Navigating the global liability defence agenda

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Kennedys

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Introduction

We are pleased to share with you our global liability/defence group brief, **Navigating the global liability defence agenda.**

Members from our various offices have identified key issues that are impacting individuals in their jurisdictions and beyond. Whether you're in London or Hong Kong, Australia or the United States, we have seen an increase in the commonality of issues our clients face and a synergy in approach to dispute resolution across the globe.

This publication was created with our clients in mind. With our legal footprint spanning across 24 countries, our lawyers have first-hand knowledge of global issues impacting our clients. We wanted to provide a snapshot of interesting legal issues we are seeing and share some takeaways we expect will resonate cross-jurisdictionally.

We hope you enjoy reading this and welcome your feedback on future topics that are of interest to you.

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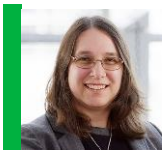

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About Kennedys

Kennedys is a global law firm with particular expertise in litigation and dispute resolution, especially in defending insurance and liability claims.

Our lawyers have a wealth of experience providing legal services to insurers and reinsurers, corporates, healthcare providers, public sector bodies and other organisations, for all lines of business, delivering straightforward advice even when the issues are complex.

We support our clients, beyond the law. By providing them with innovative products and invaluable resources, we empower them to achieve great things, even when we're not in the room.

Get in touch

If you would like to discuss any of the issues raised in this piece in more detail, please reach out to your Kennedys client relationship partner or get in touch with any of the contacts listed throughout.

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Asia Pacific

Australia

Untangling liability for injuries in strata developments

As urban populations grow, apartment buildings have changed skylines worldwide. Ownership of these complexes in Australia is predominantly subdivided under the "strata title" system.

As the number of strata developments grows, we have seen a corresponding rise in personal injury cases brought by claimants who sustained injury on those properties.

This article outlines some key considerations for insurers and insureds who may be subject to those claims.

The strata title system originated in Australia but has been adopted in parts of Canada, India, South Africa, Singapore, Malaysia, New Zealand and Indonesia. It allows for the ownership of individual lots (apartments, garages, parking spaces and storage rooms) with everything else on the parcel of land (roofs, stairwells, driveways, gardens and other amenities) defined as common property.

It can be unclear, in a strata claim, whose negligence caused or contributed to the injury, and therefore which party to pursue for damages. Owners Corporations (OC) (or 'body corporates') or their management companies, tenants, owners, developers, builders and surveyors may be exposed. Manufacturers of equipment or fittings at the property, maintenance contractors including cleaners, or even safety auditors also can be brought into a claim.

Complexity escalates when multiple parties have multiple insurance policies with any number applying situationally:

- Home and/or contents insurance - includes cover for legal liability for harm suffered on an individual lot.
- Owners corporation public liability insurance - provides cover for injury suffered on the common property.
- Professional indemnity insurance – provides cover for alleged harm caused by professionals involved in construction, installation, or maintenance of the property such as OC maintenance companies, developers and builders.

Occupiers' liability

In Australia, if a party is lawfully on the property an occupier owes a duty to take reasonable care to avoid foreseeable risk of injury - comparable to a general duty of care. An occupier is determined as a matter of fact, whether they have undertaken the care, supervision or control of the property so as to assume responsibility for its safety.

Close examination of contractual agreements between the OC and its management company will help determine where such a duty has been assumed.

The key determinants of liability are factual - where, when and how the injury occurred.

Scenario 1: Location

A person falls in a parking garage. The precise location of the fall determines who may be liable:

- A fall in a parking space means the owner or tenant may be liable, as the space forms part of their lot.
- A fall in the driveway exposes the OC as the space is common property.

Scenario 2: Causation

A person trips on unstuck carpet and falls in a stairwell. The causes of the fall could divide liability amongst multiple parties:

- The OC may be liable for not adequately inspecting the stairwell.

- The OC management company may be liable if they assume the risk through contract with the OC.
- A maintenance contractor may attract liability if they failed to repair the fault.
- The carpet installers would attract liability if the installation was defective.
- The carpet manufacturer could be liable if the carpet or related products were defective.

Inevitably, every claim is different and it is very possible that multiple parties (and by extension, their insurers) could be liable for injuries sustained on a strata titled property.

These complex situations require professional legal advice to untangle liability and manage exposure to potential claims.

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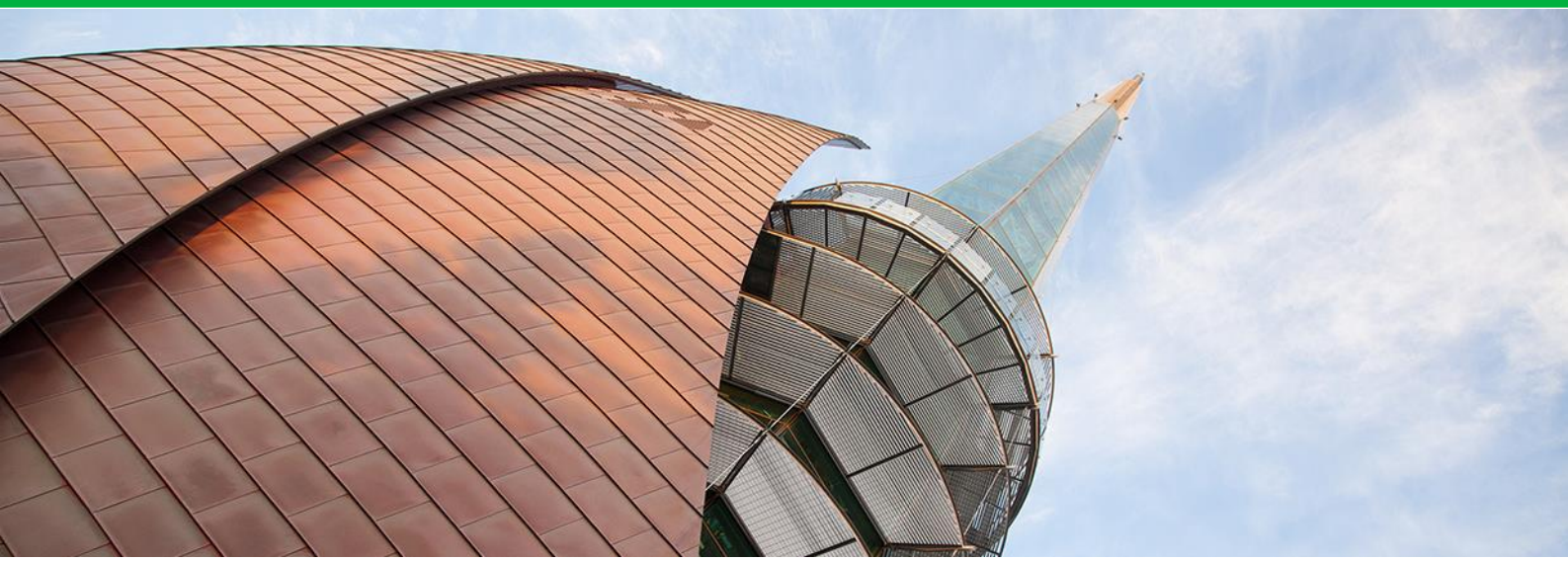
Silicosis claims trending up

Silicosis is emerging as the worst crisis in occupational lung disease since the peak of asbestos claims in Australia and poses significant risks to insurers and employers.

Silicosis has re-emerged in Australia on the back of a housing and renovation boom that has driven demand for engineered stone products for kitchen and bathroom benchtops. Engineered stone contains very high amounts of silica (93% or more) but is less expensive than natural materials (marble 2% or granite 30%).

Respirable crystalline silica (RCS) is released when engineered stone is manipulated by dry cutting, sanding, grinding and polishing. In the absence of adequate control measures (dust suppression, respirator masks) and health monitoring, workers may be exposed to hazardous levels of RCS, which when inhaled can cause silicosis amongst other serious conditions including lung cancer, pulmonary fibrosis, sarcoidosis, tuberculosis, rheumatoid arthritis, lupus, scleroderma, renal disease and lymphadenopathy.

In June 2021, the National Dust Disease Taskforce reported that almost 25% of engineered stone workers who were in the industry prior to 2018 were suffering from silicosis or related diseases. It alleged “a systemic failure to recognise and control the risk associated with … engineered stone”.



Key risks for insurers and employers

As cases rise so are the number of claims for compensation brought against employers and the manufacturers and suppliers of engineered stone products. Employers are also particularly at risk of prosecution and severe penalties for failing to adequately manage the risks associated with RCS.

It is difficult for insurers to reserve for silicosis claims: the latency period for the disease can range from weeks to decades depending on the level of RCS exposure and the variance in prognosis for diagnosed workers.

Nevertheless the quantum of claims is likely to be significant, because the condition is incurable and treatment is focused on slowing progression of the disease.

The sudden onset and affliction of relatively young workers (20-40 years old) also informs larger damages awards.

Further reading

- National Dust Disease Taskforce: Final Report to Minister for Health and Aged Care

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Hong Kong

Hybrid working and the potential rise in employees compensation claims

Almost all of us have experienced the joys and pains of working from home in the last two years, but to say that the COVID-19 pandemic has brought unprecedented change to the way we work is an understatement. This is especially so in Hong Kong where many workers have been required to work for extended periods in compact apartments, often shared with several family members, in high-density apartment blocks.

While some companies had adopted flexible working before 2020, it was not common practice until the pandemic arrived on Hong Kong's doorstep. Almost overnight, the city became one of the first to experiment with large-scale WFH when much of its white collar workforce was sent home. With few formal WFH policies or guidelines in place, specific arrangements were left mostly to the discretion of direct managers or department heads.

While some companies had adopted flexible working before 2020, it was not common practice until the pandemic arrived on Hong Kong's doorstep.

Once the pandemic was largely under control in the city many employers continued to allow at least partial WFH, but now that hybrid working is here to stay employers are clearly facing new challenges, potential risks and liabilities for employees' compensation (EC) and negligence claims. We expect to see an increase in EC claims arising out of WFH accidents in the future, given the unique challenges posed by Hong Kong home environments.

The Hong Kong Courts have yet to consider EC and/or common law negligence for WFH injuries so it is unclear what approach it will adopt, although they may look to judgments in other common law jurisdictions including the United Kingdom and Australia for perspective.

It is anticipated that, as long as both limbs of section 5(1) of the Employees' Compensation Ordinance (Cap. 282) (ECO) are satisfied — namely that an employee is able to show personal injury by accident arising out of and in the course of employment — the accident will be deemed to stem from the employment (in the absence of evidence to the contrary) and the employer will be liable for EC. The same temporal and causal tests, i.e. whether or not the work done was incidental to and in connection with employment, will still apply in determining whether an accident occurred or has arisen out of the course of employment in a WFH situation. The outcome will depend on the facts of each case, and will be a question of fact and degree.

The Hong Kong Courts may also adopt a similar approach as Australian Courts and/or Tribunals have in past and recent decisions, which may mean for example finding EC liability where an employee:

- Trips and sustains injury on a mid-morning run when WFH, given they were outside of their home (i.e. their place of work) and the injury did not happen during a temporary absence taken during an ordinary recess of their employment, such as a lunch break (Demasi v Comcare (Compensation)).
- Trips over their dog whilst reaching for their cup to make coffee when WFH (as the Court in Florida, USA did in Sedgwick CMS v Valcourt Williams). It is unclear whether it will be agreed that such an accident did not arise out of employment.

Overall, an employer is more likely to be liable where there is sufficient nexus between the accident and the employment, although what actually constitutes sufficient nexus in each case is debatable.

Employers and their insurers alike will certainly be keeping a keen eye on any test cases which may be on the horizon.

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Singapore

Tabled for discussion: an introduction to the Singapore actuarial tables

The Actuarial Tables with Explanatory Notes for use in Personal Injury and Death Claims (Actuarial Tables) published in March 2021 represent a change in the seas in the potential awards that may be arrived at via the assessment of damages in personal injury and death claims in Singapore.

The Supreme Court Practice Direction 159 and State Courts Practice Direction 145 state that all proceedings for the assessment of damages in personal injury and death claims heard on or after 1 April 2021 "will refer to the [Actuarial Tables] to determine an appropriate multiplier, unless the facts of the case and ends of justice dictate otherwise", irrespective of when the accidents or incidents occurred or when the actions were commenced.

Both Practice Directions state that the Actuarial Tables "will serve as a guide" with the selection of multipliers and the amount of damages remaining at the discretion of the Court, meaning that the facts and circumstances of the case may lead the Courts to depart from the multipliers in the Actuarial Tables.

To date, no cases have successfully argued that "adjustment factors" should apply and insurers in Singapore would do well to maintain a conservative approach, and base reserves on the Actuarial Tables without discount.

The applicability of adjustment factors

The Actuarial Tables incorporate census and economic data to derive sets of multipliers that enhance the statistical backing of the assessment of future losses for victims of personal injury or dependants in the case of death. The multipliers are intended to realistically reflect the discounted value of an accelerated receipt of compensation and the vicissitudes of life.

