Berrymans Lace Mawer
SOLICITORS

Risk assessments

Jo Francis
Partner, BLM

t: 0151 471 5439
e: *joanne.francis@blm-law.com*

September 2012

Berrymans Lace Mawer

Contents

Introduction

Risk assessments are a fundamental operational requirement for all organisations. The appreciation of risks is an integral component to ensuring the provision of safety for all stakeholders involved in operations. Breaches of health and safety regulations predominately result in criminal and civil liability attracting sanctions which can have an adverse financial and reputational effect.

Common law duty

Common law duty is a law based on the decisions of judges in the senior courts. It is more flexible than statutory duty as it may change in response to social and economic conditions and in regard to what is considered to be fair and just at the time. It may also help to decide how a statutory duty should be interpreted in specific situations. Common law is constantly changing and is not written down as such. It is found mainly by reference to official reports of important and relevant cases.

Most claims will involve a breach of common law duty - usually negligence (or fault) in addition to or instead of, a breach of statutory duty. In the same way that a vehicle driver owes a duty of care to other road users, an employer owes a duty of care to 'employees' (in the wider meaning of the term). The standard of care is based upon the conduct of the **reasonable and prudent employer.** The employer is in breach of the duty of care if he fails to do something that a reasonable person would do or does something that a reasonable person would not do (***Blythe v Birmingham Waterworks 1865)***. The actions of the employer are judged by what he knows or ought to know. For example, an employer would be expected to follow the advice provided by the HSE.

Negligence

Allegations of negligence may include:

- unsafe place of work;
- unsafe system of work;
- unsafe means of access;
- failure to warn of risks;
- failure to provide adequate supervision;
- failure to provide adequate training and/or instruction;
- failure to provide adequate protective equipment;
- exposing the claimant to unnecessary risk of injury; and
- vicarious liability

Risks of injury

An employer has a duty to warn employees of risks to their health and safety and this may be regarded as part and parcel of the duty to provide a safe system of work. Sometimes this duty may extend to obvious risks (***General Cleaning Contractors v Christmas 1953)***.

In ***Ammah v Kuehne & Nagel Logistics 2009*** the Court of Appeal re-affirmed that it was the employer, not the employee, who is responsible for devising a safe system of work and this extends to giving specific warnings about risk. Employers sometimes assert that the employee 'should have known' not to do something. It is crucial to consider whether the employee was warned and adequately trained.

Claimants may sometimes allege that their accident was similar to a previous event and/or that complaints had been made about a particular hazard. This may be followed by an allegation that the employer had ignored these previous events or complaints. If these allegations are

established, it may be difficult to refute the claim. Similarly if, after an accident to the claimant, the employer had taken preventative measures that could have been taken beforehand, the employer may have difficulty explaining why earlier action was not reasonably practicable. Unfortunately, employers may be penalised by taking action to prevent a recurrence of the accident in question.

Statutory duty

Historically there have been various Factories Acts and subsidiary regulations for health and safety in the workplace as far as employers are concerned. Much of this legislation was replaced by the general provisions of the Health and Safety at Work etc. Act 1974, although a breach of the primary duties (sections 2 to 6) imposed by the Act is a criminal issue. The Act provided powers to introduce regulations (Statutory Instruments) for health and safety at work and a breach of these can result in a civil claim.

The Six Pack

This refers to the following set of Regulations, introduced in 1993 and replacing much of the earlier legislation:

1. Management of Health and Safety at Work Regulations 1999.
2. Workplace (Health, Safety and Welfare) Regulations 1992.
3. Provision and Use of Work Equipment Regulations 1998.
4. Personal Protective Equipment at Work Regulations 1992.
5. Manual Handling Operations Regulations 1992.
6. Health and Safety (Display Screen Equipment) Regulations 1992.

Each Regulation has an Approved Code of Practice (ACOP) or Guidance Note issued by the Health and Safety Executive (HSE), which sets out its intention and application. Further details of the Regulations are set out below *.

The nature of the duty

There are three main kinds of duty:

- Strict liability

This is in effect 'no fault' liability. It is well illustrated in ***Stark v The Post Office*** where the claimant postman sustained injuries due to a latent defect in his bicycle which would not have been detected on a routine inspection. He successfully argued breach of the ***Provision and Use of Work Equipment Regulations***, in particular relying on the clause:

"Every employer **shall ensure** that work equipment is maintained in an efficient working order and in good repair."

The Court of Appeal said that the duty was absolute and it was irrelevant that the employer could not have known of the defect.

- Liability qualified by the words: ' . . . so far as is practicable . . .'

'Practicable' means something that is physically possible in the light of current knowledge and invention.

- Liability qualified by the words: ' . . . so far as is reasonably practicable . . . '

In ***Adsett v K and L Steelfounders 1953*** the qualifying words were 'reasonably practicable', which implies something narrower than 'physically possible', and a balance should be made between the degree of risk, and the sacrifice (time, trouble or expense) of averting the risk, ***Edwards v National Coal Board 1949.***

Where either of the last two qualifications apply in civil cases, the onus of proving that it was not practicable or reasonably practicable to comply with the obligation rests with the defendant, ***Nimmo v Alexander Cowan 1968***. Effectively, the burden of proving liability is reversed, once it is established that an employer has a duty under the relevant statute.

Risk assessments and the Regulations

This is the key aspect of health and safety legislation. The requirement to carry out a risk assessment appears in several of the Regulations, although the main one is in the ***Management of Health and Safety at Work Regulations.***

Claimants' solicitors appreciate that the absence of a suitable risk assessment is often the key to a successful claim and will often seek pre-action disclosure.

However, the absence of a risk assessment does not mean that the employer is automatically liable. The test is:

if the assessment had been done, what risks would have been exposed and what precautions should have been taken?

The general position is that some preventative measures could, and should, have been taken.

