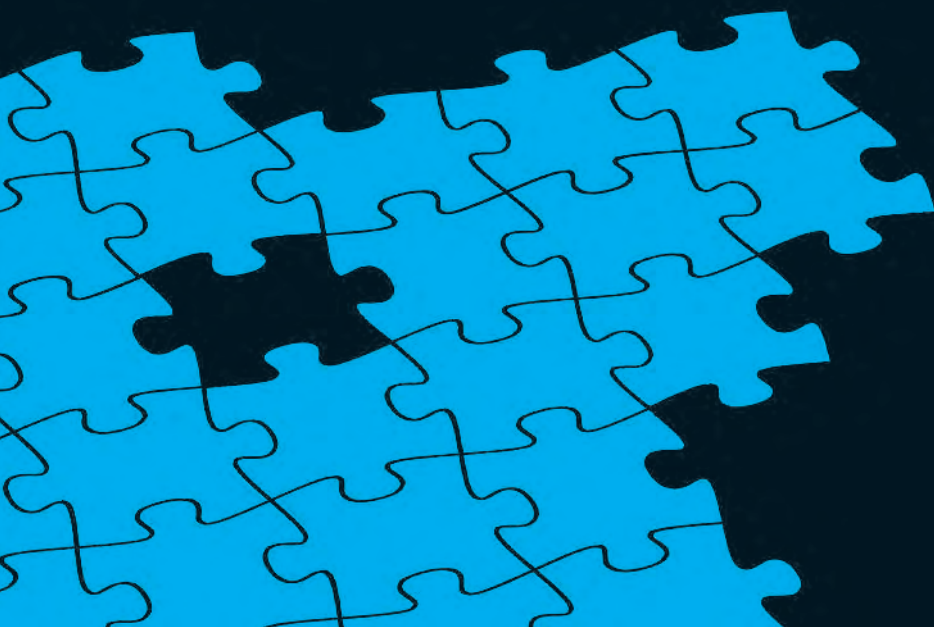


Claims defensibility

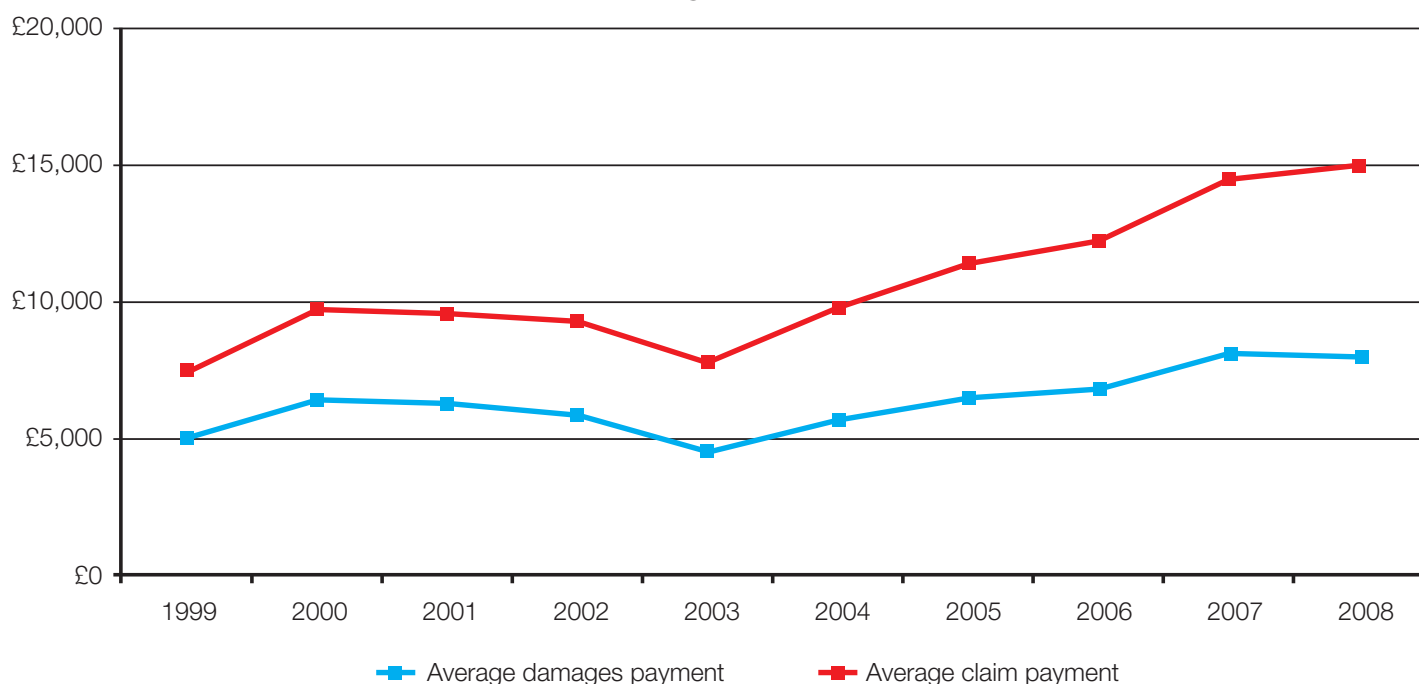
Issues forum – November 2009





Claims defensibility

EL Accident average total cost 1999 - 2008



The dynamic claims environment of the last 10 to 15 years has seen average claims costs driven to unparalleled levels and disproportionate to damages. Insurers have seen pressure to increase premiums to reflect the true claims picture, rather than relying on projected investment income returns to offset losses. Trend changes to civil procedure rules have invariably

meant shorter timescales in which to make decisions, costs penalties for procrastination, and the risks of astronomical legal bills where claims are defended. The upshot is that claims are expensive to defend, resulting in pressure on insurers and their policyholders to take the correct decision first time, every time.

Introduction

The majority of liability claims are valid and quite rightly result in compensation payments, their fate largely pre-determined by the effectiveness of risk management disciplines in the past, and long before a solicitor's letter arrives in the post. A smaller proportion represent a mixed bag; claims where the claimant has departed from an established system of work, acted in contravention of training guidelines or is the author of his own misfortune. Fraudulent claims too are a hot topic, with the Association of British Insurers (ABI) reporting significant increases in the volume and value of detected fraud for most Insurance classes from 2004 to 2008.

However, prevention is better than cure and this Issues Forum advocates that organisations should predominantly focus on preventative risk management principles that precede the claims event as the principle means of improving claims defensibility.

Defensibility – what's that?

