

Loss prevention standards

# Claims Defensibility

**Practical guide on what to do to improve claims defensibility, particularly during periods of high demand and change.**



## Introduction

In this increasingly Volatile, Uncertain, Complex and Ambiguous (VUCA) world, the way we look at risk management best practice is continually evolving. According to the Association of British Insurers (ABI), insurance companies paid out approximately [£6 million every day in 2018 for liability claims](#). This inevitably puts pressure on insurance companies to increase premiums in order to keep pace with claims inflation. Likewise, individual businesses experiencing an increase in claims frequency or cost are also likely to be facing an increase in premiums. The good news is that good risk management practices can minimise accidents and improve the chances of successfully defending claims, thus positively impacting overall claims costs in the long run. Many companies now operate “Zero Harm” programmes to try and make this happen.



For a claim to be successfully proven, the injured party (the claimant) must prove “on the balance of probabilities” that the employer/insured was negligent through three tests:

1. A duty of care was owed
2. That duty was breached
3. The breach directly caused the injury/loss or damage (causation)

Genuine personal injuries and loss/damage claims should, quite rightly receive the appropriate monetary compensation. However, where the claimant has not followed procedures, or carried out the task in the way they were trained to do so, or has otherwise contributed to their own injury, robust repudiation should be encouraged. Any suspected spurious or fraudulent claims should also be thoroughly investigated and repudiated. Companies must, therefore, be able to provide strong documentation and evidence with which to defend them – this is commonly referred to as ‘claims defensibility’.

## Prevention

Having an effective risk management system in place will not only mean that an organisation will minimise the risk of an incident occurring, but should an incident occur, all of the necessary information will be to hand, either to enable an early decision on liability or to robustly defend a claim should one be submitted.

Commitment from the Board level downwards, alongside clearly documented responsibilities and accountabilities is important to ensure the ownership of health and safety at all levels of the organisation and encourage a positive safety culture.

Nobody wants to over-burden business with unnecessary paperwork, but in terms of claims defensibility, practical, clear and concise policies, procedures and documentation can help everyone in the organisation follow safe working practices effectively and enable good claims repudiation, should it be needed.

Adopting a recognised health and safety management systems such as OHSAS 18001 or ISO 45001 will also go a long way to preventing accidents from happening in the first instance and, should the worst occur, ensure that the necessary records are in place.

From the moment an accident occurs, or an accident is made aware, a continual opportunity exists to work alongside the injured person to support them and minimise the chance of a formal claim being made in the future, this is usually up to 3 years for personal injury claims.

*“People just don’t sue (people) they like” (Gladwell; ‘Blink: The Power of Thinking without Thinking’, 2005, p 40).*

Research into medical malpractice has discovered that the quality of the interactions with patients is what really counts and concluded that the key ingredient to interactions is respect. Interpersonal skills are therefore vital for all those who will be interacting with an individual when they suffer a personal injury or loss.

## Accident Investigation

This guide is intended to provide an overview of good practice. Please also refer to the Aviva Loss Prevention Standard [Accident Recording and RIDDOR Reporting](#) for further information and contact your Aviva Risk Consultant who can advise on further support such as accident investigation training should that be of interest to you.

Aviva strongly believes that the focus of thorough accident investigations should always be to prevent future similar occurrences, and the risk of a potential future claim should not deter you in doing this. The benefits of an effective investigation leading to pro-active improvements far outweigh the risks.

In relation to claims defensibility, the following is advised:

- Always take care of the injured person first and make sure that their immediate needs are attended to
- Start the investigation as soon as is reasonably practicable, the sooner the better before the accident scene becomes contaminated/altered
- Make best use of the “Golden Hour” to collect as much factual information as possible around the circumstances of the accident. Take photos, draw sketches, obtain CCTV wherever possible
- Nominate trained, authorised accident investigators to manage the investigation process. The advantage of this is that they will have been trained to correctly fill in all documentation and conduct investigations from an objective point of view
- Keep contemporaneous notes where appropriate, particularly for serious incidents
- Collate copies of all relevant documents – risk assessments, training records, inspection records, etc. to create a “time capsule” for possible future claims disclosure
- Identify witnesses early – include those in the vicinity who did not witness the incident and take statements as soon as is practicable to confirm the **facts**
- Be open minded – avoid apportioning blame or including hearsay in investigation reports. Do not assume anything, stick to the facts!
- Implement findings and remedial actions/improvements within agreed timescales and ensure that documentation is retained to confirm these works have been completed
- Consider legal privilege aspects, refer to the Aviva Loss Prevention Standard [Legal Professional Privilege](#) for further information

