Fifty Shades of Law & more

The International Institute of Marine Surveying presents a compendium of the five chapters of the ***50 Shades of Law*** series and a futher four related chapters in association with Matrix Insurance Ltd.

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50 SHADES OF INSURANCE

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Fifty Shades of Law & more

by MATRIX Insurance Services Ltd.

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Chapter 1
Fifty Shades of Law
A SURVEYOR'S DUTY

DUTY OF CARE, OPINION, NEGLIGENT MISSTATEMENT, IMMUNITY SURVEYS AND VALUATIONS

Surveyor's thoughts – "If I were King":

Now surveying is just the thing
Which gets a fellow wondering;
And surveyors worry lots about
The fact that they are without clout.
Some think *"If only I were King!*
Then no one could do anything!
To cause me grief or say I'm wrong
To claim or cry I've been stung."
He thought: *"It really isn't fair*
To judge him when he really does care."

AA Eeyore

We shall not start with the tale of pooh sticks but in a way the story is really a little like the game of claims - you drop your sticks and then wonder who is going to win – that is the start of the job and the finish of litigation!

"So before you drop them you need to know the rules, duties and obligations"

Before we start a brief word – **"Immunity" – not "Mutiny"!**

This is a "rare breed" nowadays and not even expert witnesses have immunity from being sued over matters in the course of proceedings following a landmark rule in the Supreme Court - *Jones* v *Kaney* [2011] UKSC 13. This decision overruled the 400-year-old protection that gave expert witnesses immunity from suit for breach of duty whether in contract or negligence when they are participating in legal proceedings.

So here we start at the beginning – **WHY DO SURVEYORS HAVE A DUTY OF CARE TO THEIR CLIENTS?**

This is the result of cases that have reached our Courts such as Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 where the House of Lords said:

".. if in a sphere where a person is so placed that others could reasonably rely on his judgement or on his skill or on his ability to make careful enquiry, such person takes it on himself to give information or advice to, or allow his information or advice to be passed on to another person who, as he knows or should know, will place reliance on it, then a duty of care will arise"

So this is the starting point of ***duty of care***. This statement applies to all professionals, surveyors, architects, engineers, lawyers etc. – it is not exclusive to surveyors – so as lawyers we are taught, amongst other things:

- never to give opinion as a favour – don't do favours
- stay professional
- where applicable use necessary caveats
- always follow up all conversations in writing – contemporaneous evidence! Vital in a dispute!

To add to this – always make sure you "stick" to your brief and make sure your contract covers the work you are going to undertake.

The Contract – Its Importance – when is it formed? Importance of incorporation

If you are going to undertake a condition survey and a valuation survey, check and ensure your contract with your client covers (states) both activities – condition surveys and valuations – you may have two contracts with your client.

A valuation survey contract may contain the following clauses:

- A clause to restrict your total potential loss arising from providing a valuation
- Limiting liability by removing responsibility of change in value because of a change in a vessel's location
- Limiting or restricting liability because of market forces
- Excluding liability or loss arising from title problems

It can be difficult to restrict your potential loss to a set figure or percentage of something particularly when dealing with consumers – there is a wealth of legislation in this area but unfortunately there is not time to deal with this today.

A contract is **formed** when there is offer, acceptance and consideration.

If you wish to apply a clause you have to have had it **incorporated** into a contract before acceptance – too late if put in the report – but don't fall foul of misunderstanding the difference between a contractual clause and a caveat in a report:

Example in a contract:

- The Surveyor will not be responsible for any losses arising from a change in market value due to geographical location of the Vessel.

Example of a caveat in a report:

- This valuation is based on the value of the Vessel at the location it was valued for this report and at no other geographical location. You should be aware that geographical location may affect the sale value of a vessel.

A contract is formed by offer, acceptance and consideration – and of course requires incorporation of all you wish to include before acceptance by your client.

Many clauses are included in contracts that a Court will not uphold – frequently because of consumer law – but they are still included.

The Next Elements for Determining Liability and Quantum of Loss

After a Duty is identified then there has to be a recognised ***breach of Duty of Care***, followed by ***Causation (a slippery devil!)*** and then identified Loss.

Breach of duty is based on fact and what would normally be expected combined with case law; interestingly the most important part **CAUSATION** is often overlooked. What was perhaps missed or a negligent statement relied on has to cause the loss. If for example a vessel is purchased before the client receives the survey report, there is an argument for no reliance on the content (or at least some depending on what was discussed between surveyor and client before purchase) and hence no causation and no liability. So a negligent misstatement can be made but if not relied on then there is no liability for losses.

Determining the Loss

Cost of Repair v Diminution in Value! Determining the Measure of Damages

It depends on the circumstances and what you were undertaking. If a condition survey was undertaken often the claim is for cost of repair if they are reasonable but equally it can be argued diminution in value or purchase of a replacement vessel.

If reinstatement costs are unreasonable in all the circumstances then the measure of damages will generally be diminution in value.

Harrison and others v Shepherd Homes Ltd and others [2011] EWHC 1811 (TCC)

Keep To Your Area of Expertise

Don't be tempted by clients to go outside your expertise. It is not uncommon for client's to ask a legal question or lead you into those realms – keep to providing facts and opinion that a surveyor would ordinarily be required to provide in the circumstances, and not quasi legal advice such as by providing opinion on whether a person or entity may be liable or negligent – this is for lawyers and barristers to determine in their conclusion on the facts you and others provide combined with case law which is their domain. So a simple example is:

Surveyor:

The X was tied in an XYZ method which is not commonly found in the UK and this method has a greater frequency of failure with ZZZ high tides.

The Lawyer/Barrister:

As X was tied in an XYZ method which is not commonly found in the UK and has a greater frequency of failure with ZZZ high tides, your client should have known that ZZZ high tides occurred at ABC location and so your client should not have allowed the X to be tied in an XYZ manner and so was negligent in allowing the XYZ method to be used.

A FEW ENDING TALES

Remember anyone can have an opinion, right or wrong as it may be, and everyone can make a negligent misstatement of fact.

