

Article: Automobile Contamination Incidents

August 2009, This is a paper in 2 parts

Part 1 (August 2009) deals with the strategy of the initial investigations and collection of evidence.

Part 2 (October 2009) deals with the liabilities of third parties who allow pollutants to escape from their premises comparing the legal position in England, Holland and Belgium.

Part 1: The Investigation of an Automobile Contamination Incident

Introduction: The law of gravity means that any object stored in the open air for any length of time will be covered by particles literally falling from the sky. Automobiles stored in the open are particularly susceptible as they have at least two and probably three horizontal surfaces on which such particles can settle.

New automobiles are often stored on open compounds containing hundreds, perhaps even thousands, of vehicles parked closely side by side. This means that when an event occurs, either a natural phenomenon or due to some human intervention, either accidental or deliberate which releases harmful particles into the atmosphere - perhaps due to some industrial process or accident, the potential exists for damage on a very substantial scale. This is perhaps even more likely in these days of economic downturn, when the reduced levels of sales means that more automobiles are stored on these compounds for a longer period of time.

Discussion: Whilst there will be unique factors in each case that will need particular consideration, we do put forward the following plan as one that will ensure information and evidence is collected effectively so that a case can be properly built.

The fact that a contamination incident has occurred will usually be reported by the insured. The initial report will probably contain sufficient information for the insurer to know whether the incident is a serious one affecting many cars.

Assuming it is a significant incident then a meeting must be convened immediately, not only to assess the seriousness of the damage and what steps might be taken to deal with & remedy it, but also what recourse may be available before evidence either disappears or operational factors within the car compound make evidence much more difficult to collect.

This strategically important meeting should be held with the clients, surveyors and we suggest legal representatives for it is vital that a strategic plan is put together at this early stage and if this chance is lost it may be difficult to regain the initiative at a later date.

Contractual Claims: It is fairly unlikely that there will be any contractual claims to be pursued unless there has been a failure on the part of the terminal operator to do something he has agreed to do and this failure has allowed or caused certain cars to be damaged.

Leaving aside for the moment any trading conditions which could exclude or limit liability, there could conceivably be a claim against the operator if he had failed to put valuable cars under, for example, hail nets or indoors/ under cover if this had been agreed.

However, any recourse is mostly likely to be of a non contractual nature against some responsible third party.

Non Contractual Claims: Here we suggest you consider 7 “W’s”: What? Which? Where? When? Weather? Why? Who?

- 1. What?** What is the type of contamination that has occurred, what are its properties, how can it best be removed and what are the consequences of the contamination having occurred. In other words what is the damage that has been suffered by each of the cars? Is the damage likely to be aggravated by , for example the passing of time or continued exposure to the elements?
- 2. Which?** Which cars have been contaminated? This is something which needs to be established very quickly, at least in a preliminary fashion, as cars may be moved or removed from the compound for operational reasons or new cars may have arrived in the compound or will be scheduled to arrive in the compound.
- 3. Where?** Where were the cars that have suffered damage located within the compound? If this is carefully mapped in a diagrammatic fashion, with the extent of contamination suffered by each car noted, then this may well reveal a picture showing how the contamination has spread across the compound and the pattern, showing where, for example, the most heavily contaminated cars are located may prove a useful clue as to the source of the contamination.
- 4. When?** When did the contamination occur? This needs to be ascertained with as much accuracy and precision as possible. It may involve careful questioning of workers to discover when the contamination was first noticed and when the cars in that location were last checked or moved without any contamination being present on them. The more precise the time of the contamination can be established the easier it is to look for possible events occurring during that time span which could have caused the contamination.

- 5. Weather?** What were the prevailing weather conditions when the contamination occurred? In particular what were the wind directions and strength? This coupled with the pattern of damage may well point quite precisely to where the source of the contamination is located.
- 6. Why?** Once the source of the contamination has been located it will be necessary to establish why the contamination occurred. It is likely that any party allowing noxious substances to escape from their premises will have a clear liability to those who have suffered damage. However, the reason why the contamination escaped is important not only for the present case but to insure there will not be any repeat of the contamination if the cars are to remain stored at the particular compound.
- 7. Who?** This will be crucial. It may well be that the investigations above give a clear indication as to where the contamination came from and who is responsible for it. This may be quite obvious i.e. there is only one factory in the vicinity. But it might be much more difficult to establish if there were many similar factories in the area. If there is an obvious candidate then they should be contacted at an early stage and told of the damage caused, held responsible and given the opportunity to participate in the survey process.

It will be a matter for discussion between legal advisors and surveyors just how evidence will be prepared and collected and different factors will arise in each case, however we believe when the above 7 issues are considered and investigated then it should be possible to determine whether there is a potential liability and hopefully identify the party responsible. Time is an enemy in such cases, for if evidence is not gathered in the early hours and days following an incident it may be lost forever and not possible to collect at a later date.

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