With the overall objective of reducing the total costs of accidents, companies should always be looking to reduce the volume of claims presented by having fewer incidents, pay valid claims promptly, restore injured parties to their pre-accident condition swiftly and contest unmeritorious claims robustly.

An emotive phrase, claims defensibility is often expressed numerically, for example, as a percentage of the total claims where £0 damages were awarded, or descriptively, around how quickly an organisation arrives at the **correct** decision on liability – irrespective of whether the claim is one to contest or settle.

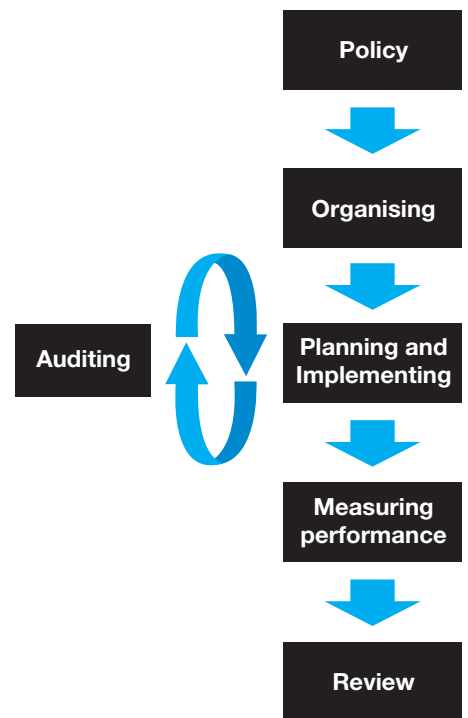
Both descriptions tell a story and each has both positive and negative connotations to the extent that they should never be viewed in isolation, or necessarily as an absolute comparator of performance against that of peers. For example, while a higher figure is often considered to be a positive indicator of performance this is not always the case. A high frequency of “defendable” claims may incorporate a large proportion of speculative or unmeritorious claims, and therefore an unhealthy claims culture. Conversely a low frequency of claims, where a small proportion are defended, can positively suggest that only genuine claims are pursued.

Prevention is better than cure

Current legislative emphasis on risk assessments and absolute duties render complete defences increasingly more difficult and often impossible. Similarly, “long-tail” occupational disease claims present their own challenges, often relating to exposures decades hence when record keeping was poor and witnesses may no longer be available.

Fundamentally, successful claims management is about good risk management. An effective management system such as HSG65 or OHSAS18001 will provide the building blocks for accident and ill-health prevention and a system of continuous improvement – provided that it has full senior management commitment.

