

A Year in Review – 2006 Update

Issues and Trends Affecting the
Liability Market in England and Wales

2007

A Year in Review – 2006 Update

Issues and Trends Affecting the Liability Market in England and Wales

Guy Carpenter Casualty Specialty is a global practice within Guy Carpenter created to provide a working environment where the combined skills within our firm are harnessed for the benefit of our clients.

We are very indebted to Fishburns Solicitors for their considerable assistance in preparing this 2006 update.

Contents

4	Introduction
5	Directors and Officers (D&O)
5	Overview
5	Legislative Developments
6	The Corporate Manslaughter and Homicide Bill
7	Extradition
7	Regulatory Intervention
7	The International Position
8	Case Law
9	Errors and Omissions (E&O)
9	The Professions Generally: Regulatory/Standards Review
9	Actuaries: The Morris Report
9	Surveyors: The Carsberg Report
10	Solicitors and Other Providers of Legal Services: The Clementi Report and The Legal Services Bill
10	The Medical Profession: The Future Regulation of Health
11	The Professions: Specific Developments of Note
11	General
11	Actuaries
11	Auditors and Accountants
12	Surveyors
13	Estate Agents
13	Architects
14	Insurance Brokers
15	Solicitors
17	Barristers
17	Financial Advisers
18	Medical
19	Expert Witnesses: All Professions
20	Environmental Liability
20	United Kingdom
20	Europe
21	Climate Change
22	Employers' Liability, Employment Practices Liability and Public Liability
22	Compensation Act 2006
22	Pension Claims
22	NHS Charges
22	Small Claims Limit

22	Asbestos
24	Age Discrimination Legislation
25	Transfer of Undertakings Protection of Employment Regulations (TUPE)
25	Bullying and Harassment
25	Statistics on Employment Tribunal Claims
26	Alternative Dispute Resolution
26	Statistics
26	Case Law
27	Legal Costs: Conditional Fee Agreements (CFAs), After The Event (ATE) and Before The Event (BTE) Insurance
27	The CFA Regime: Generally
27	ATE Premiums
28	Regulation of Claims Farmers
29	Procedural Developments
29	Performance of the Courts of England and Wales: Statistics and Trends
29	Costs
30	Offers to Settle
30	Periodical Payments Update
32	Coverage Issues Relating to Liability Insurance and Reinsurance Contracts
33	Reform of Insurance Contract Law
34	Group Litigation
34	United Kingdom
34	United States
34	European Union
35	Australia
36	Education Claims
37	Product Liability
39	International Law: Choice of Law Applicable to Torts and Forum Shopping
39	Rome II
41	Capital Measurement and Standards
41	Basel II
41	Solvency II
43	Tail of Liability Business
44	Conclusions

Introduction

In this Review (the fourth in this series), there is a real opportunity to see whether the trends identified in the earlier Reviews have become established and, if so, whether they are likely to be maintained in the future.

The main trends identified in the 2005 Review were the growth in D&O claims, the significant involvement of the government in the regulation of the corporate world and the professions, the increase in mediation and consequent decrease in litigation, and the influence of the EU in domestic legislation. It was thought that 2005 might have been a watershed year for group litigation orders.

In this year's Review, we consider whether these trends have continued and are now established, we report on what new issues and trends arose in the liability market in England and Wales in 2006, and we look to what may be to come for the remainder of 2007.

Directors and Officers (D&O)

Overview

2006 was the year that the global nature of D&O exposure really came to the fore. The extradition of UK directors for white-collar offences in the US received much publicity and the impact of foreign shareholders in class actions culminated in the US\$1.1bn settlement of a securities class action filed in the US against a European company. Regulators such as the FSA have built on last year's prosecutions against individuals and there are no signs of this changing in 2007. The Companies Act received Royal Assent on 8 November 2006 and will come into force in 2007 and 2008. The rights of indirect investors, provisions relating to directors' general duties, the enhanced business review and derivative claims will take effect in October 2007. Provisions relating to directors' conflict of interests, accounts and reports, audit and statutory auditors will take effect from October 2008.

Legislative Developments

The Companies Act 2006 (the Act)

The Act almost entirely replaces the Companies Acts of 1985 and 1989, as well as the Companies (Audit, Investigations and Community Enterprise) Act 2004. While implementation of the Act began in January 2007, the Act will not be wholly in force until October 2008.¹

Directors' Duties

Key aspects of the Act relevant to D&O liability, and therefore to both insurers and insureds alike, include the codification of directors' duties, expanded reporting requirements for directors and officers, the new ability of shareholders to bring so-called derivative actions against directors and officers, and the company's ability to indemnify its directors and officers in certain circumstances.

Directors' duties have been codified for the first time in the Act. The obligations of directors and officers are also expanded. While the overall duty is likely to remain the achievement of long-term enhanced shareholder value, directors are now expressly required to consider other matters such as any impact on the environment and on employees of the company.²

Directors' Reporting Requirements

Directors' reporting requirements have been amended in light of the continuing effects of worldwide corporate scandals. The Act requires the directors' report to include an expanded business review for PLCs and the report must also now include details of any third party indemnification to individual directors.

The Act also implements, with effect from 20 January 2007, the EU Transparency Directive and the reporting and disclosure requirements this entails (annual and half yearly financial reports and interim financial statements). Furthermore, it introduces a statutory 'safe harbour' for directors for these and other reporting requirements under the Act. A director's liability to a company is limited unless it can be shown that he made any misstatement knowingly or recklessly.

Shareholder Action

Shareholder derivative suits, once limited to cases of 'fraud on the minority' have now been expanded so that individual shareholders can sue a director or officer (or other persons, such as employees) on behalf of the company for negligence, default, breach of duty or breach of trust. Such an action can be brought by a member whether or not they were a member at the time the alleged act or omission took place. The shareholder derivative suit comes with some limitations, namely that the member must apply to the court for permission to bring proceedings and in so doing they must establish a prima facie case.

¹ *Lords Hansard 2 Nov 2006 : Column 432.*

² *The Companies Act 2006 Sections 170-177.*

Some commentators have expressed concern that this new ability for shareholders to sue will lead to an influx of such lawsuits brought against directors and officers. However, it is worthwhile remembering that not only does the individual member face the possibility of personally financing the application to court (if the court denies the application then the company is under no obligation to indemnify the member for any costs incurred) but also that any benefit, such as settlement or judgment, would only be in respect of the company and not the individual member.

D&O Indemnity

Indemnification of directors and officers remains unchanged from the position reported on in the 2005 Review concerning the Companies (Audit, Investigations and Community Enterprise) Act 2004, which is restated in the 2006 Act. A company is therefore permitted to indemnify its directors and officers for alleged liability to a third party (subject to provisions in a company's articles of association). However, there remain some circumstances where indemnification is not permitted, such as for criminal fines and regulatory penalties. The company can advance costs in defending such regulatory or criminal actions, and even a civil suit brought against the director by the company itself, but if the defence is unsuccessful then the advance must be repaid to the company in full.

Insurance can still be purchased on behalf of the directors and officers. In addition, directors who are also pension trustees are no longer prevented from seeking indemnification from the company or a third party, which was previously the case.³

The Corporate Manslaughter and Homicide Bill

As anticipated in the 2005 Review, the Corporate Manslaughter and Homicide Bill was introduced into Parliament in 2006. The Bill is expected to be enacted on or before 21 July 2007. At the time of writing this Review, there has been a threat to the continued existence of this Bill if the House of Lords' proposals to include the Prison Service within the ambit of the Bill (contrary to the wishes of the Home Secretary) are incorporated into the draft legislation.

Under current law, a company can only be convicted of corporate manslaughter if there is enough evidence to find a single senior person guilty. To date, only seven small organisations have been convicted because in most cases 'the senior person' has been too difficult to identify. The Bill addresses this by enabling the courts to consider the overall picture of how an organisation's activities were managed by the senior managers, rather than focusing on the actions of one individual.

Under the draft legislation, it will not be possible to prosecute a company where the failings are at junior management levels. This is the first of many 'loopholes' in the proposed legislation – potentially a company may delegate health and safety management to junior managers and thus try to avoid liability.

Critically, the Bill fails to provide any new offence with respect to individuals and personal liability.⁴ Trade unions have expressed dismay that senior managers, directors and officers will escape responsibility for their contributing roles in employee or third party deaths. These individuals can still be prosecuted under existing legislation (s.27 of the Health and Safety at Work Act 1974) but an average of only ten such prosecutions are brought each year by the Health and Safety Executive.⁵

³ *The Companies Act 1985 Section 310.*

⁴ *Fishburns. September 2006. Directors' and Officers' Update.*

⁵ www.hse.gov.uk.

Extradition

The Extradition Treaty between the UK and US was finally ratified by the US Senate in 2006, some three years after the UK had enacted the treaty into UK law by way of the Extradition Act 2003.

Under the Treaty, the US is granted special dispensation from the Secretary of State to forgo the usual formalities of requiring that a prima facie case be established before extradition is granted. Instead, the US only needs to produce 'information' such as a copy of a valid warrant or order of arrest. In contrast, the UK must show that there is a "reasonable basis to believe that the person sought committed the offence for which extradition is requested" before the US will grant extradition under the Treaty.

In the last year, the so-called NatWest Three (David Bermingham, Gary Mulgrew and Giles Darby) lost their battle against extradition to the US on charges of wire fraud. The three are presently on bail in Texas awaiting a trial that could be postponed for many months or even years.⁶

Another director of a UK company, Ian Norris (formerly of engineering group Morgan Crucible), has also been subject to a request for extradition. The High Court rejected his appeal against the extradition but on 13 March 2007 Lord Justice Auld and Mr Justice Field certified favourably on potential points of appeal to the House of Lords.

Regulatory Intervention

It has been suggested that 25% of all UK D&O cases are regulatory in nature and the average fine for a UK director is between £40,000 and £60,000.⁷ This percentage may well increase given the FSA and SFO's vigour during 2006 in pursuing and fining individuals for various reasons, including market abuse, management failures and market misconduct. In April 2006, Deutsche Bank's former head of European Cash Trading was fined £350,000 for market abuse while Deutsche Bank itself was fined £6.3m.⁸ In August 2006, the FSA fined Phillip Jabre and GLG Partners each £750,000 for market abuse stemming from the purchase of shares for the GLG neutral hedge fund by Jabre.

Some possible respite for insurers and insureds comes from a recent decision of the Financial Services and Markets Tribunal. Fines against two individuals (totalling some £850,000) in relation to an alleged spread-betting practice, which the FSA had deemed market abuse, were overturned by the Tribunal which then also awarded costs against the FSA. It is thought that these could be as much as £5m. It is the first time that the FSA has been ordered to pay the costs of someone it has pursued under its authority.⁹

The International Position
United States

Securities class actions are at a ten-year low, with only 110 being filed in 2006, 38% less than 2005.¹⁰ However, the average settlement value of a securities class action continues to rise and presently stands at US\$71m.

The presence of European companies in US securities actions continues to gather pace with the US Plaintiff Bar utilising losses incurred by foreign shareholders to obtain significantly increased 'global' settlements such as in the case of Royal Ahold.¹¹ In June 2006, the US District Court for the District of Maryland approved the settlement of the class action for US\$1.1bn. This growing trend of European companies settling US class actions on a 'global' basis continues, despite the fact that such a settlement is unlikely to be upheld in any European court.

⁶ *The Daily Telegraph*. 1 October 2006.

⁷ *www.lloyds.com*. 10 August 2006. 'Don't get court out at work'.

⁸ *www.fsa.gov.uk*.

⁹ *The Guardian*. 12 October 2006.

¹⁰ *Times Online*. 2 January 2007. Referencing a joint study by Cornerstone Research and Stanford Law School.

¹¹ *In re Royal Ahold NV Securities & Erisa Litigation*.

Cases are presently pending in the US against major European companies Parmalat¹² and Vivendi Universal.¹³ Both cases involve significant numbers of European shareholders who are being considered as part of the US class. In neither case has a class been certified, but decisions in these two cases about whether the classes can include foreign shareholders could decide whether European companies are pursued by the US Plaintiff Bar in future cases and could therefore significantly impact on the D&O landscape for European companies and insurers.

Europe

The European D&O market, and in particular the German D&O market, is often driven by internal or insured v. insured claims. The actions of executives implicated in bribery and sex scandals¹⁴ has highlighted the dilemma faced in providing cover to directors accused of such acts. Should the company suffer loss as a result of these immoral practices, then it is likely that a claim will ensue against the director and coverage under a D&O policy will be triggered.

Case Law

A major settlement in the D&O arena during 2006 was the coverage dispute between DaimlerChrysler and its D&O carriers. The securities class action was brought in response to the so-called 'merger of equals' between Mercedes Benz and Chrysler, although shareholders of the latter sued on the basis that this was a misrepresentation to the market and the deal was in fact a takeover of Chrysler. The case was settled in 2003 but insurers refused to pay the claim against the former Chairman of Mercedes Benz. Litigation ensued and reports suggest that this coverage dispute has now been settled for the sum of €168m.¹⁵

The long-running saga of Equitable Life also reached a dramatic conclusion in December 2005 when Equitable settled the litigation brought against former directors and officers. The decision was seen as a major victory for D&O insureds and insurers alike.

¹² *In re Parmalat Securities Litigation*.

¹³ *In re Vivendi Securities Litigation*.

