

Spring 2023

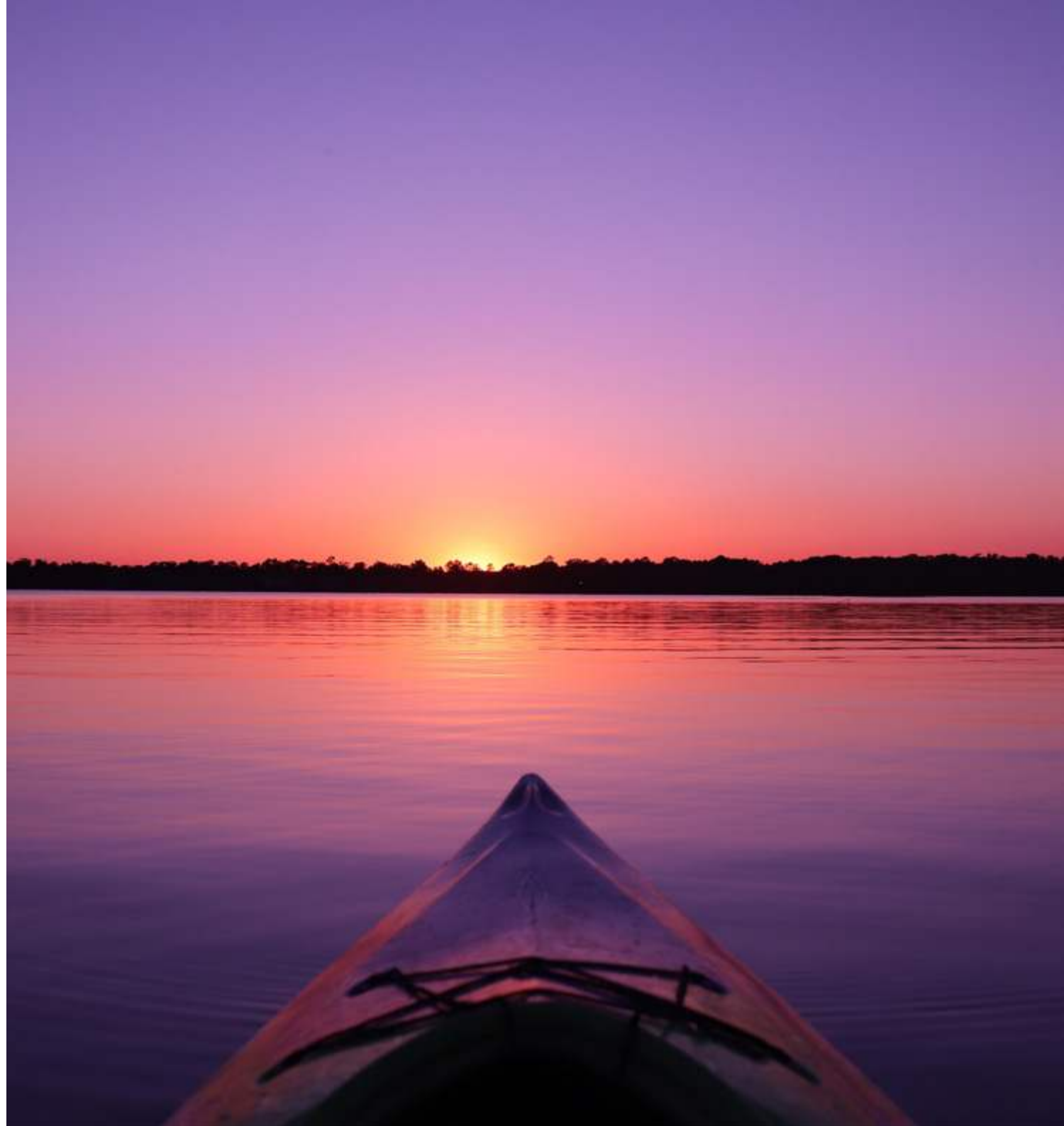


Covernotes

Explaining issues that affect insurance

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New Building Safety Act Liable to Make Insurance Conversations Key

Property developers, construction specialists and specifiers need to understand the implications of the new Building Safety Act (BSA)¹ on their insurance protection and should be reviewing their risks with a specialist insurance broker.

Liability is the thread running through the new legislation, introduced on 28 June 2022. The new Act has changed the way in which the Building Act (1984) and the Defective Premises Act (1972) view failures in building and construction duty of care, and has extended the protections available to leaseholders living in defective buildings².

Rather than contractor liability now being just six years, with regard to retrospective claims for defects, Section 135 of the BSA has extended the liability period to 30 years, for claims arising before 28 June 2022. For those after this date, there is a prospective 15-year period of limitation.

