guide

minimising the cost of personal injury claims arising under employers and public liability
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Introduction

Target audience for the guide
Organisations who pay for the cost of injury claims via insurance premiums, insurance deductibles or through their captive/self insured arrangement.

The authors credentials
Mills & Reeve are a major UK law firm with a substantial insurance law practice. We combine a refreshing approach with the scale and depth of expertise to meet the challenges facing every business. We will provide you with high quality advice that is underpinned by a real understanding of the sector. Partner Alan Jacobs and his team have worked with businesses to support their risk management strategies for over 30 years. He has prepared this guide from his experience over many years acting for insureds in defending personal injury claims under the insureds captive or self insured schemes or by nomination by an insured to their insurer. We view our role as directly helping corporates manage and contain claims spend.

Why publish the guide now?
The Jackson reforms are likely to give a short term reduction in the third party cost element of your overall claim spend. However, over time, changing market dynamics (eg, claimant law firm consolidation, ABS’s, etc) will mean a significant rise in the number of claims being pursued, in the level of damages being awarded and therefore in the overall claim spend. This guide is intended to assist organisations in adopting strategies that will keep that spend to the lowest possible level.

General principles to be applied
The key is active (as opposed to passive) management (including inspections/checks) at every stage of the incident/claims process. Underpinning this principle is a coordinated, aligned and joined up relationship between insured, broker, insurer, investigator/adjuster and solicitor.

The role of the solicitor
An experienced solicitor has a massive amount of accrued knowledge that could be used to help you in preventing incidents and helping you reduce the cost of claims arising when incidents do occur. How to best use that resource warrants a guide in its own right. Our short summary guide Managing Risk Controlling Cost is available free of charge from alan.jacobs@mills-reeve.com
Pre-incident phase

Basic behaviours

- Anticipating and then managing risk to prevent incidents occurring but nevertheless anticipating they will occur.
- Having in place processes which effectively capture evidence of the facts and circumstances surrounding an incident.
- Learning from every incident that occurs and feeding back that learning into the business.

Culture

Organisations that are best at avoiding incidents occurring, but being able to dispose of claims quickly and at their lowest cost when they do, are those who have embedded the above behaviours.

Danger areas for defendants

Risk assessments

Main problems

- No risk assessments carried out.
- Assessments are poorly prepared.
- Failure to reassess risk assessments periodically and to have a follow on inspection process to ensure risk assessments are being complied with.

Causation

To successfully argue that failures around risk assessments give a defendant liability for an injury the claimant must show that the lack of or inadequacy of a risk assessment is causationally relevant to the injury occurring. In other words a missing or inadequate risk assessment does not, on its own, help a claimant in recovering damages (see Shirley Parker v Robin Levy (T/A Essex Marinas) (2007) generally and Susan Lane v Disabilities Trust (2007) re manual handling). It has to be shown that had there been a proper risk assessment it would have prevented the injury occurring.

Non delegable duty

The courts view the requirement for risk assessments to be very important, to the extent that in Uren v Corporate Leisure (UK) Limited and Ministry of Defence (Court of Appeal) (Feb 2011) the duty for an employer to undertake a risk assessment was held to be a non delegable duty, though if an employer used a contractor for an activity and satisfied themselves that the contractor had carried out a thorough risk assessment, in relation to that activity it might well lead to the conclusion that the risk assessment carried out by the employer was suitable and sufficient even though it was not as detailed as would otherwise be required. In Uren the contractor did not carry out a suitable or sufficient risk assessment and the MoD should not have relied on it to satisfy their non delegable duty. So, even where those contractors may be experts, an employer still has to make sure that the risk assessment is suitable and sufficient. (This will not stop the employer arguing contribution or indemnity from the contractor if it is not).

Safe systems of work

Risk assessments should be the basis for detailed safe systems of work for any activities determined to have a significant risk exposure.
Training

Main problems
- No training.
- Inadequate training (e.g., Anthony Edward Gower-Smith v Hampshire County Council (2008), a case with helpful guidance on inadequate training on the use of ladders, where the defendant was found liable but managed to get a healthy 25 per cent reduction for contributory negligence despite that)
- No subsequent retraining refreshers.
- The longer the period between the training and an incident the less likely the training will be said to be relevant to the defence of a claim.

Understanding your liability

No practical and in depth knowledge of the circumstances in which you might have a legal liability is a problem because:
- Risk assessments, training and accident investigations systems will be inappropriate and will not capture the information, nor focus on the detail, that is needed to minimise or defend such a claim.
- This is a management training issue and why we spend so much time with our corporate clients training them on legal liability. You will also find AIRMIC training sessions & materials a useful resource (www.airmic.com).

Contractual terms

To make sure that your contracts with suppliers, subcontractors etc are all as strong as they can be to protect you, ideally you will require:
- Indemnities in your favour.
- The suppliers and subcontractors having adequate insurance in place to cover them should you wish to claim on the indemnities:
  - diarise their renewal dates to ensure you always have their current insurance details;
  - retain their insurance details for at least the period of any indemnity period imposed under your main contract. (But remember professional indemnity insurance is generally written on a claims made basis so retention is less important).

If you do not have the commercial clout to get indemnities you at least need to understand clearly what liabilities you have under the contract so that when an incident occurs fast accurate decisions can be made.

Make sure your contracts have been reviewed by your lawyers.

Setting up systems

Capturing the evidence, using the "golden hour" (the hour following the incident).

Witnesses
- You need systems in place for identifying witnesses and capturing their evidence following an incident (and for retaining contact details should they leave the business).
- Are people that speak to witnesses properly trained so that they can assess what facts might be relevant?
- The content of statements must be relevant to potential civil liability.
- Statements must be signed.
- Statements should include those witnesses who can talk about the relevant facts leading up to the incident.
Statements must not just describe the aftermath of the accident, particularly the injuries, without any attempt at trying to understand how and why the accident occurred.

Statements need to be taken asap after the accident and to have sufficient detail to allow readers to visualise what happened before during and immediately after the accident, as if watching a film or reading a book. They would ideally be augmented by photographs and a sketch plan.

**Documents**

- Are people who are collating relevant documents, properly trained to understand what might be available and what might be relevant.
- Are the documents stored so that they are cross reference-able to witness statements/incidents.
- Do they include relevant documents created before the accident such as risk assessments and training records, maintenance records etc.

**Joined up - insured/broker/insurer/adjuster/solicitor**

You need:

- A developed relationship between all of the team members/partners involved in the process for prevention of incidents and handling of claims with.
- Alignment of the team members/partners to your business needs.
- All team members/partners to be involved together in:
  - strategy planning sessions;
  - sharing of best practice from their industries; and
  - end of case feedback.

**Feedback/learning**

Is there a system for feeding back lessons learned following an accident, so that procedures can be reassessed, risk assessments checked to see whether they need revising, training assessed to see whether it needs updating etc.

**How much effort and resource should be put into prevention - cost benefit analysis**

An organisation needs to be very clear about what they are trying to achieve in the pre-incident phase, and the cost of achieving it.

For some organisations the resource they put into this phase might be said to be disproportionate to the benefits (financially) they will achieve. There are, of course potentially, other reasons why resource might be put into this area eg reputation, paternalism towards employees and supporting the culture of the business.

**Privilege**

You need a clear understanding of whether any documents you create arising out of an incident are privileged from production to a claimant’s lawyers subsequently. (For more detail, see under Post incident, systems.)
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Post incident phase

Basic behaviours
Where the facts surrounding an incident (why and how it occurred) are captured, and the incident/pre-incident facts are clear, cases are either:

- Successfully defended.
- Settled quickly.
- Contributory negligence is successfully raised.

Without an understanding of these matters it is virtually impossible to speedily and accurately determine legal liability.

Systems
Collating the facts

- Potential use of external resource - A lot of organisations, particularly large organisations, struggle with capturing facts and documents. Alan Jacobs and his team have advised several clients on this issue and assisted them in setting up processes involving the cost effective use of external investigators/loss adjusters to collate facts and documents within an organisation, to create a claims file for the defence of the civil claim.
- SMEs may have their own issues, including lack of specialist knowledge to know what information should be collated and inability to allocate resource to deal with the whole process. Also, SMEs are more likely to be low excess policy holders. For all these reasons, the closest possible liaison with insurance brokers, insurers, solicitors, etc will be helpful.

