

let's talk shop retail claims update

Check out your systems

Andrew Allan, a claims lawyer in our retail team, advises that care must be taken to ensure staff are not overworked and explains how to avoid potential repetitive strain injury (RSI) claims arising from the busy festive period.



Most stores have, or should have, a recommended maximum amount of time that an individual should work on a till, in order to minimise the risk of that individual developing RSI. But when drawing up the staff rotas for the festive period, there will always be that temptation to exceed the recommended time an individual should spend on tills; to keep the customers happy and both improve efficiency and maximise profitability.

What does the law allow?

The law is less accommodating. The Manual Handling Regulations (1992), at Regulation 4(1)(b), state that:

'Where it is not reasonably practicable to avoid the need for employees to undertake any manual handling operations at work which involve a risk of them being injured, then each employer shall:

- i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in Column 1 of Schedule 1 to these regulations and considering the questions which are specified in the corresponding entry in column 2 of that schedule,*
- ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable and,*
- iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on*

*(aa) the weight of each load, and
(bb) the heaviest side of any load whose centre of gravity is not positioned centrally.'*

This Regulation is directly relevant to till-workers during the busy Christmas period. Specifically relevant factors contained within Schedule 1 of the Manual Handling Regulations are:

- 'a) A rate of work imposed by a process.*
- b) Insufficient rest or recovery periods.'*

What should you ensure?

Consideration should be given to having a specific risk assessment for the festive period, given the inevitable extra pressures imposed on till workers. This should cover not just Christmas, but also the (often busier) post-Christmas sales period.

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Welcome

I'm pleased to bring you the autumn/winter edition of our seasonal claims update from our retail claims team.

Inevitably, this issue demonstrates a strong bias towards Christmas and sales-related issues. We do hope you will find some practical advice to help you plan for shopping at the busiest time of the year.

You'll see that this edition does not include an ice-scraper - instead, we've treated you to a little Christmas tree (see competition details below!)

All that remains is for me to wish all of you and your loved ones a very merry Christmas and a happy new year. On behalf of all at Hill Dickinson, thank you for your time, business and friendship over the last 12 months and we look forward to seeing you and working with you in 2012.

Best wishes

Andrew
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Competition time!

Colin Campbell, Head of Risk Management at Arcadia, loved our Christmas freebie so much, he challenged our readers to a festive competition:

- The best dressed tree
- The most well-travelled tree
- Largest tree grown by 10 December 2012

So, if you think your tree is particularly stylish or if you think yours can travel the furthest, send in your pictures to:

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Spring into Style

Hill Dickinson, in association with Fairbridge, are hosting 'Spring into Style'; a charity fashion show to be held at Liverpool's MetQuarter shopping centre on Thursday 23 February 2011.

Catch a glimpse of next year's spring/summer collections before they hit the shops as models, sporting personalities, clients and members of Hill Dickinson make their way down the catwalk!

Tickets to attend the event are £10 and all proceeds go to Fairbridge.

Fairbridge works with young people aged 13-25 that other organisations find difficult to engage - giving them the motivation, self-confidence and skills they need to change their lives.

Please visit their website:

www.fairbridge.org.uk

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Rotas should be drawn up to ensure that workers do not operate on the tills for excessively long periods. Managers should ensure that there is sufficient rotation of tasks, so that employees are able to undertake other roles having finished their time on the tills.

Managers/supervisors should also be aware of any individuals who have an extra restriction placed on them by, for example, occupational health departments, which may further limit the time spent on till duty. Claims may well arise from an exacerbation of that problem, even if the process at work has not actually caused it. A clear system of notification should be evidenced.

If it is not possible to plan the rota so that individuals are restricted to a reasonable time on the tills, other efforts must be made to ensure that everything possible is considered and/or implemented to help try and prevent an individual from developing RSI.

For instance:

- Does the individual have to stretch to reach products in order to pass them over the scanner?
- Is there a suitable chair with back support?
- Does the till have a conveyor belt to allow the easy passage of goods across the scanner and to the packing area?
- In respect of extremely heavy items, can the individual use a moveable/mobile scanner to process the goods without having to lift the items?

Appropriate planning and due consideration should hopefully limit the opportunities for potential claimants and their trade unions. It should also hopefully limit the number of absence days and consequent impact on workforce as a result of upper-limb injury and disorders.

