

Fraud rings target the Public Sector



It seems a day doesn't pass without mention being made of the recession with ever more tales of doom, gloom and financial misery being reported. Every sector of commerce from heavy industry to the financial sector is feeling the pinch and is carrying the burden.

Whilst most businesses are suffering as a result of the downturn, some are thriving. Regrettably one such growth area is insurance fraud. The Association of British Insurers have announced recently that levels of detected insurance fraud has risen by approximately 30% in 2008 from the previous year demonstrating the stark rise in this problem. This mirrors the experience of Forbes' Anti-Fraud Unit headed by Partner Christopher Booth who has seen a marked increase in the number of suspected fraudulent claims coming from almost every sector of claims. It appears that, notwithstanding the threat of ever more sophisticated methods in identifying and documenting suspect claims, numbers continue to rise.

Whilst the industry has understandably

focused on motor fraud as a specific target area because of the magnitude of the problem, the cost of public sector fraud has risen sharply over recent years.

Forbes has seen what most describe as evidence of the temptation to defraud insurers and this is seen to take a number of forms which continue to diversify through time.

We see ever increasing numbers of individuals who see an opportunity to capitalise on a legitimate but unrelated incident. Whether this be an injury suffered elsewhere, latterly claimed to have been the fault of a public authority, or a tenant claiming the fault of his or her social landlord to seek compensation for an unrelated or genuine loss for which the tenant were themselves the cause. Often genuine incidents for which compensation is properly payable will become the subject of intense investigative scrutiny as a result of the greed of the Claimant who seeks to maximise and often exaggerate a genuine claim in the expectation of financial betterment.

Of greater concern however is that Forbes have seen a sharp increase in the volume of claims coming from individuals who are considered to be part of a wider commercial enterprise resulting in so called "fraud rings". Such organisations tend to be highly organised and ordinarily comprise of numerous commercial organisations set up to provide a seamless fraud process to include the provision of accident management services, medical evidence and even legal services. Such are the yields to such enterprises, both the ingenuity but also the volume of claims emanating from these organisations to most is breathtaking and requires an equally robust, organised and concerted response.

Forbes' Anti-Fraud Unit are currently involved in numerous fraud projects with a number of public authorities involving several major insurers. The reserves for two such projects alone stand at in excess of £2.5 million.

Christopher Booth, Anti-Fraud Manager at Forbes said "we are delighted that our long-standing expertise and our efforts in this field have been recognised with one of our national claims handling clients recently nominating us as their sole fraud services provider for the North West of England. One recent fraud project we were involved in demonstrated a net saving to a Public Sector client of approximately £800,000. It is clear that painstaking attention to detail and an organised, concerted but dogged determination to succeed has paid dividends but there is still much to do."

For more information please contact Christopher Booth on 01254 662831 or chris.booth@forbessolicitors.co.uk

Disease Update

Employers Liability "Trigger" Litigation in Asbestos Policy Cover Cases

Following the Court of Appeal's Public Liability decision of January 2006 in the case of Bolton MBC v MMI, in which Forbes Solicitors represented Bolton MBC, certain insurers (all of which had ceased trading) had been attempting to avoid indemnifying their former insurers in Employers' Liability claims.

In November 2008 Mr Justice Burton handed down his High Court judgment in the Trial referred to as the "Employers' Liability Policy "Trigger" Litigation". The Trial consisted of six test cases where employees have suffered from mesothelioma, a cancer of the lining of the lung caused by the inhalation of asbestos fibres during employment.

Employers' and Public Liability policies have different triggers, or events giving rise to a claim. It has been accepted practice over many years for the relevant insurer in Employers' Policies to pay compensation for the period that their insured exposed its employee to asbestos rather than when the symptoms developed, often many years later. However, in Public Liability policies it is the insurer on risk when the injury/disease occurs i.e. when the mesothelioma tumour actually develops, that must meet the claim.

In the Employers' Liability "Trigger" Litigation, insurers attempted to argue that the wording, which provides for cover being provided when "a disease is sustained or contracted", could not mean at the time of inhalation when they were on cover, but at a later date (by which time in many cases no such policy existed) when the tumour developed thus following the Bolton decision.

The Judge found that a person who develops mesothelioma did not suffer an injury at the date of inhalation. This was good news for Local Authorities who would ultimately have had to self fund compensation payments where the insurer had ceased trading or was insolvent.

