

# Personal injury report 2023

## Trends and future risks

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Kennedys





# Table of contents

|  |    |
|--|----|
| Foreword                               | 3  |
| Claims inflation                       | 4  |
| The 'S' in ESG moves to the foreground | 6  |
| Civil justice reform                   | 8  |
| Legislative landscape                  | 10 |
| Authors and key contacts               | 14 |

# Foreword

2022 was an eventful year indeed, starting with the Russian invasion of Ukraine and the associated consequences on global politics, supply chain disruption and eye-watering energy prices. Closer to home, the UK saw three prime ministers in three months, a 59-page report into the so-called ‘partygate scandal’ and a spiralling cost of living crisis.

For many countries, 2022 promised to be a year of lifted lockdowns and the reopening of the travel sector. Whilst this has been the case, the impact of the pandemic will continue to be felt for some time. The UK and Scottish COVID-19 public inquiries commenced into the UK and Scottish Governments’ handling of and response to the pandemic. These inquiries will likely continue for many years to come.

Looking ahead, for many employers in 2023, attracting and retaining employees, hybrid working arrangements, health and safety issues, and mental and physical health will be top concerns. In turn, insurers could find themselves facing an uptick in personal injury claims should their customers fail to adapt to changing workplace risks.

Turning to civil justice reforms, the topic of legal costs will feature throughout 2023. The Civil Justice Council’s outstanding report on its holistic costs review is expected, together with the introduction of fixed recoverable costs for most civil cases up to £100,000 in value. We also await changes to the current Qualified one-way costs shifting (QOCS) regime for claims issued on or after 6 April and the Ministry of Justice’s call for evidence on dual or multiple discount rates in England and Wales, which runs until 11 April 2023, will be of particular interest to those in the high value personal injury space.

**Against this background, we highlight some key legal and regulatory developments, provide a spotlight on a number of topics to watch, accompanied by a timeline mapping the year ahead which insurers and corporates should consider as they plan for operational resilience.**



# Claims inflation

In 2023, the average cost of a personal injury claim is likely to increase, driven by a plethora of factors including rising inflation, advances in technology, increasing wages and labour shortages - to name a few.

Without adequate allowance for the impact of claims inflation, insurers will potentially be exposed to inadequate reserves and additional challenges when adjusting claims, including under-insurance, gaps in cover and the development of unexpected or unanticipated claims.

## Combatting fraud in times of recession

Research and our own experience tell us that fraud increases in times of recession. Professor Mark Burton correlated falls in GDP to increases in reported fraud offences over three decades. The combined impacts of COVID-19 and the current geopolitical and economic situation driving GDP instability and a cost of living crisis have the potential to cause a spike in fraudulent claims.

// In 2022, a number of insurers were reporting increased fraud in claims across all lines, including Zurich who reported in the industry press an increase of 25% in property claims fraud. At the same time, the UK National Crime Agency underlines the ever-present challenge presented by fraud when they reported that it is now the most commonly experienced crime in the UK.

Martin Stockdale, Partner, Manchester





In response, the House of Lords Committee on the Fraud Act 2006 and Digital Fraud Committee published its report 'Fighting Fraud: Breaking the Chain' which recommends introducing new offences, for example, including a 'failure to prevent fraud' offence. It also calls for the UK Government to establish a cabinet subcommittee dedicated to tackling fraud.

As the threat of fraud remains and with changes in the claims environment (in respect of both internal and external systems and processes), businesses and their insurers should continue to review and update approaches for detecting and tackling fraud.



Data and data analytics technologies can play a helpful role in the detection, mitigation and prevention of fraudulent behaviour, working in addition to fraud awareness programmes for people working within the organisation.



# The ‘S’ in ESG moves to the foreground

Environmental, social, and governance (ESG) related issues are rising up the boardroom agenda, with a particular focus on employee wellbeing.

Looking to the year ahead, employers will be considering how best to retain and attract talent, to include placing a greater emphasis on promoting a healthy work environment to benefit their employees, the business and UK economy.

## Key considerations for employers: from mental health and wellbeing to discrimination

Amid a ‘great resignation’, economic uncertainty, as well as an acknowledged skills shortage, businesses have been struggling to fill vacancies. For many, the pandemic blurred the traditional line between work and home life, which in turn, raised concerns around an increase in psychosocial and ergonomic risks. Added to this, around 17 million working days were lost due to work-related stress, depression, or anxiety in [2021/2022](#), a perfect storm has been created.

