

# riskinsight

EMPLOYERS' LIABILITY ISSUES 2008

  
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## Corporate Manslaughter A new risk

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– a revised 'code of conduct'?

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## An insider's view

Welcome to Risk Insight, this issue is designed to give you the inside track on all the latest developments in Employers' Liability (EL). As the UK's no.1 EL insurer\*, we're perfectly placed to keep our customers up-to-date with issues likely to affect insurance coverage, premiums and the cost of risk management. In this issue, you'll find our take on recent changes to the legal environment, including the impact of the Corporate Manslaughter and Homicide Act 2007. We also look at the continuing debate about Pleural Plaques, claims process reforms and the issue of claims reserving.

We'd love to hear your thoughts and observations on Risk Insight.  
After all, it's your publication.

Thanks in advance,

**Richard Nicholls**

Head of Employers' Liability



\*Source: ABI, 2006

## Industry developments

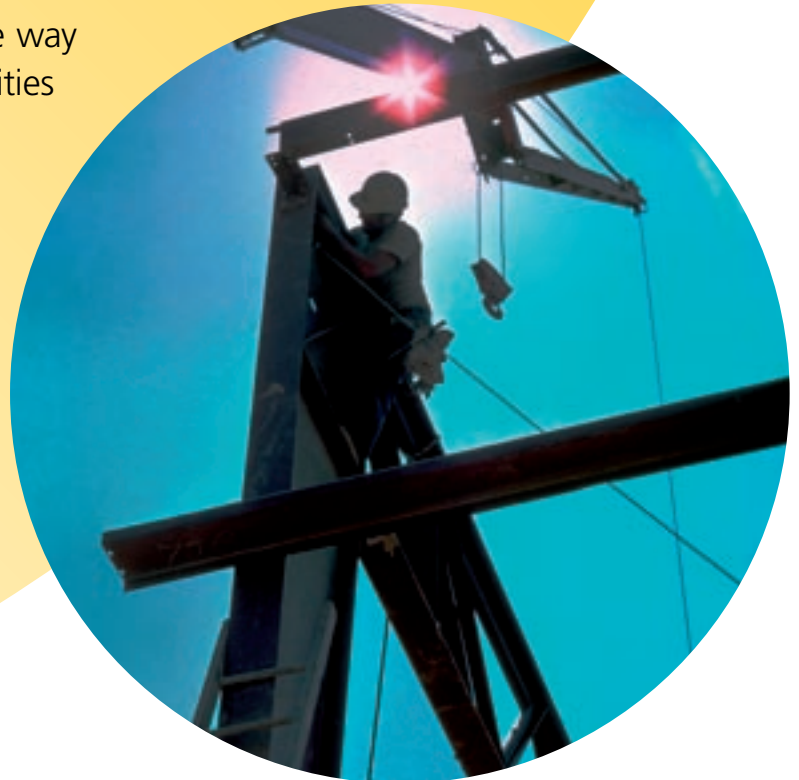
- Rates continued to fall in 2007 but at a much slower rate than in 2006. Average reductions were below 10%.
- There has been a sudden rise in self reported work related ill health.
- Accidents and claims frequency continue to fall but Government goals of revitalising health and safety targets for injuries and illness are not on track.
- The Insurance industry won a significant victory on the issue of pleural plaques, though as we go to press there continues to be debate on the subject in the English and Scottish Parliaments.
- Increased focus on tracing old Employers' Liability policies and pressure from claimant lawyers for the creation of an Employers Liability Insurance Bureau.

## What can we expect in 2008

- Market conditions are expected to harden as the general improvement in claims experiences has been offset by 2 years of rate reductions and can not be sustained.
- Long term developments are becoming more difficult to predict with a significant shift in the manufacturing base of the British economy changing the nature of risks insured.
- Inflationary pressures will increase the cost of claims including medical intervention, care, damages and last but not least costs.
- Third party lawyers will continue to seek new revenue streams to replace those such as pleural plaques.
- New Corporate Manslaughter legislation effective, 6 April 2008.
- Continuing debate on claims process reforms in the UK.
- The cost of claims will continue to drive premiums.

