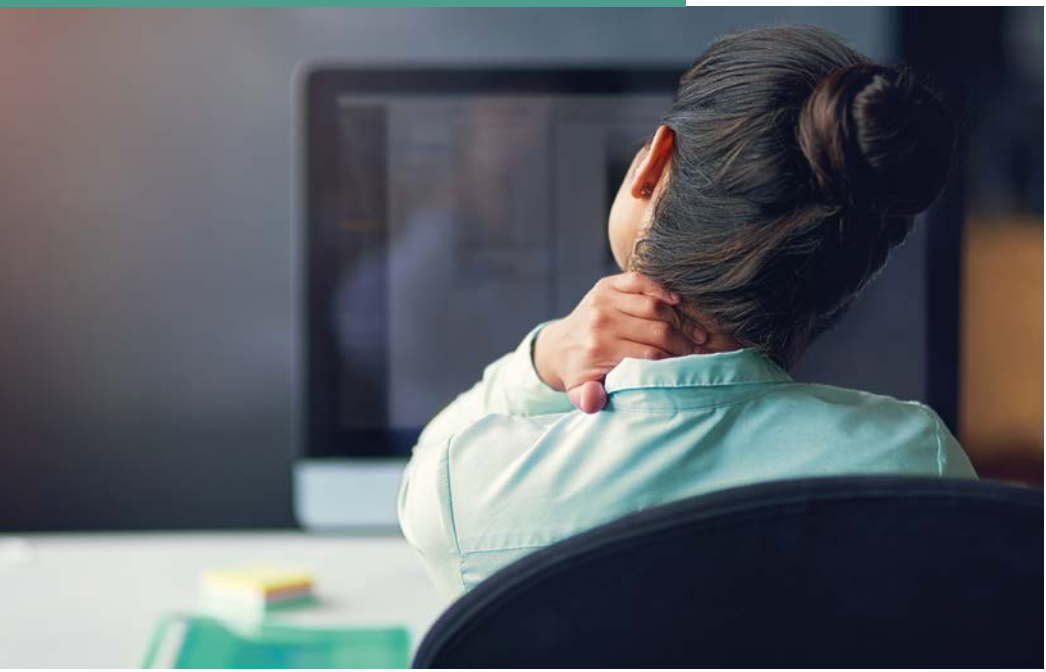
A BIBA BROKERS' GUIDE TO

EMPLOYERS' LIABILITY INSURANCE

2019 – Issue 1



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WELCOME

Inside this guide we examine the current situation around Employers' Liability cover and the matters affecting brokers and their clients.

BIBA's supplements are brought to you through a partnership of BIBA, Allianz and DAC Beachcroft. We hope that you find DAC Beachcroft's legal expertise, Allianz's industry knowledge and BIBA's desire to share these with you helpful. We welcome ideas for future subjects.

Like other classes of insurance Employers' Liability cover is facing a period of change.

As a compulsory insurance it is vital to consider how a policy might operate as well as any impacts that might affect the need and extent of cover.

Inside you will find out more about the battle to combat fraud and the importance of record keeping alongside some updated legislation and case law.

We also examine the changing nature of employment and how this affects the need for Employers' Liability cover, putting the question when is an employee an employee?

When looking at a clients needs its also worth remembering that Personal Accident policies can provide added comfort to employers and add to the advice and value a broker can bring to their clients.

Mike Hallam, ACII, Chartered Insurance Practitioner, Head of Technical Services, BIBA

AUTHOR:
STUART TOAL
CASUALTY ACCOUNT MANAGER, ALLIANZ

IDENTIFYING THE AUTHORS OF MISFORTUNE AND FINDING FACT AMONGST FICTION

UK insurers are currently paying out around £2.7 billion a year for liability claims; In 2018, Employer's Liability (EL) claims accounted for around a fifth of this amount, with an estimated value of £573 million. In the same year the ABI appraised claim fraud at £1.3bn, with £386m relating to liability – second only to motor fraud in terms of volume and value.[1]

Trends in EL and other liability claims appear to be upward, but can it really be true that people in the UK have poorer balance, are more susceptible to hearing loss and are much more likely to be harmed by work and lifting equipment than ever before?