The reality is that civil claims almost invariably stem from accidents and cumulative exposures that could have been prevented or the effects mitigated, such that allegations of negligence and /or breaches of statutory duty will have some foundation. Where that breach attracts strict liability, those claims should usually be settled quickly on best terms subject to causation being established i.e. medical evidence confirming that the injury or condition has resulted from the breach.



Organisations who fail to accept this invariably see litigation costs rise – subsequently passed back by the insurer as increased premiums.

Whilst many organisations boast their latest “H&S” badge of honour, no doubt won in the pursuit of achieving minimum standards backed up by safety documentary excellence, they would be well-served to consider their success in defending liability claims – where the civil standard of proof is far less forgiving. The claims process is a serious interrogation of an organisation’s risk management disciplines and only those who are able to demonstrate best practice rather than minimum legal compliance will be able to fully discharge their duty of care.

A critical examination of key areas relating to individual claims can provide an excellent, if somewhat sobering, platform for learning lessons.

Documented Risk Assessment

Risk assessment should be undertaken where a situation or task presents a foreseeable risk of injury. Hazards are identified and risk prioritised relative to likelihood and consequence. A hierarchical approach then determines the programme of control based on risk.

The reality is that many organisations pay lip-service to the process of risk assessment and see it a means to an end only. Whilst failure to risk assess is not directly actionable in civil claims, it will be used as evidence of a breach by the duty holder if, but for that failure, the risk would have been identified and eliminated or reduced.

It is also sadly too common for a risk assessment to be produced and to be too generic as opposed to task specific to be of any real value, or to see the suggested controls not properly implemented. Invariably, claims succeed in light of such evidence.



Training and safe systems of working:

Once steps have been taken to eliminate, reduce or control risk by physical means, safe working practices should be devised, properly communicated and supported by appropriate employee training and supervision.

“Unsafe system of working” and “failure to provide proper training” are phrases that commonly feature in letters of claim, and are usually difficult to defend. Supervisory and auditing disciplines are commonly

challenged as claimants allege that systems of working were not enforced or monitored and unsafe methods of work were “custom and practice”; condoned by a weak management culture.

Too often, training is generic, not competence-driven, not refreshed, and the results unchecked, and therefore of little use when defending claims. Not only should induction, task specific, and periodic refresher training be provided, it is vital that the trainee’s competence is validated and documented¹.

Occupational health and absence management

Pre-employment and periodic medicals will confirm an individual's fitness to work or indeed identify susceptibilities that require workplace adjustments or careful management of the individual.

A complementary absence and case management process will also minimise complaints attributed to the workplace and ensure injured parties are returned to their pre-accident state as quickly as possible – thereby reducing awards for past and future financial loss.

Claims often follow long spells of absence from disillusioned employees recovering from injury or awaiting treatment. An effective absence and case management process can increase the likelihood, and speed, of injured parties returning to their pre-accident state – thereby reducing awards for past and future financial loss. Conversely, where employees fail to engage with such initiatives, and a claim arises, arguments can be made that the individual has failed to mitigate their loss.

Personal Protective Equipment (PPE)

PPE should be the last line of defence, to be adopted after exhausting reasonably practicable higher order controls. Sadly the reverse is often true and where PPE is used common failures are still found in policyholders' ability to demonstrate the correct selection, training and supervision of its use, communication of its need and disciplinary action taken when not worn. The cheap short term fix often then becomes a long term problem both in terms of costs to the policyholder and the welfare of the workforce.



Properly deployed and enforced, these system-based controls will reduce the potential for liability claims at source by preventing accidents and ill-health. Where claims do nonetheless arise, the ability to demonstrate that such measures are in place, and operating effectively, should substantially increase an organisation's chances of successful defense.



Post incident investigations²

The purpose of the investigation and accident form is to capture the facts contemporaneously, to preserve evidence obtained and to make recommendations to prevent a recurrence. Policyholders must appreciate that the efficacy of the investigation and the delivery of its findings will influence the decision of insurers to contest a claim.

Those responsible for the investigation and associated documentation should always have in mind that the report and accompanying material are, in the context of a civil claim, key items of disclosable evidence.

Many organisations make it a condition of employment that accidents are reported immediately so as to avoid delays that prejudice the investigative process. This is to be encouraged and where delays are incurred the reported facts should be interrogated and, if necessary, challenged.

The key elements of an investigation will include:

- Early inspection of the scene including work equipment.
- Photographic and video footage of the scene. Check CCTV for evidence.
- Immediately interview the injured person, obtain a concise statement, signed and dated. This is crucial, as they are often the only percipient witness to the incident.
- Identify and record the accounts of all relevant witness, not just those in the area, or who claimed to have witnessed the incident.
- Challenge and record inconsistencies in the various parties' accounts.
- Where there are suspicions regarding accounts of the incident, check other evidence; preceding shift reports, maintenance logs, attendance records, safety inspections, etc.