We (lawyers) were always told "don't talk law in pubs! Walls have ears!"

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Chapter 2 Fifty Shades of Law

WHAT CONSTITUTES A CIRCUMSTANCE (OCCURRENCE) THAT MAY GIVE RISE TO A CLAIM AND WHEN SHOULD YOU REPORT IT TO INSURERS

What are the elements that identify a circumstance that may give rise to a claim and are notifiable to insurers? Well there are several and below is a summary of these and some tips on what you should report and when to insurers.

Two key elements for a notifiable circumstance

1. An insured must be subjectively aware of the circumstance, as illustrated in the important English Court of Appeal decision of *Kidsons v Lloyds' Underwriters* (2008) ("Kidsons").

2. The circumstance must objectively be material in that it is likely to, or may, give rise to a claim (subject to the wording).

Awareness can be tricky to identify:

- If a junior employee of a company receives a letter of complaint from a client but tells no-one about it generally their knowledge is unlikely to be attributed to the insured company for the purposes of an insurance Policy subject to the Policy wording.

- In contrast knowledge by a board of directors and perhaps knowledge of one director alone may be sufficient.

- Any in between situation is tricky and a question of awareness is fact sensitive.

Awareness can arise from internal or external factors:

- External example: a letter of complaint from a third party.

- Internal example: *Thorman v New Hampshire* (1987), a case concerning an insured who was an architect:

  'A typical example would be a belated realisation, based upon a study of professional journals, that perhaps he had specified inadequate foundations for a building which he had designed and which had already been erected'.

Analyses of: "Likelihood of circumstance giving rise to a claim" and "may give rise to a claim"

The Policy will usually stipulate that the circumstance to be notified is one which is "likely to" or "may" give rise to a claim. The differences in the wording can be significant.

'Likely' has deemed to mean:

> at least 50% likelihood of a claim occurring (*Layher v Lowe* (1996) CA);
> that it is "*probable*" or "*more likely than not*" (*Laker Vent v Templeton* (2009) CA).

'May' means:

> *'at least possible that a claim will result' (Rothschild v Collyear (1998) QB)*
> *'a real as opposed to a fanciful risk of underwriters having to indemnify insured' (Aspen v Pectel (2009) QB)*

Objective approach to a question of whether a circumstance is something which "might" or is "likely" to lead to a claim (*Kidsons*).

Points To Consider

> Is it too vague or remote to be reasonably capable of being regarded as a fact or situation which might give rise to a claim

> Would any reasonable person in the insured's position recognise a real risk of a claim from the facts

> Would different people possessed of same knowledge reasonably form different views as to whether a claim is a real possibility as distinct from a remote risk

What information should you provide to an insurer:

Unless the policy wording says something different, there is no requirement at the time of notification to identify:

> A specific transaction;

> A possible claimant; or

> A potential issue with each transaction

Checklist for consideration of circumstances

1. Form of notification of a circumstance required under a policy of insurance?

2 To whom does a notification have to be made?

3. Is the insured "*aware*" of the matters giving rise to circumstance at the time of notification that may give rise to a claim? Is it an internal or external trigger?

4. When did the "*awareness*" arise, and is it attributable to the insured (as a corporate entity, for example)?

5. Has the insured complied with the notification requirement specified in a Policy e.g. time period? Is the obligation a condition precedent?

6. What is the Policy requirement: "*likely to*" or "*may*" give rise to a claim? Does the materiality of the circumstance meet this test?

7. How would a reasonable recipient have interpreted the contents of the notification?
Is there certainty?

8. If a claim arises has it arisen out of the circumstance notified? Is there sufficient causal connection?

Condition Precedents Analysed

In the recent case of **Zurich Insurance Plc v Maccaferri Ltd [2016] EWCA Civ 1302** the Court of Appeal was asked to determine the meaning of a condition precedent in an insurance policy which required the insured to notify its insurers "*as soon as possible after the occurrence of an event likely to give rise to a claim*".

The Court decided that the insured had an obligation to assess the likelihood of a claim being made immediately after any given incident. The insured was not, however, required continuously to assess whether past events may give rise to a claim.

The Facts

> An engineering firm supplied Spenax guns to a builder's merchant that hired it to a third party building company in 2011.

> An employee of the building company was injured when a Spenax gun went off accidentally. The insured was informed of the incident but, at that time, there was no indication or allegation that the gun had been faulty, nor that anyone had been seriously injured.

In 2012 the injured employee brought a claim against his employer and the insured was notified that it had been joined as a defendant to the proceedings on 22 July 2013. The insured notified Zurich of the claim on the same day. Zurich denied cover on grounds that the insured had failed to comply with the condition precedent relating to notification.

The court's findings

The Court of Appeal rejected Zurich's interpretation of the condition precedent. If it had been upheld the potential effect would have been to exclude liability for an otherwise valid claim for indemnity.

The Court determined that the phrase "*an event likely to give rise to a claim*" meant an event with at least a 50% chance of leading to a claim. The fact that a claim was possible was not enough.

The impact of the words "as soon as possible" were the considered in the context of the drafted clause.

The words "as soon as possible after the occurrence of an event" could, in theory, mean that an insured was under an obligation to continuously assess whether past events were likely to give rise to litigation. The Court would not apply this strained interpretation of the wording unless insurers had spelt it out.

The test applied:

At the time that the event occurred – was it likely (i.e. a likelihood of 50% or more) to give rise to a claim and it was decided that the 'likelihood' of a claim could not be inferred simply from the fact that an accident/event had occurred.

It was found that on the facts of this case, particularly due to the insured's lack of knowledge as to what had happened, there was no such likelihood as at the time of the incident, the insured did not know that anyone had been seriously injured and there was no indication that the gun had been at fault. During the proceedings two of the instructed experts could find nothing wrong with the gun; there were no grounds for Zurich to deny liability.