We live in an increasingly litigious society where blame is quickly apportioned, and financial compensation is often expected.

Whenever large sums of money are potentially available, those wishing to make a financial gain through fraudulent means are never far behind. This can be opportunistic or organised, and can range from an individual exaggerating a genuine claim, to the total fabrication of a claim, or engineering a loss scenario in order to make a subsequent claim.

Legislation has always looked to respond to fraud, and the UK government introduced the option for judges to strike out 'fundamentally dishonest' claims via the Criminal Justice and Courts Act 2015.

The 2015 Act came with other welcomed provisions, such as banning incentives to bring personal injury claims – as adopted by some claims management companies (CMCs) and personal injury solicitors (e.g. "make a claim and we will give you a tablet computer").

Where a claim is dismissed due to fundamental dishonesty, claimants can be ordered to pay insurers' costs. A recent example involved a claimant who supposedly slipped and fell at work. They had no witnesses, the accident wasn't reported, medical evidence was inconsistent, the circumstances changed (e.g. it was first a carpet and then a mat that they slipped on), and by the time the case reached court the account was totally incoherent. The judge ordered the claimant to pay the insurer's costs (amounting to £18,700).

The insurance industry is continually seeking to combat fundamentally dishonest claims, making it clear to those considering chancing on a fraudulent claim that it may not be as 'risk-free' as they've been led to believe, while continuing to ensure that legitimate claimants have access to fair and appropriate compensation.

[1]UK Insurance and Long Term Savings Key Facts (2018) [PDF] Association of British Insurers abi.org.uk

IT'S NOT EXCESSIVE TO START A DISCUSSION ABOUT EL LIMITS

Employers' Liability (EL) claims which exceed the statutory minimum policy limit (£5 million) are currently rare and, consequently, for many policyholders purchasing a higher limit is not an immediate consideration.

AUTHOR:
CHRIS SHAW, SENIOR LIABILITY ACCOUNT UNDERWRITER, ALLIANZ

It's arguably more important than ever that policyholders are prompted to review their EL limit since changes were made to how courts apply a discount rate on personal injury damage awards to adjust for low-risk investment return. Following the change in the discount rate to -0.75% (from 2.5% in February 2017), forecasts of personal injury damage settlements have increased markedly and there is a realistic potential that settlements may exceed the statutory minimum limit as can be seen in the illustration below, particularly where the claimant is younger or has an above-average salary.

The UK insurance market generally provides an EL limit of £10 million as a matter of course, but some businesses may need to review how adequate this is for them. For example, a higher limit may be pertinent where a business has a high concentration of employees at their locations and so a wide-impact incident (e.g. a fire) could result in multiple casualties.

Another set of employers who may benefit from Excess EL cover are those in trades which are more hazardous by their nature. This may be due to employees carrying out more high risk activities, such as work involving height, the handling of harmful substances or the operating of heavy machinery. These clients should understand the possibility of serious injuries is greater for their employees than for those in traditionally 'low risk' workplaces, regardless of how confident they are in their risk management regime. Recent statistics provide evidence for this, showing that workers in vehicle trades are over three times more likely to sustain a workplace injury than retail cashiers.[1]

It is good practice to regularly conduct a review of EL limits and, where there is evidence that an increase may be prudent, brokers might suggest clients buy more cover or an excess layer.

	Settlement for a female with annual care costs (pecuniary loss for life) of £75,000		
Discount rate	aged 30, earning £25k	aged 45, earning £25k	aged 45, earning £80k
@ 2.50%	£2,878,250	£2,338,500	£3,188,250
@ -0.75%	£6,753,000	£4,494,000	£5,652,300

[1] (Based on the averaged rate per 100,000 workers) 'Occupation (LFSINJOCC): Incidence (three-year year average) – all injuries – for people working in the last 12 months', Labour Force Survey, HSE.gov.uk [Accessed 08/01/2019]

HISTORIC LIABILITIES

The recently enacted Civil Liability Act 2018, which will introduce tariff-based damages for whiplash claims and will be accompanied by increases in the small claims track limits, should reduce the cost of many future claims.

