FOIL
FORUM OF INSURANCE LAWYERS

the VOICE of FOIL

Informing Progress - Shaping the Future

SPOTLIGHT

In this edition, we explore the interconnected themes of fraud and disruptive technology.

FOIL
FORUM OF INSURANCE LAWYERS
the VOICE of FOIL
Informing Progress – Shaping the Future

Publisher

Forum of Insurance Lawyers (FOIL)
1 Esher Close
Basingstoke
Hampshire
RG22 6JP
www.foil.org.uk

Editors

Editor in Chief –Stratos Gatzouris, DWF

Assistant Editor – Dr Jeffrey Wale, FOIL

Guest Editor – Ian Thornhill, FOIL

Thanks also to our guest contributors: Paul Redington of Zurich; Scarlett Milligan of 39 Essex Chambers and Chris Kennedy KC/Matthew Snarr of 9 St John Street.

Future Editions

If you are interested in contributing material to a future edition of the Voice, please contact info@foil.org.uk

Disclaimer

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.

In this Edition

Welcome to the August 2024 edition.

Stratos Gatzouris (DWF and Editor in Chief)

Jeffrey Wale (FOIL Technical Director and Assistant Editor)

Welcome to the August 2024 edition of the Voice. First, we would like to express thanks to Ian Thornhill, for his work as the guest editor on this edition.

As we digest the outcome of the General Election and the recent King's Speech, FOIL is undertaking its annual review of strategic priorities and planning for the Annual General Meeting and President's Conference in London on the 21 November 2024 (see page 4). We would encourage members to attend both important calendar events.

Looking to the present and the future, we explore two interconnected claims related themes: fraud and disruptive technology. We are all familiar with cyber-enabled crimes where conventional offences like fraud are undertaken using technology (computers, networks etc). There are also cyber-dependent crimes where an offence can only be committed using technology. Often technology is both the tool and target of the crime. These offences typically operate against the integrity and availability of data, systems, networks. We also have cyber-supported crimes where the technology is an incidental element of the offence but provides evidence of the crime (e.g., location information on a mobile phone).

London FOIL explores the emerging problem of ghost broking - where insurance policies are marketed where they either don't exist or are invalid. Paul Finn considers the use of AI powered tools to develop deep and shallow fakes, with a view to making a fraudulent gain or causing a fraudulent loss. In both examples, the fraudsters often target vulnerable members of society as their potential victims.

Sticking with the fraud theme, we also have various guest contributions in the edition, including a case spotlight on a recent and substantial fundamental dishonesty claim (*Shaw v Wilde*) by Chris Kennedy KC and Matthew Snarr of 9 St John Street (a FOIL sponsor). We also have a Scottish case example of a finding of insurance fraud in a staged RTA scenario (*Arif Khan v AXA Insurance UK Plc and Mohammad Arshad*) by Kate Donachie of Brodies.

Further building on the theme of disruptive technology, we have contributions addressing developments and issues around lithium-ion batteries and automated vehicles. There is a conversation with Paul Redington of Zurich looking at loss prevention and mitigation in property claims, which alongside other matters considers the problem of rechargeable battery technology. FOIL Technical Author, Paul Finn, also explores the broader challenges and possible responses to battery technology from a legal and insurance perspective.

In addition to our usual updates and media information, we also have a comprehensive review of the UK's Automated Vehicles Act 2024 from Scarlett Milligan of 39 Essex Chambers (a FOIL sponsor).

We hope that you enjoy reading the content and look forward to receiving your ideas and contributions for the next edition of the Voice.

Stratos and Jeff

FOIL - the Forum of Insurance Lawyers

@FOILlaw

Notice of FOIL Annual General Meeting

AGM OF THE FORUM OF INSURANCE LAWYERS

The FOIL AGM will be held on **21st November 2024 at 12:00**. This will be an in-person event at the offices of **DAC Beachcroft**, The Walbrook Building, 25 Walbrook, London EC4N 8AF and will be followed by the President's Conference.

Please provide nominations for election to the national committee to FOIL secretary Stratos Gatzouris via sarah.higgs@foil.org.uk or send by post to 1 Esher Close, Basingstoke, Hampshire, RG22 6JP.

The closing date for nominations is **22 August 2024.**

If you would like to attend the AGM please click here to add the event to your diary.

FOIL President's Conference 2024

"NAVIGATING THE NEW NORMAL" SAVE THE DATE

Thursday 21st November 2024 1.00 – 4.30pm

In person only at
DAC Beachcroft – The Walbrook Building, 25 Walbrook
London EC4N 8AF

To mark the end of Pete Allchorne's year as FOIL President, we would like to invite you to a conference of debate, vision and insight exploring topical issues and looking forward to 2025.

Our speakers will include the Rt Hon the Lord Hunt of Wirral, the Rt Hon Charles Clarke and Mark Shepherd, Assistant Director, Head of General Insurance at the ABI who will consider the priorities and policies for the new government, and the implications for the insurance sector.

Further speakers will be added and the final line up confirmed shortly.

The discussion will be followed by a drinks reception.

Spaces are limited, so please click here to register your place. We look forward to seeing you on 21st November.

Kind regards

Laurence Besemer F.C.I.I.
CEO - FOIL
Pete Allchorne
FOIL President and Partner, DAC Beachcroft

The President's Page

New technologies and nascent risks

Pete Allchorne (DAC Beachcroft Claims Ltd and FOIL President)

An ancient Greek philosopher once said that 'the only constant in life is change'. With the pace of the digital revolution and rapid advancements in the development of technologies in all walks of life – not to mention Artificial Intelligence and generative AI – never before has this phrase rung true to such an obvious degree.

The increase in the use of lithium-ion batteries represents a key challenge for products and liability insurers alike. Whilst this type of battery technology has been used for some time to power a wide variety of small items including smart watches, laptops and even pacemakers, it is now being used to power much larger devices such as Battery Electric Vehicles (BEVs). The drive towards net zero carbon emissions in the automotive industry means that over the next few years we will see an exponential increase in their use. This brings an increased propensity for fire risks, as lithium-ion cells are dense in energy and, where compromised, can cause a violent chain reaction of exothermic chemical reactions, known as thermal runaway. In simple terms, this causes extremes of temperature which, in turn release energy further increasing the temperature, often resulting in devastating fires that are not easily extinguished. The case of the Felicity Ace which sank in the North Atlantic Ocean in 2022 laden with 4,000 vehicles offers a stark reminder of the risks associated with BEVs.

Another emerging risk, also in the automotive industry, pertains to automated vehicles. The passing of the Automated Vehicles Act 2024 in May brings the likelihood of AVs on our roads, albeit in extremely limited settings and conditions, one step closer. This is, however, very much an enabling piece of primary legislation, and there is still much work to be done to ensure the safe and practical implementation of AVs, with emphasis on data sharing and cyber security at the fore. After all, these vehicles are, for all intents and purposes, computers on wheels and subject to the same challenges as your home PC. Recent examples of incidents from America involving automated vehicles act as a harsh reminder that these new technologies are still developing and are not infallible.

In this edition of The Voice, we explore the challenges surrounding lithium-ion batteries and automated vehicles further. We also examine the growing issue of ghost broking in the insurance sector, where technology is being used to manipulate and falsify documents for financial gain, but where it also has a part to play in detecting the fraud.

In Conversation - An Interview with Paul Redington (Zurich)

Property Claims – Prevention & Mitigation in An Evolving Risk Landscape

Paul Redington BA(Hons) ACII Chartered Insurer (Zurich Regional Major Loss Property Claims Manager, London/South East)

Paul Redington followed in his father's footsteps when he entered the insurance industry from University over 33 years ago, but his current role could not be more different from what it was back then. Paul says his employer Zurich has encouraged him to help mould it into the role he has today, which even includes assisting in lobbying politicians to try to help to prevent the kind of damage being wreaked on buildings and communities as a result of climate change. Paul is a Regional Property Major Loss Claims Manager and has been with the firm for 13 years, joining from AIG. He and his large loss colleagues focus on major losses caused by, for instance, storms or fires. He says that in recent years there have been more claims linked to the kind of serious weather events associated with climate change. The aftermath can be dramatic and traumatic for individuals and businesses, and Paul's job is to help them to recover.

In recent years Zurich has been focusing more on resilience and sustainability. Paul really enjoys this preventive side of the job and the drive to promote best practice. Part of his role involves supporting Zurich's Public Affairs team on such issues as building safety and flood resilience. He says Zurich has been in the vanguard of this more proactive approach. "Insurance is usually a fall back, to bail people out if major events happen, but we also want to help either prevent the damage happening in the first place or to mitigate its effects," he says. Should an event be the responsibility of another party the job also involves working with panel solicitors to seek appropriate redress.