# Corporate Manslaughter – A new risk

The long awaited Corporate Manslaughter Act has now completed its Parliamentary procedures and will be effective from 6 April 2008. The Act will apply throughout the UK, and will impose liability on a company where the way in which the organisation's activities are managed, causes a death through a gross breach of a duty of care to the individual.



The new offence focuses on management failure at a senior level i.e. those persons who play a role in making management decisions about the activities of the organisation.

Management failure would be evidenced by conduct falling far below what should reasonably have been expected.

Government intention is that the new offence will be reserved for only the most serious of management failures. Upon conviction, a company will receive a substantial fine (which will be proportionate to the company's earnings) and in addition there will be powers to order remedial measures to be applied by the company, for example specified improvements to risk management.

A prosecution for Corporate Manslaughter will damage the reputation of a company.

The legislation is not restricted to workplace accidents to employees; it could be triggered by any activities that impinge upon third parties, for example, where death has resulted from a product supplied by the company, or where a visitor to a company site is killed.

The Act does not impose any liability on individual managers or directors. The new offence is aimed at the organisation, not the individual manager.

## Where Zurich can help

If you are unfortunate enough to be involved in an incident that could lead to a Corporate Manslaughter prosecution contact Zurich as soon as possible. Both Zurich and its lawyers have the expertise and experience to offer help when it is most needed in the critical first few hours when many agencies such as the Police, the HSE, and the media will all be demanding access to witnesses and key personnel within the organisation. At this crucial time Zurich can offer support and advice, whilst ensuring maximum co-operation with the investigating authorities and, at the same time, protecting the organisation.

## How to respond

Because the legislation is targeting failure in how businesses organise health and safety, it is possible to offer general guidance on how they can ensure that their business is adequately organised to avoid prosecution:

- Operate your business to a formal Safety Management System eg. HS(G)65.
- Maintain a safety policy with defined responsibilities for directors and senior managers which is based upon HSE documents HS(G) 343.
- Ensure directors and senior managers can evidence training in health and safety and product safety legislation, and can demonstrate that safety policies and procedures are known throughout the business.



# Director's duties

## A revised 'code of conduct'?

With the management of health and safety already firmly on the agenda for many corporate stakeholders, there has never been a more critical time for directors and others to ensure that they exemplify best practice in the management of such risks. It is timely then, that they themselves have helped shape their own practical management guidelines in this important area that was published at the end of October 2007.

Building on previous guidance, the joint 'code' – Leading health and safety at work, (INDG 417) – published by the Health and Safety Commission's (HSC) and the Institute of Directors (IoD), sets out a number of essential management principles which underpin a series of action points. These principles deal with promoting leadership, worker involvement; and effective assessment and review.

The guidance goes on to set a 'four-point' agenda for embedding the principles within an organisation, identifying the key collective and individual actions for Boards. It also establishes good practice guidelines in relation to each action, using a series of case studies to promote innovation.

The action points for Directors and others detailed in the guidance include the following:

### Action point 1

**Plan the direction for health and safety** – Here Board members need to establish an effective health and safety policy that is an integral part of the organisation's culture, values and performance standards. This needs to be set in the context of the significant risks faced by the organisation, 'owned' by the Board and specifying both their responsibilities. Good practice indicators include:

- health and safety as an agenda item for board meetings
- appointment of a director with responsibility for health and safety
- establishing key performance targets.

### Action point 2

**Deliver health and safety** – This depends on the implementation of an effective management system that ensures health and safety risks are dealt with sensibly, responsibly and proportionately. Here Board members must ensure that arrangements are adequately resourced; they obtain competent advice; risk assessments are completed; and employees (or their representatives) are involved in decisions that affect their health and safety. Good practice indicators include:

- board members actively involved on the 'shop floor'
- considering health and safety when deciding senior management appointments
- providing health and safety training to the Board.

### Action point 3

**Monitor health and safety** – Monitoring and reporting are vital aspects of an effective health and safety management system. The Board should ensure that this allows for the monitoring/reporting of both leading and lagging performance indicators. Also, the impact of any changes are monitored, assessed and reported on, with a view to ensuring the health and safety of employees and others. Good practice indicators include:

- effective monitoring of sickness absence and workplace health
- appraisals of senior managers including an assessment of their contribution to health and safety performance
- Boards receive regular reports on the performance and actions of contractors.