Damage caused by any breach of the Building Regulations, to any building in England and Wales, can now also lead to a claim going forward, although not retrospectively, with the period of indemnity being 15 years.

Furthermore, parent and sister companies can now be deemed liable for claims related to building safety risks caused by a developer within their group or associated company structure.

Contractors and developers should not believe this regulatory tightening up only applies to cladding scenarios. The extended liability period actually covers all claims with legitimacy under the Defective Premises Act³.

The changes could now lead to an increase in claims relating to property defects, particularly since a test case, brought by Martlet Homes Ltd against Mulalley & Co Ltd, found Mulalley liable for defective work carried out between 2005-8, when refurbishing 1960s concrete tower blocks in Gosport.

The claimant was also awarded costs relating to the 'waking watch' services, required to keep residents in the buildings safe, given the cladding fire risk and the need for 24/7 buildings' monitoring. An £8m award was granted by the Technology and Construction Court (TCC), to reimburse Martlet for the cost of the complete removal and replacement of the dangerous cladding, plus 'waking watch' costs, covering the costs of one of the two fire marshals for which they claimed⁴. This sets a precedent for other similar actions.

There could be some stormy times ahead, made more problematic by the fact that some project paperwork, from 30 years ago, may no longer exist to disprove liability.

In seeking to protect leaseholders from the costs of remedial works, the new legislation seems to be looking to insurers to pick up more of the tab for the cost, but this may not be possible. Since the Grenfell disaster, many policy wordings have had exclusions for cladding claims added.

As insurers consider the changes in legislation brought about by the BSA, there could be other developments in the insurance market. The Professional Indemnity (PI) market has already seen the withdrawal of various insurers, and others could follow. PI premiums could rise still further, despite already having witnessed significant increases. Insurers may impose more exclusions and be keener to see contractors and developers take up higher levels of self-insurance, shifting more risk exposure to the insured, rather than insurer.

It is imperative that anyone involved in the property market talks to a broker who understands their risks and can help steer them towards the right protection. Conversations need to be had long before policy renewal, to ensure the broker understands the depth of the risk issues that could be involved for the client, and that have enough time to discuss the risks and coverage required with appropriate markets, to give the client the right coverage for the risk.

Similarly, whilst many contractors and developers may have audited potential latent claims exposures stretching back six years, they must now also review the picture over the last 30.

Affected firms should also work with a broker who is used to using project recording methodologies and can ensure there is a robust audit trail, to act as a body of evidence in any future action. They should be reviewing their supply chain and assessing whether sub-contractors have the right level of Professional Indemnity cover. Contracts need to be specific with regard to who has responsibility for what. Any contractual agreement that is fluid, in terms of where liability lies or the scope and extent of liability, should be avoided.

With a big increase in potential retrospective liability, plus the ruling on cladding liability, there has never been a greater need to work closely with a broker who can help protect your business against liability claims in the optimal way. If this topic has touched a nerve, get in touch to start the discussion about your risks today.



¹ <https://www.legislation.gov.uk/ukpga/2022/30/contents/enacted>

² <https://www.wellisonssolicitors.com/news/building-safety-act-2022-changes-to-the-defective-premises-act-1972-and-the-building-act-1984/#:~:text=These%20changes%20came%20into%20force,%20completion%20of%20the%20works>

³ <https://kennedyslaw.com/thought-leadership/article/limitation-and-the-uk-building-safety-act-new-claims-and-what-insurers-may-have-missed/>

⁴ <https://www.clydeco.com/en/insights/2022/07/martlet-homes-ltd-v-mulalley-co-ltd-cladding-in-co>



Year of the Rabbit or Year of Litigation?

2023 is the Chinese Year of the Rabbit, but could also be one of unprecedented levels of SME (small, medium, enterprises) prosecution, with organisations exposed to numerous pressures and challenges.

Businesses are under enormous strain, whilst still suffering pandemic hangovers.

In 2022, businesses were under the microscope, with regard to business planning, viability and business continuity strategies.

Energy prices, supply chain woes and the Ukraine conflict have piled on the pressure. The cost of living crisis and

other economic factors are making society increasingly litigious. Claims, contract disputes, regulatory investigations, class actions, and health and safety prosecutions are real threats.

This has created the perfect storm for management liability claims, as directors and senior managers struggle to make the right decisions for workers, clients and stakeholders, as well as trying to operate within a required compliance framework.

The regulatory landscape in the UK is extensive and includes rule-imposing local authorities. The Health & Safety Executive (HSE), police, HMRC, ICO and the Environment Agency are others to be aware of, as well as industry specific, and others that can affect workplace planning. This is why it is good practice to have expert advice in this area.