AUTHORS:
DAVID WILLIAMS AND JAMES TALLANT,
PARTNERS, DAC BEACHCROFT LLP

But it remains important for businesses to retain information about their historic insurance cover to minimise the cost of injury claims to their business.

Over recent years, the introduction of fixed costs has seen some solicitors and claims management companies move away from whiplash claims and a significant increase in the number of employers' liability (EL) claims for noise induced hearing loss (NIHL). Some of these claims date back to the 1960s and relate to predecessor companies for which current businesses still face liability. While many of the claims have lacked merit, the cost of investigating, defending and, where appropriate, settling the claims can run to many thousands of pounds which, where no insurance cover is traced, falls on the business.

Where some insurers have ceased trading, for example Independent Insurance Company, businesses which had purchased EL policies from them are provided with some protection by the Financial Services Compensation Scheme. It is important to stress to businesses that they should ensure that they retain records of their insurers, seeking information from the Employers Liability Tracing Office where necessary.

The volume of NIHL claims is expected to decline as fixed recoverable costs are introduced (and as a large proportion of the available claims have already been presented), but this does not reduce the need to be vigilant about record keeping for liability insurances. In recent litigation in the USA, claimants have pursued damages for cancers linked to their use of talcum powder products containing asbestos, which is a reminder that claims relating to historic exposure to substances will continue to be presented, and that we may not be able to foresee claims which will be brought in the future against businesses' employers' public or products liability insurances.

Shift working, work with nanotechnology and the use of and exposure to chemicals from electronic cigarettes may, in time, see claims presented for personal injuries, but the potential list of areas of risk is without limit.

THE PERSONAL ACCIDENT REMEDY: AN ALTERNATIVE ROUTE TO INDEMNITY

AUTHOR:
SHAUN FAGAN, SENIOR ACCIDENT AND HEALTH ACCOUNT UNDERWRITER, ALLIANZ

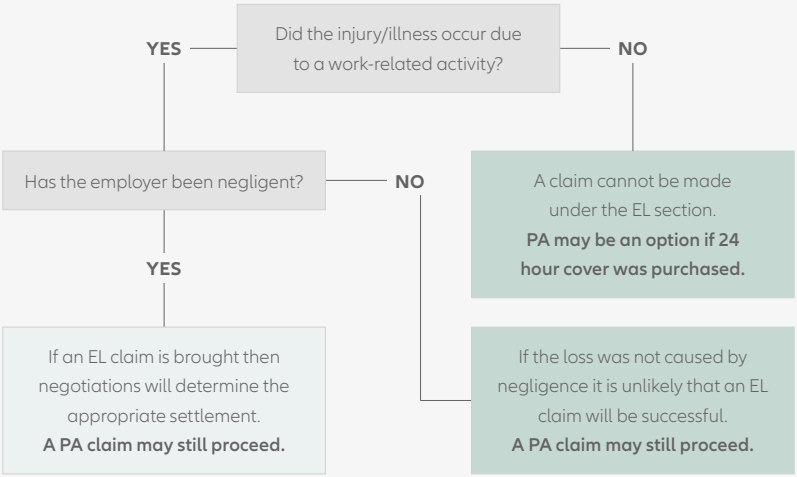
Employers' Liability (EL) claims focus on the negligence of the employer and this can therefore mean a claim may involve protracted and potentially stressful litigation. Many claimants only go through with this when they see no alternative to gaining recompense and recovery.

A Personal Accident (PA) insurance policy provides financial payments to the employer (as policyholder) in the event that an employee can't work due to an injury (and, if purchased, sickness); It's often positioned as an employee benefit but is payable to the employer. The employer can pass some or all of the benefit to the employee or they might use the benefit to support their business as they wish.