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Full steam ahead for the Jackson reforms

As we approach the end of 2011, it seems very likely that this time next year the current costs landscape will have changed dramatically. A 'go live' date of October 2012 has been given for the implementation of the Jackson reforms, with the intention that any primary legislation will be in place by April next year.

Despite some criticism, Sir Rupert Jackson maintains that the recommendations set out in his final report provide the best opportunity to sustain an adequate balance between 'perfect justice' and a 'certainty of outcome'.

It is understood that in October 2012, a new regime will come into force with the implementation of a ban on the inter partes recovery of success fees and ATE premiums: the banning of referral fees, the introduction of qualified one way cost shifting together with reforms to the Part 36 and proportionality definitions. Following recent suggestions by the Government, it is now also thought that the small claims limit may potentially be doubled to £10,000 though the personal injury limit of £1000 will remain.

Other longer-term reforms are still on the agenda including fixed costs regimes in fast track cases and a modernisation of the traditional Bill of Costs.

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Clean (and record) as you go

In previous editions of *let's talk shop*, we covered weather-related claims and offered some practical guidance. But with the season of slips, trips and falls now upon us, **Ian Evans**, a claims lawyer in our retail team, discusses the benefits of a 'clean as you go' policy during these periods of inclement weather and peak footfall in stores.

The benefits

Most retailers have developed 'clean as you go' policies that strike a sensible balance between ensuring operational requirements are met and taking reasonably practicable steps to ensure that their stores are a safe place in which to shop.

This policy encourages employees to be vigilant, identifying and dealing with spillages and hazards at the same time as carrying out other duties. The staff who are on the shop floor are the eyes and ears of the system.

Such a policy does, however, require staff to be properly trained in spotting a hazard and how to deal with it correctly. Training records must therefore be retained to evidence training and to encourage safe practice. However, is this now enough?

The weaknesses

Claimants and courts alike have seized upon the fact that for a defendant to establish 'clean as you go' as a defence, it is dependent upon a member of staff giving evidence that the accident locus was free from hazard a relatively short period prior to the accident.

The judiciary

Evidence of timing is therefore crucial, as can be noted from some recent comments by the judiciary:

"To rely on members of staff to inspect an area for hazards at the same time as carrying out their other duties is not acceptable."

"Given the size of the store involved it would not take greater than a few minutes if that every hour for the duty manager to carry out and document an inspection of the store."

"It seems to me that if management are floor walking at all times it would not take a great deal for that floor walking to be recorded."

"It appears that it is extremely difficult for the witness to say with certainty some time after the event that they were definitely in the area of the spillage just prior to the accident occurring."

Inspection and documentation

'Clean as you go' is the first line of defence but, as can be appreciated, it is extremely difficult for anyone to recall exact timings in relation to something that could have happened three years before. To improve the prospects of a defence, retailers should now have a documented system of regular inspection.

Dependent on the size of store, a nominated person should conduct an inspection of the store at, for example, half-hourly or hourly intervals, recording that such inspections have taken place. This will demonstrate to the court that staff are not only on the lookout for hazards, but that there is a definitive and documented inspection system in support.

The way forward

Most managers carry out a check of the store before opening and will be floor-walking during opening hours. The document would record this floor-walk.

However, a checklist which shows that a hazard was found and dealt with is better than a perfect score checklist, as this demonstrates that the inspection is being undertaken and is effective.

So, whilst a 'clean as you go' policy has been sufficient in the past, it is now arguably outdated, making it essential for defendants to implement a regular documented inspection to demonstrate that they are discharging their duties as occupiers and thereby providing a further line of defence.

Ian Evans

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The price is right

Derek Millard-Smith, a Trading Standards lawyer in our retail team, suggests some dos and don'ts to help ensure the festive price is right and that Trading Standards don't 'come on down'.

Regardless of how you feel about shopping or consumerism in general, as retailers know, there is a lot more involved in a shopping spree than meets the eye.

Retailers face scrutiny of their pricing practices all year round, but perhaps never more so than in the lead-up to the Christmas rush (which starts earlier every year), or the craze of the Boxing Day sales. Ensure you don't fall foul of the Consumer Regulations by following some simple advice.

The 'average consumer' is always right, so don't confuse them!

The mantra 'the customer is always right' is not always the case, but the key is understanding the 'average consumer'; somebody who is reasonably well-read and informed. Provided your actions enable them to make appropriately informed choices about their purchases, the inspector is unlikely to call.

