



## **Informing Progress - Shaping the Future**

### **FOIL's Focus for 2021**

In the introduction to our 2020 agenda published late last year, we highlighted the prospect of a year of delivery and implementation of the huge projects expected to affect FOIL members and the insurance industry. Instead, we have had a year of change. We may have grown tired of references to “unprecedented challenge” and “the new normal” but, in reality, there is hardly an area of British life that has remained unaffected by the COVID crisis and it has been a time of seismic change.

We are clearly still some way away from a life not dominated by COVID but nine months into the crisis much of the fire-fighting has been done and attention is turning to the longer term impact of the changes we have seen, in our work life, in our relationships with clients, in the courts, and in the provision of insurance. 2021 will see a bulge of COVID-related claims in the ‘squeezed balloon’ of lower value claims. The scope and terms of commercial insurance will be re-evaluated.

FOIL has always aimed to work closely with the insurance industry, recognising that our members are involved heavily in understanding the business imperatives of the sector in which they work, and are trusted advisors to their clients. That role will be more important than ever in 2021, with the culture of business life in the spotlight, placing increased responsibility on business to understand and react to political and social priorities, particularly around climate change and issues of diversity and inclusion.

2021 will be a time of analysis: how should FOIL members, and the insurance industry it serves, react and respond? Which changes should stay and which should be treated as temporary? What can we learn from the enforced change of 2020, and how should that shape reform in the future?

Of course, the huge projects we had expected to form the focus for 2020 did not go away. Brexit, the implementation of the Civil Liability Act 2018, the extension of Fixed Recoverable Costs, will all loom large in 2021. AI and new technology have been given new impetus by the crisis.

## **A. The business world after Covid**

FOIL's work in 2021 will include working with the industry and members on:

- 1) how the legal profession and the insurance industry can become more resilient and reactive to the complex challenges and opportunities that have been highlighted by the 2020 pandemic;
- 2) how the profession can help the insurance industry build on its reputation as a vital part of the UK economy – providing cover that works for all, against a backdrop of rising stakeholder expectations.

Specifically, FOIL will design workstreams around;

- a. Climate change - physical, transition and liability risks.
- b. Social inflation – a changing claims landscape increasing balance sheet provisions and market stresses.
- c. New operating environment post Covid – focusing on what we can do differently.
- d. Employment and well-being - what the talent of the future will want from their employer.
- e. Transparency – policy wordings, contracts and regulation.
- f. Customer focus – better relationships, driven via better alignment of capital to customer needs, smarter use of technology and more efficient distribution.

This represents a new area of work for FOIL and our members. Investors, regulators, insurers and brokers are looking for demonstrable evidence of corporate conduct that truly reflects the responsibility of business in these areas of change.

By being at the forefront of these conversations FOIL and London FOIL will add value for our members and their clients.

## **B. Technical and legal focus**

FOIL's technical work in 2021 will include:

- 1) The transition period ending on 31 December following the UK's departure from the EU, with or without a trade agreement with our European neighbours, will give rise to a wealth of issues of law, regulation and legal procedure, affecting everything from motor insurance to procurement.
- 2) Information on the new On-Line Claims process for lower value RTA claims, arising from the Civil Liability Act 2018, has slowed to a trickle but, subject to a MOJ decision to the contrary, remains scheduled for implementation in April 2021.
- 3) Claims arising from COVID are already beginning to arrive in all sectors. Across the spectrum, from CMC-driven personal injury claims, to continuing issues around BI, FOIL members, insurers, regulators and the courts will be grappling with questions of liability.
- 4) The need to work remotely revealed the civil justice process to be ill-suited to a digital environment. The future of remote hearings, e-bundles, court systems, medical examinations, rehabilitation, and the CPR which provides the framework, are all open to change.
- 5) Lord Justice Jackson's Supplemental Report on Fixed Recoverable Costs, the last part of his proposed reforms is back on the MOJ's agenda, with the changes, including FRC on claims up to £100k, expected to be implemented in 2021.
- 6) In Scotland, with some of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 now in force, 2021 should see finally the implementation of perhaps the most significant part – QOCS.
- 7) In Northern Ireland, the DOJ will aim to put in place a new methodology for setting the discount rate, raising significant political and legal issues.
- 8) The work of the on-going Independent Inquiry into Child Sexual Abuse and the Grenfell Inquiry, is already having an impact on policy, claims and the insurance market, with the prospect of further significant change arising from the recommendations.

