot be pursued as the time limit laid down by law has expired.

10.4 How Subrogation Rights Arise

Rights of recovery/subrogation may arise in law under the following headings:

- Statute
- Tort
- Contract.

To become competent at handling issues surrounding subrogation and to recognise opportunities to pursue recoveries, the law surrounding relevant statutes, torts and contract must be appreciated. These aspects are dealt with in this course under legal liabilities.

11

CUSTOMER SERVICE

11. CUSTOMER SERVICE

Contents

Introduction

Insurance Companies, Loss Adjusters, Insurance Brokers and indeed anyone providing a service has competition. Customer service is often a key factor by which companies compete for business. As a result, the majority of roles within the claims handling sector require good customer service skills. In claims handling, it is not always clear who the customer is. For a Loss Adjuster, it might be the Policyholder, the Insurer or the Broker.

This section explains why customer service is important, how it is measured and how customers' perceptions are formed. It also discusses what to do when things go wrong.

One key area of customer service is the FCA's requirement of "Fair Treatment of Customers". This has become a way of ensuring that all interactions with the Policyholder are fair, and the FCA's six Consumer Outcomes (see section 13.2) set the minimum standard.

11.1 Competition

While there are certain insurance covers that are compulsory, such as Third Party motor insurance, there is no requirement to purchase insurance cover from a particular provider.

There are hundreds of insurance providers and they typically compete against each other by using:

- Price
- Extent of Policy cover
- Accessibility of product, ie internet, Insurance Brokers, direct
- Customer service.

Activity

Think about the last time you purchased an electrical item. What helped you to decide the make and model to buy and which supplier to buy it from?

11.2 Customer Retention

Winning new customers is an expensive task and so customer retention is a goal of most companies. For an Insurer, customer retention means the continued renewal of Policies by Policyholders each year.

Imagine that as an Insurer you have launched a new product, for example a Policy covering veterinary fees for pets. You decide to advertise your new Policy on television, radio and via the internet. The cost of the advertising is high and so you want to gain as many customers as possible to make the launch worthwhile.

Now imagine the likely reaction of these new customers should there be difficulties when they need to make a claim. Would they renew the Policy or would they be likely to seek an alternative?

Some people would give your company a second chance, others may not have an incentive to seek cover elsewhere but many would simply switch Insurer. The loss of significant numbers is likely to gain poor publicity and the cost of gaining new customers would escalate.

Activity

Via the internet, look for blogs about customer service from well known companies. Review the comments made and note the aspects that commonly create customer satisfaction and dissatisfaction.

Think of the other ways that customers regularly publicise their views on the service they have received.

11.3 Measurement of Customer Service

Most companies will have a range of measures to assess whether they are delivering customer service, for example the average time taken to answer the telephone. In reality, the measurement of customer service is whether the customer perceives that they have received poor, good or excellent customer service.

Customer perceptions are likely to be based on the original expectations of the service they have purchased. For example, if an individual purchases a car breakdown recovery service which promises to keep the individual informed of expected recovery time, the individual expects this to happen in the event of a breakdown. Their perceptions of whether they have received a poor, good or excellent service will undoubtedly be linked to how well they were kept informed of expected recovery time. The setting and management of customer expectations is therefore critical in delivering customer service.

Companies often use customer satisfaction surveys to understand the perceptions of their customers. Typically, the customer will be asked to assess different elements of the service they have received by selecting the most appropriate description or by a numbering system. For example, the customer might be asked to select from the following descriptions:

- Unacceptable
- Tolerable
- Adequate
- Desired
- Exceptional.

Activity

Ask your line manager or review your company website to establish what level of service your company aims to provide. Find out what measures your company uses to assess whether they actually deliver this level of customer service.

11.4 What Affects Customers' Perception of Service

Throughout this course, we have used the term "Policyholder" to make it clear that we are identifying the person who has purchased insurance cover. However, it is usual to call the Policyholder the "Customer". We deal with many parties and it is not always clear who the customer is. This section deals with the customer, whoever that may be in any circumstance.

We have already identified that customers' perceptions are likely to be linked to their original expectations of the service. There are also some aspects of service delivery that commonly affect customers' assessment of the service they have received:

- How **reliable** the service was, for instance, could they get to speak to someone who could help them when they needed information
- How confident the customer was with the service provider. This may well depend on the **competence** and **credibility** of the staff encountered
- How **understanding** or **empathetic** the service provider was. This might be affected by the quality of communications. A frequent complaint customers make is that the service provider seemed not to care about the customer's predicament
- How responsive the service provider was to difficulties. Customers are looking for a **prompt** and **helpful** response to problems
- Whether the customer believes they were treated **fairly**.