Importance of legal privilege
Legal advice privilege can be summarised as applying to confidential communications that pass between a lawyer and their client; and which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context. Litigation privilege will apply to material which satisfies four basic rules:

- It must be confidential.
- It must be a communication between a lawyer and their client or between either the lawyer or the client and a third party.
- It must be made for the dominant purpose of litigation (the “dominant purpose test”).
- The litigation must be pending, reasonably contemplated, or existing.

Any documents created, ideally, should pass either from or to a member of the in-house legal team (or external lawyer), and the “dominant purpose test” must be considered in any communications with third parties (which might even include your employees).
Third party capture
Some organisations are reporting considerable success in "capturing" personal injury claims before the claimant instructs their own solicitor.

The object is to reduce claimants costs and therefore the overall claim cost.

Generally, the damages being offered to these claimants is towards the top of the bracket for the particular claim and sometimes in excess of that but the overall savings make that worthwhile.

There are a variety of ways in which capture can be done:

- The corporate insured intervening with a claimant and seeking to settle the claim without the need for lawyers.
- Using one of the available specialist third party organisations to intervene/act for the claimant.
- Your insurer's claims handlers intervening.

The key is approaching the injured party at a very early stage.

Organisations do not want to prompt claims from people that otherwise would not claim but most intervention processes involve identifying the profile of an injured person that you are most likely to receive a claim from.

Some organisations constantly review the accident book to try and identify cases which they think are appropriate for capture before a claim is made.

Anecdotally it is understood that schemes work in both Employers Liability and Public Liability situations.

From our involvement with these schemes we have seen that they can work, in terms of saving costs and creating greater satisfaction for the injured party

Anticipating incidents that will result in claims
As a separate issue to third party capture it makes sense to consider incidents to try to identify those likely to result in a claim. These are the incidents where potentially it would be sensible to put the greatest resource into capturing evidence (witness and documents) and preparing a proper claim file with which to deal with any anticipated claim. This is particularly useful where resource is limited and a decision should be made as to where to most effectively use it.

Feedback/learning/reviewing risk assessments
The post incident phase is another stage where attempts should be made to consider what learning points there are from the investigation that you have made and to feed this back into the business with a view to changing processes and procedures to stop similar incidents occurring again, to reviewing risk assessments and reviewing training requirements.
Handling claims

Basic behaviours
Once a claim is established it involves a phase up to, and including litigation.

Your lawyers may be involved pre-litigation but certainly they will be involved once litigation commences.

Because of the number of different parties that might be involved (insured, broker, insurer, investigator/adjuster and solicitor) it is vitally important that all are aligned to your business needs, so that everyone is pulling in the same direction. It varies from organisation to organisation what that direction is:

- Some organisations wish to take a really strong stand on claims to try and stop a “claims culture” developing.
- Other organisations needs are for a very early resolution of claims which appear to be meritorious.
- There is a whole range of other requirements, including coordinating the handling of the civil claim with the handling of an HSE prosecution.

All of this becomes even more important when you have an incident which has resulted in multiple claims. We deal with a considerable number of these incidents every year, particularly in the construction and energy sectors, but also in relation to manufacturing and product recalls. The consistent message in all of those cases is the need for good (and frequent) communication and alignment between all the parties involved in the handling of the claim.

Access to the facts and documents
Because in this phase the claimant can issue court proceedings, it is most important for the claim to be handled quickly and effectively.

There are endless opportunities for claimants’ lawyers to exploit defence team inefficiencies and build up costs related to pre-action applications for disclosure of records, where you have not been able to adequately produce documents in support of a denial of liability or allegation of contributory negligence. This can cost you £1000 per application.

Speedy access to witness statements following the incident, access to documents relevant to the incident etc, allow sensible and early decisions to be made on settling the claim or fighting it.

Understanding your contractual terms – contribution / indemnity
The ability to seek contribution or indemnity from the supplier, subcontractor etc by virtue of your contractual trading terms is frequently overlooked or not thought about until you have settled with the claimant.

That probably means that you do not have access to relevant contractual documents and evidence that will ultimately help you make a recovery.

There is often misunderstanding by insureds, investigators/adjusters and insurers, of the effect of contract terms. Have this aspect reviewed by competent lawyers.
Aligning your handlers to your business needs

Consistently where we have been nominated to an insurer by an insured, the overriding reason for this is to be directly connected to the insured, and not just the insurer and their panel arrangements. This nomination can provide an ongoing active role and contribute in aligning the claim handling with the needs of the business. This approach is also seen as beneficial by insurers.

We have already outlined under “general principles”, above, that this coordination and alignment is vital.

Type and use of medical experts

In lower value claims it is quite difficult to steer the identity of the medical expert used to prepare a report, it is far easier on multi-track (and therefore larger) claims.

The use of a quality, forensic medical expert of the correct type of expertise is fundamental to achieving a settlement at the right level. So often nowadays no great thought is put into this part of the claims process and a lot of both claimant and defendants’ lawyers treat the selection as if any expert will do.

Where there is psychological injury it is important to use a psychiatrist rather than a psychologist. A psychiatrist is a medical doctor. A psychologist is not.

There is all too frequent use of an accident and emergency consultant when an orthopaedic surgeon would be more appropriate.

There is often inappropriate use of the claimant’s own GP to provide a report.

Pain management consultants are frequently used when an orthopaedic surgeon or a rheumatologist would be far more appropriate.

It is not sufficient just to choose an expert of the right specialism. The quality of experts varies massively and you should be using an expert who will look at the case impartially and, crucially, forensically.

Good decisions on the law

Getting the law right is relatively easy when the facts of the case have been clearly established at an early stage. If you get the law wrong at this stage it can lead to massive claims inflation by either settling when you shouldn’t, settling at the wrong value or fighting a case when you shouldn’t. Use good quality lawyers who care about each case.

The monkey/nuts syndrome

You have to decide whether you want to use a handler/lawyer on the basis of paying them a very low (usually fixed) fee for bulk work which they will process in a commoditised consistent way (this lends itself to handling things at a high level perspective rather than a forensic case by case perspective and will probably result in reasonably speedy settlements in most cases).

To invest slightly more in your own lawyer’s fees to obtain more bespoke legal advice on each case and a more forensic and considered review of the matter, which is likely to lead to better outcomes and a saving in overall claims cost.
It is getting the balance right so that you are paying the right amount to your advisers to be able to secure the best overall total claims cost on the case. Talk to several different firms and go for one you feel you can work with, are responsive and align with your approach to claims.

**Key Performance Indicators**

To get the kind of performance you want from those handling your claims set them clear Key Performance Indicators.

Insist that the handler (whether it be insurer, Third Party Administrator (such as a claims handling organisation) or lawyer) provides the Management Information that you need and which specifically allows measurement of the agreed Key Performance Indicators.

**Effective use of Part 36**

Recent case law has clarified considerably how the Part 36 process works and it is the strongest weapon that a defendant has in limiting claimants’ solicitors’ costs. Where a claim needs settling it should be considered at every step of the way and used effectively and deliberately. For more detail, see later in the Guide, under Avoiding or Mitigating Liability for Opposing Parties Costs. A similar device is a Calderbank offer which allows you to make offers, with potential positive costs implications, where the offer does not comply with Part 36 eg, an offer to cover damages and costs at an inclusive figure. Make sure your lawyers understand the difference and you agree a strategy with them as to when to use which.

**Controlling and aligning your lawyers**

Positively choose your lawyers and not just accept the insurers (random) panel firm.
Large incidents

HSE involvement

Inevitably these incidents lead to multiple claims. This guide is concerned with civil injury claims, however the HSE are likely to be involved in any large incident resulting in injury, from a regulatory/prosecution perspective.

It is crucial for your lawyers dealing with any HSE involvement to be in very close liaison with lawyers dealing with any potential or actual civil claims. Ideally they would be the same law firm.

There is a high likelihood of claims/litigation in large incidents and it is recommended to engage lawyers early in the process, ideally pre litigation (if only to keep an overview role at that stage). It is really important to engage lawyers that you can trust, have the right expertise and who are your choice. They will be needed to help protect your brand, your reputation and to have sight of your bigger picture in relation to any HSE prosecution, which might of course result in fines and criminal sanctions against managers.