### **C. FOIL's development**

FOIL's strategic focus in 2021 will include:

**London FOIL** – building on the excellent reception that this new division has received from members and the London insurance market, working on a wide range of non-injury claims law, including reinsurance, marine and energy as well as climate change.

**FOIL Scotland** – increasing the influence and profile of this division of FOIL in Government, judicial and insurance circles in Scotland.

**FOIL Northern Ireland** – similarly increasing the influence and profile of this part of FOIL in Government, judicial and insurance circles in Northern Ireland.

**FOIL Ireland** – agreeing a mandate from the new members for this division and enhancing its place in a new market.

**Tomorrow's FOIL** – strengthening the appeal of this division of FOIL to lawyers with less than 5 years' PQE.

**Areas of insurance law** - further diversification into areas of non-claims insurance law such as policy wordings.

**Other areas of the insurance industry** – building business support relationships to help members and their clients in a radically changed post Covid environment.

**Training and Development** – launch of a qualification in insurance for lawyers, accredited by the CII.

## **Part A. The Business World after COVID**

### **Climate change - physical, transition and liability risks.**

The insurance industry is uniquely positioned to understand the risks that climate change imposes on economies and on society. This is because insurers play a dual role as risk managers - protecting society's assets - and as investors in the global economy.

The industry's mandate is to devise innovative risk-transfer solutions that minimise the financial consequences of uncertainty. In the face of climate change, such a mandate is now more relevant than ever.

As insurance lawyers, FOIL members can play a significant role in supporting innovative risk transfer by helping to develop smart contracts to support distributed ledger technology, producing clear wordings on parametric covers to close the protection gap in countries most challenged by climate change, innovating 'insurance on demand contracts' for the disrupted way we work now, and investing in technology to help lessen carbon emissions by reducing business travel.

### **Social inflation – a changing claims landscape is increasing balance sheet provisions and market stresses.**

It is not unusual today to see insurers defending \$100m plus professional liability claims.

Cases – often in the medical sphere - typically reflect arguments based in emotion rather than medical evidence, prejudicial accusations against medical staff, inflated life-care plans, spiralling legal fees and a claimant legal team alive to the possibility of creating division between defending insurers and reinsurers in different layers.

These issues combined with widespread involvement of third-party funded litigation are designed to exploit an erosion of trust in business in general, and in insurers' willingness to pay in particular.

This erosion of trust has been further exacerbated by the industry's response to Covid – which some have gone so far as to suggest raises an existential challenge for the industry.

Innovations from the legal profession, which help the industry perform its economic role well and cost -efficiently, are particularly important at a time when the casualty part of our industry is coming under sustained attack in the form of social inflation and FOIL will be playing a full part in helping to deliver innovation.

### **New operating environment post Covid – focusing on what we can do differently.**

FOIL will continue to adopt much greater use of technology to deliver more events per annum than has previously been possible due to the logistical challenges of hosting physical meetings. A hybrid programme of face to face networking opportunities (when possible) and efficient virtual business meetings and technical discussions will be deployed.

## **Employment and well-being - what the talent of the future will want from their employer.**

Businesses need the right people in the insurance and legal professions to manage the societal challenges posed by climate change and concerns for individual and collective well-being, and consider the role and impact of corporate policy on shaping behaviours now and in the future.

Employers need to attract and retain a broader and deeper talent pool to reflect their customer base and prevent 'group think'. They need to attract people from other industries into the market, people who can bring experience and fresh perspectives, who don't come from the same narrow demographic and who can challenge and change the status quo.

Diversity of thought and approach is what the industry, and our profession need now more than ever to respond to the unprecedented level of challenge and change which 2021 will bring.

The evidence for the value diversity brings is now compelling. It is now proven that companies with more diverse management teams have higher revenues due to innovation. This shows that diversity is not just a metric to be strived for; it is actually an integral part of a successful revenue-generating business.

