

let's talk shop

retail claims update

Spring cleaning

Slips and trips are the most common causes of personal injury that can lead to claims against retailers. But not only can they have an adverse impact upon your claims history, or the amount actually paid by those with deductibles; there are also the hidden costs of temporary labour, re-training, investigation time and even HSE fines. This is not to mention the time and resource spent by customer services or by those employees who have to deal with incidents and their repercussions, as **Andrew Evans** explains.

The risks to brand and profitability are obvious. Your cleaning systems and regimes are always worth keeping under close inspection and should always have the benefit of a spring clean from time to time.

So what causes a slip or trip?

Factors that often cause or contribute to a slip or trip can range from the type of flooring, the cleanliness of the environment and/or its occupants, the type of footwear being worn to the risk of contamination, hazards or traps on the floor.

What does the law say?

The law expects retailers to have in place a reasonable, practicable and well-defined system of cleaning and inspection. The better understood and documented your system is, the greater the chance that the system is properly implemented and operated, and thus the stronger the prospects of a successful defence.

What must you have and should you consider?

Most retailers operate a 'clean as you go' system, together with an hourly inspection regime supported by suitably defined and tailored risk assessments that cover issues such as the type of risk, who might be harmed, and whether precautions have already been identified and taken in order to address the risk.

Risk assessments should be reviewed annually with any changes and updates stored, well-disseminated, implemented and checked by those responsible for cleaning and supervision. Amended risk assessments from earlier years should be retained for at least six years.

In addition to generic risk assessments, more focussed risk assessments are required to cover specific business needs and/or produce and the guidance and steps that need taking as a consequence. For instance:

- flower displays should have matting in situ and signage to warn of potential water spillage;

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Welcome

We are delighted to bring you the spring edition of our seasonal retail claims newsletter.

We hope you will find the content topical and relevant.

As usual, we have attached a freebie. This time, we have provided some desk wipes to help you with your own spring cleaning!

Hopefully we will see you all over the coming weeks, but if not, please do come and see us at the various events we are attending.

Until then, best wishes to you all,

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Stop press

Hill Dickinson will be exhibiting its complete retail solution at the BRC Annual Lecture on 19 May 2011, and at the BRC Retail Symposium on 8 June 2011.

The complete retail solution

As a single-source legal services provider to the retail sector, claims services is just part of our complete retail solution, which includes:

- Claims
- Commercial
- Corporate
- Employment
- Insolvency
- Logistics and supply chain
- Product liability
- Property
- Prosecutions
- Trading standards

Letters to the editors

We would welcome any comments readers may have on the articles in this newsletter, or on any related topic, and would be happy to publish suitable commentary in a subsequent edition.

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- toy aisles should contain reminders to return non-purchased items to the shelves to prevent hazards; and
- in wet weather, (as we have suggested in earlier editions) consideration should be given to the entrance and exits, dry mopping, the use of signage and the posting of extra staff in periods of high rainfall or more severe weather (including snow and ice). It may also be sensible to distribute plastic bags to customers in which they can place their wet umbrellas.

What about cleaning contractors?

If you do decide to sub-contract the cleaning of your store or premises to others, then it is your responsibility to ensure that you have employed the services of a suitably reputable and reliable contractor. You must have agreed their areas of responsibility, but more importantly you must ensure that your contractual documentation contains the appropriate indemnities. It is essential that those providing a service on your behalf meet your own standards and expectations and fundamentally adhere to the same systems, document completion and retention as you do.

And finally...

If you do not have an effective and efficient cleaning regime under regular review, supported by adequate training and supervision then you run the risk of being taken to the cleaners! If you are still in any doubt about how worthwhile this all is then please consider the 'Did you know' box below or search the internet for the claims farmers who are clearly targeting your store or your brand.

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Did you know?

Slips and trips are responsible for:

- over a third of all reported major injuries;
- 20% of over 3 day injuries to employees;
- 50% of all reported accidents to members of the public;
- costs to employers at £512 million pounds per year; and
- costs to the NHS of £133 million pounds per year (for which you may be responsible in part).

The Jackson reforms: not so much if, but when?

