

A bitter pill?

Taking control of the organisation's health and well-being is worth it in the long run. David Adams investigates the current climate of rising claims costs and restrictive regulation

Only the most ruthless capitalist would question the principles that underlie health and safety measures, but they are making life more complicated for insurers and organisations seeking employer's liability insurance in ways that do not always seem justified.

In part this may be the result of a compensation culture developing in the UK, following a trend set in the US, although not everyone is convinced. Hugh Price, partner, and director of insurance at Hugh James Solicitors, points to research from Datamonitor that shows the overall number of third party and liability claims is falling, and suggests the compensation culture is largely a media myth.

What is beyond debate is that the cost of claims is increasing (in part because of the background investigative work now required by insurers or regulators), that much of this extra cost is swallowed by legal fees, and that this is a volatile, as well as an expensive, market. Datamonitor suggests that although the numbers of personal accident claims - and of no-win-no-fee firms - fell in 2003, personal injury claims increased, particularly those connected to

disease. Overall, the total cost of claims was rising, in particular of employer's liability claims, while payouts had increased by an average of 10 per cent.

Civil proceedings are also likely to be affected indirectly by anticipated changes in criminal liability law. A series of high-profile cases of corporate negligence or incompetence that caused loss of life have driven a campaign for a corporate killing law that can be applied more easily to senior management, and, if the government wins the next election, a new offence of corporate manslaughter is now likely to be put before Parliament at some point next year. This will help keep the cost of claims high, for both insurers and the insured.

"We now often need to arrange legal representation for policyholders



also in management time and disruption to the business."

"Changes in the law will make prosecutions easier to bring," agrees Gerard Forlin, a barrister working in this area. "Insurers know that criminal liability is very expensive to defend - with some of these big cases the damages could run into millions - and once there is a conviction it will be harder to defend a civil case."

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right away," says Mike Noonan, manager of the complex loss team at QBE. "Sometimes that might be multiple legal representation, because there might be several named individuals all facing the possibility of prosecution. With a corporate killing law that process is going to accelerate because it will be easier to convict companies and individuals. There will be a cost with that, in legal fees, but

Safety Executive (HSE) is taking a more proactive role in encouraging businesses to comply with safety legislation.

"Employees are more aware of health and safety issues, through initiatives run by the HSE and the unions," says John Horsfall, managing director at OHS, an integrated health and safety consultancy. "We're seeing staff calling in the Environmental Health Agency or



WHAT IS STRESS?

The HSE defines stress as "the adverse reaction people have to excessive pressure or other types of demand placed upon them".

The management standards required to prevent employees suffering from stress is based on a six-point checklist:

Employees should indicate that

- they are able to cope with the demands of their jobs;
- they are able to have a say about the way they do their work;
- they receive adequate information and support from their colleagues and superiors;
- they are not subjected to unacceptable behaviours, such as bullying in the workplace;
- they understand their individual roles and responsibilities;
- the organisation engages them frequently when it is undergoing change.

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the HSE themselves when they see something that needs to be addressed."

Retrospective claims have also put the wind up some sections of industry. Some insurers now ask clients to produce records going back decades that prove workplace conditions matched minimum safety requirements in the past, refusing insurance if they are unable to do so.

"What you're now seeing is a sort of matrix of compliance demands that employers are supposed to adhere to," says QBE's Mike Noonan. "Where there's a shortfall in that matrix there's more likely to be a liability. With this structure in place and the HSE playing a stronger role, more claimants are going to be more

successful and damages are going to be recovered more often."

But Pauline Pembry, employment services manager at First Assist, believes a more heavy-handed approach from insurers and regulators could be dangerous. "You have got to encourage people to take positive steps, not beat them with a big stick - that's just going to encourage them to cover up problems," she says. Pembry is concerned by a growing tendency for companies or organisations to back out of processes or activities that carry anything other than a low level of risk, just as some schools have stopped taking pupils on school trips involving risky activities. "You're already seeing it happen in industry where there's one dangerous task during a manufacturing process," she explains. "Many are now sub-contracting that part of the process." This may have some counter-productive effects. The more organisations are involved in the process, the higher the cost of investigating the health and safety credentials of companies, for insurers and regulators alike, let alone the cost of investigating claims in cases where liability is disputed.