## **Transparency – policy wordings, contracts and regulation.**

Insurers' caution over claims payment is calling into question the utility of the cover that the industry provides and causing industry associations and large corporates to ponder whether it is actually worth the price.

Older mutual or club models, and of course captives, have been a popular risk transfer solution for big businesses for many years and may present a more compelling choice going forward depending on how the industry responds to insured demands and legal challenges.

But concerns over insurers' willingness to pay are spreading doubt and disillusion among smaller businesses too – businesses that cannot afford not to have access to reliable industry-based risk transfer solutions to protect their balance sheet.

Against this backdrop of challenge and uncertainty, how can the industry restore its reputation as a vital part of the economic machine. Providing cover that works for all? Large and small? Corporate and individual? Making investments that protect our long-term future?

FOIL members will support closer and more transparent interaction in the form of clearer wordings, better product descriptions and improved efficiency in claims processing in order to support the reputation of the industry and its role in the UK economy.

**Customer focus – better relationships, driven via better alignment of capital to customer needs, smarter use of technology and more efficient distribution.**

Customer focus is going to be key. Better communication and more efficient distribution via smarter use of technology will help re/insurers build better relationships, drive better alignment of capital to customer needs.

Better protection of customer data is also a key industry priority. The industry has more to do in supporting the management of cyber claims and working effectively with regulators and information commissioners on the fair and equitable management of data breaches to ensure this does not become fertile ground for the claims shops.

## **Part B. FOIL's Technical and Legal Focus**

### **1. The challenges arising from Brexit.**

**With the negotiations on a trade deal seemingly certain to go to the wire, it is unlikely that there will be any real certainty on the UK's position before January 2021, resulting in the need to gather intelligence, analyse and predict the outcomes as far as possible before then. Once the position becomes clearer action will be needed to examine and react within a very tight timescale.**

- Monitoring the on-going negotiations and developments leading to 31 December.
- Consideration of the impact of the end of the transition period on UK law and regulation affecting insurers, the public sector and the claims industry.
- The impact of Brexit on the motor insurance sector.
- The identification of opportunities arising from Brexit to improve and reform the current legal and regulatory landscape.
- The complications thrown-up, as cross-border disputes become more complicated.

### **2. The reform of the claims process**

**With the rules and the secondary legislation setting out the detail of the new OIC still awaited, much work is still required, both inside and outside parliament, if the new process is to be implemented in April 2021. The proposals for the Online Court were already steering a path away from face-to face civil justice, a move which COVID has made unstoppable. The challenge comes in the detail: how does remote justice operate to ensure access to justice and a fair and efficient process?**

- Review and analysis of the pros and cons of remote hearings, remote medical examinations and remote rehabilitation, to enable full participation in the debate on reform.
- Lobbying for a standard process for remote hearings and the preparation of e-bundles.
- Reform of the CPR to reflect remote working and remedy the procedural shortcomings exposed by the COVID crisis.
- The development and introduction of the new OIC.
- The introduction of new Small Claims Track limits for RTA and EL/PL claims.
- The MOJ response on Part 2 of the whiplash consultation, including rehabilitation and credit hire.
- A new regime for lower value clinical negligence claims.
- Support for the Serious Injury Guide and the Rehabilitation Code.
- The effective defence of neurodegenerative claims.



- The problem of higher value claims in the portal, highlighted in *Cable v LV*.
- The use of existing and new methods of ADR, including ODR, to improve claims handling and cut costs in both low value and high value claims.
- The outcome of the CJC review of Pre-Action Protocols.