THE KEY DIFFERENCES BETWEEN EL AND PA

	Employers' Liability	Personal Accident
The cause of the injury or illness	An EL claim can only be successful if there's evidence that an injury or illness came about due to negligence of the employer.	Regardless of negligence issues, the only requirement is that the outcome of the injury makes it impossible or challenging for the employee to carry out their usual work duties.
Scrutiny of business practices	The claimant's legal team will investigate work processes, seeking evidence that relevant hazards weren't adequately controlled and the injury/illness was a direct consequence of negligence on the employer's part.	No investigations are required to complete a claim on a PA policy, which is particularly useful where the employer could not have forseen the cause of the injury or it is completely unrelated to work.
Quantifying the loss	Assigning a monetary value to an EL claim can be a complex process involving a number of parties over an extended time period. A settlement will consist of loss of earnings, medical treatment, future care costs, and other considerations, and will then be adjusted for a number of factors, such as contributory negligence.	Amounts are pre-agreed, being set in the policy schedule, and they can therefore be quickly paid out; This means that rehabilitation and other medical treatment, if applicable, can start sooner.
Payment	Payment is made directly to the employee (claimant).	The employer receives the payment; then, they are free to use it as they wish. They may transfer the money via the employee's wage payment, put it towards their rehabilitation and/or use it in some other way
Post-settlement	The relationship between employer and employee, and perhaps even the employee's co-workers, may be strained during and after the claim process.	The money provided to the employer can be used to help the employee return to work sooner and healthier by enabling access to rehabilitation services.

COULD THE INJURED EMPLOYEE CLAIM VIA EL AND/OR THE EMPLOYER CLAIM VIA PA?



EXAMPLE CLAIMS SCENARIOS

EMPLOYERS' LIABILITY

An employee who has worked for the same construction firm for many years is diagnosed with an industrial disease that is potentially incurable and going to severely impact them for the rest of their life. The condition arose gradually over a period of time, rather than from a single identifiable accident. A PA policy would not respond, as it requires an identifiable accident, but the EL policy could be triggered.

PERSONAL ACCIDENT

A delivery driver temporarily can't drive due to an injury sustained outside of work. Their employer wants to ensure they still receive their wage while out of action but also needs to pay for others' overtime accrued while picking up work in their absence. An EL claim wouldn't be applicable, as the accident was outside of work, while a PA policy based on 24 hour cover could help.

WHERE BOTH POLICIES MIGHT PAY FOR THE SAME LOSS

An employee trips over some cables left out by a colleague and fractures their wrist, leaving them unable to work. The employer continues to pay the employee's wage and be confident that they can obtain reimbursement from their PA policy - weekly benefits will start swiftly and rehabilitation options may be considered. However, the employee may still bring an EL claim against their employer.

The above scenario is one of many that may involve both EL and PA policies. Where the covers overlap, the swift settlement of the PA policy may reduce the financial 'incentive' to start an EL claim.

A PA policy can benefit the employer by supporting them in caring for their employee and may also reduce the likelihood of future litigation. For these reasons, PA is worth thorough consideration.

EMPLOYED, OR NOT EMPLOYED, THAT IS THE QUESTION

The engagement of workers as ostensibly self-employed individuals is favoured by many businesses and individuals, offering flexibility and avoiding the constraints of traditional employment contracts. However, the use of such arrangements can sometimes mask a direct employee relationship, which may not be considered until one of the 'self-employed' contractors is injured at work.

AUTHORS:
DAVID WILLIAMS AND JAMES RHODES,
PARTNERS, DAC BEACHCROFT LLP

Faced with the question of whether an injured person was the de facto employee of a business (rather than an independent contractor), the Courts have considered a number of factors including:

- whether the business controlled the work;
- who provided the tools and equipment to perform the work;
- whether the business had the ability to discipline, hire and fire workers;
- for whose benefit the work is performed (and at whose financial risk);
- whether the injured person was required to attend the business's site (and whether the business was required to provide work to him or her);
- whether the worker worked for a number of businesses in that field; and
- whether the business was responsible for the health and safety of workers performing the task.