If a claim is brought, the buck typically stops with whomever is in charge. Regulators are increasingly prosecuting individuals, not entities. The problem is that many individuals believe that Limited Company status will protect them from prosecution. That is not always true, however, but if a director or senior manager is adjudged to have acted wrongly or without authority against the interests of a company, they may well have to personally pay compensation to the injured party and could also have a jail sentence imposed. Personal assets may have to be sold to pay fines and awards.

With a plethora of things that can go wrong, it pays to be on the front foot, to prevent 'management liability' becoming the two words that become a "catch-all comfort blanket" that enables relaxation in process and thinking that insurance will cover all. Actively getting your house in order can prevent situations arising in the first place, and expert guidance and tools can also be real assets.

Accessing these may be costly, though, so securing a means to both tap into best practice advice and have legal experts on hand, ready to act the minute required, can be the best strategy.

A Management Liability Insurance policy is typically backed by a wealth of risk-reducing resources, which might be a 24-hour legal helpline, plus a library of templates, videos, checklists, guidance articles and step-by-step guides, to steer you through difficult scenarios and legal advice.. Ensure you are aware of the benefits that your Management Liability Insurance covers, in case there are variances in the cover provided.

If you need to mount a court defence, however, the policy can step in and aid you with the legal process.

To discover which Management Liability policies might serve you best, just ask. Making smarter choices, with the help of a policy that understands SME pressures, could help you get through 2023 untarnished.



Bridges Lie Over Troubled Waters

Every day in the UK, five rail bridges, on average, are struck by vehicles or loads too tall to pass under them⁵. The cost to the UK taxpayer is a staggering £23m a year⁶, but the ultimate cost to a fleet operator could also be significant.

In recent years, Network Rail has been granted the right to claim back costs from firms whose driver hit a bridge. On average, these are £13,000 per bridge strike, and rail operators may also seek to recoup costs for operations disruption.

Bridge strikes are now also reported to the Office of the Traffic Commissioner,

for potential regulatory action against the fleet operator involved. This could involve significant legal expenses and time, in addition to possible fines and operator licence restrictions.

However, not only the physical property of Network Rail can be affected. A bridge strike can lead to the vehicle's top being sliced off, if the driver is unaware of the vehicle's height, causing debris to potentially harm members of the public, and the driver, also general damage to the vehicle in less dramatic incidents.

In 2019, a Swansea bus bridge strike led to numerous injuries, a fatality and, ultimately, the driver's imprisonment⁷.

Any load being carried can also be damaged, causing potential losses of contracts.

Then there is the impact on insurance premiums. Motor-related insurance claims are soaring, due to heavy increases in the cost of vehicle parts, a scarcity of key components, the conflict in Ukraine and labour costs, so any vehicle repairs will likely be costly and typically lengthy.

Forty-three per cent of lorry drivers admit to not measuring their vehicle before heading out on the road, and fifty-two per cent admit to not taking low bridges into account. Neither omission may be a point of law, but common sense seems to be at a premium when it comes to avoiding the most public of embarrassments behind the wheel⁸. It is essential that fleet managers ensure they do both of these. Routes need to be better planned and ordinary sat navs abandoned for ones that can flag up low bridges. Driver awareness of differing loads needs to be raised, so they think about both the flatbed and what sits atop. Measuring poles can be provided to

drivers, but they should also use their eyes to locate triangular and circular low bridge warning signs, especially if their route is changed.

Above all, they must realise 'hit and runs' are not an option. All bridge strikes must be reported, using the contact details given on the bridge, either by calling the police or the Network Rail emergency line. Drivers have no idea what damage has been caused to the tracks above and any train derailment could be disastrous.

Use the tools Network Rail provides for the prevention of bridge strikes⁹, as well as your due diligence, with regard to planning and educating drivers. Access your broker's help, as part of your risk management strategy to keep your claims down, ensuring you have the right risk strategy to help mitigate when claims do occur. If you take no action, your business could be derailed.

⁵ <https://www.networkrail.co.uk/running-the-railway/looking-after-the-railway/bridges-tunnels-and-viaducts/the-risk-of-bridge-strikes/>

⁶ <https://www.networkrail.co.uk/communities/safety-in-the-community/railway-safety-campaigns/wise-up-size-up/>

⁷ <https://www.walesonline.co.uk/news/wales-news/bus-crash-bridge-driver-swansea-19682421>

⁸ <https://www.railfreight.com/railfreight/2022/11/25/half-of-uk-truck-drivers-unaware-of-vehicle-height-impacting-railways/?gclid=...>

⁹ <https://www.networkrail.co.uk/running-the-railway/looking-after-the-railway/bridges-tunnels-and-viaducts/the-risk-of-bridge-strikes/prevention-of-bridge-strikes/>

Watch Out for 'Total Loss'

Fleets need to get something on their radar, as vehicle write-offs could become more common within insurance claims, if rising costs make it more expensive to repair than scrap.