// Against the background of the #MeToo movement, the immediacy of social media with the opportunity for employees to voice their complaints on digital platforms, concerns around reputational risk and the widening scope of vicarious liability in recent years, employees’ rights are very much under the spotlight.

James Shrimpton, Partner, Birmingham





As such, we anticipate seeing an increased awareness and accountability around health, happiness, work-life balance and culture in the workplace. Accordingly, employers must ensure they continue to focus on workplace wellbeing, along with carefully considering and evaluating how to prevent employees' negligent behaviour. Failing to do so risks not only legal claims but the scrutiny of regulators, investors and the public more widely.

### Modern slavery and supply chain liability

In today's globalised world, supply chains are becoming ever more complex. This is creating challenges for insureds and their insurers in terms of identifying and responding to concerns of modern slavery. Additionally, it may not be in the interest of a supplier to disclose information relating to modern slavery, and smaller businesses in particular may struggle to fully appreciate or understand their obligations.

There is an increasing appetite to bring group actions before UK courts by those working for international suppliers to multinational organisations under the Modern Slavery Act 2015, in addition to pursuing claims for compensation based on psychiatric harm. Often these claims are supported by litigation funders willing to inject funds to bring these large group action claims to court. More recently, litigation funders have been partnering with claimant law firms to offer after the event (ATE) insurance.

Insurers should suggest businesses re-evaluate their procurement policies, analyse purchasing decisions, investor expectations and procedures relating to social risks arising through business relationships and if in doubt, they should ensure they speak to their insurer.



The damage to business reputation and competitive disadvantage for failing to take the issue seriously could be significant.



# Civil justice reform

At the Civil Justice Council 11th National Forum, Sir Geoffrey Vos, Master of the Rolls and Lord Bellamy KC, Parliamentary Under Secretary of State, set out the Civil Justice Council and Ministry of Justice's (MoJ) ongoing projects and priority areas; providing an indication as to the likely civil justice developments in the pipeline for 2023 onwards.

## Civil Justice Council

- Pre-action protocols/pre-action portals.
- A holistic review of costs to include costs budgeting, guideline hourly rates, pre-action protocols and the digital justice system, and the wider consequences of extending fixed recoverable costs.
- Taking a long-term view of the impact of technology on the administration of justice, by way of the Futures Group.
- Procedures relating to mental capacity in civil proceedings.

## Ministry of Justice

- Civil legal aid and legal support.
- Dispute resolution.
- HMCTS court reform.
- Fixed recoverable costs.
- Looking to the future - a joined up seamless system of modern civil justice.



These topics will continue to inform consultations with stakeholders leading to Civil Procedure Rule changes and legislative developments in 2023 and beyond.

### Discount rate in England and Wales: a dual rate?

In advance of the next formal review of the personal injury discount rate (PIDR) in England and Wales - which must begin by 15 July 2024 - the MoJ issued a call for evidence on 17 January 2023, seeking additional evidence and views on the introduction of dual or multiple rates. The consultation closes on 11 April 2023.

The call for evidence considers models for setting the PIDR in other jurisdictions including Hong Kong, the Canadian province of Ontario and Jersey which set different rates based on the duration of the award, in addition to the heads of loss approach adopted in the Republic of Ireland.

This is a genuine call for evidence seeking data and analysis to support the review. There is no indication that any view has been reached on whether England and Wales should move away from a single PIDR. In terms of next steps, the Government expects that a public consultation similar to the one undertaken ahead of the last rate review will form part of this evidence gathering exercise, but that will be a decision for the newly appointed expert panel.

// Ultimately, there will be a balance to be struck between adherence to the principle of full compensation whilst also ensuring that any change to a multiple or dual rate approach does not lead to greater complexity in the claims process.

Antony French, Partner, London

### Case developments

There are a number of important cases which insurers and compensators in the personal injury arena should keep on their radars.