Although many individuals work for a number of businesses simultaneously, many using their own vehicles or equipment (for example as couriers or in the delivery of fast food), the fact that they work for the benefit of the business and the business can decide whether or not to allocate work to them may be expected to weigh in favour of the relationship being akin to one of employer-employee with the businesses owing the duties of an employer.

Some of these relationships have been considered by Employment Tribunals over recent months, and we should expect them to be considered by the Courts in relation to injury claims over the coming years.

The engagement of self-employed contractors or agency employees does not necessarily enable businesses to avoid liability for their actions. The judgments in Cox v Ministry of Justice, Armes v Nottinghamshire, Hawley v Luminar Leisure plc and Various v Barclays Bank provide salutary reminders that the businesses may be vicariously liable for torts and misdemeanours committed as part of the businesses' activities.

It is important for brokers to understand this when discussing liability insurance with clients and for their clients to ensure that all of their workforces, whether directly employed or engaged through an agency or subcontractor are properly trained, supervised and managed, and that their employers' liability and public liability policies reflect the full business rather than simply their traditional employees.

HOW FAR DO EMPLOYER DUTIES GO?

AUTHORS:
DAVID WILLIAMS AND DAVID KNAPP, PARTNERS, DAC BEACHCROFT LLP

Supreme Court averts feared paralysis of civil litigation in the case of James-Bowen and others v Commissioner of Police of the Metropolis, July 2018.

If an employee is alleged to have caused an injury, or assaults or abuses someone, and the employer settles the claim on the basis that it is vicariously liable for the employee's negligence, should that employee then be able to sue the employer for resolving the claim and not defending the employee's reputation? Does the employer owe a duty of care to this employee, who may well be the key witness in the case, to protect their reputation and welfare, despite the employer (and its insurer) bearing the cost of defending the claim and of any damages which may be paid?

This claim arose from the arrest by police officers of a suspect, following which the suspect presented a claim for personal injuries, alleging that the police force was vicariously liable for the actions of its officers. While initially defended, the claim was compromised with an admission of liability and apology for gratuitous violence on the part of the officers; the officers pursued claims for compensation in respect of reputational, economic and psychiatric damage.

Did the police force owe duties to its officers to safeguard their interests and professional reputations when defending and compromising the claim presented by the suspect?

Four reasons persuaded the Court not to impose a duty on employers to protect the reputations of their employees when defending civil claims presented against the employer.

1. There is a public policy issue that parties should be able to resolve their disputes without fear of incurring liability to others.
2. Imposing a duty on employers to its employees would be inconsistent with the policy which encourages the settlement of civil claims out of Court.
3. The imposition of the proposed duty would delay or disrupt the progression of civil proceedings.
4. The imposition of the duty would result in satellite litigation.

The Supreme Court dismissed the claims of the officers, stating that the imposition of the proposed duty would have had a 'chilling effect on the defence of civil litigation' and putting a decisive stop to a potential bandwagon that could have had massive implications for the conduct of claims against employers where employees are accused of misconduct or negligence.

In the light of this decision, employers and their insurers can handle and settle claims as they see appropriate.

THE RELEVANCE OF PAPER TRAILS

AUTHOR:
MARK PEARCE,
CASUALTY LOSS
CONTROL TECHNICAL
LEAD, ALLIANZ

Any conscientious employer will want to believe they're acting appropriately with regards to the health, safety and welfare of their employees, but proclaiming a belief won't be enough to disprove guilt should a claim of negligence be made.

If an employee does become injured or ill due to a work-related exposure, starting an Employers' Liability (EL) claim is a perfectly valid approach for them to take in seeking compensation for costs and loss of earnings. Besides the financial implications for the employer/business, the potentially significant impacts on employee morale and reputational damage, amongst other intangible matters, need also to be appreciated.