*** The Six Pack Regulations and Risk Assessments**

1 Management of Health and Safety at Work Regulations 1999

These Regulations contain the main statutory provisions in the Six Pack and apply to all forms of work.

Risk assessment under these Regulations:

Regulation 3(1) states that every employer:

shall make a **suitable and sufficient** assessment of –

- the risks to health and safety of his **employees**; and
- the risks to health and safety of persons **not in his employment** in connection with the undertaking (contractors, customers or other visitors).

The term 'suitable' is defined in Regulation 4(4) of the *Provision and Use of Work Equipment Regulations 1998* as 'suitable in any respect which it is reasonably foreseeable will affect the health and safety of any person'.

Risk assessment is an ongoing process and should be reviewed when processes are changed. Once the assessment has been done and a significant risk identified, **it must be followed up** by planning, implementation and monitoring otherwise the whole process is futile. Some organisations try to cover several workplaces by carrying out 'generic risk assessments'. However, these do not always cover a specific risk at a particular location. Further, the Regulations require that specific risk assessments **must** be undertaken for employees who are:

- under 18; or
- new or expectant mothers.

The HSE Guidance relating to personal protective equipment and manual handling suggests that risk assessments take into account individual circumstances.

The HSE has now revamped its guidance to help simplify risk assessments. It has urged employers to spend less time dotting 'i's and crossing 't's and spend more time putting practical actions into effect. The revised guidance may be downloaded at: www.hse.gov.uk/risk

The guidance lists five key elements to an effective risk assessment:

- identifying the hazards;
- deciding who might be harmed and how;
- evaluating the risks and deciding on precautions;
- recording findings and implementing them; and
- ensuring assessments are reviewed at regular intervals.

Other provisions in the 1999 regulations.

Some of the other regulations, which may be relevant in civil actions include:

- provision of comprehensible and relevant **information** for employees on health and safety risks and protective measures (Regulation 10);
- taking into account the **capabilities** of employees when entrusting tasks to them (Regulation 13)
- provision of adequate **health and safety training** (Regulation 13); and
- provision of information to **temporary workers** (Regulation15).

Liability to non-workers.

One of the main provisions of the 1999 Regulations is a requirement for an employer to carry out a 'suitable and sufficient' risk assessment, not only of the risks to health and safety of his employees, but also the risks to those **persons not in his employment** arising out of or in connection with his undertaking. Also, the Approved Code of Practice accompanying the Regulations states that risk assessments must also consider others, whether they are workers or **members of the public**.

So if a retail outlet fails to carry out a risk assessment concerning the health and safety of its customers and if this breach of duty is causative of a customer's injury, can that person sue the business under the regulations? The regulations have now been amended to the effect that a breach of duty does not confer a right of action where the duty applies for the protection of a third party (i.e. other than employees). So a visitor who is not at work may not rely on a breach of the health and safety legislation (see ***Ricketts v Torbay Council 2003***, but it would seem that a claimant in this situation should be able to seek disclosure of any risk assessment which relates to protection of the visiting public.

2 Workplace (Health, Safety and Welfare) Regulations 1992

These Regulations specify requirements for maintenance of the workplace.

Regulation 5(1) states:

The workplace and the equipment, devices and systems to which this Regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair." There is no qualifying term to this duty, so it would appear to impose strict liability, but this is not necessarily so when a workplace becomes hazardous due to some transient event. In ***Lewis v Avidan 2005,*** the claimant slipped on a patch of water on a floor,

which was temporarily wet because a concealed water pipe had burst shortly before the accident. The Court of Appeal decided that the mere fact of an unexpected flood did not mean that the floor was not in an efficient state or in good repair.

Regulation 12 imposes a duty on an employer in relation to the condition of floors and traffic routes. Regulation 12(3) says that so far as is **reasonably practicable**, every floor in every workplace and the surface of every traffic route shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall. (Note the qualification to the duty under this regulation).

Regulation 12(5) says that suitable and sufficient handrails and, if appropriate, guards shall be provided on all traffic routes which are staircases except where a handrail cannot be provided without obstructing the traffic route. NB this Regulation only refers to 'staircases' - ***Coates v Jaguar Cars* 2004** - a short flight of four steps was not a staircase and Regulation 12(5) was not applicable.

Unsafe place of work – construction sites.

The *Construction (Design and Management) Regulations 2007*, which came into effect on 6 April 2007, impose specific duties on:

clients (other than domestic);
design and management co-ordinators;
designers;
principal contractors;
contractors; and
workers.

3 Provision and Use of Work Equipment Regulations 1998 (PUWER)

Regulation 2(1) of PUWER states that 'work equipment' means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not). The scope is extremely wide and includes:

- 'tool box' tools (hammers, saws etc.);
- single machines;
- apparatus (eg laboratory apparatus);
- lifting equipment;
- other equipment, such as ladders and pressure washers; and
- a series of machines (eg a paper-making line).
- 'tool box' tools (hammers, saws etc.);
- single machines;
- apparatus (eg laboratory apparatus);
- lifting equipment;
- other equipment, such as ladders and pressure washers; and
- a series of machines (eg a paper-making line).

The following would not be classified as 'work equipment':

- livestock;
- substances (acid, cement, water etc.);
- structures (walls, stairs, fences etc.); and
- private cars.

In ***Knowles v Liverpool City Council 1993***, the House of Lords held that s.1(1) of the Employers Liability (Defective Equipment) Act 1969 was to be widely construed and embraced

every article provided by the employer for the purpose of the business and not merely articles for the use of employees. Hence a flagstone was equipment within the meaning of the Act.

Suitability of work equipment.

Regulation 4(1) states "Every employer **shall ensure** that work equipment is so constructed or adapted as to be **suitable** for the purpose for which it is used or provided."