It is worth noting that customers' perceptions of service can also be influenced by:

- The **price paid** for the service
- The **emotional state** of the customer
- The **situation** the customer is in at the time
- Comments made by **friends** and **relatives**.

Activity

Think about your role; make notes about how important the issues highlighted in bold are to your customers. Consider what you could do within your role to improve customers' perceptions of your service.

11.5 The Effects of Good Customer Service

When a customer believes they have received good service, they are likely to respond in a positive way. For instance, they are likely to tell friends and family who may in turn may choose to use that service provider. This is referred to as word of mouth recommendation. The customer is also likely to return to the service provider, potentially on a long term basis. The natural result of both of these is an increase in income to the company and lower costs incurred in customer retention.

11.6 What to do when Something Goes Wrong

When dealing with claims, we are providing a service to people who have experienced a loss and there are bound to be stresses attached to this. There are lots of opportunities for problems in the handling of claims and unfortunately sometimes things do go wrong. How we respond in such instances will affect the customer's perception of the service they have received. We will undoubtedly get a negative reaction from the customer if we:

- Act as if nothing is wrong
- Blame a colleague
- Blame the customer
- Ignore the issue.

We could however react in the following positive ways:

- Acknowledge the issues causing the problem
- Provide an apology
- Take responsibility for resolving the issues
- Provide a means of compensating the customer.

While the final action, providing compensation, may be outside of your control, you could recommend to your line manager that the customer receives some form of compensation.

Activity

Find out who deals with complaints in your company and get their tips on avoiding complaints. Ask for examples of complaints that have been received by your company and review how they were dealt with.

11.7 Key Points to Remember

- No business can survive without customers and, for service providers, customers are most likely to be gained and retained on the basis of customer service.
- Acquiring new customers is much more expensive than retaining existing ones.
- Customer service is measured by the experience and perceptions of the customer.
- Customer perceptions are likely to be based on original expectations. Understanding and managing those expectations is fundamental to the delivery of good customer service.
- At every point at which you have contact with a customer you are being judged by that customer. The effect you have on them not only affects their feelings towards you but also affects the way they perceive your colleagues and your company.
- Customers have the power to influence others to either buy your services or not.

12

COMMUNICATION

12. COMMUNICATION

Contents

Introduction

This section provides an explanation of some of the theory of communication. It is intended to:

- Assist understanding of how communication works
- Provide an understanding of how to use language effectively.

12.1 Sociolinguistics

Sociolinguistics is the study of the relationship between language and society. Understanding this and using some of the knowledge will be highly beneficial when communicating, particularly when dealing with some of the difficult and emotive aspects of claims handling.

Under the heading of sociolinguistics, we are concerned with the relationship between the language used and the social setting. Consider the following dialogue:

Alice: Hi Dad.
Dad: You're late today.
Alice: Yeah that bloody women asked me to sort all her files out last thing again.
Dad: Your Nana's here.
Alice: Ooops sorry, is she eating with us?

The dialogue shows us that had Alice been aware of her Nana's presence she would have used different words and perhaps a different tone.

This can be demonstrated by the following dialogue that Alice may also have had:

Managing Director:	Alice, good to catch you here, I am most grateful to you for putting in these extra hours.
Alice:	Thank you, I do like to keep ahead of things, it helps us all.
Managing Director:	Yes, true. Good night.
Alice:	Good night.

Activity

Have a look at the two dialogues above and identify within them the words that identify the friendly relationship between Alice and her father compared to the formal relationship between Alice and the Managing Director.

We have established that we communicate differently according to the social setting. This gets more complicated however. We adapt our language not only to the person we

are addressing but also to who else is listening and even who else we are concerned or perhaps hope is listening.

The important issue for us is that if we use an unexpected form of language we can get undesirable outcomes. You have doubtless heard the expression "it's not what you say it's the way that you say it".

Some societies are multilingual meaning that different languages are used in different social settings. People may use one language between friends and family, another language at work and another for official or legal matters. Using the official language in a relaxed family environment would appear inappropriate.

Activity

Think about the last conversation you had with a group of friends perhaps in a bar or other relaxed social environment. How would the language you used there have differed had there been a teacher from your former school sitting alongside you.