Great care needs to be taken over producing documents in relation to claims investigations which, if not dealt with correctly, may become disclosable to HSE. See earlier under Post Incident Phase in relation to legal advice and to litigation privilege. The key is having lawyers on call, who know your business and will specifically instruct your teams to investigate for the purpose of and in the expectation of legal proceedings rather than simply to record what happened.

Settlement schemes

Consider setting up a scheme, a standard way of dealing with parts of the claims process. These schemes are mainly created to deal with quantum assessment.

Where there is the potential for multiple claims it is best to try to resolve liability early or, where someone is liable but there are multiple possible defendants then the potential defendants should try and agree as soon as possible to settle claims early and sort out the final allocation of payments between themselves subsequently.

Possible schemes to deal with quantum are:

- Use independent counsel to value and, in effect, act as arbitrator binding both parties to the valuation.
- Have an agreed “appeal” process in relation to any Part 36 offers you might make. That process often uses independently agreed counsel to arbitrate.
- Attempt to agree the identity of medical experts and other experts to reduce possible areas for argument.
- If there is deadlock over quantum this can be resolved through a low cost mediation scheme. The experts are CEDR (www.cedr.com/solve).
- If it not possible to set up a scheme or a claim comes out of the scheme and is litigated, rather than going through the traditional court process, press your lawyers to make sure the case goes through mediation. The advantages are:
  - Very high settlement success rate
  - Low cost
  - No legal precedents are set
  - Settlement of the claim is achieved privately and confidentiality clauses are possible
Helps to keep relationships between the parties
Lack of publicity preserves brand

Rehabilitation schemes

- There is always the potential to help resolve injuries early and to restrict damages accordingly by use of rehab treatment. Frequently this is not provided quickly enough, or at all, under the NHS.
- Setting up a scheme for referring injured parties to rehab services at your cost soon after an incident should be considered.
- Often your insurers will have facilities available that you can utilise.
- This approach is just as relevant to psychological injury as to physical injury.
- Sometimes referral through such a scheme can take away the parties motivation to pursue a damages claim.
- It can help support your brand.
- You should consider allowing access to anyone injured in the incident, without proof of your liability for the injury, or whether you wish to set up criteria to filter out access.
- Some providers have a low cost telephone triage service allowing initial assessment then routing of people down appropriate treatment paths. This process can be the most cost effective.
- There are good and bad providers. Watch out for those that have no system to objectively sense check the amount of treatment recommended, otherwise you are issuing a “blank cheque” to the providers.
- Seek recommendations for providers from your lawyers etc.
Contributory negligence

You cannot have a 100 per cent contributory negligence. For contributory negligence to arise there must be some fault by the defendant that has caused some of the claimant’s damage (PITTS v Hunt (Court of Appeal) (1990)).

Disobedience of an employer’s order is not, in itself, grounds for contributory negligence, the claimant still needs to have foreseen that the disobedience exposed them to a risk of injury (Westwood v The Post Office (House of Lords) (1974)) an employee at work fell through a defective trap door in a room. The door to the room said “No unauthorised entry”. That notice did not indicate there was any danger and there was no reason for the claimant to believe there was a danger. His only fault was disobedience, not carelessness, and so he was not guilty of contributory negligence.

In the workplace (particularly where the work is fraught with danger) the claimant has to go beyond mere inadvertence or reasonable risk taking before there would be contributory negligence (Scott v Kelvin Concrete) (1993).

The claimant must be unreasonable if he takes a risk (Gibson v British Insulated Callenders Construction Limited (House of Lords) (1973)). The claimant was not wearing a safety harness because it protected against some risks (including the fall that actually happened) but created other risks. In the circumstances the claimant was not negligent in choosing to run one risk rather than another.

If the risk to the claimant is inherent in following the defendant’s system of work it may not be contributory negligence (Moffat v Atlas Hydraulic Loaders) (1992). It was custom and practice to clean machinery whilst it was still in motion, even after a guard had been removed. The claimant was injured whilst cleaning the moving machinery and it was held there was no contributory negligence. His only choice would have been to refuse to work in the manner adopted by his employer.

A young inexperienced worker cannot be expected to be as safe as a more experienced one. (Yachuk v Oliver Blais Co Limited) (1949).

What percentage will you get:

- Rarely less than 20 per cent and rarely more than 80 per cent.

Contributory negligence has to be expressly pleaded in the defence.

Beware that an application to amend a defence to add a new allegation of contributory negligence late on in the day may be refused.

Because contributory negligence is a question of reducing quantum rather than a defence to liability, a default judgement against the defendant deals only with the issue of the defendant’s liability and still allows contributory negligence to be dealt with at the assessment of damages (Maes Finance v A L Phillips and Co) (1997).

The claimant’s own breach of a statutory duty. This is an alternative to the claimant being careless ie his actions constitute a breach of a positive legal duty by statute:
Health and Safety at Work Act 1974, section 7, take reasonable care for his own health and safety and cooperate with the employer to enable the employer to comply with their duties;

Management of Health and Safety at Work Regulations 1999, regulation 14, use equipment etc in accordance with training and instructions. The employee shall inform his employer of dangerous work situations.

The Manual Handling Operation Regulations 1992, regulation 10, to make use of any system of work provided by the employer.

Personal Protective Equipment at Work Regulations 1992, regulation 10, to use personal protective equipment provided and in accordance with training and instructions (includes self employed people). To make sure the equipment is returned after use.

Control Of Substances Hazardous To Health Regulations 2002, regulation 8, to make full and proper use of any control measures etc that are provided. To report a defect discovered.

Work at Height Regulations 2005, regulation 14, to report any activity or defect relating to work at height likely to endanger safety. To use any work equipment or safety device provided in accordance with training and instructions.

Construction (Health, Safety and Welfare) Regulations 1996, regulation 4, comply with the requirements of the regulation relating to performance of or refraining from an act by him. To cooperate with a duty or requirement imposed by any other person under the regulations. To report any defect that might endanger safety.

Construction (Design and Management) Regulations 2007, regulation 5, to report any defect which may endanger health and safety.

Examples

0% contributory negligence

Nixon v Chanceoption Developments Limited (2002) - the claimant was on scaffold and fell from it in high winds. Guardrails were absent, in breach of the Construction Regulations. Although at first instance the court found the claim failed because the claimant should never have gone onto the scaffold in high wind. The Court of Appeal found that the absence of the guardrails and the fact that the claimant was doing his job as he was told to meant that there was no contributory negligence at all and he recovered 100 per cent.

Toole v Bolton MBC (2002) - the claimant was wearing rubber gloves instead of heavy duty gloves which were provided to him and sustained an injury to his finger from a used hypodermic needle as he picked it up. At first instance the defendants were found liable but there was a 75 per cent reduction for contributory negligence. On appeal it was found that the employer should have expected employees taking shortcuts in their work, which was unpleasant and dangerous work. Even if he had worn the heavy gloves provided they would not have stopped this injury so failure to wear the heavy gloves was not causative of the injury. The defendants were liable and there was no contributory negligence in all the circumstances.

Young v The Post Office (2002) - the claimant returned to work after being off for four months due to stress. Light duties were agreed. Formally his hours were reduced but he was given so much work that he ended up working longer than he had agreed to work and so eventually he had to give up the work due to stress again. The defendants were liable but on appeal the court found the claimant had no contributory negligence. He was a hard working and contentious employee, likely to carry out whatever work he was asked to do and was psychiatrically vulnerable. In those circumstances the employers could not turn around and say that the claimant had voluntarily overworked and was contributory negligent.

Wright v Romford Blinds and Shutters Limited (2003) - the claimant was stood on the roof of a van to load materials onto it when he slipped and fell. The employers were held liable having tacitly adopted the claimant’s method of working and thereby condoned it. The actual slip was due to momentary inattention and the court found no contributory negligence.
Cooper v Carillion (2003) - the claimant and a colleague were carrying a large piece of plywood across a building site. The claimant fell down an unfenced hole which he could not see because of what he was carrying. At first instance a 10 per cent deduction for contributory negligence was made for failure to look below the board. On appeal it was held the claimant was entitled to expect that there would be no unfenced holes and there was no contributory negligence.