The Defendants have been given permission to appeal this decision and it is anticipated that the matter will be heard in the summer/autumn of 2009.

The Damages (Asbestos-related Conditions) (Scotland) Act in force from June 17 2009

It was for many years accepted practice throughout the United Kingdom that employees received damages for pleural plaques (with or without symptoms) caused where they had been negligently exposed to asbestos during the course of employment. Pleural plaques are a scarring of the membranes around the lungs, which indicates exposure to asbestos has occurred in the past. Although the condition can signal future asbestos-related disease it does not necessarily lead to ill health.

In October 2007 the House of Lords upheld the Court of Appeal's decision that an employee could no longer sue his employer where he had developed pleural plaques because the condition did not constitute an injury or disease.

Whilst the House of Lords decision is not binding in Scotland, it would be considered to be highly persuasive by Scottish Courts. Because of the political situation in Scotland, Parliament has now passed a law with the result that from 17th June 2009 Scottish employees can now claim compensation for the pleural plaques and all other symptomless asbestos conditions. A group of insurers has lodged a judicial review of the Scottish legislation arguing amongst other things that it is contrary to Article 6 of the European Convention of Human Rights which states that everyone is entitled to a fair trial.

The House of Lords ruling will still apply in England and Wales, but the decision of the Scottish Parliament has served to put pressure on the Government in Westminster which has held a consultation looking at a number of different ways to bring redress for employees with pleural

plaques. The responses are currently being considered and it is anticipated that a Government statement should be made prior to the summer recess of Parliament.

Stephanie Baker v Quantum Clothing Group and others [2009] EWCA Civ 499

This noise claim test case (sometimes called "the Nottinghamshire & Derbyshire Deafness Litigation") is a Court of Appeal decision handed down on 22nd May 2009.

It concerned the liability of Nottinghamshire and Derbyshire textile companies for hearing loss due to noise at lower levels which in the past has been generally recognised as giving rise to liability.

Prior to the introduction of the Noise at Work Regulations in 1990, employers were generally safe if they could demonstrate that noise exposure was less than 90dB(A)lepd. In February 2007 the High Court dismissed an attempt by seven Claimants to argue that from 1972 steps should have been taken to guard against exposure to noise in excess of 80db(A)lepd but less than 90dB(A)lepd.

Six of the seven Claimants failed to prove causation. In the remaining case, the judge held that Stephanie Baker had suffered noise induced hearing loss. However he dismissed her claim because he held that the employer had not been in breach of duty during the material time either at common law or under s.29 Factories Act 1961.

Stephanie Baker appealed to the Court of Appeal who held that the respondents were liable under s.29 Factories Act 1961 for damage sustained from January 1978. The duty under s.29 is far more stringent than at common law with the safety of the workplace to be judged objectively. At common law the duty is governed by reasonableness and acceptable standards, but under s.29 reasonable foresight of injury and standard practice is not relevant. It is anticipated that an application for leave to appeal to the House of Lords will be made.

Forbes at Trial



Bryan v Wigan Council and Casualtop Properties Limited

The Claimant sought damages for an accident when he slipped on pigeon droppings on the public highway.

Forbes acted for the First Defendant Wigan Council who were the relevant Highway Authority. The Claimant alleged negligence, breach of the Highways Act and nuisance for failing to clear the droppings from the pavement and failing to take proper remedial measures to prevent pigeons from roosting on adjoining roof tops. The claim was raised in the alternative against the owners of the adjoining shop where the pigeons were said to roost.

The Council had given advice to shop owners on methods of preventing pigeons roosting but work carried out was paid for by those shop owners. Casualtop had not carried out any measures.

The Claimant alleged that the persistence of the problem meant that droppings should be considered part of the fabric of the highway and that a duty was owed under Section 41 Highways Act 1980. The judge rejected that submission. *Goodes v East Sussex County Council* applied.

In relation to nuisance, the case of *Wandsworth London Borough Council v Railtrack PLC* was distinguished. The amount of pigeon droppings were not substantial in volume or number. There was no real source of danger.

In any event the Council had a regular cleaning system which involved sweeping on a daily basis with a mechanical sweeper once a week.

The claim against the Council was dismissed. The court also absolved the second defendant from responsibility. Their management of the building did not give rise to a duty to prevent the

unpreventable. The fouling happened when the pigeons were in flight.