¹⁴ *Volkswagen and Siemens*.

¹⁵ *www.CNNMoney.com*. 2 January 2007.

Errors and Omissions (E&O)

The Professions Generally: Regulatory/Standards Reviews

The UK government interest in the regulation of various professions and businesses continues. Some of the official reports, the conclusions of which were summarised in the 2005 Review, have had practical consequences most notably for the providers of legal services in England and Wales. Additionally, steps were taken during 2006 to regulate estate agents and claims farmers. It is to be hoped that in the long term, regulation should give rise to an improvement in professional standards and therefore the risks posed by the professions should decrease, in theory giving rise to fewer claims and reducing losses. There are signs, however, that in the short term there may be an increase in the number of claims¹⁶ whilst the regulators flex their new powers.

Actuaries: The Morris Report

The actuarial profession is now dealing with the fallout of the Morris Review of the Actuarial Profession in 2005. At the heart of this process was a critique of the uncertainty that lay within the whole arena of actuaries' duties and especially questions about the interests served by actuaries who rarely act for beneficiaries and/or policyholders but often have or produce information upon which these individuals might rely. In its response to Morris, the Presidents of the Institute and the Faculty of Actuaries have committed the profession to "develop means by which we can work proactively with all regulators ... and ensure that the services delivered by actuaries meet the standards expected by the public and demanded by the regulators and legislators." As recommended in the Morris Review, in May 2006 a compromise was adopted as regards self-regulation of the profession and is now overseen by the Financial Reporting Council. A new independent Board for Actuarial Standards has taken over the role of establishing professional standards.

Surveyors: The Carsberg Report

The Royal Institute of Chartered Surveyors (RICS) set up the Transitional Regulatory Board (TRB) in November 2005 to implement recommendations made by Sir Bryan Carsberg in his report published in April 2005. His recommendations include the continued regulation of chartered surveyors by the RICS with greater separation of regulatory and representational functions, the introduction of a principles-based compliance regime and a more active approach to competence monitoring and disciplinary procedures.

In October 2006, following months of consultation, the profession voted almost unanimously in favour of new principles-based rules, which replace prescriptive and detailed professional conduct regulation. The new rules will apply not only to individual professional conduct but also to firms' conduct of business as recommended in the Carsberg Report. The TRB is also working on the registration, enforcement and disciplinary framework to support the new rules of conduct.

The recommendation that the RICS take steps to investigate the opportunity to establish a Property Ombudsman Scheme may be a longer-term prospect but the implementation of the Carsberg recommendation to extend the Surveyor Ombudsman Scheme (SOS) to the rest of the UK is in the pipeline.¹⁷ The TRB proposals for a UK Ombudsman are expected in April 2007.

¹⁶ eg *Law Society Gazette*, 18 January 2007. *Legal Complaints Service proposing to write to over 700,000 miners inviting them to complain if they were not satisfied with the way in which their compensation claim was handled.*

¹⁷ *This has been run as a pilot scheme in Scotland since 2004.*

**Solicitors and Other
Providers of Legal Services:
The Clementi Report and
the Legal Services Bill**

During 2006 measures were introduced that will make potentially wide-ranging changes to the regulation and constitution of the providers of legal services.

In the 2005 Review, reference was made to the recommendations of the Clementi report in which Sir David Clementi suggested the establishment of a new regulatory framework and complaints system for the Legal Profession. During 2006 the government transformed this suggestion into the Legal Services Bill, which at the time of writing was at the committee stage of the House of Commons and was due to be given the Royal Assent in the summer of 2007.

The reforms will affect solicitors, barristers, legal executives, patent agents, trademark attorneys and licensed conveyancers.

The main changes introduced by the Bill are:

- > The creation of a Legal Services Board (LSB) that will regulate, oversee and monitor the current Professional Bodies (e.g. Law Society, Bar Council, ILEX). The LSB will have the power to issue Stop Notices under the current Enterprise Act to stop firms doing a particular kind of work.
- > The introduction of an Office for Consumer Complaints (OLC) to deal with consumer complaints with a maximum limit on redress of £20,000.
- > The introduction of Alternative Business Structures (ABSs) so that all kinds of legal service providers can practise either together as Legal Disciplinary Partnerships (LDPs) (for example solicitors and barristers) and/or with other professionals and businesses who do not provide legal services (MDPs).

Despite being urged to use 'less haste and more care',¹⁸ the government has rejected a proposal¹⁹ that ABSs be licensed in a step-by-step approach so that the operation of ABSs can be monitored. At the time of writing, the Lord Chancellor had announced²⁰ that LDPs need not wait for the licensing regime necessary for MDPs to operate so that theoretically LDPs could be open and practising shortly after the Bill becomes law (currently anticipated to be in the summer of this year).

**The Medical Profession:
The Future Regulation
of Health**

In July 2006, the Chief Medical Officer for England, Sir Liam Donaldson published his long-awaited review²¹ into the quality assurance and safety of doctors in practice in the UK, including the system of medical regulation. This report responded primarily to issues raised in the course of the inquiry into the case of Dr Harold Shipman, which examined the role of the General Medical Council (GMC) and the broad arrangements for medical regulation. Following this, in November 2006 the government launched a three-month consultation²² as part of its ongoing health reform programme with the goal of developing a regulatory framework that will support health reform and help achieve an independent and accountable system of medical regulation that commands public confidence.

Under the government White Paper reforms published on 21 February 2007, the GMC will lose its authority to adjudicate in fitness-to-practise cases when complaints are made against doctors. It will retain powers of investigation but an independent tribunal will take over its adjudication powers. The decision to remove doctors from the GMC register will be made on a lower burden of proof with the usual civil 'balance of probability' replacing the current 'beyond reasonable doubt'. The reforms also seek to introduce fitness-to-practise checks every five years for doctors and for other health professionals including dentists, pharmacists and nurses.

¹⁸ Report of Joint Parliamentary Committee into draft Legal Services Bill, published 25 July 2006.

¹⁹ Report of Joint Parliamentary Committee into draft Legal Services Bill, published 25 July 2006.

²⁰ Law Society Gazette. December 2006

²¹ Sir Liam Donaldson. 1 November 2006. 'Good Doctors, Safer Patients – the Chief Medical Officer's prescription for regulating doctors'. *J. R. Soc. Med.* 99(11). 545 - 545.

²² Department of Health Consultation: 'The Future Regulation of Health and Adult Social Care in England'. November 2006.

The Professions: Specific Developments of Note

General

Liability for the Acts of a Partner

The decision in 2006 of *Young Legal Associates Limited v Zahid Solicitors*²³ in the Court of Appeal widened²⁴ the category of individuals who potentially could be found to have been partners in a firm and therefore to have liability for the acts of other partners. The case determined that the Partnership Act 1890 did not require individuals to share profits in order for them to be partners. They only had to be “carrying on business in common with a view of profit.” In consequence, salaried partners may have an increased liability to third parties.

Actuaries

In recent years concern about actuaries’ liabilities have focused mainly on the risks arising from consulting firms’ administrative and advisory roles connected to pension funds. Despite these concerns, the number of reported cases remains small. The most recent significant reported decisions were *Precis (521) Plc v William M Mercer Ltd*²⁵ and *Andrews v Barnett Waddingham*.²⁶ In both cases, the actuaries received favourable outcomes in the Court of Appeal.

In Mercer, the subject matter was an incorrect actuarial valuation of a pension fund and it was held that a purchaser of a company with no relationship to the actuarial adviser could not rely on a report prepared for others for different purposes. The Barnett Waddingham case concerned misleading advice on the effect of the Policyholders Protection Act 1975, which an investor claimed to have relied on when taking out a with-profits annuity policy with Equitable Life.

The position in relation to general insurance actuaries is generally quiet. The major publicly asserted claim still outstanding is that brought by the provisional liquidators of the Independent Insurance Company Limited against Watson Wyatt relating to the company’s reserves. At the time of its collapse, speculation was rife about the adequacy of Independent’s reserves. Prior to any trial it is difficult to comment.

The risk of large underfunded pension schemes being wound up after employers’ insolvency is now controlled by the intervention of the Pension Protection Fund. It is too early to discern the effect of this on the industry as a whole and whether it significantly alters the risks of actuaries. Another favourable development is the slight easing or slowdown of the increase of the liabilities of pension funds as stock markets recovered reducing the possibility of further systemic risks across the industry.

Auditors and Accountants

The 2005 Review reported on proposals to remove the longstanding bar on auditors limiting their liability to companies that they audit. Certain provisions of the Companies Act 2006 [s.534 to s.538], which are expected to come into force by October 2008, will allow an auditor to reach an agreement with the audited company – a liability limitation agreement (LLA) – to limit the auditor’s liability for a particular financial year. Such an LLA will be effective if it limits liability to an amount that is ‘fair and reasonable’ in all the circumstances. Subject to any regulations the Secretary of State might make in the future, an LLA can be framed in any way, including limiting liability by reference to a sum of money or to a formula.

Consequently, despite previous objections to monetary caps, such caps on liability will soon be possible. As an alternative to a cap (or even perhaps in conjunction) an auditor might provide that his liability should be proportionate, i.e. he should only be responsible to the extent he is responsible for damage suffered taking into account the fault of others. Importantly, if an LLA is deemed to limit liability to an amount that is less than ‘fair and reasonable’, it will have effect as if it limited liability to such a ‘fair and reasonable’ amount. Consequently, where an auditor has tried to limit liability but is deemed to have done so on a basis that is not fair and reasonable, the courts may still allow the auditor the benefit of what would have been a fair

²³ [2006] EWCA Civ 613.

²⁴ From the case of *Nationwide Building Society v Lewis* [1997] 3 All ER 498.

²⁵ [2005] EWCA Civ 114.

²⁶ [2006] All ER 284.

and reasonable limitation. These provisions and, in particular, the use of monetary caps should assist auditors and their insurers when considering risk and assessing potential exposures.

Less attractively for auditors, the Companies Act 2006 will (also, we understand, by October 2008) make it a criminal offence for an auditor to knowingly or recklessly cause an audit report to include any matter that is misleading, false or deceptive in a material particular. There is no definition of 'recklessly' in the Act and the accountancy profession has expressed concern that this might lead to charges and convictions where auditors make honest mistakes.

There were two important House of Lords' decisions in 2006 involving accountants, both addressing limitation issues.

In *The Law Society v Sephton & Co*,²⁷ The Law Society sought damages from accountants for their failure, over the course of various annual Solicitors Accounts Rules reports, to detect that a solicitor was misappropriating client monies. The House of Lords held that the six-year limitation period started not when the reports were given but when a claim for compensation was first made against the Compensation Fund or possibly when it first resolved to pay such a claim, which was some years later.

In a more favourable decision for accountants and their insurers (and professionals generally), in *Haward v Fawcetts*²⁸ the House of Lords decided that a claimant who had acquired a controlling interest in a company on the allegedly negligent advice of accountants was time-barred from bringing proceedings. The case turned on when the claimant had the requisite knowledge under Section 14A of the Limitation Act 1980. The Lords held that all the claimant had to know to start the three-year limitation period running was that "something had gone wrong of which he was prima facie entitled to complain." This was an earlier starting point than had been applied by the Court of Appeal.

Surveyors

Since the 1996 'South Australia' case,²⁹ surveyors have not been liable for losses caused by fluctuations in the property market. They are potentially liable only for losses that arise as a consequence of the information they are providing by way of the valuation being wrong. The state of the property market remains of primary interest to surveyors and their insurers, however, as either a drop in property values or a rise in repossessions will increase the possibility of mortgage lending losses, which then bring about a greater scrutiny of valuations.

Following two years of slowing growth the property market accelerated in 2006, showing an annual increase of 10.5%.³⁰ The mortgage market ended 2006 with lending volumes at a record high (estimated total £346bn), showing a rise of around 20% on 2005.³¹ Two interest rate increases in the second half of 2006 had no dampening effect on the market although the RICS are predicting slower growth of 7% in 2007.³² The interest rate rise in January 2007 brought rates to their highest level for more than five years with a further rise expected in the spring.

²⁷ [2006] UKHL 22.

²⁸ [2006] UKHL 9.

²⁹ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191.

³⁰ *The Guardian*. 29 December 2006. 'House prices increased by £45 a day'.

³¹ *Council of Mortgage Lenders. Market Commentary*.

³² *RICS. UK Housing Market Forecast 2007*.

Of greater concern is the rapid rise in mortgage repossessions. These were up 76% in the first half of 2006.³³ From a low point in 2003, the rise in the number of properties taken into possession by mortgage lenders is accelerating. It is still only just over 21% of the record number of repossessions in 1991 but figures available for the second half of 2006³⁴ indicate a continuing rise. Whilst lenders in possession may be scrutinising closely the valuations on which they relied in lending, the buoyant property market may mean that they will have suffered no loss even if the property was originally overvalued.

The government's planned introduction of Home Information Packs (HIPs) under the Housing Act 2004 has been progressed with the RICS through 2006 and from 1 June 2007 home owners will be required to have a HIP in place when marketing their home for sale. The reforms are intended to reduce the risk of wasted time and cost in residential conveyancing by making more information available to a prospective buyer from the outset. In July 2006, under increasing political pressure, the government dropped the requirement to include a Home Condition Report (HCR) in the HIP to be prepared by a Home Inspector certified under a new scheme. HCRs will be a voluntary inclusion in a seller's HIP from June 2007. The RICS has been involved in establishing standards for HCRs and in training Home Inspectors who could potentially be liable to the seller, the buyer and their mortgage lenders.