One current area of focus is lithium-ion batteries (the subject of a recent FOIL webinar). These lightweight rechargeable cells are the choice for electronic equipment all around us; In the smart watches we wear, scooters and bikes we ride, cars we drive and phones that we use every-day. They have replaced single use batteries to become a more convenient & sustainable power source. However, Paul says that all Insurers are seeing a worrying increase in related fires. Most emanate during the charging phase, when devices are left unattended. The market is also seeing discarded vapes and other lithium battery products cause fires in waste lorries and waster transfer stations

Paul recently attended the parliamentary launch of a campaign by Electrical Safety First which called for legislation that would mandate a third-party safety assessment, conducted by a government-approved body, for all e-bikes, e-scooters, and their lithium-ion batteries before they enter the UK market. This process mirrors safety measures in place

for other high-risk products like fireworks and heavy machinery. Also, enhancing safe usage, charging, and storage practices for these devices. It includes setting standards for conversion kits and charging systems and considering a temporary ban on the sale of universal chargers that heighten fire risks. Finally, introducing regulation that ensures the safe disposal of lithium batteries once their lifecycle ends.

Paul says "In the past insurance was simply about issuing cheques to help people recover. Now we are increasingly about being a knowledge base and working with others, including legal partners, to be a force for change"

Lithium-Ion Batteries: New Regulatory Landscape and Insurance Implications

Paul Finn (FOIL Technical Author)

In Brief

- An overview of the risks and regulatory provisions associated with L-Ion batteries.

The proliferation of lithium-ion batteries across diverse sectors has ushered in significant advancements, yet simultaneously presented substantial new challenges for insurers and legal practitioners alike. As these power sources become increasingly prevalent in consumer electronics, electric vehicles, and energy storage systems, a thorough comprehension of the regulatory framework and potential risks is paramount for both sectors.

Current Regulatory Framework

At present, there exists no comprehensive regulatory framework specifically tailored to lithium-ion batteries in England and Wales. However, several extant regulations and standards are applicable:

1. The Electrical Equipment (Safety) Regulations 2016: These regulations transpose EU Directive 2014/35/EU into UK law and encompass the safety of electrical equipment, including devices powered by lithium-ion batteries.

2. The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019: In the post-Brexit landscape, these regulations ensure continuity of product safety standards.

3. BS EN IEC 62133-2:2017+A1:2021: This British Standard delineates safety requirements for portable sealed secondary lithium cells and batteries.

4. UN 38.3: Whilst not a UK-specific regulation, this international standard for lithium battery transportation is widely adhered to.

Notwithstanding these existing regulations, there is growing recognition of the necessity for more specific and comprehensive guidelines addressing the unique and substantial risks posed by lithium-ion batteries.

Recent Developments and Concerns

Several recent incidents have underscored the potential risks associated with lithium-ion batteries:

1. Fire Hazards: There has been a marked increase in fire incidents related to lithium-ion batteries, particularly in e-bikes and e-scooters. In response, certain UK train

companies have implemented bans on these devices within their networks.

Furthermore, there are momentous risks associated with lithium-ion car batteries and as demonstrated in several recent cases involving the cargo ship Genius Star XI, which experienced a fire of its cargo of lithium-ion batteries On December 25, 2023, the Genius Star XI reported a fire in its cargo hold while enroute from Vietnam to San Diego, carrying large industrial lithium-ion batteries. The ship was held at sea whilst authorities struggled to manage the fire and the operation took weeks to complete before eventually the ship could be safely released.

Another significant case involving a ship carrying electric vehicles and lithium-ion batteries in European waters is that of the Felicity Ace. In February 2022, the cargo ship Felicity Ace caught fire while transporting approximately 4,000 vehicles, including luxury cars from brands like Porsche, Audi, and Bentley, across the Atlantic Ocean. The fire started near the Azores, a Portuguese archipelago in the mid-Atlantic on February 16, 2022, and burned for nearly two weeks. Thankfully, all 22 crew members were safely evacuated from the ship.

However, the presence of electric vehicles with lithium-ion batteries on board significantly complicated and inhibited firefighting efforts, as the batteries continued to burn and reignite. Firefighting teams struggled to extinguish the blaze due to the intense heat and toxic fumes produced by the burning batteries. Despite attempts to tow the vessel to safety, the Felicity Ace ultimately sank on March 1, 2022, about 220 nautical miles off the Azores coast. The sinking raised concerns about potential environmental damage due to the fuel and cargo on board.

This incident highlighted the unique challenges posed by fires involving lithium-ion batteries in maritime transport and sparked discussions about the need for improved safety measures and regulations for shipping electric vehicles.

2. Product Recalls: The past decade has witnessed a sharp increase in product recalls across various industries due to lithium-ion battery safety concerns. A notable example of a product recall involving lithium-ion batteries is the Vanon Lithium-Ion Batteries recall in the UK. The Office for Product Safety and Standards issued a recall for several Vanon battery models due to a high risk of fire. Key points of this recall include:

Multiple battery models were affected, the primary hazard identified was the risk of fire due to inadequate Battery Management Systems (BMS) in the battery packs. This deficiency left the products vulnerable to overcharging, overheating, and ignition.

Additional issues included offload voltages exceeding the stated voltage on the rating plate and insufficient instructions for storage, disposal, and charging.

The products were also found to be non-compliant with the General Product Safety Regulations 2005.

Accordingly, as a corrective action, the products were recalled from end users. This case highlights serious safety concerns and the importance of proper management systems and accurate product information to ensure consumer safety.

3. Insurance Claims: Insurers have reported a significant increase in claims related to lithium-ion battery incidents. Some sources indicate a 440% surge in claims and a 900% increase in claim costs over the past three years.

Implications for the Insurance Sector

Accordingly, the insurance industry is grappling with several challenges:

1. Risk Assessment: Insurers are re-evaluating their risk assessment models to account for the unique and potentially significant hazards posed by lithium-ion batteries.

2. Policy Adjustments: Many insurers are contemplating or implementing changes to policy wordings, potentially including specific exclusions or endorsements related to lithium-ion battery risks.

3. Premium Adjustments: The increased risk profile may necessitate higher premiums for policies covering lithium-ion battery-powered devices or properties where such devices are utilised or stored.

4. Specialised Coverage: There is a growing demand for specialised insurance products tailored to lithium-ion battery risks, particularly in sectors such as electric vehicles and renewable energy storage.

Legal Sector Implications

The legal landscape is evolving rapidly in response to lithium-ion battery risks:

1. Product Liability: Legal practitioners are likely to observe an increase in product liability cases related to lithium-ion battery failures. This may involve complex supply chain investigations to determine liability.

2. Regulatory Compliance: Legal professionals will need to remain abreast of evolving regulations and standards to advise clients on compliance matters.

3. Contract Review: There may be an increased focus on reviewing and drafting contracts to clearly delineate responsibilities and liabilities related to lithium-ion battery risks.

4. Dispute Resolution: As claims increase, so too may the need for specialised dispute resolution services in this area.

Looking ahead, several developments are probable:

1. Enhanced Regulations: It is likely if not inevitable that more specific regulations addressing lithium-ion battery safety will be introduced in England and Wales.

2. Improved Standards: Industry standards for manufacturing, testing, and using lithium-ion batteries are likely to become much more stringent.

3. Insurance Innovation: The insurance sector will develop new products and risk assessment tools specifically designed for lithium-ion battery risks.

4. Legal Specialisation: Law firms may witness the emergence of specialised practice areas focusing on lithium-ion battery-related issues.

5. Technological Advancements: Ongoing research into safer battery technologies may help mitigate some current risks in the long term.

What does the future hold

The proliferation of lithium-ion batteries presents a multifaceted landscape of opportunities and challenges for the insurance and legal sectors. As these power sources become increasingly ubiquitous, the regulatory framework is rapidly evolving in an attempt to address the unique risks they pose, necessitating a proactive and adaptable approach from industry professionals.

For insurers, this paradigm shift demands a comprehensive reassessment of risk models and policy structures. The recent surge in lithium-ion battery-related claims underscores the urgency of this task. Insurers must innovate to develop specialised products that

adequately address these emerging risks, particularly in sectors such as electric vehicles and renewable energy storage.

Similarly, legal practitioners face the challenge of navigating an increasingly complex regulatory environment. As new standards and guidelines emerge, lawyers must stay abreast of these developments to provide accurate counsel on compliance matters. The rise in product liability cases related to lithium-ion battery failures is likely to necessitate specialised legal expertise, including in-depth knowledge of supply chain investigations and product safety regulations.

Collaboration between insurers, legal experts, and technology specialists will be paramount in addressing these challenges effectively. This interdisciplinary approach will be crucial in developing comprehensive risk mitigation strategies, refining policy wordings, and crafting robust legal frameworks that can adapt to the rapidly evolving technological landscape.

Accordingly, the ascendancy of lithium-ion batteries presents both opportunities and challenges as the regulatory landscape evolves and new risks emerge, professionals must remain informed and adaptable. Collaboration between insurers, legal experts, and technology specialists will be crucial in navigating this complex and rapidly changing area.

A Word from a Sponsor

On 20 May 2024 the UK's Automated Vehicles Act 2024 ("**the AVA 2024**") received royal assent. In this article, Scarlett Milligan of 39 Essex Chambers explains the key functions of the AVA 2024 and what the future holds for automated or 'driverless' vehicles on the roads of Great Britain.

The Road Travelled So Far: Where Were We Before the AVA 2024?

