



Liability Investigations for Commercial Claims – The Basics

When trying to demonstrate expertise there is often the tendency to complicate matters with the most detailed and obscure aspects – restricting any interest to those of similar experience and standing. Tom Battell takes an unashamed basic look at liability investigations that aims to assist the “newbie” and might even refresh the old hand.

Introduction

Liability claims can be great for testing and widening your skills. You need to be able to see things from different perspectives whilst utilising technical, legal, numerical, business and soft skills. Bringing the claim to a conclusion then requires the ability to negotiate and be charmingly resolute without the matter becoming personal or protracted. Age and grey hair have definite advantages but youth and zeal can bring a refreshing openness and combined with a little guidance and continuing experience there is every reason to expect the Loss Adjusters of tomorrow to be every bit as good as those of yesteryear.

The Desktop Study

A new claim comes in. What do you do? The default position might be to immediately contact the claimant and visit within KPI timescales. However a more valuable exercise, before any approach to insured or claimant, would be to examine the available data and then conduct a desktop study.

This would include:

- Internet search of the parties, to gain some understanding of their businesses, knowledge of the key people, an update on the industry and any similar incidents/events.
- Checking out the locus prior to the incident. This is now possible via Google Earth and similar facilities and can help you understand the proximity of affected neighbours and identify water courses for pollution claims as well as show the pre-damage condition of building destroyed in a fire or explosion.
- An update on the legal position and implications.
- Any news items/releases and financial review of the business. This will aid the investigator in the event that the claim arises or is driven by “credit crunch” issues or poor contractual or business performance.



The Site Visit

See the whole picture. It is important to keep focussed and to gather all the facts in a helpful non-confrontational manner.

- Do not be rushed into “*where do we go from here?*” before you have understood *the “what, when, how, who, where?”*.
- Be open-minded with all witness accounts but secure evidence with statements.
- Take photos – there is no excuse now with digital cameras and phones.
- There may be many parties on site clamoring for attention, each with their own agenda. Give each party the necessary respect and time but establish a rapport with the key decision makers.
- Ensure that all parties understand that your brief is to establish, understand and record the facts not to pre-determine the responsibilities.
- Be aware of political and PR issues and handle your enquiries sympathetically. No one will thank you for inconsiderate attitudes.
- Write up your site notes straight away if possible. Revisiting hastily written notes at reporting time or just before a trial is not to be recommended.

Investigation

Liability claims turn (are decided) on the facts – provided they can be established. The skills of observation, conversation and interview technique come to the fore with the ability to sift and analyse the facts. The steps should include:

- Compile a chronological record of the circumstances leading to the loss occurrence and the actions thereafter.
- Identify all parties and their relationships. This will help to differentiate contractual from common law liabilities.
- Determine the real cause. Liability issues look primarily at the dominant and effective cause and not the remote cause. New or later causes (*novus actus interveniens*) dictate where liability stops and passes to another.
- Where there are multiple causes, doubt or technical issues consideration should be given to the appointment of forensic scientists or engineers.

Defective products or workmanship, inadequate advice, breaches of duty, contractual default, negligent actions or omissions are all possible routes of investigation.



However do not forget that sometimes accidents happen for which no responsibility arises.

Evidence

Securing evidence early, before it is sanitised or elaborated, is the key to the successful claim or defence:

- Statements (in the witnesses own words) or contemporaneous notes are very valuable if the matter proceeds to court and can defeat unsupported allegations. “Negative statements”, that is that the witness saw nothing, should not be discounted.
- In a product liability matter protecting the unit involved for examination must be done as strict liability toward consumers arises if a defect can be shown.
- Other forms of evidence may be appropriate including documentary, IT, photographic, financial and circumstantial.
- Who else might be involved or bear some responsibility? What contractual agreements exist that may alter liability or give counter indemnities? Obtain copy contracts.
- Injury claims may need an evaluation of compliance with workplace or equipment regulations.

Liability assessment

There can be a danger in gathering some much information and citing so many legal cases and statutes that you “cannot see the wood for the trees” A logical common sense path is often the best route:

- What caused the incident?
- Who was involved?
- Was there a breach of duty or negligent action?
- Did damage result?
- What mitigation or defence is available?

Of course the law does not always follow common sense but that is where the lawyers come in citing the relevant law and looking at the “grey areas”. It is an interesting observation that 50% of lawyers are wrong (the ones who lose). Those that get it right are usually assisted by good investigation in the first place.

One of the other issues to consider at this time is whether the matter is a commercial dispute or a true negligence claim. The current downturn in the economy does prompt financial hardships



which are sometimes dressed up as insurance claims; the construction project which runs over budget has a claim against architects/engineers for inadequate supervision or the claim against accountants for restated accounts and overpayment of dividends. Employment injury claims may be a way of “offsetting” redundancy costs.

Contractual terms must always be examined as these may vary the common law position.

Policy Points

Determining whether the policy will apply is a two part process:

1. First you need to establish whether a legal liability arises.
2. Next will the policy apply to provide an indemnity in respect of that legal liability, in part or in full?

Policies vary between Insurers and territories. Does the risk match that described in the proposal/policy schedule, especially as regards business activity? Compliance with specific terms and warranties is a must.

Occurrence and breach of duty dates should be compared to the claims made or losses occurring basis of the policy for admissibility.

Damage must be accidental and not deliberate or inevitable. Pure contractual liability is often excluded.

Property damage must not fall with the “own property” exclusion. Financial losses or pure economic loss will be excluded in the absence of damage to third party property.

Damage, Quantum and Settlement

What’s it worth? Losses may be physical damage, injury or financial in nature. Assessment requires accurate recording and analysis combined with a realistic matching to loss sustained. Claim figures can be ambitious or just opening gambits that bear little relationship to the loss. One good way of establishing the correct parameters is to review the latest settled cases.



- “General Damages” are personal non-monetary claims relating to pain and suffering, loss of amenity and physical injury.
- “Special Damages” are the quantifiable monetary losses and expenses that arise.
- “Liquidated Damages” are the pre-agreed levels of compensation defined in a contract

Remember to look at savings and mitigation aspects especially if there is an alleged continuing business loss. A financial analysis can often separate the real loss from any financial downturn. Outside of contract the claim can be restricted to the level of any contributory negligence established.

Settlement usually involves a negotiation process once reasonable parameters have been established. What makes a good negotiator? Listening to the other party and understanding what they need to reach closure is key – even if their position is not achievable. Bringing expectations back to reality with open, honest, factual discussion may be the next step. Other techniques may reflect your own personality and disposition but I am in favour of “less said more done” rather than “brow beating into submission”.

A Final Thought

Commercial claims usually arise between parties that may rely on each other in business and a liability claim can break the relationship and lead to a reduction in business performance. On the other hand the Loss Adjuster can find himself in the position of being able to restore confidence between the parties, to improve processes and risk management and of preventing future claims...Nice work if you can get it.

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