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Strategic**RISK**

May 06

ROUNDTABLE 2006

MANAGING YOUR LIABILITIES

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Managing your liabilities

An introduction to the StrategicRISK roundtable discussion by **Sue Copeman**

Interestingly, our panel of experts was divided as to whether the much talked about UK compensation culture was as widespread as it is made out to be. Company culture and the way that risks are managed clearly have an impact on both employer's and public liability claims, with most participants very conscious of the potential reputational fall-out resulting from a badly handled claim. There was, however, general consensus that regulation, both national and European, is likely to encourage growth in litigation.

Another key point that emerged in the discussion was that too much focus on transferring liabilities within contracts can result in an unmanageable or uneconomic situation. Unrealistic requirements from third parties to buy insurance which may be either unavailable or overly expensive can break a deal. In connection with this, some participants deplored a lack of depth of knowledge in the insurance industry about the liabilities and profile of the specific businesses with which insurers are dealing. And procurement departments are sometimes more interested in achieving savings than in the appropriateness of the cover purchased. Not surprisingly, in view of these perceptions, insurance is viewed as a backstop, with the main emphasis being on risk management and carrying a significant portion of risk yourself.

Discussion of the risk manager's role in identifying liabilities associated with mergers and acquisitions revealed that this tends to be reactive rather than pro-active, with the risk manager mostly called in at the tail end of the deal. Communicating the fact that risk management can enhance business opportunities rather than simply representing a process clearly needs some work.

Finally, our participants gazed long and hard into the crystal ball and suggested some liability issues, both general and specific to their industries, that could be on the horizon.

Sue Copeman
Editor

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Roundtable participants



Gary Marshall, group risk manager, The Polestar Group, chaired the discussion



Andrew Bye, head of risk management, O2



Amanda McKendrick, insurance manager, McNicholas



Enda McKenna, director of risk, InBev UK



Nick Patterson, managing director, Corpore



Hugh Price, partner, Hugh James



Joe Whittaker, risk and insurance adviser, Save the Children UK



Steve Willis, head of insurance, insurance risk management, RWE Thames Water



Managing your liabilities

GARY MARSHALL: I'd like to suggest some points for discussion, and I'm looking to you to be as expansive as possible in your thinking. First, how do we consider today's legal climate? Do we consider it friendly, or not much of an issue? Or is it hostile, becoming not just more of an issue but increasingly more difficult to manage? Do we feel that the legal climate is expanding its borders into areas which are perhaps beyond the broad remit of legal liability, whether at EU level, through common law, or because of a developing case book? Or is it more restrictive?

Something that is self-evident is the change from the dirty industry type of liability basis which we have been used to, to the white collar risk basis. How do we see that in terms of employer's liability? Does it have a knock-on effect on public and products liability, particularly when we talk of the services industries?

How is employment practices liability developing? Is this becoming an area where people are assuming liability without really understanding it? And is risk moving, even if not contractually, from the straight consequences of accident or damage to the bigger issue of consequential loss? Is this restricted through contracts, and if so how? Or do we see it more in terms of the kind of effect seen with the Buncefield explosion at the end of last year, where an explosion in a relatively small area of occupation resulted in a very large area of consequent liability? That it is already going through the courts perhaps says something about the immediacy of things now. Everything seems to go through the courts much more quickly. I am sure there will be some views on that.

Even more recently, there was the issue of the pharmaceutical trial that went wrong. Not only did it go wrong for the six people concerned, the company that was conducting the trial and the company that was funding it, but it was picked up by the media in such an

aggressive way that it has suddenly affected a whole range of other people as well. Does every business have a ticking liability time-bomb?

HUGH PRICE: Well to respond as a lawyer, the answer to that is yes. Going back to your point about whether we are becoming more of a litigious society, the statistics say that we are not. All the evidence suggests that there are fewer claims being brought through the courts. But of course those statistics don't necessarily take into account those cases that are resolved without any statistical evidence being generated. It is interesting too, how EU health and safety legislation, the so-called six pack, has brought risk assessment very much to the forefront. As a matter of law, it is now necessary for businesses to show, where there has been an accident, that they have carried out a positive risk assessment to show that they have analysed the particular process to ensure that it doesn't result in injury or an incident to their employees. It is a developing area. Whether it is a time-bomb or not is perhaps for others outside the legal profession to judge.

STEVE WILLIS: In respect of litigation and claims, it would be an easy answer to say we are getting more litigious, but the culture of the company that you work for counts as well – how they want to deal with claims. Liability in the courts is a consideration, but an important issue is how we deal with the claims and the reputational risk. As you have already alluded to, Gary, if we don't have answers for these claims they will hit the press straight away. And whether we decide that we are legally liable or not, do we make the decision to settle to protect the company? It's knowing what the culture of the company is in respect of this ticking time-bomb and how it responds. That is the most important thing for me. Do we want to take these claims forward? Do we want to go

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to court? Do we want to consider reputational risk and look at other ways out?

NICK PATTERSON: If you speak to most insurers, they actually take a contrary view about the compensation culture. They take the view that we are living in a compensatory environment, where it is very much the case that the value of claims has increased over the last 10 years, even if the number of claims has not. Most insurers say they are seeing an increase of around 10% every year, so there is a culture, and it is now endemic in the UK.

Will that spread to other parts of the world where we are exporting jobs and human capital and where they might start embracing our type of culture? We have got a whole industry now which supports that culture, and that is worrying – how we are working in this environment which is driven by an industry which supports a claims process rather than dealing with the actual injury and its effects on the individual. I think the Government has actually started to try and address that. We have seen some changes in the pre-action protocols where they stress the importance of considering alternative dispute resolution (ADR). I don't know what this will mean in practice, but there is a drive now to move away from the adversarial culture towards a mediation type of approach.