## Having the Correct Information Available

The following examples are the sorts of documentation/records that may prove essential in successfully defending a claim:

<ul style="list-style-type: none"> <li>• Health and safety policy</li> <li>• Site/task specific risk assessment</li> <li>• Generic pre and post-accident risk assessment</li> <li>• Safe systems of work</li> <li>• Permits to work (if applicable)</li> <li>• Disciplinary proceedings records</li> <li>• Internal workplace inspection and housekeeping records</li> <li>• Cleaning and spillage records</li> <li>• Maintenance records and defect reporting</li> <li>• Hire agreements for, e.g. hired equipment</li> <li>• Health and safety group or committee minutes</li> <li>• Health and safety audit findings and response</li> <li>• Company car/commercial vehicle driver handbooks</li> </ul>	<ul style="list-style-type: none"> <li>• First aid report</li> <li>• Accident report</li> <li>• Accident investigation report form</li> <li>• Photographs/video/CCTV</li> <li>• Statements from all relevant witnesses, including negative statements</li> <li>• RIDDOR report/F2508(A) (if applicable)</li> <li>• Historic accident data and analysis</li> <li>• Near miss register</li> <li>• Training records</li> <li>• Occupational health surveys – Noise, Vibration, etc. (Disease claims)</li> <li>• Occupational health records</li> <li>• Health and safety group or committee minutes where the accident is discussed</li> </ul>
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In order to be able to successfully defend a claim, insurers are not only required to have the appropriate evidence, but also to make it available within given timescales; 1 working day to acknowledge the electronic Claim Notification Form (CNF) and 30 working days (for Employers' Liability) and 40 working days (for Public Liability) to make a decision on liability.

Keeping records safe and accessible is just as important as making sure they were completed in the first instance. It is frequently the case that a claim has to be paid because the relevant documentation could not be located or located in a reasonable timescale. For large, multi-site organisations it may be felt that a bespoke on-line health and safety management system is the answer to recording, disseminating and retrieving information. For smaller organisations local or paper-based systems may be adequate. Whatever the case, the documentation required to make a decision on liability must be available to insurers within the required timescales.

The most important timescales at the initial stages of a claim are those imposed as a result of the Ministry of Justice Reforms, these are:

- 1 working day to acknowledge the electronic Claim Notification Form
- 30 working days (for Employers' Liability) and 40 working days (for Public Liability) to make a decision on liability

It is also worth noting that an employer may be required to disclose the accident/incident report and any findings to a third party's solicitor during the investigation of the claim. It is therefore essential that those completing the reports/investigations are fully aware of the potential consequences of making unsupported claims about the causes of the incident or potential future remedies.

Accident reporting/investigation training should not just focus on the mechanics of filling in the forms, but also on the type of information that should or should not be included. Those responsible for monitoring/analysing this

information should also be on guard for any employees including personal thoughts or conjecture. Once such comments have been made, they may be very difficult to undo in court. [Click here](#) for further information on Disclosure Documents.

## Change Management

Site closures, introduction of new processes or changes to work processes, or relocation of operations/employees can present a significant risk in relation to effective claims defence. The proper collation, retention, and storage of all documentation and records will need to be considered.

During the decommissioning and site closedown period, non-standard activities may be undertaken that give rise to new risk exposures, e.g. drain and purge of bulk fuel tanks, dismantling and removal of plant and machinery. Once unoccupied, Occupiers Liability Act responsibilities will need to be considered to minimise the risk of potential public liability claims too.

Thought should be given to:

- Who will be responsible/accountable for managing the change successfully? Will there be a Site Closure Committee for example to manage the process from start to finish?
- Redeployment or redundancy considerations – do employees need re-training or other support during this period?
- How will the people be looked after – remember “You don’t sue, people you like”. Treat employees with respect and dignity. Change is often seen as unsettling by employees at all levels of the organisation
- Maintain good communication channels. Publish information regularly, e.g. weekly, and structure content to accurately inform employees of the things they need to know
- Contractor and supplier management as there may be increased activity during this time
- How documents will be retained and stored for easy retrieval in the event of a future claim

For further information also refer to the Aviva Loss Prevention Standard [Managing Change - Liability](#).