It's possible for this to be avoided if there's evidence that the employer did all that was in their power to eliminate employees' exposure to hazards and then adequately controlled residual risk where elimination wasn't possible. So long as there isn't anything to suggest that unsafe practices have been condoned (at any time), documented evidence may be used to argue that the injury or illness came about as a consequence of circumstances that weren't reasonably foreseeable, or due to the employee's disregard for the control measures put in place (for example).

While a range of factors and the individual circumstances of any accident or incident will need to be considered, in some cases, neglect of procedures on the part of an employee may, at least in part, be demonstrated by presenting a documented, communicated and regularly reviewed safe system of work (SSOW), alongside the employee's signed acknowledgement confirming understanding and that they've received appropriate and relevant training.

Because it's conceivable that an illness or injury may take several years to manifest, for relevant cases the courts will want historical evidence of risk management, not just documentation relating to controls currently being used in the workplace. It's therefore vital that any documentation relating to the management of health, safety and welfare is kept safely and securely in a form and for a period consistent with the employer's assessed needs and, where relevant, legislative compliance.

In recognising the relevance of documentation as outlined above, it's clearly important to emphasise that the foundations of any good risk management system and associated effective health and safety performance is dependent on leadership, employee engagement, good arrangements for identifying and managing health and safety risks and for monitoring, reporting and reviewing performance.

If brokers have a client who needs to improve how they record steps taken to manage risks, they can point them in the direction of helpful content regarding a vast range of risk-related issues, including the development of health and safety policies, risk assessments and safe systems of work, via our risk management website, www.allianz.co.uk/riskmanagement

THE ROLE OF ELTO IN POLICY RECORDS

The Employers' Liability Tracing Office (ELTO) maintains an electronic database of EL insurance policies that claimants (and their representatives) can use to identify relevant insurers for the period(s) they were exposed to a hazard that caused an illness or injury.

AUTHOR:
STUART TOAL
CASUALTY ACCOUNT MANAGER, ALLIANZ

It's particularly useful when the illness or injury has manifested over or after a long period of time, such as when lung disease is diagnosed years after repeated asbestos exposure, and so there might be a number of insurers involved (and not necessarily the current EL insurer).

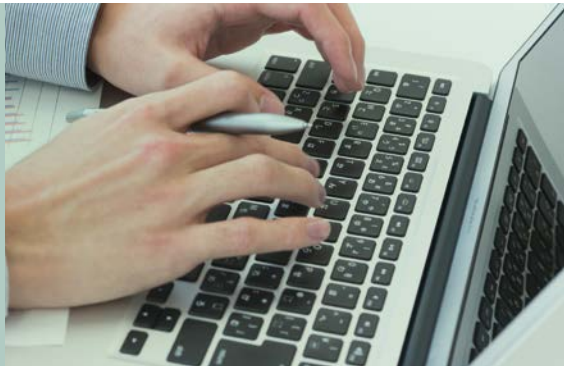
Getting results from the database doesn't equate to 'proof' that there's an insurer the claimant can pursue for compensation, but it certainly helps establish routes for litigation.

While EL insurance has been compulsory for the vast majority of employers since 1969, the first tracing service Employers' Liability Code of Practice (ELCOP) was only put in place in 1999 and contribution was voluntary.

ELTO replaced ELCOP in 2011 and it has since been compulsory for 'lead insurers' to submit policy details; consequently, over 99% of the EL insurance market in the UK is signed up to the service.

99%

of the EL insurance market is signed up to ELTO



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enquiries@biba.org.uk
www.biba.org.uk

British Insurance
Brokers' Association
8th Floor, John Stow House
18 Bevis Marks, London EC3A 7JB

Allianz Insurance plc
57 Ladymead, Guildford
Surrey GU1 1DB

DAC Beachcroft
1 Minster Court, Mincing Lane
London, EC3R 7AA

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