The Highways Act duty is essentially to keep the fabric of the Highway in good repair and this does not include transient defects. While snow and ice have been brought within the statutory network since *Goodes* other categories of passing hazards may not be recoverable in law. The implementation of regular cleaning systems by public authorities makes it additionally difficult for Claimants to broaden the categories of Highway liabilities.

Elliott v Warrington BC

The Claimant alleged that his wife drove his car along Dingleway, Stockton Heath, when one of its wheels went into a large pothole in the road causing damage to the vehicle. The claimant produced photographs showing that the defect was of considerable size and was certainly actionable. Liability was denied on the basis that the Defendant had a Section 58 Defence due to the fact that the accident site, categorised by the Defendant as a link road, was subject to an annual system of inspection and the defect was not present at the pre-accident routine inspection one month prior to the accident. As a result of a complaint from a member of the public a further inspection at the site took place three days prior to the accident. The defect was ordered for repair and the repair took place within one week as prescribed by the Defendant's Code of Practice. Unfortunately for the Claimant, the accident occurred whilst the defect was awaiting repair.

At trial the Claimant attacked the Defendant's frequency of inspections and contended that the annual frequency did not meet with national guidelines for the category of road in question. The

Claimant produced no fewer than five Codes of Practice from other Local Authorities in an attempt to show that the Defendant's frequency of inspection did not live up to standards in other parts of the country. In response the Defendant, whilst maintaining that the frequency of their inspections was adequate, sought to rely on the decision in *Williams v Knowsley BC* in relation to the pre-accident inspections. The decision in *Williams v Knowsley BC* effectively rendered any arguments as to the frequency of inspections obsolete given that the locus was inspected three days prior to the Claimant's accident.

In a change of tack the Claimant then effectively argued that, contrary to legislation laid down by Parliament in the form of s58 Highways Act 1980, strict liability should apply in respect accidents that occur due to defects in the carriageway. Unsurprisingly the Court sided with parliamentary legislation and dismissed the Claimant's case. In dismissing the case the Court made no criticism of the frequency of the Defendant's inspection system.

Christopher Platt v Wigan Council

The Claimant was employed by the Defendant as a support worker in social services. He claimed that on 17th December 2004 while working at a respite home run by the Defendants, he slipped and fell as a result of a wet floor and while chasing a service user who had run out of control. Forbes represented the Council.

The service user had thrown breakfast cereal at the wall and run amok causing the Claimant and another member of staff to pursue him. A further member of staff mopped the spillage and it was during the pursuit the Claimant said he had slipped on the recently mopped floor. The Claimant alleged breaches of the Workplace Regulations and a failure to

warn and put out signs. The Defendant raised causation issues and made the point that putting out warning signs was impractical and could have been used as weapon by the service user himself.

The judge found the Claimant's evidence inconsistent under cross examination. He was unclear where he had fallen. He alleged that the member of staff who had mopped the floor stood by, unconcerned, and watched him fall. The Defendant for its part, produced that person's diary entry in which she had recorded in detail the mopping even down to the type of cereal, with no fall being mentioned. The Claimant also had not reported the accident for 7 weeks. He said the injury was 'really painful' and yet records produced showed he had continued to work even claiming overtime.

The judge declared himself unconvinced by the Claimant's evidence and impressed by the Defendant's evidence particularly the member of staff who cleaned the floor who he described as a caring person who would not stand by as suggested had she seen him hurt. The claim was accordingly dismissed.

Slipping accidents in the workplace can appear to present problems for Defendants where onerous statutory duties apply to employers. Where defences of reasonable practicability are raised the burden of proof switches clearly to the employer. Notwithstanding that, claims can and should be successfully resisted where the Claimant's case cannot meet the appropriate forensic test.



Pearson v Salford CC

The Claimant alleged having fallen after he stepped off a kerb into a pothole in the road. The Council accepted the defect was there and that they had no statutory defence under the Highways Act. However, they did not accept the Claimant fell as he had alleged. The Claimant called corroborative witnesses to confirm that the accident occurred as the Claimant alleged.

The Defendant relied on the contents of the Claimant's medical records. The ambulance records stated "damaged ankle on a kerb, 6/7 pints". On being triaged it was recorded that the Claimant "went over on ankle". The doctor who saw him in casualty recorded "patient fell over" and on the Claimant's discharge note it stated that he had tripped "over pavement during a fight".

At trial, the Claimant stated he had only had 3-4 pints. He also said that he was walking in between two friends and that one of his friends was walking in the road. This information had not been given on exchange of witness statements.