The employer must consider:

- that the equipment is of sufficient quality and soundness in the first place;
- where it will be used; and
- what it will be used for.

Regulation 4(2) states "In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment."

It is clear that this envisages some form of risk assessment and there is a connection with Regulation 3(1) of the *Management of Health and Safety at Work Regulations 1999*.

Duty to maintain work equipment.

Regulation 5(1) of PUWER states "Every employer **shall ensure** that work equipment is maintained in an efficient state, in efficient working order and in good repair." This means equipment must not be defective and be properly maintained otherwise it leads to strict liability. In ***Stark v Post Office*** the employer was liable for a defect in a bicycle even though a rigorous examination would not have revealed the defect. In ***Ball v Street 2005***, the claimant was adjusting an agricultural machine when a coil spring fractured and struck his eye. The Court of Appeal held that Regulation 5(1) imposed an **absolute duty** to maintain and the fact that the accident was not foreseeable did not avoid the duty being applied. In ***Hislop v Lynx 1993***, it was held that it was sufficient to prove that a piece of work equipment had failed.

Regulation 5(2) says that every employer shall ensure that where any machinery has a maintenance log, it is kept up to date. Maintenance logs will be disclosable.

Work Equipment and Risk Assessments

Regulations 8 and 9 of PUWER impose the following duties on an employer about persons who use work equipment and their supervisors and managers:

- They should have adequate health and safety information available.
- Written instructions should be available where appropriate.
- They should have adequate health and safety training.

In ***Allison v London Underground 2008***, the Court of Appeal considered the requirements of Regulation 9(1), which states: "Every employer **shall ensure** that all persons who use work equipment have received **adequate training** for purposes of health and safety, including training in the methods which may be adopted **when using the work equipment**, any **risks** which such use may entail and **precautions** to be taken."

This is not absolute liability because the word 'training' is qualified by the word 'adequate'. This in turn may involve the test of **reasonable foreseeability**, and this includes what an employer **would have known** if he had carried out a **suitable and sufficient risk assessment** as required by Regulation 3 of the *Management of Health and Safety at Work Regulations 1999*.

This case concerned the use of a traction control brake on tube trains driven by the claimant. The claimant was only 5ft. 1in. and of slight build and she developed tenosynovitis through having to rest her thumb on the end of the handle for prolonged periods. This handle had been modified at the request of some drivers. If the employers had carried out a **suitable and sufficient risk assessment** looking at the design **and operation** of the device (with help from an ergonomist), it would have identified the need for **training** in the way drivers should hold the handle to minimise the risk of strain injury.

In ***Whitehead v Trustees of the Chatsworth Settlement 2012***, the claimant was a gamekeeper patrolling the defendant's estates with a shotgun. The shotgun was broken open and carried over his arm but there were live cartridges in the barrel and, he fell when he climbed over a wall, causing the gun to close and discharge the cartridges. He had received the appropriate instruction and training that he should remove the cartridges but he chose to ignore this and the employer had no reason to suspect that he was doing so. Appeal dismissed.

The Importance of Risk Assessments.

In ***Griffiths v Vauxhall Motors 2003***, the claimant was using a tool to tighten bolts on car seat belts when it 'kicked back'. The Court of Appeal found that there were no breaches of PUWER as equipment was not unsuitable and injury occurred through inadequate control or mishandling. *However*, the court held that if an **adequate risk assessment** had been carried out under Regulation 3 of the *Management of Health and Safety at Work Regulations 1999*, it is likely that this would have identified a risk of injury, and had the claimant then been given warning or instruction, it is not likely that the accident would have occurred. Primary liability attached with 50% contributory negligence.

4 Personal Protective Equipment at Work Regulations 1992

The Personal Protective Equipment at Work Regulations 1992 enforces a responsibility for employers to provide employees with suitable personal protective equipment (PPE) appropriate for the risks involved in their work. 'Provide' states they must go beyond simply making equipment available. They need to actually place the equipment into the employee's hands and explain why and when it should be worn. The equipment must be tailored and suitable for each worker. It is the employer's duty to ensure that the equipment is properly maintained. A risk assessment is fundamental to decide who needs protection and what is required.

Duty to protect only against identified risks

Regulation 7(1) imposes a duty on employers to maintain protective equipment ". . . in efficient state, in efficient working order and in good repair". This appears to be an absolute duty, but the House of Lords ruled otherwise in ***Fytche v Wincanton Logistics 2004***. The defendant had issued the claimant, a milk tanker driver, with boots fitted with steel toecaps to protect his feet against falling objects. The claimant's tanker got stuck in snow and he eventually managed to free it. However, water had leaked into his boots through a tiny hole and he suffered frostbite. He alleged breach of duty under Regulation 7(1).

The House of Lords held that the boots did what they were intended to do – protect against the risk of falling objects. They were not intended to protect against severe weather so there was no liability. If the boots were intended to protect against severe weather, they had clearly failed to do so and there would have been a breach of Regulation 7(1). But this was not the case.

Suitability of PPE

HSE guidance says that when assessing the suitability of PPE:

- it must be appropriate for the risks involved;

- the conditions where the exposure may occur;
- the time it is worn for;
- the ergonomic requirements;
- the state of health of the user;
- other PPE that may be used at the same time; and
- the characteristics of the user's workstation.

Risk Assessments

Where PPE needs to be hygienic and free of health risks, it must be provided for the sole use of the wearer. Employers must ensure that information necessary for the effective use of PPE is always available to users and they must, at suitable intervals, organise demonstrations in the wearing of PPE. It is clear that the Regulations involve the need for an individual assessment of the risks requiring the use of PPE. A so-called 'generic' risk assessment is unlikely to be sufficient in this situation.

