GUIDE

Insured risks litigation in the Channel Islands

Last reviewed: April 2017

Introduction

'Be afraid, be very afraid', were the immortal words uttered by Geena Davis in the 1986 science fiction horror film The Fly, about the dangerously mutated Jeff Goldblum. While it is perhaps stretching a point to liken Channel Island law to a monster, there are many dangerous traps for the unwary, which, if not liable to lead to professional death, will certainly cause professional embarrassment and spawn an equally undesirable offspring, the *professional negligence claim*.

But it *looks* like English law, and it *tastes* like English law...

But it isn't English law. The Channel Islands comprise two separate jurisdictions, Guernsey and Jersey. Each are independent of each other and independent, jurisdictionally, of the United Kingdom and have had a distinct constitutional position of their own since AD 1204. They each have their own laws and customs, their own parliamentary assemblies, their own courts and appellate structures, albeit sharing the Privy Council as their court of final appeal. Their law has its origins in Norman and French law, not English law.

While Channel Island courts are heavily influenced by English tort case law, they are not in any sense bound by it, any more than they are bound by UK statutes. It is not at all uncommon to take account of the case law of other common law jurisdictions, particularly in cases where English common law development has come to an end because of the introduction of a statute or because English case law is itself subject to criticism. An example of the former would be the question of occupiers' liability (the Islands have no equivalent of the Occupiers' Liability Acts 1957 and 1984). An example of the latter would be whether *Rylands v Fletcher* liability has any place in Channel Island law. It does in England, but not in Scotland or Australia. The case law of all three would be persuasive.

Matters taken for granted by an English qualified lawyer can be bear traps in the Channel Islands, eg provision for deferred limitation periods in the case of latent damage (we have no equivalent of section 14A Limitation Act 1980) or the absence of lost years claims in fatal accident claims (no legislation has ever abolished such claims in these jurisdictions, unlike the UK).

But your courts and court procedures are the same aren't they?

Well, they are not wholly alien to the English trained and qualified lawyer but very different in many respects. We have rules of procedure derived from English rules but there is no 'fast track' or 'multi-track' and, while there are small claims courts, they have different limits and procedures to the English petty debt court. Even between Guernsey and Jersey, court procedures differ significantly, let alone as between England and the Islands. For example, there is no equivalent of the Acknowledgment of Service in either island. When a case is first issued, the parties are required to appear in person or by advocate at an initial hearing to given an address for service (which must be within the island) and to either admit liability or confirm the matter is to be defended. The matter then proceeds to the production of 'defences' which may or may not include '*exceptions de fond*' and '*exceptions de forme*', the former being preliminary issues as to whether there is a cause of action at all and the latter being akin to requests for further and better particulars.

But your judges do the same job don't they, surely they do?

No, afraid not. Our judges decide issues of law and procedure, but any issues of fact are dealt with at trial by 'jurats'. Jurats look and feel like lay magistrates, which is what, in effect they are. They are drawn from a standing panel and sit on civil trials and perform the function of a small and experienced civil jury. A judge usually sits with three jurats in a civil matter. You have to be a Guernsey advocate to appear in a Guernsey court and a Jersey advocate to appear in a Jersey court. Lawyers qualified in other jurisdictions have no rights of audience and cannot have conduct of proceedings.

What about personal injury and clinical negligence cases, surely there can't be much difference there?

Ah, now we are in serious trouble. While there is much that is familiar, there are some very important exceptions. Take, for example, the quantification of damages. We have no equivalent of the Damages Act 1996 and no Lord Chancellor's 2.5 per cent discount rate. In fact the whole question of how multipliers should be calculated in the Islands is a hot topic with potentially very substantially larger multipliers. There is no decided case law to date, but there are a number of large claims approaching trial where the point is being pursued vigorously. Likewise in clinical negligence cases the much criticised decision in *Chester v Afshar* would not bind a Guernsey court. The issues would be re-argued should they arise in the same way. The powerful dissenting opinions in *Chester* of no lesser figures than Lords Bingham and Hoffmann would be relied upon by a Defendant to uphold what, until then, was the generally accepted orthodox position as regards causation and the 'but for' test.

Well, I am an English solicitor, can I use a Guernsey or Jersey firm as an agent and let them front the case for me and advise me of the pitfalls?

Yes you can, but this may prove very costly for the client because of the limited recovery of costs permitted under Channel Island procedural law for non-advocate firms. In Guernsey, the general rule is that only an advocate's costs are recoverable at court – all costs incurred by the English solicitor will have to be borne by the client, win or lose. In Jersey, the rules are more relaxed but as in Guernsey, only a locally qualified advocate may have conduct of proceedings. Accordingly, there will be inevitable duplication of costs between UK firm and agent which will not be recoverable at court and which would be difficult to justify in a personal injury claim for example. As advocates in both islands must first qualify as a UK solicitor or barrister before being entitled to take the additional qualifications to enable them to practice as advocates, the reality is that advocates have knowledge and experience of English law and in addition are experts in their own jurisdiction. Thus the cases in which the instruction of an English solicitor or Counsel is justified on complexity grounds are likely to be few and far between. The lay or insurer client must be informed of the likely costs and the options available.

So what should I do?

We advise UK insurers to seek advice from an advocate before considering settlement of a claim of any substance in the Islands. Such advice should be sought at an early stage of the claim to avoid incurring irrecoverable costs. UK solicitors firms should also be aware of the possibility that their professional insurance may not cover the provision of services in a 'foreign' jurisdiction.

We suggest you consult a Channel Island firm at the earliest opportunity to take advice. Mourant Ozannes' Insurance Risk Group has a wealth of experience in relation to all insurance based litigation and will be happy to discuss the case with you and give advice as to the best way to proceed.

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