### 3. Tackling the ‘squeezed balloon’

**The claims management industry has shown itself adept at taking advantage of any change in the claims environment, demonstrated by the numbers of new CMCs registered in 2020 referencing COVID in their title. 2021 will see not only the potential for volume claims arising from the crisis but also the CMC industry response to the introduction of the OIC:**

- The potential for CMCs to dominate the OIC
- Additional injuries claimed alongside whiplash in the OIC
- The potential for the emergence of low value COVID claims
- The role of McKenzie Friends
- The implications of the introduction of QOCS in Scotland

### 4. Working closer with clients

**FOIL understands that legal reform does not stop at the court door. The ability to understand the implications of new legislation, case law and proposed reform, and translate that into the practicalities of a business environment, is a key skill for lawyers in helping their clients navigate the challenges created by change:**

- Ensuring that the defendant voice is heard in the reform debate, through effective participation in the organisations which bring about change.
- The introduction of the OIC
- The civil litigation regime after Brexit.
- The compulsory motor insurance regime after Brexit
- The recommendations of the Grenfell Tower inquiry and the implications for the construction and insurance industries.
- The potential for e-scooters to be legalised, and the arising regulatory regime.
- The legal and practical challenges presented by automated and driverless cars
- Outcomes from the Independent Inquiry into Child Sexual Abuse.

### 5. The control of legal costs

**Litigation at proportionate cost is a key issue in the effective handling of insurance-backed litigation. Fixed Recoverable Costs, costs budgeting, and a transparent and**

**effective costs assessment regime are essential elements in ensuring recoverable costs commensurate with the work required. In no other area is the principle of ‘the devil is in the detail’ more significant:**

- An understanding of the costs implications of process reform, including remote hearings.
- Mr. Justice Stewart’s CJC review of GHR.
- Support for and engagement with the MOJ’s implementation of Lord Justice Jackson’s supplemental report on the extension of fixed costs.
- The implications of the CJC report on vulnerable parties and witnesses.
- The extension of costs budgeting to mesothelioma claims
- The introduction of fixed costs in clinical negligence.
- Effective and proportionate development of e-billing
- Effective control of court fees.

## **6. The excessive cost of compensation**

**The Civil Liability Act 2018 is a major tool in tackling excessive compensation, which in turn leads to increased costs and the creation of an incentive for fraud. The problem remains to be tackled on a number of other fronts, including in the detail of the OIC regime:**

- Claims for additional injuries in the OIC.
- The challenge of COVID-related claims inflation in credit hire claims.
- Continued leadership of the cross-industry working group on rehabilitation in lower value claims.
- The increase in recoverable benefits brought about by Universal Credit.
- The establishment of a new methodology for setting the discount rate in Northern Ireland.

## **7. The challenge of technological change and innovation**

**The COVID crisis has changed the needs and expectations of consumers and workers for good, requiring insurers and their lawyers to respond. Technological solutions are driving government policy and business behaviour. 2021 is likely to see the acceleration of existing trends and the introduction and discussion of reforms unthinkable before the crisis:**

- The challenges of home working.

- An effective move to the delivery of remote civil justice.
- The growth of Online Dispute Resolution and ADR.
- The development and application of AI and digital processes.
- The legal and regulatory challenges presented by the likely legalisation of e-scooters and the continued development of autonomous and driverless vehicles.
- The development and growth of cyber cover.
- The use of technology to address insurance fraud.
- Meeting the needs of the millennial generation.
- The use of technology and medical advances to improve the outcome for claimants.
- The evolving nature of product risks.

## 8. Tackling fraud

**The identification and suppression of fraud is a prerequisite to a fair, cost-efficient claims environment. With fraudulent behaviour under constant change the COVID crisis presents new challenges:**

- The potential for fraud in CMC-driven COVID claims.
- Supporting the continued development and extension of MedCo.
- Deterring fraud in the OIC.
- Effective use of “fundamental dishonesty” provisions, to include exaggeration.

## 9. London market issues

**Whilst many of the subjects set out in 1-8 above impact the London market (and the addition of London FOIL seats on the established UK SFTs for Property, Construction, Professional Indemnity, D&O and Regulatory Law will bring the domestic and the London markets together in those spaces), there are numerous discrete subjects that affect the London market particularly.**

- Environment / climate change
- Decommissioning of an increasing number of unwanted / economically unviable ships in ways contrary to international law is causing damage to the environment, injury and death to workers and board level liabilities.
- The escape of water which costs more in claims payments than any other type of loss.
- US litigation trends expected to cross the Atlantic (e.g. opioids crisis)

## **Part C. FOIL's strategic Focus.**

### **1. London FOIL**

**Building on the excellent reception that this new division has received from members and the London insurance market, working on a wide range of non-injury claims law, including reinsurance, marine and energy as well as climate change.**

- Increasing the number of firms represented on the LF Executive.
- Identifying additional areas of interest unique to the London and Lloyds (Re) Insurance market and building SFTs to major on these subjects.
- Expanding and promoting the London Members' Library.
- Greater engagement with like-minded trade bodies through the Trade Bodies Association.