The Actuarial Tables are very much in their infancy compared to the (established UK equivalent) Ogden Tables (8th Ed), which incorporate additional adjustment factors based on granular data that is not yet possible in Singapore. For example, the Ogden Tables account for adjustment factors such as gender, age band, education level, and whether the individual was disabled and/or employed at the time of the accident. The confluence of these factors can result in significant reduction factors of between 12-88%.

This may leave the Actuarial Tables open to challenge in the short term, on the argument that recognised adjustment factors under the Ogden Tables should apply — although the Courts may have to be persuaded that the proposed adjustment factor(s) are relevant to the Singapore context, that their application should result in a non-negligible reduction factor, ceteris paribus, and what the reduction factor should be.

Certain assumptions in the Actuarial Tables, e.g. 2% inflation per annum, may also be open to challenge. In Pollmann, Christian Joachim v Ye Xianrong (which pre-dated the Actuarial Tables), the plaintiff sought, albeit unsuccessfully, to rely on high-level commentary and statistical data on healthcare inflation in general.

In the future, sufficiently targeted economic modelling may persuade the Courts to depart from the Actuarial Tables' in-built assumptions. However, a challenge of this nature would need to be backed by the highest level of expert economic evidence to satisfy the Court. Or, in the event of baseline shifts in economic outlook, it might simply be argued that the Actuarial Tables require recalibration.

Over time, the scope for challenges may dwindle. There is promise of a committee, headed by a Supreme Court judge and/or Registrar, and comprising representatives from the Monetary Authority of Singapore, the Singapore Actuarial Society, the General Insurance Association of Singapore and the Law Society, which will meet periodically to ensure that the tables remain updated and relevant.

Adoption by the Singapore Courts

It is plausible that the Singapore Courts will apply the Actuarial Tables in conjunction with traditional approaches, at least initially.

In Pollmann's case, for example, the Court was disinclined to endorse the use of Personal Injuries Tables Singapore 2015 because it had not attained the status of authoritativeness, and contained outdated data that affected the computation of future medical expenses. Thus, it applied the actuarial approach in conjunction with the arithmetic approach, applying a formula to determine the net present value of a stream of futures payments, and cross-checked against precedent cases (the precedent approach). In doing so, the Court satisfied itself that the multipliers arrived at via all three approaches fell within a comparable range.

Annex I to the Actuarial Tables also provides a glimpse into the UK experience, where the courts have declined to apply the Ogden Tables when there were "too many uncertainties to adopt the conventional multiplier and multiplicand approach", or where the award arrived at would be "hopelessly unrealistic" or "excessive".

The local bar awaits the development of local jurisprudence and continued refinement of the Actuarial Tables.

Given the Actuarial Tables' infancy, a great measure of flexibility in application can be expected, with the Singapore Courts retaining the ultimate discretion to adhere to or depart from the Actuarial Tables, or to decline their use altogether.

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Thailand

New regulations prescribe which buildings must apply for legal liability insurance

The Thai Government has updated laws on compulsory liability insurance. This will have significant consequences for many private sector property owners or occupiers.

The Ministerial Regulations are issued in accordance with the Building Control Act B.E. 2522 (1979) and came into effect on 6 November 2021. The Regulations are broadly split into those relating to buildings under construction or refurbishment and those already in use.

Buildings under construction or modification

Clause 3 of the Regulations relates to coverage against liability for life, body and property of a third party as a result of construction, modification, relocation, or demolition of private buildings. The building owner, occupier or operator shall obtain an insurance policy for the following buildings:

- High buildings (over 23m)
- Large buildings (the legislation is silent on the precise definition)
- Extra large Buildings (over 10,000 sqm).

Before carrying out any works under a permit for construction, modification, relocation, or demolition, the building owner, occupier, or operator is required to obtain third party liability coverage (in accordance with limits below) and maintain the relevant documents for the local official to inspect at any time.

If the construction, modification, relocation, or demolition of a building is unfinished prior to the date the Regulations come into force, the owner, occupier or operator must obtain such insurance within 30 days from the date the Regulations come into force.

The period of insurance shall not be less than the period under the construction permit.

Buildings in use

Subject to clause 4, during the use of a building by the private sector, the building owner or the building occupier must obtain an insurance policy which provides coverage against liability for life, body, and property of a third party, for the following buildings:

- Public assembly buildings (all or part of a building where people may enter for assembly, having an area over 10,000sqm, or capacity for 500+ people).
- Hotels under the Hotel Act, with 80 rooms or more.
- Service facilities with space exceeding 200sqm.
- Signboards installed more than 50m from the ground or from rooftop of building height greater than 25m; or occupying space of 50sqm or more.

The building owner or occupier must maintain the insurance policy at all times the building is being used, and retain the relevant documents for local officials to inspect at any time.

The obligations under this clause must be completed within 30 days from the date of any completion of construction, modification or change of use of the building.

Third party liability policy requirements

The building owner, occupier, or operator under clause 3 or clause 4 has to obtain a third party liability policy, which provides coverage amounts of not less than:

- THB 100,000 per person for death or infirmity
- THB 100,000 per person for medical expenses
- Combined coverage for (1) and (2) must be at least THB 5,000,000 per occurrence
- THB 500,000 per occurrence for damage to property.

Building owners or occupiers under clause 4 shall obtain the insurance under these Regulations within 30 days from the date the Regulations come into force, and shall maintain such insurance policy documents for the local official to inspect at any time.

> **Note: The insurance documents required under the Regulations may be kept electronically.**

Conclusion

Building owners/occupiers should note that the legislation specifically provides that the payment of insurance compensation under these regulations shall not prejudice the rights of the injured persons to demand compensation under other laws. Consequently, these Regulations should be seen as a minimum level of cover, not necessarily the limit of cover.

Failure to maintain appropriate insurance may result in imprisonment for up to three months, a fine of up to THB 60,000, or both. In addition, there may be a penalty of up to THB 10,000 per day until compliance is achieved.

Individuals responsible for violation by a juristic person may also be liable to these punishments.

> **Consequently all building owners, occupiers and operators would be prudent to review their insurance cover with their broker or insurer to ensure they are compliant with the new laws and avoid potential penalty.**

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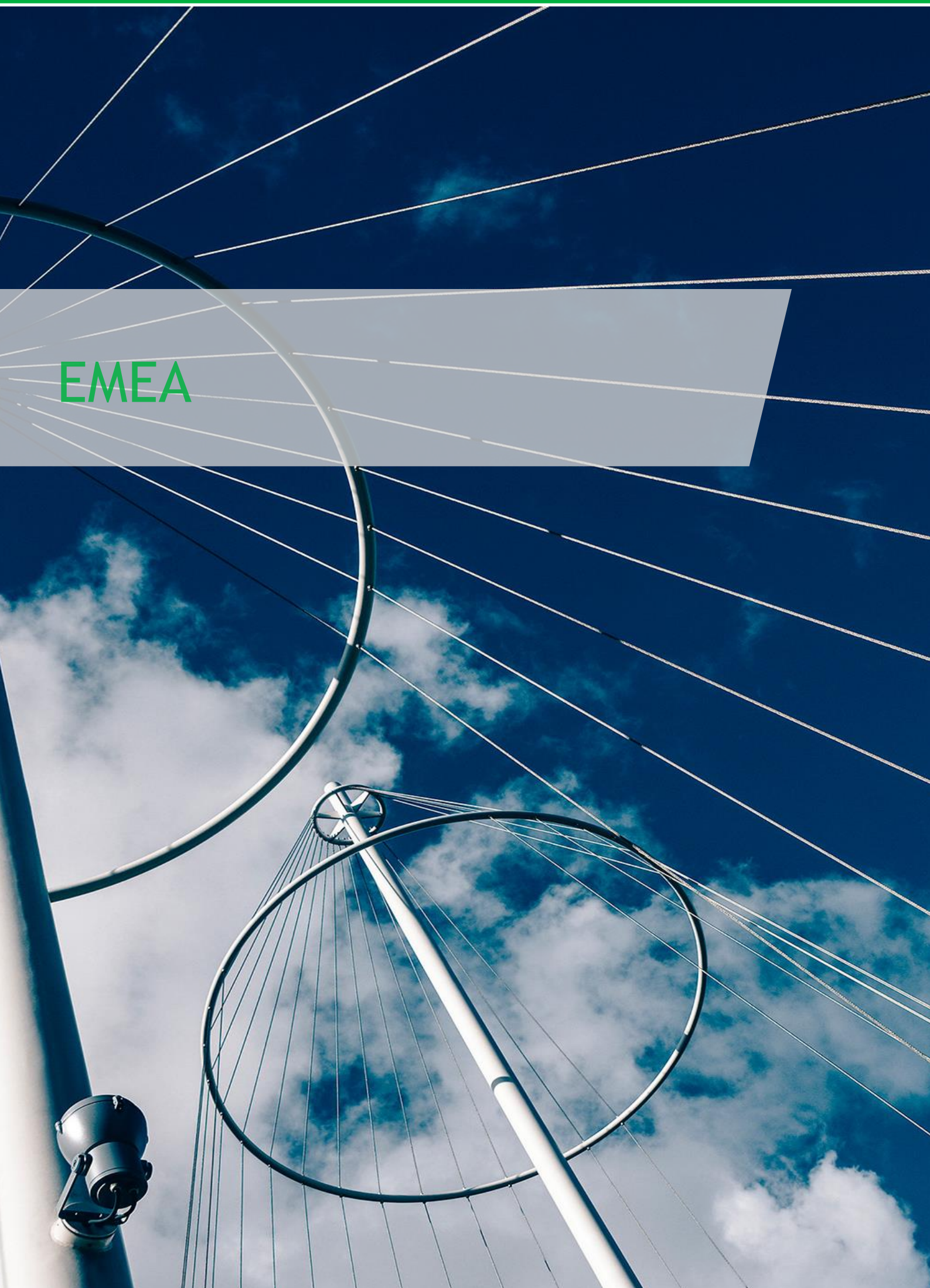

EMEA

Denmark

Employer liability flowing from workers who suffer COVID-19 related ill health/death

In the aftermath of the COVID-19 pandemic, Denmark has seen a number of work-related injury claims where an employee claims to have contracted COVID-19 in the course of their employment. Today, the Danish Labour Market Insurance (AES), who administer the Mandatory Workers Compensation Scheme in Denmark, has received more than 10,000 claims reports and recognised almost 2,000 of these as work related injuries due to COVID-19. Therefore, it is expected that Insurers will also see additional employer liability claims, as the pandemic continues and the long-term side effects appear.

However, the Danish Courts have not yet adjudicated any cases regarding employer liability in connection with an employee contracting COVID-19. This raises the question of whether an employer can become liable.

As a general rule, employer liability in Denmark is based on a relatively strict assessment of culpability.

First and foremost, an injury must have taken place in connection with an employee's employment before employer liability can be established. In COVID-19 cases, this means that the employee must be able to prove that he or she has been exposed to the virus in relation with his/her work and that it is more likely than not that this exposure is the cause of the employee's illness.

The AES has developed certain guidelines to be used when ascertaining when COVID-19 can be recognised as a work-related injury. The guidelines distinguish between 3 types of work where the risk of contracting COVID-19 is respectively great, lesser and small. The risk of contracting COVID-19 is great if the employee has a lot of contact with potential infected persons, such as social workers, doctors and nurses working in, for example, hospitals or nursing homes. This group accounts for more than half of all of the reported claims. The second group encompasses employees whose work includes a high degree of contact with other people but where this contact is more sporadic, for example, employees in supermarkets, teachers, bus drivers or prison officers. The last group, where the risk was small, are employees who have little daily contact with potentially infected persons as well as persons who have worked from home during the pandemic.

Though AES's distinction does not have any formal significance when determining employer liability, it seems logical to make use of the same distinction when assessing liability of employers. Ipso facto, an employer's degree of negligence does not need to be very high if the COVID-19-affected employee is a nurse or doctor at a hospital, as compared to a COVID-19-affected employee, who has worked from home during the pandemic.

Another factor that can play a role in an assessment of liability is the fact that the employer has a duty to ensure employees can perform their work in a safe working environment. Part of ensuring such an environment for the employees is to comply with guidelines set forth by authorities. In connection with the pandemic, the Danish Health Authority, the Danish Working Environment Authority and the Danish Patient Safety Authority provided guidelines for employers to ensure a safe work environment.

These guidelines were targeted at specific sectors and employed a distinction similar to the one that AES employed when assessing a work-related injury. As an example, the guidelines targeted at workers at hospitals and nursing homes were more comprehensive and included employers' duties to ensure COVID-19-affected patients were identified and isolated, as well as to ensure all preventive safety measures were in place at all times. Meanwhile, the guidelines targeted at employees working in offices merely charge employers to ensure social distancing is maintained, provide hand sanitizer/hand washing facilities and prioritise cleaning.

Consequently, it seems probable that employers will be found liable for their employees contracting COVID-19 if employers have not complied with the authorities' guidelines that are targeted at their specific sector.

