



UK flooding: the aftermath

January 2016

As the flood waters subside and residents, businesses, insurers and public bodies survey the damage and pick up the pieces, thoughts will turn to what, if anything, could have been done differently to have prevented or minimised the damage caused.

Some might think that water, rainfall and watercourses are natural, and that flooding is an 'Act of God' and therefore there is no one to blame when these catastrophic floods occur. To a certain extent, that may be true. However, it may not always be the case.

Where a flood is caused or contributed to by someone's act or omission, the possibility of liability arises and claims can be made in relation to flood damage and to recover at least some of the resultant losses. Therefore, insurers and their representatives should have this in mind when investigating and dealing with flood damage claims.

The estimated total pay-out from the insurance industry as a result of Storms Desmond, Eva and Frank in December 2015 and January 2016 is likely to reach £1.3 billion. The ABI have reported that the average pay-out per household is likely to be £50,000 (compared to £31,000 for the 2013/14 storms) and the number of individual claims made is nearly 15,000¹. KPMG have estimated that the economic impact of the recent floods will breach £5 billion.²

Once the emergency measures are in place, the insurance claims are progressing and insurers assess their likely outlay,

consideration can be given as to whether any losses can be recovered from the responsible party(s). Such an assessment is partly about recovering money for insurers, but it also has the benefit of highlighting the flood causes to the third party in the hope that they will take steps in the future to prevent the same thing happening again. This obviously helps those directly affected such as the insured.

The 'typical' potential defendants to consider are landowners, local authorities, engineers (and other professionals, including those involved in the design and construction of flood defences), public bodies, national governments and possibly also the emergency services. Often, the cause of the flood may be a combination of factors for which potentially a number of defendants may be liable.

The basis of liability for flooding in England and Wales is governed by tort, contract and statute. A claim in contract law will arise, if, for example, a property owner's obligations are supplemented by deeds, covenants or easements. Certain contracts, for example with water undertakers and the Environment Agency, may also allow a claim to be brought in contract. Statutes, in particular the Highways Act 1980 and the Water Resources Act 1991, may give rise to liability of public

Any comments or queries?

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1. <https://www.abi.org.uk/News/News-releases/2016/01/New-figures-reveal-scale-of-insurance-response-after-recent-floods>
2. <https://home.kpmg.com/uk/en/home/media/press-releases/2015/12/flooding-economic-impact-will-breach-5bn.html>

bodies as a result of the powers vested in them to provide or improve drains and watercourses to prevent or alleviate flooding. However, tort law is the most common basis for a flood damage claim.

A claim in tort for flood damage will be in negligence, nuisance and/or more rarely, the rule in *Rylands v Fletcher*. The usual principles of duty, breach, causation and loss need to be addressed. It is usually difficult for a defendant to argue that a duty of care does not arise and has not been breached in these circumstances. In each case, causation will be a key issue and save for the most straightforward example, expert evidence will be needed.

Causation issues such as whether there has been any interference with a watercourse (including creating or adopting a flood defence, or diverting a watercourse), whether the potential defendant (primarily in the case of public bodies and emergency services) has made a situation worse and whether the rainfall or storm was so exceptional that it would have happened in any event, will all be highly relevant and must be considered. The courts will also weigh up public policy considerations when dealing with public bodies (ie the likelihood of damage occurring versus the cost to the public purse of preventing it from occurring).

The fact that expert evidence (often in the form of flood modelling) is required and the fact that one claim on its own may be of a relatively low value should not be seen as a negative factor. Claims can be combined and insurers can join forces by co-ordinating the provision of legal and expert evidence. Also, expert evidence does not have to be overly complicated. If required, experts are able to construct sophisticated hydraulic modelling of the flood area to identify the cause and mechanism of the flooding, often using little more than publicly available documentation

and information – from local councils (plans and planning information), the Met Office (rainfall data) and the Environment Agency (for example, tide data). Such expert evidence will also assist the insured in identifying why the flood occurred and what can be done in the future to prevent it from happening again.

In terms of what insurers and their representatives can do to assist with a recovery action, the following is generally of assistance:

- retaining a flood expert at an early stage
- gathering pre and post flood photographs and documentation
- interviewing witnesses and keeping full details of their account of what happened
- keeping a diary/log of events leading up to a flood
- getting residents together/keeping in touch with residents groups
- keeping a log and taking photographs of immediate steps taken to minimise the damage caused by the flood, if any. This may be steps taken by landowners, public bodies or private entities
- asking tenants and owners for evidence at an early stage, and not when a recovery claim is underway (which may be years later).

Flood Re and Reinsurance

For the majority of the UK, the introduction of Flood Re in April 2016 will not materially alter the way that flood insurance is purchased and flood claims are processed. However, for certain identified postcodes, Flood Re will be a welcome introduction. Flood Re is a fund which has been established to allow domestic properties at the highest risk of flooding to benefit from affordable insurance cover. It only applies to houses in identified postcodes – estimated to be the 1 to 2% highest risk homes, around 350,000 houses in total.

The flood element of the applicable household insurance policies will be reinsured by Flood Re at a fixed cost (subject to a few

exceptions). Claims by policyholders will be paid by insurers in the usual way and will then recover from Flood Re under the reinsurance.

More generally:

- there is often an hours clause, meaning that losses occurring across a number of different weeks/months cannot be aggregated when applying deductibles
- there is often a high attachment point and so the deductibles are not breached.

However, the recent softening of the reinsurance market has led to longer hours clauses and capacity for lower attachment points. As a result, it might be that reinsurance has an increasing exposure to flood events in future. There are also reports of recent flood losses breaching deductibles in some policies. In any event, Flood Re will probably make limited difference to how reinsurance for flood damage operates, given its limited application to certain postcodes.

Conclusion

Insurers should always consider the possibility of a subrogated recovery for flood damage claims, particularly as the frequency and severity of floods is increasing. If a flood is an entirely natural disaster, there is normally no liability. However, where man's activity (or inactivity) causes or contributes to the damage, there is a real possibility of establishing liability in tort, contract or statute. A successful recovery action is also likely to result in the third party taking future preventative measures to reduce the risk of flooding in the same area in the future. Therefore, potential recovery claims should not be disregarded without proper consideration.

RPC have acted and are acting for a number of insurers in relation to claims arising out of flood damage, including damage arising out of the flooding in Wales and the North East of England in 2012. They have also advised insurers on the terms of their participation in Flood Re and the impact which Flood Re will have on surveyors and valuers and the claims they may face if they fail to advise properly.

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