Report of the
Service Director Finance

Agenda Item No:
Meeting: 30 June 2010

NORTH LINCOLNSHIRE COUNCIL

AUDIT COMMITTEE

RISK MANAGEMENT PROGRESS REPORT

1. OBJECT AND KEY POINTS IN THIS REPORT

1.1 To inform members of key issues arising from Risk Management work.

1.2 Regular reporting on Risk Management issues is an important source of assurance for Members to fulfil their role and provides supporting evidence for the annual approval of the Governance Statement.

2. BACKGROUND INFORMATION

2.1 Members receive regular reports throughout the year to update them on key risk management issues. This provides an important source of assurance on the adequacy of internal control and governance arrangements and provides supporting evidence for the approval of the Annual Accounts and Governance Statement. Regular updates are also recognised as good practice by professional bodies CIPFA (The Chartered Institute of Public Finance & Accountancy) and ALARM (Association of Local Authority Risk Managers).

2.2 Internal Audit's independent review of risk management arrangements has been completed and is reported in the Internal Audit's Annual Report elsewhere on this agenda. The review showed that arrangements were generally good and adequate assurance could be provided by Internal Audit.

2.3 Service planning has been enhanced for 2010/11 to explicitly report the risks of none achievement of council objectives. Strategic risks will be reviewed when all service plans are completed to ensure all significant risks are captured. The outcome of this work will be reported to the Audit Committee in September.

2.4 Everyone has an important role to play in managing risks and the message is reinforced at every opportunity. New generic competencies have been introduced which define the behaviour and skills expected and required within all levels of the workforce. These are important tools in workforce planning to ensure the appropriate skills are

available in a modern and progressive council. The importance of risk management is highlighted and forms a significant feature of the competencies. All staff are required to have been assessed against the competencies to identify skill gaps and training requirements. Risk management training provision has been identified for the autumn.

2.5 Risk management forms part of the induction programme for new staff and more detailed coverage is incorporated in the induction of new managers. Training dates have been scheduled throughout the year. The course evaluation record for the last induction for new managers' course provided (26th January) showed the training objectives were met; the trainer showed good knowledge and created interest for the course subject; and there was opportunity for interaction. The next induction training is scheduled for 25th June.

2.6 External Audit conduct a strategic overview of IT controls to inform their risk assessment of the adequacy of the council's control environment each year. This in turn influences the scope of work necessary to form their opinion on significant issues such as the final accounts. The outcome of this work identified no significant control issues to report.

2.7 Issues 4 and 5 of the popular quarterly risk management newsletter 'Risk Roundup' are attached in appendices A and B. Local news and reminders posted on the 'notice board' feature are included in the newsletter help to raise awareness on risk management issues across the council. Two questions on risk management were included in the recent counter fraud survey (details are provided in the counter fraud report elsewhere on this agenda). The results show that 31% had read the risk management strategy or were aware of its contents whereas 52% were aware of the strategy but not of its contents. As a result of these findings further work is underway to summarise the key messages of the risk management strategy to include in the next edition of Risk Roundup and through other communication channels available.

2.8 The CIPFA/ALARM risk management benchmarking questionnaire has been completed. This is a new benchmarking club which will, for the first time, provide comparative measures, help develop SMART indicators and highlight areas for improvement in current arrangements. The self assessment indicated that risk management is embedded and integrated (score 4 out of 5). Benchmarking club outcomes will be reported to the Committee in September (reports are due in July/August).

3 OPTIONS FOR CONSIDERATION

3.1 The Committee should consider whether this update provides sufficient assurance on the adequacy of risk management arrangements detailed in this report. The Committee should ask questions about the contents of the report and seek clarification as necessary.

3.2 The Committee may consider that the report does not provide sufficient assurance on the adequacy of risk management arrangements detailed in this report or may seek further clarification.

4. ANALYSIS OF OPTIONS

4.1 This progress report updates Members on key internal control issues and complies with professional guidance available and is designed to provide this Committee with the assurance required. Members should ask sufficient questions to ensure adequate assurance is provided.

4.2 The option set out in paragraph 3.2 represents an opportunity missed to receive an important source of assurance to assist the Committee to fulfil its role effectively if adequate clarification is not provided.

5. RESOURCE IMPLICATIONS (FINANCIAL, STAFFING, PROPERTY.IT)

5.1 Resources are met from Internal Audit and Risk Management budget.

5.2 Regular reviews of risk management arrangements should safeguard the council's assets and ensure that value for money is achieved in the use of resources. There are no staffing, property or IT implications.