> **It is however important to remember that the employer's negligence will have to be decided based on the guidelines that were in place at the time the employee was affected with COVID-19.**

Today, all the guidelines prescribe that the employer must provide the employees with necessary protective equipment such as face masks/shields and disinfectants. However in the beginning of the pandemic, there was a shortage of face masks/shields and disinfectant even in some hospitals. In such cases, liability must be based on a very specific assessment, including what the employer actually did and tried to do.

Thus, it can be concluded that in Denmark an employer's liability in relation to employees contracting COVID-19 is based on an assessment of culpability, where the specific employee's risk of contracting COVID-19 in his/her work environment, as well as the employer's compliance with the authorities' guidelines, will be included as relevant factors.

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France

The possible qualification of the COVID-19 pandemic as force majeure

The COVID-19 pandemic has had unprecedented global consequences. In France, as from 29 February 2020, several administrative measures were ordered to handle the spread of the pandemic, such as lockdown, curfews, and restrictions of movement beyond a certain perimeter. The last of these restrictions were lifted on 3 May 2021. These circumstances disrupted business relations and caused numerous litigations. We will analyse below whether obligors might invoke force majeure to avoid liability.

Contractual force majeure is defined in Article 1218 of the French Civil Code (FCC) which provides that an event stopping a party from performing its obligations under a contract must meet three conditions to qualify as force majeure. The event must be:

1. beyond the control of the obligor who can no longer perform its obligations
2. reasonably unforeseeable at the time the contract was concluded and
3. irresistible during the performance of the contract - *in essence*, performance of the contract must be rendered impossible and not just more expensive or complicated. As such, the possibility to ensure performance of the obligations under the contract by implementing appropriate measures is directly opposed to the qualification of a force majeure event.

French case law shows that these conditions are appreciated on a case-by-case basis and that crises cannot be considered as of themselves a force majeure event. For instance, the existence of an epidemic does not necessarily imply the qualification of force majeure, in particular when the disease is not particularly lethal and has consequently not rendered impossible performance under the contract[1].

When questioning whether the COVID-19 pandemic could qualify as force majeure under French law, it appears that if the evolution of this pandemic is most certainly beyond the control of the parties, the conditions of foreseeability and irresistibility vastly depend on the date of conclusion of the contract as well as the date on which the force majeure is examined.

Indeed, if a contract has been concluded mid-March 2020, it might be difficult to consider that the consequences of the COVID-19 pandemic were not reasonably foreseeable.

As regards the condition of irresistibility, it should be highlighted that the operational consequences of the pandemic varied a great deal between the first administrative measures and the following ones, and between the sectors of activity.

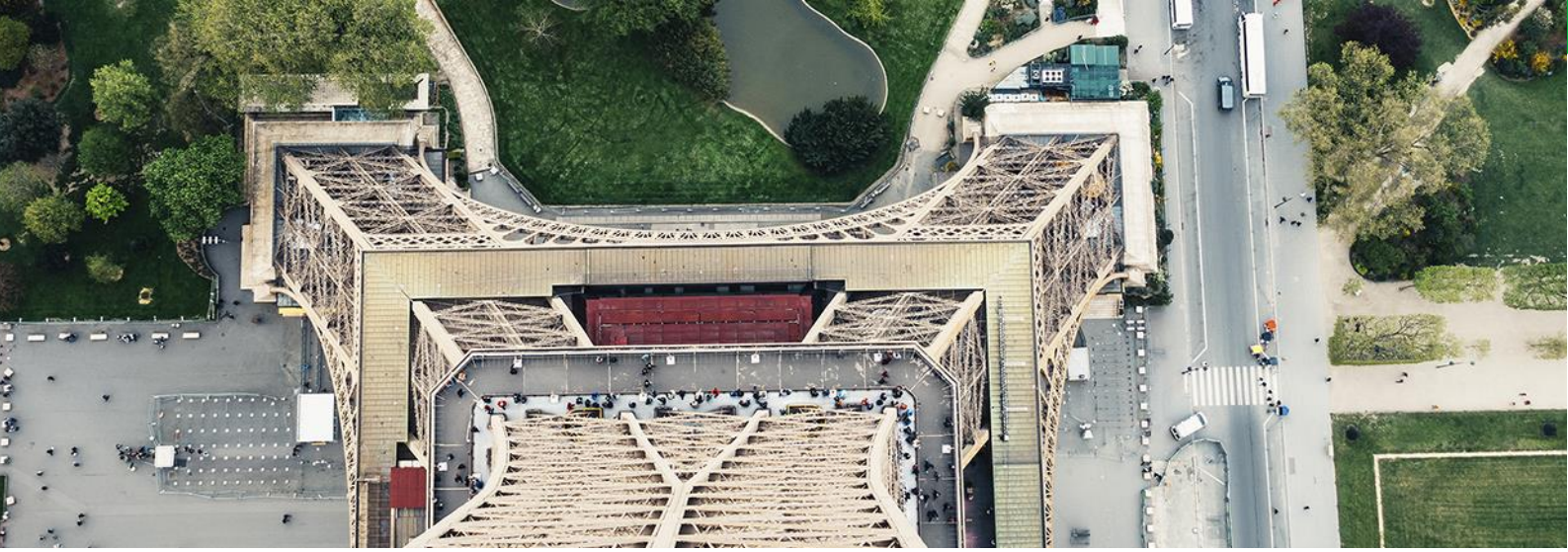
With regards to the date on which the condition of irresistibility must be assessed, it was ruled in one of the few decisions dealing with the qualification of the COVID-19 pandemic as force majeure, that it should be assessed on the date on which the obligor prevailed itself of it[2]. In this last case, relating to construction works to be conducted in application of a contract concluded in 2017, the Court dismissed the obligee's argument that the performance was only rendered more onerous and found that the Covid 19 pandemic constituted a force majeure event in consideration of the lethality of the virus, the administrative measures, the sanitary obligations and the low availability of employees due to the lockdown measures.

Several elements should be borne in mind when trying to assimilate any event to force majeure:

- Force majeure cannot be invoked by the obligee as Article 1218 of the FCC refers to the impossibility of performance of the obligor. This solution has been confirmed by the French Supreme Court, which ruled that it results from Article 1218 of the FCC that an obligee who was not able to benefit from the obligation it was entitled to under the contract could not solicit the resolution of said contract by invoking the occurrence of a force majeure event[3].

[1] Court of Appeal of Basse-Terre, 17 December 2018, n°17/00739 in relation with the chikungunya virus and Court of Appeal of Nancy, 22 November 2010, n°09/00003 for the dengue fever virus.

[2] Commercial Court of Evry, 1 July 2020, n°2020R0092.
[3] *Cour de Cassation*, 1re civ., 25 November 2020, n°1921060.



- Monetary obligations cannot be affected by a force majeure event, since those obligations are never entirely impossible to perform[4].
- The statutory regime of force majeure is not mandatory and as such it is possible for parties to vary from it by inserting a clause in the contract providing for more restrictive or broader conditions than the ones set out by Article 1218 of the FCC.

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[4] *Cour de cassation*, 16 September 2014, n°13-20306 and Court of Appeal of Grenoble, 5 November 2020, n°16/04533 for a recent case in relation with the consequences of the Covid 19 pandemic.

Ireland

The Personal Injuries Guidelines 2021

The Personal Injuries Guidelines (the Guidelines) were commenced on 24 April 2021, replacing the Book of Quantum in Ireland for all claims issued post-April 2021.

The Guidelines are applicable to personal injury and medical negligence claims. The Guidelines were described as "*a key milestone in the insurance reform agenda*" by The Minister of State and since their introduction there has been a dramatic reduction in personal injury general damages awards.

Operation

The fundamental difference between the Book of Quantum and the Guidelines is that the application of the Guidelines is mandatory, insofar as the trial judge must have reference to the Guidelines when making their decision on quantum.

At the conclusion of every case, the parties will be directed to the Guidelines to identify (by reference to the dominant injury) the relevant damages bracket in the Guidelines, and make submissions as to where within the bracket the injuries fall. Up until now, it was rare for parties to make submissions on quantum to the trial judge.

It is mandatory for the trial judge to make their assessment having regard to the Guidelines, and if departing from the Guidelines, to state the reason(s) for doing so.

Where there are multiple injuries, the trial judge should firstly identify the most significant injury and the bracket of damages relevant to that injury, and then uplift the value to ensure that the claimant is properly compensated for the additional pain and suffering caused by any other, lessor injuries.

Where a pre-existing condition has been aggravated by an injury, the trial judge should have regard only to the extent and duration to which the condition has been exacerbated.

Expansion

The Guidelines also provide judicial guidance on a number of new injuries, which were not previously addressed in the Book of Quantum. These include:

- Psychiatric injuries

  The Guidelines include a standalone section dealing with post-traumatic stress disorder (PTSD).

- Chronic pain

  The inclusion of guidance for chronic pain conditions, in particular Chronic Regional Pain Syndrome, is to be welcomed, given the highly subjective nature of many of these conditions.

- Facial injuries and scarring

  The Guidelines include sections related specifically to facial and non-facial scarring, as well as to burn injuries.

- Eye injuries and hearing loss

  The Guidelines provide comprehensive guidance on the appropriate damages for total deafness, partial loss of hearing/tinnitus, as well as for total blindness and loss of sight in one eye with reduced vision in the remaining eye.

- Foreshortened life expectancy

  This category includes guidance in relation to claims resulting from undiagnosed illnesses. Factors influencing the level of damages include the claimant's age, the reduction in life expectancy and the nature and duration of the treatment required.

Reductions

The PIAB Award Values Report (October 2021) found that in the first six months since the introduction of the Guidelines, there has been an average reduction in general damages awards of 40%, in comparison to the same period in 2020. The PIAB has reported that since the introduction of the Guidelines, average awards have fallen from €23,877 to €14,233.

The Guidelines have significantly reduced awards for minor and moderate orthopaedic injuries. For example, a minor neck injury, which has substantially resolved within six months, is valued between €500 - €3,000. This compares with a value of up to €15,700 in the Book of Quantum.

This trend is not limited to orthopaedic injuries. For example, whereas the Book of Quantum values minor concussion injuries up to €21,800, the Guidelines value a minor head injury between €500 and €3,000 where there is a substantial recovery within 6 months.

Conclusion

- The Guidelines have directly impacted on the level of damages awarded and have seen awards and settlements becoming more proportionate to the injury suffered.
- While the Book of Quantum will continue to apply to 'old' claims (pre-April 2021), recent judicial decisions have highlighted that the Guidelines may still have a bearing on the assessment of damages in pre-April 2021 claims, with judges using the Guidelines as a useful benchmark for damages, despite there being no obligation to do so.
- The Guidelines restate the established position that in the absence of physical injury, there must be a recognisable psychiatric injury – upset, distress, grief, disappointment and humiliation do not attract compensation.
- Concerns have been expressed about the number of claims that will now fall within the monetary remit of the District Court, in the wake of the introduction of the Guidelines, and whether the District Court has the resources in place to manage this workload.
- A number of Constitutional challenges have been raised against the Guidelines and are currently proceeding through the courts, claiming that the Guidelines breach the separation of powers between the legislature and judiciary. Insurers will be following these challenges with much interest.

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Portugal

Insurance subrogation: common law vs roman law perspective

A crucial aspect for any insurer/reinsurer is knowing, safely in advance, how the right of subrogation works in each jurisdiction, with a view to settling the claim. Without knowing how it works, a future recovery claim could be seriously jeopardized.

In general terms, the subrogation of rights consists in that every time someone fulfils its obligation, independently of the quality of the subjects and the obligation concerned, the credits are transferred in its favour by effect of that fulfilment.

Nevertheless, subrogation works differently in the Common Law and Roman Law jurisdictions.

In Common Law jurisdictions, in the context of insurance/reinsurance, the right of subrogation entitles an insurer/reinsurer, having paid/indemnified the loss to the insured, to "step into the shoes" and bring an action in the (re)insured´s name, against any third party who was responsible for causing the loss. The insurer acquires the right to use the insured's name to proceed against any third party liable for the loss and to claim from the insured any sums received by way of compensation from that third party.

We can say that the same happens in Roman Law jurisdictions, but with some important differences: unlike Common Law jurisdictions, Roman Law jurisdictions generally state that any subrogated claim be presented in the name of the insurer and not in the name of the insured, and insurers can only claim sums they have actually paid to the insured (the entity which in fact suffered the loss) at the date the proceedings are issued.

Unlike Common Law jurisdictions, Roman Law jurisdictions generally state that any subrogated claim be presented in the name of the insurer and not in the name of the insured

In both jurisdictions, generally, the insurer/reinsurer acquires the creditor's/insured's right to claim against any liable third parties, by two common ways:

- legal subrogation (through general laws, statutory or insurance laws) or
- conventional subrogation (through an isolated statement or a contract/insurance/reinsurance policy).