When the investigation is complete, the investigation team should record their findings. Ordinarily, a thorough enquiry will illicit an uncontroversial set of facts facilitating a review of controls and working practices. However, where there are doubts and uncertainties, this should be articulated within the main body of the report. Speculation should be avoided and any root cause analysis should be conducted with care, particularly where the circumstances of the accident are in doubt, rendering resulting actions potentially invalid or unnecessary.

Any action points should be realistic, in line with good practice and designed to prevent a recurrence. This should never be a meaningless quick fix solution simply to satisfy the requirements of the form. Such actions, as irrelevant and ineffective as they may in fact be, will be pounced upon by claimant solicitors as being indicative of negligence.

Where an injured party has willingly deviated from an established safe method of working, or in contravention of training or safety rules, the company must ensure that the matter is dealt with properly through normal disciplinary channels – lest this be interpreted as condoning that action.



Documentation: creation, retention, retrieval³

Claims are seldom defended without supporting documentary evidence, be that the accident report, investigation findings, risk assessments, training records, maintenance logs, PPE issue, etc.

Disease claims present their own challenges where the insurer has to build evidence to show that assessments were undertaken by qualified experts and exposures were not excessive – or if they potentially were, that all the necessary controls were in place at the time. Doing this many years down the line when processes have been changed, sites have closed and employees have moved on, is an all but impossible task. Indeed as the state of knowledge and evidence improves on issues such as occupational cancers and risks relating to nanotechnology – history tells us that it may be the evidence gathered or actions taken (or missed) now, that determine the claims of the future!

The alternative is to rely on the oral recollection of lay witnesses, although this too will often be severely diluted unless supported by contemporaneous records.



To claim or not to claim?

While accident and absence rates can be a useful indicator of likely claims activity there is rarely a straight line relationship. Some sites see more, or less, activity than others whilst seemingly having identical processes and accident rates. The reason for that may be up for debate but in our experience, where individuals feel they are both valued and properly engaged by management, there is a correspondingly lower rate of both accident and claims activity. The challenge therefore rests with management to facilitate that mindset.

The motivations of individuals who choose to pursue claims are many and varied, and can be affected by a number of dynamics, not least of all:

- Loss of employment is an obvious claims driver, particularly where loyalties have been severed resulting from poor management of the redundancy process. Honest and open communications with the workforce, and supportive redeployment and retraining initiatives can reduce any “spikes” in claims frequency following rationalisation and site closure.
- Claims often follow employee grievances either individually or collectively. The role of human resource departments is obviously important in these situations.
- Organisations who simply “finger point” or foster adversarial relations with trades unions, rather than positively engaging with them, can expect an increase in claims.
- Financial loss e.g. lost wages following work related absence. Whilst a careful balance has to be struck, discretionary payments relating to valid absence can prevent the pursuance of a far more costly claim.
- Speculative claims can arise from a misunderstanding of risk and exposure, for example where the cause of illness and absence is misguidedly attributed to a chemical agent in the workplace. The importance of good communication to ensure risk, and the perception of risk, is kept in proper context – often determining whether claims are pursued at all.

There are many variables in individuals’ rationale for making claims and this needs to be properly understood rather than simplistically attributing it to a claims culture, which may be a manifestation of the wider working environment.

Conclusion

Claims prevention and claims defensibility are not exclusive disciplines, requiring the same fundamental risk management principles to be in place. Perhaps the main differentiating factor for defending claims is the need to be mindful of liability considerations during the accident investigation process and the required emphasis on document capture, archive and retrieval.

Best practice organisations are those that see their claims as an opportunity to improve. They are willing to work in partnership with insurers and brokers, focusing on the chance to interrogate and improve upon the failures that precede claims, rather than dwelling on the mistakes of the past or the realities of the legal process.

Further reading

- 1 QBE Risk Management Standard: Competence Validation
- 2 QBE Risk Management Standard: Accident Investigation
- 3 QBE Risk Management Standard: Standard Document Disclosure

See www.QBEurope.com/rm

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Matthew qualified in 1992 and joined BLM in November 2007. He specialises in the defence of high value Employers and Public Liability claims including catastrophic injury, occupational disease and group actions. He is also regularly instructed to advise corporate clients when investigating serious incidents, to handle Inquests and the defence of regulatory prosecutions.

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