HUGH PRICE: You are absolutely right, that is in process following the Woolf report and the civil procedure rule changes. Going back to Steve's point about culture – culture lies in the legal process as much as anywhere else, and it is taking time for that process to become almost habit-forming. Too few solicitors in fact are looking down the particular route of asking how they can sort a case out as quickly as possible. So there are issues to do with mediation. Of course there is the pre-action protocol, which frankly should be sorting these cases out much sooner. I am disappointed to hear you say that insurers are getting increasingly concerned about the increase in the value of claims. These claims should be settled much more quickly.

ENDA MCKENNA: My own company has been progressively moving away from the transport and distribution functions, which are inherently high hazard and therefore more likely to have accidents, and we are now a sales and brewing only company. But even when we strip out all that, we find that claims are static or decreasing. We are not seeing huge increases for a claim, and when we do see increases, a lot of them are attributable to medical inflation rather than the damages awarded to the individual. I think there is a difference between perception within the general population about the American attitude of "If I get a case I can make a fortune and never have to work again" – versus the realities of it. The Woolf changes are doing a lot to try to control it and manage it; the pre-action protocols are having an impact.

If we compare our business in England and Wales to our business in Northern Ireland, in Northern Ireland you see a completely different picture. You get a much higher rate of claims, settlements are usually at a higher level and litigation is often the first step; cases get to the courts very quickly. Whereas, in England and Wales, a lot of negotiation goes on, and it is only when we believe that there is absolutely no liability, or that there is a particular point to be made, that we will litigate. In Northern Ireland, where Woolf doesn't apply, it is almost taken out of our hands. It is very interesting to compare the two different models



HUGH PRICE: The lawyers are encouraged to pursue proceedings because they get paid for them. That is the fundamental flaw in that system and it needs to be addressed. The reverse applies now in England and Wales, of course, with prescribed fees, and we are going to see those prescribed fees coming to the liability side as well, which is going to encourage lawyers to settle cases more quickly.

STEVE WILLIS: That takes me back a few years to when I started dealing with asbestos and noise-induced loss of hearing claims in the power industry. We thought we were going to get them across the whole country and considered how we were going to provide for this and reserve for that. But it didn't happen. You got to know the areas of the country where the claims were going to come from. There were certain pockets where there was a culture that a claim would help someone out of a situation, a poor area; claims were seen as a way out. It wasn't universal; we just had these pockets.

GARY MARSHALL: Are we seeing more or fewer claims in the charity sector, Joe?

JOE WHITTAKER: We do envisage a future where charities are seen as an equal target to any other sector. Historically, claimants have had a softer attitude towards charities. Generally, from an employer's liability viewpoint, we have seen very few claims. The volunteers and people who are working for us have a moral ethic which suggests that they are not seeking money from us or from our insurers – which is ultimately from us of course – because their aim is to improve the lives of children. By making a claim they are clearly taking money away from the main purpose for which they joined the organisation. I think the international perspective is one to be aware of though. If we export the compensation culture to the ultra-capitalist Hong Kong environment, for example, they would make even the US plaintiff bar look like the Sisters of Mercy! I think 28% of US GDP goes into the compensation culture at the moment. We are running 6-7% at the moment in the UK. We have to be aware that, when a lot of the rest of the world works out that Americans are actually no more valuable than the rest of

If we export the compensation culture to the ultra capitalist Hong Kong environment, for example, they would make even the US plaintiff bar look like the Sisters of Mercy!

Joe Whittaker



Expectations have changed. Someone has to be to blame. There is no such thing as an accident any more

Amanda McKendrick

humanity, we could be in a serious economic situation. We are exporting jobs into the Indian sub-continent at the moment, both in the insurance and the legal practice, and to assume those two are not going to match up at some stage and come up with their own business model is, I think, slightly naïve.

AMANDA MCKENDRICK: Most of the claims we see are from members of the public. I think you need to distinguish between the employer's liability (EL) and public liability claims. Although construction and civil engineering are a traditionally dangerous industry, our EL claims are actually very low. Again that probably reflects the culture in the company, in that we try to look after our employees. Public liability is a completely different proposition. Four or five years, ago, members of the public tripping near our barrier near an excavation would expect an apology saying that it wouldn't

happen again, thanking them for bringing it to our attention, and perhaps a bunch of flowers. Now, the first phone call you get is about compensation – this has happened and how much are you going to pay me? We have noticed regional variations as well. When we were working on a contract in the West Midlands, I noticed that the no win/no fee solicitors would set up a booth in the shopping mall on a Saturday and hand out leaflets to passers-by, which said exactly the same as the adverts which ask if you have had an accident that was not your fault. Expectations have changed. Someone has to be to blame. There is no such thing as an accident any more. There is tendency to go straight to a solicitor rather than letting the company investigate. Buncefield is a good example. I am astounded that there is already pressure for a class action, when there is actually no evidence that the HSE or anyone else has disclosed so far to suggest that there was actually any negligence. So I believe that the compensation culture is growing, and I also think we probably exacerbate it by the fact that we are settling cases out of court as an ex gratia payment, as a gesture of goodwill, without admission of liability, because it is cheaper.

STEVE WILLIS: And to protect our reputation.

HUGH PRICE: Is that partly because you are under pressure from your insurers to settle?

AMANDA MCKENDRICK: We are mainly self-insured. We have taken the decision that we only want to insure for catastrophic loss, so we take a large excess and therefore deal with all the slips, trips and falls claims in house.

GARY MARSHALL: Andrew, what about the clean hi-tech industry of telecoms? Is there any liability issue there that is growing, or is it bouncing along the bottom, with just the odd claim coming in?