We should also note that some important aspects have to by complied with, in order to bring a successful recovery, namely, the following rule of four:

1. Existing subrogation title

   Subrogation rights should be provided in absolution, by legal means, and a declaration should be issued by the creditor/insured or in accordance with the policy terms.

   This should take place prior to any payment.

2. A clear proof of damages

   Any recovery claim should be duly sustained on documental or witness proof, according to each jurisdiction.

3. Recovery deadline compliance

   Common Law and Roman Law jurisdictions stipulate different deadlines to bring a recovery claim against the third party, and, therefore, insurers/reinsurers have to be cautious and know, in advance, each jurisdiction's deadline to which they are subject.

4 Correct and proof of payments

A common situation in the insurance market is where payments are made by a subsidiary insurance company in the group (but the subsidiary does not hold the policy) or payments are made to entities belonging to the same group as the insured who suffered the loss (but the entities have not legally suffered the loss).

If one of these situations occurs - and they often occur - the recovery claim could be jeopardised.

Accordingly, insurers' payments/indemnities should be made by the insurer who holds the policy and to the correct insured who in fact suffered the loss.

Finally, to succeed with a recovery claim, (re)insurers should be duly supplied with proof of payments (e.g. proof of bank accounts and confirmation of payments made).

By safeguarding these general assumptions, insurers/reinsurers should be able and equipped to settle claims, to conveniently prepare recovery claims, but must always take into consideration the specifics of each local jurisdiction.

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Latin America

Argentina

Rules of civil liability in cases of damages caused by minors in Argentina

Generalities

An increase in news reports about unfortunate events where the main characters are minors, leads us to consider, once again, their civil liability.

The new Argentine Civil and Commercial Code[5] (CCC), in force since 2015, embraces liability of minors at younger ages. Although the CCC maintains the age of 18 years old as the full age[6] for attaching liability (reduced from 21 in 2009[7]), the new Code imposes a progressive capacity[8] for lower ages[9].

Minors are represented by their legal representatives[10]: their parents[11] or their guardian[12], together with the Public Prosecutor[13].

Despite that representation, and as the former Civil Code, the CCC maintains the age of 10 years old[14] from which minors can be held personally liable[15]. In such cases, minors are held jointly liable with their parents, and parents are granted an action of reimbursement against their children, according to legal doctrine[16] in case of compensation paid.

Adolescents

One of the new definitions within the CCC is *adolescents*: adolescents are those older than 13 years old[17].

Adolescents have the right to be on trial together with their parents; however they also have the right to be represented by their own attorney, without having to obtain parental consent[18] although they will still require judicial authorization[19].

Furthermore, if minors, no matter their age, have an enabling title to exercise a profession[20], they have the right to exercise it without having to obtain any kind of consent. In such cases, they

[5] The new Civil and Commercial Code (CCC) is in rule since 1 August 2015. enacted by Law Nbr. 26.994, and was published in the Official Journal on 19 April 2014. This was the result of the unification of the Civil Code and Commercial Code. Regarding minors, the former Civil Code was enacted on 29 September 1869 under Law Nbr. 340, with various amendments regarding women capacity, minimum age for marriage, divorce, full age, among others (Llambías, Jorge Joaquín, "Tratado de Derecho Civil, Parte General" (*Civil Law Treaty, General Part)*, Abeledo Perrot Editorial, 18° Edition, Buenos Aires, 1999, pages 171-179.

[6] According to Article 25 CCC.

[7] By Law Nbr. 26.579, that was published in the Official Journal on 22 December 2009.

[8] The CCC states a progressive process where adolescents can exercise rights by themselves, according to their age and level of knowledge (articles 26 and 639, sub. b) of CCC).

[9] From 16 years old, adolescents also have the right to give their own consent together with their parents to hire their own services or to learn a trade. Over 16 years old, if adolescents exercise a job, profession or industry, it is presumed that have been authorized by their parents for any kind of contracts regarding their activity, having their own and only the administration of their assets acquired by their activity. Nevertheless, the rights and obligations of third parties fall over adolescents´ assets. As the former Civil Code, the CCC also maintains the emancipation of minors through marriage, over 16 years old[9], not needing a legal representative from that moment. According to articles 27 and 28 CCC, the minimum age required for marriage is 18 years old (article 403, sub. f) CCC). If they are less than 18 but over 16 years old, they can be married with the authorization of their legal representatives. If they are less than 16 year old, they need a trial discharge (article 404 CCC). However, there are some restrictions for empowered for certain acts: they cannot sell without Judicial authorization the assets received free of charge (Article 29 CCC). They also cannot, even with judicial authorization: a) To approve the accounts of their guardians; b) To donate assets received free of charge; c) To guarantee obligations (Article 28 CCC).

[10] According to Article 26 CCC.

[11] Since Law 26.618, enacted on 21 July 2010, that allowed the equal marriage, parents can have the same gender. The CCC considered it on article 402.

[12] According to Article 104 CCC.

[13] Its representation can be complementary or principal. It is principal if there is inaction of their legal representatives, or if shall be deemed the duties of their legal representatives or there is no legal representative (Article 103 CCC).

[14] Article 1114 of previous Civil Code stated the liability of minors over the age of 10 years old. Article 261, sub. b) of new CCC defines as an unintended act the illegal one performed by a minor of less that age.

[15] Under that age, the act is considered made without discernment. However, in this last case, the reparation can be claimed to their parents under reasons of equity. (Alterini, Jorge, Civil and Commercial Code, Commented, Volume VIII, Thomson Reuters La Ley, Buenos Aires, 2015, pages 329 and 330).

[16] Rivera, Julio César – Medina, Graciela, Civil and Commercial Code, Commented, Volume IV, Thomson Reuters, La Ley, Buenos Aires, 2015, page 1111.

[17] Within adolescents, there are two different frames of level of capacity: one from 13 up to 16 years old; the another one, from 16 to 18 years old. As general idea, the first frame can exercise by themselves, without the consent of their parents and/or tutor, certain and non-invasive medical treatments. In the second frame, they can have the possibility to go further regarding certain medical surgeries, without any consent, and can have the ability to have a job or exercise commercial or industrial activities.

[18] Parents have the right and duty to represent them at Court and/or authorize them (article 645, sub. d) CCC).

[19] According to articles 677 and 678 CCC.

[20] It is stated in article 30 CCC.

also have full control of the administration of and right to sell their own assets.

The liability of their legal representatives

The new CCC changed the concept of *patria potestad* (parental authority) from the former Civil Code to *responsabilidad parental* (parental liability). This created rights and obligations of parents over their children's body and assets, to ensure of their protection, development, education and formation[21].

The former CCC stated the subjective and joint liability of both parents for damages caused by their children. Parents or guardians may be released from liability if they can prove that they did not have custody at that moment; for example, if the child was in the custody of the other parent (if they were separated[22]) or a third party[23] (such as a school). Parents can also be released if they can prove that the event was impossible to avoid, despite he or she having active custody of the child. Legal doctrine and precedent calls that kind of subjective liability *culpa in vigilando* (*guilt in custody*)[24].

The new Article 1754 of the CCC changed to a strict liability of both parents. The CCC maintains the principle that parents are jointly liable with the minor. As condition for that, the child shall be in the parent's custody and living with them.

Nevertheless, the parent cannot be released from liability if the cause of the child not living with the minor was due to the parent's decision.

Exceptions to a parent's liability[25] are cases where:

- Minors are under the supervision of a third party
- The accident involves a labour task and the minor was exercising their own profession
- If minors exercise a function under the instruction of a third party
- Contractual obligations validly hired by minors.

A typical case involving minors under the supervision of a third party is when the minors are attending school. Article 1767 of the CCC expressly maintains, as the former Civil Code, the personal liability of the owner of schools for damages caused or done by minors, if they are at school. Now, it is expressly states the strict liability of schools. However, the CCC maintains force majeure as the only case for releasing liability, and thus schools are obliged to have valid insurance policies[26].

Where a guardian instead of parents represents a minor, the guardian also faces strict liability for damages[27]. But, contrary to the situation with

[21] According to article 638 CCC, while they are under 18 and if they are not emancipated.
[22] According to article 1114 of the former Civil Code.
[23] According to articles 1114, 1115 and 1117 of the former Civil Code.
[24] Nevertheless, in the last years and in some cases, it has been impossible to prove an event of liability release, considering also the obligation of parents of education, and that it could vary over the age of the minor.
[25] According to article 1755 CCC.
[26] As the former Civil Code and the CCC state, that liability is not applicable for education at Tertiary level or University level.
[27] According to article 1756 CCC, first paragraph.

parents, the guardian can be released from liability if he or she can prove that it was impossible to prevent damages[28].

Conclusion

The CCC embraces the possibility for minors to be held personally liable at lower ages, by their own profession and activity. Also, a subjective liability of their legal representatives is replaced by a strict one.

Reasons of social interest, such as the protection of the unjustly injured and a preventive function, justify the new rules, despite the extension of life expectancy.

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[28] A similar case of Act of God or Force Majeure, under the definition of article 1730 CCC: The fact that cannot be provided, or provided, cannot be avoided.

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Chile

Can an employer require the worker to be vaccinated?

The COVID-19 pandemic has undoubtedly demanded the entire world to take certain measures to adapt to the situation and Chile was no exception.

One such measure was that for a long time we were unable to attend our workplaces, providing services using the medium of teleworking or remote working, from our homes. As a consequence, in March 2020, a special law was issued to regulate the matter.

Subsequently, and once the vaccination process began to advance, face-to-face work was resumed and the question arose: Can an employer require the worker to be vaccinated to return to work in person?

In Chile, the issue has not been settled and labor authorities have not had a clear answer. Below, we analyse what the Chilean Labor Authority has pointed out:

1. The employer could not prevent the entry of the dependents to their workplace invoking the lack of vaccination against COVID-19, without incurring in a breach of your obligation to provide the agreed work, unless in case of force majeure
    a. The Labor Authority indicates that since vaccination against COVID-19 is a voluntary act for workers, as reported on its website by the Ministry of Health[29], the employer could not prevent dependents from entering their workplace by invoking the lack of vaccination, without breaching its contractual obligation to provide the agreed work.[30]
2. The labor authority does not have jurisdiction to pronounce on whether employers have the right to require workers to provide essential services and attention to the public, among others, to vaccinate against COVID-19.
    a. Indicates to the Labor Authority that this entails a collision of fundamental rights. On the one hand, respect for the fundamental rights of workers must be considered by the employer, especially those concerning private life, honor, respect for life and physical and mental integrity; on the other, the employer's obligation to adopt all necessary measures to effectively protect the life and health of workers must be considered. Likewise, the employer has the right to direct and organise the company. Therefore, there is a collision of rights that is not easily resolved and must be analysed in case.

This is different from what happens, for example, in Costa Rica, where a decree took effect in October 2020 that allows the dismissal of any public sector worker who refuses to be vaccinated against COVID-19. Likewise, in the case of private sector workers, they, if they wish, could make it enforceable, with the sanction of dismissing the worker, without employer responsibility, provided that it is found in the company's internal regulations.

The same occurs in the United States, where most public employees are required to be vaccinated, as well as workers in companies with more than 100 employees, who are either vaccinated or must show a negative test.

But what about Chile?

The Health Authority chose not to make vaccination against the coronavirus mandatory. In effect, Chilean legal regulations indicate that it is the President of the Republic who, at the proposal of the Health Authority, can declare mandatory the vaccination of the population

[29] https://www.gob.cl/yomevacuno/

[30] https://www.dt.gob.cl/legislacion/1624/articles-119995_recurso_pdf.pdf

against certain communicable diseases, including, for example, COVID-19. For now, this has not happened.

Unlike with other countries, in Chile the issue has not been settled and the labor authorities have not had a clear answer. Consequently, it will be the judicial authorities who will determine what is permitted, resolving disputes on a case by case basis.

We understand that it could be reasonable for the employer to demand vaccination as a requirement both for hiring and for their maintenance in the company, provided that there are no other sanitary measures that guarantee the life and health of workers and their colleagues, without prejudice of course, do what the judicial authority ultimately decides.

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Colombia

Need to establish a mandatory liability insurance in Colombia for private vehicles

The Colombian legislation does not establish the obligation to purchase a liability insurance for private vehicles to cover the damages caused by the driver or the vehicle, leaving the victims of traffic accidents without effective tools to obtain full reparation for the damages suffered. Additionally, the mandatory insurance policies already in place in the country are not sufficient and do not cover all the damages that may be caused to the victims, since they offer a symbolic rather than comprehensive and effective reparation.

The commercial law regulates the liability insurance, the purpose of which is to indemnify the pecuniary damages caused by the insured in case he is declared liable in accordance with the law. Although at the beginning the insurance did not offer any guarantee for the victim, the modification introduced by Law 45 of 1990 to Article 1127 of the commercial law, did not only grant direct action to the victim against the insurer to claim from it the damages caused by its insured, but it was expressly established that the purpose of the insurance would be to compensate the victim. Although there are some insurance companies that offer such a policy to cover the civil liability of a driver of a private vehicle, it is a voluntary insurance, so that if the vehicle that causes the accident and damages to the victim does not have this insurance, the victim is at a disadvantage.

