

# FOCUS

## RISK MANAGEMENT

THE QUARTERLY NEWSLETTER FROM GALLAGHER BASSETT

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## Comprehensive Area Assessment

Details of the new assessment regime for the delivery of local public services has been published.

The Local Government and Public Involvement in Health Act 2007 provides the legal framework for the assessment of how well the £200 billion spent on local public services is being applied.

The aim of the process is to provide an independent assessment of how well people are being served by their local public services. In particular it looks at how local public services, working together, can achieve long term sustainable improvements for communities.

The CAA will align to other performance frameworks. Councils, Fire Brigades, Police Forces and Primary Care Trusts will each be assessed on "Use of Resources" including Financial Management, Governance and Management of Resources.

In addition Councils and Fire Brigades will be assessed on "Managing Performance", PCTs assessed through an "Annual Health Check" and Police Forces using "Rounded Assessments" of policing and police authority inspections.

The Use of Resources assessment examines, amongst other things, "Governance" which includes an assessment of how risk is being managed through the following enquiries:

The organisation has:

- effective risk management which covers partnerships
- a clear strategy and effective arrangements, including the allocation of appropriate resources to manage the risk of fraud and corruption; and
- a sound system of internal control including internal audit.

The new regime takes effect in 2009.



Further information is available from:

<http://www.audit-commission.gov.uk/Products/NATIONAL-REPORT/63FF7DFA-D1DB-46D0-B72E-39DA12AEF9E1/200902CAAFramework.pdf>

<http://www.audit-commission.gov.uk/useofresources/downloads/UoR2009OverallApproach.pdf>

### News in Brief

#### Court of Appeal rules against Doncaster Metropolitan Borough Council

In our March 2008 edition of Focus we reported the High Court decision on the case of *Pierce v Doncaster Council*. Mr Pierce was subjected to abuse and "grave neglect" at the hands of his parents and sought to bring an action against Doncaster Council for failing to take him into care. The High Court awarded compensation of £25,000 to Mr Pierce.

The Council took the case to the Court of Appeal on two grounds:

- the council was not negligent in that no reasonable authority would have attempted rehabilitation; and
- the High Court was wrong in the interpretation of the Limitation Act 1980 in allowing the case to proceed in the face of evidence that the claimant had constructive knowledge of the matter and could have obtained his records at an earlier date.

The Court of Appeal upheld the original decision of the High Court in finding that the council had indeed been negligent; however the case has been referred back to the High Court to re-consider its use of discretion to extend the limitation period.

This case is thought to be the first of its kind where a claim for the failure of the council to take a young person into care has been successful and creates a difficult precedent in the field of child protection.

## Mitchell and another v Glasgow City Council

The House of Lords has just ruled on an interesting case involving the council's duty of care to its tenants.

The claimants, the mother and daughter of a tenant who was killed by his neighbour, D, also a tenant of the council, brought a claim against the council in negligence for failing to warn the deceased tenant of the risk of harm or by evicting D. The claim was also brought under article 2 of the Human Rights Act, right to life.

There had been a history of anti social behaviour by D culminating in a meeting at the council offices when D was

told that if his behaviour continued it would lead to his eviction. After leaving the meeting D then went home and attacked the deceased with an iron bar. D admitted culpable homicide.

The case was determined on four counts:

1. Foreseeability of harm was not enough to create a duty of care.
2. The law does not generally expect a positive duty to protect others from harm, in this case the law does not impose a positive duty to protect one person from the criminal acts of another, just on the basis of foreseeability.
3. The only time there should be a positive duty to protect another from harm is where, by duty or conduct, one person has assumed

responsibility for the safety of the person at risk, and that was not the case here.

4. Not every claim that involved a risk to life could create a responsibility under the Convention for Human Rights to take operational measures to prevent that risk from occurring. It would have to be established that the authorities knew of a real and imminent danger. Again that was not the case here.

So the claim against the council failed.

The January 2009 edition of Focus reported on two cases of the extent of a duty of care the police have to witnesses, which are in a similar vein to this case. In the June 2008 edition we also reported on X v London Borough of Hounslow, a case which had

some similarities to this case. In that case the victims of the injuries caused by local youths living nearby were known by the social services department to be vulnerable. That case was found against the council as the court determined that the council had assumed a level of responsibility for the safety of the injured tenants.