Following Sir Rupert Jackson's key-note speech at our annual transport seminar on 7 April, **Paul Edwards**, outlines the current position and expectations.



Paul Edwards, with Sir Rupert Jackson, keynote speaker at Hill Dickinson's transport seminar on 7 April 2011

Many of you who have followed, both in this newsletter and generally, the updates we have issued about the proposed civil litigation reforms will be aware that the Government launched a consultation process regarding the introduction of Sir Rupert's proposals at the end of last year. That process has recently concluded.

Sir Rupert had, in fact, taken the rather unusual step of publicly responding to the process in support of his recommendations, suggesting that it is essentially a question of all or nothing; in his view, piecemeal reform will not work.

One of the biggest proposals for reform is ending the recoverability of success fees and ATE premiums on an inter parties basis. This could have a dramatic impact on the liability of paying parties, but even with the reforms still not implemented, success fees have remained in the spotlight.

It had been hoped that the highly-publicised decision in the case of MGN Ltd -v- UK (better known as the Naomi Campbell case against the *Daily Mirror*) might have led to an earlier end to the recovery of success fees, the European Court of Human Rights held that the recovery of the success fee, in a case where the claimant could afford to pay her solicitors without the incurring of substantial success fees, was disproportionate and affected the newspaper's 'human rights', in addition to impinging upon freedom of speech.

This decision led to some commentators predicting the immediate end of success fees, but a number of parties rushed to the Court of Appeal to see if the principle in MGN Ltd can be extended generally. In Sousa -v- London Borough of Waltham Forest, the first such case, on that point, the court was clear in its finding that, whilst it opposed the current claims cost 'bonanza' afforded to claimants' solicitors, success fees were permitted by statute and could not be disallowed.

Interestingly, the decision in MGN Ltd distinguished the media law but much of the dicta unequivocally supported the Jackson reforms and their coming into force sooner rather than later.

The Government seem committed to these reforms coming in as soon as possible, with Jackson himself predicting autumn 2012, but such is the support for implementation (not necessarily in the right camps) that we predict we may see some changes by April 2012.

When the reforms do come into force, it is more than likely to mean a wholesale change to the tactical approach to claims. Anticipated costs savings may be set off against a new costs war as claimants try to manipulate or test the new regime to maximise their claims for costs. In the meantime there is likely to be increased pressure on defendants as they will have to deal with an influx of litigation whilst success fees remain recoverable.

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Economic recovery

Denny Payton explains how to make sure your business delivers customer satisfaction without unnecessary motor outlay.

Shopping habits are changing. UK sales in the retail sector amounted to £293 million in 2010, with 8% of this figure coming from internet-based sales. More than one in three adults are believed to have left their Christmas shopping until the week before Christmas, and with some crediting internet sales for better sales figures than expected, many retailers are enhancing or launching their own online capability to ensure they retain or improve their wider market share.

An efficient and effective home delivery service is paramount to the success of any online business but this is not without hidden operational costs and unnecessary wastage. From a motor perspective, where are the risks and how can you control and/or improve your margins?

Most retailers do count the cost of third party claims with management information readily available, yet considerable sums are still lost to non-fault incidents. For instance when a vehicle is involved in a minor shunt, many quickly carry out the repair to return the vehicle back to the road, but fail to recover the cost without good reason.

A damaged wing mirror is often replaced through leasing agreements or servicing costs which are rarely captured for recovery against the party at fault. Even a very minor collision can cost over £100 to repair, and whilst this sum, at first sight, appears nominal, it becomes rather more significant when one takes into account the number of vehicles which are involved in similar such incidents.

With fleet sizes increasing, inefficient handling of non-fault incidents will only cause this outlay to increase. This is cash flow out of the business which can be refunded. Most companies do not count this cost, or worse, see it disappearing from the bottom line without adequate explanation or understanding.

We carried out a survey of minor, damage-only incidents for a medium-sized commercial fleet, and found that if all of their so-called 'minor damage' or 'servicing' costs had been captured, claimed and recovered against third parties, it would have returned thousands of pounds straight back into the business.

The recovery process is straightforward and can achieve remarkable results in a short space of time. The difficult part is changing the mindset of those at the front end of the process (service and maintenance engineers), whose goals and targets are very much removed from any costs recovery and safety process.