In Colombia, there is only one mandatory insurance for driving private vehicles, called *Seguro Obligatorio para Accidentes de Tránsito - SOAT*. This insurance is deficient considering the limited coverage it provides which is not enough to achieve full compensation to victims of traffic accidents.

The *SOAT* offers the following coverage[31]:

- Medical, surgical, pharmaceutical and hospital expenses for injuries: the indemnity for this coverage is paid to the health service provider and the indemnity is limited to 800 minimum daily wages (USD $6,207).
- Compensation for permanent disability: it compensates the victim when he/she suffers a loss of working capacity; however, the compensation is very limited. For example, for a loss of working capacity of more than 50% (state of disability) the compensation is 180 minimum daily wages (USD $1,396), which is the highest compensation.
- Transportation and mobilization expenses to the hospital or clinic: it covers up to 10 minimum daily wages (USD $78).
- Compensation for death and funeral expenses: this compensation is granted to the beneficiaries of the deceased victim and is limited to 750 minimum daily wages (USD $5.819).

As it can be seen, the coverage and its limits are insufficient to achieve full compensation for victims of traffic accidents, without overlooking the fact that damages related to loss of profits and moral damages are totally excluded.

In 2021, the Colombian Congress attempted to establish a mandatory liability insurance for driving private vehicles, however, the law finally enacted did not impose such mandatory nature. On the contrary, Law 2161 of November 26, 2021, contemplates the possibility of contracting a voluntary policy that covers civil liability for material damages to third parties, a policy that may be offered by each insurance company that markets the *SOAT* line of business.

However, this new regulation is still insufficient to protect the victims of traffic accidents, since the law does not establish a mandatory policy, but leaves it to the discretion of the insurer to offer such a policy, as well as to the policyholders to contract it. In addition, the law only speaks of material damages, limiting them to the repair of

[31] Decree 56 of January 14, 2015 of the Ministry of Health and Social Protection.

the vehicle involved in the traffic accident and leaving aside all other damages caused in a traffic accident to the victim, including non-material damages.

According to the statistical bulletin of August 2021 issued by the Nacional Institute of Legal Medicine, transport events are the second cause of violent deaths in Colombia. This reality shows that it is necessary to impose a mandatory insurance that covers the civil liability of drivers of private vehicles. The country needs an insurance designed for the victims rather than the health service providers or the repair of the damaged vehicle. As stated, the existing regulation does not allow to fulfil one of the purposes of the civil liability insurance which is the effective protection of the victims, according to the purpose of legislator embodied in Article 1127 of commercial law.

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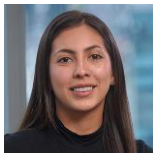

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Mexico

YosStop: A warning for social media users

On 29 June 2021, a popular Mexican influencer and youtuber known as YosStop (Josseline Hoffman) was arrested after Ainara Suarez filed an accusation against her for producing, storing and publicizing a video showing the gang rape that Suarez suffered at a party in May 2018, when she was 16 years old.

Suarez stated that while she was being sexually assaulted, other people in the vicinity recorded the attack, circulated the recording, and posted it on social media.

The case became even more controversial when the influencer YosStop, in a video released to her millions of followers, commented on the video and insulted the victim.

Suarez filed a criminal charge against influencer YosStop and do not disregard the possibility of her filing a civil lawsuit against the influencer, to claim moral damages, due to the psychological effect and reputational damages she suffered as consequence of the comments made by the influencer on her social media.

This case is relevant to the Mexican legal system since, although there has always been a public debate about the content that can be published by a person and the limits of the freedom of speech, this is the first time that a youtuber has been arrested and criminally processed, due to declarations made via social media.

YosStop was incarcerated while her defence collected more evidence for her case. After 5 months in jail, the defense and Ainara Suarez reached an agreement and YosStop was released. Although the details of the agreement are not available to the public, they usually include an economic compensation, the obligation to publicly apologize to the victim and taking educational courses given by the government or private foundation to prevent discrimination.

As part of the public apology, YosStop uploaded a video to her Youtube channel where she does recognize that she made a mistake, and she is now including more educational content in her channel.

Although there has always been a public debate about the content that can be published by a person and the limits of the freedom of speech, this is the first time that a youtuber has been arrested and criminally processed, due to declarations made via social media.

As regards the possibility that Ainara Suarez could bring a civil lawsuit claiming moral damage from YosStop, based on the comments published on social media, we consider that this is legally possible under the Mexican legal provisions; particularly, Article 1916 of the Mexico City Civil Code[32], and Article 26[33] of The Civil Liability Law for The Protection of The Right to Private Life, Honor and Own Image of Mexico City.

According to Article 38 of The Civil Liability Law for The Protection of The Right to Private Life, Honor and Own Image of Mexico City, the civil action should be brought forward by Ainara Suarez, the injured party in this case, and her claim should be filed within 2 years following the date when the illegal act was committed. However, in this specific case, at the time of the event, Ms Suarez was 16 years old and she was not able to exercise her rights on her own; therefore, she could easily argue that her 2 year limitation period did not start to run until she reached the legal age 18 on 2021.

[32] *"ARTICLE 1916.- **By moral damage it is understood the affectation that a person suffers in their feelings, affections, beliefs, decorum, honor, reputation, private life**, configuration and physical aspects, **or in the consideration that others have of themselves**. It will be presumed that there was non-pecuniary damage when the freedom or physical or mental integrity of people is unlawfully violated or impaired.*

***When an unlawful act or omission produces moral damage, the person responsible for it will have the obligation to repair it by means of monetary compensation**, regardless of whether material damage has been caused, both in contractual and extra-contractual liability…"*

[33] *"Article 26.- The capture, reproduction or publication by photography, film or any other procedure, of the image of a person in places or moments of his private life or outside them without the authorization of the person constitutes an affectation to the moral patrimony."*

The sanction, in addition to the economic compensation that would be determined by the judge according to the circumstances of the case, would include the publication of the judgment in the same way that the offense was committed.

Although the option to commence of civil proceedings is still available, it is unlikely, because usually when the parties reach an agreement in criminal proceedings, that agreement is for full and final settlement of all prospective claims.

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Peru

Shipping container crisis and carriers' liability under Peruvian law

Introduction

Many factors have shaped the container crisis, COVID-19 pandemic being the principal one:

- shipping containers were stranded at different ports due to the inability to return to China at COVID-19's early stage
- disruptions of maritime traffic flow due to ports operating at a much lower capacity and
- steady delay in products' delivery due to manufacturing restrictions. Companies decided to charter their own vessels, increasing existing traffic of ships queueing up to disembark cargo, and creating heavy bottlenecks at sea.

The situation had repercussions in the shipping industry, including cargo delays and losses, amongst others. We will analyse the manner in which these claims would be resolved by Peruvian law.

Carrier's liability under The Hague Rules

Bills of Lading document contracts of carriage, which contain clauses regarding the carrier's liability and refer to international conventions that pursue a uniform treatment of the matter. The 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (also known as "The Hague Rules") is the only convention on the subject in force in Peru. In addition, where absence of regulation by The Hague Rules, the 1902 Code of Commerce and the 1984 Civil Code apply.

Peruvian law may step in under the following scenarios: (i) it is set as the applicable law; or, (ii) local courts are competent and another applicable law was not chosen. On (ii), according to the Civil Code, local courts are competent: (a) when the claim is against a defendant domiciled in Peru; (b) when the defendant is non-domiciled; (c) when the contract was executed in the country or obligations were performed in Peru; or (d) when the parties expressly set Peru as the competent jurisdiction.

The Hague Rules indicate that carriers are liable in relation to cargo loading, handling, stowage, carriage, custody, care and discharge. Additionally, a list of liability exemptions in favour of carriers is provided, such as:

- unseaworthiness, unless caused by want of due diligence of the carrier
- act, neglect, or default of the master, mariner, pilot, or servants of the carrier in navigation/management of the ship
- quarantine restrictions and
- any cause arising without actual fault or privity of the carrier, his agents or servants.

According to The Hague Rules – with exceptions irrelevant to this article - carriers' liability shall not exceed 100 sterling pounds per package or unit, or its equivalent in other currency, in any event of loss or damage to cargo, or in connection with this.

Carrier's liability under Peruvian law

The Hague Rules do not expressly mention carrier's liability for loss resulting from delay. Hence, the following positions prevail: (1) "damage" for which carriers shall respond is not limited to damages to goods under carriage, but refers to damages suffered by cargo interests as a result of delay; or, (2) delay shall be regulated by member states' domestic law.

Regarding (2), the Code of Commerce provides that carriers are liable for damages caused in an event of "voluntary delay" of the master. Despite insufficient material defining "voluntary delay", we consider it is the conscious will of the master to disregard the original itinerary, meaning that there were no external factors (e.g., force majeure or a vessel's malfunction) making advisable such decision, but a voluntary motive behind making the delay desirable. This would need to be assessed on a case by case basis, broadening the scope of potential claims on delays under Peruvian law.

Likewise, where delays are not regulated by The Hague Rules, liability limits set therein would not

be applicable. Therefore, carriers would not be able to invoke liability limits unless internal provisions stipulate so, which is not the case under Peruvian law.

Particularly relevant to this analysis is the "quarantine restrictions" exemption to carriers' liability. While many ports are setting restrictions to vessels due to COVID-19, neither meaning nor confines of the concept are found in The Hague Rules. The Civil Code regulates force majeure or acts of God events as the only liability exemptions for non-performance of contractual obligations, restricting its releasing effects only for the duration of the event. Quarantine restrictions may fit within the force majeure concept but, according to the Civil Code, they would only be considered as such if they are extraordinary, unexpected and irresistible.

Today, quarantine restrictions may not be taken neither as extraordinary nor as unexpected, as they are a common measure informed ahead by jurisdictions. Therefore, in Peru this exemption would be difficult to be resorted to by carriers.

Conclusion

Carrier's liability international regulatory framework set in The Hague Rules requires domestic legislation input on aspects not covered by those rules. In Peru, a case by case analysis would be required to determine carriers' liability due to delays under the Code of Commerce, subject to the broad concept of voluntary delay by the master. Furthermore, it may be argued that liability limits are not applicable to delays, as The Hague Rules limits would not apply and, in Peru, there are none. Likewise, carriers may not resort to "quarantine restrictions" as a liability exemption, as today these limitations are ordinary and expected.

While claims may arise as cargo arrives with delays, is undelivered, damaged or lost due to the shipping container crisis, insurers shall consider that local legislation and case law may be relevant for the outcome of a cargo liability claim.

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North America

United States

Coming to America - Threshold issues facing international companies sued in the United States

International trade is a mainstay of the current global economy, and businesses must navigate complex regulations and legal restrictions in order to engage in worldwide commerce. International companies looking to take advantage of the lucrative US marketplace face the threat of expensive litigation arising out of inevitable disputes. But when can a US state or federal court exercise power over a foreign company to adjudicate those disputes?

This article aims to provide a general framework for personal jurisdiction jurisprudence in the United States and an overview of the issues foreign companies may run into when defending against legal actions in the United States.

I. Step one: effectuating service of process on the foreign company

Before a foreign company can be hailed into US state or federal court, it must first be notified of the lawsuit. Lawsuits in the United States begin with the service of a complaint upon a prospective defendant. Service is generally a straightforward process governed by local state and federal court rules. Most often the primary method for obtaining *in personam jurisdiction* over a defendant is to have that defendant personally served with the summons and complaint in the state where suit is initiated.

Often foreign business entities maintain an authorized "registered agent" in those states where they routinely engage in business activities in order to expedite the service process. However, when a foreign entity maintains no physical presence or authorized agent in the United States, service must occur in accordance with any international treaties or conventions. Typically the "governing international treaty or convention" regarding service of process on foreign entities is the Hague Service Convention. Adopted on November 15, 1965, the Hague Service Convention is an international treaty that currently has 79 contracting parties including, but not limited to, Canada, China, Japan, the Republic of Korea, the United States, and all member countries of the European Union.[34]

Specific service requirements will vary from country to country, however the process for effectuating proper service under the Hague Convention is often both time consuming and expensive, sometimes taking two or more *years* to complete. As such, US litigants look to service via the Hague only as a last resort. Instead, these litigants with claims against large foreign companies will often look to locate and serve a domestic subsidiary in order to bypass the requirements of the Hague, which will be further discussed below.

II. Personal jurisdiction jurisprudence in the United States

Assuming for the moment that service has been properly effectuated on a foreign company, this does not mean that a US court necessarily has the power to maintain legal proceedings against the foreign entity. Specifically, the Due Process Clause of the Fourteenth Amendment to the US Constitution "limits a state court's power to exercise jurisdiction over a defendant." Ford Motor Co. v. Montana Eight Judicial Dist. Court, 141 S. Ct. 1017, 1024 (2021). As such, when a foreign entity claims a lack of personal jurisdiction as a defense, the court will need to examine the nature of that entity's connections with the forum state to determine whether or not personal jurisdiction exists. Furthermore, the defense may be considered waived if it is not raised at the outset of litigation.