A comprehensive legal framework governing the use and regulation of automated vehicles ("**AVs**") has been some time in the making. In 2016, the UK's Centre for Connected and Autonomous Vehicles consulted on the challenges that AVs were likely to pose to the UK's existing vehicle safety and road traffic rules and regulations. The Government response to the consultation, dated January 2017, set out that the UK intended to take "*a step-by-step approach, and regulating in waves of reform*".

The first wave arrived in 2018, with the passing of the Automated and Electric Vehicle Act 2018 ("**the AEVA**"), which provided for insurers of automated vehicles to be directly liable to those who suffered losses because of an accident caused by an automated vehicle when driving itself on a road or other public place (under s.2 AEVA), with insurers able to reduce their outlay for contributory negligence of the claimant (s.3 AEVA) and/or recoup their outlay as against those that are responsible for the accident (s.5 AEVA). Those provisions of the AEVA came into force on 21 April 2021.

Beyond providing for a direct cause of action against AV insurers, the AEVA did not actually change the law that governed whether and when a driver (or 'user in charge'), manufacturer, or other party might be liable for an accident involving an AV.

Between 2018 and 2021 no further waves of reform came, but the Law Commission published three consultation papers concerning all manner of AV-related matters. The Law Commission's final report was published on 26 January 2022. Its comprehensive recommendations formed the basis of the AVA 2024, which began its life as a bill in the House of Lords in November 2023.

The AVA 2024 Explained: 10 Key Concepts

In the grand scheme of 'waves' of reform, the AVA 2024 is a big one: extending to 100 sections and six schedules, the AVA 2024 is a comprehensive framework for the regulation and roll-out of AVs in the UK. There are ten key features or concepts of the AVA 2024 that those interested in the development and roll out of AVs in this country – as well as those who practice in personal injury and/or product liability – need to be aware of.

1. **A new system of approval and authorisation for AVs**

Vehicles will need to be authorised and licensed for autonomous use in accordance with a procedure set out in forthcoming regulations (ss.11 and 13). The authorisation regime will apply whether the vehicle is fully autonomous or has discrete autonomous features (such as a self-parking mode) only. In addition to the AVA 2024 authorisation procedures, AVs will be subject to the well-established type approval process, which will be updated to include AV-specific standards under s.91 of AVA 2024.

The AVA 2024 will make it a criminal offence for false or misleading information to be given – or for relevant information to be withheld by – responsible organisations in support of an application for authorisation, or in respect of other information gathering provisions in the act (see ss.24-27 AVA 2024).

2. **AVs are to achieve a level of safety that is equivalent to, or higher than, careful and competent human drivers**

To be authorised under AVA 2024, AVs will need to be authorised under s.3 as having satisfied the self-driving test, defined under s.1(2) AVA 2024 as meaning that:

> *"(a) it is designed or adapted with the intention that a feature of the vehicle will allow it to travel autonomously, and*
>
> *(b) it is capable of doing so, by means of that feature, safely and legally"*

It is also likely that authorisation requirements will be contained within regulations made under section 5 of AVA 2024. Those requirements, and the general authorisations under s.3, will be informed by statutory guidance (a "*statement of safety principles*") that s.2 AVA 2024 mandates must be prepared and laid before Parliament by the Secretary of State.

This statutory guidance will be at the heart of the new regulatory framework. Section 2(3)-(4) AVA 2024 requires the Secretary of State to consult "*such representative organisations* [in relation to the interests of relevant businesses, road users, and the cause of road safety] *as the Secretary of State thinks fit*" on the content of the guidance. Those principles are, ultimately, required to prioritise the safety of AV use, with s.2(2) AVA 2024

mandating that the principles "*must be framed with a view to securing that-*

(a) authorised automated vehicles will achieve a level of safety equivalent to, or higher than, that of careful and competent human drivers, and
(b) road safety in Great Britain will be better as a result of the use of authorised automated vehicles on roads than it would otherwise be."

3. There will be clear boundaries of automation

Where an AV is authorised under s.3, the authorisation must clearly identify the feature(s) that the Secretary of State has determined satisfy the self-driving test (s.4 AVA 2024). In respect of each feature that satisfies the self-driving test, the Secretary of State's authorisation must specify:

"(a) whether the mode of operation of the feature is "user-in-charge" or "no-user-in-charge",

(b) how the feature is engaged and disengaged, and

(c) the locations and circumstances by reference to which (in the opinion of the Secretary of State) the vehicle satisfies the self-driving test by virtue of the feature."

An authorisation should, therefore, make clear to users in charge what an AV's automated capabilities are, the limits of those capabilities, how to engage and disengage them (including the relevant 'transition demand', by which the vehicle will request the user in charge to assume control of the AV) and where the feature can be used (whether by reference to situations such as parking, road types such as motorways, or geographical locations, for example, where the road infrastructure enables data to be provided to the AV).

4. Clear transitions between automation and human control

Where AVs require control to be handed back to the user in charge, the Secretary of State must impose authorisation requirements that are designed to secure the requirements set out in s.7(3), namely:

"(a) the transition demand will be capable of being perceived by anyone who might legally be a user-in-charge of the vehicle (having regard in particular to users-in-charge with disabilities),

(b) the transition period will be long enough for the user-in-charge to prepare to assume, and assume, control of the vehicle,

(c) the vehicle will continue to travel autonomously, safely and legally during the transition period,

(d) equipment of the vehicle will make a further communication at the end of the transition period to alert the user-in-charge to the ending of the period, and

(e) the vehicle will deal safely with a situation where the user-in-charge fails to assume control by the end of the transition period."

As commentary on AVs has repeatedly explained in the years since the AEVA 2018, one of the most concerning aspects of AV use for road safety is the interplay between automation and human control: in a situation where the user in charge is not actively engaged in and controlling the driving task, their awareness and ability to

re-take control of the AV safely is compromised.

The regulation of the transition demand and the transition period under s.7 AVA 2024 seeks to minimise and mitigate the most dangerous aspects of these transitions (where, for example, an AV encounters an unknown road environment, or is otherwise unable to continue the driving task, and hands over control to the user in charge at short notice). Instead, authorisation requirements will limit transitions to well-defined and safe situations, where an AV will be able to control itself safely in the event that a user in charge fails to re-take control. In practice, this is likely to require AVs to operate to an extremely high standard and level of automation before being authorised for automation.

5. Clear bounds of liability for an AV's automated functioning

The clear delineation as between a vehicle's automated driving and that of its user in charge is reflected in, and gives the benefit of, clear lines of liability: where an authorised automated feature is engaged, the user in charge will not be held responsible – whether for criminal offences or in civil law – for the actions of the AV (ss.47-49).

The user in charge is, however, still responsible for remaining in a position and state to control the AV further to a transition demand and will be responsible for any acts amounting to criminal offences or giving rise to civil liability once the transition period has ended, unless those acts arise from the AV behaving unpredictably and in breach of the authorisation requirements concerning transition made under s.7 AVA 2024.
In this sense, the AVA 2024 promotes a system where automated features can be relied on as automated, as opposed to a 'halfway house' whereby users in charge are expected to scrutinise and intervene in an AV's driving. This, combined with the type approval and authorisation requirements explained above, results in the system of regulation under the AVA 2024 intending to authorise only truly 'automated' features of AVs.

6. When 'driverless' really means 'driverless': restrictions on marketing

A regime that places criminal and civil liability on the AV when operating an automated feature requires there to be clarity as to what an AV can and cannot do in its automated capacity. In addition to the requirement under s.4 AVA 2024 that an authorisation must clearly specify the bounds of automation, sections 78 and 79 of the AVA 2024 gives the Secretary of State a power to place restrictions on how automated features may be marketed to consumers.

Section 78 enables the Secretary of State to make regulations that specify certain "*words, expressions, symbols or marks*" are appropriate only for use in connection with authorised AVs, and making it a criminal offence to use those terms in respect of vehicles not so authorised. The terms "driverless" and "self-driving" are likely to be candidates for such restrictions.

Similarly, it will be a criminal offence under s.79 AVA 2024 to make a communication in connection with the promotion or supply of a product or service that "*would be likely to confuse end users of road vehicles in Great Britain as to whether a vehicle that is not an authorised automated vehicle is capable of travelling autonomously, safely and legally on roads or other public places*".

Amidst widespread and worldwide reports of AV users mis-understanding the boundaries of an AV's capabilities, at times in reliance upon marketing materials that failed to clearly lay down those boundaries, these restrictions are an important and welcome aspect of the new regulatory regime. It will be important for these powers to be exercised swiftly and comprehensively to have any meaningful effect. The AVA 2024 provides that the Secretary of State may apply for a civil interim and/or final injunction preventing the use of such communications and restricted terms (see paragraph 4 to Schedule 5), but it is also likely that such restrictions will be enforced via regulations made under the AVA 2024 and as conditions of authorisation under the Act.

7. Remotely operated vehicles can be authorised, although subject to additional regulation and authorisation

Typically, AVs will continue to have a user-in-charge on board within the vehicle, at least in the initial waves of AV technology. However, the AVA 2024 envisages and provides for AVs to be operated remotely, by a licensed no-user-in-charge ("**NUiC**") operator, subject to additional requirements set down in regulations pursuant to s.12 AVA 2024. In the event that those AVs are operated as an automated passenger service, they will also require a permit (see s.82 AVA 2024), which presents another layer of safety-focused regulation.