6. OTHER IMPLICATIONS (STATUTORY, ENVIRONMENTAL, DIVERSITY, SECTION 17 – CRIME AND DISORDER, RISK AND OTHER)

6.1 The Chief Financial Officer has a statutory duty under the provisions of the Local Government Act 1972 to ensure the proper administration of the council's financial affairs. The council also has a duty under the Local Government Act 1999 to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

6.2 The evaluation of the council's arrangements will help to promote good corporate governance. Risk management work, as a component of the council's internal control framework ia a key source of assurance to support the Annual Governance Statement. The risk management framework addresses all key risks the council may face. It promotes appropriate action to manage risks to an appropriate level.

7. OUTCOMES OF CONSULTATION

7.1 The Strategic Risk Management Group is made up of representatives from all services and is therefore risk management outcomes are the result of a comprehensive consultation process.

8. RECOMMENDATION

8.1 The Audit Committee should consider the assurance provided by the Risk Management progress report on the adequacy of risk management arrangements detailed.

SERVICE DIRECTOR FINANCE

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Background Papers used in the preparation of this report
Risk Management Strategy and Action Plan 2010-2011

RISK roundup

Issue 4
February 2010

A quarterly digest of risk management issues

Potholes - when to repair? page 3

NUISANCE – NOISE – WORDING OF NOISE ABATEMENT NOTICES
(1) Elvington Park Ltd, (2) Elvington Events Ltd v York City Council, 20.07.09, High Court

Noise abatement notices 'unclear'

"Anyone who received such a notice, would not know what they were to do to avoid criminal liability."

The appellants occupy Elvington Airfield, located at the south-east of York, near residential housing areas and farms. It is a particularly long airfield, originally constructed for the American Air Force.

Since 1992, for aircraft purposes, it has only been used by light aircraft. It is also now used for Formula One motorcar testing which includes engines, not silenced, operating up to 24,000 rpm. There were 21 Formula One test days in 2007.

In 2005 the respondent Council issued two noise abatement notices to the appellants stating that the motor racing and testing activities constituted a nuisance under s.79(1) of the Environmental Protection Act 1990.

Before the case was heard by magistrates in 2006 the appellants conceded that a nuisance had been created. However, they contended that the abatement notices were unclear in respect of requiring the appellants to "take steps necessary to prevent noise", without defining the steps.

The court had to decide whether the notices, failing to state the steps to be taken to abate the nuisance, were sufficiently clear and fair, and whether the Council should have issued a notice stating the steps that the appellants were to take.

The court held that if a noise abatement notice required the abatement of noise and that steps were to be taken to abate it, the notice should specify what those steps were. If, as here, they were not specified, the noise abatement notice would be invalid because the appellants, and anyone who received such a notice, would not know what they were to do to avoid criminal liability in respect of the noise.

However, where it was difficult to assess or quantify the steps that were to be taken, it would not be irrational for a local authority not to specify them in a notice.

The Council could have imposed a simple notice simply requiring the nuisance to be abated, which would not have needed to specify any works to be done or steps to be taken. That would not have been irrational and the notices would have been valid. The appeal was allowed.

This ruling highlights the importance of noise abatement notices being worded clearly and correctly. Under s.80(1) a local authority has a choice as to whether to issue a simple notice requiring the abatement of a nuisance, or also issuing a notice requiring works or steps to be taken to abate a nuisance (known as "single-barrelled" or "double-barrelled"notices).

If a notice states that steps are to be taken to abate a nuisance, the notice must specify what steps a recipient of such a notice must take.

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PUWER – REFUSE VEHICLES – RECYCLING – VEHICLE SAFETY
Morgan v Enterprise plc, 03.04.09, Settlement

Retaining physical evidence is vital

The defendant was contracted by South Ribble Borough Council to carry out collection of waste for recycling. The claimant worked for the defendant as a recycling collector and had been employed in this role since September 2004.

In October 2005, in the course of his work, the claimant was picking up matter for recycling. As he walked at the back of the refuse vehicle, which was stationary at the time, a tyre exploded, injuring his right leg. The claimant, who was aged 33 at the time, suffered a torn ligament in his right knee, was off work for four months and underwent an arthroscopy. He had fully recovered within 18 months of the accident.

The claimant notified the defendant that he intended to claim damages for personal injury and loss as a result of the incident. The claimant alleged negligence and breach of the Provision and Use of Work Equipment Regulations 1998 (PUWER). His allegations included failure to ensure that the vehicle was suitable for its intended purpose and failure to ensure that the vehicle was maintained in efficient working order and in a good state of repair. He also alleged that the defendant had exposed him to a foreseeable risk of injury, had failed to warn him of the danger presented by the vehicle and had allowed the tyre to develop a dangerous defect. He further alleged failure to operate a suitable system of inspecting and maintaining the vehicle.