34 https://www.hcch.net/en/instruments/conventions/status-table/?cid=17

Defeating corporate separateness with the Alter Ego Theory and piercing the corporate veil

US litigants seeking to sue foreign business entities will often look to the existence of domestic subsidiaries in order to bypass the requirements of the Hague or to show that personal jurisdiction otherwise exists. Traditionally, Supreme Court rulings have limited the circumstances in which US courts may exercise personal jurisdiction over foreign companies for claims arising from their conduct overseas.

Foreign parent corporations, seeking to insulate themselves from liability arising out of a domestic organization's activities, or avoid being dragged into a US court, can wall themselves off from its subsidiaries if they operate separately from their subsidiary or related company. This is known as the doctrine of corporate separateness. For example, parent organizations may have marketing or sales subsidiaries located in the US and elsewhere around the world that fall under a large corporate umbrella, but have a separate corporate structure and organization. Typically, the parent organization can insulate itself from liability claims brought against a related but separate organization or subsidiary.

Corporations structured in this matter must be wary of the possibility that US litigants may seek to draw the foreign corporation into a lawsuit through its domestic subsidiaries.

If a plaintiff can establish that the US based subsidiary is an agent of the parent with respect to the matter before the court, the closeness of the relationship between the parent and subsidiary could allow the court, under an "alter ego" theory, to look beyond the legal wall of corporate separateness. Previously some state and federal courts would apply a relaxed agency standard, however the Supreme Court of the United States rejected that theory of personal jurisdiction in 2014. See Daimler AG v. Bauman, 571 U.S. 117, 135-36 (2014). The Daimler case involved allegations that Mercedes-Benz of Argentina, a subsidiary of Daimler AG, were involved in the disappearance, torture, and murder of several labor leaders. Plaintiffs brought suit against Daimler AG, the German parent company of various Mercedes-Benz subsidiaries, and personal jurisdiction was argued under an agency theory as to subsidiaries located in the Unites States. The United State Supreme Court ultimately rejected this agency theory of personal jurisdiction. Now litigants will ask the court to "pierce the corporate veil" and treat parent and subsidiary organizations as one and the same. This exposes the parent corporations assets to litigation.

Despite this risk, establishing jurisdiction over a parent through an "alter ego" theory is difficult. Courts will conduct a fact intensive inquiry, and scrutinize the relationship between the parent and subsidiary organizations to determine, in essence, how much control the parent exerts over the subsidiary or related entity. For example, court will look at a parent's involvement in the day-to-day activities of its subsidiary, how well and independently capitalized the subsidiary is, and whether the subsidiary maintains its own corporate formalities, amongst other factors.

In the example above, a court would closely examine the relationship between the foreign parent organization and its marketing subsidiary located in the US. If the court were to then find that the two entities shared employees, were governed by the same board of directors, that the parent capitalized the marketing subsidiary, that the parent ran the day-to-day operations of the subsidiary, etc., then the court could potentially exercise personal jurisdiction over the parent company despite the fact that the parent maintains no physical presence in the US.

III. Tips for litigating a personal jurisdiction defense and conclusion

A successful personal jurisdiction defense can ultimately mean avoiding the costs associated with years of drawn out litigation. With that being said, a personal jurisdiction defense is not a panacea to litigating in the US, as a US court will likely need to probe into a businesses' contacts with the state where the lawsuit is initiated. In addition, litigants may attempt to defeat a personal jurisdiction defense by pointing to the

activities of domestic subsidiaries, which will necessitate even further investigation by the parties.

While plaintiffs bear the burden of proof in demonstrating that a court has personal jurisdiction over a foreign entity, courts recognize that this burden is difficult, if not impossible, to meet without further information from the foreign entity itself. For this reason, US courts will routinely permit a period of "jurisdictional discovery," wherein litigants will seek to uncover evidence concerning the entity's contacts with the forum state and the underlying claims. As a result, jurisdictional discovery can itself be a lengthy and costly process, as the parties battle over the scope of discovery to be allowed. Because trial courts also have a great deal of discretion in guiding the discovery process and rendering a final decision regarding personal jurisdiction, these issues can also be further drawn out through subsequent appeals.

It is therefore imperative that foreign companies retain US defense counsel as soon as they are aware of the potential for litigation in the United States.

These companies should work closely with counsel to provide information concerning their corporate structure and business activities in order to determine whether a lack of personal jurisdiction is a viable defense.

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Analyzing how right to repair legislation may affect insurance coverage and litigation

Tractors, ventilators, and iPhones are at the center of a growing dispute between consumers and manufacturers. For nearly a decade, organizations such as the Repair Association and iFixit have lobbied legislators to enact laws that would make it easier for consumers to repair electronic products. Industry giants such as Apple and John Deere have expressed a willingness to ease the process for repairs, but most manufacturers have refused to disclose digital information over intellectual property, consumer privacy, and safety concerns.

To date, twenty-seven states have introduced

right to repair legislation,[35] and Democrats in Congress have proposed a similar bill aimed at easing restrictions on medical device repairs.[36] While no state has passed an electronic right to repair law, over the next 18 months this issue is primed for debate on Capitol Hill and in a majority of statehouses. Accordingly, this article aims to provide an overview of the right to repair movement, and examine the potential impact of legislation on insurance litigation and coverage issues.

Background

Shifting the antenna back-and-forth may have helped "fix" problems in the 1950s, but today it is much more difficult to repair a television. Whether it is a cell phone, computer, or medical device, most people rely on electronic devices to get through the day. But repairing these devices is rarely as simple as moving an antenna or opening a user's manual and replacing faulty parts. Instead, often times when an electronic device is damaged, consumers must use repair providers that have been approved by the manufacturer.

As technology has evolved, manufacturers have become increasingly concerned over the amount of digital information available about their products. Intellectual property and safety issues can arise if a competitor acquires a critical line of source code, or if a consumer mishandles a dangerous piece of equipment and causes a device to catch fire. To protect their property and ensure devices are properly handled, most manufacturers only provide specialized repair tools and access codes to authorized repair providers.

In 2013, Massachusetts became the first state to pass a bill that required manufacturers to provide independent repair shops with software and diagnostic information. Specifically, the Massachusetts automotive law forced car manufacturers to give independent repair providers the information necessary to diagnose and repair issues that previously could only be resolved at a dealership. Supporters of the bill argued that it would increase competition and benefit consumers by giving them more options for repairs.

The passage of the Massachusetts automotive law sparked a larger right to repair movement. In July 2013, the Digital Right to Repair Coalition (now known as the Repair Association) was formed with the goal of advocating for "repair-friendly policies."[37] The Repair Association crafted a right to repair Legislative Template based on the 2013 Massachusetts automotive law that it now uses to lobby legislators across the United States.

Despite the efforts of the Repair Association and other advocacy groups, no state has passed an electronic right to repair law. Unlike the 2013 Massachusetts bill that was limited to automotive information, electronic right to repair laws would require all manufacturers of digital electronic equipment to make information available to independent repair providers and consumers, unless the bill provides specific exceptions.

While the scope of these bills is very broad, there are three products that are frequently mentioned in right to repair discussions: tractors, ventilators, and iPhones.

How right to repair legislation could affect farmers, hospital workers, and cell phone users

Farmers are often cited as a group of consumers that would benefit from the passage of right to repair laws. John Deere, one of the world's leading manufacturers of tractors and farming equipment, generally requires their products be repaired only by an authorized provider. Some of the equipment cannot be restarted or repaired without specific software codes, and the codes are generally only available to authorized providers. Additionally, farmers who repair their own equipment or use an unauthorized provider run the risk of losing their warranty. Right to

[35] https://uspirg.org/blogs/blog/usp/half-us-states-looking-give-americans-right-repair

[36] https://www.nytimes.com/2020/10/23/climate/right-to-repair.html

[37] https://www.repair.org/history

repair advocates claim that practices like these are unfair and unduly burdensome, particularly for farmers who are often in rural areas where access to authorized providers may be limited.

As a result of the COVID-19 pandemic, hospital equipment has been increasingly mentioned in right to repair debates. As hospitals work to maintain enough supplies and equipment to treat patients, medical workers have reportedly been frustrated at times with how difficult it is to repair ventilators. Like tractors, some ventilators require software codes for repairs, which may only be available to authorized providers.

Advocates and legislators claim that this presents unnecessary hurdles for hospital employees who rely on effective equipment to meet their patients' needs.

Cell phones are the most ubiquitous product mentioned in the right to repair debate. Some smartphones contain terms and conditions that prohibit any modifications to the device unless expressly approved by the manufacturer. If users disregard those conditions, they risk voiding their warranty. Advocates claim this promotes a culture of waste, as consumers tend to opt for new devices rather than repair older models.

Apple has taken steps to ease independent iPhone repairs. The company announced that in early 2022, it will provide more than 200 individual parts and tools available for purchase that customers can use "to complete the most common repairs on iPhone 12 and iPhone 13."[38] However, the announcement noted that the new Self Service Repair is intended only for technicians with knowledge and experience to perform electronic repairs.

How right to repair legislation may affect manufacturers

Manufacturers argue that widespread dissemination of the information required by right to repair laws could negatively affect consumers. Cameron Demetre, the regional executive director for TechNet, a group that represents companies such as Apple and Hewlett-Packard, explained that there are concerns over information that would be provided to "unvetted third parties." Additionally, Mr. Demetre argued that right to repair legislation, if passed, could have "the potential for troubling unintended consequences, including serious adverse security, privacy and safety risks."[39]

Manufacturers have also expressed concerns over potential intellectual property violations. In 2017, the Supreme Court cemented the doctrine of patent exhaustion and ruled that "[o]nce a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose."[40] However, the Court explained that contract law was still a useful vessel for protecting the rights of a patentee.

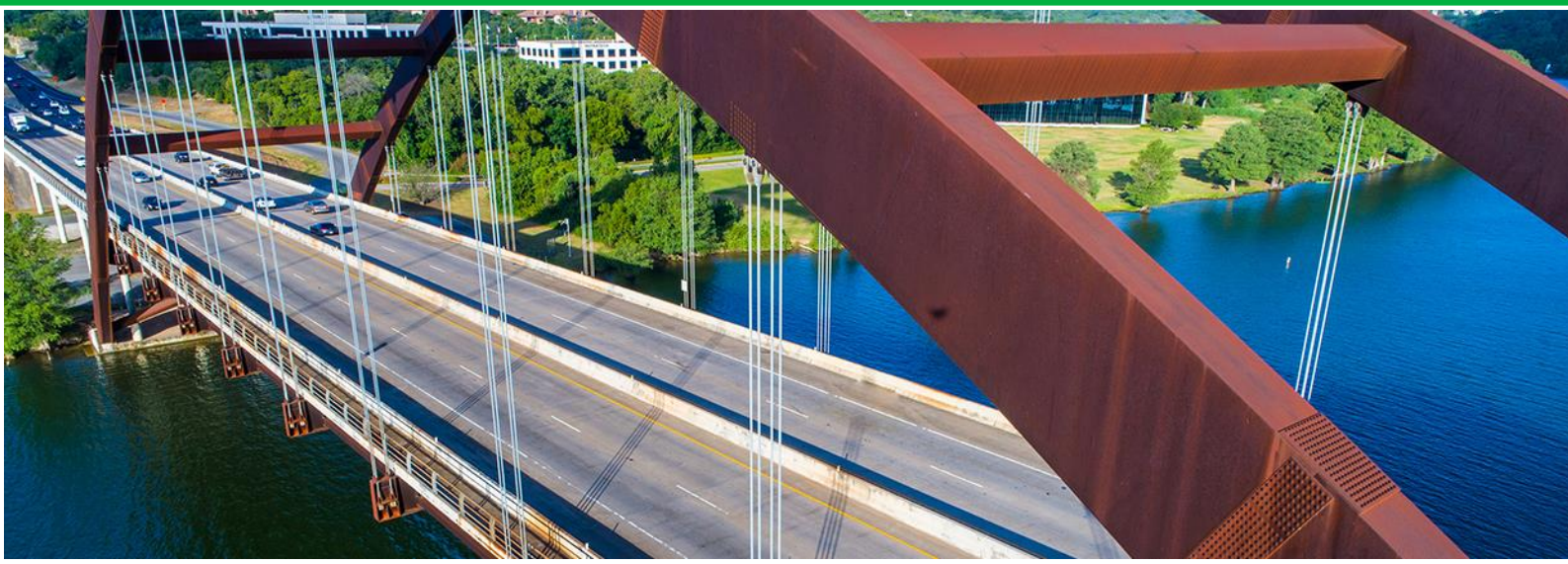
Currently, manufacturers can use contract law to protect their intellectual property in at least two ways. First, terms and conditions that restrict a consumer's repair options limits the pool of repairers that can access or modify a device's software. While some consumers may ultimately disregard the terms and conditions, it nonetheless acts as a deterrent against a competitor modifying a device. If a consumer experiences issues with a device and needs repair, the consumer will likely go to the authorized provider to maintain their warranty, rather than go to an unauthorized provider that may fail to fix the device. This helps the manufacturer ensure its product is not being misused by a competitor.