Estate Agents

In November 2006, the government introduced the Consumers, Estate Agents and Redress Bill. The Bill will require all estate agents in the UK to belong to industry redress schemes dealing with complaints about the buying and selling of residential property.

The Bill also

- > requires estate agents to make and keep records, including records of offer letters, for a period of six years;
- > gives the OFT and local Trading Standards Officers power to require access to premises and on-site production of records in a wider range of circumstances;
- > expands the circumstances in which the OFT can consider the fitness of an estate agent to practise and issue prohibition or warning notices under the Estate Agency Act.

Architects

Part F and Part L of the Building Regulations 2000

In April 2006 part L (Conservation of Fuel and Power) and amendments to Part F (Ventilation) came into force, affecting (by reason of the more stringent testing of a building's performance) the extent to which defects emerge and providing for pass or fail criteria.

A large percentage of the UK's carbon emissions emanate from the use of buildings³⁵ and the government sees control of energy use as part of its commitment to the Kyoto Treaty. Under the Regulations, buildings must be both more energy efficient and demonstrably so in order that they receive the necessary certification. The use of the National Calculation Method to assess performance is mandatory under the new Regulations. The building owner will expect the building to receive the necessary accreditation. Failing this there are likely to be implications for engineers and architects, in particular. It is likely that the impact of the Regulations can only be ascertained over the years, but consultants are having to address such issues as how specifications are written and how early in the design stage the lead consultant involves the engineer. Practical completion will be delayed until the building complies with airtightness and other requirements, with attendant impact on such matters as loss and expense claimed under the building contract and lost revenue claimed in relation to the building.

Commentators fear confusion over the interpretation of the regulations, inconsistency of enforcement, how the regulations will 'sit' with the increasingly complex nature of buildings and procurement methods, and the increased liability implications for consultants.

³³ Council of Mortgage Lenders statistics.

³⁴ DCA statistics.

³⁵ Office of the Deputy Prime Minister.

Procurement Methods

The increased use of design and build procurement has led to a relatively new class of claim against architects in particular, relating to the adequacy of design information supplied to a contractor client on which its tender was then based. JCT documentation³⁶ together with various standard partnering documents provide for parties to be judged by Key Performance Indicators and to give early warnings to other parties (including the employer) of difficulties with the performance of their services. Some partnering contracts provide for each party to waive any rights to claim against the other parties. There is a mismatch between such provisions and professional indemnity insurance policies for individual consultants, which preclude an insured from making any admissions of liability and which require the insureds to maintain subrogated rights of recovery against other parties. It is likely that the insurance industry will need to react by making more freely available insurance policies for the project as a whole, and for the duration of the liability period, along the lines of Decennial Insurance available in other parts of Europe.

Asbestos

The Control of Asbestos at Work Regulations 2002 have now been in force for more than two years. The construction industry's response has largely been to exclude any liability for asbestos in main consultants' appointment terms as a standard provision and to include, under standing instructions, advice to an employer to engage a specialist asbestos removal consultant.

Insurance Brokers

Spitzer and Regulation

In January 2005, when the FSA took over responsibility for the regulation of insurance broking, it was clear that the Spitzer investigation would have a significant and lasting impact on insurance broking although the form that this would take in the UK was not clear. Spitzer had been highly critical of practices that he had uncovered in the industry in the US. The payment of 'incentive commissions' was at the top of his list and a close second was the 'tying' of reinsurance business to primary insurance contracts at the expense of market competition that would benefit the consumer. The high-level regulatory Principles for Business of the FSA's regime in other industries were already in place. The more detailed application of the FSA's regulatory reform in the insurance industry reflects Spitzer's concerns in the US.

The FSA identified the way conflict of interest was managed as an early priority and a majority of the FSA's work on conflict management in 2005 focused on commission and profit sharing arrangements. In November 2005, the FSA published a 'Dear CEO' letter setting out concerns about the effective management of conflicts by insurers and intermediaries, based on a review of 38 firms. A number of areas of conflict and potential conflict were identified in an FSA factsheet published in January 2006. Procedures for the management of conflict of interest are seen by the FSA to be unequivocally the responsibility of senior management.

During 2007 the FSA will be looking more closely at potential 'market failures', identified by John Tiner, and in particular at the issue of mandatory disclosure of commission arrangements.

The issue of contract certainty has also been to the fore throughout 2006. In March, the FSA challenged the industry to move away from the 'deal now, detail later' culture to secure a market-driven solution to the issue of contract certainty by December 2006. The FSA announced the industry's success in January 2007 after meeting with industry leaders who reported that 90% of contracts in the subscription market and 88% in the non-subscription market were achieving contract certainty.³⁷

The year 2006 also saw a number of high-profile enforcement actions against insurance intermediaries, mostly under the banner of Treating Customers Fairly (TCF). These for the first time included secondary insurance intermediaries.

³⁶ *The Joint Contracts Tribunal Limited. 2005 Framework Agreements binding and non-binding.*

³⁷ *Lloyd's News Centre. 26 January 2007. 'UK Insurance Industry's Work on Contract Certainty recognised by regulator'.*

Cases

Three cases in 2006 will be of particular interest to brokers and their insurers. In *Goshawk v Tyser & Co Ltd*,³⁸ the Court of Appeal confirmed that, at least in the Lloyd's market, a broker must make available to underwriters placing and claims documentation previously shown to them and premium accounting documents necessary to the operation of a contract.

Two cases in the Commercial Court extended the duties of brokers. In *BP Plc v Aon Ltd*,³⁹ Colman J ruled that a sub-broker could owe a duty of care in tort to an insured even though there was no contractual relationship between them. The extent of a sub-broker's assumption of responsibility was the determining factor in this case. *HIH Casualty and General v JLT Risk Services*⁴⁰ imposed a duty on the broker who had placed reinsurance for HIH in relation to a film finance scheme to alert HIH to matters of potential concern post-placement that might have an impact on the risk that had been placed.

Solicitors

Scope of Duty

The scope of a duty owed by a solicitor to a client came under scrutiny by the courts in 2006 in particular in relation to advice given by a solicitor in commercial transactions. The decisions in *Football League Limited v Edge Ellison*⁴¹ and *Marplace v Chaffe Street*⁴² followed the decision of the Privy Council in the 2004 case of *Pickersgill v Le Cornu & Riley*.⁴³ A solicitor will generally not be able to avoid advising on a transaction simply because he has been instructed to implement an agreement reached by his client in relation to which he had not been involved in the negotiation. The solicitor's obligation is to point out to the client any legal obscurities or hidden pitfalls, which the client might have been unaware of. In neither case was it found that the solicitor owed a duty to advise on the commercial aspects of the transaction. This is even more likely to be the case where the client is an experienced businessman.

Contributory Negligence

The judgment in the *Football League* case concluded that had the solicitors been liable to pay substantive damages there would have been a finding of contributory negligence of 75%. The grounds for this were that the solicitors' breach of duty was one of failing to advise the Football League to consider a commercial aspect of the transaction. The Football League admitted that this was an aspect about which it was capable of forming a view and had formed its own view. The decision suggests that although a finding of contributory negligence may not always be available to a solicitor because the breach of duty will often be in relation to a matter that is within the solicitor's expertise, where it is available there is nothing to prevent a very high level of contributory negligence from being found.⁴⁴

Lost Chance

Many decisions involving solicitors' negligence involve an assessment of whether or not the claimant would have achieved a different and better outcome, had the solicitor given the correct advice. Reported decisions continued to show that it is possible to defeat such claims on the grounds of causation (see for example *Robinson v Buss Murton LLP and Another*⁴⁵ and *Siddiqui & Another v James & Charles Dodd*).

³⁸ [2006] EWCA Civ 54.

³⁹ [2006] EWHC 424 (Comm).

⁴⁰ [2006] EWHC 485.

⁴¹ [2006] EWHC 1462 (CH).

⁴² [2006] EWHC 1919 (CH).

⁴³ [2004] PNLR 31, PC.

⁴⁴ See also: *Solicitors Journal*, 15 December 2006. Charlwood & Wygas.

⁴⁵ Decision handed down on 17 November 2006 Queens Bench Division.

Solicitor's Reliance on Counsel

The case of *Regent Leisure Time Limited v Skerrett & Pearson*⁴⁶ found that where Counsel had extensive knowledge of the proceedings and did not need more detailed instructions from the defendant solicitor, the solicitor had been entitled to rely on Counsel's advice and was not liable for the fact that the claimant company's claim was statute barred.

Claims Arising out of the Collapse of The Accident Group (TAG)

The TAG litigation continued to attract attention in 2006 and will no doubt do so in 2007.

In the negligence proceedings, the privilege challenge mounted by one of the group defendants failed to present anything more than a temporary obstacle to the progress of the claims. The claimant's audit process failed to deliver the expected reduction in the volume of claims pursued and 600 plus firms and 40,000 plus claims (valued at in excess of £80m) are carried forward into 2007. The Commercial Court set aside time in the autumn to deal with expected lead cases and generic issues although the litigation is not being conducted pursuant to a formal group litigation order as it was felt that certain consequences of litigation allocated as a group litigation order (GLO) would not be appropriate in this case.

A trial date has been set for April 2008, but the parties are currently engaged in a three-stage mediation process, which is due to culminate in June 2007.

Copycat claims from ATE insurers involved in other claims farming schemes have yet to develop, and if they do, attention will be focused on the scope of sweep-up notifications to the 2004 year of account. At the time of writing, nine Lloyd's syndicates had just announced that they would not be issuing negligence proceedings against the panel firms involved but would continue to pursue claims for referral fees to a TAG sister company (AIL), which the market declines to indemnify.

Conflicts and Confidentiality

In May 2006 following several high profile cases,⁴⁷ new rules on conflicts and confidentiality were introduced, the first time there had been such rules other than in relation to conveyancing. Within four months of their introduction, solicitors were arguing that they did not have the desired effect of enabling them to act in situations in which they had confidential information about former clients as unsurprisingly when approached, former clients refused to give their consent to the firm acting.

2007

Issues to look out for in 2007 include:

- > whether the solicitors' regulator will, as threatened, clamp down on breaches of the regulations allowing solicitors to pay referral fees for work (payment of referral fees is banned in other European jurisdictions);
- > whether miners' claims against solicitors will increase;
- > whether the Law Society's campaign against lenders increasingly providing incorrect redemption statements will result in solicitors refusing to provide undertakings in conveyancing transactions;
- > what the impact of a new code of conduct and the Legal Services Bill when enacted in the summer will be.

⁴⁶ [2006] EWCA Civ 1184.

⁴⁷ eg *Marks & Spencer v Freshfields*, *Prince Jefri Bolkiah v KPMG*.

Barristers

Notwithstanding abolition of the immunity from suit of advocates by the House of Lords in *Hall v Simons*,⁴⁸ the number of reported cases against barristers remains relatively low. Areas in which barristers have faced claims include the settlement of personal injury actions. In *David Alan Walker v Charles F Chruszcz & Irwin Mitchell*,⁴⁹ neither solicitors nor Counsel were found liable for advice given in relation to the risks of liability based on their assessment of the client's potential performance as a witness. The advice was held to be reasonable and sufficiently highlighted. In *Morris Joseph Hickman v Blake Laphorn and David Fraser*,⁵⁰ both solicitors (one third) and Counsel (two thirds) were liable for failing to take into account the real possibility that their client would be incapable of future employment with the result that the client settled his claim for too low a sum.

From 1 April 2007, the Bar Mutual policy extends to cover barristers for defence costs of disciplinary action.

Financial Advisers
Trends

The Financial Ombudsman Service's (FOS) annual review, published in June 2006, provided mixed messages for financial advisers.

The number of new non-endowment investment cases fell to 15,795, a reduction of 18% on the 2004–05 figures, although within that figure pensions cases remained static at about 4,000 and income drawdown cases, which tend to involve substantial compensation, increased from 162 to 516. This suggests, unfortunately, that the reduction is likely to be connected to stock market movements and the end of the split capital investment trust debacle, rather than to improvements in the quality of advice provided to customers.

Mortgage endowment cases showed a slight decrease from 69,737 new cases in 2004–05 to 69,149 in 2005–06. However, there is some evidence that while cases against larger providers are tailing off as they are resolving more cases before they reach FOS, cases against financial advisers are increasing.

FOS expects to see a similar level of mortgage endowment complaints in 2006–07, partly because all the large endowment providers have announced their intention to apply 'time bars'. Thus during 2006–07, a significant number of consumers will receive letters providing them with a final deadline by which to complain.

Judgment: Garrison v FOS

Probably the most important legal decision for financial advisers in 2006 was the Garrison case,⁵¹ which held that FOS had failed to establish a sufficient logical connection between the error identified by FOS and the redress awarded.

In this case, the court upheld FOS's decision that it was unreasonable for a financial adviser to advise a retired couple to invest 40% of their investment portfolio in structured income products. However, the court upheld the firm's claim that FOS's standard redress model, comprising a full return of capital plus interest at 1% over the base rate compounded annually, was not appropriate in this case. The customers had previously held their portfolio in equities and, in the absence of the firm's advice, would probably have left it there. The issue of redress was therefore remitted to FOS for reconsideration.