DOs

When comparing previous higher prices, you should:

1. State the prices of goods in a clear and unambiguous way
2. Use clear and intelligible language
3. Use accurate and valid information

DON'Ts

You should not:

1. use misleading actions, e.g. offer false information which is capable of deceiving the 'average consumer';
2. make misleading omissions, e.g. omit or hide material information or use unclear or unintelligible language; or
3. use unfair commercial practices, e.g. advertise a product for a very limited time, or under very particular terms which elicit an immediate decision from the 'average consumer', but deprive them of their ability to make an informed decision.

What original prices can you use to show a reduction?

Price comparisons can come in a variety of forms.

The most common are:

'RRP', 'was' and 'now':

1. 'RRP' can only be utilised in respect of products supplied by another supplier. So someone who is the sole provider/supplier of a product cannot price-compare using the RRP.
2. In relation to the supplier's own products, the most appropriate way to price products is to utilise the 'was' and 'now' comparison.

For how long and in how many stores does the product have to be on sale at the original price?

Recent changes in the law mean it is no longer necessary to expose a product for sale for 28 days at its original price before applying a reduction - provided the duration and extent of the exposure at original price is made clear to the average consumer, e.g. 'higher price charged in at least 10% of our stores for a minimum of seven days' or 'higher price charged in X stores (this number needs to be significant) from Y - Z dates'.

The 28-day rule still applies if this information is not made clear, so you must check that all labelling and signage is made available to the average consumer if you wish to deviate from the 28-day rule.



Where do I advertise the price comparison to ensure the 'average consumer' is informed?

The 'average consumer' can be made aware of the price comparisons:

- at the point of sale; or
- on each item's price ticket

Practically, the point of sale is safer from a regulatory compliance perspective, as it avoids complications when individual item tickets fall off or are removed from items. These locations are also more cost-effective to the retailer.

Price comparison pointers

1. Be transparent: price comparisons must be genuine, as even factually correct information can breach the Regulations if it in any way deceives, or is likely to deceive, the 'average consumer'.
2. Make sure the 'higher' price is a genuine retail price, and not a price created to give the impression that the lower price is a reduced price, when in fact it is not.
3. Set out clearly the immediate previous price and when that price was last offered.
4. State explicitly that a product was previously for sale the higher price at 'XXX stores' so as to show a sufficient % of locations.

5. State the number of days the product was offered for sale at the higher price – seven days is probably the absolute minimum to ensure that the reduction can be viewed as genuine.
6. Do not make comparisons with prices offered over six months ago unless you explicitly detail the exact dates.

And finally...

Whilst the 'average consumer' is informed, they will be less well-informed than you (the retailer), so if in doubt about your pricing practice, do not do it: avoid a run-in with Trading Standards and potential damage to your reputation.

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Ogden 7: live long and prosper

Kari Hansen, a partner in our retail claims team, discusses the impact of the recently published Ogden 7 Tables.

Those familiar with the Ogden Tables know that they assist with calculating lump sum damages for future losses in personal injury and fatal accident cases in the UK. They are particularly useful for determining future loss of earnings, pension loss and pecuniary losses such as care. Without them, defendants and/or their insurers would be faced with established annual losses, which would continue for lengthy terms with no determined stop point.

The new edition of the Ogden Tables, released in October, is all about upward pressure on damages. There are no structural changes – but the figures have changed dramatically. The tables now reflect the most recent increased mortality statistics, as well as changing the definition of 'disabled' and introducing a bigger and broader discount rate. The effect: increased damages just in time for all those claimants who are tempted by a pre-Christmas settlement.

For example, a 20-year-old male with a lifetime loss of £100,000 under Ogden 7 will now recover £47,000 more than he would have received under Ogden 6. The impact is even more profound when dealing with older claimants – in males aged 75 the increase is just under 15%. A 70-year-old man with a lifetime loss of £10,000 will now receive £134,400 under Ogden 7, as opposed to £123,000 under Ogden 6 – an additional £11,400 for, in effect, doing nothing.

Ogden 7 is very much an interim revision of the Ogden Tables. Ogden 8 is expected to provide the greater overhaul in terms of structure and also content in the explanatory notes – it is awaited with baited breath.

Even though the changes to Ogden 7 have been relatively minor, the impact on the pounds for retailers and their insurers may prove to be significant. For more detail about the specifics of the changes, please contact one of our retail claims team.