Such is the demand to return the vehicles to the roads quickly that there are also hidden health and safety risks. My colleagues are regularly seeing employers' liability claims arising from patched-up vehicles, where strict liability attaches for the defective work equipment. Night deliveries, understandably designed to avoid traffic congestion, raise additional hazards. Claims that arise from insufficient lighting at the depots or at the point of delivery can produce vastly disproportionate outlay to the cost of properly administered repair.

So now is a good time to review your systems and processes and to safeguard against avoidable risk and loss. There can also be many easy wins when it comes to costs recoveries. Why not improve margins by having a robust, measurable system for bringing your money back into your business? A few small changes can dramatically control leakage and assist in the overall pursuit of economic recovery.

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The royal wedding: Did the great haul of China rule Britannia on 29 April 2011?

The royal wedding provided a timely boost not only to the British economy, but also unofficially, to economies world wide! Derek Millard-Smith explains.

UK retail analysts estimate the wedding should have generated as much as £620 million with merchandise alone set to raise £26 million. Retailers scrambled to cash in on this rare opportunity and capitalise upon the attention of patriotic consumers and souvenir-hunters wishing to purchase memorabilia.

Directives were issued from Buckingham Palace outlining strict guidelines for the production and content of memorabilia. However, this did not stop the influx of 'unofficial' merchandise flooding the market from around the globe, is cheaper than that available from the official and UK manufactured royal collection.

Since Prince William popped the question in November, factories across the world were mass-producing commemorative items around the clock, competing against official merchandise in the build-up to the big day. China, as ever, appears to head the leader board with hundreds of firms producing souvenirs. One Chinese company even claimed it had been approached by Buckingham Palace to manufacture the wedding breakfast porcelain to be used by guests, forcing a denial to be issued by the Palace.

What is official merchandise?

For royal wedding souvenirs to be deemed 'official' they must adhere to the strict guidance set out by Buckingham Palace.

Normally, use of Royal Devices (which are approved photographs of Prince William and his full coat of arms) are prohibited by the Trade Marks Act 1994. Nonetheless, a temporary relaxation has been allowed for the use of Royal Devices to be used on souvenirs commemorating the royal wedding in recognition of the massive economic potential it attracts.

Despite the temporary relaxation, limitations remain in place with strict wording which must be included on commemorative items, such as:

'To Commemorate the Marriage of Prince William of Wales and Miss Catherine Middleton, 29th April 2011'

In addition, Buckingham Palace has stated that such souvenirs must be:

- in good taste;
- free from any form of advertisement; and
- carry no implication of royal custom or approval.

Already, dozens of souvenirs could potentially fall foul of the good taste requirement, such as royal wedding condoms ('Crown Jewels Royal Wedding Souvenir Edition') and plates thanking the royal couple for the free weekend!

Further limitations include the use of Royal Devices on drying cloths, articles of clothing (including t-shirts) and aprons and the use of Prince William's coat of arms on containers.

Risks

The producers of unauthorised souvenirs, and more particularly, those selling them in the UK, could be criminally liable under both the Trade Marks Act 1994 (where Royal Devices are used without authorisation), and the Consumer Protection Regulations 2008 (where merchandise is purporting to be official and therefore misleads the consumer in to making the purchase). Retailers selling official merchandise must take all 'reasonably practicable' steps to ensure the authenticity of their stock – due diligence checks, and evidence of such, are key.

However, policing the authenticity of these souvenirs through test purchases, fixed penalties and prosecutions remained difficult for the beleaguered Trading Standards officers, as the rush for memorabilia, rather than peaking before the wedding, continues unabated (due to the reinvigorated patriotism the wedding has created).

Whilst British morale and sense of history undoubtedly benefitted from the royal wedding, economically, I suspect that China, and many other economies, have enjoyed a great haul.

Derek Millard-Smith

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Driving down the average cost of claims

Following on from his talk at our annual transport seminar on 7 April 2011, **Laurence Ives** examines the increase in average claim costs and suggests some simple steps you can take to bring this down and make savings.