### Action point 4

**Review health and safety** – The code stipulates that a formal boardroom review of health and safety performance is essential. This should be done at least once a year and should examine policy, reporting, decision-making, immediate action and future strategy. Good practice indicators include:

- performance on health and safety is recorded in organisations' annual reports.

The guide also includes a summary of legal liabilities; a checklist of key questions for leaders; and a list of resources and references for implementing the guidelines in detail.

This directive should have a wide application across all types of organisations – including those both in the public and private sectors. Importantly, the guidelines are not compulsory, however, where employers do choose to follow it, they will normally be doing enough to comply with the law. In addition to this, HSE inspectors may refer to it as illustrating good practice when carrying out their duties. No doubt, evidence of compliance coupled to the right levels of commitment and support will be of considerable interest to insurers.

### Key references

Leading health and safety at work INDG 417, Health and Safety Commission's (HSC) and the Institute of Directors (IoD), available to download at [www.hse.gov.uk](http://www.hse.gov.uk)

Successful health and safety management HSG65, HSE Books, 1997, ISBN 978 0 7176 1276 5

# Claims process reforms

In April 2007 the Ministry of Justice commenced a consultation on proposals for reform of the case track limits and claims process for personal injury claims.

The Government is expected to announce the results early in 2008.



## The Insurance Industry view

If someone has been injured as a result of another person's negligence, they are entitled to personal injury compensation.

The Association of British Insurers welcomes the Government's proposals to reform the personal injury claims process to deliver faster and more efficient care and compensation. The Government must stick firm to its latest proposals, and ensure that it does not bow to vested interests.

The current system takes far too long to get compensation to claimants:

On average, an employers' liability claim (brought by a worker who has been injured or made ill as a result of their employment) takes three years to settle.

The current level of recoverable costs are completely disproportionate:

For every £1 paid by insurers in personal injury compensation, an additional 37p is paid to claimant representatives in employers' liability claims.

In small claims under £5,000, this rises to 93p for employers' liability.

Disproportionate legal costs make insurance more expensive for everyone:

Legal costs are a disproportionate burden on businesses and local authorities.

The current system undervalues care and rehabilitation. This not only disadvantages claimants, it also leads to high benefit bills for Government, and lost competitiveness for the economy.

A paraplegic has a 14% chance of returning to full-time employment in the UK, compared with 32% in the US and at least 50% in Scandinavia.



# Pleural Plaques

In 2004, Zurich decided to bring about a test case on claims for Pleural Plaques, because recent advances in medical evidence showed that Pleural Plaques are not a disease and do not cause any symptoms. Furthermore, they do not develop into any other condition such as lung cancer or Mesothelioma (a cancer caused by over exposure to Asbestos).

The insurance industry has a responsibility to compensate people who have suffered an injury and not to pay out policyholders' money for a condition that causes no symptoms and that cannot develop into any other condition such as lung cancer or Mesothelioma.

The House of Lords upheld this philosophy. The case that opened in 2004 ended at 10.30am on Wednesday 17 October when the House of Lords unanimously upheld the judgment of the Court of Appeal, dismissing all claims for symptomless Pleural Plaques whether or not accompanied by psychiatric conditions.

As an Insurer, we will continue to compensate people who suffer illness or injury as a result of negligence by their employers. It must be our priority to continue to deal with injured claimants such as these as quickly and as fairly as possible.

At the time of going to press the Scottish Parliament has for political reasons decided to overturn the decision made by the House of Lords. There has been pressure in the House of Commons for the decision to be reversed.

## An overview of Pleural Plaques

### What are Pleural Plaques?

- Small circular discs on the inside of the chest wall which, over time, become calcified;
- The latency period is between 10-30 years;
- They are diagnosed by X-ray or CT scan;
- They are not a disease of the lung itself;
- They do not cause, and are highly unlikely ever to cause, any impairment or symptoms;
- They are not compensatable under the Industrial Injuries Disablement Benefit scheme;
- They are objective evidence of an individual's exposure to asbestos dust.