Regulation 4(1) requires an employer to ensure that suitable PPE is provided to employees who may be exposed to a risk of health and safety at work unless the risk is adequately controlled by other means. In ***Threlfall v Hull City Council 2010*** the claimant was a council refuse worker who was clearing rubbish from gardens when his hand was cut and he sustained serious injury. Whatever had cut his hand had penetrated the gloves supplied by his employer. The Court of Appeal decided that the standard issue gloves provided did not effectively prevent or adequately control the risk. They were general gardening gloves and not designed to prevent laceration. A similar issue arose in ***Blair v Chief Constable of Sussex 2012*** where a police officer sustained injury on a motor cycle training course. He had been given standard issue boots which were not effective to prevent significant injury.

5 Manual Handling Operations Regulations 1992

Over a third of all work-related accidents involving absences over three days are a result of manual handling. Soft tissue injuries commonly arise from lifting objects, sometimes leading to long term absences and rendering the employee at a disadvantage on the open labour market. This is a major cost for organisations.

The Regulations provide for three main duties (referred to as a hierarchy of measures), which may be summarised as follows:

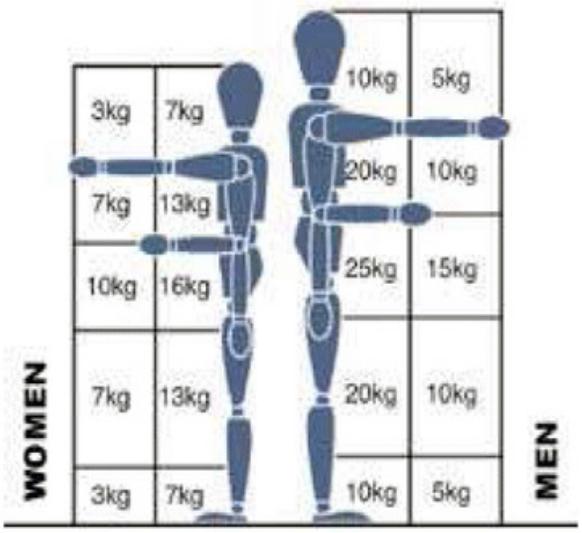
1. Avoid hazardous manual handling operations so far as is reasonably practicable.
2. Thoroughly assess any such operations that cannot be avoided.
3. Reduce the risk of injury so far as is reasonably practicable.

These duties are included in the following Regulations which incorporate provisions in relation to risk assessments:

- The Regulations apply to **any transporting or carrying** (not just lifting) of a load ('load' includes persons or animals) - Regulation 2(1).
- The primary duty is to **avoid** manual handling so far as is reasonably practicable (e.g. by using mechanical means) - Regulation 4(1)(a).
- If (and only if) manual handling cannot be reasonably avoided, then a **risk assessment** must be carried out - Regulation 4(1)(b)(i).
- The **risk assessment** must consider the **physical suitability** of the employee and what **training** has been given - Regulation 4(3).
- The employer must take steps to reduce the risk of injury to the **lowest level reasonably practicable** - Regulation 4(1)(b)(ii).
- The employer must **provide information** about the weight of the load and the heaviest side, wherever this is reasonably practicable – Regulation 4(1)(b)(iii).

Official guidance details suggested maximum weights to be lifted (see below **). These recommendations are dependent upon the height from which he load is being moved and to the extent of arms being outstretched.

**** Manual Handling Weight Recommendations**



Risk of Injury not Foreseeable

In ***Bennetts v MoD 2004*** the claimant tried to empty a mail bag in a manner which was a 'one off' situation that had never been attempted before. The Court of Appeal said that in making an assessment of manual handling operations, there had to be an element of realism and there was no relevant risk of the handling being done in the way the claimant did it. Even if there had been a breach of duty, this would not have caused the injury.

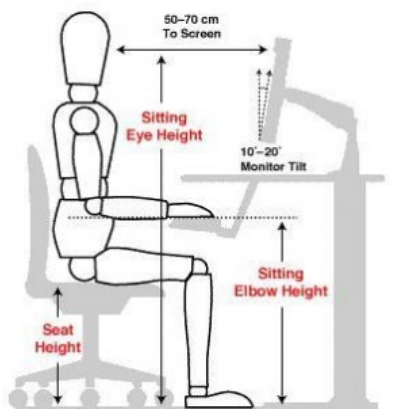
Reducing Risk to Lowest Level Reasonably Practicable.

In ***Gravatom Engineering Systems v Parr 2007*** considerable force was needed to move some heavy machinery. The force was between two and four times the HSE guideline figures. The court held that there was a considerable risk of serious injury and a breach of Regulation 4(1)(b)(ii) in failing to reduce the risk to the lowest level reasonably practicable.

6 Health and Safety (Display Screen Equipment) Regulations 1992

These Regulations cover equipment including computer monitors, keyboards and workstations and those using the equipment (Regulation 1(2)(d)). The principal requirements are:

- analysis of, and requirements for workstations (Regulations 2 and 3);
- daily work routine (Regulation 4);
- eye tests (Regulation 5); and
- training and information (Regulations 6 and 7).



Health and Safety Display Equipment Recommendations

Failure to train and properly assess risk.

In ***Fifield v Denton Hall 2006*** the claimant had been employed by the defendant as a secretary for 19 years. She began to develop pain in her hands in 1998 and this extended to other parts of her upper body resulting in difficulty typing. In early 1999 her workload increased substantially. Her GP referred her to a consultant who recommended physiotherapy but this did not resolve the problem and she gave up work in July 1999.

The claimant alleged breach of the Health and Safety (Display Screen Equipment) Regulations 1992 in failing to provide proper training and failing to **properly assess** workstations and daily work routines. There was a connection between the increased workload and the onset of severe symptoms and a causal link established. There had been a failure to provide proper training. The workstation assessment had been regarded by the employers as a waste of time and box-ticking exercise. The injuries were caused by those breaches of statutory duty.