The defendant was responsible for keeping records of maintenance of their vehicles. The claimant alleged that these records should have recorded daily checks of each vehicle by its driver, including of its tyres, and that any repair requirements were to have been logged in the appropriate record book.

Liability was admitted in July 2006 and settlement was later achieved, although proceedings were issued to protect the claimant from the imminently expiring limitation period.

Neither party was able to establish the cause of the incident due to the defendant removing and destroying the tyre afterwards, before an expert witness had the opportunity to examine it.

The claimant was not aware of any previous similar incidents.The parties settled the claim with a payment to the claimant of £10,000, £5,000 for pain, suffering and loss of amenity and £5,000 constituting sums for loss of earnings and private medical expenses.

Although this claim settled, it highlights the importance of retaining physical evidence after an incident – the defendant had removed and destroyed the tyre that exploded, injuring the claimant. There was therefore no physical evidence of the tyre itself that could be examined to establish what caused the incident – whether it was a latent problem or something that occurred during its use that day. Retaining physical evidence, where possible, is obviously desirable for both defendants and claimants to assist with liability enquiries and potentially for risk management purposes.

PUBLIC RIGHTS OF WAY – CYCLISTS – S.31 HIGHWAYS ACT 1980
Crowther v Sonoco Cores & Paper Ltd, 07.07.09, Bradford County Court

Lane was a right of way

The claimant alleged that, in February 2005, he sustained an injury to his leg after striking his foot against the edge of a concrete trench while cycling along a lane in Halifax. He alleged the lane was owned and occupied by the defendant for the purposes of the 1957 and 1984 Occupiers' Liability Acts and that works they had carried out in the area created a danger to users of the lane.

The defendant denied liability, arguing that the lane was a public right of way and that the claimant was therefore not a visitor under occupiers' liability law. They showed that the lane had been used by the public for at least the preceding 20 years and their premises had been in the same location for 25 years without interfering with the lane.

They had always considered it a public right of way and had never placed any signs along the lane to suggest otherwise. Further evidence suggested that the lane might have been used as a public right of way since the nineteenth century.

The question of whether the lane was a public right of way was tried as a separate issue first. The court held that s.31 of the Highways Act 1980 applied, which states, "(1) Where a way over any land…

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has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it." Subsection (2) provides that the 20 year period is calculated retrospectively from when the right of the public to use it is first questioned.

The court considered the evidence and held that "the obvious conclusion" is that the lane had been used as a public right of way for more than 20 years; the claimant had therefore used it as of right rather than as a visitor.

The result is that the principle in Gautret v Egerton (1867) applies, that a private landowner does not owe a duty of care to the public in respect of a public right of way over his land, unless the landowner creates a hazard on the land in question. This was restated in McGeown v Northern Ireland Housing Executive (1994, House of Lords).The court also rejected the claim of nuisance, ruling that there was no evidence that the defendant had created the irregularity in the lane's surface. The claim was dismissed.

This ruling revisits the important and long established law concerning liability by a private landowner for a public right of way over their land. In cases of uncertainty as to responsibility for a track or path or some other way, it can be useful if not imperative for extensive enquiries to be made of individuals likely to have local historical knowledge of the area. These investigations can establish length of use and by whom the way has been used, and whether s.31 Highways Act applies.

HIGHWAYS – POTHOLES – TRIPS – SCOTLAND
Nugent v Glasgow City Council, 24.06.09, Outer House

No duty to maintain flat road

"Foreseeability of risk of injury was not of itself enough to give rise to a duty to repair."

The pursuer alleged that she tripped in a hole in the pavement in West Nile Street, Glasgow, dislocating her elbow. She claimed damages of up to £200,000 from the defender roads authority, alleging failure to comply with its statutory duty to maintain the road. The area was subject to a monthly walked inspection.

The pursuer alleged that the hole was about two and a half inches (65mm) at its deepest point and its horizontal size was about 12 inches square (30cm²). In June 2006, after the pursuer had intimated that a claim was going to be made, the roads inspector went to the site of the alleged pothole, finding a depression measuring about 30mm deep at its edge and noting it as a "Category 1 defect" requiring repair within five days. The last inspection before the accident, in December 2005, did not record a defect in the area.

The court held that the defect was probably in existence, but smaller, at the December 2005 inspection and was probably caused by traffic.The judge referred to one of his previous decisions, Hutchison v North Lanarkshire Council (February 2007), where he agreed that, at common law, the duty on a roads authority in the maintenance and repair of its carriageways is to take reasonable care; it is not a duty to maintain those surfaces in a uniformly flat condition. Irregularities in the surfaces are to be expected; it will be a matter of degree whether a particular defect creates a reasonably foreseeable risk of injury.