Having understood the relationship between language and social setting, we can appreciate the importance of getting speech right if we wish to communicate effectively. In fact when we do communicate effectively in speech, we will start to "mirror" the other speaker. When we get on well with people, our language converges. This shows that there is a bond building and it shows an affinity and respect for the other person. At the other end of the spectrum, when we wish to make a clear point and things are not going well, language will diverge. In fact, sometimes language divergence is used as a means of highlighting disagreement. For instance, think about the politician who might change his tone, the complexity of the words used and even the strength of his accent to underline disagreement with a rival.

12.2 Referential and Affective

The language used can serve the function of passing on objective information (facts) and it can express feelings too. Think about the expression "that bloody woman" in the dialogue above. This passes on the fact about who was responsible for Alice being late home and highlights how Alice feels about her.

Activity

Determine a) what the following comments reveal about the relationship between the speaker and listener and b) the intention of the comments to convey mainly affective (feelings) or mainly referential information (facts):

1. *The next train to depart from platform four is the 07:19 to Luton, calling at St Albans and Harpenden only.*
2. *Hi, my little Blossom, how was your day?*
3. *Prime Minister, your car is ready for you now.*

Hopefully you will have noticed that example 1 above is a recorded or prepared message. It is not intended to express anything other than referential information.

Example 2 suggests that the speaker is wishing to convey a message of how he feels about the person he is speaking to. "My little Blossom" is a term of endearment and is being used to express affection. The secondary purpose of the comment is to demonstrate care and concern about how "little Blossom" is.

In example 3, it is clear that the opening comment “Prime Minister” is being used to highlight respect. It signifies a subordinate speaking to a superior.

This is a simple introduction to sociolinguistics to help provide an understanding of how communication can express much more than the facts that we are conveying.

12.3 Better Written Communication

Having spent a long time preparing an essay and eagerly awaiting the teacher’s comments, the student is often upset by comments such as “difficult to follow”, “confusing”, “not clear”, “could not understand” or “write more clearly”. This informs the student that the teacher did not understand the message being put across, but does not help the student to write in a way that can be understood more easily.

The purpose of writing is to convey a message, whether it is a note for the writer such as a shopping list, a thank you letter, an essay putting forward different arguments or a novel. Each of these different messages has one thing in common, ie they are to be read later, and if they cannot be understood they are not fit for purpose.

Activity

Take a text book that you have found difficult to follow. Examine a few pages to try to understand why it is difficult to follow - is it complicated, muddled or not clear?

12.4 Ordering of Words (Given and New Information)

A good writer considers the order in which information is presented in a sentence as this helps the reader understand quickly what is being written about.

For example, compare the ease of understanding of these two sentences:

> *“To perform mathematical computations you can use a mechanical or electronic device, known as a calculator.”*

Or,

> *“A calculator is an electronic or sometimes a mechanical device used to perform mathematical computations.”*

You may agree that the second sentence is easier to understand because you are told, at the outset, what the sentence is about.

Activity

Take a look at a newspaper, magazine or book. Note how the sentences are constructed and, in particular, whether the given information is at the beginning of the sentences. After the first sentence, the given information may be represented by a pronoun such as he, she, it etc.

12.5 Active and Passive

The active and passive tenses are most easily understood by the following examples:

Mick liked the book. – Active tense
The book was liked by Mick. – Passive tense

The second version is a little clumsy and arguably the first version is clearer to the reader. In fact it can be argued that the two sentences do not have identical meanings. This is highlighted in the following comparison:

a. *Sally was invited in by a person wearing a black scarf.*

b. *A woman wearing a black scarf invited Sally in.*

Reading these two sentences carefully may highlight to you that the first one emphasises the role of Sally and the second highlights the role of the woman wearing the black scarf.

You can now understand that the choice made by the writer between the two phrases could have a subtle difference in meaning and therefore impact. By using the active or passive tenses, the involvement of the participants can be played up or down. Following large scale flooding, an Insurer may wish to emphasise the role played by their staff to help those affected. In this respect, compare the following two sentences:

(a) *Our claims team who worked over the weekend contacted all affected Policyholders.*

(b) *All affected Policyholders were contacted by our claims team who worked over the weekend.*

Arguably, the first sentence highlights the work of the claims team while the second shows more empathy with the Policyholders.

So we could change our maxim from "Its not what you say it's the way that you say it" to "It's not what you say it's the way or the order that you say it".