ANDREW BYE: It's important to understand whether we are talking about insurance or about general commercial exposure. On the technology side of things we find that what you can and can't insure for legal liability will actually influence your policy. We focus more around the commercial side of the business and managing risk, and only buy insurance where it actually fills a hole in our exposure. Insurers generally exclude a lot of technology risk because they just don't understand it. We are moving from the current physical, well-understood process carried out by a man and a van, towards a situation, in a year or two's time, when this will be carried out through the Ethernet between one device and another device somewhere in the middle. There could obviously be a claim from somebody for financial loss or even some other claim we haven't foreseen today because we haven't experienced the actual event yet. A lot of it isn't legacy, it is more future risk where we haven't seen the problem occurring. So insurance in that respect is very much a lottery.

We are focused on prevention, so we have a very active culture. We are very much more risk management driven in that respect, rather than actually worrying about insurance claims. Also, in this sector we rely on outsourcing supplies and sharing work with each other, so there is a very strong cultural pressure to ensure when you are transferring liabilities under contract you make it as manageable as possible. Looking at where our exposures are and what our experience is, it's a matter not so much of claims but of the requirements of a contract for insurance. We are finding more pressure from lawyers, NGOs, government, and bureaucrats, who are requiring ill-thought-out concepts of insurance, because they are asking for insurance that it actually doesn't make any sense to buy. To try and buy it and build it into your contract would make the contract uncompetitive. But the people involved don't seem to understand what legal liability is all about from an insurance perspective, or from that of the commercial entity they are looking to trade with. I think the knowledge of risk and the liabilities is being eroded, and we are just looking at buying insurance as a legal expenses policy to compensate you later, rather than understanding the risk in the first place.

GARY MARSHALL: Is it that these people are ignorant perhaps?

ANDREW BYE: It is not ignorance. I guess, it is like a lot of industries, when the insurance industry doesn't help we just get on with it ourselves.

GARY MARSHALL: Yes, your industry does, but what kind of industries do these third parties that ask you to come up with high cost solutions based around insurance come from?

ANDREW BYE: They are usually people in the bidding or tendering process, who are working to a template. They are working in a laboratory environment rather than a real environment, and they are asking for a wish list which ends up being put in the contract. Because it is in a tender process, everyone wants to go for the main contract. And at the end of the contract period, there are all these liabilities in the contract. Often these conditions are unrealistically pathetic to ask for, and they want you to buy insurance to cover them. They are not interested in your credibility or your business continuity plan or how your whole process works; no one is looking at the process – they are just looking at an additional level of

security. It is probably the wrong form of security anyway, because you can't rely on insurance to cover you for half of these things. And that I think reflects a lack of understanding of what legal liability is all about and certainly what insurance should be used for.

GARY MARSHALL: Are they asking for the electromagnetic type effects on third parties to be protected?

ANDREW BYE: It's not really that. It is like any industry: people ask for the latest big thing to be included. In some respects this is a bit daft. They ask for one thing to be included and the way they phrase their clauses excludes any other future potential major issue. Generally, a lot of these contracts are ill-thought-out, and as a consequence managing the legacy of these contracts in the future could be a significant burden.

HUGH PRICE: One reads in the media about all sorts of horrendous things that might happen to young people who are using mobile telephones. Presumably that must take up quite a bit of your research. Do you see this as the next asbestosis?

ANDREW BYE: No. Every industry has an area of risk, otherwise there is no reward and if it is a dangerous industry it is going to be highly regulated. We don't just sell mobile phones with no disregard for people. Most of the mobile phone companies are very highly involved in ensuring that their business is well run and their community is well informed. (See www.o2.com/health_mobile_safety.asp)

HUGH PRICE: So is that a classic piece of media scaremongering?

ANDREW BYE: Before I joined O2 I could understand these sorts of concerns, but once you understand what is going on, it opens your eyes. The problems that arose with things like asbestosis, for example, mainly occurred because businesses in the past didn't have actually much regard for the environment and the people they worked with and didn't know the implications of their actions. Companies I have worked with in new industries have much more regard to the work environment. Within O2 on a general basis across the business we are very much focused on prevention, so we have a very good claims experience in all classes. We spend a lot of time making sure that we have a good culture within the business and within our supply base, and have good working practices with our suppliers, so that we can deal with resolving an issue rather than waiting for it to become a claim.

GARY MARSHALL: Thanks for that, Andrew. Perhaps we could take the debate a step further, away from the area of claims and contracts. Although it doesn't affect everybody in exactly the same way, I am interested in where insurers are in this process. It is not so much based around whether or not we see insurability, but about how insurers themselves have responded in recent years to significant heads of claim. An obvious example here is what insurers did in respect of asbestosis and how they reacted, particularly in the public liability policy, by simply saying, right we don't like it, so we will exclude it. Do we see more things like that coming along? Are we going to get a point where a public liability policy, which to be fair has always had exclusions, is going to have so many exclusions that you have to look at your profile and decide whether or not you actually need to worry about

this cover or whether you should buy something bespoke, perhaps in the area of environmental liabilities?

AMANDA MCKENDRICK: That is a very good point. As an ex-broker, I have the advantage of an insurance background and I resist very strongly any changes that my insurers try to make, specifically with public liability. I say to them, well is this what you are worried about, in which case why not word it like this? I think a lot of companies are going to be caught out by having to accept conditions and exclusions on their policies, because they, and sometimes their brokers too, don't really understand what the future impact will be. But most worryingly, I don't think there is the depth of knowledge any more within the insurance underwriting fraternity – that is the problem. There are ever increasing complications within contracts. My personal view is that often someone is writing a contract by cutting and pasting and thinks that, as they had something in a previous contract, they had better put it in the new one, even if they're not sure what it means. I query a lot of clauses in contracts with employers and they come back and say, well no-one has queried that before, and I say fine, well I am, what do you intend by this clause? If they can't answer that then we say that we are not going to accept it. And leading on from that, there is also the point that just because it is in the contract it doesn't mean it is insurable, which is the point Andrew was making.