Numerous factors are now impacting on motor insurance claims, and the process has become a vicious circle. A vehicle is only typically written off when the total hire car charges and repair bill would exceed its value, but this is rapidly becoming a reality for many claims.

The average motor claim is now £5,349. Repair cost inflation has been fuelled by an acute shortage of spare parts, beginning with the much-reported pandemic semiconductor chip shortage. It is now being exacerbated by the conflict in the Ukraine – a country which produces 50% of the world's neon – that is vital for semiconductor chips, of which a modern car can require up to 1,500. Ukraine was also a major supplier of nickel and palladium, used in electric batteries and catalytic converters.

The weakness of Sterling has also driven up the price of imports, such as in the automotive sector, where 80% comes from the EU¹⁰.



Shortages mean that turning vehicle repairs around is taking longer. In the first eight months of 2022, it took 11 days more to get a vehicle back to the customer, following first notification of loss, than previously. This has put huge pressure on claims, due to the soaring replacement vehicle hire costs. The insurance industry even had to strike a deal with the credit hire companies, agreeing to pay faster, in return for lower hire rates, but the agreement only lasts until June 2023.

Energy price hikes have greatly impacted on repair shops. In July 2022, 63% of independent garages and dealership workshops said they would be increasing their prices to customers¹¹.

This also affects technology and the inclusion of brilliant but extremely costly-to-replace Advanced Driving Assistance Systems in vehicles.

For anyone running a fleet, it is time to embrace risk management and adopt strategies that reduce claims. It's also where a fleet broking specialist can step in, analyse claims experiences, spot patterns and trends, to advise on solutions.

However, for those buying new vehicles or leasing vehicles, there is a further consideration. If insurers write-off vehicles, rather than repair them, payouts may not allow for brand-new replacement vehicles to be purchased, or for the finance agreement to be paid off.

In the first scenario, whilst the insurer should compensate for the vehicle's value at the time of write-off; in the second scenario, you could be left paying finance on a vehicle you no longer possess, with the insurance payout insufficient to cover contractual sums owed.

It might be time to consider 'gap insurance', if you are not content to replace a vehicle only to the value of one written off, or if you cannot contemplate being left with ongoing finance agreement payments on a written-off vehicle. If that's the case, talk to an insurance broker, as you will probably find a better deal than buying gap insurance through a dealership.

¹⁰ https://info.allianz.co.uk/rs/004-TVS-119/images/%5BALZ_127%5D%20Motor%20Claims%20Inflation%20Guide_1920%20x%201080_V10%20interactive%20-%20final.pdf?mkt_tok=MDAOLVRWUy0xMTkAAAGlkSb4MVMISkrorRbLm_kdnd7mHxeVgUc0x66V7rqtqc7vKlHR43IT4OJcnkN86pXPaolBn6gB1CaOHTcevm2gsc8lFKYrAWzto9cY0yMxQ
¹¹ <https://www.thisismoney.co.uk/money/cars/article-11005719/Why-cost-car-repairs-set-rise-coming-months.html>

Is it Covered?

A Building Contractor allowed people to sleep in a show flat at an unfinished apartment block within a construction site. No one was injured and nothing was damaged – so what is the issue?

After being tipped off about the situation, the limited company was investigated by the Health & Safety Executive (HSE). It was found that there were serious breaches of fire management at the site, creating a risk to workers and members of the public at the premises outside of business hours. The director of the business also regularly visited the site, but made no changes to mitigate the risks. The company was fined £600,000, and the director was fined £4,200, receiving 100 hours of community service¹².

So, is it covered (by insurance)?

If there had been damage or even worse injuries to workers or the public, the Management Liability policy (MLP) cover would help to defend the client

by activating the covers within, such as legal protection. However, fines and damages must still be paid by the business. With the subsequent damage to the companies' and the directors' reputations, this could potentially mean an end to the business.

The real issue here is not is it covered AFTER the event, but could it have been prevented BEFORE?

Businesses must appreciate their legal responsibilities... it is no one else's responsibility and, with the UK's regulatory landscape, this responsibility must be taken seriously. Businesses need to comply by having access to legal, employment and management information, as having an MLP policy could reduce damages and court costs. Yet getting the right advice beforehand can also have these types of risks, and the HSE may not have to get involved.



¹² <https://www.thefpa.co.uk/news/building-contractor-fined-600-000-for-repeated-fire-safety-failings>



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