

# What to do following an incident: The Legal Perspective

by Matthew Davies



## Introduction

The Institute for Outdoor Learning has teamed up with Hill Dickinson Solicitors LLP to provide legal support and services to IOL members (see the IOL website for further details of the scheme). Hill Dickinson has specialist expertise in this field and many of you will be familiar with their unique courses for the sector. The firm acts for many well-known Outdoor and Adventure travel companies and has dealt with many high profile cases for the sector.

Matthew Davies, keen outdoorsman, Partner and head of the Outdoor Activity and Adventure travel Team at Hill Dickinson LLP Solicitors provides some basic steps to take to protect your legal position following an incident.

**T**he Outdoor Activity and Adventure travel Sector has a good safety record. That is the starting point and we must put matters in context from the outset. This is not a scare-mongering article. What the article is intended to be is a focus on what to do if the worst does happen. It is based on years of experience acting for and advising companies in the travel and leisure (including outdoor and adventure travel companies) sector in the aftermath of an incident.

Unfortunately, the longer you have been operating as a business and the greater the number of customers you work with, the greater the likelihood that at some point you will face an incident. That is not to say that it will be of your making.

All responsible companies will have a crisis response plan and that plan has (hopefully) been furnished to all staff and has been tested at least at a desktop level.

Every team member should be aware of everyone else's role. Sod's law (Latin legal phrase!) dictates that when the incident does occur, the boss, who usually deals with any incidents, will be on holiday or on a crag with no mobile reception. Testing should have also included a number of key figures being removed from the exercise to ensure that all key team members can step into any role. I am hoping that I am preaching to the converted and it is highly likely that this is the case.

Having dealt with numerous incidents for this sector over the years, a number of common threads arise. Companies do tend to have good incident response and management policies in place but tend not to consider the days, weeks and months after that, including protecting their reputation and legal position going forwards.

Clearly, the safety and health of those involved in incidents is paramount. However, once those issues have been dealt with, a number of additional considerations arise. This article will not focus on all aspects of crisis response, but will address a number of areas with which operators may be less familiar but are no less important and should be integrated into your response plans.

Many of our clients are proactive and attend our annual training course held in March every year. Subsequently, many include me or another lawyer as a member of their incident response team so that advice can be provided immediately after an incident. However, frequently, I am called in to assist by liability insurers some time following an incident. Often, the insurer has only latterly been advised of the incident (and often only when a letter of claim or inquest arises, often well after the incident) and the insured have taken steps before the insurers involvement. This can be problematic for two reasons

– firstly, your insurance policy undoubtedly requires you to notify your insurer either immediately after an incident occurs or as soon as possible thereafter. Oxford English Dictionary definitions apply. Failure to notify your insurers in the timescale specified in your policy is likely to be a breach of a Condition Precedent (i.e. an extremely important clause of your insurance) and could invalidate your insurance and leave you to face a claim without cover. Late notification is likely to impact on your insurer's ability to investigate the claim and preserve important evidence. However, the insurer doesn't have to prove this to refuse to indemnify you. Your failure to notify them in accordance with the contract is fatal in itself.

The solution is simple, notify your liability insurers immediately and include this as part of your response plan. As experts in incident response (or at least with access to experts), your liability insurers are likely to be an extremely helpful resource.

Secondly, in an attempt to be seen to be transparent, companies very often promise an independent enquiry/investigation and offer to make that report widely available. This is often part of a rehearsed PR response. Offering full assistance with any follow up can and does have merit but taking steps as a knee jerk reaction can be extremely dangerous.

Such a decision to offer an independent enquiry and to publish the results is, in my experience, often taken at a time of intense pressure on the company and its officers and almost exclusively with no thought as to insurance coverage and the risk of a future Coroner's inquest/Criminal investigation and/or any civil claim for compensation.

Insurance policies effectively say that your insurer has control over any claim. Insurers are in business to make money rather than offer a public service. Most do offer a very good service but the context of your relationship with them is an important consideration. Any step taken by you that prejudices the insurers position will likely invalidate your insurance coverage so in that light, is it really a good idea to produce a report and disclose it?

It might be very laudable to be seen to be open and transparent...but:

? Who will carry out the investigation and produce the investigation report? Often an "expert" is called in but is that person the right type of expert given that a claim or coroner's inquest is to follow.