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Christmas parties: a sobering reminder

The festive season is fast approaching, and with it comes the annual gossip-sparking, sherry-drinking, Slade-singing tradition that we all know and love as the office Christmas party. **Tim Thomas**, an employment lawyer in our retail team, explains that despite this providing a golden opportunity for employees to let their hair down and socialise over a glass of mulled wine (and for senior management to show off their moves on the dance floor), it is important to remember that employees' actions could result in a costly hangover for employers.

Under the legal principle of vicarious liability, employers are liable for acts of their employees during the course of their employment. The employment tribunals have given a wide interpretation to the definition of 'course of employment', and it is highly likely that work-related functions such as the office Christmas party will be classed as an extension of employment.

As a result, employers could find themselves liable for acts of discrimination and harassment committed by employees at the annual yuletide shindig. A serious act of harassment can result in an employer being found strictly liable (that is, having no defence) in both the civil courts and the employment tribunal.

However, if an employer can show that they took all reasonable steps to prevent acts of harassment and discrimination, they may avoid liability. Employers should therefore take precautions to minimise their risks. Having clear, well drafted anti-discrimination and anti-harassment policies in place is a good start, but a tribunal is unlikely to consider them sufficient on their own to avoid liability.

Before the party, all members of staff should be reminded of the standard of behaviour that is expected of them. A simple way to achieve this is to circulate a short email reminding employees that inappropriate behaviour will not be tolerated and may result in disciplinary action. (Removing any mistletoe from the venue might also be a sensible precaution, in order to reduce the risk of unwanted advances and allegations of sexual harassment!)

Employers who appreciate the risks in advance, and take preventative action to minimise them, are the most likely to have enjoyable Christmas parties.

Tim Thomas

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STOP PRESS!

National Fraud Intelligence Bureau crack-down on fraud

A major National Fraud Intelligence Bureau (NFIB) campaign to shut down the websites, email addresses and telephone numbers fuelling much of today's fraud has already stopped at least £7 million being lost to fraudsters in the last two months.

During September and October, the NFIB has suspended 12 websites, 179 telephone numbers and 155 email accounts, which were enabling organised crime gangs to target and steal from individuals and the public and private sector.

The threat of personal information being stolen through phishing e-mails is now being tackled in partnership with UK Payments Administration (UKPA). A total of 978 emails have been passed to the UKPA-run website for suspension: www.banksafeonline.org.uk.

NFIB analysis has shown how fraudsters can be resilient, with the ability to quickly reinvent their criminal operation.

Hill Dickinson is the only law firm partner of the NFIB. For further information, contact:

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Toy story 2011

For the less organised of us, or those who have been too busy fighting claims, fraudsters or managing risk, and still have Christmas shopping to do we thought it might help to let you have an aide-memoire of predicted top-selling Christmas toys for 2011.

So here goes (run the Top of the Pops music!):

1. **Doggie Doo**, John Adams, RRP £22.99
2. **Fijit Friends**, Mattel, RRP £54.99
3. **Fireman Sam Pontypandy Rescue Set**, Character, RRP £29.99
4. **Kidizoom Twist**, VTech, RRP £49.99
5. **LeapPad Explorer**, Leapfrog Toys, RRP £79.99
6. **Lets Rock Elmo**, Hasbro, RRP £69.99
7. **Milky the Bunny**, Flair, RRP £59.99
8. **Monster High Lagoon's Hydration Station**, Mattel, RRP £39.99
9. **Moshling Tree House**, Vivid, RRP £18.99
10. **Nerf Vortex Nitron Blaster**, Hasbro, RRP £44.99
11. **Ninjago Fire Temple**, Lego, RRP £91.99
12. **Star Wars Ultimate Force Tech Lightsaber Assortment**, Hasbro, RRP £39.99

Toy industry statistics for 2011

With retailers under pressure from the global economic downturn, what actual impact is this having on Woody, Buzz and their mates? The following details some of the key headlines:

- Market worth £2.9bn in 2010 or 436m boxes of toys sold with an increase of 8% over 2009.
- The UK toy market is the biggest in Europe, 10% bigger than France (#2).
- In 2010, toys bought for Christmas represented 35% of the annual turnover with an average price at £8.71.
- Latest trends show a growth of 3% in value for the first 9 months of the year.
- The best-selling toy for 2010 and for the month of December was Vtech's Kidizoom Digital Camera.
- 21.5% of sales in 2010 were made online, an increase of 42% over 2009.
- Building sets continue to enjoy a fantastic popularity as the fastest growing super category in the UK (+22%).
- Dolls have been recovering over the past few months (+11%) and are the second fastest growing category to date. Boosted by Disney Princess - Tangled and the arrival of new Monster High Dolls (Mattel), while Barbie still dominates the category.
- Licensed sales represent no less than 24% of the UK toy market with particular success from Toy Story, Cars and Star Wars.
- Moshi Monsters from Mind Candy is currently one of the hottest licensed brands around.
- The Infant Preschool category is doing well with a 5% increase compared to last year.
- The Plush category (+9%) is still proving popular and after last year most popular Zhu Zhu Pets, NPD expect more cute fluffy animals to do very well.

Source: Toy Retailers Association

Christmas claims: 'tis the season to be careful

According to the Royal Society for the Prevention of Accidents, Christmas is a particularly dangerous time of the year. In fact, 80,000 people in the UK require hospital treatment for 'Christmas-related' accidents every festive season. At least 1,000 of those occur as a result of miscellaneous Christmas decor.

Here are a just a few of the types of the Christmas or weather-related claims we are handling or have resolved.

At the car wash

Recently, we successfully passed on liability for a claim where the claimant, a customer, slipped on ice that had formed on the surface of a car park in one of our retail clients' stores. An independent car company was, by agreement with our client, hand washing cars of shoppers, parked in bays, whilst customers did their shopping. On the day of the incident the car company had been asked by our client to cease washing activities due to sub zero temperatures and the potential slipping hazards such temperatures may create. Their requests went unheeded. The claimant sustained a back injury in the fall and claimed against our client under the Occupier's Liability Act, citing the car company as their servant/agent.

The claim was successfully re-directed to the insurers of the car wash company who accepted that they had failed to act in accordance with our client's instruction, and so settled the claimant's claim.

Rockin' around the Christmas tree

The claimant, also a customer, was proceeding through the store when she suddenly fell to the floor. It was alleged that her skirt snagged on a cardboard cut out Christmas tree, which protruded into the aisle. Our client had retained CCTV footage of the incident which showed that another customer who was browsing had inadvertently bumped into the claimant.

This case demonstrates the importance of retaining CCTV footage as with the benefit of it, we are now in a stronger position to attack the allegations as pleaded. It was also important in this case to put the claimant to proof of her allegations in the letter before action, before disclosing the CCTV. A further

point to note - it is essential that risk assessments are carried out in relation to the placement of festive decorations.

Deck the halls

There is a common myth that companies should ban their workers from putting up Christmas decorations in their offices for 'health and safety' reasons. Another is that decorations can only be put up by a 'qualified' person. Most organisations, including the Health and Safety Executive (HSE) and local councils, manage to put up their decorations, celebrating the Christmas spirit without a fuss. All it takes is for the company to provide their staff with suitable step ladders to put up the decorations, rather than expecting the staff to balance on wheelie chairs. This underlines the importance of taking active steps to minimise the risk where it cannot be eliminated.

Events for 2012

As ever, we have been busy planning for 2012. Here are just a few of the events we are hosting, speaking or exhibiting at in the first half of 2012:

- **Hill Dickinson hosts the Institute of Risk Management Seminar - 26 January 2012;**
- **Ladies' Business Forum with VIP guest speaker - 9 February 2012 (invitation only) - Hill Dickinson's Liverpool office;**
- **IOSH - Managing Home Delivery Seminar - 22 February 2012 - Donington Park, Castle Donington, Derby;**
- **Future of Casualty Claims Seminar - 23 February 2012 - Lloyd's Building, London;**
- **Retail Week Conference - 14 to 15th March 2012 - Hilton London Metropole;**
- **Transport seminar - Spring 2012;**
- **BRC Annual Retail Lecture - 23 May 2012 - London;**
- **AIRMIC Exhibition - 11-13 June - ACC Liverpool;**
- **BRC Retail Symposium - 26 June 2012 - Lancaster London Hotel.**

Hopefully we will see you all along the way.

If you would like to know more about our retail claims services, or any other services we provide, then please visit our website or contact one of our retail team:

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The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Sheffield, Piraeus and Singapore. Collectively the firms have more than 1,300 people including 190 partners.

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