The pursuer must demonstrate that it was reasonable and practicable for the roads authority to have become aware of the defect (and to have repaired it) before she suffered injury.The court accepted that, in December 2005, the hole was a defect that created a degree of risk to the safety of pedestrians. It was likely to deteriorate and was a defect "presenting a moderate level of hazard or risk of structural deterioration" under the defender's classification system. However, foreseeability of risk of injury was not of itself enough to give rise to a duty to repair. There was no evidence that as at 16 December 2005 the hole presented such a material or reasonably foreseeable risk of injury to pedestrians that the defender's failure to repair it before the pursuer's accident in January 2006 amounted to breach of their duty of reasonable care. The claim failed.

The Court of Session accepted that, even if a defect in a footpath or carriageway creates a foreseeable risk of injury, a defending roads authority would be likely to be able to defend a claim for damages from an accident in such a defect if it can show that it operated a reasonable inspection and maintenance system.

MISCELLANEOUS EXPENSES
Ghattaorya v Bailey, 27.05.09, Leicester County Court

Symptoms were exaggerated

"It illustrates a court's irritation with the habitual claiming of 'miscellaneous expenses'"

In December 2004 the claimant was injured when she was travelling in a vehicle which was struck in a rear-end shunt by a vehicle driven by the defendant. The claimant claimed damages for whiplash injuries to her neck and lumbar spine.

Liability was admitted. The claimant alleged that the incident exacerbated her pre-existing back problems, that she was unable to undertake routine shopping and that she had to be assisted by her husband and mother in heavy lifting tasks.

She also claimed that sitting or driving for long periods was painful. She further alleged that she suffered travel anxiety for about two years after the accident.

An orthopaedic consultant gave evidence that the accident would only have caused the claimant to suffer, as a result of the accident, for six months from the date of it. He said that her other symptoms were caused by her pre-existing condition.

The judge awarded the claimant £1,400 in total. He rejected her claim in respect of her back injury and her claims for special damages. He considered rejecting her claim for her neck injury but decided that, although she had exaggerated her symptoms, she was not sufficiently dishonest to have fabricated all the information about that injury.

The judge also dismissed her claims for "miscellaneous expenses" which he said was a "bad habit" of claimant solicitors: the cost of telephone calls, for example, is now quite low.

This award confirms the importance of obtaining accurate information, as far as possible, about a claimant's alleged symptoms, even in relatively low value claims. It also illustrates a court's irritation with the habitual claiming of "miscellaneous expenses". Even where such claims are small, they accumulate over many claims and claimants should be able to justify and support them with evidence.

PUBLIC RIGHTS OF WAY – PEDESTRIANS – TRIPPING ACCIDENT
Young (now Phillips) v (1) Merthyr Tydfil County Borough Council, (2) Merthyr & Rhondda Cynon Taff Ground Work Trust, 07.07.09, Cardiff County Court

No duty to repair bridge

The claimant claimed damages from the defendants after she sustained injury when she tripped while walking across a footbridge in a park in February 2005. Photographs showed the bridge in a state of disrepair at the time of the accident. The claimant alleged negligence, nuisance and breach of duty under the Occupiers' Liability Act 1957 (the 1957 Act).

The park is owned by the first defendants, D1, who contracted with the second defendants, D2, to allow D2 to carry out certain works in the park. These included constructing paths and bridges. The defendants agreed they were both responsible for the bridge at the time of the claimant's accident. D1 argued that the footpath and the bridge to which it led were part of an unadopted highway and that they therefore had no duty to maintain it under the Highways Act 1980.

They also argued that the rule in McGeown applied, referred to in Crowther v Sonoco Cores & Paper Ltd (page 2): there is no liability on a private owner or occupier of land, over which there is a public right of way, for injuries sustained by the user of the right of way, because the user uses it as of right.

The court heard that D1 had implied to the public that they could cross the bridge at any time. The pathways and bridges in the park were unobstructed, clearly marked and had the physical attributes of a highway. The public had uninterrupted use of these ways for about four years before the accident.

However, the court held that, although D1 had not adopted the bridge as a highway, it had formed part of the highway though not maintainable at public expense. The court held that the state of disrepair was obvious and the claimant had used this route on numerous occasions before her accident. D1 was not under a duty to repair it although, had it been adopted, they would have been obliged to maintain and repair it under s.41 of the

This is another example of the application of the principle in McGeown, that a private owner of land is not liable for injuries sustained on a public right of way over that land. As this case illustrates, the use of the land and the intention of the owners needs to be carefully examined when addressing these types of claims. The possibility of a defence under this principle should always be considered where it is alleged that a defendant is liable under occupiers' legislation for an accident on what might be an unadopted public right of way over private land.