STEVE WILLIS: Going back to when we were talking about insurance and indemnities, I am sure we have all had the experience where you get a procurement department sending you extracts of indemnity clauses and insurance clauses saying, is this alright? So what is the risk? what is the cost? what are we actually looking at? You have to ensure that within the business there is a commercial awareness of what the risk value is against what we are being asked to provide, or what we are asking other people to provide, and then try to

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Often these conditions are unrealistically pathetic to ask for and they want you to buy insurance to cover them

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demolishes the net then we end up with somebody in the crowd injured.

GARY MARSHALL: Leading on from that, procurement is quite topical at the moment. Are we part of a procurement process if we do insurance as opposed to risk management? If we do a procurement process, is the general view from procurement that everything is capable of a legal certainty? In other words, do we say the insurance process and the insurance product, the wording, are something that we agree at the first stage and then get procured, making sure that it is a contract that is legally bound? The question is, does that meet the liabilities of the business – which is probably where we would expect some degree of intellectual oversight – or is that question just pushed out of the way in the headlong rush to get a deal done at an acceptable price? Perhaps you can take that approach with property insurance but is that dangerous ground with liabilities?

JOE WHITTAKER: I think if we are looking at contract certainty, we need to look at the aspect of legal certainty. In my experience, the legal process in the UK and the US is a bit of a lottery, so to assume that what we address through the insurance process will increase our ability to procure certainty for our organisations is something of a vain hope. My view has always been that if I have a legal liability policy, I want lawyers to give me their view as to the efficacy of that policy for our business. We are not going to have very many large liability claims in our lives, but when they come they will be large; they will be complex; they will hit us in a multi-faceted way, and our legal team needs to be on board, so I think scrutiny by legal experts of your legal liability policy is an absolute essential.

STEVE WILLIS: I agree with you, because the larger the claim, the more likely it is that the insurers are going to engage lawyers and look at the policy wording. As to the future, the certainty issue is a little bit clouded. We have got these unknown risks which may not materialise for three or four years. The certainty you have got now may not be there in five years time.

JOE WHITTAKER: Absolutely, again you should be buying your liability policy looking at the claims culture that will be there in 10 years time.

ENDA MCKENNA: Our products and public liability is part of a kind of overall global programme which is bought in Belgium to try to cover all Western Europe through to China, ignoring North East Turkey where they have got their own programme. Within these countries you have got different kinds of mentalities, attitudes and, for want of a better term, trends, so the umbrella has to be quite broad to try to catch all aspects.

NICK PATTERSON: Part of the problem surely is that the so-called insurance cycle is getting much shorter than it has in the past. There is talk now about there being a soft market, so buyers of insurance are looking at this and thinking that it's going to be financially beneficial to change insurers. They are being encouraged to shop around all the time so there is no consistency, no relationship building. I am not saying that this is necessarily wrong, but it is building in a dynamic which is making it much more difficult to build in a certainty.

ENDA MCKENNA: That is an excellent point. It also

reflect that in policy wording.

JOE WHITTAKER: Contract risk apportioning skills are very low generally.

STEVE WILLIS: It is important to get that right first before you go through a renewal process, especially if you are changing insurers, because otherwise you will just get a policy wording that has been there for years, with a total mismatch between what you are doing within your commercial business, what the policy actually provides, and what the insurers think they are providing.

HUGH PRICE: There are probably a large number of underwriters who simply do not understand all the different types of businesses and what their different risks are. In theory, contract certainty should help here because it means that the insurer has to concentrate on identifying the issues, the risks and the client's needs, and set that out in a bespoke document. It will be very interesting to see how the industry manages to achieve it.

JOE WHITTAKER: I went to a contract certainty forum last year and posed that very question to an insurer. The general consensus was that they would move away increasingly from bespoke policies to standard wordings. I said I wouldn't be satisfied with this on the basis that, from my previous experience, the insurer couldn't even deliver standard wordings let alone bespoke wordings. I think the erosion of human capital in the industry, whether in broking, insurers and corporate bodies generally, is a worrying trend. On a day to day basis, we need intelligent and complex answers to the intelligent and complex questions which we pose. Insurers do not have the people or the time to give for those complex business risks to be fully understood. That is why most of us are going down the risk management route and looking at the insurer very much as the safety net behind us, the goalkeeper behind our risk managers who are the 10 players out in front of the field. As long as we can describe to our insurers the exact size of the ball that's going to hit their net, they will stop it, but if we get the description of the ball wrong and it turns out that it is either going at a velocity greater than the net can cope with, or is of a size which goes through the net or

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depends on which area of insurance we are looking at. Certainly with EL you want long-term relationships unless you're getting a very poor deal relative to the marketplace, perhaps less so with general liability and motor insurance. Interestingly, in terms of procurement, there seems to be a greater understanding of this. Generally with procurement functions, their ears prick up when they see insurance and a relatively big budget and they think they can produce better results. In my own company, it's important to explain to them that I am not actually buying insurance I am selling risk. That's when they realise that they cannot just dial up somebody and say, 'quote me happy'.

Predominantly our contractors are supply-driven rather than necessarily customer-driven, and there is a better understanding now that we have to be absolutely tighter on the area of contract certainty. I think there's a better relationship with procurement now. They realise that their involvement lies more in your routes to market rather than necessarily trying to drive individual prices down because that is the risk manager's job and that's the broker's job.