### **2. FOIL Scotland**

**Increasing the influence and profile of this division of FOIL in Government, judicial and insurance circles in Scotland.**

- Working alongside the Forum of Scottish Claim managers to establish a second independent defendant voice in the Scotland market.
- Supplying a more centralised admin and support service regime, especially for national SFTs.
- Bedding in the new role of Chair of FOIL Scotland ensuring that the local and UK wide activities of FOIL meet the expectations of members in Scotland.

### **3. FOIL Northern Ireland**

**Similarly increasing the influence and profile of this part of FOIL in Government, judicial and insurance circles in Northern Ireland.**

- Working to establish an independent defendant voice in the Northern Ireland market.
- Supplying a more centralised admin and support service regime, especially for national SFTs.
- Bedding in the new role of Chair of FOIL NI ensuring that the local and UK wide activities of FOIL meet the expectations of members in Northern Ireland.

#### **4. FOIL Ireland**

**Agreeing and acting on a mandate from the new members for this division and enhancing its place in the Ireland market.**

- Increasing the range of learning events delivered to members.
- Supporting the President of FOIL Ireland in the new ex officio National Committee role
- Creating a greater level of engagement as between FOIL UK and FOIL Ireland (both ways)
- Understanding the post Brexit environment in Ireland.

#### **5. Tomorrow's FOIL – strengthening the appeal of this division of FOIL to lawyers with less than 5 years' PQE.**

- The 2020 member satisfaction survey revealed that TF is little known amongst respondents, so we need to promote awareness of everything that this division offers.
- Finding ways to recreate the networking opportunities TF events used to offer.
- Adding a FOIL Ireland rep seat to the TF Executive.
- Establish a three-year succession plan for Vice President and President.

#### **6. Areas of insurance law - further diversification into areas of non-claims insurance law such as policy wordings.**

- Expanding FOIL's range of work beyond the traditional base of insurance claims law to include agency, underwriting and risk management.

#### **7. Other areas of the insurance industry – building business support relationships to help members and their clients in a radically changed post Covid environment. Corporate values and culture are now critical agenda items amongst all financial services organisations, including law firms and insurers.**

- Establish a working group to consider how change will affect service suppliers and purchasers and how FOIL members can work together with their clients to strengthen relationships, through responsible corporate behaviours. The Group will look at how conduct affects:
  - Climate change
  - Diversity & Inclusivity

- Wellbeing
  - Mental Health
  - Corporate Social Responsibility
  - Ethical practices
  - Citizenship
  - Social mobility
- The group will consider all areas of culture and values helping FOIL members to fully recognise the impact upon their own organisations as well as the sector more broadly. By extension this will heavily influence the relationships between our members and their instructing clients and associated regulators or governing bodies. The scope of this group will therefore extend to fully consider this area too.
  - We will actively engage with our members, the insurance providers, trade associations and other organisations with a vested interest in the subject. The Group will form a standing committee to create and steer the agreed strategies, supported by working groups convened to tackle specific issues”.

**8. Training and Development. With a business environment involving so much change, being well trained and well-informed has never been more important. FOIL will continue to support its members’ professional development and lifelong learning.**

- Effective continuing education and training for insurance lawyers.
- Embedding the principle of “working to the FOIL Standard” using the FOIL Statement of Competence and the Statements of Legal Knowledge.
- Adding to the number of Statements of Legal Knowledge to mirror the increased range of insurance claims law covered by our SFTs.
- Encouraging all insurers to see the FOIL Standard as a key differentiator for panel review and selection purposes.
- Launching a qualification in insurance for lawyers, accredited by the CII.

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