An interesting issue in ***Fifield*** concerns the defendant's challenge of the claimant's version of events on the basis of apparent inconsistent history contained in her medical records. This situation arises frequently in gradually-occurring conditions where it may be difficult to arrive at a precise time when the symptoms arose.

It must be recognised that what a doctor records as having been told to him by a patient is hearsay evidence. Buxton LJ said that if the defendants seek to challenge the claimant's credibility on the basis of inconsistent records, they should plead this in the defence. The onus will then shift to the claimant to dispute the accuracy of the record.

Most modern display screen equipment involves desktop computers and laptops and the Regulations apply to users at work. Civil claims for upper limb disorders often allege breaches of these Regulations. The requirements include:

- Risk analysis of workstations (desks, chairs, keyboards etc – see below)
- Breaks in work routine
- Eyesight tests
- Training and information.

Note also:

Work at Height Regulations 2005

Although not part of the 'Six Pack', these Regulations are relevant where employees are working at height (eg stacking shelves). The *Work at Height Regulations* came into force on 6 April 2005. Most of the previous legislation was concerned with construction work, but the new legislation goes further and extends the application to work in any place at, above or below ground level. Also, there is no minimum distance at which the duty of an employer applies. The Regulations impose a three-stage hierarchy of measures:

- avoid work at height where possible, but if not –
- use work equipment etc to prevent falls; and if the risk cannot be eliminated –
- use work equipment to mitigate the distance and consequences of a fall.

A common means of access in almost every workplace is by using a ladder or stepladder. Regulation 6 says they should be used only if a **risk assessment** has shown that the use of more suitable equipment is not justified because of:

- the low risk; and
- the short duration of use (15-30 minutes); or
- existing features on the site.

The use of a ladder may be justified for, say, a window cleaner on a house but not normally for any longer duration. For longer durations, access equipment such as scaffolding, scissor lifts or cherry pickers should be used.

Summary – Risk assessments

When denying an alleged breach of statutory duty, the burden of proving that a course of action was not practicable or reasonably practicable rests with the defendant. As will be seen with the various Regulations, the completion of a thorough risk assessment is crucial. Risk assessments are systematic methods of analysing work activities, recognising potential failings and implementing suitable control measures to prevent loss, damage or injury in the workplace. The assessment should include the controls required to eliminate, reduce or minimise the risks. Employers must assess the working practices that could cause harm, in order to evaluate whether they are taking the reasonable measures to meet their legal obligations. Organisations must endeavor to reduce the risks as much as is reasonably practicable. This presents the legal minimum requirement for companies to adhere to, determined by the balance of the costs to install mechanisms to reduce risk against the degree of risk presented.

Failing to conduct or implement sufficient risk assessments presents organisations with considerable legal ramifications. The absence of such assessments does not automatically render the employer liable. It is for the courts to deem whether the risks were foreseeable and if an adequate risk assessment was conducted and if preventive actions could have been taken. Certain cases have been summarised in the relevant sections set out previously. This paper continues by detailing a number of recent legal cases alleging fault against public and private entities regarding the implementation or neglect of risk assessments.

Recent case law

***H Evans (Executrix of the estate of M Evans, Deceased) v Windsor & Maidenhead Royal Borough Council & Charles Wilson Engineers Ltd* July 2012**
EWHC 2096 (QB)

Circumstances: The deceased was an employed by the second defendant for 13 years as an HGV driver delivering industrial plant for hire. Whilst collecting a mobile elevating work platform from a site belonging to the first defendant, the deceased struck an overhead pipe while reversing the partially-elevated platform. He sustained fatal injuries. The second defendant's sales manager had visited the site before the hire to assess the size of plant required, and the deceased had delivered the platform without incident. The height of the platform unit was three metres fully stowed. The overhead pipe was about 3.3 metres from the ground. On the entrance side it had some warning tape and a 'danger' sign warning of the restricted headroom but there was nothing on the other side. There were no warning signs in advance of the pipe work on either side. The deceased had attended an accredited course as an operator and demonstrator of mobile elevating work platforms almost five years before the accident. His certificates were valid but about to expire. He had had no training since the course. The second defendant's evidence was that drivers were expected to **carry out their own risk assessment for each delivery.**

Both defendants submitted that the accident had been caused wholly or partly by the deceased's own negligence. Further, the first defendant denied the signage was inadequate and alleged that the deceased had not been properly instructed or trained by the second defendant in the use of the platform, and that there should have been a banks man present to assist in its delivery and collection.

Court of Appeal held: The court made no finding as to the extent to which the deceased contributed to his own accident, but found that both his employer and the owner of the site were equally responsible for the accident. The warning signs about the pipe were inadequate, and the employer had failed to train the driver sufficiently or to warn him on the delivery note that there was a headroom problem at the site. The deceased had undergone no training on new plant since his accredited course, and the machine on which he had been trained was about half the size of the one on which he had his accident. Furthermore there should have been procedures in place to keep at the forefront of the employee's mind of his surroundings to make sure the area was safe. The Court therefore considered that both defendants were equally responsible for the accident. The provision for own risk assessments was clearly unacceptable.

Held both defendants were equal responsibility for the accident.

***R v Willmott Dixon Construction Ltd* May 2012**
EWCA Crim 1226

Circumstances: The defendant had been contracted to refurbish a department store. The work involved the handling of significant amounts of asbestos. Health and Safety Executive inspectors identified deficiencies in the way the work was carried out and the defendant was charged for breach of duty under s2(1) and s3(1). Under s33(1) such breaches become criminal offences. Section 40 provided that, once the prosecution had established that there was a risk to workers, the burden fell on the defendant to prove, on the balance of probabilities, that all that was reasonably practicable had been done to satisfy the duty.

