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# Claims Defensibility

## A guide to claims defensibility and how it can help you and your business

## INTRODUCTION

**Claims Defensibility offers a framework on how to defend claims bought against you, and your organisation, and it should play an integral part of any risk management strategy.**

Of course, in an ideal world accidents would not happen, and certainly prevention is better than cure, however this guide will provide guidance on claims defensibility if ever needed.

If, and when things go wrong, an injured person could normally pursue a claim through the civil courts. Under civil law, organisations have a duty of care to make sure that they do not injure anybody as a result of their activities. Where this does happen, those found negligent may be ordered to pay compensation for any loss or injury.

Where a claim arises, it is important to be able to demonstrate that the arrangements in place and the precautions implemented were those expected of a 'reasonable and prudent' employer. Such a person would take account of:

- The likelihood of injury and its potential seriousness.
- The adequacy of the precautions they have taken in the light of current knowledge they ought to have.
- The cost of eliminating or reducing the risk in particular circumstances.

When it comes to claims, the key question is whether there has been a breach of duty and – if so – has that breach caused any injury and is the injury a direct result of that breach.

Since 1st October 2013, where an injured employee brings an action at common law, this can now only be for negligence. Previously, an action could be brought for either negligence or a breach of statutory duty - more commonly - for both. Despite this change, it is likely that the Courts will still take the view that a breach of a statutory duty remains evidence of negligence.

We typically see the success of claims being influenced where there are failures in identifying or following good practice which ultimately leads to a breach of duty.

This is particularly so in relation to:

- The adequacy of the precautions taken (including maintenance and repair).
- Non-existent or inadequate risk assessments.
- Inadequate arrangements for training.
- Ineffective post-accident investigation.
- The lack of relevant health and safety documentation.

## ADEQUACY OF PRECAUTIONS

One aspect that comes under close scrutiny in civil proceedings is the precautions that were taken to prevent accidents. Usually, this is on two fronts.

- Firstly, there is a consideration of the adequacy of the precautions themselves relevant to the particular circumstances.

Here, scrutiny can focus on how the defendant considered this in the light of any regulations, guidance or other standards that might apply. Where risk assessments need to be completed to meet the requirements of the Management of Health and Safety Regulations, these should do this. They should determine what (if anything) needs to be done to comply with the standards that have been identified.

- Secondly, the implementation of those precautions may be called into question.

Sometimes the success of a claim can be influenced where evidence suggests that the precautions were poorly implemented or checked to make sure that they remained adequate. Here, the resources, equipment, materials, information, training etc. provided to do this might be challenged.

## RISK ASSESSMENTS

Another aspect that can come under close scrutiny is risk assessment. Successful claims can be influenced by the adequacy of any risk assessments that were made or if it is possible to show that these were not completed where required (or at all).

It has been suggested that previously insufficient judicial attention had been paid to risk assessments. This has been because the lack of one or any inadequacy in it was never a direct cause of an injury. However, the judgment in this case now suggests that for claims the most logical approach in considering the adequacy of any precautions taken is to consider the adequacy of the risk assessment that was made.

In practice, general assessments made under the Management of Health and Safety at Work Regulations can be used to identify where hazards occur. This, in turn, should help to decide what precautions would be appropriate to prevent them.

With risk assessments, common failings include not:

- Being able to adhere to or follow the precautions in practice.
- Being able to demonstrate that they have been completed where necessary, although this on its own is not a clear indication that any claim will succeed.
- Considering fully the risk from particular activities or premises.
- Considering all those who may be at risk.
- Identifying the steps employers needed to comply with relevant statutory requirements, guidance and best practice.
- Being relevant to the actual premises or 'local' conditions.
- Being kept up to date, particularly where there have been changes in legislation, guidance or best-practice; the premises themselves; the tasks carried out there, etc.
- Being completed by persons who are sufficiently competent.

From a defensibility point of view, it is important that assessments are properly documented and are kept readily available or suitably archived when they are superseded. Current assessments should be subject to appropriate review and updated as necessary. The arrangements and responsibilities for completing them should be recorded as part of the health and safety policy or other supporting documentation.

As we have seen, it is important to remember that many claims succeed on the basis of poor implementation of the required precautions. Whilst a risk assessment is a first step in identifying these, it is just that - and other steps will be needed to make sure that the required precautions are taken and remain adequate.

## TRAINING

Adequate training is another aspect that repeatedly comes into question in the event of claim.

With claims defensibility in mind, it is not only important to be able to demonstrate that training was provided, but it was also adequate in the circumstances. Guidance provided by the HSE broadly outlines what is required and is freely available at www.hse.gov.uk. The risk assessments that have been completed can also help identify training needs for particular circumstances.

Arrangements should allow for adequate training at induction; for the particular circumstances, equipment and tasks involved; and for refresher training at appropriate intervals. The method, length and complexity of delivery should be proportionate and will largely be determined by the particular circumstances, the degree of risk, associated precautions etc. It should also be ensured that any training provided is effective and clearly understood (both in content and language).