Piccolo v Larkstock Limited (2007) - a public liability case. The claimant slipped on flower petals on the floor of a railway station. They would have been readily visible if he had been particularly vigilant but the court found that this was a similar situation to the classic case of Ward v Tesco in that shoppers, intent on looking to see what is on offer, cannot be expected to look where they are putting their feet. There was no contributory negligence.

Barbara Hook v Eatons Solicitors (2012) – a firm of solicitors was liable when an employee fell down a flight of stairs after losing footing when stepping backwards to accommodate an outward opening door on a tiny landing. The firm had failed to carry out a risk assessment regarding the suitability of the route in question in breach of its statutory duty under Management of Health and Safety at Work Regulations 1999 and Workplace (Health, Safety and Welfare) Regulations 1992. No contributory negligence as the employee’s behavior was momentary inadvertence rather than contributory negligence.

Ali Ghaith v Indesit.co.uk Ltd (2012) - an employer was liable for employee’s back injury where there had been no suitable or sufficient assessment by the employer of the relevant risk of injury to the employee when carrying out a stock take. No deduction for contributory negligence.

30% Contributory negligence

Ellis v Bristol City Council (2007) - the claimant was a care worker in a care home who slipped on a spillage on the floor. Although the employers were liable the claimant was well aware that the spillage was likely to be present and should have kept a special lookout. The lack of concentration was beyond mere inadvertence. There was 30 per cent contributory negligence.

Anderson v Lyotier (2008) - the claimant was asked by a ski instructor, negligently, to ski down a slope beyond the claimant’s ability. The claimant felt he had to comply even though he believed it was too difficult. His failure to voice his concerns meant 33 per cent contributory negligence.

50% Contributory negligence

Parker v PFC Flooring Supplies Limited (2001) - the claimant was number two in a small family business. An employee warned the claimant about going up onto a roof to investigate a problem. Nevertheless the claimant went up despite wearing leather sole boots and knowing it was slippery. He slipped and fell through a skylight. The defendants were liable for breach of the workplace regulations as it was foreseeable that employees would get access to the roof and were not prevented or forbidden from doing so. The claimant was held equally to blame and there was a 50 per cent reduction for contributory negligence.

Anderson v Newham College (2002) - while walking across a classroom the claimant tripped over the legs of the stand of a whiteboard. The court found 50 per cent contributory negligence.

Butcher v Cornwall CC (2002) - the claimant, working outside, left a shed door ajar. It blew against him injuring him. The retaining hook for the door to hold it back and open was missing and the defendants were liable however the claimant did not shut the door properly and was negligent. There was a reduction of 50 per cent for contributory negligence.

Lowles v The Home Office (2002) - the claimant walked up a ramp into a portacabin but tripped on the two inch step created between the top of the ramp and the floor of the portacabin. There was a "Mind the Step" sign. 50 per cent contributory negligence was found.
Guide to minimising the cost of personal injury claims arising under employers and public liability

- *Robb v Salamis* (2006) - On an oil rig the claimant descended from his bunk bed via a ladder. The ladder was not properly slotted into position and came away such that he fell. There was a reduction of 50 per cent for contributory negligence, the defendants being liable because the ladder could become detached and was not suitable therefore for use.

- *Egan v Central Manchester and Manchester Children’s University Hospital* (2008) - The claimant was a nurse who wheeled a patient on a mechanical hoist. The hoist contacted with a plinth which was not visible under a bath and she jerked her back. The claimant had not looked carefully to see exactly where the feet of the hoist where going under the bath and there was 50 per cent contributory negligence.

- *Collins-Williamson v Silverlink Trains Limited* (2009) - The claimant was drunk getting off a train and placed himself into the gap between the platform and the train and was injured when the guard negligently failed to see him. There was 50 per cent contributory negligence.

- *Blaine Vincent Adam Quinn v Patrick Keenan* (2013) - An employee sustained a back injury when lifting a heavy piece of work equipment on his own. The employer was held to have failed to maintain and enforce safe system of working but there was 50 per cent contributory negligence because the employee had disregarded an obvious danger.

### 60% Contributory negligence

- *Sherlock v Chester City Council* (2004) - The claimant, an experienced joiner, cut his hand on a circular saw whilst feeding a long fascia board onto it. The accident was partly caused by there being no run off table. The claimant was fully aware of the risks and how to avoid them. He had consciously accepted the risk and was therefore 60 per cent contributory negligent.

- *Smith v Notaro* (2006) - At a construction site the claimant chose to deliver goods by walking on a plank walkway, which gave way. He was found to have given no thought to suitable alternative means of access, of which several safer options existed. There was 60 per cent contributory negligence.

### 75% Contributory negligence

- *Harvey v Plymouth City Council* (2009) - The claimant was drunk and running away from a taxi driver when he fell over an obscured drop. The landowners were liable but there was 75 per cent contributory negligence. (In an appeal to the CA in 2010 the 2009 decision was set aside and the appellant local authority’s appeal against the decision that it was liable for personal injury sustained by the respondent on its land was allowed. When a local authority licensed the public to use its land for recreational purposes, it was consenting to normal recreational activities, carrying normal risks, and its duty as occupier to an implied licensee could not be stretched to cover any form of activity, however reckless).

### Practical considerations

- Be realistic when deciding to allege contributory negligence. You must pick your cases carefully as fighting the issue will increase both sides costs, potentially considerably. Know when to use it as a negotiating tool but know when to drop it. However, with the right case you will get it.

- Positive indicators are an experienced employee and/or recent relevant training. Negatives are serious and persistent failings in maintenance of plant, equipment and premises and/or in enforcing safe working practices.

- Try to get a feel from the case law for when a court will give contributory negligence. That doesn’t necessarily match with what you might think is reasonable (see for example above, *Wright v Romford Blinds and Shutters Limited* and *Cooper v Carillion*).
**Employers’ liability – case law illustrating when an employer can win**


*Hughes v Grampian* (2007) - the regulations require that there must be a risk of injury arising out of the manual handling operation. Manual handling is defined as any transporting or supporting of a load by hand or by bodily force. In this case the claimant was complaining of repetitive movement of the wrist, hand and fingers in the manipulation of chicken carcasses by tucking in the legs and wings and tying it with elasticated string. Whilst that was being done there was no transporting or supporting of the load.

*Wellard v DSG International Plc* (2009) - the claimant tore a bicep when he was attempting to remove and collect a washing machine situated in a tight space underneath a worktop. There was a suitable and sufficient risk assessment. The claimant was fully trained as to the methods of handling to adopt. He was experienced. He was entitled to refuse to conclude the job if there was any danger to him, and that was an established part of his training. The defendant had no liability.

*Ife v DSG International Plc* (2009) - the claimant was attempting to deliver an American style fridge freezer. He stepped onto a rockery, slipped and injured his shoulder. The risk assessment was suitable and sufficient. He had been provided with a mobile phone and could have telephoned his employers for guidance if he felt he needed it. He was aware at all times of the policy that goods which were undeliverable should be returned to the depot. The circumstances of the accident were not foreseeable.

*Thorley v Vicarage Care Home* (2010) - the claimant was an experienced carer who wounded her hip when lifting an elderly resident by using a method of lifting she had known was prohibited. She chose that method. She had had appropriate training and appropriate equipment was available. The defendant had no liability.

*Ann Wilson v Baxterstorey Ltd* (2012) - an employer was not liable for a repetitive strain injury caused to a chef’s thumb, where the chef had adopted a work practice of holding mixing bowls using a pincer grip. The activities were undertaken for a very short time and for limited periods during the day and did not give rise to any foreseeable risk of injury or any requirement for a risk assessment.

**Work equipment** (Provision and Use of Work Equipment Regulations 1998)

*Couzens v McGee* (2009) - a piece of scrap metal that a claimant lorry driver had used as a makeshift tool did not amount to work equipment as the employers had no knowledge of it and had therefore not given express or implied permission for it to be used.

*Smith v Northamptonshire County Council* (2009) - the claimant collected a disabled person from her house. The claimant pushed the person in her wheelchair down a ramp at the house and the edge crumbled, the claimant stumbled and was injured. She alleged the ramp was work equipment, although it was installed at the disabled person’s home. Because the employers had no control over the ramp, what was done with it and to it, it was not work equipment. The defendant had no liability.