On giving judgment, the Judge stated that as none of the contemporaneous medical notes made reference to a defect, he was not satisfied that the accident had occurred due to the pleaded defect. He found that the Claimant fell over due to pure accident and not due to the defect. The claim was struck out and the Defendant awarded its costs of the action.

Reardon v Warrington BC

The Claimant alleged tripping over a raised stop tap box on Ellesmere Road, Warrington, outside the Stag public house. The Claimant adduced witness evidence to suggest the defect had been in that condition for at least a year.

The Council had a regular system of highways inspection at the accident site but the highways inspector was aware that the area was prone to parked vehicles. He confirmed that he looked under the parked vehicles, albeit without getting down on his hands and knees.

Review of the Claimant's hospital records showed that he appears to have told the treating practitioners that he fell due to a pothole, and had been drinking. It was also noted in the records that it was suggested to the Claimant that he visit his GP and the alcohol liaison nurse due to the amount of his daily alcohol consumption.

The Claimant denied being drunk at the time of accident, but accepted he may have had a small amount to drink prior to the accident. He also stated that he would not have referred to the defect as a pothole, as he used to be employed as a highways inspector.

Based upon the council's section 58 defence and the causation issues, it was decided to defend the matter to trial. Six days before the trial the Claimant discontinued agreeing to pay the Council's costs in full.

Craig Johnson v Wigan Council

Forbes recently represented Wigan Council in an alleged highway tripping claim where the Claimant alleged he had tripped on a raised flagstone thereby sustaining a fracture to his ankle. The Claimant alleged the accident occurred around 2.00pm and that the following day he sought treatment by attending the A&E department at around 2.30pm. His alleged accident was witnessed by his mother who was with him at the time.

The Claimant was put to proof as to the accident circumstances by the Defendant following close scrutiny of the hospital records which recorded the mechanics of the injury as "fell last night up kerb edging."

The Claimant within his witness statements sought to deny making those comments to the hospital staff but under cross examination readily conceded that he may have used the term kerb and accepted he knew what this term related. There were also other inconsistencies regarding the time of the alleged accident and what the Claimant was doing at the time. The mother's evidence also changed during the course of cross examination in

order to fit in with the Claimant's altered version of events.

Forbes were also able to establish that Claimant had phoned in sick to work that day and the Claimant readily conceded under questioning that he had skived off that day.

The Defendant contended that the alleged accident circumstances were a lie to obtain gain.

The trial judge in dismissing the claim found that the Claimant's evidence was inconsistent and inaccurate and went further by specifically making a finding that he was satisfied that this was a deception with the Claimant trying to make out an accident happened and it was a try on.

The Claimant was also ordered to pay Wigan Council's costs.

Wilson v Scarborough Borough Council

Forbes recently successfully defended a claim for damages brought by the Claimant who allegedly injured himself by tripping as a result of a combination of a depression in the footway and an elevated area of tarmac surrounding a manhole cover.

The claim was defended on the basis that the depression was measured by Council inspectors at approximately 22-24mm, and the raised tarmac at approximately 10mm. Both of these measurements when viewed separately fall below the 25mm measurement that is used as a general guideline for what is an actionable defect in a footway but the claim was ultimately about assessing the actionability of the accident location as a whole. This saw a number of photographs of the location produced and the testimony of two eye witnesses who suggested that the photographs did not do justice to the seriousness of the defect.

Council inspectors gave evidence for the defence that the location was on a stretch of road that was inspected monthly and, while minor defects had been noted on previous inspections, it was not

considered that there was an actionable defect at the accident location. While accepting that it was possible to foresee the potential for a trip to arise from any defect, the inspectors said that it was their job to assess whether a defect presented a real danger and it was these defects that they focussed on.

After careful consideration of *Mills v Barnsley MBC* (1992), the Judge decided that, while in this case it had emerged from the Claimant's oral evidence that the tripping edge alone had resulted in the Claimant falling, even if the fall was attributed to the combination of the depression and the tripping edge, this did not present a 'real danger'. The Judge found that the accident location was a 'wholly unremarkable street scene' and that as such it would place too high a burden on Local Authorities to impose liability for those defects such as the one found at the accident location that did not present a real danger.