JOE WHITTAKER: Also you lose qualitative judgement. That is a big issue, and you don't actually know how good your policy is until you have to test it. That is a problem with any form of insurance and, working in a multinational environment, the one thing I am acutely aware of is what I call the 'Andrex insurance companies' which exist in most parts of the world. Their policies are written on tissue paper and that paper probably ought to be put to an obvious use. They really don't provide financial protection to a multinational organisation. One of the problems, as the spend on insurance has gone up and up each year, is that the finance and procurement disciplines have looked at it because it has now got a figure which is meaningful and has some impact, and feel that they can make quantitative judgements without understanding the qualitative imperative to get the wordings and the relationships right and get the understanding and comprehension fully there and literally embedded.

ANDREW BYE: My personal view is that you can buy insurance as a commodity, or you can buy it as part of your risk certainties programme where you have a financial tool that you can actually rely upon when you need it. If you buy it as a commodity, you get your price saving, but you don't necessarily have a quality product when you need it. Legal liability, whether it's EL, public liability, motor or whatever, depending on your view of that insurance and the value it really brings to your business, is a strategic requirement. You should make that decision accordingly. The other aspect you mentioned, Joe, is the 'tissue scenario'. I guess it depends on why you are buying your legal liability insurance globally. Are you buying it purely as evidence that you have cover in certain territories?

JOE WHITTAKER: It's there as a local requirement.

ANDREW BYE: Are you relying on it as meeting a need for the business? We buy liability insurance on a two fold basis. One is on a big scale, so when we are dealing with major contracts people can see we have got some additional legal liability behind us. Secondly, it is just part of the things you have to do for your report and accounts or your governance; you have to show how much insurance you have got as part of assurance to your



stakeholders. A big claim is not going to bankrupt a major plc because most of them have got a better credit rating than the insurers. The insurers are a long term backstop, as you mentioned earlier, that you might recover from at a later stage. Legal liability insurance is becoming less and less relevant for a large company. It is more a matter of providing evidence than dealing with an issue. That creates a credibility issue in the long term for insurers, perhaps particularly for more bespoke wordings where no-one really knows how the policy is going to pay out. In the US, they tend to use insurance more as a commodity than as an actual certainty sort of product.

JOE WHITTAKER: I would be quite happy with a solution which is more customer-led than insurer-led. You can have a customer-led policy wording which says 'cover is provided for all liabilities arising from the business of the insured with the following exceptions...' If insurers understand the business fully, they should be understanding the risk. That is where the challenge for me lies, and the FSA and its approach on contract certainty is only addressing one of the dimensions.

HUGH PRICE: Doesn't this also confirm the fact that a lot of corporates now take on much more of the risks themselves and retain the risk with higher deductibles and so on. They are effectively self-insured. Is that the feeling round the table?

ENDA MCKENNA: That is the way we as a company are going. It obviously depends on where the market is and whether it is the right thing to buy that kind of format. Generally I think that would be the trend for companies of our size.

HUGH PRICE: But is part of that that it enables you as a company to have greater control as to whether to pay a claim and also to retain data so that you can actually analyse what is going on out there?

STEVE WILLIS: You are right. That data is driving risk management back into the business. If you cannot rely on insurance companies to provide that data in a timely, organised way that suits you, why should you go to them?

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Nick Patterson



If you cannot rely on insurance companies to provide that data in a timely, organised way that suits you, why should you go to them?

Steve Willis

GARY MARSHALL: Do we have the time as professionals to find out all the liabilities that have occurred in the business, quantify them and understand them? I'm talking here about the ones that don't become insurance claims or whatever, but are the actual liabilities of the business. I know from my own company, we might have discussions about an employment practices liability type of issue for instance, and you might hear of somebody who has sued the business for whatever it might be. But you don't actually gather that information. Is that a problem that everybody has? I suspect that it is a problem that doesn't just occur with the big multinational companies represented here but affects all businesses – that we don't garner enough information about liabilities? Or do you think we are really good at that?

HUGH PRICE: I think it is important for risk managers if they are to do the job properly, to analyse their near misses – those incidents which didn't produce a claim but where there could have been serious consequences.

ANDREW BYE: On the health and safety side, a lot of businesses now do use their own sites to measure. They go to a big industrial site and look at how many losses or injuries they've had and how many hours or days there have been since the last loss or injury. When you get into the commercial contracts side, they have KPIs based around the logistics of the industry, on the brewing side, you have got shortages, unexplained disappearances in stock; they are all measured to ensure an acceptable turnaround. It's the same with mobile phones, it's service credits, how many have a quality service, etc, so there are a lot more commercial measures about performance. It is just a case of drilling down. We have a risk register, which goes right to the spine of the business. The issue is where does the risk holder sit? I guess what you are trying to do is make sure everyone in the business is a part sponsor or owner of the risk so you are not taking ownership accountability away. You are trying to encourage them and ensure a world where they can do their day to day business as well. Everybody is like an individual entrepreneur to a degree. If they understand a bit of the fundamentals of risk and accountability then they

understand when to call for more support and when to take accountability themselves. If you take the case of employment practices liability, it's a matter of working with the HR side to make them understand when something is a business-as-usual situation – when it is acceptable to pay out. But we do have one or two 'take us to court' situations that cost quite large amounts a year. When we have a trend of those becoming unacceptable, we identify the reason for it. Is it a bad practice in the business? That is where the risk and other aspects of assurance come in; where people start to perhaps add some value in terms of ensuring that business as usual doesn't impact on the business and its performance.