The prosecution claimed that any such dealings with asbestos created the requisite risk of exposure to asbestos-containing substances which might cause harm. The defendant argued that it had to be demonstrated that there was some risk of actual danger to those protected by the legislation, and adduced expert evidence to the effect that, although there was no threshold of danger in relation to asbestos, the risk in the instant case was negligible. The defendant

made unsuccessful submissions of no case to answer at the conclusion of the prosecution's case and at the conclusion of the evidence. The issue to be determined was whether the judge had been entitled to leave the case to the jury.

At first instance the defendant was found by the jury to be in breach of the Health and Safety at Work etc. Act 1974 s2(1) and s3(1).

On appeal: The health and safety legislation had to be seen and interpreted in its correct social policy context. Its purpose was to protect those who otherwise could not protect themselves. It did not impose absolute liability but did impose strict obligations in terms of justifying the steps taken**.** The Court held that the judge had been correct in concluding that it was for the jury to consider whether the requisite material risk of danger had been for offences of the Health and Safety at Work etc. Act 1974 s2(1) and s3(1). The instant case had to be seen in the context that the works were significant ones of a potentially hazardous nature, taking place in a store which remained open to the public. The works were accompanied by the failures identified by the inspectors, in a context where there was no known threshold of danger. When one considered whether the aims of s2 and s3 had been fully accomplished, and whether a reasonable person would have appreciated that there was a risk of exposure to asbestos and taken steps to guard against it, it was appropriate that the judge had concluded that those were matters to be left to the jury.

Appeal dismissed.

***Ghaith v Indesit Co* May 2012**
EWCA Civ 642

Circumstances: The claimant suffered a back injury whilst carrying out a stock take which required him to lift and move boxes. He brought a claim against the defendant employer alleging a breach of the Manual Handling Operations Regulations 1992.

The first instance: It was agreed that his injury had accelerated a pre existing back condition. The judge dismissed the claim on the basis that he was not satisfied that his injury was caused by a breach of Regulation 4, which required the employer, where a manual handling operation could not be avoided, to **make a suitable and sufficient assessment of the operation and take appropriate steps to reduce the risk of injury.** Indesit had issued a repair and maintenance risk assessment in August 2006 and a manual handling risk assessment in December 2006.

The claimant appealed, submitting that it was for the employer to demonstrate that the risk of injury was at the lowest level reasonably practicable.

Court of Appeal held: The requirement in Regulation 4(1)(b)(ii) to make a suitable and sufficient assessment was separate from and additional to the requirement to carry out a risk assessment in Regulation 4(1)(b)(i) and the burden of proof was on the defendant to prove that it had taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. The relevant feature of stock taking was the risk of injury to the back or other parts of the body due to handling items of equipment over what might be a lengthy period. The defendant failed to address this within its risk assessments. There was no suitable or sufficient assessment of the relevant risk. The onus was on the defendant to show that it took all reasonable practicable steps to reduce the risk. That burden was inevitably difficult to discharge. There was no obligation on an employee to suggest ways in which the risk could be reduced. There should be regular breaks of reasonable length in the stock taking process for the benefit of the employee.

Appeal successful. Defendant liable and no deduction for contributory negligence. The matter was remitted to the county court for an assessment of quantum.

Wilson v Baxterstorey Ltd **April 2012**
Unreported

Circumstances: The claimant claimed damages for personal injuries arising from a repetitive strain injury allegedly sustained during her employment with the defendant. The claimant was employed as a chef to prepare food in the staff restaurant and acted as an assistant manager. Her responsibilities included mixing up to 10 salads a day in a large aluminium bowl and making cakes three days a week. She alleged that holding the bowls using a pincer grip with her left thumb, particularly when decanting food, caused her to develop de Quervains Stenosing Tenovaginitis (DQT). She submitted that the method of holding the bowls was unsafe and, as the tasks were manual handling operations for the purposes of the Manual Handling Operations Regulations 1992, a **risk assessment** should have been carried out.

Held: The claimant's claim failed. Her work practices were an unlikely cause of the DQT and on the evidence the DQT was likely to have been idiopathic. The judge considered that the claimant's witness evidence was unreliable. The court accepted the defendant's submissions that the activities were (a) not unduly onerous, whether a pinch grip was used or not; (b) were only undertaken for a very short time and only for limited periods of time during the day; (c) were not repetitive or forceful; and (d) did not give rise to the alleged or any foreseeable risk of injury. Accordingly, there was **no need for a risk assessment of how the claimant should have emptied the contents of the mixing bowls**. It was such a mundane task involving no foreseeable possibility of injury that the requirement for an assessment would not arise. As to the common law duty, there was nothing unsafe about the system of work and it could not be said to be unsafe for an employee to decant such a limited number of bowls over such a limited amount of time in the manner described.

Judgment accordingly, claim dismissed.

Sutherland v McConechy's Tyre Service Ltd **February 2012**
Unreported

The claimant was a tyre depot manager employed by the defendant. He sustained injuries to his leg when a commercial vehicle tyre which he had been inflating in a service bay blew off the wheel. He alleged negligence by the defendant, inferring to its failure to enforce the health and safety policy that a safety cage had to be used when inflating tyres.

The defendant stated that it had fulfilled its duty of care to the claimant and that he had caused or contributed to his injuries by failing to take reasonable care for his own safety; and, further, that he was the author of his own misfortune.

Held: The defendant was not liable and the claim was dismissed. The court remarked that had the issue of contributory negligence arisen, the claimant would have been found to have been 80 per cent contributorily negligent as he ignored the defendant's protocols. Moreover, the claimant was responsible for implementing the defendant's health and safety system.

Claim dismissed.

Hadlow v Peterborough City Council **October 2011**
EWCA Civ 1329

Circumstances: The claimant was an employee of the defendant and had been working in a secure facility for women operated by the defendant. The facility was secure on account of the women's dangerous behaviour. The claimant was to teach a class of three inmates within a locked classroom. The defendant's policy specified that staff members should not be alone with more than two women. The teaching assistant who usually took the class with was running late.