Second, manufacturers enter into contracts with authorized providers that restrict the provider's ability to use the manufacturers data and information. These contracts protect manufacturers by providing a remedy at contract law if the repair provider breaches the agreement and misappropriates intellectual property.

[38] https://www.apple.com/newsroom/2021/11/apple-announces-self-service-repair/

[39] https://apnews.com/article/legislature-nevada-coronavirus-pandemic-laws-5ade405a7befdf16e9f0107b7e142be3

[40] Impression Products, Inc. v. Lexmark Intern., Inc., 137 S.Ct. 1523, 1535 (2017).



Arguably, right to repair laws could produce intellectual property violations with questionable means of recourse, because contracts would no longer be tethered to the dissemination of manufacturer information.

Additional stakeholders

Consumers aren't the only ones championing right to repair legislation. Environmentalists opine that if repairs become more affordable and accessible, consumers will use their devices longer. In turn, manufacturing—and the amount of natural resources it requires—would decrease, and greater energy efficiency could be promoted throughout multiple phases of production.[41]

Similarly, manufacturers aren't the only ones opposing right to repair legislation. Major tech companies such as Amazon, Google, and Facebook have devoted considerable resources to defeating right to repair legislation in New York, Washington, and elsewhere. While these companies manufacture electronic devices, protecting consumers from the physical dangers of repairing Amazon's Alexa or Google Play likely is not the motivation behind the lobbying of these tech behemoths. Rather, it seems more likely that these companies that have invested billions of dollars into the development of artificial intelligence are concerned about the potential ramifications of mass dissemination of their digital information.

If right to repair legislation is adopted across the United States, there will likely be legal issues in the fields of environmental, privacy and security, and intellectual property law that have yet to be fully conceived. However, if an electronic right to repair statute was enacted tomorrow, product liability litigation and coverage would likely be immediately affected.

Product liability claims

There are still a number of questions regarding the implications of right to repair laws. The scope of the proposed bills varies from state to state, but the Legislative Template from the Repair Association provides insight on how right to repair laws could affect product liability claims.

The Repair Association's Legislative Template proposes that states require manufacturers "make available, for purposes of diagnosis, maintenance, or repair of such equipment, to any independent repair provider, or to the owner of digital electronic equipment manufactured by or on behalf of [the manufacturer] . . . documentation, parts, and tools, inclusive of any updates to information or embedded software."[42] The template includes a Limitations section, which explains "[n]othing in this Act shall be construed to require an original equipment manufacturer to divulge a trade secret . . . except as necessary to provide documentation, parts, and tools on fair and reasonable terms."[43] The debate over what trade secrets, if any, fall into the exception of

[41] https://www.nytimes.com/2020/10/23/climate/right-to-repair.html

[42] https://www.repair.org/legislation

[43] Id.

this limitation is likely to be the subject of future litigation. For now, the proposition that independent repair providers may have access to a breadth of manufacturing information has implications for future product liability claims.

The elements of a product liability claim are well-settled. In order to be successful, a plaintiff must prove that the product was

1. defective when sold
2. unreasonably dangerous,
3. proximately caused plaintiff's injuries, and
4. not substantially changed between the time it was distributed and when the injury occurred.[44]

A repair provider cannot be held strictly liable for a defective product if it did not make or design the product.[45] However, a manufacturer cannot be held liable for a defective product where the product is made unsafe by subsequent changes.[46]

Judging whether a product has been substantially altered is not a particularly complicated task. For example, if a repair provider ignores a manufacturer's warning and performs an alteration the manufacturer has explicitly warned against, that is a substantial alteration. Accordingly, the manufacturer is unlikely to be held liable.[47]

Ultimately, courts rely on the testimony of experts to determine whether a manufacturer or repair provider is liable for injuries caused by a defective product.

Assigning liability becomes more difficult when it is unclear how a product has been altered. In situations where either a manufacturer or repair provider is responsible for a defective product, the burden of proving which party is at fault shifts from the plaintiff to the defendants.[48]

Assuming right to repair legislation were to pass, it is easy to envision the following scenario. A consumer is injured when the lithium battery in their smartphone malfunctions. The consumer previously visited an independent repair provider who, using the information and parts available from the manufacturer, repaired the battery. The consumer then brings suit against the manufacturer and independent repair provider.

Prior to the passage of right to repair laws, the independent repair provider likely could be dismissed from the case by demonstrating that it did not significantly alter the smartphone or act carelessly in performing the repairs. However, where the independent repair provider has access to much of the same information as the manufacturer, it may be more difficult to avoid costly products liability litigation. It will be easier for manufacturers to present a question of fact as to whether an independent repair provider significantly altered a device because, in theory, there will be little preventing an independent repair provider from doing so.

If an independent repair provider has access to software codes and other diagnostic data, then products liability claims will become even more of a battle of experts.

This presents potentially costly, drawn out litigation where a smaller, independent repair provider is pitted against a large manufacturer with significant resources.

Insurance coverage issues

Large businesses that offer repair services likely have product liability insurance. While many general liability policies offer some product liability coverage, large repair providers typically obtain additional product liability insurance.

[44] Hutchinson v. Penske Truck Leasing Co., 876 A.2d 978, 982 (Pa. Super. 2005).
[45] Ayala v. V& O Press Co., 126 A.D.2d 229, 235 (2d Dep't 1987).
[46] Reese v. Ford Motor Co., 499 Fed.Appx. 163, 166 (3d Cir. 2012).
[47] Pichardo v. C.S. Brown Co., Inc., 35 A.D.3d 303, 304 (1st Dep't 2006).
[48] Rest. Second of Torts § 433(B)(3) (1965).

Often times, manufacturers will refuse to contract with a repair provider that does not have a minimum amount of product liability coverage. Naturally, a manufacturer's insurer does not want to be left defending a claim where an injury occurred because of faulty repairs, but the repair provider has little or no insurance coverage.

The enactment of right to repair laws likely would force manufacturers to pay increased costs for product liability insurance. In the status quo, a manufacturer's insurer is afforded a level of security when the manufacturer only contracts with repair providers that have product liability insurance. If a lawsuit presents the issue of whether an injury was caused by manufacturing defect or faulty repair, the covered parties can appear and put forth a defense. That security ceases to exist if manufacturers are required to disclose repair information to any independent repair provider. Insurers would need to account for the possibility of a manufacturer being forced to pay an entire claim because the repair provider lacked coverage and failed to appear. Even if the manufacturer is later able to obtain a judgment against the repair provider for all or some of the claim, enforcing the judgment could prove difficult or impossible. Meanwhile, the manufacturer engaged in prolonged litigation and incurred additional expenses because the repair provider lacked adequate coverage.

This increased risk will likely cause insurers to raise product liability premiums for manufacturers.

Small businesses may also incur additional insurance costs. One goal of right to repair legislation is to "promote consumer choice and competition" by expanding the pool of capable repair providers.[49] However, the cost of additional insurance may deter businesses from opening independent repair centers. While product liability insurance can be relatively inexpensive (many plans start as low as $0.25 for every $100 in revenue), most insurers calculate costs based on the type of products that are covered. Thus, some businesses may refrain from providing repairs for $1,000 iPhones and $40,000 John Deere tractors due to the added insurance expenses that would be required.

Recent regulations

On October 19, 2021, the US Copyright Office (USCO) took steps to ease restrictions on repairs of cell phones and other consumer devices. The USCO proposed exemptions to the Digital Millennium Copyright Act (subsequently approved by the Librarian of Congress) which included a consumer's right to access their device for diagnostic, repair, and maintenance purposes. While the exemptions granted consumers additional rights to modify or repair their devices, the new regulations are unlikely to appease right to repair advocates.

First, the new exemptions apply only to consumer devices. Farming and hospital equipment, as well as most other commercial and industrial products, do not benefit from the exemptions. Second, manufacturers are not required to provide additional tools or information. In essence, the exemptions give consumers the right, but not the tools or information, to try and repair their devices. Third, manufacturers may be able to block independent repairs by tethering certain functionality to the manufacturer's products. For example, while a consumer may now have the right to replace a broken iPhone screen, Apple will likely continue to tether face identification to its screens. Thus, in order to replace a broken screen, a consumer likely will still need to go to an Apple store or authorized dealer to ensure that the new screen functions properly with Apple's face ID technology.

Arguably, the new exemptions signal an increased appetite for government consideration of right to repair legislation. However, regulatory actions alone are unlikely to substantially affect an individual's right to repair their products. Significant change likely will come only if Congress or states pass legislation similar to that championed by the Repair Association and other advocacy groups.

[49] https://www.repair.org/legislation

Conclusion

Right to repair legislation could spring litigation in a number of areas of law. However, as Congress and state legislators continue to evaluate proposed legislation, manufacturers, independent repair providers, and their insurers, should consider how these bills could increase the cost of product liability litigation and insurance coverage. It is likely that the passage of these bills would make it more difficult to determine who is at fault for a defective product that has been repaired by an independent provider.

> **Accordingly, what may have previously seemed like a fairly straightforward argument over whether an alteration was substantial will likely become more convoluted.**

This could lead to exponentially more expert fees, extended litigation, and the need for additional insurance coverage.

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The consequences of being even 1% liable when two or more defendants are at fault – the doctrine of joint and several liability

Many defendants who get sued for causing or contributing to an accident in the United States hold the false belief that their exposure is limited to their own percentage of responsibility. However, they often learn, much to their surprise, that despite their seemingly nominal responsibility for the accident, they are liable for the full amount of the judgment pursuant to the doctrine of "joint and several liability." When two or more parties are jointly and severally liable, each party is responsible for the full extent of damages (Restatement (Third) of Torts: Apportionment of Liability § 10 (2000)). In this context, the joint acts that give rise to an injury do not require parties to agree to act in concert.

> **As long as an injured party can prove that a defendant's alleged wrongdoing was a contributing factor to the harm endured, full liability may attach.**

The usual objection to joint and several liability is that it wrongs a minimally responsible but financially prudent defendant when the primary tortfeasor co-defendant is unable to pay his share of a judgment. Consider the following hypothetical. One sunny afternoon in San Francisco, a drunk driver barrelled through a busy intersection, sped through a red light, and ultimately plowed into a world-renowned neurosurgeon. At the time of the incident, the surgeon was jaywalking across a busy four-lane street. According to the surgeon, she avoided using a nearby marked crosswalk because she did not think it was safe due to its midblock location and poor visibility.

Miraculously, the driver survived the accident unscathed. The surgeon was not so fortunate; the impact threw her body across the street, and she sustained a traumatic brain injury. Despite multiple surgeries and months of rehabilitation programs, the surgeon was left with permanent brain damage that impaired her motor function. Her august medical career was over. She could no longer operate on patients. Seeking redress for her injuries, the surgeon sought out a lawyer.

The surgeon's attorney initially observed that any damages award would likely be limited given the driver's marginal financial resources. However, the attorney then discovered that the City of San Francisco was responsible for designing, planning and installing the crosswalk that the surgeon deemed too dangerous to use just before her accident. The attorney then sued both the driver and the City of San Francisco.

At trial, the jury awarded the surgeon $14,800,000, finding that the driver was 99% liable and the City was 1% liable. Initially, the City was relieved to have escaped with a favorable result. However, the driver turned out to be judgment-proof. Consequently, the City had to pay the entire amount of the verdict under the doctrine of joint and several liability.

This illustration is more than fiction. Instead, this

hypothetical is loosely based on Sills v. City of Los Angeles, where a driver, high on drugs, sped through a stop sign and collided with another vehicle. In Sills, a passenger in the car suffered permanent brain damage as a result of the accident. Alleging that the City of Los Angeles' failure to trim bushes obstructed the driver's view, the passenger sued both the driver and the City. A jury awarded a verdict of $2,160,000 jointly against the driver and the City. Despite a finding that the city of Los Angeles was only 22% responsible for the harm, it had to satisfy the entire judgment because the driver was judgment-proof.

The inequity of California's joint and several liability law as applied in Sills, above, drove the citizens of the state of California to modify the state's joint and several liability law by ballot initiative in 1986. Since passage of Proposition 51, now codified in California Civil Code section 1431, a solvent joint tortfeasor may have to pay 100% of economic damages (e.g., past and future medical expenses, past and future lost earnings, etc.) but will only be responsible for an amount of noneconomic damages (past and future pain and suffering) equal to that solvent tortfeasor's own proportion of fault assigned by the jury.