HUGH PRICE: The other point surely is that it is not just the claims that are going to cost money. Someone may have been injured through nobody's fault; it couldn't have been avoided, but there's all the management time spent in sorting it out, with the effect on the morale of other people at work, you have got to replace that employee, permanently or temporarily – all those sort of issues, which in a sense are hidden costs that surely one needs to take into account when looking at risk management.

NICK PATTERSON: That is a very good point, because what you are saying is effectively that there are other parts of the business that could be affected by absence. It is not just an insurance problem, it is a much broader problem in the business community in terms of how do you manage an absence, how do you manage the operational impact of an absence, whether it be an accident for which there might be a liability or not. When talking to businesses, we see a disconnect between insurance process, insurance service, and also the HR department. And there are also the financial aspects. Measuring the cost of absence in a business is very difficult. There are some calculators that have been produced. The HSE has got a very good calculator showing the effects of absence. The lost time indicators are one point but absence will affect your bottom line, your balance sheet, and businesses have to understand that absence costs money which will affect shareholder value.

ANDREW BYE: We have looked at this with our health and safety people, looking not just at loss and injury but at people being off sick or, for example, people in a call centre who have to go home early because one of their children is sick – things like that. These may seem trivial things, but you have to get a temp in or somebody to cover them, and then the quality of service might not be so good for your customers phoning into the call centre, so the customer experience is weakened. One of our key focuses is the customer experience. So it is actually worthwhile ensuring that we look at the impact on the customer experience of someone being absent – we don't just ignore it. We need to support the person where we can so if they are off sick we try to get them back to work more quickly or, more importantly, if they have got issues outside work, so that we can understand them and help them. When you have spent a great deal of time investing in your people, getting a temp in is a sub-standard alternative unfortunately, because they just can't pick up that culture quickly.

GARY MARSHALL: I'd like to bring something else into play – the area of disclosing liabilities in terms of corporate governance. In the case of my own company which is owned by one shareholder, we don't have the same rules and responsibilities as others at present, but



we have been exploring one or two areas in terms of environment and liabilities. For example, suppose you are given fragmented information that your business is impacting environmentally on an adjacent third party business? An environmental example is a good one, because it can almost be something unseen like fumes. There was one incident in the past where over a period of time a company ended up contaminating all the gardens adjacent to the factory with arsenic. Today's issues will not be quite as bold or deliberate as that, because so much extra environmental legislation has come through since. The limits have come down so the tolerances are less. But if you have that sort of information, how do you put that forward as a contingent liability in terms of corporate governance? Or do you just say, well it is not my responsibility, someone else will have to think about that? Is that the sort of area where we need to be on the ball?

JOE WHITTAKER: If you take environmental issues, the spread is so huge, it is difficult to see that you could report in any meaningful way in a corporate governance sense other than to say, in the course of our business we carry out things which may impact on the environment. That is a very broad brush, typical annual report type of response. I think if you drill down any further then you are identifying something which may attract a claim that you actually don't want.

STEVE WILLIS: And your insurance policy may not respond to it.

GARY MARSHALL: We are not necessarily talking about insurance, we are talking about legal liabilities.

STEVE WILLIS: Yes but that is where the path could lead to.

ANDREW BYE: I think it depends on the values of the company you are working for – whether you want to be best of breed or if you are working within materiality rules, ie something has to be proved to be material before you disclose it – according to the governance rules you set. I worked for one company which was actually keen to

show it had environmental liabilities and had set aside money for this. It was a natural resource business, and NGOs were glad to see that it had x million of known reserves against x million of liabilities. It proved it was being a responsible citizen. And my present company has a highly visible corporate responsibility programme. I think it depends in some respects on what you are trying to achieve in the business that you operate within.

HUGH PRICE: From a legal angle, if a company is aware of a potential risk and simply ignores it and then a claim is made as a consequence, that company is going to have serious difficulties with the claim because they are aware of the problems. Conversely, the reverse applies. If the company recognises the problem and attempts to do its very best to resolve it, given the state of technology and knowledge at that time, then that would be a pretty good defence. To ignore it is a recipe for disaster.

ANDREW BYE: How do you define a company? Is it the board? When does the knowledge become a company's issue, when does it actually become a material issue for the company to act on? You could say that as long as it is not reported to x or y committee, it is not technically known about and is exempted. I guess you have read about some of these businesses in the past, where they structured the company in such a way where you can keep positions away from being materially notified to the board.

ENDA MCKENNA: It also depends on the reputational aspects.

GARY MARSHALL: Do we build reputational effect into our liability calculations? When you consider your own company's worst case scenario, do you think in terms of strict liability – what you are going to pay – or do you also add in an amount relating to the impact of that liability in whatever form it might be? It might be cessation of market; it might be adverse publicity, which leads to additional costs in terms of advertising spend, with management having to hawk themselves around to deal with these things. Sometimes we don't really add that on and simply look at the direct

I think it is important for risk managers, if they are to do the job properly, to analyse their near misses

Hugh Price

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financial effects of the liability.

STEVE WILLIS: We are very aware of this. We have Section 209 of the Water Industry Act where we have a strict liability for clean water escapes, but on an indemnity basis only. But if you are talking to customers who have had quite a lot of damage and you say you are just going to pay the indemnity value, then that doesn't help our reputation. So we have to think about that, which takes us further away from insurance and more towards self-insurance, – being in control of how we manage our claims because it doesn't always suit to follow the insurance line.

NICK PATTERSON: Once the claim has been settled, surely they haven't got any other option but to take their water from whichever local water supply there is?