Factors considered:

1. the insured knew very little of what had happened at the time of the incident;

2. there were limited grounds for alleging that the insured's product was faulty; and significantly

3. the allegation of fault was not even made until a year after proceedings were first issued.

On the facts of this case, the Court found that it would be unreasonable to expect an insured to carry out a "*rolling assessment*" of whether past events were likely to give rise to a claim.

If you are interested in discussing any of the content of this article we will be pleased to do so as independent insurance intermediary that specialises in arranging insurance for the marine industry.

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Chapter 3 Fifty Shades of Law

A FAIR REPRESENTATION

Why is it important

Whether we are beginning the process of obtaining quotations for you for professional indemnity insurance or obtaining renewal terms from insurers on your behalf, we will request the completion of either a proposal form or renewal declaration. Both these forms request comprehensive information including details of your business activities, qualifications and experience, income and claims history.

You may wonder why underwriters need so much information. When you are busy doing your day job it can be a tedious task to fill out a long form and hopefully we can help to explain why such information is necessary and how it can impact on your insurance cover.

At the bottom of the proposal or renewal form there is normally a declaration which requires your signature. By signing this you are usually confirming that you have made a fair presentation of the risk by disclosing all material circumstances or that you have given sufficient information to put a prudent insurer on notice that it needs to make further enquiries in order to reveal material circumstances. A matter is material if it would influence the judgement of a prudent insurer as to whether to accept the risk, or the terms of the insurance. The details requested on the proposal are therefore important in providing insurers with the details necessary for them to assess the risk, or the terms of the insurance (including premium).

So what are you expected to know and provide

The Insurance Act 2015 (Act) abolished the basis clause which operated to turn insured's pre-contractual representations into warranties and replaced with the requirement of fair presentation.

"The duty of fair presentation"

1. Before an insurance contract is entered into, the Insured must make a fair presentation of the risk to the Insurer, in accordance with Section 3 of the Insurance Act 2015. In summary, the Insured must:

   a) Disclose to the Insurer every material circumstance which the Insured knows or ought to know. Failing that, the Insured must give the Insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries in order to reveal material circumstances. A matter is material if it would influence the judgement of a prudent insurer as to whether to accept the risk, or the terms of the insurance (including premium); and

b) Make the disclosure in clause (1)(a) above in a reasonably clear and accessible way; and
c) Ensure that every material representation of fact is substantially correct, and that every material representation of expectation or belief is made in good faith.

2. For the purposes of clause (1)(a) above, the Insured is expected to know the following:

a) If an Insured is an individual, what is known to the individual and anybody who is responsible for arranging his or her insurance(s).

b) If an Insured is not an individual, what is known to anybody who is part of the Insured's senior management; or anybody who is responsible for arranging the Insured's insurance.

c) Whether an Insured is an individual or not, what should reasonably have been revealed by a reasonable search of information available to the Insured. The information may be held within the Insured's organisation, or by any third party (including but not limited to the broker, subsidiaries, affiliates or any other person who will be covered under the insurance). If an Insured is insuring subsidiaries, affiliates or other parties, the Insurer expects that the Insured will have included them in its enquiries, and that the Insured will inform the Insurer if it has not done so. The reasonable search may be conducted by making enquiries or by any other means.

So what are you expected to know and provide

Since the basis clause was abolished insurers are relying more on condition precedent clauses to require insured's that certain matters listed are true and accurate at the time of inception of an insurance contract; this provides a contractual promise that a particular matter is true. If this is breached it may entitle an insurer to reject a claim regardless of whether prejudice is suffered by them, or may mean that cover never attached.

Prior to the Act a breach of warranty discharged insurer's liability under a policy entirely. The introduction of the Act improved the position for insured's as it makes warranties "suspensive conditions". This means that an insurer's liability is suspended only while the insured remains in breach of a warranty.

Insurers Remedies for breach of the duty of fair presentation

1. If, prior to entering into this insurance contract an Insured breaches their duty of fair presentation the remedies available to Insurers are as follows:

a) If an Insured's breach of the duty of fair presentation is deliberate or reckless:

i) The Insurer may avoid the contract, and refuse to pay all claims; and,
ii) The Insurer need not return any of the premiums paid.

b) If an Insured's breach of the duty of fair presentation is not deliberate or reckless, the Insurer's remedy shall depend upon what the Insurer would have done if the Insured had complied with the duty of fair presentation:

i) If the Insurer would not have entered into the contract at all, the Insurer may avoid the contract and refuse all claims, but must return the premiums paid.

ii) If the Insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms from the outset, if the Insurer so requires.

iii) In addition, if the Insurer would have entered into the contract, but would have charged a higher premium, the Insurer may reduce proportionately the amount to be paid on a claim (and, if applicable, the amount already paid on prior claims). In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/ higher premium) x 100.

2. If, prior to entering into a variation of an insurance contract the Insured breaches the duty of fair presentation the remedies available to the Insurer are as follows:

a) If an Insured's breach of the duty of fair presentation is deliberate or reckless:

i) The Insurer may by notice to the Insured treat the contract as having been terminated from the time when the variation was concluded; and,

ii) The Insurer need not return any of the premiums paid.

b) If an Insured's breach of the duty of fair presentation is not deliberate or reckless, the Insurer's remedy shall depend upon what the Insurer would have done if the Insured had complied with the duty of fair presentation:

i) If the Insurer would not have agreed to the variation at all, the Insurer may treat the contract as if the variation was never made, but must in that event return any extra premium paid.

ii) If the Insurer would have agreed to the variation to the contract, but on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms, if the Insurer so requires.

iii) If the Insurer would have increased the premium by more than it did or at all, then the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation. In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/higher premium) x 100.

iv) If the Insurer would not have reduced the premium as much as it did or at all, then the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation. In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/reduced total premium) x 100.

Section 11 of the Act provides that an insurer may not rely on the policyholder's breach of a risk mitigation term (including warranties and conditions precedent) to reject a claim if the breach could not have increased the risk of the loss.

