

# Fuelling claims culture

New regulations which will extend the liability of road and rail operators have attracted little attention so far. But are they likely to trigger a rise in claims across the sector? **By Simon Challis**

**N**ew European Commission (EC) regulations that define the rights of train, bus and coach travellers are set to cause tremors across the sector. White Papers issued by the EC aim to harmonise the patchwork of different rules that exist across the various member states for the provision of information to passengers, disabled passenger access and liability to passengers – although there are two separate regulations covering bus/coach and rail passengers which differ in some important details.

These regulations will be introduced across member states, so that, for example, a Dutch passenger injured in an accident in France on a Belgian bus knows his rights and how much compensation he is entitled to. But, controversially, the new liability rules are set to be extended to domestic journeys as well as international travel, meaning that commuter train or bus services in the UK will be subject to the new rules.

Despite their importance, the new regulations have had a relatively low profile in the insurance industry, says Andy Bear, Head of Transport, Engineering and Water Utilities at Jardine Lloyd Thompson. “It has been surprising how late this has appeared on the radar of insurers, brokers and risk and insurance managers. Many are now scrambling to understand and influence the situation,” he says.

The most important change for operators is

that under the new regulations they will be strictly liable for death or injury to passengers that occurs on, or in the act of getting on or off, their trains, buses or coaches. However, the regulations setting this out differ between bus/coach and rail.

## Complex liabilities

For bus and coach passengers, the EC proposes that strict liability applies up to a limit of 220,000 euros per person (there is a proposal to cap this at 5,000,000 euros per incident). But UK rail operators will effectively have unlimited strict liability towards their passengers.

Relief from strict liability is only proposed in limited circumstances, where accidents are caused by circumstances not related to the provision of bus, coach or rail services, or where the passenger is at fault. To further complicate matters, strict liability will only apply to the special damages element of a claim.

It will not be possible for bus operators in some circumstances to avoid liability, even if they were not responsible for the crash,

**“It’s very difficult for operators to cost the impact of the liability changes, but there is a strong view that claims costs will inevitably rise.”**

Ian Thompson, Jardine Lloyd Thompson



according to James Backhouse, a director at specialist transport law firm Backhouse Jones. For example, if a pedestrian or a motorist responsible for the accident either cannot be identified or is uninsured.

The regulations will also introduce a new system of advance payments to cover victims’ immediate needs following an accident that must be made within 15 days of the accident. This means that within little more than a fortnight the operator must identify those who were travelling on their train or vehicle, contact them or their next of kin, assess their immediate needs and make a payment.

The new EC requirement that advance payments in the event of death, on either road or rail, are not less than 21,000 euros will be a major change for British operators, as under current English and Welsh law victims of fatal accidents with no legal dependents are entitled only to their funeral expenses.

“I think the issue of advance payments will cause the most aggravation to train-operating companies,” says Andrew Gilbert, a Partner at law firm Kennedys, “as they will have to set up new systems to deal with it.”

## Insurance implications

The insurance market’s response to the changes is, so far, unclear. However, it is unlikely that policies will be restricted as a result of these regulations as they do not fundamentally change the nature of the risk, according to Mike Noonan, Head of Strategic Claims Management at insurer QBE.

A bigger concern to operators is the effect the new rules are likely to have on claims, as strict liability effectively shifts the burden of proof for responsibility to them. Under the new rules, a passenger needs simply to establish the injury took place on the bus or train, while the responsibility will lie with the carrier to recover from a negligent party.

This is likely to increase the claims for lesser injuries that operators will find difficult to deny, predicts Noonan. “I can’t help thinking that when people realise they no longer have to prove fault on behalf of the operator for their injury, that will push up claims frequency for minor slips, trips and falls.”

For bus operators there is a real concern that the application of strict liability will be open to abuse, says Bear. “There could also be a rise in fraudulent claims, with injuries suffered elsewhere being blamed on a fall during a bus journey, for example. These will be difficult to defend.”

The likely increase in claims may feed

through into higher insurance prices, warns Ian Thompson, also a Partner in the Transport practice at Jardine Lloyd Thompson and former Head of Insurance at Network Rail. “It’s very difficult for operators to cost the impact of the liability changes, but there is a strong view that claims costs will inevitably rise. For major firms who retain significant amounts of risk, the higher costs will likely hit them directly. For smaller operators with insurance cover with low deductibles, premiums might rise,” he says.

## Inconsistent approach

The rail regulation, which is set to pass into law in December 2009, is likely to have less impact on UK operators, because the new system effectively mirrors the liability accord that already exists in the form of the Claims Allocation and Handling Agreement (CAHA). The Department for Transport is entering a consultation with the rail industry to look at possible exemptions (in particular with regard to domestic services), which it will complete and decide upon by August this year.

For bus and coach operators, however, the changes are likely to be more profound, because the regulation introduces a more comprehensive system of liability than existed previously. With it not likely to be implemented until at least 2010, bus operators are trying to influence its final shape. “But the likelihood is that it will come into force at some stage in a form that is broadly similar to what is being proposed now,” says Backhouse.

The differences between the two regulations creates an added headache for operators that run both train and bus services, while several key aspects of the regulations are open to differing interpretations that may ultimately only be settled by the European Court.

At present, bus and coach operators in the UK are lobbying to have domestic services exempted from the regulations, which if successful would make a dramatic difference to the impact on operators

“These are complex proposals and inconsistencies exist between the regulations that would seem to undermine the principle of harmonisation,” says Bear. “Operators, their brokers and insurers need to understand the implications.” **RS**

**i** [Andy\\_Bear@jltgroup.com](mailto:Andy_Bear@jltgroup.com)

Simon Challis, former editor of *Reactions* and senior correspondent at Reuters, writes about insurance.