STEVE WILLIS: It is not only that. We have to satisfy the regulator that we are responding in the correct way. So we can't just willy nilly pay people over and above the legal liability, it has to be a judgment. Also it seems to me with reputational risk, speaking to underwriters, they want to offer a product which will protect reputation but the question is, how do you value it? Is it the advertising spend, trying to mitigate the effects? What is the value for an organisation like O2 which has a huge chunk of the market share? It is very difficult.

ANDREW BYE: The fact that insurers are looking for solutions to help business is very good, rather than just running away from a new product. But the other issue is why doesn't the current product work? Perhaps we should go back a bit more and work out what we really need. O2 is a huge brand, so its reputation is the number one priority. It comes with things like customer experience. So we couldn't afford not to be operating for more than a few hours, we would most certainly be losing customers. It all depends on your business dynamics I guess. Getting away from liability for a moment, it is very much about keeping yourself in business. For us, that means having an effective business continuity plan.

STEVE WILLIS: Business continuity is a key consideration for us as well. Going back to the contracts, it's how you make sure when you transfer liability to your supply chain management that they understand how important they are to your business and they have kept some of that liability in those deals.

ANDREW BYE: On the subject of back-to-back indemnity type positions, our experience is that some people just want the whole risk totally moved away from them. I prefer to see everyone taking a small part of risk so they are all motivated, but without being so burdened that they can't do anything. I think the main view about liability in the UK or generally, as was mentioned earlier, is that there doesn't seem to be the experience any more, or it is declining. People are looking at contracts, looking at how liability is shared, so it becomes the continually commercial viable proposition. The original commercial contracts can get distorted by the indemnities and liabilities and can fall apart because people hadn't thought about it properly at the beginning. When they see all the liabilities and indemnities, they say, let's insure it all. And when they find out insurance isn't the answer, it's back to the drawing board.

STEVE WILLIS: It is selling risk to your stakeholders. You are actually giving them your risk and saying, look after this for me. Are you making sure they understand what they are holding?

ENDA MCKENNA: Since we are sitting on fairly hefty excesses, we recharge costs directly to the cause of the cost on each and every claim, and similarly claims history is the basis of premium apportionment for each particular part of the business. So they really do own risk locally and that leads them to manage it.

JOE WHITTAKER: The move away from describing people as profit or cost centre managers to responsibility centre managers is actually very beneficial. We are some way behind other countries generally in that. You are then judged by the size of your envelope and how quickly it grows. That includes everything that a business needs. Whether it is governance issues, corporate tax, HR or health and safety, it is all in your envelope as the responsibility centre manager and your performance can be judged very accurately by how well you grow your envelope.

GARY MARSHALL: Are things like acquisitions and mergers, divestments and those types of deals that are going on all the time creating more risk? Do we have an adequate handle on this, are we expected to anyway, or do we just pick up the pieces in whatever form that might be at some point? There's usually a big final agreement with a vast number of clauses and in there are liability indemnity clauses as well as lots of related things.

STEVE WILLIS: My experience of acquisitions has been going to the due diligence room and going through shelves and shelves of documents to make sure they have got their liabilities covered, or the opposite of that if we are being bought. But how do you bring out the environmental risks in the due diligence process and make sure those are identified?

HUGH PRICE: Is your point, Gary, that one needs as part of the due diligence exercise to actually look at the processes of the other company and make sure their

You are actually giving them your risk and saying, look after this for me

Steve Willis



processes are correct and accurate?

GARY MARSHALL: It is really a case of saying that when we talk about liability, it is an area where one assumes that everything is correct and proper and so on, but how much do we actually get involved in and contribute to that process?

STEVE WILLIS: You're given a level of materiality below which you don't consider things. So it's whether those liabilities are being assessed properly and they breach that materiality level or not.

ENDA MCKENNA: I think Steve you are right. We tend to be brought in some way down the chain and it is just a matter of getting the data. Certainly with some previous companies that I have worked for when I have been involved with takeovers and divestments, they have just looked for mechanisms to make sure that the deal is done. Quite often the CEO may be there for a relatively short period of time. He does the deal and moves on, but the liabilities are going to be there for a lot longer.

STEVE WILLIS: Sometimes the speed of the deal overtakes the questions you have asked them. You can have a whole list of questions that you want to know about the business.

JOE WHITTAKER: Charities haven't been subject to a great deal of merger and acquisition activity so far. Maybe we are lagging in that area. There could be potential from a donor's view point to consolidate some of the support functions in charities but it hasn't been a major trend in the charities sector yet.

NICK PATTERSON: I was talking to a risk manager the other day who said that her boss, who is the managing director of her particular company, gets her involved from day one whenever there is talk about a merger or takeover. She becomes part of the team that take over the business. Doesn't it just come down to the attitude of the leadership in the business?

JOE WHITTAKER: It comes down to where the risk manager is positioned. I once worked within the legal department of a plc and therefore I was involved in mergers and acquisitions. That might not have been the case if I had worked in HR, finance or wherever. It's departmental silo thinking. Positioning yourself as part of the corporate hierarchy is a very important part of being a risk manager – getting in the right place to make sure you are involved in the processes – and it may take a bit of time to achieve.

ANDREW BYE: Networking is the key thing.

AMANDA MCKENDRICK: We have had a sea change in direction, because my position as insurance manager was a brand new position four and a half years ago. Gradually I have had to get out there and bang the drum for insurance and risk management. Now people realise that there is an in-house resource and that maybe they should ask about the impact of taking on a particular contract and what would actually happen if we didn't take on that contract, that sort of thing. Because of the nature of the contracting business we do, contracts move around and there is quite a lot of TUPE (Transfer of Undertakings (Protection of Employment) regulations) activity. I have been getting involved in this at a much earlier stage because people realise that when we take on these people



who have been working for other organisations, actually there are liabilities that could come with them.