While this judgment is unlikely to have implications for the standard redress model as a whole, it does emphasise that if it can be shown what customers would have done with their investment funds in the absence of a firm's advice; this, rather than the standard model, should be the starting point for redress.

48 [2002] 1 AC 615.

49 [2006] EWCH 64 (QB).

50 [2005] EWCH 2714 (QB).

51 *R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service* [2006] All ER (D) 110 (Aug).

The Pensions Review

The Financial Services Compensation Scheme's (FSCS) report for the Financial Services Compensation Scheme's (FSCS) report for the first half of 2006–07 revealed a worrying increase in Pension Review claims. The FSCS suggested that the increase in claims was caused by the number of firms being pushed into default by the combined weight of Pensions Review and endowment complaints. The problem was that if a firm goes into default, claims that were closed could be reopened by the FSCS, increasing its overall compensation bill and thus the levy which it charges to financial advisers.

There are suggestions that the FSCS may be exceeding its remit and one trade body (AIFA) has threatened to take the FSCS to court over concerns that it may be reopening cases in breach of the Limitation Act 1980.

To Look Out for in 2007

Real Estate Investment Trusts (REITs) are a new form of financial product, launched on 1 January 2007. They operate by pooling investors' money and investing it in commercial and residential property.

However, REITs may suffer from illiquidity and a collapse in either the commercial or residential property market could send their value plummeting. As with all new products, there may also be hidden risks that only reveal themselves with time and there are likely to be issues surrounding the way in which risks are explained to property-infatuated consumers.

FOS's jurisdiction extends to consumer credit disputes from 1 April 2007. This affects any business with a consumer credit licence or anyone giving advice on consumer credit and is most likely to affect banks and shops issuing credit cards.

There are ongoing several major consultations on changes to the Financial Services Authority's Handbook. Amongst other things, the consultations propose changes to the Conduct of Business Rules, complaint handling including FOS procedures and the FSA's own enforcement procedures. Some of these changes form part of the implementation of the Markets in Financial Instruments Directive (MiFID), whereas others evidence the FSA's desire to move away from detailed rule-following towards a culture based on the enshrinement of higher-level principles, such as treating customers fairly (TCF).

There is likely to be a period of uncertainty whilst the new rules bed down. For larger firms, the shift to a principles-based environment may offer welcome flexibility, but for smaller firms the uncertainty caused when tried and tested rules are replaced with vague statements about fairness, may give rise to complaints.

Medical

Claims Generally

The number of clinical negligence claims brought against the NHS continues to rise at a steady 1.6%, with the number of claims in 2004–05 rising from 5,609 to 5,697 in 2005–6. However, there has been a 7.1% decrease in the number of non-clinical claims over the same period.

The costs of these claims have also risen quite considerably from £502.9m in 2004–05 to £560.3m in 2005–06.

The average claim now takes 1.46 years from notification to settlement (or discontinuance) with 96% of claims settling out of court via ADR. Fewer than 50 clinical negligence cases a year are actually contested in court.

The NHSLA currently estimates its total liabilities for clinical claims to be £8.22bn. This figure may well be reduced after the 2005 case of *Sheppard v Essex Strategic Health Authority*⁵² in which Mrs Justice Hallett agreed to cap the NHS's liabilities on costs in a case brought by twins injured

⁵² *Supreme Court Costs Office No 21 of 2005.*

at birth. Previously costs had only been capped in group litigation cases. In a novel decision, Portsmouth Healthcare Trust was allowed in the highly publicised case of Charlotte Wyatt to seek to recover its costs in the Court of Appeal from the Legal Services Commission who had funded her parents' argument that she should be resuscitated.

The practice of the NHS subcontracting its testing function was highlighted in the case of *Hanan Basem Farraj (2) Basem M Farraj v King's Healthcare NHS Trust & Cytogenetic DNA Services Ltd*. It was held on the determination of a preliminary issue that a sufficient relationship of proximity existed between Mrs Farraj and the DNA laboratory (which did not detect a blood disorder in an unborn baby) to found a duty of care. The Healthcare Trust was found to have successfully delegated its duty of care to the DNA laboratory.

**Expert Witnesses:
All Professions**

Expert Immunity

Expert immunity was one of the issues that dominated the expert witness arena this year following the high-profile appeal by Professor Sir Roy Meadow against the decision of the General Medical Council (GMC) in *Meadow v General Medical Council*.⁵³

In this case, the court was asked to consider whether badly performing experts could be disciplined by their professional regulatory body. At first instance the trial judge's finding was that it should not happen unless the judge at trial or possibly the Court of Appeal later on thought that an expert's conduct was so bad that it called into question their fitness to practise. At the end of last year, the Court of Appeal overruled this. On the question of immunity, it found that an expert is not immune from disciplinary proceedings in respect of evidence given in court in the capacity of expert witness. They confirmed that there was no bar to fitness-to-practise proceedings, allowing the GMC or similar bodies to proceed with disciplinary actions without court direction.

Conflicts of Interest/Bias

Another case that had implications for all experts giving evidence in court proceedings was the decision in *Toth v Jarman*⁵⁴ on whether a judgment should be set aside where the expert witness engaged by the defendant had not declared a conflict of interest in the case. The Court of Appeal held that while a conflict of interest would not automatically disqualify the evidence of an expert witness, it is important that any conflict should be disclosed as soon as possible so that the court can decide the extent to which reliance can be placed on the expert's evidence. The expert's declaration in his or her report should include a statement that the expert has no conflict of interest of any kind.

⁵³ [2006] EWCA Civ 1390; [2007] 1 All ER 1 (CA (Civ Div)).

⁵⁴ [2006] EWCA Crim 1028; *The Times*, 17 August 2006. (CA (Civ Div)).

Environmental Liability

United Kingdom

Statistics

In the 2005 Review it was identified that the number of criminal sanctions against polluters was on the rise. A recent report by the Environment Agency⁵⁵ suggested that this trend is continuing. There were 317 prosecutions against businesses in 2005, resulting in total fines of £2,742,250. This represents a 16% increase on 2004. A total of 161 businesses were fined over £5,000, with Thames Water Utilities having the highest cumulative fines at £128,000; 94 businesses were fined more than £10,000, compared to 86 in 2004; 22 of the businesses fined over £5,000 in 2005 were also fined at least once in the preceding five years. Twenty-eight directors were successfully prosecuted – more than double the number in 2004 – and 47 individuals for business-related crimes. In addition to these penalties, four prison sentences and 25 community service orders were handed out.

Waste, water and farming sectors are responsible for over three quarters of all serious industrial pollution incidents.

Anti-Social Behaviour Orders

In our 2005 Review, we reported that the first Anti-Social Behaviour Order (ASBO) for breach of environmental law was issued in 2004 against the owner of a skip who consistently refused to dispose of his waste legally. The Environment Agency highlighted this case once again in its most recent report. Following a successful prosecution in 2004, an illegal waste operation continued at this site. The Agency prosecuted the operator again in 2005, resulting in a six-month prison sentence. It has since taken further action when the operation did not close during the operator's imprisonment.

Chemicals

The sector releases a complex mix of potentially harmful chemicals into the environment. One of the most significant releases of priority hazardous substances to water by the sector is the carcinogen, hexachlorobutadiene (HCBD).

The fuel and power industry has always been the most resource-intensive sector, utilising huge quantities of water and fuel and releasing about three quarters of industrial greenhouse gas emissions in England and Wales. There were five serious non-compliance events in 2005. The sector caused one serious pollution incident, compared to six in 2004. Reducing emissions of greenhouse gases is identified as a key challenge.

Europe

Environmental Directive

With the EU Environmental Liability Directive's (the Directive) implementation deadline of 30 April 2007 imminent at the time of writing, the UK government has only recently launched a consultation on implementing the Directive. It was thought unlikely that the government would achieve the April deadline. The general ethos behind the Directive is 'the polluter pays'. The Directive establishes two new categories of mandatory remediation in respect of those businesses that cause significant damage to the environment: compensatory remediation, which is designed to compensate for temporary or interim damage to the environment, and complementary remediation, designed to compensate where significant permanent environmental damage has resulted. There is a shift away from criminal liability to civil penalties.

⁵⁵ Environment Agency, September 2006. 'Spotlight on Business Environmental Performance in 2005'.

REACH

The European Parliament finally adopted the REACH (Registration, Evaluation and Authorisation of Chemicals) regulation on 13 December 2006. This represents one of the most stringent forms of worldwide regulation in terms of the management and control of chemical substances. The REACH regulation imposes on companies the registration of 30,000 substances, whether manufactured in the EU or imported in volumes exceeding one tonne per year. This regulation was set to come into force across the European Union on 1 June 2007.

With the environmental liabilities imposed by the Directive – in particular liability for damage to protected species and natural habitats – comes the obvious potential for an increase in litigation in situations where businesses fail to implement the necessary changes or fail to meet increased standards, or where damage is caused to the environment. There will not be any mandatory insurance to start with to meet liabilities under the Directive.

This is, however, subject to a European Union Review in 2010 about the general availability of suitable insurance products at which point the Directive may be amended to introduce mandatory insurance in all member states. Once the Directive is implemented, companies will be liable for the remediation of environmental damage. This will inevitably increase demand for special policies with a broad scope of cover. As a result, individual markets in the EU will be looking to develop new insurance products to meet these new risk areas.

There is still potential for certain environmental liabilities under this Directive and other environmental legislation to be covered by the wording of public liability policies. It may lead public liability insurers and their reinsurers to consider deleting the qualified pollution exclusion in their policies in favour of an absolute pollution exclusion.

Climate Change

In our 2005 Review, we highlighted that climate change may be the next big target for claimant lawyers in the US (after tobacco, asbestos and food). This issue is likely to assume prominence in the UK following a recent study by Sir Nicolas Stern⁵⁶ (the Stern Review), which addresses the economic arguments for urgent worldwide action to tackle greenhouse gas emissions. The Stern Review has already been used by the UK government in preparatory meetings for the next round of discussions on the Kyoto Protocol.

In October 2006, the European Commission launched an Energy Efficiency Action Plan, to be implemented over the next six years. Its aim is to reduce energy consumption by 20% by 2020.

DEFRA ran a Climate Change Consultation until 31 January 2007 and the proposals could be implemented by 2009.

In one recent high profile case in the US, the State of California commenced proceedings against six major car manufacturers who, it is alleged, are responsible for 30% of greenhouse gas emissions in California. The main crux of their case is that the State will need to spend millions of dollars in its attempt to mitigate the effects of climate change and damage to the natural resources of the State.

In December 2006, the Environment Agency for the first time fined four companies more than £750,000 for failing to account for their carbon emissions during the first year of the European Union Emissions Trading Scheme.⁵⁷

⁵⁶ *Stern Review on the Economics of Climate Change*. October 2006.

⁵⁷ *Environment Agency: Civil Penalties*. Document reference 177/12.

Employers' Liability, Employment Practices Liability and Public Liability

Compensation Act 2006

Section 1 of this Act provides that in considering a claim in negligence or breach of statutory duty a court may, when determining whether the defendant should have taken particular steps to meet a standard of care, have regard to whether a requirement to take those steps might prevent an activity that is desirable from taking place or might discourage people from undertaking functions in relation to the activity.

Section 2 stipulates that an apology, an offer of treatment or other redress shall not of itself amount to an admission of negligence or breach of statutory duty.

Both these provisions merely restate the existing law. The aim of section 1 according to the government is to:

“Contribute to improving existing awareness of this aspect of the law, providing reassurance to the people and organisations who are concerned about possible litigation and to ensuring that normal activities are not prevented because of the fear of litigation and excessively risk averse behaviour.”

Pension Claims

During 2006, the government published its White Paper on pension reform. After a consultation period, the government published the Pensions Bill in November 2006. The Bill is presently on its second reading in the House of Commons. It proposes changes in retirement ages and the introduction of personal pensions saving accounts. The effect of the Bill and in particular the changes to the pension ages may allow up to a year's loss of earnings to be added to the value of a claim, which may require insurers to consider increasing their reserves in appropriate cases.

At the time of writing, the High Court had ruled in favour of four people who lost all or part of their company pensions, a decision that affected 85,000 others. The ruling does not oblige the government to compensate those who lost their pensions when the firms they worked for went out of business and caused 400 schemes to close with deficits. It does though condemn the government's decision to reject in its entirety the Parliamentary Ombudsman's report into the collapsed schemes. The outcome of this Judicial Review meant that the government will have to reconsider whether to compensate those people who lost their pension from public funds, although the Prime Minister's Office has already announced the intention to appeal.⁵⁸

NHS Charges

Regulations introduced with effect from 29 January 2007 will oblige compensators to reimburse the cost of any necessary NHS charges in all personal injury cases for accidents occurring on or after 29 October 2007, extending the current liability for motor accidents under the Road Traffic (NHS Charges) Act 1999.

Small Claims Limit

The monetary limit for personal injury claims that can be brought in the small claims court is to be reviewed. Currently the limit is £1,000. It is suggested that this may be increased to £5,000. If implemented, the effect would be to make many personal injury claims non-cost-bearing so that claimants might have difficulty in obtaining legal representation to bring claims.

Asbestos

Mesothelioma

Asbestos and the diseases contracted as a result of exposure to it continued to feature throughout 2006. The decision of the House of Lords in *Barker v Corus (UK) Plc*⁵⁹ (Barker) handed down in May 2006 was hailed as a result for both employers and insurers by providing a fairer apportionment of liability in relation to mesothelioma claims.