Section 11 does not apply to terms which define the risk as a whole. Insureds should be on the lookout for attempts to frame policy provisions, including conditions precedent, in a way that increases their chance of being found to apply to the risk as a whole, thereby falling outside the scope of section 11. In addition, section 11 is unlikely to assist with regard to conditions precedent that relate to notification, so particular care needs to be taken in relation to these.

We hope that this article has helped you to understand the importance of completing the forms requested and sometimes having to provide additional information for insurers so they may properly assess the risk. It may take some time to complete but far better to spend the time doing so than to wreak the consequences for failure to present material circumstances.

So we ask, when we request you complete a form or provide further information please have patience with us and understanding as the purpose is a benefit to you to ensure you have the correct insurance cover in place which is always our aim.

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About our services

To us everyone is an individual and we strive to achieve the highest service standards for our UK and international clients using our insurance, legal and risk management experience.

Professional indemnity insurance for the marine industry is just one of the many insurance covers that we arrange.

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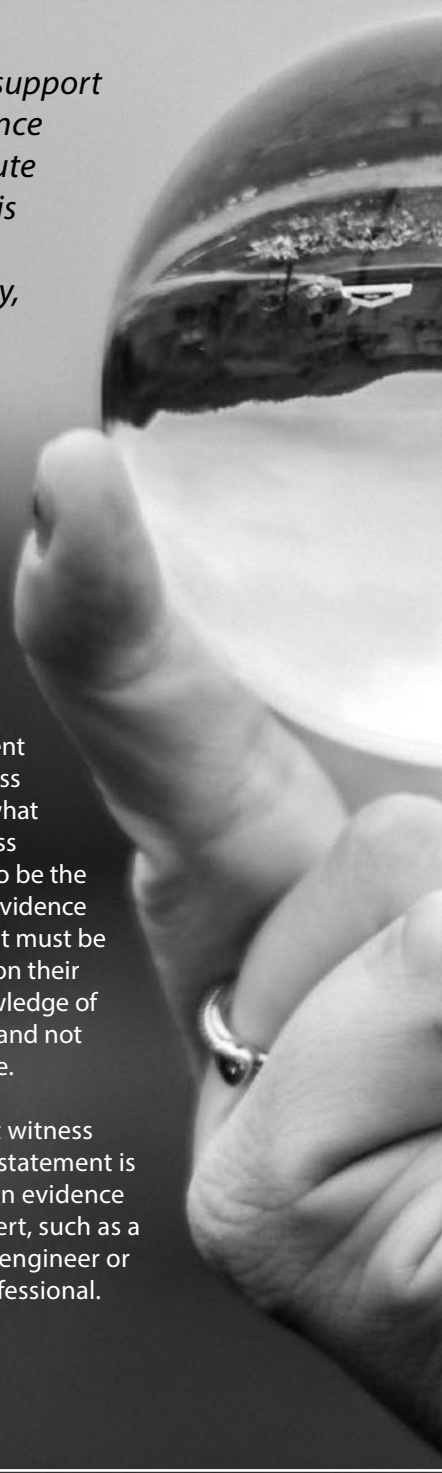
Chapter 4
Fifty Shades of Law

WHAT IS EVIDENCE AND WHEN IS IT ADMISSIBLE

All parties in court cases in England and Wales must produce evidence in support of their case. Without supporting evidence a claim or prosecution or defence is highly likely to fail. Therefore it is vitally important that all who contribute to providing evidence understand what constitutes evidence and when it is admissible. In law, rules of evidence govern the types of evidence that are admissible in a legal proceeding. Types of legal evidence include testimony, documentary evidence, and physical evidence.



WHEN IS EVIDENCE ADMISSIBLE

Not all evidence produced is admissible in court and there are clear legal rules as to what evidence is admissible.

Under the rules of evidence, the first rule is that it must be relevant to be admissible. For the evidence to be relevant, the facts which are subject to being proved or disproved must amount to:

- Facts in issue, i.e. those which need to be proved by one party.
- Relevant facts, i.e. those which tend to prove the facts in issue.
- Collateral facts which may, for example, affect the credibility and/or competence of a witness.

TYPES OF EVIDENCE

Oral evidence

The parties, witnesses and experts will usually give oral evidence in open court. Oral evidence is evidence put forward as the truth of its contents. Oral evidence is made on oath in open court and put forward as evidence of its truth.

Witness statements – lay and expert

Lay witness statements should be a true and accurate summary of a lay witness's evidence as to the facts that occurred. Statements should not be in the word of another person. They should be written in the first party.

A statement of a witness sets out what the witness believes to be the relevant evidence in a case; it must be based upon their own knowledge of the facts, and not conjecture.

An expert witness report or statement is the written evidence of an expert, such as a surveyor, engineer or other professional.

Witness statements must make clear what is based on the witness's own knowledge, and those matters which are their belief. Care should be taken with opinions and hearsay rules should be complied with. Opinion evidence is not generally admissible – though expert opinion is an exception.

Real (tangible) evidence

Real evidence is usually tangible, and takes the form of some kind of material object produced before the court. It is normally produced to show that it exists, or so that an inference can be drawn from its physical properties or condition.

Real evidence can take many forms. Material objects such as faulty products or parts, the appearance of people, photographs are all real evidence.

This evidence is usually produced for inspection by parties and courts draw inference from this evidence when deciding on causation.

Documentary evidence

Documentary evidence can be wide-ranging and includes any documents or written records that help prove or defend a claim. It is essentially anything that contains writing, including digital records so documentary evidence ranges from: diaries, spreadsheets, work accident log books, employment contracts, and medical notes, to repair invoices, pay slips, transcripts of phone calls and emails, texts, whatsapp messages, metadata. Even draft documents are evidence including draft reports subject to the privilege rule.

Certain information may be privileged. Only documents created for the dominant purpose of actual or contemplated litigation will qualify for litigation privilege purposes. Where documents have been provided for another purpose the document will fail the dominant purpose test. Where documents have been provided for more than one purpose, the court must be satisfied that the dominant purpose is litigation, from an objective standpoint. It is not sufficient if litigation is a secondary or equal purpose.