*Whitehead v Trustees of the Chatsworth Settlement* (2012) - the claimant, who was employed as a gamekeeper by the defendant, accidentally shot himself in the leg while hunting vermin. He had been scaling a dry stone wall at the time which collapsed beneath him. Both barrels of the shotgun he was
carrying went off and hit him at point blank range in the right calf causing him to suffer injuries. The employer was not in breach of its duty to ensure that the claimant’s exposure to health and safety risks, when negotiating obstacles carrying a shotgun, was prevented or adequately controlled, as the employer had distributed instructions on best practice and it had no reason to suspect that the gamekeeper was not following best practice when working alone.

Jason Harris v Waitrose Ltd (2011) - the claimant had been unloading a cage from a lift when the wheels of the cage struck a lip that had formed between the slightly misaligned floor of the lift with the floor of the warehouse premises. The claimant jarred his back. He had deliberately ignored safety procedures that were to be followed when the lift was out of alignment and of which he was aware. It was impossible for the defendant to eliminate all misalignment and although the degree of risk was foreseeable, it was very low. The claimant alleged that once there was a risk, even if it was a very small risk, if it was a foreseeable risk of something that would affect the health or safety of an employee that was sufficient to give rise to a breach of regulation 4. The court found the risk was low and had been eliminated by the defendant’s safety procedures.

David Elliott v Wincanton Group Ltd (2012) - although an employer had been in breach of the Provision and Use of Work Equipment Regulations 1998 by failing to keep metal parts of a refrigerated trailer in proper repair, an employee who fell and injured his hand on the metal parts while using non-standard procedures to tighten webbing belts within the trailer had been the author of his own misfortune.

PPE (Personal Protective Equipment Work Regulations 1992)

Fytche v Wincanton Logistics (2004) - safety boots were provided to the claimant driver to meet the danger of objects dropping on the foot. Water leaked through a hole in the boot and reached his little toe causing frostbite. There was no liability as the claimant was not expected to do work which required him to have waterproof boots. He was not required to walk about for long periods in snow and ice. Plus, although there was a defect with the boot, that defect was not one relevant to the safety function of the boot that they were provided for.

Susan Marie Splatt v Lancashire County Council (2010) - a local authority was not liable for injuries suffered by one of its cleaners who had slipped on a floor she had recently mopped where the cause of her slip was her own decision to disregard what were satisfactory cleaning procedures by mopping the floors at a time when she could still be distracted by members of staff in the building.

The Workplace (Workplace (Health Safety and Welfare) Regulations 1992)

Furness v Midland Bank (2000) - the claimant slipped on water that had been spilled on stairs in the defendant’s offices. There were only a few droplets of water, there was no history of leakage or spillage on the stairs where the accident occurred, the risk was small and it was not reasonably practicable for there to be continuous supervision of the staircase. If there had been frequent spillages the position might have been different. The defendant had no liability.

Palmer v Marks & Spencers (2001) - Is the floor of suitable construction? The claimant tripped over a weather strip placed across a door threshold. The claimant had passed over the threshold regularly for two years before the accident and there had been approximately 8,000 exits by people over the period since it had been in place and with no other problems. The weather strip did make the floor uneven but this was only slight and given it’s use without incident it did not pose a risk.

Adams v Omar (2008) - this case involved the suitability of traffic routes and the defendants were not liable when a loaded trolley had been blocking a pathway and the claimant was injured whilst trying to pass it, because alternative routes were available and this was a transitory situation. There was no
longstanding problem with loaded trolleys blocking walkways. It was the claimant’s failure to use one of the alternative routes that caused the accident.

*Maxted v Carillion J M Limited* (2009) - tripping accident. There was no liability for the employer, nor for the occupier of the premises when a paving stone on a pathway rocked and the edge came up by 1/4 inch. This did not make the traffic route unsuitable nor constitute a danger. The claimant had alleged a 3/4 inch rocking.

*Taylor v Wincanton Group* (2009) - there was a 20cm high step up from the floor to a portacabin being used as an office. There was an unblocked and unmarked gap of 6.5cm between the floor and the body of the portacabin. The claimant caught his foot in the gap. The gap was obvious and pretty much standard for this type of structure. It had been in place for some time with a high footfall without any problem. The accident occurred because the claimant misjudged the position of the step and the gap. It was held that a prudent employer would not have recognised that gap as being a risk and the defendants had no liability.

*Kurij v Total* (2011) - this was a public liability case where the claimant alleged to have stumbled on a spillage at the entrance of the petrol station shop. A reasonable system of inspection was shown. The claimant did not prove that there was a substance on the floor and, if there was, that this was the reason for him stumbling. Furthermore the cleaning system was satisfactory.

*Broadfield v Meyrick Estate Management Ltd* (2011) - the defendant employer had breached its duty of care in failing to provide a suitable and sufficient handrail along a staircase in accordance with the Workplace (Health, Safety and Welfare) Regulations 1992 reg.12(5) but the claimant employee could not establish that the presence of a handrail would have prevented her injury given the mechanism of her fall. Therefore, her claim failed.

*David White v Coventry City Council* (2012) - A local authority was not in breach of its duties owed to an employee under the Workplace (Health, Safety and Welfare) Regulations 1992, the Occupiers’ Liability Act 1957 or in negligence in respect of personal injury he had suffered when he tripped in the car park of his work premises. The route which the employee had taken was not reasonably used and the local authority had taken as much care as was reasonable to see that that route was reasonably safe.

**Occupiers liability overview**

*Occupiers Liability Act 1957 - Visitors and Occupiers*

Under the Act occupiers have a duty to visitors in respect of dangers caused by the state of premises or to things done or omitted to be done to them.

The Act does not extend to dangers arising from activity taking place on the premises (eg, shooting, driving vehicles etc) which are governed by the general law of negligence.

An occupier may owe a separate duty in another capacity, for example, as an employer.

The visitor can rely on whichever cause of action is most advantageous to them.

The Act can also cover fixed or moveable structures such as scaffolding, a lift, platform or a temporary staging.
A landlord is generally not an occupier of those premises he lets (his tenant will be the occupier) although landlords who exclude common parts, such as shared entrance halls, from their leases can be occupiers of those parts of the premises.

A builder in *de facto* control of part of a house he is working on can be occupier of that part.

The duty is owed to a visitor, ie, someone who enters by the express or implied permission of the occupier e.g. where an as yet unadopted road on a new housing estate has its entrance left open and not barred, someone was injured (when walking down the road and falling in a trench cut across it) and could be assumed to have implied permission to be there and therefore to be a visitor rather than a trespasser (*Coleshill v Lord Mayor of the City of Manchester*) (1927).

A person using a private right of way over another person’s land is not a visitor for the purposes of the 1957 Act.

Where the Act does not apply (eg, where the claimant is deemed not to be a visitor) the claimant will have to rely on another cause of action such as negligence.

A landlord may have a liability to their tenant (and indeed any person who might be expected to be affected) for injury or damage to property caused by a defect in the state of the premises due to the landlord failing to maintain or repair the premises in circumstances where the landlord is under an obligation to maintain or repair Defective Premises Act 1972.

**Occupiers Liability Act 1984 -Trespassers and Occupiers**

Under this Act an occupier owes a duty to a trespasser (someone not therefore a visitor under the 1957 Act) to take such care as is reasonable to see that the trespasser does not suffer injury on the premises by reason of any danger there, provided the occupier knows or has reasonable grounds to believe of the existence of the danger, that he knows or has reasonable grounds to believe that the trespasser is in the vicinity of a danger or is likely to be so and the risk is one against which in normal circumstances the occupier might reasonably be expected to offer some protection from.

Generally this is all about hidden traps such as hidden razor wire or a covered over water well where the cover is flimsy and will easily collapse if trodden on. An occupier can exclude liability to trespassers by displaying adequate notices warning that no liabilities are accepted. Such an exclusion is not subject to the usual rule (under Unfair Contract Terms Act 1977) that a business cannot exclude its liability for negligence causing personal injury and death.

Apart from trespassers, those exercising private rights of way are also protected so in *Holden v White* a milkman exercising a private right of way while delivering milk to a house is not a visitor under the 1957 Act in relation to the owner of the land the right of way ran over, but he would now be owed a duty of care under the 1984 Act.