Christopher Virgin v North Lincolnshire Council

Forbes successfully defended a potentially very expensive employers' liability claim on behalf of North Lincolnshire Council. The Claimant was employed as a handyman to carry out minor adaptations to the homes of elderly and vulnerable tenants. The claim arose as a result of an incident on 4th July 2005; the Claimant was working alone lifting a settee in order to place raisers on the base of the same. He sustained a serious back injury in the process.

The Claimant's case was pleaded in negligence together with various manual handling regulation provisions. The Claimant alleged his manual handling training was inadequate, he was under pressure to complete as many jobs as possible, that he had complained on previous occasions that the lifting of sofas should be a two man job, no assistance was offered and that no risk assessment had been carried out in relation to the specific task of lifting settees alone.

The Defendant refuted these allegations; it maintained the Claimant was more than adequately trained in relation to manual handling and specifically was trained in relation to assessing the weight of loads before carrying out a lift. The Claimant was also provided with a mobile phone which could be used to summon assistance from other handymen if necessary. It was accepted that there was no written risk assessment in place at the time of the accident; generic or specific. The Council was in the process of drafting the same when the accident occurred.

After a three day trial involving ten witnesses, the Judge found in favour of the Council. He was satisfied that on the balance of probabilities that the accident occurred because the Claimant failed to take the opportunity to assess the weight of the settee contrary to his training, that assistance would have been available had he requested it, his training was thorough and more than adequate. In relation to the risk assessment, the Judge found the lack of formal risk assessment was not causative of the accident and had any other guidance been in place it would not have reduced the risk further.

The Claimant's claim was dismissed and we were awarded our costs of defending the claim.

Douthwaite v Ryedale District Council

Mr Douthwaite was employed as a refuse collector by Ryedale District Council. He alleged that he had been struck in the face by a wheelie bin which fell from the lifting gear of the refuse vehicle. The happening of the incident was not in dispute.

He claimed that bins falling in such a way was a regular occurrence that the Council had not done anything to address, that he had not had proper training about where to stand so as to be safe, and that the lifting gear was defective.

In addition, at court he raised a new theory, for the first time, as to what had caused the accident. He suggested that the metal bar at the top of the lift, against which the bins rested as they were being emptied, could move back if the bins were

loaded in such a way by the householder as to be bottom heavy. He suggested that this could cause the bin to fly off the lifting gear striking the operator. Under cross examination however he conceded that the Council could not do anything about how householders loaded their bins and he also conceded that there was nothing defective about the lifting gear. Further he accepted that he had been told that he should stand further back but that he did not do that as he considered where he was standing to be safe.

The Council argued that bins falling off the lifting gear did happen from time to time, but the records showed that it was not more than six times in a two year period. Bearing in mind that the Council empty bins from 23,000 domestic properties a week this was not statistically significant. The Judge agreed that there was no evidence to suggest that there were regular incidents.

In the absence of any plausible explanation as to how the bin came to fall from the lifting gear the conclusion that the judge came to was that there was no evidence that the Council had been at fault. He criticised the Claimant for raising the new theory at court for the first time and for not obtaining expert evidence on the point.

Judgment was given for the Council with full costs.

Brittany Anderson v Northern College

Forbes were recently successful in defending a claim at trial brought by a minor against Northern College. The College offers on-site accommodation for students and their children. The Claimant, aged 3 at the time of the accident, had been playing unsupervised in a children's library room with 2 other children. There were no adult witnesses to confirm the exact cause of the accident but the Claimant was injured when a window blind was pulled or swung on resulting in the wooden window frame coming away and hitting the Claimant on the head. The Claimant's mother and litigation friend held the College responsible for failing to supervise the children in what she called a

play room, failing to provide a designated crèche and, under s2 of the Occupier's Liability Act 1957, failing to operate a reasonable system of inspection and ensure the reasonable safety of its visitors.

Liability was strenuously denied on behalf of the Defendant. A reactive system of maintenance is operated and no faults had been recorded with the blind or window frame prior to the accident. No similar incidents had taken place either prior or post the Claimant's accident. Further, student parents were made well aware that the responsibility for supervising their children remained with them at all times unless the child was in the care of the College crèche (open on weekdays from 9am-4pm). The suggestion that the room constituted a playroom was also denied; the purpose of the room was for parents to sit and read books with their children.

The Judge found in favour of the Defendant on each and every point. She considered the reactive maintenance system to be more than reasonable bearing in mind a more proactive inspection of the window frame and blind would not have detected a latent or possibly non-existent defect prior to the accident. In relation to the supervision issue, the Judge agreed with the College that it had made clear to the Claimant's mother that supervision of her child was entirely her responsibility when not in the designated crèche and it was refuted that the room was a playroom in which it was accepted practice to leave children unsupervised.