Section 12 AVA 2024 envisages that regulations will specify that NUiC operators "*should have general responsibility for the detection of, problems arising during a no-user-in-charge journey overseen by the operator*" and, as with authorised self-driving entities (discussed below), NUiC operators must be of good repute and financial standing, and "*capable of competently discharging any authorisation requirements imposed on it*".

8. The role of the 'Authorised Self-Driving Entity'

For each AV given authorisation under the AVA 2024, a person must be designated as the 'authorised self-driving entity' ("**ASDE**") in respect of the vehicle. Section 6 of the AVA 2024, which introduces this requirement, states that regulations shall be designed to secure, so far as reasonably practicable, the following objectives:

> *"(a) that an authorised self-driving entity should have general responsibility for ensuring that an authorised automated vehicle continues to satisfy the self-driving test by virtue of its authorised automation features, and*
>
> *(b) that an authorised self-driving entity should be—*
>
> > *(i) of good repute,*
> >
> > *(ii) of good financial standing, and*
> >
> > *(iii) capable of competently discharging any authorisation requirements imposed on it for the purposes of paragraph (a)."*

Those requirements ensure that the safety of AVs, and their compliance with stringent regulatory requirements, is the responsibility of – and can easily be placed at the door of - a well-resourced legal

person (whether the manufacturer, software producer, or other appropriate party). The aim of introducing an ADSE is the swift actioning of any safety or enforcement issues, as well as any co-operation with the Secretary of State of AV Inspectorate (see item 10 below), without any wrangling as to the precise cause of, and the legal responsibility of, those issues.

Whilst the identification of an ADSE also has the benefit of ensuring that those who suffer injury or loss as a result of the operation of an AV have an easily identifiable and well-resourced entity to have recourse to, in reality the operation of s.2 AEVA 2018 will mean that insurers are likely to be the first port of call for individuals who suffer injury or loss, with insurers pursuing, in turn, an ADSE or other liable party pursuant to section 5 AEVA 2018.

9. The Secretary of State's enforcement and remedial powers

Separate from, and additional to, civil causes of action concerning AV accidents, the Secretary of State will have a power to issue redress notices where regulatory requirements are not met or an automated vehicle has committed a traffic infraction (anything that, if an individual were in control of the AV, would amount to an offence or give rise to a penalty charge, see s.44 AVA 2024) and "*as a result, users of roads in Great Britain have suffered loss, damage, inconvenience or annoyance*" (s.35). Traffic infractions will be the responsibility of the AV, unless "*wholly caused by a failure of a licensed no-user-in-charge operator to comply with a requirement under operator licensing regulations*"

Ultimately, the Secretary of State may vary, suspend or withdraw an AV's authorisation (see s.8 AVA 2024) where an authorisation requirement is not met or has not been met, an AV has committed a traffic infraction, or the AV no longer satisfies the self-driving test in respect of all authorised locations and circumstances. Whilst taking such action under s.8 will ordinarily involve the ADSE being given an opportunity to make representations prior to any withdrawal, suspension or variation taking effect, the Secretary of State will have the power to urgently suspend or vary an AV's authorisation at the same time as seeking the ASDE's representations where the Secretary of State considers that the need to suspend an authorisation is "too urgent" (see paragraphs 1-2 of Schedule 1 AVA 2024)

10. Annual Monitoring of AVs and the Establishment of an AV Inspectorate

The AVA 2024 contains a number of powers that enable information to be obtained from ADSEs and NUiC Operators by the Secretary of State and for premises to be investigated (see, in particular, Chapters 3-4 of the AVA 2024). Plainly, that safety information will be central to an effective authorisation system of AVs, but it is also likely to inform the Secretary of State's remedial orders (see item 9 above) as well as national monitoring of how AVs are performing as compared to the safety principles. Two particular forms of monitoring are noteworthy.

First, under s.38 AVA 2024, the Secretary of State must put in place an effective and proportionate system for monitoring and assessing the general performance of AVs, which must look in particular at AV performance as against the statement of

safety principles under s.2 AVA 2024, and report his or her conclusions on an annual basis. The Secretary of State must also make arrangements to identify the occurrence and causes of "*relevant incidents*", which are defined as involving an AV on a road or public place which "*reveal grounds for enquiring into whether any of the enforcement powers has become exercisable as a result of the incident*" (s.39).

Second, s.60 AVA 2024 makes provision for the mandatory appointment of civil servants as inspectors of automated vehicle incidents, whose main purpose is the "*identifying, improving understanding of, and reducing the risks of harm arising from the use of automated vehicles on roads in Great Britain*" and, like other independent inspectorate bodies, has no role in establishing blame or liability for particular incidents (s.61), though may investigate those incidents for the purpose of determining their cause (s.62) and for reporting to the Secretary of State accordingly (s.68 and s.72). The inspector has powers to require information, items, or materials to be provided to him/her (s.63) as well as powers of entry and seizure (s.64) and other forms of assistance that may be provided pursuant to regulations made under the AVA 2024 (see ss.63(2) and 70).

The Future of AV Law: What Does the Road Ahead Hold?

First and foremost, the substantive provisions of the AVA 2024 need to come into force: they will come into force on a day that the Secretary of State so appoints under secondary legislation: see s.99(1).

Thereafter, many of the Act's key features and provisions require regulations to be made or, in the case of the statement of safety principles under s.2 AVA 2024, statutory guidance to be issued. Both the statutory guidance and the vast majority of the regulations to be made under the AVA 2024 require representative organisations to be consulted. Against the dynamic backdrop of rapidly evolving automated technology and artificial intelligence, those provisions seem entirely sensible and worthwhile. They will, however, inevitably introduce a delay to the roll out of the substantive features of the AVA 2024.

What is clear is that the safety of AVs is the core and overriding principle of the regulatory framework. One of the likely side effects of those high standards is that vehicle features will need to be automated to a high standard to be authorised under the regime, removing the cause of much of commentators' anxiety in respect of transition periods and user in charge monitoring of AV driving.

In announcing the royal assent of the AVA 2024, the Transport Secretary issued a press release stating that automated vehicles could be on Great Britain's roads as soon as 2026. Whilst the framework of the AVA 2024 makes that possible, it remains to be seen whether the substantive foundations can and will be laid in automated vehicle technology, and in the framework for its approval, to see a wider range of automated features on our roads in a year and a half.

CASE SPOTLIGHT

Fundamental Dishonesty finding in a multi-million pound personal injury claim: *Shaw v Wilde* [2024] EWHC 1660 (KB)

Chris Kennedy KC and Matthew Snarr (9 St John Street, Manchester) (9 SJS are FOIL Sponsors)

Background

1. On 27.6.24 His Honour Judge Sephton KC, sitting as a Judge of the High Court, dismissed the Claimant's claim in **Shaw v Wilde [2024] EWHC 1660 (KB).**
2. The Claimant sustained serious polytrauma orthopaedic injuries in a road traffic accident in June 2018. He suffered particularly severe injuries to his left wrist and to his right femur, and he was left with a permanently shortened right leg of between 31 – 42mm.
3. Prior to the accident the Claimant was a keen BASE jumper and outdoor pursuits enthusiast.
4. The Claimant had alleged that:-
   (i) He needed a stick to walk a maximum of 100 – 200 yards. He used to undertake hiking, climbing, sky diving and base jumping and had not been able to resume any of these activities.
   (ii) He required a pavement scooter and quad bikes (to access areas for off-road sporting events).
   (iii) He required 30 hours care for life (He also made a significant claim for loss of services a nanny).
   (iv) He needed an adapted automatic motorcar.
   (v) He required single-storey accommodation.
   (vi) He required business class flights for all travel.
5. The Claimant disclosed a day in the life video in which he demonstrated significant restrictions in particular a practically immobile left arm. He relied on a walking stick in his right hand.
6. The Claimant applied for an interim payment of £300,000, (he had previously asked for £1.5 million in correspondence). His application was supported by a statement from his case manager, a transport expert and his own statement along with a Schedule of Loss which valued the claim at £6.47 million (with future aids and equipment as 'tba').
7. The Defendant's evidence was that he was not as badly disabled as the material he relied on suggested. It therefore sent him correspondence to that effect and invited him to withdraw his application. He did not do so.
8. The Defendant subsequently disclosed its surveillance evidence which showed the Claimant walking without a stick further than he alleged he could, riding an electronic mountain bike to the shops and not using a mobility scooter when his evidence suggested that he did. The Defence was amended to allege fundamental dishonesty.
9. The Claimant contended the surveillance showed atypical isolated instances and did not represent the

true picture of his day to day life, he had miscalculated his ability to walk specific distances and he disclosed photographs of him using his mobility scooter.

10. At trial the Claimant called 19 lay witnesses to support his claimed level of pain and disability over the 5 ½ years since the accident. He contended that he was not seen doing anything that he had denied, his pain fluctuated and the extent of his activities were known to his treating rehabilitation team indeed they formed part of the treatment recommendations. The Claimant maintained his claims for care, equipment, transport, and accommodation. Importantly, as it turned out, he also alleged in a Reply that he had never been up a mountain on a mountain bike since the accident.