So what do courts mean by actual or contemplated litigation. Litigation will be in contemplation if it is 'anticipated', 'apprehended', 'pending' or 'threatened' and will be a question of fact in each case. While there is no need for more than a fifty percent (50%) chance of litigation, it is not enough that there is a 'mere possibility' or even a distinct possibility that sooner or later someone might make a claim. Litigation should be reasonably in prospect, or reasonably anticipated, when the relevant communication/ document is made.

Hearsay evidence

Hearsay evidence is where a witness in proceedings seeks to give evidence of a particular fact on the basis of what was said to him or her by a third party. The general rule is that hearsay evidence is admissible in civil proceedings under the Civil Evidence Act 1995, however you (i.e. your solicitor) must give notice to the other side of your intention to rely on hearsay evidence.

Hearsay evidence is basically second hand evidence. A written or oral statement made otherwise than by a witness giving their own first-hand evidence in proceedings, which is tendered as evidence of the matters stated and which is relied on in court to prove the truth of the matters stated.

So a court is likely not to give so much weight to hearsay evidence as it would to other evidence. The court will take a number of factors into account when weighing up the strength or otherwise of the hearsay evidence.

The strongest type of evidence is therefore that which provides direct proof of the truth of an assertion.

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Chapter 5 Fifty Shades of Law

Financial Loss – What is it and when is it covered?

You are probably wondering;

"why should I be interested in knowing how the law and insurers view financial loss"?

For most of your daily life you are probably correct; but when it comes to covering your business against risk or understanding the risk to your business then, yes, it is important to understand how the law and insurers view financial loss and particularly at a time when "financial loss" cover is increasingly given as an extension to liability policies.

As this area of law and insurance is extensive, we are going to tackle the subject over a few IIMS magazine publications – so keep scanning the IIMS publication for our article!!

Well let's start with "what is it"!

English law divides situations into two:

- situations where there has been physical injury or damage, and
- situations where there has not. ***"financial loss" as understood by insurers exists only in the second situation.***

Hence, the way the law changes, and the insuring of "financial loss", are intimately bound up with each other.

It is in the law of tort that most of the legal changes have taken place, particularly the tort of negligence and we will "take a look" at these changes and how the two main strands have developed:

- physical injury or damage cases rely on the case of Donoghue v Stevenson
- special relationship cases rely on judgement in Hedley Byrne case

Generally, for there to be a liability for "financial loss" in negligence, there must be a special relationship. A special relationship can be formed within the law of contract. Interestingly, if an insured has entered into a contract the question often arises of whether he or she has a liability in tort at the same time. This is known as concurrent liability, and this is something of a moving legal target. It is important, because:

- many policies restrict cover for liability in contract.
- claims in contract usually become barred sooner than claims in tort, so claims can often only be advanced in tort.

There also seems to be an increasing exposure to liability under statute in almost every area of commerce. Sometimes such liability arises where there has been physical injury or damage, and sometimes where there has not.

In order to understand how liability for "financial loss" arises, it is of course necessary to understand what is actually meant by "financial loss".

There is plenty of scope for confusion. For example, what are the differences between the following?

- economic loss
- pure economic loss
- consequential loss
- financial loss

"Economic loss" and **"pure economic loss"** have clear meanings in law – they are the phrases used by judges.

Judges almost never refer to "financial loss", and yet, that is the phrase usually used by insurers to refer to what the law calls "pure economic loss".

We will be using ***"financial loss"*** as insurers do but, where necessary and to be legally precise we will use the phrase ***"pure economic loss"*** in preference to ***"financial loss"***.

Let's summarise to try to simplify some important definitions:

> **Economic loss:** pecuniary loss consequential on injury or damage.
> **Pure economic loss:** pecuniary loss not consequential on injury or damage.
> **Consequential loss:** often used to mean economic loss.
> **Financial loss:** a term usually used by insurers to mean pure economic loss, but often loosely used to mean any of the above. Three example policy definitions:
  - A pecuniary loss cost or expense incurred by any person other than the insured
  - A pecuniary loss cost or expense incurred by any person other than the insured resulting from the sale or supply of Products
  - A pecuniary loss cost or expense and not occasioned by injury or loss of or damage t0 property

Are you *"scratching your head now!"*

Confusing? Yes! So, it is always good practice to read your policy wording very well or seek professional help if you are unsure. We try as professional insurance intermediaries to take a simple approach to the application of law and insurance to business and we hope this is exemplified by our articles.

So, to help simplify this muddled area, courtesy of the insurance industry for not following the legal definitions, in our next article we will revisit in more detail what is financial loss and delve into how liability arises?

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Insurance Claims are on the Increase!

What can you do about it?

As an insurance intermediary we are passionate about helping our client's reduce the risk of claims occurring against them and so we are working with the IIMS to produce a series of talks and articles that we hope you will find useful in your everyday working life.

From one of our recent talks we received a very interesting email that raised the question of the effectiveness of the terms that some insurers are requesting their insured's put in their terms and conditions.

This is such an important and interesting area that we would like to share this topic with you so below is the story of what occurred.

We presented in Scotland in November this year a talk on *"The Number and Size of Insurance Claims Is Rising. What can Surveys Do to Prevent This If Possible"* – if you wish to obtain a copy of the slides, the updated version can be obtained from the IIMS. If you have the luxury of some time you can watch my presentation at the recent Portsmouth IIMS training day.