12.6 Sentence Length

Language is about getting a message across about our interpretation of the world; we all see the world differently. It is therefore important that we use language in a way that gets our interpretation of the world across to the reader. Keeping sentences short can help with this.

To give an example, compare the following:

(a) Frank put his lunch on his desk. It was made of natural products.

Is it the lunch or the desk that was made of natural products? The following might help:

(b) Frank put his lunch on his desk. The desk was made of natural products.

Putting this into practice

Take a look at any internal documents and guidelines that your firm has to assist you in communication, for example standard letters. Discuss with colleagues the benefits of the documents and guidelines.

13

THE FINANCIAL CONDUCT AUTHORITY

13. THE FINANCIAL CONDUCT AUTHORITY

Contents

Introduction

The Financial Services Act 2012 has given the Financial Conduct Authority new powers to help them act faster, with the aim of keeping the financial market sound and stable.

They are authorised to:

- fine, suspend, prohibit, order injunctions, bring criminal prosecutions or take other action to prevent market abuse, such as insider dealing
- make a public announcement when they begin disciplinary action against a firm or individual and publish details of warning notices.

They work closely with law enforcement agencies to combat market abuse and other financial crime.

Their stated aim is to make financial markets work well so that consumers get a fair deal. They supervise firms to make sure they act in the best interests of consumers and the market focussing on:

- **conduct:** for the market to thrive, firms must behave ethically, stick to the rules and meet FCA standards
- **competition:** healthy competition between firms is encouraged to keep the market buoyant and help grow the economy
- **reducing market abuse:** firms need to have procedures to help them identify and stop market abuse, such as insider dealing and share price manipulation.

The outputs of the FCA have yet to manifest themselves and those working in Insurance and particularly those who aspire to high standards such as members of the CILA should ensure that they are up to date with the rules set by the FCA and keep to the ethos set out by the FCA. The FCA require ethical behaviour at all times.

13.1 Regulation of the Insurance Market

The FCA regulates the Insurance market and their website has a section dedicated to the handling of insurance claims. This includes an online handbook entitled Insurance: Code of Business sourcebook (ICOBS).

Activity

Go to the FCA website and click on the tab at the top that says "FCA Handbook". Then click on FCA Handbook, which brings up all the section headings. Find the heading "Business Standards" and to the right of this click on Insurance: Conduct of Business sourcebook. Once you have reached the ICOBS, you will see that it is divided into eight sections plus a section titled ICOBS transchedule. ICOBS 8 relates to Claims Handling - you may be surprised at how simple this section is!

ICOBS 8

You will see from the FCA website that ICOBS 8 details how the Insurance company should operate, in general terms, with regard to the handling of claims.

An Insurer must:

(a) handle claims in a fair manner and within reasonable timescales

(b) guide the Policyholder and help them with their claim. This includes keeping the Policyholder informed of developments

(c) not repudiate a claim unreasonably, or unreasonably terminate or avoid the contract of insurance

(d) once settlement of a claim has been agreed, make the settlement as soon as is reasonable.

The FCA consider the rejection of a claim to be unreasonable, except where there is evidence of fraud, if the rejection of the claim is for:

(1) non-disclosure of facts that should be disclosed that the Policyholder could not in reasonable circumstances have had knowledge of

(2) non-negligent misrepresentation of a fact material to the risk, or

(3) breach of warranty or condition unless the breach is material to the cause or extent of the loss and the warranty or condition was brought to the attention of the Policyholder.

In reality the foregoing is logical and probably agreed by most as good practice. It is about fair treatment of customers and the six Consumer Outcomes (see section 13.2). It is of utmost importance that these guidelines are followed in the course of handling claims.

ICOBS 8.2 relates to Motor Vehicle Liability Insurers, and you should review the wording of this on line. Of particular interest is the fact that the FCA requires, among other things, that:

(a) a reasoned offer of compensation must be made within 3 months of the claim where liability is not in dispute

(b) where liability is denied, the insurer must provide within 3 months a reasoned reply to points made by the person making the claim

(c) where liability is not denied, an offer for settlement must be made within 3 months.

The FCA requirements in this respect are there to protect consumers. Where the requirements are not followed, aside from the repercussions from the FCA, there are other important issues. For example, failure to follow the requirements weakens the Insurer's position considerably, as it leads to complaints and loss of faith and trust.

13.2 Fair Treatment of Customers

The FCA state that *"All firms must be able to show consistently that fair treatment of customers is at the heart of their business model"*.