Arrangements were therefore made for a member of staff sit in until the teaching assistant arrived. Two escorts brought the women into the locked classroom and then left. The claimant was seated, and as she tried to get to the door quickly to ask an escort to stay, she tripped over her chair and injured herself.

First Instance: Defendant liable. The Judge held that the defendant's failure to provide another staff member was negligent; that the claimant was following the policy; that there was a direct causal connection between the claimant being left alone with the women and her injury; and that the fact that it was not a conventional causal connection was immaterial.

The defendant appealed on the basis that the accident was not reasonably foreseeable. It argued that if the claimant had sustained her injuries as a result of the threat of violence from the women or actual violence, her accident would have been foreseeable, but as it was, the claimant by her actions, had broken the chain of causation.

Held: Appeal dismissed. The Court of Appeal dismissed the appeal, agreeing with the initial judgement that despite the accident occurring in an unlikely manner, the defendant was in breach of duty and that the accident had arisen as a result of her taking action, quite reasonably, to remove the risk and remedy the local authority's breach of duty in leaving her alone with the three women.

***Reynolds v Strutt & Parker LLP* July 2011**
EWHC 2263 (QB)

Circumstances: The claimant had attended an activities afternoon at a country park arranged by his employer for all of its employees who worked at one of its offices. The event was organised by two of the defendant's partners. It was decided that the end of the event would include a cycling race. Before the event took place, the organisers and defendant's health and safety officer had met and discussed the safety of using bicycles and they dismissed the idea of using mountain bicycles. At the race, of the 12 cyclists involved, only one wore a helmet. Near to the finish line, the claimant collided with that cyclist collided, resulting in the claimant sustaining a serious brain injury.

The claimant brought a claim alleging negligence, breach of the common law duty owed by an employer to an employee, and breach of statutory duty under the Health and Safety at Work etc Act 1974. Expert evidence indicated that if the claimant had been wearing a helmet it was very unlikely that he would have sustained the injury that he had.

The defendant argued that the claimant's injuries were not sustained in the course his employment. Further the defendant contended that as the claimant was an experienced cyclist, he could have chosen to use a helmet and the fact that he did not suggested that he would not have complied if he had been told to wear one.

Held: The court found that the claimant was not participating in the course of his employment for the purposes of health and safety legislation. Nevertheless, the partners who organised the event had breached their duty of care. Neither partner had the necessary skill and knowledge to make the necessary **risk assessment**, so they overlooked the most obvious risk, namely collision. Regarding the wearing of a helmet, if the claimant had been told to wear a helmet and had not complied, he should then have been excluded from the race. The defendant was negligent in its communication of information concerning the wearing of helmets. The defendant was therefore liable but the collision occurred as a result of a deliberate attempt by the claimant to force the other cyclist out of the race or, at the very least, as a result of a reckless disregard for his own and the other cyclist's safety.

The judge concluded that therefore the defendant was liable but that the claimant was 2/3 contributory negligent.

Hufton v Somerset County Council **July 2011**
EWCA Civ 789

Circumstances: The claimant pupil slipped and injured herself at her school, which was maintained by the defendant. She was aged fifteen and a half and fell in the main assembly hall on an area which was wet. She alleged that the accident had been caused by the defendant's negligence and breach of statutory duty. The essence of the claim was that on the day in question it was raining. The school staff had negligently permitted pupils to walk directly into the assembly hall from the quad through the fire exit doors, thus depositing water onto the floor of the assembly hall, where the claimant slipped.

First instance: The claim failed as the judge accepted that the defendant had a reasonable system in place in order to prevent the floor of the assembly hall becoming wet.

The claimant appealed to the Court of Appeal on nine separate grounds. The principal grounds were based upon an acceptance of the judge's findings of primary fact. The claimant contended that the defendant did not have a proper system in place for (a) preventing the assembly hall floor from getting wet or (b) clearing up water if the floor did become wet.

Held: The Court of Appeal rejected the claimant's appeal, stating that there is no basis upon which the court should or can interfere with the decision of the trial judge on the issue of reasonable care. The school's **risk assessment** was reasonable and identified appropriate control measures. Its recommendations had been properly implemented. The law did not require an occupier of premises to take measures which would absolutely prevent any accident from ever occurring; all that was required was the exercise of reasonable care. The judge had made primary findings of fact and had evaluated those facts. It therefore followed that the defendant was not liable either in negligence or for breach of statutory duty.

Appeal dismissed.

Uren v (1) Corporate Leisure (UK) LTD (2) Ministry of Defence **February 2011**
EWCA Civ 66

Circumstances: The claimant was a senior aircraftman in the RAF. He took part in a health and fun day at the base where he was stationed. He participated in a team relay race which involved retrieving objects from an inflatable pool installed on a grass playing field and filled with water to a depth of about 18 inches. The first defendant was an events company which had supplied equipment, including the pool, and personnel for a series of games.

The pool's sides were approximately cylindrical and about a metre high. The claimant took part in the second heat of the game. He entered the pool head first and struck his head on the pool's base, breaking his neck. Staff employed by the first defendant gave instructions and supervised the operation of the game. However no instruction was given that participants should not go into the pool head first. The claimant alleged that both defendants had **failed to carry out adequate risk assessments** and that if proper risk assessments had been carried out the participants would have been forbidden to enter the pool head first.

First instance: The judge held that the risk assessments were inadequate and that the second defendant could not delegate risk assessment to the first defendant. However, the judge deemed that on the evidence the game was reasonably safe even when participants entered the pool head first. The claimant appealed and the second defendant cross appealed against the judge's finding that its risk assessment was inadequate; and that it was not entitled to rely on the first defendant to conduct the risk assessment.