### Derivation of Compensation Awards

- Pain, Suffering and Loss of Amenity;
- Anxiety;
- The risk of contracting a more serious lung condition;
- Possible disadvantage in the labour market.

### These awards are made notwithstanding:

- Pleural Plaques do not themselves and never will (except in exceptional circumstances) cause symptoms – they are an aetiological 'dead end';
- It is not the Pleural Plaques themselves which increase the risk of developing the serious diseases – it is the history of past exposure to asbestos which the presence of pleural plaques betokens which creates the increased risk;
- A higher percentage of the population is seen with pleural plaques at autopsy than are ever detected in life because the diagnosis of Pleural Plaques is generally incidental to the investigation which throws up their presence. Most people who develop them and do not know of it will never suffer a days anxiety or lose a days quality of life, or life itself, as a result of their presence;
- The anxiety which those who are informed of the presence of Pleural Plaques may well suffer is not as to the actual presence of the Pleural Plaques themselves, but to the fact that they are at a higher risk of developing further disease as a result of their asbestos exposure. The anxiety therefore belongs to any claim which could legitimately be made should one of the more serious diseases eventuate.

# The challenge of claims reserving in uncertain times

We are frequently asked by customers about the reserves held on their claims.



Reserving is complex, requiring a detailed knowledge of actuarial, legal, accounting and underwriting issues.

Prudent insurers should adopt a cautious approach when setting reserves.

## The 'claims reserve'

There is a belief that an automatic linkage from claims reserve to pricing exists, so that a £10,000 reduction in a claims reserve should result in an identical reduction in premium. This belief raises a few interesting examples:

- A risk with no claims – would this mean a nil premium at renewal?
- A risk that suffers a £3m claim – would this mean that the premium would go up by £3m?

The answer to both of these questions is no.

## Claims reserving

The purpose of a claims reserve is to enable us to make financial provision for settlement of the claim at an uncertain date and for an uncertain amount. It is this uncertainty that makes reserving a complex issue for insurers. There is a considerable time lag between, for example, an injury happening and any resultant claim being settled. This can often be several years.

By applying a reserve, a view has to be taken on what changes may occur before the settlement date is reached and what impact this may have upon the settlement cost of the claim.

## Risk of change

Insurers need to be cautious in setting reserves, because they carry the unknown risks associated with change.

Here are just some factors insurers consider when reserving for claims:

### **Legal**

There may be new 'heads of damages' introduced such as the NHS charges in 2007. New case law may widen the scope of liability or increase the level of damages.

### **Economic**

Inflation is an obvious factor that will affect long-term settlement costs. Higher unemployment could also impact the ability of an injured claimant to return to work, and this would also be compensated for in a settlement.

### **Social**

A rise in the compensation culture will increase pressure for defendants to be found liable – at increased levels of damages.

### **Medical**

New treatments may prolong life, or new methods of diagnosis may reveal an unknown occupational cause that relates to a known condition.

These are the elements of change that we are aware of but do not know what their exact impact will be at any given time in the future. In setting reserves, insurers must assess all of the above risks associated with change and what their impact on the final settlement is likely to be.

Failure to take account of the impact of these factors will lead to under-reserving. If this happens, the amount of money set aside to cover potential claims costs will be inadequate, threatening an insurer's solvency and their ability to settle the claims. There have been several examples of this in recent years.

## Approach to reserving

Prudent insurers should reserve on a 100% liability basis with no reduction for any potential contributory negligence. The reserve represents the expected ultimate claims cost, reflecting the uncertainty that a rapidly changing claims environment has on outstanding claims.

# Health & safety key facts for 2006/07

## Ill health

- 2.2 million people were suffering from an illness they believed was caused or made worse by their current or past work.
- 646,000 of these were new cases in the last 12 months, equating to 2,100 per 100,000 people employed in the last 12 months.
- 2,037 people died of mesothelioma in 2005 (latest data), and thousands more from other occupational cancers and lung diseases.

## Injuries

- 241 workers were killed at work, a rate of 0.8 per 100,000 workers.
- 141,350 other injuries to employees were reported under RIDDOR, a rate of 535.1 per 100,000 employees.
- 274,000 reportable injuries occurred, according to the Labour Force Survey (LFS), a rate of 1,000 per 100,000 workers.