Further, the FCA require that firms should strive to achieve the following six Consumer Outcomes to ensure fair treatment of customers:

- **Outcome 1:** Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- **Outcome 2:** Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.

- **Outcome 3:** Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- **Outcome 4:** Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- **Outcome 5:** Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
- **Outcome 6:** Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

14

THE DATA PROTECTION ACT 1998

14. THE DATA PROTECTION ACT 1998

Contents

This section provides a basic understanding of the Data Protection Act 1998 and sets out information that is commonly required when claims staff are dealing with matters affected by the Act.

14.1 The Purpose of the Data Protection Act 1998

The purpose of the Act is to provide protection to people when their personal data is being processed and to ensure that the information is only used for the purpose for which it was intended. It is essential that any personal information and data is kept both confidential and private to protect the persons concerned. The Act covers electronic and paper records and this is contrary to the common belief that it applies to electronic data only.

The information that is protected by the Act is personal information about living people who can be identified from that information.

Activity

Consider a typical claim file. What information is kept on the file that you would consider to be personal?

14.2 Consequences of a Breach of the Act

Any breach of legislation could have repercussions both for the Company you work for and for you as an individual. This is because it is a criminal offence to make unauthorised disclosures of personal data about a living individual. Penalties include unlimited fines for the Company and, in addition, the person who the information is about may apply for personal compensation due to the damage and distress they may have suffered.

14.3 Protecting Information

Within the claim handling role, it is necessary to consider personal information, and this is legal providing that the information is only shared with the person to whom it relates. In the context of a claim, this will be the Policyholder. However, the information may also be required by, for example, the Policyholder's Appointed Agent, the Insurer, the Insurer's Appointed Agent, the Loss Assessor, suppliers etc.

You must get permission from the data subject (ie the person who the information is about) before releasing any information to any other person (and this includes the data subject's partner or any family member). Consent can be verbal or in writing and you should record that it has been obtained.

In respect of the Policyholder's Loss Assessor or Solicitor, it may not be necessary to obtain written permission, but it is necessary to have sufficient reason to believe they are acting on behalf of the Policyholder. For example, if the Policy is in the name of Mr and Mrs Richards then you will be able to discuss the claim with either party, but if the policy is in the name of Mrs Richards only then no details should be discussed with Mr Richards without permission from Mrs Richards.

The Act states that you should make sufficient enquiries to ensure that you are sufficiently certain that you are authorised to divulge details to a third party.

14.4 Information that is Covered by the Act

The Act covers information about a living individual who may be identified by, for example, their name, address, photographs etc.

Activity

Find out what procedures are in place where you work to ensure there are no breaches of the Data Protection Act 1998.

14.5 Types of Information

The Act makes particular requirements with regard to sensitive personal data, which is defined as:

- racial or ethnic origins
- political opinions
- religious beliefs or other beliefs of a similar nature
- membership of a trade union
- physical or mental health or condition
- sexual life
- commission or alleged commission of any offence
- any proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings.

14.6 Subject Access

The Act also provides that data subjects have the right to have access to data that is stored about them. This is to protect the data subject and to give them the opportunity to ensure that the data stored is accurate. The data subject may be required to make a nominal payment.

14.7 General Data Protection Regulation (GDPR)

In 2016, the European Commission approved the draft of its General Data Protection Regulation (GDPR) which will replace the 1995 EU Data Protection Directive, which created

the Data Protection Act 1998. The GDPR will automatically become law in the UK on 25th May 2018.

The aim of the GDPR is to harmonise current data protection laws across all EU Member States. The fact that it is a 'regulation', rather than a 'directive', means it will be directly applicable to all Member States without the need to implement national legislation.

The Information Commissioner's Office (ICO), which will remain the UK regulator, has stated that it is in favour of the new regime and has indicated that the introduction of the GDPR will not be impacted by BREXIT, the UK negotiations to leave the EU in 2019.

The key similarities between the current Data Protection Act and the GDPR are:

1. It remains principles-based
2. The concept of individual rights is maintained
3. The concept of organisational responsibilities is maintained
4. ICO remains as regulator – numerous sources of advice and guidance
5. The concept of justifiable grounds to processing is retained (including consent).

The key differences are:

1. Greater emphasis on control and rights for data subjects
2. The definition of personal data is expanded
3. Enhanced requirements to secure an individual's explicit consent to the purpose and use of their data
4. Transparency and accountability (new)
5. New obligations on data processors
6. Higher fines.