## What if a Dishonest or Fraudulent Claim is Suspected?

The Fraud Act 2006 is the main piece of UK legislation that covers insurance fraud related cases. In summary this legislation contains three main offences:

1. False representations – dishonestly misleading a party with the intention to gain financially
2. Failure to disclose information where there is a legal duty to disclose it
3. Abuse of position through an act or omission where a person occupies a position where expected to safeguard the financial interests of another

Spotting potentially dishonest or potentially fraudulent claims can be difficult. Here are some tips:

- No accident report made when the claim notification/solicitors’ correspondence allegedly says the accident occurred
- No witnesses to the accident
- Bizarre or unlikely circumstances present or occurred at a strange time of day
- Injuries seem to be more serious/exaggerated than the circumstances of the accident suggested should have happened
- Extended periods on sickness absence leave allegedly due to the injury where evidence suggests that they may be well enough to return to work. Consult your HR department

Also, to improve early detection:

- Have clearly documented procedures in place for incident prevention, reporting and investigation
- Collate relevant documentation at the earliest possible opportunity
- Make best use of technology to support investigations such as CCTV, vehicle cameras
- Introduce a “Whistleblowing” line for anonymous reporting of suspected fraud

The insurance industry has invested heavily in tackling the problem of dishonest, exaggerated or fraudulent claims. Contact the Aviva Claims Team for further guidance and support or to report a suspected dishonest or fraudulent claim.

## How Well are we Doing?

All companies need to remember that having a health and safety management system in place or receiving regular health and safety awards is not the same as having good claims defensibility. It is important that not only are the usual inspections/audits of the health and safety systems and procedures undertaken, but that these are occasionally reviewed against the recent claims history or emerging risks such as the COVID-19 pandemic. This has had a massive impact on the way companies are working during the lockdown, what they are manufacturing or during temporary site closures. Remember the “VUCA” world, so connect regularly with your company’s risk register to think ahead as to what maybe the next significant loss.

The health and safety management team should be included in claims reviews and should have sight of regular updates on new or revised claims data. As well as any in-house reviews you may wish to undertake, Aviva routinely make members of their Claims and Risk Consulting teams available for tri-partite claims review meetings.

When reviewing claims information, questions to be asked should include:

- Is our claims experience improving or deteriorating?
- Are there any common trends or themes in the claims arising?
- If we have been successful in denying liability was there anything particularly useful in defending the claim?
- If we have identified useful documents/policies/procedures, do we ensure that they are rolled-out to all locations, and maintained?
- If we have had to admit liability, was this justified and are there any lessons to be learnt?
- If we have identified gaps in information, assessments, inspections, procedures, etc. have we ensured that they are revised accordingly, and that updated information is circulated to all locations?
- Are suitable sanctions in place for those failing to comply with the requirements of the management system and are they used where appropriate?
- To be able to demonstrate that they take health and safety seriously, an employer not only has to show that they have adequate procedures in place, but that they deal consistently with any non-compliance

If there is a suitable health and safety management system in place, then incidents should be prevented and if suitable arrangements have been made for the recovery of the appropriate information, where they do occur, an early admission of liability can be made, or the claim successfully defended.

## Be Aware

Although the idea of claims defensibility is to have the necessary systems of control in place to prevent accidents/incidents and to have a body of evidence to hand if they do occur, there are certain factors which may significantly increase the likelihood of claims arising. When these circumstances occur, the employer will need to be particularly vigilant.

The most likely cause of an increase of claims is uncertainty, if employees feel that their job security or income is at risk, they may well feel that they have nothing to lose by making a claim and, potentially, everything to gain. From experience, common causes of this uncertainty are redundancy, being furloughed, zero hours contracts, temporary, seasonal or agency labour. This creates the additional difficulty that, at precisely the time when the employer needs to be most vigilant, those responsible for implementing and maintaining the relevant systems may also be distracted and that changes within the business may make the control of data more difficult.

When businesses are bought or merged, although high level due diligence may well be a key factor, at the operational level, what do we do with the archive documentation, this may well be overlooked? Likewise, there are things that can be done, even if an accident has occurred, that might minimise the risk of the injuries giving rise to a claim. Employees recovering at home can often feel isolated and abandoned. Having an effective rehabilitation process can increase the prospect and speed of their return to fitness, and ultimately their return to work. This can have a significant impact on the likelihood and value of any claim which might arise.