Why does the law foist this seeming inequity on a tortfeasor with minimal fault but substantial assets or sufficient insurance? Tort law is a patchwork of ancient doctrines the main goal of which is to provide a remedy to individuals who have wrongfully suffered injury to their property or person. Not only does the law deter wrongful behavior, but it also provides aggrieved parties with a means for redress. The doctrine of joint and several liability is grounded in these basic principles because it prioritizes compensating innocent persons wrongfully harmed by tortfeasors. In practice, the doctrine favors a plaintiff's ability to collect damages from any defendant regardless of degree of fault. This outcome is justified, the law says, because leaving an innocent plaintiff without a means to collect is considered more unfair to society than burdening a minimally responsible defendant who happens to have the ability to pay.

Joint and several liability was once applicable in every US state, but, that is no longer the case. The majority of states have adopted modified versions of joint and several liability. In some jurisdictions, such as California discussed above, a plaintiff's recovery may be offset by his/her comparative fault or by his/her relative proportion of fault for the overall damages. Some states, like Nevada, apply joint and several liability, but will limit the plaintiff's recovery if that plaintiff is found to have been more than 50% at fault. Finally, the following fifteen jurisdictions retain pure joint and several liability: Alabama, Arkansas, D.C., Delaware, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia (Restatement Third §17 cmt. a. at 151-99.)

If you, your company or your insured is sued in the United States, do not assume that your exposure is minimal just because of your seemingly tangential connection to and responsibility for the accident. Depending on the US state where the suit is pending, you could find yourself faced with an exposure that you never contemplated.

Therefore, be sure to consult your attorneys as to whether joint and several liability applies in the case jurisdiction, as the answer could make a tremendous difference in how you value the case and set your reserves.

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New liabilities, new investigations, but the same inflationary pressures

Like many other jurisdictions, there has been a huge shift towards remote and digital working. Even the court system, which had been slowly embracing technology, found itself fully embracing remote hearings, electronic bundles and e-filing. Against that backdrop, litigation in England and Wales has continued with claimants constantly striving to find new bases on which to make an injury claim. For example, in head injury cases we are increasingly seeing claims alleging the early onset of dementia. The causal link between head trauma and early-onset dementia is highly controversial but has led to increasing sports-related litigation, and most notably the high-profile World Rugby litigation, which Ben Appleton discusses below. The increased reliance on digital working has shown the importance of interrogating digital media as a routine part of injury cases. Amber Jenner covers the developing field of computer forensics below. Finally, the increasing cost of claims and particularly claimant's costs has been an issue for many years. Lewis Thompson discusses the impact of a recent increase in the guideline hourly rates.

Sports concussion

Kennedys acts in the defence of world rugby test cases brought by nine former international rugby union players. The players allege that the rugby governing bodies failed to take adequate steps to prevent permanent brain damage from concussive and sub-concussive injuries. Their lawyers are also said to be representing more than 100 other former rugby union players. The same lawyers act for former Rugby League players and this is likely to form part of a separate class action. It is further envisaged that litigation will shortly be commenced in the UK against football clubs and governing bodies.

Sport-related concussion is a global issue for the sports world. Kennedys has been at the forefront of similar cases in the US, where we have been appointed by insurers of every major sport in connection with the defence, coverage or monitoring of head trauma claims.

The causal link between head trauma and early-onset dementia is highly controversial. The science is ever changing but there remains an absence of agreed medical opinion. Consequently, the defence of these actions requires a complex claims handling process that brings together expertise in the following areas: policy coverage issues, e-disclosure, media strategy, group litigation orders and rehabilitation strategy.

The causal link between head trauma and early-onset dementia is highly controversial but has led to increasing sports-related litigation.

The rapid expansion of sports-related litigation in some parts of the world has created significant legal and financial exposure for the insurance industry. Insurers across the globe will need to stay vigilant to this body of claim and take steps to effectively evaluate potential exposure.

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Computer forensics

Whilst surveillance and social media are commonly used in injury cases, they are not the only useful tool for investigating a claimant's pleaded case and assessing the genuine elements. There is a wealth of data generated by electronic devices or apps that the CPR permits disclosure of, but in reality is often overlooked.

Electronic data stored on items such as computers, mobile phones, fitness trackers and apps can all provide useful information to either support or discredit a claimant's case. For

example, access to a self-employed claimant's work email account can show how much they have actually been able to progress their business, whilst a video doorbell might show how frequently an alleged social recluse leaves the house. Equally, a Sat Nav or Fitbit may assist in more accurately calculating the speed of a cyclist involved in a collision whereas metadata could be used to prove that documents supporting an allegation are fraudulent.

> **There is a wealth of data generated by electronic devices or apps that the CPR permits disclosure of, but in reality is often overlooked.**

Where surveillance may show limited contradictions to the claimant's evidence over a limited number of days, computer forensics can often show a fuller picture over a prolonged period making it harder for a claimant to argue against. As the world becomes more technologically dependent, the more widely available such useful data becomes to defendants as it becomes harder for people to not leave an electronic trail for the most basic of actions. Using such data can strengthen allegations of fraudulent or exaggerated cases, assist in resolving liability and may ultimately lead to significant savings on quantum.

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Costs

The level of hourly rates sought by claimant solicitors and recoverable upon detailed assessment continues to cause concern as one of the key inflationary pressures on costs claims faced by insurers.

Following a review in 2010, the guideline rates set by the court for summary assessment had remained static for 11 years, prompting increasingly loud complaints by solicitors that they should be increased. A consultation launched in 2014 was abandoned after the inquiry found that there was a lack of available data. Pressure continued to build however, and a number of judicial decisions over the last two years emphasised that the old hourly rates were no longer of significant relevance, in particular on detailed assessment. Prompted by concerns raised by the courts, the Civil Justice Committee undertook a review during late 2020 and published its consultation in January 2021. The final report was published on 30 July 2021, and recommended substantial increases to the hourly rates, with some grades of fee earner and location seeing upward revisions by up to 27%.

The recommendations were adopted in full by the Lord Chancellor, with the new hourly rates

applicable from 1 October 2021. A number of questions and concerns remain, both with regards to the methodology adopted for the consultation, and the impact of the increases. The review focused primarily on the hourly rates allowed on assessment by the court, rather than undertaking any investigation as to the actual costs faced by solicitors, or the impact of remote working during the pandemic on location and overheads.

A number of questions and concerns remain, both with regards to the methodology adopted for the consultation, and the impact of the increases.

Whilst the guidance is clear that the new rates are not to be applied retrospectively, it is anticipated that claimants will seek to push the boundaries further with regards to historical claims. In addition, the exposure to costs for insurers on the majority of lower value claims not subject to fixed costs will increase by approximately 20% as solicitors revise their client retainers to include reference to the new rates. On higher value cases, it is anticipated that the key players in the claims industry will continue to push for rates higher than the new guidelines, and the courts' attitude to such inflationary tactics remains to be seen.

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Northern Ireland

Northern Ireland update

There have been several consultation processes in the last year or so, that have impacted upon, or have the potential to impact, the legal system in Northern Ireland. The Personal Injury Discount rate (PIDR) has been of great concern to insurers. Also, there was a consultation process which will impact upon the monetary jurisdiction of the county court system. Both are worthy of lengthy articles in and of themselves, but we have condensed into a summary below.

By way of needed background, the discount rate formally in Northern Ireland was 2.5% until the local devolved government in Northern Ireland and the Minister of Justice decided that the rate should be changed to -1.75%. One failed judicial review later, the personal injury discount rate was set at a temporary level of -1.75% in May 2021, pending the introduction of the Damages (Return on Investment) Bill which recently went through committee stage at the end of October 2021. In spite of objections from insurers, solicitors acting for insurers, and trade bodies, the rate was fixed and this gave rise to a test case being brought which was adjourned before Christmas and remains part-heard.

On 04 November 2021, the Justice Committee released its report following detailed scrutiny of the legislation in respect of re-setting personal injury discount rate in NI. The Committee is content with Bill as drafted and did not suggest any changes to the wording. The PIDR of -1.75% set this May under the current legislation and Wells v Wells principles is not, formally, part of the scrutiny of the new Bill, but the report states that the Committee *is of the view that it [the Wells approach] no longer reflects how a claimant would be advised to invest their lump sum and therefore a new framework for setting the PIDR is needed [and the Committee also] understands the difficulties with the current rate in relation to potential over-compensation in many cases and the resultant economic and social ramifications*.

In spite of objections from insurers, solicitors acting for insurers, and trade bodies, the rate was fixed and this gave rise to a test case being brought which was adjourned before Christmas and remains part-heard.

The Damages (Return on Investment) Bill was given Royal Assent and enacted on 2 February 2022. Sections 1 and 2 of, and the Schedule to, the Act commenced on 10 February 2022 when the Government Actuary has 90 days within which to review the rate using the methodology prescribed in the Act. However, it is thought that the rate will be struck sooner than this and the hope is that this will reflect the current Scottish rate of -0.75% rather than the present interim rate.

Jurisdiction of County Court

A DOJ consultation from February 2021 concerned the proposal to increase the jurisdiction of the County Court (which hears personal injury, loss and damage claims of up to £30,000.00) to £60,000.00 or £100,000.00. The same consultation has also proposed whether to provide a statutory power to County Court judges to remove cases from the County Court to the High Court. This is still at a consultation stage at present, but any proposed increase would have a significant impact on personal injury, loss and damages claims brought in this jurisdiction.

Minor rulings

Another DOJ consultation from July 2021 concerned the proposal to introduce a statutory duty for solicitors and insurers to seek court approval in cases involving a minor claimant. The vast majority of minors' cases in this jurisdiction settle by way of a court approval, and parties to an action are obliged to obtain approval in both the High Court and County Court rules. The rationale behind the proposal appears to be pushed on by claimant representatives seeking to restrict pre-proceedings settlements being agreed without court approval.

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Scotland

A whistle stop tour of key Scottish legal changes in 2021

There is no denying that the last two years have been challenging and, in terms of the Scottish legal world, it has not always been easy to keep the wheels of justice turning in such unprecedented times. However, a number of new pieces of legislation have received Royal Assent, the switch to digital hearings has sparked a contentious consultation process and there is an update on loss of society claims in Scotland.

The Redress for Survivors (Historical Abuse in Care) (Scotland) Act 2021 received Royal Assent on 23 April 2021. This legislation is designed to establish an alternative Redress Scheme (the Scheme) to civil proceedings, giving survivors of historical abuse a more accessible means of justice through financial and non-financial redress. The Scheme is on track to open for applications in December this year, remaining open for 5 years, for survivors of abuse occurring before 1 December 2004.

The Scheme will be funded by the Scottish Government with contributions from interested organisations. It is not known how this will operate, however, it is intended that relevant organisations will provide "fair and meaningful" contributions to the Scheme, assessed on the level of applications for redress concerning them and any potential payments that may follow. In doing so, organisations agree to publicly and explicitly recognise the harm or wrongful acts faced by survivors.

Redress Scotland will assess the applications, while Scottish Ministers will monitor contributions, if those are "fair and meaningful", the organisation will be granted a "waiver". This document will be signed by any survivor who is accepting redress funds relating to a relevant organisation and accepts that they must not raise or continue any civil court proceedings against that organisation.

2021 has also brought Qualified One-Way Cost Shifting (QOCS) to Scotland. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 received Royal Assent in 2018. It provides that, where a person brings an action for personal injuries, or death, and has conducted the proceedings in an "appropriate manner", the court must not make an award of expenses against the person in respect of any expenses relating to the claim itself, or any appeal.

QOCS came into force on 30 June 2021 with the specific rules being published at the start of June. It is intended to increase access to justice and certainty, and the rules are not retrospective.

Section 8 considers that parties will be able to recover costs where the defenders show that the pursuer or their representatives has made a fraudulent representation; acted fraudulently; behaved in a manner which is manifestly unreasonable or the court considers amounts to abuse of process. There are currently no statutory definitions of what constitutes the above and these are new or rare tests for Scotland.

It still remains the case that the defender can recover costs if the award of damages is less than the sum tendered. Recovery will also be an option where the pursuer has delayed in accepting the tender, abandonment of the action or appeal, and where the pursuer's case is summarily dismissed by the court. Any recovery is however restricted to 75% of the damages awarded to the pursuer.

The pandemic also saw the introduction of court documents being lodged online and remote hearings, either by telephone or WebEx. The Scottish Civil Justice Council consulted with members covering the mode of attendance at civil court hearing. It has sparked a lot of debate in respect of access to justice and determining the credibility and reliability of witnesses during substantive hearings when they call remotely.

Scottish fatal awards were considered further in the recent judgement of McArthur v Timerbush Tours Ltd [2021] CSOH 75. This reflects the realities of modern relationships whilst highlighting the gap that exists in how fatal cases are approached by our English counterparts.

The deceased's parents separated when he was nine but shared his care. The step-father and half-sister relationships featured as part of the

claim. The deceased lived some distance from his family. The mother and father were each awarded £100,000; the half-sister, despite a 14 year age gap with the deceased, was awarded £45,000; and the step-father was awarded £70,000.

This case shows the difficulties faced by defenders when challenging the closeness of the relationship between a deceased and their family. It is also a stark reminder that fatal awards in Scotland are much higher than those in England & Wales.

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