## More case law on Workplace Regulations 1992

**Craner v Dorset County Council, Court of Appeal, December 2008.**

Mr Craner was a handyman at a primary school. In August 2003 he injured himself when pushing a trolley along a paved area. The trolley "hit" a raised slab and came to a dead stop causing Mr Craner to injure his right knee.

Neither the council's Health and Safety Officer, who examined the area after the accident, nor the claimant himself, who had some health and safety responsibilities and had made a number of reports about the condition of various parts of the school, mentioned the raised slab.

There was little evidence about the height of the slab but it was thought to be in a range of 18mm to 25mm. At the court of first instance the judge concluded that, whatever the height, it must have been sufficient to cause the accident.



The court at first instance found the Council liable for:

- a breach of Regulation 12(3) of the Workplace Regulations because the workplace had not been kept free of obstructions; and
- a breach of the Regulation 4 of the Provision and Use of Work Equipment Regulations 1.

The council appealed and the case was referred to the Court of Appeal in December 2008.

The Court of Appeal found that the trolley was not unsuitable so there was no breach of Regulation 4 of the Provision and Use of Work Equipment Regulations.

However, the Court of Appeal supported the first decision that the unevenness of the paving was in breach of Regulation 12(3) of the Workplace Regulations because the workplace had not been kept free of obstructions. Although other matters at the school had higher maintenance priorities this was not a defence to the claim.

This case further illustrates the extent to which employers need to be vigilant in their maintenance of all aspects of the workplace.

## News in Brief

### Health & Safety Prosecution for death of dumper truck driver upheld

The House of Lords has upheld a prosecution of an employer of a dumper truck driver who was killed when the vehicle he was driving overturned. There were no witnesses and the exact circumstances were never established. There had been no risk assessments or training and the deceased was not wearing a helmet or seatbelt.

A successful prosecution was brought against the employing contractor, the main contractor and a director of the main contractor, for breaches of general health and safety duties imposed by the Health & Safety at Work Act 1974.

The House of Lords held that the prosecution did not have to prove specific breaches of duty. Once a breach of duty is clear by virtue of the known facts, it is up to the employer to demonstrate it had done all it could to protect the health and safety of the employee. In an earlier hearing the Court of Appeal said that it in this case "there was a real risk as opposed to a hypothetical one, established by the fact that there was an accident". The House of Lords endorsed this view.

As far as concerns the individual liability of the company director, there was evidence to show that the offences were committed with his consent, connivance or their commission was due to neglect on his part. Where the director is in day to day contact with what is being done and what is not being done (as was the case here) little additional evidence is needed.

## Health and safety - what elected members of local authorities need to know

In most local authorities, the chief executive is at the top of the organisational structure and has overall responsibility for health and safety. But a recent prosecution has seen the courts question this, raising the issue of the potential responsibility of the council leader and elected members.

"The (health and safety) failings were not only at the lowest levels...those failing went all the way, I am afraid to say, to the top of the council in terms of its serving officers. It is likely they went beyond the officers to the councillors" - Mr Justice Brunton, judge in the case against Barrow Borough Council following the deaths of seven people (2006).

The Institute of Occupational Safety and Health (IOSH), Europe's largest professional health and safety organisation, has recently published a booklet entitled "Think about health and safety" which looks at the impact of getting health and safety wrong and how to get it right. The booklet provides councillors with some timely and pertinent prompts to help think through the issues they may need to consider, helping them to make the right decisions and to ensure that no-one is put at serious risk.

The Convention of Scottish Local Authorities (CoSLA) and the Health and Safety Executive both support this publication.

With this booklet in mind Gallagher Bassett is developing a briefing session for elected members. If you would like more information or wish to make arrangements for this briefing to be provided within your Authority please contact your local Risk Control Consultant or alternatively call: Colette Dark, Risk Control Manager (020 7208 8514) or David Pranauskas, Assistant Risk Control Manager (01782 510317).

## Practical advice for dealing with unstable memorials



Over-zealous risk assessments and fatal accidents involving memorials are the cause of distress, but how do you balance the threat from defective memorials with the likelihood of this threat materialising in an injury or worse?