**When has liability been found?**

- Polishing the floor so highly that it is dangerous.
- Switching on electricity when a decorator is working near exposed live cables.
- Failing to alleviate hazards by lighting stairs adequately.
- Not making safe surfaces that have become dangerous, eg, not clearing litter or not cleaning a slime covered manhole cover.
Guide to minimising the cost of personal injury claims arising under employers and public liability

Failing to remove potential hazards likely to injure children.

Failing to warn a swimmer there is inadequate water under a diving board.

Failing to anticipate problems caused by human agency (e.g., where a spectator was trampled at a football match when hooligans forced their way through an inadequately maintained exit barrier, or where a nightclub customer was injured in a fight but the proprietors had taken inadequate precautions to contain).

When has liability not been found?

A hotel car park customer climbing onto a log and falling off.

A supermarket customer falling over a pile of cartons in a gangway.

A visitor killed owing to the inadequacy of a handrail in the absence of a bulb in the light at the top of the stairs the occupier was not liable because there was no way of him knowing that the bulb was absent.

A reveller who toppled over a low balustrade at a hotel.

An eight year old child falling against a wall in a school playground.

A domestic visitor tripping over a lowered washing line.

A delivery man slipping on a wet plank over a trench in the garden.

Obvious dangers

There is no duty owed in respect of dangers which are obvious to a reasonable visitor. For example, that a sea wall covered with seaweed may be slippery or that a hot coffee may scald if spilled.

Visitors carrying out their trade or profession

People entering premises to carry out work of construction or maintenance can be expected to protect themselves against any special risks normally applicable to such works, e.g., an occupier was held not liable to chimney sweeps killed by carbon monoxide poisoning whilst up a sweep hole or to a window cleaner who lost his balance when ornamental trellis work broke away, or to an experienced roofer where the occupier failed to urge him to use crawling boards.

Avoiding Liability Under The 1967 Act

Warnings

Where a visitor is warned of a danger which will ultimately cause damage, that warning must be clear and appropriate e.g., a verbal warning given insufficiently seriously, or a notice in an unsuitable location (e.g., behind a door) will not therefore be enough to protect the occupier from liability.

Contributory negligence

This is not a defence as such but a way of reducing the value of a claim. It is possible however that a visitor’s carelessness is so extreme that the claim fails completely on the grounds that the occupiers breach of the Act was not the cause of the accident, e.g., Munro v Porthkerry Park Holidays Estate (1984) where a drunken customer at a clifftop bar tried to climb a low chainlink fence and fell over the cliff but was unable to recover damages.
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Exclusion of liability

Subject to the Unfair Contract Terms Act 1977 and similar legislation the duty of care under the 1957 Occupiers Liability Act can be excluded by contract between the occupier and the visitor.

As a result of the Contracts Rights of Third Parties Act 1999, a contract can also exclude liability of someone who is not a party to the contract (for example, a subcontract agreement can exclude the main employer’s liability to the sub-contractor).

Subject to the Unfair Contract Terms Act 1977 liability can be excluded by a physical sign or notice and the occupier will not need to show the visitor has actual knowledge of the notice, only that reasonable efforts were made to bring it to his attention. However, a notice may not be effective against a visitor who does not have any choice about entering the premises, eg, on duty policemen or ambulance men, having no choice as to whether to enter premises.

Unfair Contract Terms Act 1977

Where premises are occupied for the purposes of the business, liability for death or personal injury resulting from negligence, including breach of the 1957 Act, cannot be excluded at all, however warnings, rather than exclusions, may stop there being deemed to be a breach of the duty of care. The 1977 Act does not apply to exclusions of liability to trespassers.

Independent Contractors and the Occupiers Liability Act 1957

Where damage is caused to a visitor by a danger due to faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, then the occupier is not liable if he acted reasonably in giving the work to an independent contractor and has taken such reasonable steps to satisfy himself that the contractor was competent and the work had been properly done.

Practical strategies

Prevention is better than cure so proper inspection and maintenance regimes backed up by risk assessments, all properly documented, should be in place.

Signage can help in stopping someone claiming that they had implied permission to be somewhere they had not (that can be the difference between someone being treated as a visitor and therefore getting protection under the 1957 Act as opposed to being treated as a trespasser and having to rely on the very light protection provided by the 1984 Act).

Signage can exclude liability to trespassers.

Signage or other warning of danger may prevent the danger grounding a claim under the 1957 Act.

Don’t forget that any independent contractors on your premises carrying out works to the premises which subsequently injure someone or damage their property can make you liable as occupier, unless you have taken appropriate steps in advance to be sure that the contractor was competent and that the work had been properly done. In addition to that, you need to consider whether there are contractual terms in your contract with those contractors that adequately protect your position should an incident occur.
Avoiding or mitigating liability for opposing parties costs

Part 36 Civil Procedure Rules

Both before and after proceedings are issued the procedure under Part 36 gives you the ability to make offers to settle which will protect you against liability for the opposing parties’ further costs from that point on.

The short point is, if you want to settle a claim you need to ensure that whoever is handling the claim for you makes a Part 36 offer asap.

If there is no offer then there is no potential protection against rising costs.

Sometimes handlers wait until every last piece of evidence is available before making the offer. That may not be the best commercial approach to settlement.

The opposing side will not take an offer seriously unless it complies with Part 36 and, where they are funded by insurance, the making of an offer will usually mean that the solicitors will need to seek instructions from the claimant and insurers on whether to accept or reject the offer (sometimes a powerful dynamic in a case).

Strategies

Have systems in place to ensure that letters of claim are recognised as such and passed to someone who understands their importance quickly, whatever location within the organisation they are received. This should stop unnecessary issue of proceedings, inability to challenge the use of poor medical experts and wasted costs.

Have similar systems in place re service of court proceedings documents. Consider ensuring handlers/insurers nominate solicitors to accept service of proceedings so that the proceedings do not get lost and are dealt with urgently and appropriately, saving wasted costs and the potential of a court default judgement being entered.

Investigate liability as soon as possible. An early full admission would avoid the opponent incurring the costs of their investigations into liability. If contributory negligence is argued the claimant will still need to make liability enquiries and incur the costs of that.

When speaking with claimants lawyers initially ask who is dealing with the matter and always make a note of the person you have spoken to when discussing the case on the telephone. You will be surprised how many calls are made by the file handler’s secretary, yet when the claim for costs is presented a lawyer rate is claimed.

Equally, make a note of the length of the telephone conversation because if the costs are being assessed on the court standard basis, any doubt as to the accuracy of the same will be found in favour of the paying party.

Look out for the locality of the solicitors, as opposed to the claimant. Most cases do not require central London solicitors to act. If a claimant could have used an equally as competent lawyer in their locality, the hourly rates claimed should be reduced to the local rate.
Most of all, make sure that your handlers are pro-active, not re-active so as to reduce the number of chaser letters and potential applications received.

**Medical expert evidence**

The importance of selecting a really good, forensic, medical expert to provide an opinion which is used to determine medical causation and to value a claim can not be underestimated. The effect of the Pre-Action Protocol For Personal Injury Claims and of the Civil Procedure Rules in practice is that in fast track cases (those valued at £1k -£25k) the claimant is in the driving seat in terms of fixing the medical expert who reports. The court are in most cases unwilling to allow a defendant to get their own report. The best a defendant can do is object to poor experts nominated by the claimant or, ideally, agree to a good expert who is nominated.

In a multitrack matter (over £25k) there is scope for defendants to obtain medical evidence. Frequently good evidence allows defendants to defend a case, on the grounds that the claimed injuries are not caused by the incident or work complained of, or to reduce the claimed value of the case significantly. No better illustration of this is there (and the need for the defence handler to know what kind of expert to use) than where you are dealing with a psychiatric injury. Claimants frequently obtain evidence from a psychologist. Usually however the evidence of a consultant psychiatrist is best.

What is the difference between a psychologist and a psychiatrist? A psychiatrist is a medical doctor. After a minimum of five years they obtain a MB or BM, B Ch. degree and then become a houseman for a year. They then train for a further (minimum) six years in psychiatry, and sit a further postgraduate qualifications (MRCPsych (Membership of the Royal College of Psychiatrists)) before becoming eligible for appointment as a Consultant Psychiatrist.