We received an interesting email from one of the attendees that said that they are asked by insurers to include certain phrases in their terms and conditions:

These were the phrases apparently suggested by insurers:

- *No dismantling work was carried out except for the removal of normally portable hatches and sole boards.*
- *We have not inspected parts of the structure or machinery which are covered, unexposed or inaccessible and we are, therefore, unable to report that any such parts are free from defect.*
- *Without prejudice to the whole terms of this report the main recommendations are noted below.*

Our comments were as follows:

- *No dismantling work was carried out (except for the removal of normally portable hatches and sole boards. I think this is superfluous).*
- *We have not inspected parts of the structure or machinery which are covered (by what? A coat?), unexposed (by what a coat?) or inaccessible (everything is accessible if you have tools) and we are, therefore, unable to report that any such parts are free from defect.*
- *Without prejudice to the whole terms of this report the main recommendations are noted below. See appropriate sections for details.*

The problem is that not many people, including underwriters, have the time to consider case law and there is much case law around the definition of what we deemed nebulous words (because they are not defined with parameters) such as accessible and not visible.

The Courts consider the understanding of *"the person on the omnibus"*. What would they, the person on the omnibus, understand from not visible, not accessible and not exposed? What would they consider is reasonable for their professional person to have undertaken during their surveys? If you wish to leave it to the lawyers or Court's decision as to the application of these words then you have an unknown in your terms and conditions, but if you either define them or use a different phraseology then you are potentially controlling the outcome of a dispute.

So, our thoughts on what could be included I have outlined here from our recent talk...

A problem frequently occurs with the use of the word "inaccessible", because it has been held in case law that an area behind a hatch was accessible because it only required a few screws to be removed. If they had said that no screws would be removed to access areas or tools used to access areas the outcome in that case we suggest would have been different.

So consider including some of the following, but before doing so make sure it is appropriate for the contract between you and your client and actually reflects what you do, or do not do, during your survey and after post your survey if applicable:

> No parts of the vessel are dismantled and no bolts are drawn or screws removed or tools used to access areas for inspection of:
  - parts of a vessel
  - vessel structures
  - vessel appliances
  - vessel machinery (if machinery not inspected then remove this as there would no doubt be a an specific exclusion excluding liability and inspection of machinery and no doubt engines)

  And in these terms and conditions and any report or communication the above parts of a vessel, vessel structures, vessel appliances or vessel machinery will be deemed to be "inaccessible" or "not accessible".

> Parts of the vessel, vessel structures, vessel appliances or vessel machinery which are not visible at the time of the survey will not be inspected including but not limited to those behind linings, beneath fixed floors or sole boards and in these terms and conditions and any report or communication the phrase "not visible" will be deemed to include such parts of the vessel, structures, appliances or machinery.

> We are unable to report or provide advice on inaccessible and not visible parts of a vessel, its structures, its appliances or its machinery and hence we are unable to report that such inaccessible and not visible parts, structures, appliance or machinery are free from defects.

> Engines and machinery and appliance are not inspected and where applicable the client would be advised to instruct appropriate experts in their fields to advise on these parts of the vessel.

You should we suggest consider including certain phrases and words also in your report when you are "telling the story" of what you did in each area of the vessel. So here are some thoughts for the month.

When you write your report:

- Say what you did in an area – tell the story – and what you found
- Say what you did not do in an area and why – e.g. unable to access X,Y or Z because of X,Y or Z (may be screw needed removing and you do not remove screws) and therefore unable to check for cracks
- It may be appropriate to advise they consider taking separate advice or action such as considering engaging an expert, or boat builder, to further investigate where you could not access or even where you did access and identified something that you have brought to their attention.
- Likewise for potential cost of repairs; surveyors do not normally provide costs of repairing, unless you have experience, as this is a boatyard's area of expertise.

You may wish to refer to previous problems found (state facts as where the information came from – not specific because of data protection but perhaps say from experience or perhaps information in the public domain) in areas accessed and not accessible.

Always keep continuity by that we mean if you use a phrase or word in your terms and conditions and want to draw it to the attention of your client in your report, use the same word or phraseology where possible.

Finally, "Recommendations". Should there or should there not be a recommendation at the end of a report? Should you have recommendations in each section?

Should you at times consider saying "you may wish to consider" because it is more appropriate that a recommendation. Only you can decide depending on the facts but our thoughts are if you wish to have a recommendation section at the end of your report perhaps instead of using the heading "Recommendations" or as some people do "Main Recommendations" use the following:

"Without prejudice to the whole content of this report we would like to draw your attention to the following findings and comments:"

This may be a bit legalistic for you but you can change the phraseology but with this type of phrase you are not setting yourself up, unless you want to, as categorising what is a more important than other issues in the report and hence for criticism should another professional consider you missed an important point from your report in the Recommendation Section. As we have said The Courts always take the view:

"What does the person on the omnibus understand by the word or phrase"

I would say it means to the person on the omnibus the most important recommendations so if you then miss something off your list under the section of main recommendations you have potentially set yourself up for criticism.

Everyone writes in a different style and uses different phraseology so there are no specific rights or wrongs but what is important is thinking about how the person reading your report will interpret it and what are their expectations.

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GIVING EXPERT WITNESS

By **Karen Brain**

Are you ready to be an expert witness? What does being an expert witness really mean?

This is one of a number of articles to explain the role and requirements of an expert witness but it is also relevant to those who write professional reports that may be in the "firing line" at sometime as an expert witness. To know what they should do and aim to achieve can focus those who write professional reports to consider their structure and content to avoid criticism.

First know your forum:

- Civil Case – Supreme Court
- Civil Case - County Court
- Criminal Case – Magistrate & Crown Court
- Coroners Court

Secondly know the rules:

- Civil Procedure Rules ("CPR") Part 35 - **https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35**
- Official Guidance e.g. Practice Direction Part 35 and Guidance for instructions of experts in Civil Claims 2014 - **https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35**
- Criminal procedure rules and practice directions
- Codes of Practice and Other Guidance e.g. professional codes of conduct and model forms

Your duty as an expert is to the court but do you really know what this means as the first case we look at explains?

Make sure you know the rules and how to conduct yourself at trial.

If you are not an expert of suitable calibre or competent as an expert (e.g. qualifications, knowledge, experience, not fit at the time of trial) or do not comply with the rules you may be open to criticism and be responsible for wasted costs.

In this article we are going to look at some of the recent cases that highlight the need to comply with court procedure rules and the consequences if you deviate from them, including wasted costs orders made against experts.