HUGH PRICE: Presumably the risk manager would play an integral role, a vital role, in challenging the due diligence?

JOE WHITTAKER: Very few organisations in the UK have a risk court. I worked with one organisation where if you had a proposal it went before a contract control committee, which became a risk court, so you had the pros and you had a devil's advocate department. I think that examination, that close scrutiny, is absolutely vital because certainly we saw situations where projects looked very attractive initially but when you started stacking up the liabilities we were assuming they became very unattractive almost as quickly. I like the idea of a risk court generally.

STEVE WILLIS: We have risk control that gets to oversee most material projects and they have to be signed off by the various heads of departments before they get to that stage.

ANDREW BYE: Why aren't risk managers higher up in the food chain? Is it because we are not perceived as adding very much value in that respect, we're seen as the treatment side of things – one of the parts of the treatment process down the line – rather than seeing what we can add? It might be that we identify opportunities as well, rather than just looking at why something cannot be done. There might be contracts out there that fall away because people perceive them to be higher risk than they actually are.

JOE WHITTAKER: Producing practical solutions for business managers is part of what I do, and I think it is an integral part of the job. It may not be in any way related to insurance or purchasing a product of any description. It's simply looking at what they are trying to achieve and saying, well, applying this mindset as opposed to your

There might be contracts out there that fall away because people perceive them to be higher risk than they actually are

Andrew Bye

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I don't think we are quite as litigious as we are being pictured at the minute but there is danger

Enda McKenna

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target driven mind, maybe we could phase-shift that and achieve a better result for you, the same sort of result which doesn't have the consequences that might arise otherwise. To give an extreme example, suppose someone suggested trying to run an outdoor event, a hike up Snowdon in February? It's fairly obvious you don't do this sort of thing, but people tend not to look at risk because they are driven by that operational imperative to achieve a fund raising goal or a manufacturing goal or a financial goal.

GARY MARSHALL: I don't want to end this discussion without a little bit of crystal ball gazing. It is difficult because we are all in different business sectors and you might see an emergent liability as something that only applies within a given area. Perhaps emerging liability is the most difficult thing to deal with because we simply don't know it is coming.

JOE WHITTAKER: I would say we are almost going back to where we started – the compensation culture. If you look at the way medical malpractice has developed as industry and a claim category, in 10 or 20 years time it is quite possible that organisations, particularly in the humanitarian aid field, could potentially face humanitarian malpractice risks whereby, although they have done their best they are judged to have failed to deliver a life-saving product. In the US and increasingly in the UK, you won't get a medical practitioner attending a road traffic accident if they happen to be an innocent bystander. They don't want that degree of exposure to medical malpractice. It may be a long way down the road, but where you are dispensing good to the masses, whether that be selling mobile phones or, as in our case, feeding children, there is always that potential of a significant head of claim arising from that mass distribution, whatever it is. Most of us these days are addressing mass markets in order to be of a size which is economically viable. The multiplier effect across a mass market is big if you get it wrong.

STEVE WILLIS: I think it comes back to what Andrew said about business continuity. If you are planning for your business not operating you may not be able to

identify the risk, but you need to know how you are going to respond. You keep monitoring things so that business continuity becomes part of the business. Someone said recently, it is not just what we earn it is what we get to keep in business. That is what business continuity is about. You may not know what is coming but knowing how you are going to respond to it when it happens will drive out the risk.

HUGH PRICE: The point about emerging risks is an interesting one. Lawyers have been badly hit as a result of the High Court judgement and Law Society ruling in respect of TAG, the accident group. The financial model basically blew up in their faces and there are 750 to 1,000 lawyers out there now all facing the possibility of claims against them. That has put huge pressure on the professional indemnity guys, regarding why somebody didn't think of this and why they didn't look more closely at the agreements. If you don't analyse something properly and just assume you will go along with the flow, you can create all sorts of horrendous problems.

JOE WHITTAKER: A good example in the UK is the classic issue of back pain. How many people are measured when they are allocated their company car? The seat in which they sit for prolonged periods when they are on the road isn't actually tailored to their needs. The car manufacturers just produce a seat that is designed for the average person. And yet most organisations are spending a considerable sum of money on work stations analysis including the seating of the people who are going to use them. We have probably got about two to three million drivers out there at the moment ready to come up with a claim and frankly it would be very difficult to disprove.

NICK PATTERSON: Lower back pain is becoming a bigger problem; RSI type rotator cuff injuries are definitely on the increase. And there's also stress. I know this has already emerged as a risk but I think we are going to see lots of growth in that and the way it is managed. The HSE has put forward some very good guidelines about it but I still don't think we're going far enough. It has to be managed in the workplace. We have had some good results in using strategies to manage stress in the workplace which are very easy and cheap to implement. Sometimes it's a matter of perceptions. We run some courses, one is called stress management and we don't get a particularly good turnout for that, but the other is called motivation management and we get a massive turnout. It is the same course but with a different spin.

AMANDA MCKENDRICK: Stress is something that we are aware of. It tends not to be an upper middle management problem but affects operational staff. And we have a lot of operatives out on the streets all day, every day including weekends, handling emergency response work, with time pressures. These guys won't necessarily say they are suffering from stress; they just know that they can't cope. It's a cultural issue that we have to address.

GARY MARSHALL: Just to conclude on emerging legal liability, I am not sure it is about finding the next form of liability or even whether it is the question of whether it would be frequent or severe in its nature. But it is a shrinking world. What I think is that intrusive media action on the back of your relatively small liability issue may be the big effect that we need to understand. And I leave that on the table because I don't think we are going to solve that problem today.

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