11. The Defendant relied on evidence that in fact the Claimant not only had been mountain biking but had cycled up Mount Snowdon. It obtained the Claimant's bank records which further demonstrated he had been abroad on several occasions post-accident to Italy (twice), Amsterdam and Poland. It also found social media evidence which suggested the Claimant had participated in base jumping activities, although these were denied by the Claimant and acquaintances with whom he was present who gave supportive evidence on his behalf. Some of the images showed the Claimant carrying a large backpack and a helmet in a known landing spot for BASE jumpers which the Defendant maintained were consistent with him having completed a BASE jump.

The Findings of the Court

12. The court rejected the Claimant's account of his mobility, inability to return to sporting activities, his care and transport needs and alleged requirement for business class travel. The court also rejected arguments that the Claimant's symptoms fluctuated and that he had miscalculated his distances.

13. The court found that the evidence in support of the Claimant's interim payment application was misleading and untrue. The judge did not accept the Claimant's defence that he did not realise he was advancing exorbitant claims because he had relied on his experts and his legal team to present his case. The court held that the Claimant had been climbing both indoors and outdoors and that he had gone up Snowdon on his electronic mountain bike and that he knew this when he signed his Amended Reply. The court held that the Claimant had carried out a BASE jump in 2022 despite his denial. The court held that the Claimant had already travelled abroad using economy class and that care claims advanced by his mother were significantly overstated. He knew he could drive an un-adapted vehicle.

14. The court held the Claimant would have been advised to consider carefully the case he was presenting in light of the Defendant's correspondence at the time of the interim payment application warning the Claimant that his case was overstated but that he chose not to set the record straight.

15. The Judge valued the claim at £1,230,145.60 (inclusive of interest).

16. The court held that the Claimant's dishonesty was more than mere exaggeration, which might be excused, and that the conduct was dishonest by the standards of ordinary people. The court considered that, but for the Claimant's lies, the case would have been relatively straightforward and would highly likely have settled after joint statements.

Substantial Injustice

17. The Claimant sought to argue that denial of compensation would amount to substantial injustice within the meaning of Section 57(2) of the Criminal Justice and Courts Act 2015 ("the 2015 Act").

18. The court rejected this argument and weighed up the issue of substantial injustice as follows:

(i) The court was obliged to dismiss the claim unless the Claimant persuaded the court he would suffer substantial injustice.

(ii) The loss of legitimate damages alone was not a sufficient reason to find substantial injustice would be occasioned to a claimant, see **London Organising Committee of the Olympic and Paralympic Games v Sinfield [2018] EWHC 51**.

(iii) It was helpful to consider the situation whereby a person was injured in a similar capacity to the Claimant but there was no solvent tortfeasor to sue.

(iv) The Claimant may be required to pay an interim payment of £150,000 which he had spent.

(v) The decision may result in an order for cost against the Claimant.

(vi) The Claimant may have incurred significant debts.

(vii) The Claimant had a limited earning capacity.

(viii) The Claimant had ongoing needs for care, assistance, and equipment albeit some support would be provided by the state. His basic needs will be met.

(ix) The blameworthiness and effect of the Claimant's dishonest conduct was relevant. He lied to experts. He was aware of the potential consequences of his dishonesty but despite this maintained the lie and was unrepentant.

(x) Rather than admit his error he persisted in his lies effectively gambling that his lies would not be found out or the court would excuse them. Accordingly, despite significant financial hardship to the Claimant it would not inflict substantial injustice upon him to dismiss the claim and he had only himself to blame.

Analysis

19. The following points emerge from this Judgment:

- This is the first reported authority in which a claimant has been found

to be entitled to a £million+ sum of damages but the claim has been rejected on the grounds of fundamental dishonesty.

- The highwater mark of the Claimant's case had been a Schedule of Loss during proceedings which valued the claim at £6.47M. Whether by reference to the damages claimed or the damages assessed as genuine the case of Shaw demonstrates the potential importance of meritorious allegations of fundamental dishonesty and that catastrophic injury claims are not immune from such arguments.
- The multiplicity of lay witnesses advanced by the Claimant was insufficient to persuade the court against making findings of dishonesty. Some of the witnesses gave the impression that they were partisan. Other witnesses had relatively brief encounters with the Claimant.
- The application of the substantial injustice test grants the court a wide discretion and it is for the Claimant to satisfy the burden to demonstrate substantial injustice will occur.
- **Shaw** reaffirms the decision in **LOCOG** that the loss of damages alone does not result in substantial injustice. The importance of **Shaw** is its application of that principle to a multi-million pound claim for damages.
- The comparison of a similarly injured individual by a non-solvent tortfeasor provides a useful yardstick to consider the issue of substantial injustice.
- The case management fees were reduced by 42.9%. The court was influenced by the fact that the case manager was a defensive witness who was very reluctant to accept of obvious conclusions. She was evasive in response to questioning about invoices for care during periods when the Claimant had been abroad. This is a recent example of a substantial reduction in case management fees following judicial unease as to the amounts claim in line with **Loughlin v Singh [2013] EWHC 1641 (QB).**
- The early correspondence from the Defendant warning the Claimant of his misleading evidence and providing him with opportunity to "set the record straight" was a touchstone in the litigation on which the Judge relied both in respect of his findings of fundamental dishonesty and whether or not substantial injustice was made out.
- The Claimant was denied permission to appeal.

20. The Defendant was represented at trial by Christopher Kennedy KC and Matthew Snarr who were instructed by Mike Pope and Ryan Hodgkinson of Keoghs LLP acting on behalf of Hastings Direct.

AI-Powered Deception: The Rising Threat of Tech Fraud in Law and Insurance

Paul Finn (FOIL Technical Author)

The insurance sector in England and Wales is currently grappling with an unprecedented surge in technologically driven fraud, particularly through the exploitation of artificial intelligence (AI) and advanced digital manipulation techniques. This evolving landscape presents significant challenges for claims management, fraud detection, and legal proceedings within the industry, necessitating a comprehensive reassessment of existing practices and legal frameworks.

Of paramount concern is the emergence of AI-powered fraud techniques, notably deepfakes and shallow fakes. Deepfakes, which utilise sophisticated AI algorithms to create synthetic media, pose a substantial threat to the integrity of claims evidence. For instance, fraudsters can fabricate convincing x-rays, CT scans, or even video footage to support fraudulent injury claims. Shallow fakes, while less technologically advanced, are equally pernicious due to their accessibility and subtlety, often evading detection by standard fraud prevention measures.

A recent case in Hong Kong, albeit not in the UK jurisdiction, illustrates the potential magnitude of AI-enabled fraud. In this incident, deepfake technology was employed to impersonate a company's CFO and colleagues in a video call, resulting in the fraudulent transfer of approximately £25.6 million. While this case pertains to corporate fraud, it underscores the potential for similar sophisticated schemes in insurance claims. The implications for the insurance industry are profound, as such technology could be used to fabricate entire claim scenarios, from accident reconstructions to witness testimonies.

In response to these emerging threats, insurers are enhancing their fraud prevention strategies by incorporating AI and machine learning technologies. These tools can analyse vast amounts of data to identify patterns and anomalies indicative of fraudulent activity. For example, AI could be utilised to examine the time an applicant takes to complete an online form, flagging potential fraud if answers are provided more quickly than humanly possible. Additionally, machine learning algorithms can cross-reference claims data with social media activity, identifying discrepancies that may indicate fraudulent behaviour.

The legal sector will need to adapt to these technological advancements in fraud detection and prevention. The courts are increasingly confronted with complex cases involving AI-generated evidence and sophisticated identity fraud schemes. Legal professionals will face the challenge of needing to develop expertise in digital forensics and to stay abreast of the latest technological developments in order to litigate these cases. This may involve understanding the intricacies of blockchain technology for verifying the authenticity of digital evidence or comprehending the nuances of AI-generated content detection methods.

Moreover, the regulatory framework governing insurance fraud in England and Wales may require revision to address the unique challenges posed by AI-enabled fraud. The current legal provisions, such as the Fraud Act 2006 and the Insurance Act 2015, may need to be interpreted more broadly or amended to encompass AI-generated fraudulent activities. For instance, the concept of "false representation" under the Fraud Act

2006 may need to be expanded to explicitly include AI-generated misrepresentations.

The case of ***Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*** **[2016] UKSC 45** established that the "fraudulent device" rule does not apply to collateral lies that are immaterial to the claim. However, with the advent of AI-generated evidence, the line between material and immaterial misrepresentations may become increasingly blurred, potentially necessitating a reassessment of this precedent.

Collaboration between insurers, law enforcement, and legal professionals is becoming crucial in combating insurance fraud. The Insurance Fraud Enforcement Department (IFED) is adopting a partnership approach to tackle issues such as moped crash-for-cash scams. This collaborative effort extends to sharing intelligence and best practices across the industry to stay ahead of fraudsters' evolving tactics. The creation of industry-wide databases and AI-powered fraud detection systems could significantly enhance the sector's ability to identify and prevent sophisticated fraud schemes.