? Who does that expert owe duties to? Are you their client?

? What if the expert gets it wrong or you disagree with the report? Do you have any input into it before it is published. What if the expert is not in possession of all the facts?

? What if the report is unhelpful to you? It is now in the public domain and undoubtedly will feature in any Coroner's inquest or civil claim. Worse still, if a fatality is indeed involved, the Coroner's inquest may lead to a Criminal investigation or prosecution.

Still happy to have disclosed a report without legal advice even if it prejudices your own position regarding a corporate manslaughter charge?

The correct procedure is to notify your insurer immediately. Your insurer will advise you and approve (or not) any steps you wish to take, allowing you to protect your company's reputation as well as protect your legal position. Often, they will appoint a specialist Solicitor to work with you to protect your and their positions regarding any future hearing or proceedings.

Preparation for and representation at Coroner's inquests are often not included in your insurance coverage but insurers may assist you as the outcome of the coroner's inquest is likely to have a bearing on whether Criminal or Civil proceedings will follow.





**What you can do now to prepare:**

- Ensure you have liability insurance
- READ IT
- Identify when your policy requires you to notify insurers. Build this into your plan
- Speak to your insurers – what incidents do they want you to report (not all incidents will seem significant but some can lead to unexpected claims)
- Ensure that your contracts with freelancers are up to scratch (are they in fact freelancers or employees? You are unlikely to know without taking legal advice). This could have an impact on a claim if the freelancer is injured and maintains that he/she was an employee and you owe them compensation
- Ensure freelancers and all employees know to notify you of any incidents, however minor
- Ensure your freelancers have liability insurance...and obtain and keep copies before you let the freelancers work for you
- Invest in a high tech data storage system – a filing cabinet. Keep post-incident documents and safety documentation. Adults generally have three years after a claim to issue proceedings...and then four months to serve them. Children have until their twenty first birthday to issue proceedings then four months to serve them. Keep your documents for at least these periods and have a system for separating incidents relating to minors
- Have a crisis response plan
- Test your crisis response plans
- Consider appointing a lawyer to your response team (make sure it is someone who understands your business and is experienced in crisis response/PR support). Check with your liability insurer that the lawyer is on their panel. If you aren't happy, you can always change your insurer at renewal to someone who does have a specialist firm on their panel
- Train your staff
- Secure media training for key staff
- Know who to contact in the event of a fatality (Police in the UK and FCO if its overseas – they will liaise with the next of kin – you should not do this yourself)

**When an incident occurs:**

To reiterate, this piece is not going to address all steps of crisis response, it is aimed at the legal and insurance position.

- Implement your plan
- As one element of your plan, notify liability insurers
- Liaise with insurers throughout including regarding any PR activity/statements
- Contact your lawyers who may be able to assist you with the PR response and investigation with insurers authority to ensure you don't prejudice the insurers position
- DO NOT prepare, circulate or promise any independent investigation without first liaising with your insurers and lawyers
- DO NOT make any admissions of guilt or liability.
- Secure evidence
- Preserve evidence
- Retain evidence
- Support your staff and consider the future impact on them
- Consider offering counselling where appropriate

**This article is designed to simply raise awareness. For a more in depth analysis of the subject watch out for future seminars run in conjunction with IOL. ■**

**Authors Notes**

Matthew Davies is a Partner at international Law Firm Hill Dickinson LLP and heads their specialist Outdoor Activity and Adventure Travel Team which advises on all legal aspects from the sector, from health and safety prosecutions to employment, commercial, incident response/claims, to property, website and trademark issues. He is a Fellow of the Royal Geographical Society and a Solicitor Advocate (All Higher Courts) as well as a keen outdoorsman. He has planned and led expeditions to a number of overseas environments and has trained in jungle, desert, Arctic Circle and mountainous environments. Matthew is an instructor for the Off Site safety Management qualification and has provided safety and crisis response training to outdoor and expedition professionals through to exploration geologists as far afield as China. He was a member of the committee that drafted BS 8848, the new British Standard for safety on overseas expeditions and fieldwork and represents and delivers training for numerous Outdoor and Adventure Travel companies and industry bodies.

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