⁵⁸ Downing Street press briefings, 22 February 2007. Morning press briefing 2007.

⁵⁹ [2006] UK HL20.

Where a mesothelioma victim had been exposed to more than one source of asbestos, it was difficult to determine with any degree of certainty which source ultimately caused the disease. Historically this fact posed difficulties for victims in proving causation in a claim for damages for death or personal injury following exposure to more than one source of asbestos. The 2003 House of Lords decision in *Fairchild v Glenhaven Funeral Services Limited*⁶⁰ (Fairchild) introduced an exception to the usual causation rule. It was decided that where an employee has contracted mesothelioma following exposure to asbestos whilst in the employment of several different employers, the employee was entitled to claim the full amount of damages from each or any one of those employers notwithstanding that the employee could not show which exposure had directly caused the illness. This was because all employers had materially contributed to the risk of him contracting the disease. The paying employer would then have to seek a contribution from the other employers (provided that these could be traced and were solvent). Following *Fairchild* there was a degree of uncertainty as to the basis on which an employer's liability was to be apportioned for the purpose of seeking contributions from others, i.e. the decision did not resolve whether liability should be joint and several but it was presumed that this was the rule and this was the approach taken in practice.

In *Barker*, the House of Lords found that in respect of mesothelioma claims an employer should only be liable for its individual contribution to the risk, i.e. according to its relative degree of contribution to the chance of the person contracting the disease. This meant that in practice the claimant would have to trace all relevant defendants before liability could be apportioned and full compensation paid or to issue multiple claims to recover damages on a piecemeal basis. The victim bore the risk of a former employer being untraceable or insolvent.

The public outcry that followed given the perceived injustice to claimants as a result of the decision, forced the government to take swift radical action and introduce Section 3 of the Compensation Act 2006, effectively overturning the judgment.

The section effectively reverts to the position post-Fairchild in that 'the responsible person' can be liable for the full damages even though there was some exposure to asbestos by another. Subsection 3 confirms that contributions can be sought subsequently by the responsible person(s) who paid compensation. The defence of contributory negligence is, however, available if the victim negligently exposed himself to asbestos. The section also has retrospective effect in relation to those claims settled or legal proceedings determined after 3 May 2006 (the date of the *Barker* judgment).

The Act gives the Treasury powers to make provisions to speed up payment of claims to mesothelioma victims by enabling responsible persons to claim money back from the Financial Services Compensation Scheme (FSCS) when another responsible person and their insurer are both insolvent and unable to pay their own share of compensation payments. Previously only the claimant had this right.

Pleural Plaques

In the 2005 Review, we reported on the decision of the High Court in *Grieves and Others v FT Everard & Sons Ltd and British Uralite Plc and Others*⁶¹ (Grieves) in which the court held that claimants claiming in relation to pleural plaques (concentrated areas of thickening in the membrane covering the lung), which were asymptomatic, were nonetheless entitled to compensation. This decision went to the Court of Appeal and the decision was overturned by a majority of 2:1.⁶² The court reasoned that since none of the three injuries alleged in *Grieves* alone is compensatable, the sum of the three is not compensatable.⁶³

⁶⁰ 2003 1 AC 32.

⁶¹ *Grieves v FT Everard & Sons* [2005] EWHC 88 (QB).

⁶² *Rothwell, Grieves, et al. v Chemical & Insulating Co Ltd et al.* [2006] EWCA 27 CA.

⁶³ An appeal against the *Grieves* decision to the House of Lords is expected in summer 2007.

Limitation

In *Bolton Metropolitan Borough Council v (1) Municipal Mutual Insurance Ltd (2) Commercial Union Assurance Co Ltd*,⁶⁴ a claim relating to mesothelioma, the Court of Appeal followed previous authority in finding that loss occurred for the purpose of claiming under a public liability policy at the time when the injury occurred and not at an earlier date when the claimant was exposed to asbestos nor when there were bodily changes as a result.

The Control of Asbestos Regulations 2006

The Control of Asbestos Regulations 2006 came into force in November 2006, incorporating amendments to the European Asbestos Workers Protection Directive into English law.

The three main effects of the new Regulations are:

- > the introduction of a single, more stringent control limit;
- > a change in the approach to determining when a licence is required;
- > placing more onerous training requirements on all employers whose employees are exposed to asbestos.

Asbestos Statistics

It is anticipated that the number of asbestos-related deaths in the UK will rise in the foreseeable future, with the number peaking during the period 2011 to 2015.⁶⁵ According to the Health and Safety Executive (HSE), at least 3,500 people die each year from mesothelioma and asbestos-related lung cancer as a result of earlier exposure to asbestos. Given that asbestos was used extensively in construction throughout the UK for a 30-year period from the 1950s, claims are likely to increase. The diagnosis of asbestos-related diseases, such as asbestosis and pleural thickening, is also on the increase.⁶⁶ An example of claims from individuals who were at one remove from direct exposure to asbestos had arisen at the time of writing this Review. The 47-year-old daughter of a man who worked as a lagger in Devonport Dockyard in the 1960s is believed to have contracted mesothelioma by inhaling asbestos dust from her father's clothing. She is to sue the Ministry of Defence for £75,000.

Age Discrimination Legislation The Employment Equality (Age) Regulations 2006 (the Regulations) came into force on 1 October 2006. These outlaw direct and indirect discrimination, victimisation and harassment on the grounds of age. There is a three-month time limit for bringing claims and no cap on potential compensation. Hot on the heels of the Regulations came the Employment Equality (Age Amendment No. 2) Regulations 2006.⁶⁷ These were implemented on 1 December 2006 and make it unlawful not only for the trustees of occupational pension schemes but also for the employer to discriminate against a member or prospective member.

The Employment Rights Act 1996 has also been amended by the Regulations from 1 October 2006 and dismissals of employees before they are 65 are unlikely to be on the grounds of retirement unless a younger retirement age can be objectively justified. It remains to be seen whether claims in this country follow the pattern in Ireland where following the introduction of similar legislation, age discrimination claims now give rise to approximately 20% of employment disputes.

⁶⁴ [2006] EWCA Civ 50.

⁶⁵ J T Hodgson, D M McElvenny, A J Darnton, M J Price, J Peto. 25 January 2005. 'The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050'. *British Journal of Cancer*. 2005. 92. 587-593.

⁶⁶ <http://www.hse.gov.uk/>.

⁶⁷ SI 2006/2931.

Transfer of Undertakings Protection of Employment Regulations (TUPE)

The law governing the transfer of undertakings changed with the introduction of new regulations in April 2006. The main goal of the changes is to establish greater certainty over the circumstances in which TUPE applies and to clarify when terms of employment can be changed and dismissals implemented for transfer-related reasons. The incumbent employer is now required to give the new employer information on the staff who transfer their contracts of employment and any associated liabilities.

If the incumbent employer fails to comply with the rules on information and consultation, a tribunal can order a penalty of up to 25% of the annual payroll costs of employees affected by the transfer. Under the new TUPE regulations, the incumbent employer and the new employer will be jointly as well as severally liable to pay any penalty incurred and an aggrieved employee will be able to bring a claim against either or both employers.

Bullying and Harassment

A unanimous House of Lords confirmed in a decision handed down on 12 July 2006 in *Majrowski v Guy's and St Thomas' NHS Trust* that an employer can be vicariously liable under the Protection from Harassment Act 1997 for harassment committed by an employee in the course of his employment. It also upheld that employees bringing a claim under this act do not need to prove that they developed a psychiatric illness or that the employer should have foreseen what happened. It is sufficient that anxiety and distress are suffered. In addition, an employee will have six years rather than the normal three years for personal injury claims to bring any claim. The case represents the first application of the Protection from Harassment Act 1997 in an employment situation. The fact that claims under PHA 1997 can only be brought in the County Court or the High Court may deter some claimants, given the potential liability for costs. Employers can try to guard against such harassment or discrimination occurring in the first place by having a documented and properly implemented diversity policy in place.

Statistics on Employment Tribunal Claims

The Employment Tribunals Service (ETS) reported that in 2005–06 there was an increase in the number of claims from the previous year, 115,039 in 2005–06 compared with 86,181 claims in 2004–05. The ETS considered that this increase was mainly due to a significant rise in multiple claims (i.e. those claims involving more than one allegation by an employee) with 63,543 in 2005–06 compared with 31,126 in 2004–05.⁶⁸ Single cases fell from just over 55,000 to under 52,000. In spite of the overall rise in claims, there was a drop in the number of claims disposed of in 2005–06, 86,083 compared with 97,966 in 2004–05.

In 2005–06, 60% of all cases in which the ETS had jurisdiction were withdrawn or settled before a tribunal hearing compared with 67% of all cases in 2004–05.

⁶⁸ Employment Tribunals Service, *Annual Report and Accounts 2005–06*.

Alternative Dispute Resolution

Statistics

The increasing use of ADR continues. In November 2005, CEDR published the Second Mediator Audit, collating data from the major ADR providers in the UK since November 2003. The Audit shows a 35% increase in the number of mediations over the two-year period with an estimated 2,700 mediations in 2005. More surprising was the reported aggregate settlement rate (on the day plus shortly after) of 93%, an improvement of 10% on the 2003 Audit figure.⁶⁹

The ADR Group recorded an increase of 25% in private case referrals in 2006 with a 7% improvement in settlement rates. Seventy-one percent of the cases settled on the day with 85% settling within two weeks.⁷⁰ Littleton Chambers, one of the most prominent ADR providers, saw a 19% increase in the number of mediations in 2006 although the known success rate dropped from 90% in 2005 to 69% in 2006.⁷¹ Government departments and agencies, including the National Health Service Litigation Authority, consistently increased their use of ADR since 2001 and doubled its use in the 2005–06 annual reporting period with a fairly consistent settlement rate of around 75%.⁷²

Case Law

Both the government and judiciary continue to promote the use of mediation.

The Civil Procedure Rules require litigators to consider ADR in all cases before proceedings are issued. The 41st series of amendments to these Rules published in April 2006 warned that if the Protocol is not followed then the court *should* consider this when awarding costs.⁷³

Generally, the keenness of the courts to penalise parties by means of costs when they refuse to mediate will depend upon the circumstances of each case and whether the refusal is considered unreasonable. The courts will scrutinise the conduct of the parties. This approach has been reinforced by the courts in a number of cases this year. See by way of example *Hickman v Blake Laphorn and Another*,⁷⁴ where the second defendant's refusal to mediate was found not to be unreasonable and so the second defendant was not held to be liable for the first defendant's costs.

⁶⁹ CEDR. 7 November 2005. *The Second Mediator Audit*.

⁷⁰ ADR Group statistics.

⁷¹ Littleton Chambers statistics.

⁷² DCA Annual Report 2005/6. 'Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution'.

⁷³ 41st Update Civil Procedure Rules.

⁷⁴ *Maurice Joseph Hickman v (1) Blake Laphorn (2) David Fisher* [2006] EWHC 12 (QBD).

Legal Costs: Conditional Fee Agreements (CFAs), After The Event (ATE) and Before The Event (BTE) Insurance

The CFA Regime: Generally

Since 2000, copious satellite litigation over costs has been spawned by the Conditional Fee Agreement Regulations 2000 and the Access to Justice Act 1999 s.27 amendment of the Courts and Legal Services Act 1990. This litigation falls broadly into two categories: the 'technical challenges' to the enforceability of CFAs and the level of success fees recoverable under the s.27 amendment.

Three years on, the Court of Appeal decision in the test cases led by *Hollins – Russell* [2003] sorted out the majority of 'technical challenges' for breach of the CFA Regulations 2000⁷⁵ (the 2000 Regulations). A CFA would remain enforceable unless the identified breach had caused the client material detriment.

Litigation over success fees was reduced by a Court of Appeal decision in February 2005 – in *Begum v Klarit*. Firm guidance as to the level of a success fee that would be recoverable was given, pegging it firmly to the risks involved in the litigation.⁷⁶ By October 2005, the CPR Part 45 brought into effect caps on the levels of recoverable success fees in road traffic accident (RTA) claims under £10,000, employer's liability (EL) claims and EL disease claims, bringing greater certainty.

Despite five years of clarification the complexities of the CFA Regulations 2000 were irredeemable. They were revoked on 1 November 2005 and replaced with a simplified CFA regime under the Law Society's Costs Information Code. However, developments in 2006 dampened this longer-term good news.

For the many thousands of CFAs entered into before November 2005 and yet to be concluded, the CFA Regulations 2000 still apply. The Court of Appeal's decision in the jointly heard cases *Myatt and Garret* has revived the 'technical challenge' argument that a CFA is not enforceable and no costs are recoverable.

In *Garret*, the solicitors breached the regulation requiring them to disclose an interest in the ATE insurance policy. In *Myatt*, the issue was whether the solicitor had asked the questions necessary to discharge their duty to consider whether the client had the benefit of BTE insurance. Not only were these breaches held to be material but *Dyson J* also gave detailed guidance on the questions a solicitor must ask a client so as not to be in breach of the 2000 regulations. These 2000 regulations have been revoked and the guidance comes just in time to assist paying parties seeking to establish a claimant solicitor's material breach. Leave to appeal (and possibly avoid a raft of satellite costs litigation) was refused by the House of Lords on 7 December 2006.