- In *Rabot v Hassam; Briggs v Laditan* [20.01.23], the Court of Appeal clarified that the correct approach to valuing 'mixed injury' claims brought via the Official Injury Claims (OIC) portal is for the award for pain, suffering and loss of amenity for both the whiplash injury (i.e. tariff element) and non-whiplash injury (i.e. non-tariff elements) to be quantified separately, added together and then a deduction applied for overlap of pain suffering and loss of amenity in the usual way. One caveat was provided, which was "that the final award cannot be less than would be awarded for the non-tariff injuries if they had been the only injuries suffered by the claimant". The defendant in *Rabot* has now petitioned to the Supreme Court.
- The Supreme Court heard the case of *Trustees of the Barry Congregation of Jehovah's Witnesses (appellant) v BXB (respondent)* on 13 and 14 February 2023. The Court considered whether the Court of Appeal wrongly found the appellant to be vicariously liable for a rape committed by one of their elders. Judgment is awaited.
- Permission to appeal has been granted by the Supreme Court in the case of *Griffiths v TUI (UK) Ltd* [2021] and will be heard later in 2023. At present, following the Court of Appeal judgment, a trial judge is not obliged to accept expert opinion evidence which is otherwise uncontroverted.



# Legislative landscape

## Online Safety Bill

The Online Safety Bill aims to provide UK internet users with a safer digital experience by imposing a new statutory duty of care on regulated online service providers. All in-scope platforms will need to moderate and remove illegal content, and platforms accessed by children will also have a duty to protect them from viewing 'harmful' content.

The legislation will also require tech firms to tackle fraudulent adverts, and it is possible that the Bill will be amended further to include provisions about online scams more generally.

It has also been announced that the Bill will criminalise 'revenge pornography', cyberflashing and coercive behaviour.

Failure to comply will result in substantial fines (of up to £18 million or 10% of a company's annual global revenue) from Ofcom as regulator or, in extreme circumstances, company directors and senior managers facing prosecution.

The Bill will next enter Committee Stage in the House of Lords and is expected to receive Royal Assent by the end of the current parliamentary session. It is worth noting that this Bill has been carried over from the previous session, which means that it is at risk of being struck down if it does not complete its passage through Parliament on time.

## Retained EU Law (Revocation and Reform) Bill

The 'sunset clause' in the Retained EU Law (Revocation and Reform) Bill could see large numbers of retained EU laws simply expire at the end of 2023. The number of pieces of legislation covering more than 400 policy areas now totals 3,700. This includes laws covering employment rights, product safety, vehicle standards, noise pollution, health and safety and environmental protections. Only the laws which are expressly selected by ministers will be retained.

The potential impact on businesses could be significant and, as such, the progress of this Bill should be carefully tracked. In turn, the impact on insurers' books of business may well be extensive. Any legislation which does fall away could give rise to an increase in claims, as new practices, regulations and laws are challenged.



If the government opts for significant regulatory divergence from the EU, this could make trade more difficult for UK businesses and would add another layer of complexity for insurers and corporates.

## Protect Duty

Towards the end of 2022, the UK Government renewed its commitment to introduce the Protect Duty with the legislation expected to be brought forward in the current parliamentary session.

Whilst the details of what the Protect Duty will entail are still to be finalised, it is expected that anti-terror duties will apply to eligible locations for qualifying activities based on a tiered model. For insurers, this translates into continuing to work with existing and new clients in terrorism risk mitigation - particularly those in the retail and entertainment sectors. The Duty is expected to have implications both in terms of the cost and scope of insurance bought by, among others, local authorities, and owners and operators of publicly accessible venues.

In-scope businesses should begin developing or revisiting their counter-terrorism measures, paying specific attention to how best to manage and mitigate the identified risks.

## Freedom of Information Reform in Scotland

Since 2002, anyone requesting information from a public authority listed in the Freedom of Information (Scotland) Act 2002 has been entitled to receive it, unless a statutory exemption applies.

Nonetheless, in recent years, concerns have been expressed as to whether the legislation is keeping up with the changing face of the Scottish public sector. A debate in the Scottish Parliament in June 2017 identified that further reform was needed.

However, in the absence of action by the Scottish Government, on 1 November 2022, Katy Clark MSP launched a consultation on how to reform the Scottish freedom of information (FOI) regime, with a view to introducing a Freedom of Information Reform (Scotland) Bill. Only 28 days later, the Scottish Government launched its own consultation, taking a more cautious approach to FOI reform. In this interesting turn of events, stakeholders now had two consultations to respond to, both of which closed on 14 March 2023.