As the insurance sector continues to digitalise, balancing fraud prevention with customer experience remains a key challenge. Insurers will need to implement robust fraud detection measures while maintaining frictionless, digital-first strategies that meet customer expectations for fast and seamless interactions. This may necessitate the development of new legal doctrines and precedents to address the unique issues arising from AI-enabled fraud in insurance claims.

The judiciary may need to develop new tests and principles to address the admissibility and reliability of AI-generated evidence in insurance fraud cases. For instance, the Daubert standard (derived from US case law requiring judges to scrutinise the science behind an expert's evidence), while not directly applicable in UK courts, could serve as a model for developing criteria to assess the scientific validity and reliability of AI-generated evidence. This could involve considerations such as the error rate of the AI system, peer review of the underlying algorithms, and the general acceptance of the technology within the relevant scientific community.

Furthermore, the use of AI in fraud detection raises important data protection and privacy concerns. Insurers must ensure compliance with the UK General Data Protection Regulation (GDPR) and the Data Protection Act 2018 when collecting and processing personal data for fraud prevention purposes. The recent case of **R (Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ 1058**, while focused on facial recognition technology, provides insights into the legal considerations surrounding the use of AI for law enforcement purposes, which may have implications for insurance fraud detection.

Accordingly, the convergence of AI, advanced technologies, and sophisticated fraud techniques is reshaping the insurance landscape in England and Wales. Legal professionals will need to be informed about these developments to effectively navigate the complex intersection of technology, fraud, and insurance law in the coming years. The industry faces the dual challenge of harnessing AI's potential for fraud prevention while simultaneously guarding against its misuse by fraudsters. This technological arms race will likely necessitate ongoing legal and regulatory adaptations to ensure the integrity of the insurance claims process in the digital age.

LONDON FOIL
FORUM OF INSURANCE LAWYERS
Informing Progress - Shaping the Future

Ghost Broking: A 21st century problem on the rise

Jordan Leech, Ben McHardy and Kathryn Wood (Kennedys) (on behalf of Fleur Rochester)

Ghost broking is a well publicised issue amongst insurers and brokers, most often associated with motor insurance policies.

Ghost brokers are not characters in a scary campfire story – they are fraudsters walking among us, who set out to sell cheap insurance deals where the policies either don't exist at all or aren't valid. Either way, the end result is that the consumer will not be provided with any form of legally valid insurance. Over the past few years, ghost brokers have been associated with targeting unsuspecting victims through social media and scam advertising.

Ghost broking in the motor insurance market

A ghost broker may present himself as a representative for a well known insurance company and will tempt his victim with the promise of cheaper car insurance.

Unlike a staged or contrived accident, the driver is often the victim. Not only is the driver out of pocket, but they can face criminal charges including driving without insurance, a fine or licence points.

Consumers and insurance companies are equally impacted by this type of fraud, with the insurance company forced to spend additional funds in investigation and defence and the consumer potentially facing uninsured losses and their premiums subsequently impacted.

Unsuspecting drivers are targeted and offered cheap car insurance deals and issued with what appear to be legitimate policy documents.

Young people who typically receive higher premiums than older drivers and those who do not speak English are particularly prone to target by a ghost broker. Elderly and less tech-savvy drivers may also be at increased risk.

In all the cases, the policy documents provided by a ghost broker are not worth the paper they are printed on.

Some scary stats

Major insurers have highlighted the growing risks of ghost broking. In November 2022, Aviva confirmed that ghost broking made up 15% of all policy fraud, whilst Insurance Age have confirmed a 143% rise in ghost broking referrals to the Insurance Fraud Enforcement Department of the City of London Police, measured year-on-year between 2021 to 2022.

The ghost broking issue remains prevalent in 2024 with the City of London Police's Insurance Fraud Enforcement Department serving nine cease and desist notices in February this year. This has resulted in 438 arrests, and asset seizures of circa £19 million.

Put simply, ghost broking is a risk to which insurers, policyholders and the general public alike must be alive.

Avoiding a run in with a ghost broker - advice to policyholders

- As with all things, if something seems too good to be true, it usually is
- Beware of brokers using only messaging applications, emails or mobile telephone numbers to contact you. A ghost broker will not want to be traced
- Ghost brokers will lurk on money savings websites or market saving websites
- Do not get your insurance from people on social media, cold calling or from introductions by others alone
- Do not take insurance from a business that is not regulated

The role of Artificial Intelligence (AI)

Looking ahead, rapid developments in AI are likely to increase instances of ghost broking, not least because the sophistication by which fraudsters dupe innocent members of the public will improve. Whilst it seems an insurmountable hurdle to tackle the ghost broking problem, hope is not lost.

The Online Safety Act 2023 received Royal Assent on 26 October 2023. By virtue of sections 38 and 39, providers of online content owe a duty to ensure that fraudulent content is swiftly removed, failing which providers could be liable for substantial fines.

Apart from increased online regulation, another bow in the arsenal will be further and increased education of the public at large. A YouGov survey commissioned by the Insurance Fraud Bureau confirmed that only 17% of people have heard of ghost broking. That is a staggeringly low number. Insurers can and should look to increase investment to ensure that the general public and their policyholders are aware of the ghost broking problem.

Informing Progress - Shaping the Future

Tomorrow's FOIL

Rebecca Barton (Forbes)

Tomorrow's FOIL in Brief

Tomorrow's FOIL was launched in 2012 to cater for lawyers at member firms with less than 5 years' post qualification experience. This division runs learning and social events, helping to build career long relationships with fellow practitioners and counterpart insurance professionals.

Since the last edition of The Voice in May, Tomorrow's FOIL has again been working hard at generating ideas on how we can reach out to people to gain interest in the world of insurance law.

We have held a further Mock Trial on 2nd July 2024, this time in Manchester, with the help of Nine St John Street Chambers. This was well attended, with about 36 attendees on the day. The event was very well received and when we spoke to the attendees following the event they all fed back that it was a very enjoyable event. Counsel took the lead in the trial and played the relevant parts, including witnesses. Performances were brilliant and they really took their roles seriously for this event, wearing wigs and gowns to really make the occasion better. Rebecca Barton, current Tomorrow's FOIL President and Ian Thornhill, FOIL Operations Manager, were both in attendance and managed to get some footage of the event. This is currently being edited and something should be being released on Social Media platforms as soon as, so keep an eye out for this.

Tomorrow's FOIL President, Rebecca Barton and FOIL's CEO, Laurence Besemer have completed a fireside chat recording for universities to try and show what interested and brought Rebecca to the world of insurance. This is to be potentially sent to universities and posted across the relevant social media platforms as a way of showing students and others who may be unsure about what area of law to go into what the world of insurance law can offer.

Laurence has also interviewed one of the new Partners at Forbes Solicitors, Sarah Davisworth, for the "So you want to be a partner" podcast series. Sarah was promoted to Partner in May 2024; she is a Chartered Legal Executive in the Insurance Team at Forbes. She has been with the firm for 20 years and has significant experience of defending Public Liability and Employers Liability claims. Once the podcast has been finalised you will be able to find it on the FOIL website at Tomorrow's FOIL Podcast – So you want to be a Partner - Forum of Insurance Lawyers (FOIL)

Tomorrow's FOIL are always keen to hear new ideas about how we can generate interest from the future generation of lawyers in this area of law. Please keep an eye on LinkedIn and other relevant Social Media platforms for content relating to the amazing world of Insurance Law.

Informing Progress - Shaping the Future

Injuries Resolution Board: mediation in Ireland

Martina O'Mahoney, Aoife Conway, with assistance from Ella Kelly (trainee) (Kennedys)

On 8 May 2024 the Irish Injuries Resolution Board's mediation service was extended for public liability along with employers' liability personal injury claims. According to Dara Calleary, Minister of State for Trade Promotion, Digital and Company Regulation, "this is part of the work of the government's Action Plan for Insurance Reform which set as a primary goal the enhancement and reform of the then Personal Injuries Assessment Board which has been achieved through the Personal Injuries Resolution Board Act 2022."

What is mediation?

Mediation is a form of alternative dispute resolution (ADR) introduced under the Mediation Act 2017. It provides parties with the option to resolve a claim outside of the court system and is a confidential and voluntary process. Mediation involves a mediator liaising with parties to reach an agreement. Mediators are accredited and independent and they are typically experienced litigators. If an agreement is not reached, the legal rights of the parties are unaffected and the matter can proceed through the court system.

Why mediate?

Time efficiency – mediation is often more time efficient than court proceedings as claims tend to be resolved at an earlier stage, and in some cases, pre-litigation. For example, Circuit Court claims generally take between 12 to18 months to resolve and High Court Claims can generally take over two years. The Injuries Resolution Board estimates the mediation process to be completed within three months.

(It is) Less expensive as it can save the legal costs of litigation.

The mediation process is confidential.

Legally binding agreements – a mediation agreement has the same enforcement as a court order.

Mediation is voluntary; all parties must consent.

Reform under the Personal Injuries Resolution Board Act 2022

The Personal Injuries Resolution Board Act 2022 introduced changes to the Injuries Board, now known as the Injuries Resolution Board. A welcome and notable change for insurers is the introduction of a new mediation service. Parties to a dispute will now be given the option of availing of mediation from the outset of the claims process. The Act was commenced on 14 December 2023.