## Working days lost

- 36 million days were lost overall (1.5 days per worker), 30 million due to work-related ill health and 6 million due to workplace injury.

## Health and safety targets: progress to 2006/07

- The incidence rate of self-reported work-related ill health from the Labour Force Survey rose suddenly between 2005/06 and 2006/07. The rate in 2006/07 is similar to that in 2001/02 despite earlier indications of a downward trend from 2001/02 to 2005/06.
- Our judgment is that we are **not on track** to meet the Revitalising or PSA ill-health targets.
- The rate of employee major injury reported under RIDDOR, that dominates the injury target, shows a fall within the range of 7% to 11%, between 1999/2000 and 2006/07. This is against a pro-rata Revitalising target for 2006/07 of a 7% reduction.

- Our judgment is that we are on track to meet Revitalising and PSA fatal and major injuries targets.
- The number of working days lost per worker from the 2006/07 Labour Force Survey is similar to that in 2003/04 despite earlier indications of a downward trend from 2000-02 to 2005/06. Since 2000-02 working days lost per worker has fallen by 12% within a possible range of 2% to 23%. The pro-rata Revitalising target reduction of 21% for 2006/07 falls close to the top end of this range.
- Our judgment is that we are **not on track** to meet Revitalising or PSA days lost targets.

## Enforcement

- 1,141 offences were prosecuted by HSE.
- 257 offences were prosecuted by local authorities in 2005/06 (latest data).



# Zurich Services



## Zurich claims service

Our priority is to deal with your claims swiftly and professionally. We take a proactive approach, using our expertise in medical management, investigation and negotiation to ensure overall costs are contained.

- We agree a claims service protocol with you, which is tailored to your needs.
- Our claims inspectors carry out a site investigation if appropriate.
- Our claims team has a wealth of industry experience and expertise. They can deal with claims ranging from slips and trips causing bruises and sprains, to machinery accidents resulting in amputations and fatalities.
- Our in-house claims investigation team deal with desktop liability investigations; assessing wage loss claims, valuation of pain, suffering and loss of amenity, and settlement negotiation.

## Zurich Rehabilitation

If an accident occurs in your workplace, Zurich Rehabilitation is an innovative approach to risk management, which brings together traditional insurance, risk management, and injury management to help employees return to work sooner. It's all about working with you to help manage the cost of business risk. This is a free service that is available as part of Zurich Employers' Liability Insurance.

Zurich Rehabilitation is suitable for most injuries arising from workplace accidents and offers immediate access to professional medical expertise. As well as demonstrating a commitment to the well-being of employees, early intervention can help reduce the cost of accidents, to your business. For example, loss of earnings can form a large part of a claim. By reducing the length of time an

employee is absent from work Zurich Rehabilitation can have a big effect on final costs.

The type of injuries likely to benefit from Zurich Rehabilitation are:

- back injuries
- neck injuries
- musculo-skeletal injuries
- hernia.

## Risk Management

In conjunction with the risk management processes your organisation already has in place, Zurich can carry out in-depth risk analyses to gauge the risk awareness, controls and culture in your business. We can also offer you a comprehensive corporate governance 'health check' service, using structured interviews and facilitated workshops.

## Engineering Inspection Services

Employees are one of the biggest assets for any business. Protecting those assets is a critical issue for today's risk managers and insurance managers.

With more than 500 engineer surveyors, Zurich Risk Services delivers a market leading inspection service. Not only does this ensure that employers meet their statutory requirements to comply with the Health and Safety at Work Act, but it can also help reduce employers' liability exposure.

We are pleased to present to customers on all aspects of our Employers' Liability proposition.

Presentations available on request on EL issues, rating methodology, claims protocols, rehabilitation and risk management.

## How to contact us

If you'd like to find out more about our Employers' Liability proposition, either speak to your usual contact, your broker or one of the EL team directly on **+44 (0)20 7648 3286**.

Alternatively take a look at our website  
**[www.zurich.com/corporatebusiness](http://www.zurich.com/corporatebusiness)**

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