The risk of injury from loose or unstable memorials is very low, but fatalities do happen; so does bad publicity from inappropriate risk control measures. What practical advice is there for managing the safety risks and reputation risks from memorials in a sensible, proportionate and sensitive way?

A new guidance has been developed by a sub-group of the Burial and Cemeteries Advisory Group, which advise the Ministry of Justice on all

aspects of burial law. The sub-group represented burial ground operators, memorial masons, cemetery managers as well as the Health & Safety Executive. The insurance industry and local government associations were also consulted.

The new guidance represents good practice on the standard expected in the risk management of memorials in all types of burial grounds, public or private.

Gallagher Bassett Risk Control Service can help you to audit your existing systems for the control of risks from crematoriums and cemeteries, including the new "best practice" identified in this new guidance, to reduce the risk of injury or damage to your reputation.

**Further Reading:** "Managing the Safety of Burial Ground Memorials; Practical Advice for Dealing with Unstable Memorials." Ministry of Justice. Jan 2009. [www.justice.gov.uk](http://www.justice.gov.uk)

## Employers' Liability Insurance Bureau Bill 2009

Thousands of injured employees are prevented from recovering compensation for work related accidents or disease because they are unable to trace the relevant employers' liability insurer at the time of their injury.

This bill proposes the establishment of a bureau to maintain a central database and establish funding arrangements so that those entitled to compensation are not prevented from doing so by lack of insurance evidence or because their employer at the time no longer exists.

The compensation fund mirrors the fund operated by the Motor Insurers Bureau which compensates victims of uninsured drivers.

We will report further progress on this important bill.

## Environmental Damage (Prevention & Remediation) Regulations 2009

Taking effect from 1st March 2009 these regulations impose obligations on “the operators of economic activity” to prevent, limit or remediate serious environmental damage.

The new regulations apply in England; separate regulations will be introduced for Scotland, Wales and Northern Ireland.

The regulations reinforce the “polluter pays” principle in that serious damage to land, water, species and habitats should be remediated and the cost borne by the polluter. The regulations provide for certain defences such as activities undertaken under a permit or if the damage was caused by an unauthorised third party despite adequate precautions being taken to prevent such an action.

There are an estimated 30,000 events of damage to the environment each year; it is expected that the new regulations will apply to only 1% of these incidents. However, where the regulations do apply they will demand a much higher standard of remediation and estimated costs per case of £22,000 for damage to “Sites of Special Scientific Interest” have been quoted and a figure

of £100,000 for damage to water has been suggested as being a typical sum. Costs for very serious cases could be far in excess of these figures.

Existing legislation remains in place and the new regulations

apply only to activities taking place on or after 1st March 2009.

To avoid falling foul of the new regulations, clients are advised to undertake a thorough review of all sites and

operations and using a “risk based” approach, take preventative actions and develop emergency response plans.

[http://www.opsi.gov.uk/si/si2009/em/uksem\\_20090153\\_en.pdf](http://www.opsi.gov.uk/si/si2009/em/uksem_20090153_en.pdf)



## Misfeasance in Public Office

**Hussain v Chief Constable of West Mercia Police**  
*Court of Appeal Nov 2008*

It is rare indeed for such cases to be brought before the courts but the Chief Constable of West Mercia Police was recently subject to such an allegation.

Mr Hussain alleged that, during his trade as a taxi driver, he had been involved in numerous incidents with members of the public and had called for police help on at least 50 occasions. He claimed that the police responded in a way that amounted to misfeasance and, on two occasions he alleged that he was falsely imprisoned.

A claim was made for compensatory, aggravated and punitive damages. Psychiatric evidence was brought which attempted to show that, although there was no current diagnosis, Mr Hussain experienced significant anxiety symptoms at stressful times.

The claim was struck out by the High Court on the grounds that there was not enough evidence to establish that the damage or injuries suffered were sufficient to constitute the tort of misfeasance in public office.

The case was appealed and the Court of Appeal rejected the claim. Case law has established that the tort of misfeasance in public office requires proof of material damage as a result of the breach of duty. A recognised

psychiatric illness would be defined as material damage but not hurt feelings, indignation and annoyance. In this case the conditions complained of were not a psychiatric illness, just symptoms of stress and anxiety.

### Information

If you would like further information on any of the articles contained in this issue, need guidance on whom to contact or just wish to pass on any comments, please call,

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