ATE Premiums

The year has also seen the Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council*⁷⁷ allow a claimant to recover staged ATE insurance premiums that in total exceeded the damages award by more than 60% despite evidence that a single premium policy was available at a much lower cost. The court ruled that costs incurred must be proportionate but the fact that a premium was very large in comparison to the sum claimed did not necessarily render it disproportionate. The court said that staged and single premium policies should not be compared and looked at the risk to the insurers of the case failing and the amount of costs they would have to pay in this event.

⁷⁵ *Tony Girling and Robert Lowe*. 17 August 2006. *Conditional Fee Agreements*. *Lawtel*.

⁷⁶ *Wragge & Co LLP*. June 2006. *Legal500.com*.

⁷⁷ [2006] EWCA Civ 1134.

Regulation of Claims Farmers Part 2 of the Compensation Act 2006 provides for the regulation of the claims management industry. The Boleat Report⁷⁸ was scathing in its criticism of the Claims Standards Council, which had been set up so that the industry could be self-regulating. Parliament rejected any idea that self-regulation could work.

The Compensation Act 2006 provides the statutory framework for regulating the provision of claims management services. Under the Act, businesses providing regulated claims management services will need authorisation to operate and if authorised will have to comply with Conduct of Business Rules. The main regulatory arrangements are currently being brought into effect and businesses can apply to be authorised. All the secondary legislation has now been laid before Parliament and the regulator's rules have been published. People who are already regulated (for example, solicitors and barristers) will not have to be regulated and charities are exempt from the provisions. The provisions are directed at those people or bodies that provide claims management services on a commercial basis in respect of claims relating to personal injury, housing disrepair, employment, criminal injury, industrial injuries, disablement benefits and financial products and services (for example, complaints against bank charges).⁷⁹

⁷⁸ Prepared by Mark Boleat, a proposed regulator for the industry.

⁷⁹ www.dca.gov.uk.

Procedural Developments

Performance of the Courts of England and Wales: Statistics and Trends

26 July 2006 marked the tenth anniversary of the publication of Lord Woolf's *Access to Justice* report recommending comprehensive reforms aimed at reducing the cost, timescales and complexity of litigation and at avoiding litigation wherever possible.

Judicial Statistics, published annually by the Department of Constitutional Affairs indicate a degree of success in reducing the time it takes to litigate a claim. The time from issue of a claim to trial in the High Court, which remained fairly constant from 1996 (179 weeks) to 2003 (164 weeks), has now dropped by more than 40% to 97 weeks.⁸⁰ The County Courts steadily reduced the time from issue to trial by just under 30% in the last four years.⁸¹ Figures for clinical negligence claims, 'live' as at 31 March 2006 published by the NHS Litigation Authority (NHSLA), show that claims are now settled in an average of 1.46 years from date of notification to NHSLA to disposal.⁸²

The shift in culture towards ADR has been more successful, with the number of High Court Commercial Proceedings having halved since 1999. The number of proceedings in Chancery excluding bankruptcy dropped by almost 10% in 2005, no thanks, however, to professional negligence actions, which increased in number threefold. In the Queen's Bench Division, the number of claims issued in 2004 and 2005 saw 4% and 3% increases respectively, against the context of a 24% drop in 2003. The Technology and Construction Court continues to receive about 350 actions per year but only 10% go to trial.⁸³

The number of County Court claims increased by 17% in 2005 following years of minor fluctuations. The most notable statistic in 2005 was the 53% increase in repossession orders on top of a 14% increase in 2004.

The cost and complexity of litigation remains largely unaltered by the Woolf reforms, suggesting that further reforms (possibly in relation to caps on costs amongst other things) and a greater use of much more cost-effective ADR lie ahead.

Costs

The courts' powers to penalise parties for acting unreasonably were highlighted in the case of *Hooper v Biddle*⁸⁴ when the claimants were denied their costs after they accepted a settlement offer amounting to just over 1% of their original claim.

DCA was due to publish its consultation paper on claims process review in early 2007. One of the aims was to streamline pre-action process in order to bring down costs and the DCA was to work with the Forum of Insurance Lawyers to this end. The small claims limit⁸⁵ was also set to come under review despite its increase from £1,000 in 1995 to £5,000 in April 1999, a level higher than that of any other EU country.⁸⁶

⁸⁰ *Judicial Statistics 2004*. DCA. No High Court data is available for 2005 or 2006.

⁸¹ *Judicial Statistics 2005*. DCA.

⁸² *Information on Claims*. July 2006. NHS Litigation Authority.

⁸³ *Judicial Statistics 2005*. DCA.

⁸⁴ [2006] EWHC (Ch).

⁸⁵ Currently £5,000 except in personal injury and housing repair where the small claims limit is £1,000.

⁸⁶ Professor John Baldwin. 2002. 'Lay and Judicial Perspectives on the Expansion of the Small Claims Regime'. DCA.

Offers to Settle

In the wake of two recent Court of Appeal decisions⁸⁷ that were reported in the 2005 Review, the DCA published new rules aimed at altering the way in which a defendant party to litigation may make an offer to settle the proceedings. The new rules remove the requirement for a defendant to make a payment into court.⁸⁸ A written offer to settle will be effective, provided that an accepted offer is paid within 14 days. These changes came into effect on 6 April 2007.

Periodical Payments Update

In our 2005 Review, we reported on the legislation that would increase the number of awards of periodical payments (PPs) in personal injury claims and the implications for insurers. As is well known by now, since 1 April 2005 amendments to the Damages Act 1996 make it necessary for the court to consider in all personal injury and clinical negligence cases involving damages for future pecuniary loss whether to make an order for PPs. The consent of the parties to the type of settlement is not required and a defendant can only avoid the possibility of a court-imposed PPs award by reaching a settlement before proceedings have been issued. Claimants may well use the threat of PPs as a bargaining tool to increase the level of pre-litigation lump sum settlements in clinical negligence and personal injury claims involving future loss.

Reported cases are focused on the indexation of PPs to cater for inflation. The legislation provides for variation of the amount of the payment by reference to the retail price index (RPI) but the court can disapply or modify this provision. Claimants hope that the power can be used to link PPs to other indices, which may lead to higher future payments. In the case of *Flora v Wakom (Heathrow) Ltd*,⁸⁹ the claimant seeking PPs for future care needs has contended for variation using an alternative index, the Average Earnings Index (AEI). The defendant's attempt to strike out this aspect of the claim failed at first instance and on appeal. Brooke LJ's judgment suggested that the Court of Appeal should lean against a construction of the Damages Act that unnecessarily restricted the use of indices other than the RPI. With a lump sum award, the claimant bears the risk but can try to beat the discount rate on which the award is based. The court indicated that with PPs a claimant would not be able to do this but would be stuck with a level of compensation that would be eroded if wage inflation continued to exceed price inflation and the more likely it would be that he would be seriously under-compensated as the years went on. The Court of Appeal anticipated that some test cases would sort out the issues.

The scale of the problem caused by past wage inflation in the care sector and the linking of payments to the RPI was illustrated pre-Flora in *A v B Hospitals NHS Trust*,⁹⁰ in which the claimant contended successfully that a lump sum award would meet his needs better than a periodical payments order indexed to the RPI.

⁸⁷ *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332; *Trustees of Stoke Pension Fund v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854.

⁸⁸ 44th Update Civil Procedure Rules.

⁸⁹ [2006] EWCA Civ 1103.

⁹⁰ [2006] EWHC 2833 (Admin).

The first case post-Flora – *Lee Carl Thompstone v Tameside & Glossop Acute Services NHS Trust*⁹¹ deciding the indexation for PPs for the claimant's future cost of care – rejected the defendant's arguments for payments linked to the RPI. Instead, it linked the claimant's award for future cost of care PPs to the *Annual Survey of Hours and Earnings: Occupations Earnings for Care Assistants and Home Carers* (ASHE 6115).⁹² Following Brooke LJ's guidance in Flora, the court said that the PP award should adhere to the 100% principle, namely that it should, "aim to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident."⁹³ It said that the RPI is not designed as a tool for measuring growth in earnings and assumes that there is no real earnings growth, an assumption that is not supported by past data. Offered several alternative indexation measures and an abundance of expert evidence, the court selected ASHE 6115 as the index most likely to reflect changes that would affect the earnings levels that the claimant would be required to pay for future care.

As yet there is no decision concerning indexation of PPs for future loss of earnings. However, two High Court decisions in 2006 concerning awards of future loss suggest that it will be very difficult for a defendant to force a claimant to take a form of award, whether PPs or lump sum, against his wishes.⁹⁴

The manifold implications of PPs for insurers and reinsurers will be examined in 2007 in a new International Underwriting Association (IUA) study into bodily injury awards. The aim of the research is to provide a comprehensive picture of injury claims across the UK insurance market and will particularly examine the introduction of PPs. The new study is expected to be published in the fourth quarter of 2007.⁹⁵

91 [2006] EWHC 2904 (QB).

92 Published by Office of National Statistics.

93 Lord Hope in *Wells v Wells* [1999] 1 AC 345.

94 *Redhead v Rawcliffe* [2006] EWHC 2695 (QB) and *A v B Hospitals NHS Trust* [2006] EWHC 2833 (Admin).

95 International Underwriting Association. December 2006. *Risk Today*. Issue 58.

Coverage Issues Relating to Liability Insurance and Reinsurance Contracts

During 2006 there were again many cases before the Courts involving coverage issues. The controversial decision in *Lumbermans Mutual Casualty Company v Bovis Lend Lease*⁹⁶ did not reach the Court of Appeal.

The Commercial Court Judgment in *Enterprise Oil v Strand Insurance Company Limited*⁹⁷ reviewed the circumstances in which a settlement of a claim by the insured will be binding on liability insurers and criticised the decision in *Lumbermans*. The judge made clear that he did not regard it as based on authority. He stressed the commercial and policy reasons for not requiring that a global settlement, judgment or award specifically identify and quantify the insured elements of the claim as a precondition to an indemnity claim.

Notwithstanding this criticism, *Lumbermans* remains authority that insureds and reinsureds should take into account in structuring settlements and considering their insurance and reinsurance recoveries.

Other cases of interest included *Shinedean Limited v Alldown Demolition (London)*.⁹⁸ The issue to be decided by the Court of Appeal in this case was whether a breach of a claims co-operation clause (expressed to be a condition precedent to indemnity) entitled insurers to decline indemnity. The Court of Appeal held that if any determination (with hindsight) that the insurer had not suffered prejudice was left out of account, the insured were plainly in breach of their obligations in providing the documents requested by insurers two years after the request had been made. This period was unreasonably late and the insurer was entitled to say that it had not had co-operation and the relevant information within reasonable time and so to decline indemnity. In order to avoid disputes and promote clarity, it may be useful to include timescales for compliance with co-operation conditions in policy wordings. If no time scale is provided, an insurer's right not to pay a claim or provide indemnity may depend on the facts of the case. Where the provision of information is long overdue, it is unlikely that the courts will focus on whether insurers have actually suffered prejudice.

The decision of the Court of Appeal in *Brit Syndicates v Italaudit SPA*⁹⁹ arising out of an audit undertaken by Grant Thornton Italy of a subsidiary of Parmalat, resulted in the consequence that non-disclosure by one insured operated to deprive the 'innocent' insured of cover. The decision highlights the requirement for policy wordings to be carefully scrutinised, particularly where more than one insured is covered under a composite policy.

The Court of Appeal's decision in *Bonner v Cox*¹⁰⁰ laid to rest any suggestion in the context of non-proportional reinsurance treaties that the reinsured owes any implied duty to the reinsurer with regard to the risk that it writes other than not to act recklessly or dishonestly. Another decision of the Court of Appeal in *North Star Shipping v Sphere Drake*¹⁰¹ confirmed that an insured must notify prospective insurers of allegations of dishonesty made against him or her, even if those are subsequently proved to be false.

In the public liability arena, the decision in *Bartoline v Royal Sun Alliance and Heath Lambert* means that insureds may not be getting as extensive cover as anticipated. The particular public liability policy issued to Bartoline covered it "against legal liability for damages in respect of... accidental loss of or damage to property..." Following a fire at Bartoline's building, firefighting foam and chemicals polluted two water courses. The cost of the clean-up works incurred by the Environment Agency (EA) and Bartoline was £770,000.

96 [2004] EWHC 2197 (Comm).

97 [2006] EWHC 58 (Comm).

98 [2005] EWHC 2319.

99 7 December 2006.

100 [2005] EWCA Civ 1512.

101 [2006] EWCA Civ 378.

Bartoline sought to recover the costs of the clean-up from its public liability insurers. The Court held that these payments, which were made pursuant to powers granted to the EA by statute, did not fall within the meaning of damages and were not covered by Bartoline's policy. It is not clear that such a claim would have been covered even if the insurers' obligation had been to indemnify against legal liability for compensation and it remains to be seen whether the issue will be resolved on appeal or by a change in policy wordings.

**Reform of Insurance
Contract Law**

The year 2006 began with the Law Commissions of England and Scotland launching their investigation into the operation of insurance contract law in the UK. The existing law is described as 'incoherent and flawed'. There are concerns that the existing law is 'arguably unfair' to the insured, particularly when dealing as a consumer. The Law Commissions' paper, published in August 2006, concluded that the review should have a wide scope and include insurance and reinsurance. The review will focus on warranties, insurable interest, duties of pre- and post-contractual utmost good faith, fraudulent claims, the absence of any remedy (in England and Wales) in damages for late payment of a claim, agency (in particular the relationship between broker and insurer where an insured discloses all material facts to a broker that those are not passed on to the insurer), and co-insurance.