The Claimant's claim was dismissed and we were awarded our costs of defending the claim.

Dixon & Irwell Street Metal Company v Trafford MBC

Trafford MBC, represented by Forbes successfully defended a claim for damages following an unusual incident involving an overturned lorry.

On 31st March 2004 Mr Dixon, who was employed by Irwell Street Metal Company,

collected a lorry load of waste and set off on his usual journey to deliver the waste to a land-fill site. While negotiating a roundabout his vehicle overturned. Mr Dixon brought a claim for personal injuries while his employers brought a claim for the damage to their vehicle and other losses totalling £100,000 plus costs.

Mr Dixon and his employer claimed that the Council were negligent and/or in breach of statutory duty by reason of a sudden change in the camber of the road at the roundabout. The Council argued that the vehicle in fact overturned due to either excessive speed and/or load-shift caused by the load being unevenly packed.

Both sides relied on expert evidence but a further factor contributing to the court's decision was evidence produced by way of CCTV footage, obtained from a factory overlooking the roundabout. This video cast doubt as to whether the Claimants' vehicle overturned at the point where there was the alleged excessive cross-fall in the camber on the roundabout. Evidence produced pointed to the driver having lost control before this point, which was accepted by the Judge. The Judge also accepted the Council's expert evidence that the vehicle's speed of 19mph was excessive as far as safety was concerned.

The Judge's conclusion was that the cause of the accident was driving at an excessive speed, perhaps assisted by uneven loading. He found that the cross-fall in the camber on the roundabout did not play any causative part in the accident. He therefore struck out the claim, awarding the Council its costs.



Limits of strict liability for work equipment

The House of Lords has upheld the Court of Appeal's decision that a Local Authority was not strictly liable for the construction and maintenance of an access ramp used by a Local Authority employee at a person's home.

The Claimant worked for the Defendant as a carer and driver. As part of her job duties she had to collect a wheelchair bound service user from her home, which was accessed by a ramp. That ramp contained a latent defect such that it crumbled when used by the Claimant and she stumbled and was injured.

The ramp had been provided by the NHS Authority 10 years ago. It had been assessed by the Local Authority and inspected. By a majority (Lord Hope and

Baroness Hale dissenting) the House upheld the Court of Appeal decision.

It was conceded that the ramp constituted 'Work Equipment' for the purposes of the Provision and Use of Work Equipment Regulations 1998. The House chose to focus on the limitation imposed by regulation 3(2) of those regulations and in particular focused on the concept of control.

Lord Mance stated that there needed to be some specific nexus, beyond simple use, between the equipment and the employer's undertaking. The test was whether the equipment was provided as part of the employer's business either by the employer or any one else for use in the employer's business with his consent and

control.

The simple fact of the assessment of the ramp by the Council did not make them strictly liable for equipment they did not provide. It was left open that there might have been strict liability had the Authority repaired or replaced the ramp.

The case provides helpful judicial guidance to a potentially difficult statutory provision and sets boundaries which should prevent absurd results. An employee travelling to work, injured by equipment such as a defective lift would not be owed strict liability by his employer nor an employee working at a third party's premises in the example of an accountant carrying out an audit at a client's offices, injured by a defective coffee machine.

Lord Justice Jackson's preliminary review on civil costs

Lord Justice Jackson was appointed by the Master of the Rolls in November 2008 with the task "to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost."

The judge acknowledges the "middlemen" who push costs up, such as the claims management companies who take fees of up to £1,000 to refer cases to solicitors; or medical reports companies who are paid more than the doctor who produces the report.

His preliminary report considers the various options of funding civil litigation by reviewing possible reforms, including: fixed costs for many more cases than now; a benchmark or tariff of costs; contingency fees or a "contingency legal aid fund" paid for through a slice of each winning Claimant's damages; and an overhaul of no win, no fee cases involving capping the

"success" fees charged by lawyers, and reviews the merits of a compulsory BTE insurance scheme which would cover legal expenses only but attract no success fee or ATE premium in cases won.

The era of the CFA is more likely to live on following the review given LJ Jackson's provisional view "that following the retraction of legal aid either CFAs or some other system of payment by results must exist in order to facilitate access to justice." He does acknowledge that CFAs have massively increased the costs burden on Defendants.