As healthcare and rehabilitation experts, Aviva understand that the earlier your employee can get help and support, the faster they can recover.

The Aviva Injury Management (AIM) service provides:

- **Easy access service which fits your business needs:** we've designed our services so that they can dovetail seamlessly with any Occupational Health arrangements you may already have in place
- **Early intervention:** forms the basis of our approach. We believe that the earlier intervention can occur, the earlier an employee will recover and return to work
- **Clinical assessment and advice:** we'll talk your employee through the best practice injury management advice to ensure they feel fully supported from day one
- **Access to effective treatments:** includes Physiotherapy, Work Specific Strengthening, Cognitive Behavioural Therapy, Specialist Consultations and Investigations, and Workplace Assessments
- **Dedicated in-house case management:** injured employees are encouraged to talk to their case manager during their recovery period about potential adjustments that can be made to help them to stay at work or return to work sooner

## Disease Related Claims

Because a long time can pass between the initiation of the disease and the claim arising, they are worth a specific mention, not least because this significantly challenges the way in which historic records are archived in order to ensure safe retrieval.

The ABI published findings which confirmed that [Noise Induced Hearing Loss claims alone increased by 189% between 2011 and 2014](#). In respect of disease claims, specific areas to be considered are the use of pre-placement, on-going/periodic and post-employment medicals. These will not only confirm an individual's continued fitness to work but will also show any deterioration in health over the working life.

This information should be coupled with an appropriate absence process to ensure that anyone affected is quickly identified, and that suitable additional controls and/or rehabilitation can be introduced at the earliest possible time.

## Summary

By ensuring that there are well documented systems of control in place, that day to day health and safety activity (as well as events around incidents) is accurately recorded and that all those documents and records are readily available should they be required in the future, there is much that can be done to lessen the likelihood and impact of injuries occurring.

## Checklist

A generic Claims Defensibility Checklist is presented in Appendix 1 which can be tailored to your own organisation.

## Specialist Partner Solutions

Aviva Risk Management Solutions can offer access to a wide range of risk management products and services via our network of Specialist Partners who are reputable companies offering agreed discounted rates for Aviva customers.

For more information please visit:

[Aviva Risk Management Solutions – Specialist Partners](#)

## Sources and Useful Links

- [Pre-Action Protocol for Personal Injury Claims](#)

## Additional Information

To view our additional COVID-19 support please visit our [COVID-19 webpage](#)

To find out more, please visit [Aviva Risk Management Solutions](#) or speak to one of our advisors.

**Email us at [riskadvice@aviva.com](mailto:riskadvice@aviva.com) or call 0345 366 6666.\***

\*Calls may be recorded and/or monitored for our joint protection.

# Appendix 1 Claims Defensibility Checklist



Location	
Date	
Completed by (name and signature)	

	Claims Defensibility Checklist	Y/N	Comments
1.	There is a documented safety management system in place that is reviewed at least annually or when changes occur?		
2.	Risk assessments identify all activities, are documented and reviewed regularly?		
3.	Accidents are reported and records maintained?		
4.	Staff know how to report suspected spurious or fraudulent claims to Aviva?		

	Accident Investigation	Y/N	Comments
5.	Accident investigations are undertaken by trained, authorised persons?		
6.	Accident investigators are appropriately trained and competent, and report quality is monitored?		
7.	Investigations identify root causes effectively and implement appropriate remedial action?		

	<b>Documentation</b>	<b>Y/N</b>	<b>Comments</b>
8.	Training and competency records are maintained and up to date?		
9.	There is an inventory, tests and inspections in place for all physical precautionary measures and records are maintained?		
10.	Systems are in place to keep up to date with risk exposure changes, e.g. non-injury incident reporting, regular communications with external agencies (e.g. police and local authority), new and emerging risks that may give rise to future claims?		

	<b>Monitoring and Review</b>	<b>Y/N</b>	<b>Comments</b>
11.	Random monitoring of quality of documentation is undertaken?		
12.	There is a review of claims trends undertaken that includes all interested parties, e.g. via a claims review meeting?		
13.	Where liability has to be admitted, a review of the reasons why is undertaken?		
14.	Do insurance, risk and health and safety work closely together to identify emerging trends and put into place preventative measures?		

15.	Additional comments:		
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## **Please Note**

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## LOSS PREVENTION STANDARDS