By the end of 2006, the Law Commission had published two position papers, one on misrepresentation and non-disclosure, the other on warranties. A further paper on pre-contractual information and intermediaries is expected in the first quarter of 2007. These papers are designed to promote discussion and do not represent the Law Commissions' final policy. It is anticipated that a consultation paper will be issued during 2007 and a final report on the proposed reforms in 2008.

Group Litigation

United Kingdom

In the UK, there were no real success stories for group litigation claimants and several defeats in both the product liability and financial services areas.

MMR litigation was discontinued following the withdrawal of legal aid funding (see the 2004 and 2005 Reviews). A group of ten families, known as the MMR Ten and others took their case via the Funding Review Committee, the appeal body of the Legal Services Commission; then to the High Court and the Court of Appeal in the form of a Judicial Review application. There they sought damages for being denied their rights of access to justice under the Human Rights Act 1998, which incorporates the European Convention of Human Rights UK in Law. The case is now with the European Court of Human Rights.

At the time of the 2005 issue of the Review going to press, Vioxx litigation in the US¹⁰² had encouraged lawyers from the UK to look at remedies for UK patients, some 400,000 of whom were reported to have been prescribed Vioxx. The two alternatives were to file suit via a group litigation order in the UK or, alternatively, to seek to pursue claims in the US courts. Both avenues appear now to have closed to the majority of potential claimants. Legal aid was refused to those seeking redress in the UK courts, and this was compounded by the inability of the claimants to obtain insurance to pursue their cases on a no win/no fee basis. Second, a court in New Jersey (Merck & Co's home state) dismissed the lawsuit brought by a group of 100 claimants from the UK on the grounds of *forum non conveniens*.

In the realm of financial services, potential group litigants were also dealt a significant blow when the High Court refused to allow an application for a group litigation order in respect to investment in Split Capital Investment Trusts. Splits have been the subject of many professional negligence actions over the past few years regarding the alleged mis-selling by financial advisers and also wrongdoing in respect of the management of certain split caps, which have been investigated by regulators. In this case,¹⁰³ 73 individuals sought redress against 11 investment firms for losses relating to investment in splits. The court ruled that as the mis-selling cases related to advice given to individuals, a group litigation order was inappropriate.

With the difficulties faced by claimants and groups in these circumstances, it remains difficult to see how group litigation in the UK really aids access to justice for those claimants who are unable to fund litigation.

United States

In the US, securities class actions are at a ten-year low, with only 110 filed in 2006, 38% less than 2005.¹⁰⁴

European Union

In March 2007, the European Commission raised the possibility of allowing consumers across the EU to bring class action lawsuits, which is currently possible in only 12 of the 27 member states. The proposals would allow consumer groups from any EU member states to bring consumer claims against companies that may have provided flawed products or services. The groups would file proceedings in national courts. The proposed changes address e-commerce, telesales, mail order shopping, doorstep selling, international sales and the travel industry, aiming to harmonise rules across the EU while giving consumers more rights when shopping across borders. Extensive consultation is anticipated and implementation may be several years away.

¹⁰² *Ernst v Merck & Co. District Court of Texas.*

¹⁰³ *Allerton and Others v Brewin Dolphin Securities and others.*

¹⁰⁴ *Times Online. 2 January 2007. Referencing a joint study by Cornerstone Research and Stanford Law School.*

In France and Germany, small steps have been taken towards changes in procedure to allow multiple claims to be brought. These jurisdictions are, however, a long way off from introducing the US-style class action. In France, a class actions bill was introduced in November 2006 as part of a new Consumer Protection Law. Only consumer groups will have standing to bring group actions and the amount each individual can recover will be capped at €2,000.

In Germany, an act came into force at the end of 2005,¹⁰⁵ which allows a claimant to file an exemplary action for a declaratory judgment to be published within an electronic claims register. If nine other parties file similar claims within four months of the claim then similar claims are stayed until the representative action is concluded. All parties to all the proceedings are served with third party summonses and are able to participate in the representative proceedings. Any judgment is binding on all the proceedings but not on unnamed parties.

Australia

Since 2000, class actions in Australia have become a risk to businesses with about 120 cases brought to date. There has been a shift in the type of class actions brought from product liability to securities and antitrust actions with at least 14 securities and antitrust class actions presently at various pre-trial stages. Most are connected with large corporate collapses, such as the US\$200m (£83m) class action looming over the collapse of Fincorp investment company, which may involve 7,800 mostly retiree investors, said to bear “frightening similarities” to the collapse in February 2006 of Westpoint owing over US\$300m (£125m) to 4,000 investors.¹⁰⁶ Australia’s first successfully pursued cartel class action against Roche Holding, BASF, Sanofi-Aventis and others involved in price-fixing of vitamins from 1989 to 1999, settled at US\$30.5m (£12.7m) in July 2006.¹⁰⁷

There are two forms of class action in Australia. An opt-out form of class action is allowed in the Federal Court of Australia and the Supreme Court of Victoria where class members are bound by the result of the litigation unless they opt out by filing a notice. A pending opt-out US\$300m class action brought by Telstra shareholders is to go to trial in November 2007 almost two years after the case was launched but 28,000 letters must go out to investors before the hearing can begin.

A representative, or opt-in, form of class action can be brought in all Australian jurisdictions, pursued only on behalf of those who have entered into a funding agreement.

On 30 August 2006, the High Court of Australia handed down a landmark decision in *Campbells Cash & Carry Pty Limited v Fostif Pty Limited*¹⁰⁸ (Fostif) that clears the way for litigation funding and is likely to have a significant impact on the proliferation of class actions. In this opt-in class action, claimant tobacco retailers were seeking to recover the value of tobacco licence fees collected from them by the wholesalers. Representative proceedings were commenced in the NSW Supreme Court and financed by a litigation funding company, which was to receive one third of any amount recovered in the proceedings. Defendants have repeatedly attacked such funding arrangements arguing that the proceedings should be stayed because the funding arrangements constitute an abuse of process and are contrary to public policy. The High Court of Australia in Fostif determined by a 5:2 majority that “public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.”

¹⁰⁵ *Kapitalanleger-Musterverfahrensgesetz – Act on Exemplary Proceedings in Capital Market Disputes.*

¹⁰⁶ *The Australian*, 30 March 2007. ‘Class action looms over the collapse of Fincorp’.

¹⁰⁷ *Decision News Media SAS*, 17 July 2006.

¹⁰⁸ [2006] HCA 41.

Education Claims

There were a number of cases relating to education law before the courts during 2006. In *Ali v Lord Grey School*,¹⁰⁹ the House of Lords held that exclusion from a particular school did not infringe the claimant's right to education pursuant to Article 2 of ECHR. For that article to be infringed, the system of education offered had to be lacking.

The House of Lords dealt with another case involving education law, which received a great deal of publicity. In *R(Begum) v Headteacher and Governors of Denbigh High School*,¹¹⁰ the House of Lords upheld the school's decision not to allow a pupil to attend school whilst wearing the jilbab. The House of Lords decided that this did not infringe Article 9 ECHR the right to hold and manifest religious beliefs.

In *Skipper v Calderdale MBC*,¹¹¹ the Court of Appeal found that a negligence claim alleging a failure to diagnose dyslexia should not be struck out. The court found that the claim had a real prospect of success even though pursuit of the claim (which was not for very much money) was disproportionate.

The body of case law in this area is established and is growing with a number of claims seemingly destined for final determination by the European Court.

¹⁰⁹ [2006] 2 WLR 690.

¹¹⁰ [2006] 2 WLR 719.

¹¹¹ [2006] ELR 322.

Product Liability

The General Product Safety Regulations 2005¹¹² (GPSR) implementing the 2001 EU Directive¹¹³ came into force on 1 October 2005 and were mentioned in the previous edition of the Review. The significant new power given to enforcement authorities (local government) to order a complete recall of dangerous products from consumers was a new departure for the UK. Previously product recall was covered by the Consumer Protection Act 1987 (CPA) and was voluntary. A study by PricewaterhouseCoopers in 2005 of EU countries that had implemented the Directive found a 126% increase in the number of product recalls¹¹⁴ and the GPSR certainly appears to have had an impact in the UK in 2006 with major product recalls hitting the headlines.

In June, Cadbury-Schweppes was forced to recall millions of chocolate bars from stores across the UK and Ireland following the discovery of *Salmonella montevideo* contamination at one of its factories¹¹⁵ and 31 widely distributed cases of infection.¹¹⁶

A number of Sony notebook computer batteries, which overheated or caught fire, prompted massive product recalls. In August, Dell recalled over four million notebook computer batteries (made by Sony) mostly from the US, followed by Apple's recall of 1.8 million batteries. Further recalls of notebook computer batteries in smaller numbers followed in September and October by companies including Matsushita (Panasonic), Toshiba, IBM/Lenovo, Hitachi, Fujitsu and Sharp.¹¹⁷

The UK courts in 2006 established some limits, however, to the EU-directed improvements to consumer protection and the reciprocal manufacturer and supplier liability. The Court of Appeal in *Piper v JRI (Manufacturing) Limited*¹¹⁸ (a case involving the implantation of a hip prosthesis) examined the ambit of a defence and rejected a claim brought under the CPA (which implemented an EU Product Liability Directive¹¹⁹ into UK law).

This legislation effectively removed a consumer's need to prove negligence by manufacturers and suppliers if they could show an injury was caused by a product defect. Section 4(d) of CPA is a defence, which applies if the defect did not exist at the time the product was supplied.

The Court of Appeal upheld the trial judge's rejection of the claim. They concentrated on detailed analysis of the evidence relating to the manufacturing and inspection processes undertaken by the defendant manufacturer of the prosthesis. It was concluded that had the defect existed, it would have been detected prior to delivery to the hospital that carried out the operation.

The defendant had to prove on the balance of probabilities that the defect did not exist at the relevant time (when the manufacturer supplied the product). Once established, a defendant is not required to go further and establish the actual cause of the defect or when it arose, though it would be useful for a defendant to do so.

112 SI 1803/2005.

113 Directive 2001/95/EC.

114 *Continuity Central*. 21 February 2006.

115 *Chartered Institute of Environmental Health*. Food Standards Agency. 30 June 2006.

116 *BBC News*. 30 June 2006.

117 *UK Institute of Trading Standards*.

118 [2006] EWCA Civ 1344.

119 85/374/EEC.

The European Court of Justice (ECJ) decision in *O'Byrne v Sanofi Pasteur MSD Ltd*¹²⁰ clarified the date from which time starts to run for the purpose of the ten-year limitation period for defective product claims. The claimant received a vaccine after which brain damage was suffered. Proceedings were commenced against a wholly owned subsidiary of the manufacturer, and it was later sought to substitute the parent company, which was the actual manufacturer, after the ten-year long stop limitation period had expired. The specific point referred to the ECJ was whether a product was “put into circulation” when it was supplied by the manufacturer to a distributor, which was its wholly owned subsidiary, or whether the product was not put into circulation until it passed out of the control of the manufacturer. The ECJ said the product was put into circulation when it was taken out of the manufacturing process operated by the producer and entered a marketing process in the form in which it was offered to the public in order to be used or consumed. The distributor of the product may or may not be owned by the manufacturer, which was not a determining factor.

120 (Case C-127/04) Court of Justice of the European Communities (First Chamber) [2006] All ER (D) 117 (Feb).

International Law: Choice of Law Applicable to Torts and Forum Shopping

Where a claim in tort involves events or parties in more than one jurisdiction one of the first legal questions is which law applies. Legislation¹²¹ provides the general rule that the applicable law is the law of the country in which the events constituting the tort or delict occurred. This general rule applies only to substantive law – matters that affect the existence, extent or enforceability of the rights or duties of the parties.¹²² It does not apply to matters of procedure. Local (usually national) law applies to all procedural issues and the local law is chosen by a claimant when choosing the jurisdiction in which to issue proceedings. The distinction between substantive and procedural law can have wide implications. It has been the subject of significant court decisions in 2006 and is likely to have the effect of increased forum shopping by claimants to the disadvantage of defendants and their insurers.

In the case of *O’Byrne v Sanofi Pasteur MSD Ltd*,¹²³ a no-fault product liability claim under the Product Liability Directive,¹²⁴ the European Court of Justice (ECJ) said that the conditions determining the substitution of a party in litigation are a matter of procedural law and therefore determined by national law. Proceedings were commenced against a wholly owned subsidiary of the manufacturer. The claimant then sought to substitute the parent company, who was the actual manufacturer, after the ten-year long stop limitation period had expired. The consequence of the ECJ’s ruling is that a claim may be effectively statute barred in one jurisdiction but not in another depending on the local rules about substitution of interrelated companies.

The House of Lord’s decision in *Harding v Wealands*¹²⁵ has significant implications for the measure of damages in tort claims. In this personal injury claim Wealands, an Australian, was on holiday in New South Wales with her English husband, Harding, when she crashed her car. Harding was rendered tetraplegic. Liability was admitted and proceedings were issued in the English High Court to determine quantum only. The principal issue was whether the NSW statutory cap on damages for personal injury was substantive law that would have to be applied or procedural and could be avoided in awarding compensation to Harding. The House of Lords decided on a wide and, some say, inconsistent definition of ‘procedural’ law to avoid the NSW provisions that would cap the damages award, referring to a general rule that “issues relating to the quantum or measure of damages” are procedural and governed by the local law, in this case English law.