Retailers, like most corporates, can expect upward pressures on their motor fleet renewal premiums in 2011/12. Insurers are continuing to trade unprofitably in view of the average combined operating ratio of 120% over the past ten years. This means that for every £1 an insurer collects in premium, they pay out £1.20 in claims costs. In 2009 alone, the motor insurance market made an overall underwriting loss of £1.5 billion.

But it is not just the costs of the additional premiums that should be taken into account. Most retailers on a non-conventional programme, with higher deductibles, will have to bear the brunt of the higher average claim costs.

Incidents -v- claims

The good news for insurance and risk managers is that the number of casualties in road accidents is actually on the decline. There were 163,554 accidents on the road involving personal injury in 2009, representing a 31% reduction from the average figure in the period 1994 to 1998. Of the 2009 figure 24,054 accidents involved death or personal injury, which is a reduction of 41% for the same period.

However, despite the downward trends in both volume and severity of injury, the number of personal injury claims relating to motor accidents has increased by a staggering 70% in the past five years. The number of claims now far outstrips the number of accidents, possibly as a consequence of several people, including both drivers and both sets of passengers, making claims from one single accident.

The Association of British Insurers (ABI) suggests that average awards for personal injury are increasing by 20% per annum, with the average cost of claim having increased significantly in the past five years.

Why is the average cost of claim increasing?

The British Insurance Brokers Association have stated that 'the increase in the propensity to claim, the increase in the amounts awarded, the impact of claims management companies and the increases in the number of whiplash claims' are reasons why claims costs are on the rise.

On 4 March 2011, the cross-party Transport Committee published a report, '*The cost of motor insurance*'. In this report, Louise Ellman, chair of the Transport Committee, said:

"Wider access to justice is to be welcomed, but it has come at a significant cost, with far more personal injury claims being made than in the past. The police made it plain to the committee that 'staged accidents' are on the increase and that, so far, we have been lucky that there have been no fatalities resulting from such incidents. That luck may run out unless the insurance industry acts rapidly to help the police target this kind of insurance fraud."

The same committee also identified that consumers are largely unaware of the amount of money that moves around the market when they make a claim. They are unaware of 'referral' payments which are made to or by insurance companies, law firms, rescue truck drivers, vehicle repairers, credit hire or credit repair firms, accident management companies and medical agencies. In its report, the committee called for greater transparency: 'Insurers should publish on their websites a list of firms with which they have referral arrangements, an indication of the level of fees paid, and a clear explanation of how the referral arrangements work and their purpose.'

The ABI estimates that 10% of all motor insurance premiums (£2.7 million per day) is being paid to the legal profession, with the average legal costs associated with a claim (£2,100) now almost as great as the average amount paid to the claimant (£2,430).



So how do you reduce the average cost of a claim?

The way that a motor claim is handled within a typical insurance company claims department has changed very little in the past 20 years. Generally, insurers experience operational inefficiencies due to poor processes, out-dated and/or legacy claims systems combined with a lack of resource, often resulting in backlogs of several weeks.

In addition, claims notification processes are often too slow and lack critical information to allow pro-active intervention techniques to be deployed. Far too frequently, the focus is naively, on the easily targeted defence costs rather than where the real cost lies in the average cost of the claim.

So, in addition to having good systems and a reliable claims handling solution, the following are just some practical steps that a retailer can take which can achieve a positive impact upon claims spend:

Earlier first notification of loss

- Recent research carried out in the USA has established that notification within 30 minutes of an accident reduces claims resolution costs by an average of £500 per claim. Costs will increase by 20% if notification is delayed by 24 hours, and 33% if it takes 48 hours to notify the claims management company.

Mobile applications

Drivers need to be equipped with the latest technology to report immediately, e.g. smart phone applications. This should not be limited to the circumstances, but should include photographs of the scene, vehicle damage and where appropriate, the third party individuals.

Claims handling processes

Effective claims management is critical in the reduction of claims cost. Modern administrative systems, including automated workflow management and imaging, will reduce settlement times. Towers Watson Consultants have suggested that 'claims is the new underwriting', on the basis that provided insurers can settle 40% or more claims within a 12 month period, they will reduce their operating ratio below 100%.

