

Loss prevention standards

Claims Defensibility for the Health and Care Sector

Practical guide on what to do to improve claims defensibility, particularly during periods of high demand and change for the health and care sector.



Claims Defensibility for the Health and Care Sector



Introduction

In this increasingly Volatile, Uncertain, Complex and Ambiguous (VUCA) world, the way we look at risk management best practice is continually evolving. The healthcare and social care sector are experiencing unprecedented and challenging times due to the COVID-19 outbreak. Not only is there the increased pressure from dealing with the increased risk of serious illness, but day to day risk exposures continue.

Good risk management practices can minimise exposures and improve the chances of successfully defending potential future claims, thus positively impacting overall claims costs in the long run.

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, illness and loss/damage claims, if covered under the terms of the policy 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. During the current pandemic all relevant policies, procedures and risk assessments, etc. should be reviewed and aligned with current Public Health England, Government or World Health Organisation best practice along with recognised professional trade and industry guidance.

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

Nobody wants to over-burden businesses 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 ISO 45001 will also go a long way to preventing incidents from happening in the first instance and, should the worst occur, ensure that the necessary records are in place.



LOSS PREVENTION STANDARDS

From the moment an accident occurs, a communicable disease (COVID-19) is suspected, or you are made aware, a continual opportunity exists to work alongside the affected 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.

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 additional information and contact your Aviva Risk Consultant who can advise on further support should that be of interest.

Aviva strongly believes that the focus of thorough 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 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 scene becomes contaminated/ altered. Think of yourself as being a police detective, trying to collect all the facts
- **Make best use of the “Golden Hour” to collect as much factual information as possible around the circumstances.** Take photos, draw sketches, obtain CCTV wherever possible. Understand key contacts and possible external sources of COVID-19
- Nominate trained, authorised 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"> • Policies and procedures • Site/task specific risk assessment • Generic pre and post-accident risk assessment • Safe systems of work • Personal protective equipment (PPE) provided • PPE records • Permits to work (if applicable) • Disciplinary proceedings records • Internal workplace inspection and housekeeping records • Cleaning and spillage records • Maintenance records and defect reporting • Hire agreements for, e.g. hired equipment • Health and safety group or committee minutes • Health and safety audit findings and response • Company car/commercial vehicle driver handbooks 	<ul style="list-style-type: none"> • First aid report • Accident report • Investigation report form • Photographs/video/CCTV • Statements from all relevant witnesses, including negative statements • RIDDOR report/F2508(A) (if applicable) • Historic accident data and analysis • Near miss register • Training records • Occupational health surveys – Noise, Vibration, etc. (Disease claims) • Occupational health records • Health and safety group or committee minutes where the accident is discussed
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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 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 CNF
- 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 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.

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

The COVID-19 pandemic has had a significant impact on all our working lives, but particularly those in the healthcare and social care sectors. Other examples of change include site closures, introduction of new processes or changes to work processes, relocation of operations/employees, all of which can present a significant risk in relation to effective claims defence. The proper collation, retention, and storage of all documentation and records need to be considered.

During any mothballing, decommissioning or 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.

Consideration should be given to:

- Who will be responsible/accountable for managing the change successfully? Are there nominated staff who are responsible for keeping up to date with changing best practice guidance during the pandemic? Will there be a Site Closure Committee to manage the process from start to finish?
- Redeployment or redundancy considerations – do employees need re-training or other support during this period? How is this going to be documented?
- How will the people be looked after – **remember “You don’t sue, people you like”**. **Treat employees** and service users 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 and other interested parties of the things they need to know and what action you are taking to keep service users safe during the pandemic or change process
- 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. Think about timelines to make sure that for e.g. training records, this is linked to the package that was actually undertaken (version control)

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 one 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 with your HR department in such circumstances

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 health and care providers need to remember that having a risk management and care management system in place or receiving regular awards is not the same as having good claims defensibility. It is important that not only are the usual inspections/audits and procedures undertaken, but that these are reviewed against the recent **claims'** history or emerging risks such as the COVID-19 pandemic. During such periods there are a number of amendments and changes which organisations will need to keep abreast of and respond to, based on the latest Government guidance. This will mean the likelihood of further changes in working practices. Now may be the time to review how well the risks are being managed and lessons that can be learned in preparation for any possible future second wave of the pandemic or other significant event. **Remember the “VUCA” world, so connect regularly with your organisation'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 incident reports and claims information, questions to be asked should include:

- Is our incident/claims experience improving or deteriorating?
- Are there any common trends or themes in the incidents/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?

LOSS PREVENTION STANDARDS

- 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 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.

A potential 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

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 for the Health and Care Sector 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](#) - Ministry of Justice
- [COVID-19: Guidance for supported living and home care](#) - GOV.UK
- [COVID-19: Guidance on home care provision](#) – GOV.UK
- [Coronavirus \(COVID-19\): adult social care guidance](#) – GOV.UK
- [Information for adult social care services during coronavirus \(COVID-19\) outbreak](#) – Care Quality Commission
- [COVID-19: Guidance from other agencies](#) – Skillsforcare
- [COVID-19: Managing the COVID-19 pandemic in care homes for older people](#) – British Geriatrics Society

Additional Information

Relevant Loss Prevention Standards include:

- [Legal Professional Privilege](#)
- [Accident Recording and RIDDOR Reporting](#)
- [Managing Change - Liability](#)

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

Email us at riskadvice@aviva.com or call 0345 366 6666.*

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

Appendix 1 - Claims Defensibility for the Health and Care Sector 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 and 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?		

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	Documentation	Y/N	Comments
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?		

	Monitoring and Review	Y/N	Comments
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?		

	COVID-19 Specifics	Y/N	Comments
15.	If you have taken in NHS patients, can you timeline this and demonstrate the isolation facilities both prior to the 15 th April 2020 and afterwards?		
16.	Are you implementing the measures recommended by Public Health England plus others to minimise transmission of COVID-19 (this includes clinical procedures as well as other hygiene and social distancing measures)?		
17.	Do you have procedures in place to manage suspected or confirmed COVID-19 cases in staff or service users?		

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18.	Do you have procedures in place to monitor and implement any revised guidance from Public Health England, etc?		
19.	Have you been able to maintain adequate levels of appropriate PPE to manage risks from COVID-19?		
20.	Have you experienced any difficulties in obtaining appropriate PPE?		
21.	Do you have records to support purchases and/or attempted purchases of appropriate PPE?		
22.	What arrangements do you have in place for staff testing of COVID-19 and can you show the revisions to this plan?		
23.	Do new starters receive adequate training before commencing work?		
24.	What COVID-19 training is given to employees, how is this delivered and are records maintained?		
25.	Have absence and return to work procedures been reviewed to incorporate the latest guidance on isolation of employees with suspected or confirmed COVID-19?		
26.	Are safeguarding standards being maintained during the pandemic?		

27.	Additional comments:		
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Please Note

This document contains general information and guidance only and may be superseded and/or subject to amendment without further notice. Aviva has no liability to any third parties arising out of ARMS' communications whatsoever (including Loss Prevention Standards), and nor shall any third party rely on them. Other than liability which cannot be excluded by law, Aviva shall not be liable to any person for any indirect, special, consequential or other losses or damages of whatsoever kind arising out of access to, or use of, or reliance on anything contained in ARMS' communications. The document may not cover every risk, exposure or hazard that may arise and Aviva recommend that you obtain specific advice relevant to the circumstances.

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