Rome II

The Rome II Regulation (Rome II) on the law applicable to non-contractual obligations, which has been making its way through the European Union maze since July 2003, made significant progress in 2006 towards rules that would create greater certainty and render the distinction between liability and quantum meaningless in the context of the applicable law. Currently the position in the UK, confirmed by the House of Lords decision in *Harding v Wealands*, is that quantum is assessed in accordance with the law applicable in the jurisdiction in which the case is heard but liability is determined by the law of the country or state in which the tort occurred. Rome II seeks to bring both liability and quantum issues in any one case under the law of the same country or state.

121 *Private International Law (Miscellaneous Provisions) Act 1995*.

122 *John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 503 (HCA).

123 (formerly *Aventis Pasteur MSD Ltd*) [2006] All ER (EC) 674 referred to in the Product Liability Section of this Review (p38).

124 *Council Directive 86/374/EEC*.

125 [2006] UKHL 32; [2006] 3 WLR 83.

In September 2006, the Council of the European Union adopted a Common Position, defining a very wide scope of issues in non-contractual claims that would be governed by Rome II.¹²⁶ Evidence and procedure would remain matters of local law but are narrowly defined in the Common Position document and do not include the nature and assessment of damages. Potentially Rome II will create greater certainty for all litigants and reduce forum shopping by claimants. Issues relating to road traffic accident and defamation claims are still in debate in the European Parliament (EP) but the second reading report on the Common Position was adopted by an overwhelming majority of the EP on 18 January 2007.¹²⁷

¹²⁶ *Common Position adopted by the Council of the European Union (25/09/06).*

¹²⁷ *European Parliament Session Document A6-9999/2006.*

Capital Measurement and Standards

Basel II

In 2006, it was anticipated that many of the 100 and more countries currently using the Basel I accord would by 2008 have implemented Basel II, also known as ‘The New Accord’ or ‘The International Convergence of Capital Measurement and Capital Standards – A Revised Framework’. Basel II represents recommendations by bank supervisors and central bankers from the 13 countries making up the Basel Committee on Banking Supervision (BCBS) to revise the international standards for measuring the adequacy of a bank’s capital. It will make capital requirements more risk sensitive and more reliant on banks’ own assessment of risk.

Basel II uses the concept of ‘three pillars’, namely minimum capital requirements, supervisory review and market discipline. It is the first pillar concerning the maintenance of capital for the major components of risk, including credit risk, operational risk and market risk that is of interest to the insurance market. The Basel I accord dealt with some of these risks but not with operational risk defined in Basel II as the risk of loss resulting from inadequate internal processes, people and systems or from external events.

Insurance mitigation of the capital charge for operational risk will be available to banks in very specific circumstances. Broadly, it will only be available to banks that adopt the Advance Measurement Approach (AMA), which requires a sophisticated empirical model to quantify required capital for operational risk and is subject to the approval of the local regulator. For a bank meeting the regulatory requirements, insurance mitigation of up to 20% of the total capital charge for operational risk would be available under specific policy terms from insurers meeting defined criteria. By way of example, the policy must have a residual term of at least 12 months for the capital relief granted to the bank to be maintained.

The BCBS released a comprehensive version of Basel II on 4 July 2006 with no new elements introduced. Implementation of Basel II in the EU is via the Capital Requirements Directive, which was formally adopted in June 2006 and came into effect on 1 January 2007.¹²⁸

In the UK, the directive (and therefore the BIPRU rules) does not impose any limits on the type of insurance that can be used but there are a number of specific conditions that must be met.¹²⁹ In addition, firms may only recognise the impact of insurance to the extent laid out in the firm’s AMA waiver. As part of the waiver, application process firms are required to explain their approach to using insurance.

Elsewhere implementation is looking more problematic with widespread concern over costs, fears being expressed in the US that the regulation will lead to a decline in bank capital and Moscow bankers saying it is unlikely that Russian banks will adopt the new Basel II capital standards until 2010.¹³⁰

Solvency II

The European Commission jointly with Member States is carrying out a fundamental review of the regulatory capital regime of the insurance industry (the Solvency II project). Its objective is to establish a solvency system that is better matched to the true risks of insurers enabling supervisors to protect policyholders’ interests as effectively as possible and in accordance with common principles across the EU.¹³¹

¹²⁸ British Bankers’ Association. 11 October 2006. *Creating a Single Market for European Financial Services: The role of industry.*

¹²⁹ BIPRU 6.5.26 R-30R.

¹³⁰ Global Risk Regulator. 26 February 2007.

¹³¹ HM Treasury. *European Union Financial Services.*

In November 2006, HM Treasury and the FSA published a joint Discussion Paper setting out key principles for Solvency II on supervising insurance groups under Solvency II. This paper sets out a bold proposal for streamlining group supervision and allowing insurance groups freedom to allocate their regulatory capital efficiently.

The Commission has produced a 'Framework for Consultation' setting out the policy principles and guidelines that will act as the basis for the development of the Solvency II regime. The Commission intends to adopt the Framework Directive by mid-2007 with implementation in the UK expected in 2010.

Tail of Liability Business

In this year's Review we consider in outline issues that may affect the length of the tail of some of the different classes of liability business. It is hoped that by so doing in future years observations can be made as to changes in the length of the tail. Factors that may influence the length of the tail include the basis on which the insurance is written (for example claims made or occurrence based), the nature of the risk written, including whether it incorporates any element of personal injury, the policy wording used, the territorial limits of the policy, the duration of the judicial process from issuing a claim to trial and any applicable limitation period and related law.

In policies with territorial limits in the UK, claims made under, for example, professional indemnity or D&O policies will normally be brought within six years of the date of breach (in the case of contract), six years from the date of damage or three years from the date of knowledge (in tort). These are subject to a 15-year long stop period. In Scotland, the limitation period is generally five years subject to a 20-year long stop period. The case law as to when damage is suffered or the relevant knowledge acquired has not changed significantly in the last few years.

Similar six-year limitation periods are applicable in many US states for bringing breach of contract claims with three-year limitation periods, often applicable, for example, to professional malpractice claims and other tortious claims. In France and Germany limitation periods for breach of contract vary according to the type of contract breached but can typically be from one to ten years from the date of breach or knowledge with claims in tort often having a limitation period of three to ten years, subject to a long stop of 30 years.

Claims arising from product liability will normally have a long stop period in the UK of ten years from the date the product was put into circulation by the manufacturer.¹³²

Policies involving cover for bodily injury and disease such as Employers' Liability (EL) and Public Liability (PL) may have the longest tail. Such policies are written on an occurrence basis. As is well known, personal injury claims in the UK are subject to a time limit of three years from either the date on which the cause of action accrued or from the date of knowledge of the claimant to bring a claim. There is no applicable 15-year long stop period and the UK courts can disapply any limitation period at their discretion.

Historically EL and PL policies have had longer tails often due to problems that did not give rise to claims until a later date, most notably the use of and exposure of people to asbestos. The decision in *Bolton Metropolitan Borough Council v MMI*¹³³ is to be welcomed in this regard in declining to follow the US courts. The US courts have adopted a 'multiple trigger' approach in asbestos claims in finding any past employer liable on policy grounds, i.e. all employers from the time of first exposure to diagnosis of disease as contrasted with the UK courts' approach that loss occurred at the later date when the injury occurred rather than when the claimant was exposed to asbestos or when there were bodily changes as a result.

With public liability policies routinely excluding claims arising out of asbestos, and in view of the implications of REACH with public liability, insurers considering deleting the qualified pollution exclusion in favour of an absolute pollution exclusion, it may be that the tail for this class of business will reduce.

¹³² See *O'Byrne v Sanofi Pasteur Limited* referred to in the Product Liability section of this Review (p38).

¹³³ See *Employers' Liability, Employment Practices Liability and Public Liability* section of this Review under Asbestos, Limitation (p24). The court stressed that the decision in this case was made on the basis of the particular wording.

Conclusions

The trends reported on in previous Reviews of a reduction in the number of claims being filed at court and an increased use of mediation consolidated during 2006. The number of claims filed seems now to have levelled out at a constant rate following a dramatic drop in the early post-Woolf period. Overall, there seems to have been a significant increase in the number of mediations and an increase in the number of successful resolutions of disputes at or shortly after a mediation takes place.

A number of factors suggest that the tail for professional liability claims may be getting shorter: the statistics reported during 2006 and the combined effects of the requirement under various pre-action protocols for a claimant to notify a defendant of a claim as soon as he or she is aware of it; the detailed exchanges that take place under the Protocols; the increased (and successful) use of mediation; and the increased speed with which proceedings are taken to trial following issue.

Independent regulation was a key trend during 2006. This was the year in which the government's imposition into the regulation of various professions by way of official reports produced during 2005 began to be implemented through practical steps taken by the professions themselves. It remains to be seen whether the independent regulators that the reforms encourage raise standards within the professions or lead to an increase in the number of claims. During 2006, the FSA remained a strong regulator unafraid of prosecutions against individuals and companies alike.

D&O coverage remained at the forefront during 2006 with the global nature of insurers' exposure highlighted by several high-profile cases.

The group litigation orders highlighted in the 2005 Review as one to watch during 2006, appear to have made little progress with the lack of funding in the UK coupled with the decision in the *Allerton and Others v Brewin Dolphin Securities* meaning that liability claims involving individual advice to claimants may well not proceed by way of a GLO.

During 2007, it is anticipated that D&O claims will continue to burgeon and that there will be opportunities for new D&O products arising out of the Companies Act. Despite the reforms introduced post-Woolf, there is growing criticism by the courts of the continued expense and complexity of litigation. It remains to be seen whether these criticisms will result in attempts to cap costs in ways similar to the predictable costs regime already in operation in relation to smaller value claims.

For additional copies of this report, please contact us at marketing@guycarp.com

This report is also available for download at www.guycarp.com

Questions or comments regarding this report should be addressed to:

Guy Carpenter

Carolyn Morley
e: carolyn.morley@guycarp.com
t: +44 (0) 20 7357 2733

Jonathan Fahie
e: jonathan.fahie@guycarp.com
t: +44 (0) 20 7357 2235

Nick Frankland
e: nick.frankland@guycarp.com
t: +44 (0) 20 7357 3477

or Fishburns Solicitors

Sheona Wood
e: wood@fishburnslaw.com
t: +44 (0)207 280 8804

Michelle Malson
e: malson@fishburnslaw.com
t: +44 (0)207 280 8872

Guy Carpenter & Company Ltd provides this report for general information only. The information contained herein is based on sources we believe reliable, but we do not guarantee its accuracy, and it should be understood to be general insurance/reinsurance information only. Guy Carpenter & Company Ltd makes no representations or warranties, express or implied. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such. Please consult your insurance/reinsurance advisors with respect to individual coverage issues.

Readers are cautioned not to place undue reliance on any historical, current or forward-looking statements. Guy Carpenter & Company Ltd undertakes no obligation to update or revise publicly any historical, current or forward-looking statements, whether as a result of new information, research, future events or otherwise.

Statements concerning tax, accounting, legal or regulatory matters should be understood to be general observations based solely on our experience as reinsurance brokers and risk consultants, and may not be relied upon as tax, accounting, legal or regulatory advice, which we are not authorised to provide. All such matters should be reviewed with your own qualified advisors in these areas.

This document or any portion of the information it contains may not be copied or reproduced in any form without the permission of Guy Carpenter & Company Ltd, except that clients of Guy Carpenter & Company Ltd need not obtain such permission when using this report for their internal purposes.

The trademarks and service marks contained herein are the property of their respective owners.

Guy Carpenter & Company, LLC is the world's leading risk and reinsurance specialist and a part of the Marsh & McLennan Companies. Guy Carpenter creates and executes reinsurance and risk management solutions for clients worldwide through 2,600 professionals across the globe. The firm's full breadth of services includes 16 centres of excellence in Accident & Health, Agriculture, Alternative Risk Transfer, Environmental, General Casualty, Investment Banking*, Life & Annuity, Marine & Energy, Professional Liability, Program Manager Solutions, Property, Retrocessional, Structured Risk, Surety, Terror Risk, and Workers Compensation. In addition, Guy Carpenter's InStrat® unit utilises industry-leading quantitative skills and modelling tools that optimise the reinsurance decision-making process and help make the firm's clients more successful. Guy Carpenter's website address is www.guycarp.com.

*Securities or investments, as applicable, are offered in the (i) United States through MMC Securities Corp., a US registered broker-dealer and member NASD/SIPC, and (ii) European Union through MMC Securities Ltd., regulated by the Financial Services Authority for the conduct of investment business in the United Kingdom. Reinsurance products are placed through qualified affiliates of Guy Carpenter. MMC Securities Corp. and MMC Securities Ltd. are affiliates of Guy Carpenter.

Guy Carpenter & Company Ltd is an appointed representative of Marsh Ltd which is authorised and regulated by the Financial Services Authority. Guy Carpenter & Company Ltd conducts its reinsurance and insurance mediation activities on terms that are set out in the document 'Our Business Principles and Practices'. This may be viewed on the website www.marsh.co.uk/aboutMarsh/principles.html.