A psychologist is not a medical doctor. They take a BSc degree or equivalent, followed by three years or more of postgraduate training to become one of various types of practitioner, for example, a Chartered Clinical Psychologist.

A report from a psychiatrist is generally regarded as a more weighty opinion by the court, since a psychiatrist is a medical doctor with a wider training. A psychiatrist has powers such as the prescription of medication and in respect of the Mental Health Act, which are not available to a psychologist. Psychiatrists, but not usually psychologists, have charge of inpatient beds. Psychiatrists will frequently lead an NHS clinical service where the team includes a psychologist, though the converse is not usual.

However, in certain areas, a psychological report is appropriate. For example, neuropsychologists are needed in cases of brain injury, where quantitative testing of memory and other intellectual functions is required.
Post-traumatic stress disorder and psychiatric injury

It has become common practice for claimants who are claiming damages to complain of psychiatric symptoms following physical injury.

You would be forgiven for thinking that in some cases (mainly road traffic accidents) it is almost automatic that psychiatric symptoms are complained of. The major difficulty for defendants over this is that there are no objective tests that can be carried out to validate the existence of the psychiatric symptoms. In this respect this is similar to whiplash (i.e., neck strain) injuries in road traffic accidents where there is no objective testing of the existence of the injury.

If a medical expert states that there is a psychiatric injury it is very difficult to disprove that. Post Traumatic Stress Disorder (commonly called PTSD) is one of the most common psychiatric illnesses claimed for following accident.

The absolute key to dealing with any psychiatric injury claim is having a good, reliable and forensic medical expert providing the expert evidence. In most cases it should be a consultant psychiatrist.

Where there is a strong likelihood of multiple claims for psychiatric injury, such as following a large catastrophic public incident, it can be cost effective to set up a counselling helpline backed up by a telephone triage assessment service and by treatment facilities for those deemed to require it. There are numerous organisations who can provide these services and if they are offered to potential claimants on a free of charge and without prejudice to liability basis a good take up rate can be anticipated. The triage service should filter out those genuine cases and then arrange for early treatment to try and mitigate the symptoms.

Where you have a multiple party incident it is sensible at a very early stage to identify who an appropriate medical expert should be. Ideally someone credible to both claimant and defendant. If claims are presented attempts should be made to have claimants agree to the instruction of such an expert. One thing you can do to help persuade claimants is to offer to pay for that expert's fee, once the report is prepared, direct to the expert and irrespective of whether or not a claim is subsequently pursued. There is a real advantage to the claimant's solicitors of the fee being funded in this way.

Where you have a one off claim you can still try and steer the claimant to a good expert by agreeing to fund the fee up front as described above.

Where a claimant is unwilling to instruct your preferred expert it is far easier on a larger claim, than a small claim to be allowed to obtain your own medical evidence, in addition to the claimant's evidence. In a smaller claim, however, if you have objected to the claimant's nominated experts and indicated that you think a consultant psychiatrist is the correct expert but nevertheless the claimant has gone ahead and obtained a report from a psychologist, there are reasonable arguments open for you to persuade a court that a psychologist is the wrong kind of expert and you should be allowed to obtain your own evidence from a consultant psychiatrist. Bear in mind that the cost of your own report may be around £2000 so pick your case carefully to make this economic.

Because there will be no objective evidence of psychiatric symptoms a forensic approach to the claim will involve consideration of the following:
the Civil Procedure Rules require an expert to confirm that their report contains their true and complete professional opinion, to discuss the likely range of professional opinion and to mention factors which might detract from the opinion expressed. You should make sure in the claimant’s report that those three duties have been complied with. If not questions should be put to the expert accordingly;

in considering whether psychiatric symptoms constitute a psychiatric injury or not, the courts will frequently be looking for whether the symptoms match a recognised classification for diagnosis under medical classification standards. The two main ones are DSM-IV-TR of the American Psychiatric Association or ICD10 of the World Health Organisation. The introduction to DSM-IV makes it clear that the diagnostic criteria included in it should only be a guideline and should be informed by the clinical judgment of the expert. In reality that means looking at contextual information, common sense and clinical experience than just checking off what the claimant says against the elements of the classification;

contextual information should always include a thorough and forensic examination of all of the medical records of the claimant. This is potentially the only objective record of the relevant clinical history;

in DSM-IV there is a definition of when it says malingering should be strongly suspected. That is where there is a medico-legal context to the examination and a discrepancy between the claimants complaints and objective findings. A good expert should be looking for signs of this;

where a case warrants it consider surveillance video recording. Often for it to be effective you need some pretty clear witness evidence from the claimant to say what they definitely can and cannot do.

Remember that distress, anxiety and fear falling short of a recognisable psychiatric illness (illness such as PTSD) do not qualify for compensation in their own right unless accompanied by a physical injury, and then they are factors that will enhance the damages for physical injury.

In their own right the following have been held not to qualify for standalone damages:

- Grief and sorrow at losing a husband (*Hinz v Berry*) (1970).
- Short lived terror of impending death in the Hillsborough disaster did not survive as a cause of action for the benefit of the victims’ estate (*Hicks v Chief Constable of the South Yorkshire Police*) (1992).
- Numbness and discomfort in the left arm and leg caused by stress and anxiety that fell short of a recognised psychiatric illness (*Hussain v Chief Constable of West Mercia*) (2008).
Claiming/defending claims for contribution/indemnity

Frequently when someone is injured in an accident there is more than one party that may be liable. The claimant can choose to proceed against the easiest party for them to sue, frequently the employer. It is for that defendant to decide whether they can seek a contribution or indemnity from anybody else.

Example

We have previously noted the importance of contractual relations to allow contribution or indemnity from another party. However, a good example of a case relying on the general law is Smith v Notaro and Plumbase (2006) - the claimant was employed by Plumbase to deliver goods to a building site occupied by Notaro. Whilst carrying radiators over a walkway made of planks of wood, a plank gave way and the claimant was injured. As site occupiers, Notaro were held to be responsible for the unsafe walkway. Plumbase were in breach of the Manual Handling Operation Regulations 1992 in failing to train the claimant, particularly to impress on him not to walk on uneven surfaces and they were also liable. Plumbase were held to be a third liable, Notaro held to be two thirds liable but then in addition the claimant’s damages were reduced by 60 per cent due to contributory negligence.

Practical strategies

When claiming or defending a claim for contribution or indemnity:

- Check to see if you, or the potential contributor/indemnifier has the benefit of joint insurance (common, for instance, in construction matters). If so either/both of you may claim under that policy for it to indemnify you against the injured party’s claim. This removes the necessity for contribution/indemnity proceedings between yourself and the other potentially liable party. If there is no joint insurance you will need to seek an indemnity, for any claim against you by the injured party, under your employer’s liability or public liability policy instead.

- When initially setting up a contractual relationship with any party who might ultimately be jointly liable with you to an injured claimant, try to include clauses which give you rights over the control of the defence of any claim which you might ultimately have to contribute to.

- If you have no relationship with the other potentially liable party and they are not co-operative with you, to consult and keep you informed on the progress of any claim against them, for which they might ultimately seek contribution/indemnity from you, then the best you can do is to put them on notice that you reserve your position to argue that any damages agreed or paid by them to an injured party were not properly payable or were excessive in amount, and that therefore they need to consult with you before making a decision on either liability or quantum in the claim against them.

- You have to decide whether you are going to take the strategy of “keeping your head down” and hoping that the other party will simply deal with the injured party’s claim and not seek any contribution or indemnity from you, or be proactive asking them to consult you and to approve anything that is done in relation to their defence of or settlement of the injured party’s claim against them. There are pluses and minuses to both approaches and you have to try to find the right balance in a particular case. Take professional advice.

- On day one of an incident occurring, where you have a potential liability, you should be considering whether anyone else might also be liable and you should be taking steps to capture evidence that will ultimately assist you in that. It should automatically become part of your data/fact gathering exercise as soon as you are aware of an incident. That includes
capturing relevant contractual and other documents which might assist you in arguments for contribution indemnity.

- Where you have a contractual relationship with someone who you might ultimately wish to seek contribution or indemnity against it is always helpful, in advance, to have obtained details of their relevant liability insurances so that you can correspond direct with those insurers if a claim arises. The golden rule then is to put those insurers on notice of your claim as soon as possible. Do not wait as that could prejudice the liability of those insurers to indemnify.