Collapse of trial – Fraud trial of brokers - carbon credits

In this case the judge decided the expert was not an expert of suitable calibre. He had no good understanding of the duties of an expert, no academic qualifications, his work had never been peer-reviewed and he had received no training, nor had he attended any courses.

This was a fraud case involving conspiracy to defraud carbon credits and diamonds and the prosecution's case was that there was no room to sell carbon credits in a secondary market and therefore no room for brokers to be working in a secondary market. The defence case was that a secondary market existed and there was legitimate room for brokers selling carbon credits in a secondary market.

One defendant found an expert who had worked in the market, he had academic experience and had written a book on carbon credits and fraud. He also was an academic and he had a PHD in carbon credits as well as having given evidence in other countries and civil courts. So, he had "good credentials" in contrast with the prosecution's expert witness. The defendant asked for the prosecution to abandon their expert witness before the trial commenced but they did not have a case without their expert so they would not abandon him.

The judge in the case asked the prosecution expert questions and from these questions it transpired amongst other things that the prosecutions expert witness had no academic qualifications (which is not always important as some areas are very specialist), he had decided to leave some years off his CV that were relevant and for years he had not undertaken any training post him leaving the market. Also, he had not undertaken any research on his opponent.

In this case experts should have used the CPS guidance on expert witnesses. Its appendices include:

- Certificate instruction that sets out the day the expert was instructed and what they were asked to do i.e. the scope.
- Certificate of self-declaration – experts sign a check list and if you have not got ticks in the boxes you have not done everything you should have done.
- Proforma for schedule of unused material so if and when an expert is asked by any side to amend a report or delete an appendices they can then put in their report the changes and who asked them to change the report, meaning the expert cannot be criticised.

In this case it transpired that the prosecutions expert was aware of the guidance but then accepted he had done none of it.

He had no certificate of instruction, no record of unused material and he had not been checking in with the officer of the case or the CPS lawyer and his only contact was a week before the trial and apparently he had missed the call.

In this case the instructing officer did not have an understanding about carbon credits and the expert had been leading the case and had been cutting and pasting questions from an officer but, the officer had not asked him the question. So incorrect information was contained in the report.

In addition, the police did not look properly into the background of the expert. They did not understand the expert's role and duties to record, retain and reveal; the disclosure officer did not understand what the expert should be doing. This expert had been used on other cases and at no time was his background and expertise challenged.

By following procedures and guidelines experts are protecting themselves in which ever court they are in - civil or criminal. So, make sure you follow procedure rules and ask for them if they are not provided, likewise for any specific guidance to follow. Ensure you communicate with your instructing party and query any instructions if they appear to digress from the rules.

So, it is crucial for an expert to be trained properly and understand his/her duty to the court and actually appreciate what it means by "your duty is to the court".

As an expert you should not rely on others to "police" you and make sure you are trained and understand and follow the procedures of any court - for civil disputes this is the Civil Procedure Rules.

The second case **we consider** highlights the duty to the court, the need **to** understand those duties and financial consequences of not understanding and complying with the duties.

Thimmaya v Lancashire Foundation Trust – wasted costs nearly £89k

This case involved a consultant who acted as an expert witness in a clinical negligence proceedings and was ordered to pay £88,800 to cover the costs wasted as a result of his input.

The expert was a consultant spinal surgeon who was deemed not generally competent as an expert witness and not fit to be giving evidence.

The defendants sought the wasted costs order after the expert was wholly unable to articulate the test applied in determining breach of duty in a clinical negligence case and as a result the claimant had to discontinue her claim.

The court found that the expert owed important and significant duties to the court and had failed comprehensively in those duties. A significant amount of court time had been wasted and significant consequences to the NHS in terms of costs.

The court heard that the expert was not fit at the time of the trial to give expert evidence. The expert submitted that he was having cognitive difficulties, problems with his memory and concentration, and had not appreciated he was unfit to give evidence. He added that on the day of the trial he had an adverse psychiatric reaction to the questioning of counsel for the defendant who reminded him of an interrogator who had previously questioned him in Iraq.

In 2017 the claimant's solicitor had asked the expert to confirm his suitability as an expert. He was not considered dishonest or deliberately misleading but he should have recognised he should not have continued to act as an expert witness and as a consequence the balance came down in favour of the defendant's (the NHS) application for wasted costs.

So when deciding on whether you are suitable to be an expert witness in a trial not only consider amongst other things your calibre, competence, qualifications, expertise, experience and knowledge of court rules, but also whether you are fit to undertake the role.

For those who are not expert witnesses but who intend to become expert witnesses it is worth considering your expertise, competence, qualifications, knowledge of the area and experience before accepting a commission. Also, as in the previous case, use check lists, ensure external sources are quoted for external information used in a report. Make sure you understand your scope of work and ensure it is clearly stated in your contract and report to your client.

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PUT EVERYTHING IN WRITING!

By **Karen Brain**

INSTRUCTION, CLIENTS AND TERMS & CONDITIONS

In life most things are simple, and this is so if basic guidelines are followed in what ever you do in your business and personal life. It is so easy to overlook, neglect to do or decide in a fleeting moment of haste that a step is not necessary and so omit it; and those omissions can often lead to substantial long-term grief.

In this short article we are going to look at a few basic steps that should be undertaken when dealing in business i.e. when forming a binding agreement (a contract) to reduce the possibility of "grief".

We start by asking three basic questions:

1. Do you know who instructed you?
2. Do you know who your client is?
3. Do you know if your terms and conditions are accepted?

So, a scenario is: You take a telephone call from a person, perhaps a sales broker, asking you to undertake a survey on a vessel for which he has a potential purchaser. Business for you may be slow, or it seems a good opportunity or you know the broker well. So, you say yes you will do the survey.