Types of claims that can be mediated

The Injures Resolution Board currently provides mediation for employers' liability and public liability claims. It plans to expand the service to motor claims later in 2024.

Cost

There is no additional cost if parties opt into the mediation service provided by the Injuries Resolution Board. This differs from mediation that occurs after the commencement of proceedings, where there are a number of costs involved.

Assessment

If the parties do not wish to engage in mediation, they may proceed to decline or consent to assessment as usual. Should they also agree to mediation then mediation occurs first. If no agreement is reached, the claim proceeds to assessment.

Process

When applying to the Injuries Resolution Board, a claimant can opt into the mediation service. The respondent(s) will then be given the option to consent to mediation.

The Injuries Resolution Board have a panel of experienced mediators. They will generally communicate with both the claimant and respondent(s) over the phone. The parties involved do not have to directly communicate with one another. While parties do not need a legal representative for the mediation, they can choose to have one to either accompany or represent them.

If an agreement is reached, both parties must sign an agreement. A statutory 10 day cooling off period follows. After 10 days, if neither party has invoked the cooling off period, the agreement becomes legally binding. The Injuries Resolution Board will then issue an order to pay.

Parties can withdraw from the mediation process at any stage without impacting their legal rights. Should an agreement not be reached, the discussions during the mediation are confidential and cannot be used in later court proceedings.

Conclusion

The introduction of a mediation service by the Injuries Resolution Board is a welcome and positive step forward for insurers. It encourages a focus on alternative, voluntary and early resolution to claims without necessarily having recourse to an adversarial litigation system. Mediation at the Injuries Board stage can reduce legal spend, the life cycle of the claim and therefore the overall cost of the claim for insurers.

It may also be a preferred option for dispute resolution where the parties wish to maintain confidentiality over the terms of any agreement as opposed to the open and public nature of the courts.

The fact that the mediation service by the Injuries Resolution Board comes at no extra cost makes this a cost effective option for resolving claims where the parties wish to save both time and money.

[Also published on Kennedys' website]

A step in the right direction for fraudulent claims in Scotland?

Kate Donachie (Brodies LLP Solicitors and Chair of FOIL Scotland)

In *Arif Khan v AXA Insurance UK Plc and Mohammad Arshad* 2024 SC EDIN 18 the All-Scotland Sheriff Personal Injury court was content to find that the pursuer along with the second defender and other witnesses had staged an accident, and that they were complicit in perpetrating or attempting to perpetrate an insurance fraud.

The pursuer was a passenger in a vehicle being driven by Mr Tas. The vehicle was travelling on Dalkeith Road, Edinburgh. The second defender, Mr Arshad, pulled out of a side street without giving way to Mr Tas' vehicle and a collision occurred between the vehicles. There were also two passengers in Mr Arshad's vehicle. Following the accident, Mr Tas phoned Kwick Claims to recover his vehicle. The director of Kwick Claims was Mr Ifran, who the court found knew both the drivers and passengers in the vehicles involved.

While initially AXA Insurance admitted liability for the pursuer's accident, they subsequently withdrew indemnity under Mr Arshad's policy of insurance on the basis that they believed the accident was not genuine.

At proof, the pursuer's counsel submitted that the court could be satisfied that a collision had occurred given the evidence available. He submitted that any inference of fraud must be more consistent with fraud than any innocent explanation, and if such inferences are equally consistent with honesty, then the benefit of the doubt favours the pursuer. He submitted that there was no clear evidence to allow the court to conclude that the collision was staged, or that it was likely a dishonest claim had been made. Counsel instructed for AXA submitted that there were significant differences between what witnesses had said at earlier stages of the accident compared to what was said in parole evidence. It was submitted that the evidence of the witnesses allowed inferences to be drawn that they were involved in a fraudulent scheme.

Sheriff Nicol reached the "inescapable conclusion" that the pursuer along with others who took part in the road traffic collision were complicit in an insurance fraud. While the evidence was circumstantial, looked at as a whole, Sheriff Nicol considered that it strongly favoured that inference being drawn. Accordingly decree of absolvitor was granted in favour of AXA, and the action was dismissed as direct against the second defender, Mr Arshad. The issue of AXA's expenses was not addressed at proof.

This case is a positive step forward for insurers and representatives involved in the detection and prevention of fraudulent claims in Scotland. It shows that, although the concept of 'fundamental dishonesty' does not exist in Scotland, the All-Scotland Sheriff Personal Injury Court is prepared to reject claims on the basis of inferences of fraud alone, even where there is no direct evidence of fraud. Of course, each case will turn on its own facts. In this case, the court noted that the circumstantial evidence "strongly favoured" an inference of fraud being drawn.

What was not specifically addressed in the decision (presumably because an application to disapply Qualified One-Way Costs Shifting (QOCS) requires a written motion) is the issue of expenses following proof. One of the exceptions to QOCS protection is where the pursuer has made a fraudulent representation or otherwise acted fraudulently in connection with the claim or proceedings. Given the findings of the court it seems unlikely the pursuer will be entitled to QOCS protection and that expenses will have been awarded in favour of AXA Insurance.

Personal Injury Discount Rate

Dr Jeffrey Wale, FOIL Technical Director

Scotland

The Damages (Review of Rate of Return) (Scotland) Regulations 2024 were formally approved on 5 June 2024. These amend some of the factors used in reviewing the discount rate as per Schedule B1 of the Damages Act 1996:

- the index to be used for the impact of inflation is now the average weekly earnings (AWE) index.
- the standard adjustment for tax and investment expenses has increased to 1.25%.
- the period of investment has changed to 43 years. This change aligns Scotland with England, Wales and Northern Ireland.

The decision to utilise an earnings inflationary measure tends to over-inflate core consumption needs. The increase in the adjustment for tax and investment expenses is also a negative outcome for compensators.

Northern Ireland

The Stormont Assembly also voted to approve the Damages (Process for Setting Rate of Return) Regulations (Northern Ireland) 2024 on 17 June 2024. Again, these Regulations prescribe AWE as the measure of inflation and modify the adjustment for taxation and investment expenses to 1.25%. There is also an intention by the NI DOJ to review how Schedule C1 addresses the impact of inflation to provide more flexibility, but any amendment would require primary legislation in the future.

We must wait to see how these changes are translated in the ongoing statutory reviews in Northern Ireland and Scotland (as well as in the ongoing review in England and Wales which started on 15 July 2024).

Operations Update

Ian Thornhill (FOIL Ops Manager)

It's been another busy few months for me, including being the guest editor for this edition of The Voice.

As one of the themes of this edition is Lithium-Ion batteries, I thought I should start by mentioning our recent online Lithium-Ion battery event, entitled "Tomorrow's Energy, Today's Safety" which proved to be tremendous success with some great feedback. We had John Owen from the London FOIL Marine SFT and Barnaby Winkler from the Product Liability SFT providing an introduction of how Lithium-Ion batteries are prevalent in their specialist area. We then had Richard Heath from Hawkins giving us an insight into how Lithium-Ion batteries work and the issues investigating these types of fires, before Phil Clark from Tyne and Weir Fire and Rescue spoke on the problems they face fighting these fires. Each presentation was thought-provoking and intriguing with some fascinating pictures and videos to watch and it was interesting to note that all the speakers later told me that they had learnt something new from each other's presentation! If you missed the event, an edited version is available on the FOIL website on the following link:

https://www.foil.org.uk/event/tomorrows-energy-todays-safety-lithium-ion-batteries/

We have had a couple of other successful events recently including a well-attended event at Weightmans in London entitled "From Intent to Action; Managing D & O risks from D & I strategies" which concentrated on risks that Directors & Officers (D&O) must consider in the context of diversity and inclusion policies and practices. The event was chaired by Mark Huxley (Huxley Advisory), who was joined by Pamela Freeland (Weightmans), Nathan Penny-Larter (Beale & Co), Anna Manning (Yes You Coaching) and Bronwen Horn (Hiscox). This was very engaging event on a more conversational angle, and which encouraged plenty of questions from the audience.

Recently, as Rebecca Barton has previously mentioned, we ran a Tomorrows Foil Mock Trial event entitled "I'm sorry, I'll have to take your first answer – A tale of personal injury and dishonesty'" an event we had done before, but this time we took the event to Manchester where Nine St John Street Chambers very kindly hosted for FOIL. We had a very good attendance for this event and we even had a witness attend by video who had rehearsed to ask for a break in the proceedings to attend to their shopping delivery! This, of course, was firmly denied! We have recorded the event as we look to take our first steps onto Instagram and Tick Tok, building on our increased presence on X and LinkedIn, where we now stand at 894 followers on LinkedIn and 1398 on 'X' as I write this. We are hoping to achieve our magic number of 1,000 for LinkedIn by the end of year, so if you are reading this and not a follower yet, please use the QR codes at the end of this article to follow us.

The website development continues to gather pace. Having looked at many different options as to how we can update the website, we have now agreed all changes and the developers are now working on all the updates. The new changes will be in force sometime very soon and we hope you like the new look. I am particularly looking forward to seeing a fresh new look and an updated Trade and Industry page to make it easier to use as reference guide for all our members, as well finding out about each firm in more detail.