On the other hand, argues Hugh Price, you could also view this as the action of a responsible employer determined to make sure that only qualified personnel undertake a dangerous procedure - provided the employer has checked that the sub-contractor has suitable qualifications and insurance. If not, then the liability burden for an accident may still be passed back. "The difficulty comes when it hasn't done those checks," he says. "If you haven't then that's abrogating responsibility, not delegating it." There's also a danger of the company employing the sub-contractor being sucked into a dispute in the event of an accident if responsibilities have not been carefully defined.

More regulations may have other adverse effects. "There has to be a concern that too much red tape will have negative effects on recruitment and investment, particularly foreign investment," says Gerard Forlin.

"In a climate of fear you will have difficulty recruiting people of the calibre you want at board level."

John Horsfall says he knows of manufacturing companies who have moved parts of their operations elsewhere in Europe because they know EU regulations are not so strictly enforced there, thus reducing labour costs.

But maybe this is being overly pessimistic. As Hugh Price points out, one important aspect of the US compensation culture responsible for inflating the cost of claims - the awarding of punitive damages by juries - cannot be replicated in England and Wales because judges set a cap on compensation, based on the severity of the injury and the duration of ongoing symptoms. He also points to efforts being made by the Department of Work and Pensions to find new ways of reducing the number of duplicate investigations into accidents, thus cutting the costs associated with claims, in particular legal fees.

Meanwhile, the positive effects of heightened health and safety awareness are undeniable, in particular a growing awareness of health and safety issues at board level. "Health and safety always used to be driven by claims or a need to comply with demands from insurers," says John Horsfall. "But now more corporates realise they have a responsibility to look after their staff, and that it's a good investment to do so."

Pauline Pembry hopes that this growing awareness, and a willingness to be more proactive in trying to prevent accidents, can be translated into a more mature attitude to risk. "People see risk in the workplace as something that their employer will deal with," she says. "That's totally unrealistic because they have a duty to make sure they don't damage their own health or that of others."

"Accidents have complex causes," she asserts. "If you look at something like the Hatfield rail disaster, it happened because the rail broke, but there are all kinds of different reasons why the rail broke. There's never just



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one reason. Employees should be reporting regular problems as well as accidents, because you should be collecting information on accidents that don't quite happen. It's better to tackle it then and there, rather than wait until you end up in court."

Hugh Price agrees. "What governments have been trying to do is to encourage employers to take steps that will prevent the accident in the

first place," he says. "Of course I recognise that more regulations inevitably create more red tape, more bureaucracy and higher costs, but what you have to say to anyone worried about that is that an accident involving a fatality has horrendous consequences for the victim's family, of course, but also for staff morale and the company. Far better to prevent the accident happening in the first place."

WHAT WILL BE THE CONSEQUENCES FOR COMMERCIAL INSURANCE PROVIDERS IF EU AND UK LEGISLATION AND THE PREVAILING CULTURAL CLIMATE MAKE IT EASIER FOR EMPLOYEES AND MEMBERS OF THE PUBLIC TO MAKE COMPENSATION CLAIMS AGAINST CORPORATE ACCOUNTABILITY?

Hugh Price, partner, director of insurance, Hugh James Solicitors, says: "The compensation culture is something of a myth fuelled by the national press. Datamonitor research confirms that liability claims are falling. There is certainly far less litigation following the introduction of the new Civil Procedure Rules in 1999. Occasionally 'rogue' cases get through the system, but they are relatively few and far between.

"Obviously any additional safety obligations placed on companies will increase the potential for claims. However, the object of the exercise is to increase awareness of health and safety and risk prevention. This has been very effectively achieved in the construction industry where regulations require that any construction project planning must include pro-active assessments of all health and safety issues. The European Health and Safety Regulations serve as another example of government imposing health and safety requirements as priority.

"I do not accept, therefore, that the corporate market or insurers will be surprised or caught unawares by any legislation that emphasises prioritising health and safety. It has been happening for a long time now."

A spokesperson for Norwich Union said their company "welcomes a culture that encourages individuals to exercise their rights but we believe that those same individuals also need to accept their responsibilities. People making spurious claims need to appreciate the effect their actions have, specifically restricting innovation and creating a nation fearful of taking even the smallest risk. The current compensation system sees 40 per cent of the monies paid out going to lawyers - this is unacceptable. More investment needs to be made in rehabilitation, something that would benefit the injured party, their employers, compensators, the economy and society in general.