Court of Appeal held: The judge's conclusion that the game as played carried only a very small risk of serious injury was untenable. It could not be said that the judge's decision was wrong, but

nor could it be said that it was sound. The judge had held that there was a risk of serious injury in the game as played but because the risk was very small and because the game as played had some social value, the defendants were not in breach of duty in allowing it to be played. The judge did not make an error of approach in balancing the level of risk against the social benefits of the activity. However, since his conclusion on the degree of risk was unsound, the balancing exercise was affected and the final conclusion had to be set aside. The appeal was allowed and the case remitted for retrial.

The duty to undertake a risk assessment was closely related to the common law duties of the employer and the judge was right to hold that it was **non-delegable**. It required the reasoning process of an intelligent and well informed mind'. If an employer used a contractor for some activity and satisfied himself that the contractor had carried out a thorough risk assessment in relation to that activity, that might well lead to the conclusion that the risk assessment carried out by the employer was suitable and sufficient even though it was not as detailed as would otherwise be required. That would be a question of fact in each individual case and it was impossible to generalise as to the standard of risk assessment which would be required of an employer. In the instant case, on the facts, it was clear that the first defendant did not carry out a suitable or sufficient risk assessment and it could not sensibly be argued that the second defendant could properly rely on it. The cross-appeal was dismissed.

Appeal allowed; cross-appeal dismissed.

Practical implications

The cases provided within this document explicit fundamental aspects that need consideration to minimise legal liability. The law does not expect companies to eliminate all risks, but employers are required to protect persons as far as reasonably practicable. Risk management duties are imposed every employer, self-employed person and principal (including contractor and sub-contractor). These parties must take all reasonably practicable measures to ensure that the workplace is safe to every person within its premises.

It is a legal requirement for organisations with five or more staff to carry out documented health and safety risk assessments of all of their significant hazards. How these assessments are conducted varies on the firm level. However there are three core components which are universal to all assessments: Hazard Identification, Risk Evaluation and Risk Control. The Health and Safety Executive guidance advocates a five step approach to risk assessments:

1 Identify the hazards present.

2 Identify the people at risk from the hazards e.g. employees, contractors, visitors etc. Particularly vulnerable employees should also be considered, eg young people and new/expectant mothers.

3 Evaluate the risk, taking into account the likelihood and severity of any accidents. Existing controls in place should be identified and evaluated.

4 Record the findings on a suitable form.

5 Review the risk assessment regularly.

A holistic risk assessment requires a multi-disciplinary team of experienced individuals. The assessment should engage with all levels of personnel, the actions and duties of performing a risk assessment should not be the responsibility of one individual. It is essential that once the assessment highlights potential significant risks, that this leads to the planning, execution and monitoring of these risks. Risk assessments are an iterative process, requiring regular review, in particular with any process alterations.

Once a risk is identified careful diligence is required to implement suitable practices to reduce this risk. In the case of *Ghaith v Indesit Co* the defendant had conducted a risk assessment detailing the potential risks associated within manual handling. However it had neglected to implement procedures to reduce the risks to the lowest level reasonably practicable and consequently it was liable for the injuries sustained by an employee. This is also highlighted in the case of *Hadlow v Peterborough City Council*, where the defendant had indentified safe working protocols as a result of suitable risk assessments, but failed to implement them. In contrast the case of *Hufton v Somerset County Council* illustrates the effect of undertaking suitable risk assessments, deemed to be reasonable and identifying appropriate control measures which were followed. Further there is no automatic liability for an alleged fault with the absence of a risk assessment. It is not necessary to take measures to prevent every accident from occurring, but to exercise reasonable care.

The complexity of assessing risk assessments is detailed within the *Uren* case. The judge advocated that the evaluation of a suitable risk assessment is question of fact in each individual case and it is impossible to generalise as to the standard of the risk assessment which would be required. This emphasises the importance to conduct a detailed and thorough assessment to protect against the judge's discretion of what is reasonably practicable. This case further demonstrates a number of complexities associated with risk assessments. For instance non delegable duty and the issues attributed to the presence contractors in deeming who is responsible for the completion of a risk assessment and who is liable if an accident arises. This

case demonstrates the importance of employers conducting their own risk assessment to ensure safe compliance of the non delegable duty.

Furthermore this case further illustrates the complexities associated with 'extracurricular' work activities. Team bonding activities and fun days are events where risk assessments are commonly neglected. In *Reynolds v Strutt & Parker* in which the defendant had failed to conduct a risk assessment there was liability despite the claimant not acting within the scope of his employment.

In the tragic case of *Evans*, the defendants failed to implement the iterative process of risk assessments. The employee had failed to retrain the deceased, who was expected to conduct the on site risk assessment. This case represents how risk assessments are intertwined with training programmers to ensure employees understand the protocols of business practices and within this case possess the skills to conduct a suitable risk assessment.

But it is not all doom and gloom for employers. Regularly employers successfully defend allegations of negligence and breach of statutory duty by implementing safe working practices as outlined within regular and adequate risk assessments. Conducting sufficient risk assessments protects employers from civil claims such as within the case of *Wilson* which stated that the allegations of the cause of injury brought against the employer were not sufficient to require risk assessing. This further depicts the nature of spurious civil claims epitomising the necessity of risk assessments. A further successfully defended allegation is that of the *Sutherland* where the claimant manager at the depot was acute with the safe working practices as highlighted within the risk assessment. The court ruled that the injury was a result of the employee's failed to act in line with these regulations. This edifies employees' responsibility to adhere to the protocols as established by their employer.

There are several pointers in these recent judgments to augment existing risk assessment advice. Risk assessments are legal requirements for companies exceeding five employers and the neglect of such assessments can led to legal liability. Conducting sufficient risk assessments is a necessary process, not only to protect against civil claims but to provide a safe environment for persons entering and working within premises.