- **Have you formed a binding agreement (oral contract) at this point? Good question. Not if the amount to be charged has not been discussed and agreed; consideration is a required element of forming a binding agreement (a binding contract) and this can be money or monies worth.**
- **Have you advised them before accepting the job that all your work is undertaken under your terms and conditions; these may be standard terms and conditions?**

Let's go back a stage. A contract (a binding agreement) may be oral or written and is formed by:

- **Offer**
- **Acceptance**
- **Consideration**
- **Intent to create legal relations**
- **Certainty**

The last two elements are normally quite obvious so we will not concentrate on these in this article.

In the above scenario who is offering and who is accepting?

It should be made clear that you as a surveyor are offering your services at the agreed price with your terms and conditions applying; the client should be the one accepting your offer, preferably in writing.

Your terms and conditions may be attached to an email or included as an attachment to a letter and you may request they are signed and dated by your prospective client and that they return a signed and dated copy to you before you undertake the work – this is preferable. Or you decide to refer to your terms and conditions applying to all your work and direct them to an attachment to an email or an inclusion in a letter. Another alternative is to state your terms and conditions apply to any work you undertake and refer them to a copy on your website by providing the URL; you may do the latter and still ask them to confirm they agree to your terms and conditions. There are different options available to incorporate terms and conditions in a binding agreement.

A final catch all is to state that even if they do not confirm they agree to/sign your terms and conditions, they agree to your terms and conditions by accepting your offer of services. Whatever you do, you must make sure your terms and conditions apply to your contract (your binding agreement) with your client.

If you agree with the sales broker to do the survey what is his status? Is he an agent of the potential purchaser? Has he become your client? Payment for a service is just one element that is looked at by courts when deciding who are the parties to a contract. You may have formed a contract with more than one person by accident. Thus, the rule is, always write to your client before commencing work and ensure they confirm you are working for them only and that they accept your terms and conditions.

It is helpful if you always state in your survey report that the survey is only for the benefit of your client "Mr Bloggs" and there can be no reliance on the document for other parties and neither do you have any liability to anyone else except your client and that the document cannot be released to any other party without your written agreement. You may wish others to be able to rely on the survey report and if so you would need to add that other parties can rely on the survey report but only if you give your written agreement (consent). The decision is yours as to how wide you wish your liability to be to parties.

So, three simple things to remember:

- **Know who is instructing you**
- **Identify your client by confirming in writing to your client your instructions, your offer and supply them with your terms and conditions at this point**
- **Ensure your terms and conditions are accepted by your client**

"put everything in writing"

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The root of most problems with contracts is caused by common formation problems.

By **Karen Brain**

Contracts and law govern and fundamentally affect the operation and functioning of businesses. As such, businesses and their personnel should be aware of and understand the formation of contracts and their key elements that will affect the relationship and liabilities to their clients.

First you have to ascertain if a binding contract (a binding agreement) actually exists. Secondly, if so, what terms have been incorporated into the contract.

This article "dips" into the arena of forming contracts. It is not meant to be a comprehensive overview of contract law, which is highly complex, it merely seeks to summarise the fundamental elements of a contract which a business should consider when contracting with other entities.

Offer

1. An offer is a promise by one party to enter into a contract with another party.
2. An offer must be (a) specific (i.e. unambiguous/unequivocal); (b) complete; (c) capable of acceptance; and (d) made with intention of being bound by acceptance.
3. An invitation to treat is not an offer. An example of this is a shop window. If you are not dealing on your own standard terms, it may be beneficial to send an invitation to treat and wait for the other party to return with an offer. This then gives you the discretion and flexibility in accepting or rejecting that offer.
4. An option is to send out all correspondence marked "subject to contract", until you wish to form a binding contract. This clarifies that communications are invitations to treat and avoids you potentially being bound to the other party inadvertently.
5. Check that your standard terms are included in your contracting procedures and ensure those staff forming contracts understand how to ensure to include your terms and conditions in a contract.

Acceptance

1. Acceptance is a final and unqualified assent to an offer.
2. It must be communicated to the offeror to be effective, however, conduct can sometimes constitute acceptance.
3. Do not forget that contracts can be made by email/orally and they do not have to be formal written documents; and you can modify contracts also in this way by intention or accident. So, the rule is "use informal communications with caution!"

Sometimes it is better to consider heading all emails with "subject to contract" as a failure to do so runs the risk of forming a contract without the intention and/or having the appropriate protection.

4. Now for the battle of the forms. At what point is the contract formed? Which party's terms will apply? If a party offers to contract on its own terms, which the other party accepts but then imposes its own terms, there is no acceptance but rather a counter-offer. Each party wants to ensure its terms are the last set of terms despatched prior to performance, at which point the contract between the parties is formed.
5. Acceptance is the final step before the contract is formed and becomes binding, unless the other party agrees to vary the terms of the contract at a later date; so at this point normally no other terms can be incorporated into the agreement, unless the agreement provides for it.

Consideration

1. A promise cannot be enforced unless there is consideration given or promised in exchange for it.
2. Consideration does not need to be adequate, however, it must have some value (monies or monies worth).
3. Deeds do not require consideration to be given. A deed is a written document which is executed with additional formalities and by which an obligation binding on some person is created or confirmed.
4. Past consideration is no consideration, i.e. if a party performs a pre-existing obligation, it does not constitute consideration for a new obligation.
5. In most cases consideration is obvious but if you are not sure it exists either acknowledge in an agreement the existence of some consideration (e.g. £1) or execute the agreement as a deed.

Intention

1. A contract cannot be made unless the parties have a mutual intention to create a legally binding agreement.
2. An intention to create legal relations is presumed in commercial situations but it is always better to make it clear.

Certainty

1. The agreement must be complete. It must not lack an essential term which constitutes the fundamental purpose of the agreement.
2. The agreement must not be vague or ambiguous i.e. uncertain.
3. Although in some circumstances a court may decide to fill in perceived "gaps" in a contract in accordance with the parties' intentions at the time, this should not be relied on.

Do think carefully when you are forming a binding agreement (a contract) with one or more parties to ensure you have incorporated your terms and conditions in the contract that you may wish to rely on at a future date.

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