Fraud detection

The ABI estimates that fraud costs motor insurers £410 million per annum. A Lloyds market member reported a 54% increase in fraudulent claims in 2009, compared to the previous year. Whilst fraud detection and market cooperation is improving, the ABI estimate that £930 million of motor insurance fraud went undetected in the same period. Drivers need to be better-trained to identify and report suspicious activity by third parties, and claims managers need improved data-sharing counter-fraud processes.

Injury management

Around 70% of all personal injury claims arise from whiplash injuries. Approximately 432,000 people make a whiplash claim every year – equivalent to one in every 140 people in the UK. In recent research carried out by Liverpool Victoria, 93% of GPs thought that claimants exaggerated their injuries. Claims managers and medical experts need to develop more sophisticated techniques in order to assess more effectively the true extent of the injury.

Can we put the brakes on the average cost of claim?

Lord Justice Jackson's proposed reforms of civil claims (if implemented, as seems likely) should achieve a positive impact in reducing legal costs.

The Ministry of Justice portal, introduced in April 2010 for personal injury claims under £10,000, is also expected to reduce claimants' costs through the electronic processing of at-fault personal injury claims. In a recent survey carried out by Post Magazine, 65% of insurers believed the portal was beneficial, and the general consensus is to increase the limit to £25,000

These developments, together with your own efforts to ensure better notification, capture, containment and control of claims should impact favourably on the average cost of claim, a cost that in most cases impacts directly on the retailer's bottom line.

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Cleaning up your act

Eye can see clearly now the claim has gone

The claimant was employed as a cleaner by one of our well-known retail clients. She alleged that she picked up a spray gun containing a cleaning product and noticed that this detergent sanitiser had not been adequately diluted. She alleged that whilst attempting to remove the top of the dispenser, the detergent sanitiser 'spilt' into her eye, causing damage to the surface of her right eye. Liability was denied on the basis that the claimant had been adequately trained and was the author of her own misfortune. A day prior to the trial, the claimant's solicitors accepted a Calderbank offer made at the outset of the litigation, meaning that our client recovered a significant proportion of its outlay. This is a further example of agreeing an early case strategy, the usefulness of Calderbank offers, and of the importance, of course, of not squirting cleaning products at yourself!

All day and all of the night

The claimant, a customer, slipped on a grape within an aisle on one of our client's shop floors. The claim was repudiated. At trial, we argued that there was an adequate system of inspection in place in the form a 'clean as you go system', with hourly patrols carried out by independent cleaning contractors, and the absence of similar recorded accidents. In this case, the incident occurred at 19:30. The aisle in operation was last inspected at 19:00. Our client was able to prove the existence and implementation of a reasonable inspection system, bolstered by strong witness evidence from relevant staff. Fundamentally, and from a learning perspective, the system was found to be appropriate despite the reduction in visitors at night.

Wet wet wet

In this case, the claimant - a visitor to our client's store - slipped in a tiled area immediately after crossing the matting. Water had been carried into that area because the matting had become sodden, due to the amount of the rainfall. Despite the client having good systems specifically for adverse weather conditions, a split in relation to liability was agreed when our main witness failed to come up to proof

in her witness evidence. This case underlines the importance of not only having good systems, but of retaining properly completed documentation (which was lacking) and having reliable witnesses in support. Further, it was necessary to prove the monitoring of the effectiveness of the matting. Having said all of this, and given the commercial approach taken, savings of approximately two-thirds were achieved - not to mention the associated trial costs and enhanced success fee that were avoided.

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Did you know?

- Retail's gender profile is 61:39 (female and male)
- A third of retail employees (31%) are aged 16-24
- Nearly a quarter (23%) of the retail workforce is aged over 50
- There was a 5.2% like-for-like increase in sales in April 2011, mostly due to better weather, holidays and the royal wedding
- Administrations have increased by 55% in the first quarter of 2011, with retail CVAs increased by 30% and administration appointments overall increase by 22%
- Retail continues to be the UK's largest private sector employer, with £2.8 million employed by the top 75 retailers

Sources: BRC, KMPG & Skillsmart retail

Coming up in the next edition...

- **Summer fun**
- **Interview with a leading retail Insurance & Risk Manager**
- **MOJ at a year**
- **Plus much more...**

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:

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About Hill Dickinson

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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