Whilst both consultations recognised the need for transparency and accountability for all public funds and services, they proposed different methods of achieving that aim. The Scottish Government sought views on strengthening requirements for contractors to supply information to public bodies. Ms Clark, on the other hand, sought views on making third and private sector bodies subject to statutory FOI obligations in their own right.

If Ms Clark's Bill progresses, employers' and public liability (EL/PL) insurers of public authorities should be aware that FOI may be used as a tool to investigate legal claims against their insured, but also against contractors employed by their insured, without the insured's knowledge. Contractors would then be making decisions about what information to release and what exemptions to apply under the FOI regime.

**// Whether Ms Clark's or the Scottish Government's proposals are legislated, EL/PL insurers of voluntary and private sector organisations can expect their insureds to be subject to greater obligations to disclose information to members of the public, either directly or via public authorities, which may be used as a basis to investigate claims against them.**

Lesley Allan, Partner, Glasgow



Given the limited requirement for pre-litigation disclosure in Scotland, this could create an uneven playing field, where a public body is obliged to disclose information related to a claim which a private organisation not in receipt of public funds could refuse to provide.

### Transport Bill

Announced in May 2022, a Transport Bill intended to “improve transport across the United Kingdom, delivering safer, cleaner services and enabling more innovations” was paused in October last year and is yet to be republished. The scope of the Bill - originally expected to include new laws relating to self-driving and remotely-operated vehicles and vessels, as well as supporting the rollout of more electric vehicle charge points - may also be narrower, and is awaited. It remains to be seen whether the Bill is introduced in the next parliamentary session.

It is anticipated that subject to the scope of the Bill, motor insurers, but also insurers that provide cover for product liability, cyber, EL/PL and property could be impacted in the following regard:

- In the context of the regulation of e-scooters (and potentially other forms of micromobility) and the development of self-driving legislation (both within the Transport Bill itself and in secondary legislation).
- With the development of electric vehicle charge points/infrastructure.



Additionally, local authorities will require clarity on their role in the transition to electric vehicles.



## 2023 timeline

|                    |   |
|--------------------|---|
| 20 January         | 'Mixed injury' judgments of <i>Rabot v Hassan</i> and <i>Briggs v Laditan</i> are handed down.  |
| 17 January         | MoJ launches England and Wales personal injury discount rate (PIDR) call for evidence.  |
| 24 January         | Civil Aviation Authority opens request for further information on ATOL reform.  |
| 6 February         | New County Court Pre-Action Protocol for Personal injury and Damage Only RTA claims in Northern Ireland came into effect.   |
| 9 February         | MoJ consultation on whether UK should become signatory to Hague Convention 2019 on recognition and enforcement of foreign judgments closed.   |
| 10 February        | Justice Committee launches call for evidence on whiplash reform.  |
| 13 February        | Supreme Court heard the case of <i>Trustees of the Barry Congregation of Jehovah's Witnesses v BXB</i> on vicarious liability.  |
| 14 March           | Scottish Freedom of Information consultations closed.   |
| 17 March           | Stage 1 of the National Care Service (Scotland) Bill to be completed.   |
| 17 March           | Justice Committee call for evidence on whiplash reform closes.  |
| 24 March           | Civil Aviation Authority request for further information on ATOL reform closes.   |
| 6 April            | QOCS changes - a defendant will be able to enforce costs up to "the aggregate amount in money terms of any orders for or agreements to pay or settle a claim for, damages, costs and interest".   |
| 11 April           | PIDR call for evidence closes.  |
| Summer             | Civil Justice Council to review and report on guideline hourly rates.   |
| By July            | The MoJ will publish its response to the PIDR call for evidence.  |
| October            | Fixed recoverable costs will be introduced for most civil cases up to £100,000 in value, with some exceptions.  |
| 30 November        | Online civil money claims pilot ends.   |
| By the end of 2023 | A report and draft Bill to be published towards the end of 2023, along with the consultation responses following the Scottish Law Commission's 'Discussion Paper on Damages for Personal Injury'. |
| By the end of 2023 | The Retained EU Law (Revocation and Reform) Bill will automatically revoke, or 'sunset', most retained EU law at the end of 2023.   |

## Legislative landscape

**By the end of the current parliamentary session:** Protect Duty Bill expected to be introduced, although it may be pushed to the next.

**By the end of the current parliamentary session:** Online Safety Bill expected to receive Royal Assent.

**By the end of the next parliamentary session:** Transport Bill expected to be introduced.

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