Finally, from me, just a word of thanks to everyone who participated and donated money to the Presidents Charity, Kintsugi Hope, at our Golf event on 24th May at the Warwickshire Golf Club, (photos overleaf). We were lucky with the weather on the day with no rain and just a bit of cloud and sun to make conditions ideal for the golfers. We had 8 teams of 4 participating from DAC Beachcroft (3 teams), Kennedys (2 teams) and one team each from DWF, Clyde and Co and Forbes. The competition was run on a Stableford basis with a couple of extra competitions including 'Beat the Pro' which proved popular with three of our golfers going on to beat the Pro, and with Kennedys taking the two top places in the main event. Thank you to everyone who attended for participating in the raffle and thanks to DAC Beachcroft for donating some of the prizes. We managed to raise £689 for the President's charity.

We are presently working on another fund-raising event which will be a Quiz night in Manchester. More details will follow in due course.

X

LinkedIn

Charity Golf event photos

(May 2024)

FOIL in the Media (May - August 2024)

FOIL members regularly contribute to external media publications. Here are the contributions over the last quarter:

The Global Legal Post featured insights from **Dr Jeffrey Wale, FOIL Technical Director**, on the CJC's terms of reference for reviewing third-party civil litigation funding. (3 May 2024)

Pete Allchorne, President of FOIL, of DAC Beachcroft shared his insights on the rising car insurance premiums in an article featured in **Insurance Times.** (10 May 2024)

Jeffrey Wale, Technical Director of FOIL discussed the implications of changing the law to make it easier for organisations to apologise in **Insurance Post**. (10 May 2024)

Pete Allchorne, President of FOIL, of DAC Beachcroft appeared in **Claims Magazine** where he provided his expert opinion on why car insurance premiums are rising. (15 May 2024)

Insurance Day published a contributed piece from **Emma Fuller, Motor SFT, of DAC Beachcroft, Nicola Critchley, FOIL Past President, of DWF, Glyn Thompson, Motor SFT, of Horwich Farrelly, and Jeffrey Wale,** reflecting on whiplash reforms in the UK. (17 May 2024)

Niall McLean, Environment SFT, of Brodies, and Sarah Keir, of Brodies contributed their joint expertise to **Insurance Day**, discussing the lessons to be learned from the challenges to the UK's net zero strategy. (22 May 2024)

Global Legal Post published **Paul Finn's** thoughts on the likely impact of the new SRA budget on law firm members and its justification. (30 May 2024)

Alec Cameron, member of the Forum of the Insurance Lawyers and Legal Director at Birketts explored whether the "real Martha" Fiona Harvey stands a chance in suing Netflix over its Baby Reindeer series in **The Metro**. (8 June 2024)

Lesley Allan, FOIL Public Sector and Blue Light SFT, of Kennedys explained the potential impact of proposals to expand FOI laws to private and third sector bodies that provide public services Scotland in the **Solicitors Journal**. (17 June 2024)

Modern Insurance Magazine's most recent issue included a piece from **Pete Allchorne,** explaining why car insurance premiums rose by a third in just one year. (July 2024 issue)

Consultations and Reviews

Civil Justice Council Enforcement Working Group, Call for Evidence

The CJC has issued a Call for Evidence seeking views on a range of questions relating to the enforcement of domestic judgments. There are 40 questions, falling into four main categories:

a) The experience and awareness of enforcement

b) The supply of information about potential judgment debtors

c) The support provided for debtors

d) Possible improvements to the enforcement system

You can find the Call at the following Link. The deadline for responses is the 16 September 2024.

FOIL needs your help to formulate a response to this Call. Please complete the following survey by the **30 August 2024**: https://www.surveymonkey.com/r/FSS867T It should take you about 5-6 minutes to complete.

SRA Consultation: Financial Penalties – Further developing our framework

The Solicitors Regulation Authority (SRA) are seeking views on proposals to update the approach to financial penalties given new powers to issue unlimited fines for certain breaches of the SRA rules under the Economic Crime and Corporate Transparency Act 2023. Of note is the proposed fine banding for individuals and organisations. A key consideration is whether the proposals generate issues of fairness and duplicate punishment for any defaulting or offending party. There is also the question of alignment with other professional body sanction powers. You can find the consultations at the following Link.

The submission deadline is 20 September 2024. Again, if you have any feedback on the consultation, please Jeffrey.wale@foil.org.uk.

Trade and Industry Partners

FOIL is pleased to announce details of three firms that have recently joined our growing list of Trade and Industry Partners.

"*The ethos of FOIL resonated with Infoprotect UK, particularly with the increase in cyber related claims and the urgent need to push cyber security to the top of the agenda. This is especially important as the move to more digitalised processes continues at pace. Proactively making sure processes and transactions are secure has never been more important and we will support Laurence, his team and the FOIL membership however we can.*"

Brad Fraser, CEO, Infoprotect UK

"*In joining FOIL we've become part of a prestigious network of members dedicated to promoting best practices, shaping public policy, and championing the interests of the insurance and legal sectors,*" says Nuvalaw UK MD, Matt Jarvis. "*We at Nuvalaw look forward to contributing to FOIL's efforts and engaging with its dynamic community.*"

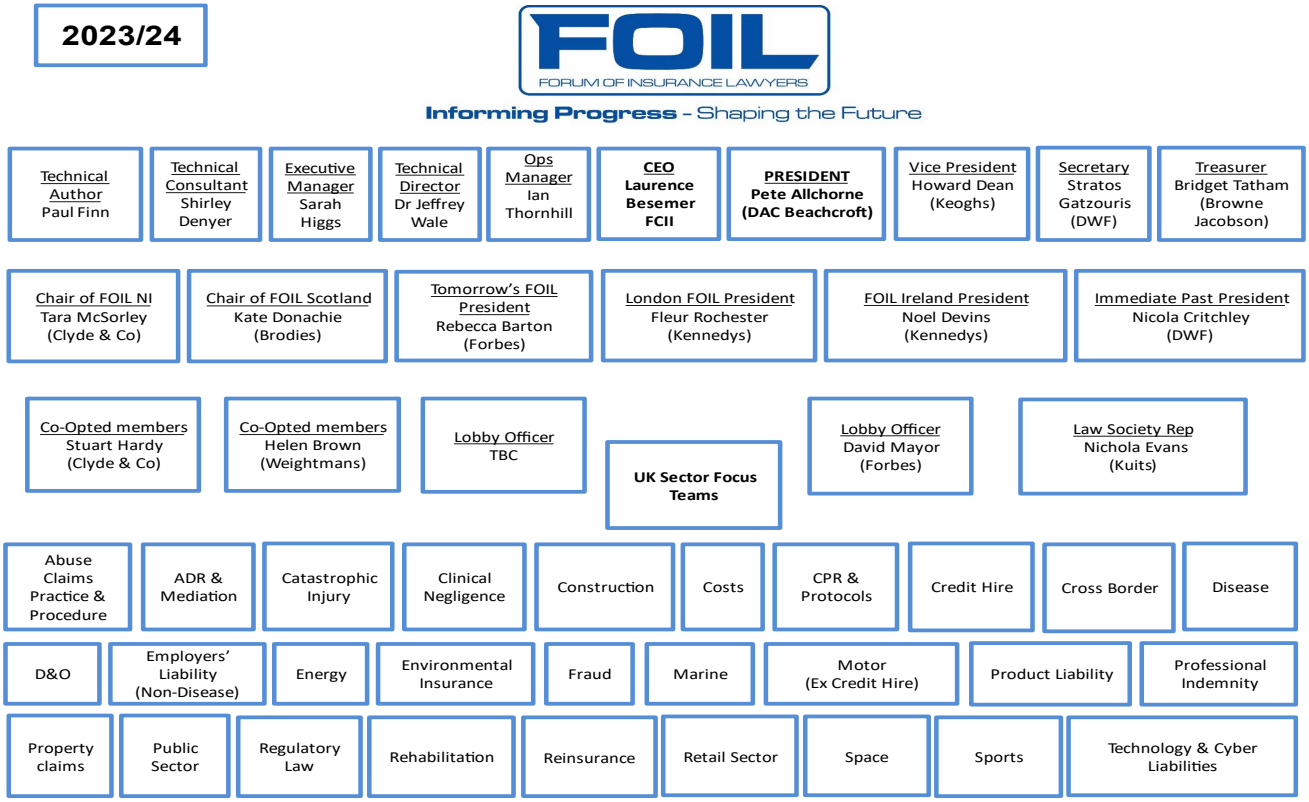
Matthew Jarvis, Managing Director, Nuvalaw UK

"*We are delighted to be joining as Trade and Industry partner and we look forward to the opportunity of working with FOIL members in the near future*".

Mary Medrana, Marketing, The Royal Buckinghamshire Hospital.

These three firms join our list of Trade and Industry Partners and you can find details on our website.

The FOIL Structure



FOIL Sponsors

FOIL is grateful for the continued support of our four main sponsors:

Disclaimer

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.

1 Esher Close

Basingstoke

Hampshire

RG22 6JP