On the issue of fixed costs in fast track claims, this is an area where Jackson has highlighted his desire to achieve a fixed solicitors' cost system for all steps in a claim up to trial. The basis of the proposed fixed costs will be on a matrix calculation for cases settled pre-issue and post issue, a base fee applicable to a given type of case to which would be added a further calculated sum based as a percentage of

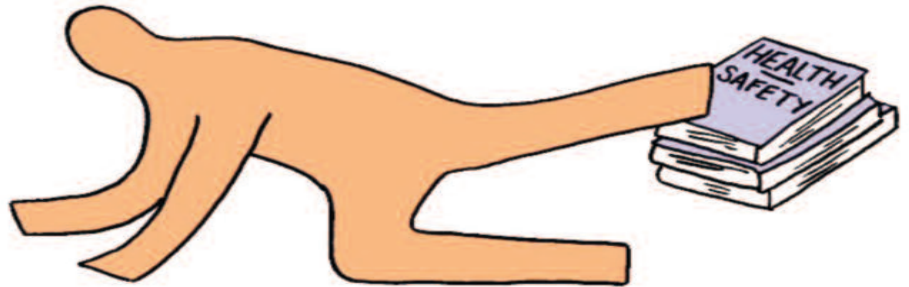
damages recovered less a deduction for early admission of liability. There are exemptions to the use of the matrix.

There are other options/solutions discussed within the 663 pages of his preliminary report which as expected has received mixed responses from both Claimants and Defendants. The consultation period ends on 31 July 2009 for all interest groups to have an opportunity to put their opinions forward on the preliminary views.

It is anticipated that the proposals will recommend the development of the existing fixed costs system. Whether the recommendations are any more radical than simply a revamp of the existing cost system in this highly charged area, we will have to await LJ Jackson's final report. What is certainly required is the ending of disproportionate costs in low value claims.

For more information contact **Ridwaan Omar of Forbes' Costs team on 0113 244 6688 or email ridwaan.omar@forbessolicitors.co.uk**

Stay on the safe side



The Government's crusade to force organisations to take Health & Safety issues more seriously shows no signs of running out of steam. Hot on the heels of last year's widely publicised Corporate Manslaughter Legislation comes the far less publicised Health & Safety (Offences) Act 2009 which came into force on the 16th January 2009.

Whilst this new legislation does not create any new offences it still represents a very significant change in the way that Courts will deal with sentencing in Health & Safety prosecutions. The Courts have been granted greater powers than were previously available. Magistrates' Courts now have the power to fine up to a maximum of £20,000 and in addition to this they now have the power to imprison individuals for a maximum period of 12 months. In the Crown Court fines are unlimited and the maximum period of imprisonment is 24 months.

It should be noted that the Courts extended powers are not limited to fatal accidents. The new powers also apply to the more common prosecutions under Section 2 and 3 of the Health & Safety at Work Act 1974. Thus managers and employees for that matter now face the very real risk of a criminal investigation and prosecution if they have caused an accident.

In relation to the question of fines, it should be remembered that these cannot be covered by an insurance policy so the organisation responsible for the accident or an individual will have to pay the fines from their own pockets. The latest thinking is that fines should be related to the turnover of an organisation. In relation to very large organisations this can obviously lead to very

significant fines. The current record in the UK stands at £15 million which was handed to Transco for a fatal gas explosion back in 2005. Clearly that is an extreme case but even so, fines in relation to accidents involving fatalities very often run into six figures. In December of last year a theme park was fined £250,000 in respect of a fatality.

Even more worrying than the question of fines is the issue of potential imprisonment. Lord McKenzie tried to give some reassurance about this by suggesting that it should be "reserved for the most serious matters". Nonetheless managers and employees now potentially face jail sentences for essentially not performing their jobs as well as they might have done. The situation can be made all the worse by the fact that the prosecuting authorities can take an incredibly long time to pursue these matters. Forbes was recently instructed in one case where a fatal accident occurred in May 2004 but Criminal Court Proceedings were not commenced until October 2008.

It follows therefore that it is essential to obtain early legal advice after any accident in which the HSE and/or the Police have shown a significant interest. At Forbes we have over 50 years experience handling criminal and regulatory prosecutions. We have nine Solicitors who have achieved High Court Advocate status and we have a very large team of fully accredited Police Station representatives who are available 24 hours per day to provide advice and assistance at Police Stations.

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