- Where you have the potential for obtaining contribution or indemnity from another party it cannot be over emphasised how beneficial it is to be considering that aspect and planning for it at the earliest possible moment, making sure that your brokers, insurers, adjusters and solicitors are all aware of the need to consider that issue and to work proactively towards pursuing contribution indemnity.
Rehabilitation

We have already mentioned the role of rehabilitation in relation to large incidents where the benefits are well understood and pretty clear.

In relation to one off incidents the cost benefit analysis shows the strong likelihood of a cost effective outcome where:

- the probability of liability for the incident is high
- the potential injuries are serious and
- the consideration of providing rehab is within a reasonably short timeframe of the incident occurring

The less likely cost effectiveness of rehab is where:

- the likelihood of liability for an incident is low
- the injuries are not serious and
- consideration for rehab is at a time significantly after the incident

The key is:

- having access to a good rehab provider that you trust (your insurer may have access to such)
- who has the facility for a (ideally telephone) triage service to assess an injured party quickly and
- who have good checks and balances in place to ensure that those treating do not, in their own interests, recommend more than the absolute necessary amount of rehab

There appear to be no accepted, universally applicable, statistics that would prove or disprove the financial benefit to an employer offering rehab to injured employees, irrespective of liability. Certainly some employers do have such a system and believe that it is cost effective for them, particularly when forming part of an overall return to work programme for ill or injured employees, whether injured at work or not. Some providers claim a 20 per cent reduction in claims cost when using rehab habitually in relation to employers liability claimants.
Liability to the Compensation Recovery Unit

Offsetting repayable benefits
This liability is frequently overlooked, particularly when allocating appropriate reserves. It can run in to tens of thousands of pounds.

Whilst a compensator will always have to pay the repayable benefits to Compensation Recovery Unit (CRU), legislation permits a compensator to offset (i.e. retain) a sum equivalent to the amount of certain of those benefits from the special damages (damages for financial loss) that are due to the claimant.

General damages (damages for pain, suffering and loss of amenity) are "ring fenced" such that the compensator cannot make any offset against them.

Where you have a head of loss which can be offset against, the compensator will nevertheless have to repay the benefit, as indicated on the CRU certificate, to the CRU.

What benefit can be offset against what head of loss? The benefits listed under each head of loss, below, can only be offset against payments due to the claimant in respect of that particular head of loss.

<table>
<thead>
<tr>
<th>Loss of Earnings</th>
<th>Care and Assistance</th>
<th>Loss of Mobility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disability Working Allowance</td>
<td>Attendance Allowance</td>
<td>Mobility Allowance</td>
</tr>
<tr>
<td>Disablement, Pension/ Benefits</td>
<td>Care component of Disability Living Allowance</td>
<td>Mobility Component of Disability Living Allowance</td>
</tr>
<tr>
<td>Incapacity Benefit</td>
<td>Disablement Pension</td>
<td></td>
</tr>
<tr>
<td>Income Support</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Invalidity Pension</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Invalidity Allowance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Job Seeker's Allowance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reduced Earnings Allowance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Severe Disablement Allowance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sickness Benefit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unemployability Supplement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unemployment Benefit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment support allowance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Thus if presented with a claim for loss of earnings in the sum of £5,000 and the claimant has been claiming jobseekers allowance, as a result of the accident, worth £3,000, then as compensator you are
allowed to offset the £3000 jobseekers allowance against the loss of earnings damages you are liable for. Therefore the claimant would receive £2,000 for loss of earnings after the offset principle. Please note that you will still have to repay the CRU the £3,000.

**Methods of reducing your liability to CRU**

If you suspect that the reason that the CRU benefits were paid to the claimant was not accident related then you can challenge the CRU certificate.

A classic example is a Claimant who has been off work for a year as a result of the accident however, the Certificate shows that he has been claiming Incapacity Benefit for two years. Clearly there are arguments to suggest that the Compensator should only be liable to pay one year’s worth of benefits as this was attributable to the accident in question. Investigations may reveal that the second year of Incapacity Benefit were as a result of another accident or a medical condition unrelated to the incident for which you are liable. In such a case the Defendant can request a review of the certificate or appeal it.

A review of the CRU certificate may be requested during its period of validity and before the settlement of a compensation claim. Any request must be supported by evidence. For example medical evidence to suggest a particular period of payment of benefits are not accident related.

An appeal of the CRU certificate can only be made at completion of the claim and after repayment of the benefits to CRU. An appeal can be brought when the amount, rate, or period of benefits on the certificate is incorrect or when benefits have been included which have been paid for a reason other than due to the accident or injury. The time limit for appealing against a CRU certificate is one month of receipt by the CRU of repayment of the benefits at the conclusion of the claim.

These are some of the reasons for why you may wish to review/appeal a CRU certificate:

- Benefits paid are not accident related.
- Benefits paid are in relation to a separate unrelated accident.
- There is an obvious mistake on the certificate.
- Causation is an issue i.e., the reason why benefits were paid was due to a pre-existing condition unrelated to the accident.
- The benefits accrued may relate to a period after the claimant fully recovered from their injuries.

**NHS charges**

NHS charges are also recoverable from compensators if treatment received by the claimant from the NHS was as a result of an accident or injury which the compensator is liable for.

On larger claims, it is not unusual for claimant’s to stay in hospital for weeks if not months therefore charges can run in to tens of thousands of pounds as well.

There is no provision for offsetting these payments against the claimants damages so they are always an additional cost to the defendant over and above damages payable to the claimant.

What is distinctive about NHS charges is that you can reduce the amount payable to the CRU for them if the claimant has agreed or is found to be contributory negligent. For example if the claimant has accepted 25 per cent contributory negligence, the NHS charges payable can also be reduced by 25 per cent.
Guide to minimising the cost of personal injury claims arising under employers and public liability

In relation to road traffic accidents, the compensator is liable to pay NHS charges for all compensation payments relating to RTA claims made on or after 5 April 1999 irrespective of the accident date.

In relation to employers and public liability claims, NHS charges are payable by the compensator where the incident occurs on or after 29 January 2007.

Please see the below table for the payable NHS charges:

<table>
<thead>
<tr>
<th>Date of accident</th>
<th>Chargeable rates</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Out-patient (per visit)</td>
<td>In-patient (per day)</td>
<td>Ambulance (per person per journey)</td>
</tr>
<tr>
<td>29/01/07 – 31/03/08</td>
<td>£505</td>
<td>£620</td>
<td>£159</td>
<td>£37,100</td>
</tr>
<tr>
<td>01/04/08 – 31/03/09</td>
<td>£547</td>
<td>£672</td>
<td>£165</td>
<td>£40,179</td>
</tr>
<tr>
<td>01/04/09 – 31/03/10</td>
<td>£566</td>
<td>£695</td>
<td>£171</td>
<td>£41,545</td>
</tr>
<tr>
<td>01/04/10 – 31/03/11</td>
<td>£585</td>
<td>£719</td>
<td>£177</td>
<td>£42,999</td>
</tr>
<tr>
<td>01/04/11 – 31/03/12</td>
<td>£600</td>
<td>£737</td>
<td>£181</td>
<td>£44,056</td>
</tr>
<tr>
<td>01/04/12 – 31/03/13</td>
<td>£615</td>
<td>£755</td>
<td>£185</td>
<td>£45,153</td>
</tr>
<tr>
<td>01/04/13 – 31/03/14</td>
<td>£627</td>
<td>£770</td>
<td>£189</td>
<td>£46,046</td>
</tr>
</tbody>
</table>
Conclusion

We hope that the content of this guide has illustrated how the cost of personal injury claims can be significantly reduced. It takes active management and positive engagement with, and co-ordination of, the people involved in the incident/claims process, namely insured, insurance broker, insurer, investigator/adjuster and solicitor.

Harnessing and utilising the expertise and experience of that group of people is key. The Jackson Reforms have the potential for mitigating some of the projected likely increases in the cost of claims over the next few years. In addition, what is really going to make a big difference is your active management of the process and the people involved in it.

If you would like to receive updates from us on the issues covered by this guide or for any further advice, please contact:

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