Records of any training provided should be retained. These should contain detail relating to the persons who were trained (including their signatures to say that they have received and understood the training); when they were trained and by whom; an overview of the training that was provided etc.

The arrangements for the provision of training should be reviewed (as appropriate) to ensure that they remain adequate, relevant and provided at regular intervals. Again, these should be recorded as part of the health and safety policy or other supporting documentation.

## POST-ACCIDENT INVESTIGATION

The adequacy of any post-accident investigation that is conducted can also be important. This is because documentation produced as a result will usually be required in the defence of any claim. Once the immediate aftermath of an accident has been dealt with, it is important that a prompt investigation is conducted gathering relevant information and documentation. This requires careful consideration, particularly if a claim might result and documentation is to be relied upon sometime in the future.

As an example, where an individual slips or trips, any immediate record of that accident should be recorded as making reference to an 'alleged' accident. It will not be until following the post-accident investigation has been fully concluded that a cause can be properly identified.

For example, unless the area has been inspected immediately at the time an individual has slipped, the initial accident report form should record the accident as an 'alleged accident'. That is, 'X says they have slipped on a wet floor' rather than 'X slipped on a wet floor'. By recording the accident as 'X slipped on a wet floor' this infers that the floor has been inspected and it was categorically wet, when in fact the report of the alleged wet floor has come from the claimant themselves and not from the individual who is completing the accident report form.

It may be that following further investigation or inspection after the accident report form has been completed that the floor was, in fact, not wet and/or other suitable precautions were in place. By not recording the accident report form accurately, would take away any perceived 'certainty' that the floor was wet, when no investigation has been completed to confirm it was so.

Accident investigation documentation is important in defending claims. In some cases, it might be appropriate for those completing it to have appropriate training. This is particularly so, as any reports they prepare and information they collect can become disclosable in the event of claim.

For many claims, being able to provide adequate documentation promptly to an insurer can ensure that costs remain low. This is because employers' liability and public liability injury claims valued between £1,000 and £25,000 are now processed through an online portal. Lower, fixed costs are payable to claimant's solicitors as long as the case remains in the portal (subject to liability being accepted). Should a claim fall out of the portal due to an insured not being able to provide the insurer with the necessary documentation and thus delaying a decision on liability being made, then predictive costs can be up to six times more expensive if the case then proceeds outside the portal.

For claims in the portal, insurers must acknowledge receipt within 24 hours and investigate within 30 working days for employers' liability cases, or 40 working days for public liability cases. Failure to comply with these time limits will result in the claim dropping out of the portal. Therefore, being able to provide all relevant accident documentation as soon as a claim is received in the portal will help insurers to properly investigate and consider claims within the prescribed time limit. Where there are denials of liability and/or allegations of contributory negligence, these claims will drop out of the portal.

Claims exceeding £25,000 cannot be handled through the portal. Here, claims are notified by a claimant solicitor's letter and this must be passed to the insurer. Once the letter is acknowledged, the insurer has a maximum of three months to investigate the accident (this time limit is different in Scotland and Northern Ireland). Within that time, they must inform the claimant's solicitor that liability is either admitted and the claim will be settled or that liability is denied/contributory negligence is alleged and a defence will be prepared.

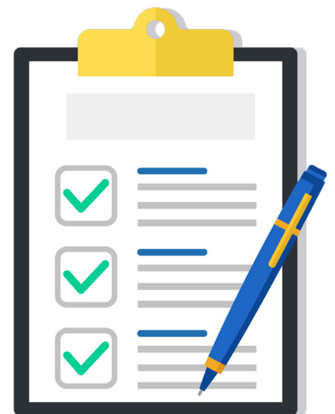
The Claimant Solicitor's letter will contain a list of documents for disclosure. If liability is to be denied or contributory negligence alleged, the letter informing the claimants' solicitor of this must include the documentation that is being relied upon. Failure to disclose all the relevant documentation can result in additional sanctions for the defendant.

## DOCUMENTATION

In either context, documentation will be important in the defence of a claim. Further detail on relevant disclosable documents can be found at www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic#C.

Broadly documentation could include those:

- **Information gathered at the scene of the accident** – for example, details relating to the injured parties; the extent of any injuries incurred; the circumstances of the accident (e.g. time, location, environmental conditions etc.); the layout of the area where the accident happened (including any sketches/photographs); witnesses statements; CCTV; details of any equipment used etc.
- **Documents prepared as a result of any accident investigation –** for example, entries into an accident book; internal accident report forms and/or investigation reports; first-aid reports and any other associated records; copies of any reports made to the Enforcing Authorities under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations and other related documents; any Enforcing Authority correspondence relating to the event; minutes of any meetings at which the event or related matters were discussed etc.
- **Relevant documents drafted to meet specific health and safety requirements** – for example, general risk assessments or more specific ones; records of equipment maintenance, inspection and/or other checks that have been made prior to the accident; records of any information, supervision and/or training that was provided; policy documentation detailing the arrangements for managing the risk from manual handling tasks etc. be challenged.



For more information about how to process a claim, please visit www.alexanderbonhill.co.uk/claims-management