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Highways Act 1980.In the circumstances, the court concluded that the bridge was part of the highway that had not been adopted by D1 and the claimant was therefore there as of right, not as a visitor under the 1957 Act. The claim was dismissed.

CAR PARKS – SLIP ON ICE – INTERPRETATION OF STATUTE – SCOTLAND
Munro v Aberdeen City Council, 17.09.09, Outer House

Employer not liable for ice slip

The pursuer worked for the defenders. In March 2004 she slipped on ice in a car park in Aberdeen that was part of her workplace for the purposes of the Workplace (Health, Safety and Welfare) Regulations 1992 (the 1992 Regulations).

Damages were agreed, subject to liability, of £150,000 which included a 25% discount for contributory negligence.The parties agreed how the accident occurred but a dispute arose as to the correct interpretation of reg. 5(1) of the 1992 Regulations, particularly whether it applies to transient hazards such as ice. The pursuer had based her claim on an alleged breach of absolute duty under this regulation which requires a workplace to be "maintained … in an efficient state, in efficient working order and in good repair".

If it applies to transient hazards, there would be strict liability on the defenders with no defence of reasonable practicability offered by reg. 12(3). The pursuer argued that the ice presented an obvious risk of danger to users of the car park and, as the car park was part of her place of work, the defenders had breached reg. 5(1) by failing to maintain it in an efficient state.

The defenders argued that reg. 5(1) did not apply to transient hazards, relying on reg. 12(3) which requires floors and traffic routes in workplaces to be kept free, as far as reasonably practicable, from obstructions and substances that might create a tripping or slipping hazard. They argued that, if the pursuer's case is accepted, employers would be prevented from showing that no reasonably practicable steps could have avoided the accident.The judge was referred to numerous relevant cases, including the Court of Appeal decision in Stark v The Post Office (2000), but found a compelling argument in the Court of Session decision in McEwan v Lothian Buses plc (2006), where a fitter slipped on a surface made slippery from spillage of coolant fluid. In that case, the judge said that if reg. 5 were given an unrestricted meaning, many of the other regulations would become otiose and the defence of reasonable practicability in certain situations, such as under reg. 12(3), "might as well not be there at all".Here, the judge held that regs. 5 and 12 reflect the different duties on employers in respect of long-term hazards and short-lived, transient conditions. The claim failed.

This important ruling will be of interest to employers in clarifying their duty owed in respect of transient hazards on workplace traffic routes, including car parks. The judge emphasised that non-structural or transient dangers might occur so frequently as to invoke the absolute duty under reg. 5(1). However, he accepted that with genuinely short-lived dangers, such as a spillage or ice in an outdoor area, an employer would have the opportunity to demonstrate that, under reg. 12(3), it had done everything reasonable practicable to avoid dangers and nothing else it could reasonably have done would have prevented the accident in question. The precise nature and frequency of occurrence of the hazard alleged to have caused such an injury will therefore be of central importance to these types of cases.

"The precise nature and frequency of occurrence of the hazard will be of central importance"

The council gratefully acknowledges the contribution made by its insurers, Zurich Municipal, in providing articles for this publication.

Any employee intending to take action arising out of these articles should, if in any doubt, contact the council's legal section for advice before doing so.

If you want further information or advice, please contact the insurance and risk management team.

NOTICEBOARD

Money Laundering

A policy was approved by the Audit Committee on 26 January 2010 as part of the Anti Fraud, Theft and Corruption Strategy.

Targeted training was provided to relevant staff on 16 December 2009

Strategic Risk Registers (SRRs) Updates

Reminder: Is your Strategic Risk Register up to date?

As with ORRs, your SRRs are dynamic documents and need to be regularly reviewed.

Operational Risk Registers (ORRs) Reminders

Would you please amend you Operational Risk Registers by 28 February 2010, as part of the ongoing QPR process.

SRMG Intralinc site

Reminder, there is a wealth of risk management information on the council's intralinc site. Access the site via: councilwide issues, groups, strategic risk management group.

Risk Management Training courses

Risk Management for Managers induction course was held on 26 January 2010.

This was made available to managers new to the council and, and for those recently promoted from within the organisation.

Designed by North Lincolnshire Council Publications Unit Ref 8044

RISK roundup

Issue 5
June 2010

A quarterly digest of risk management issues

Icy car park: costly slip page 3

ACCIDENT AT HORSE FAIR – DUTY TO OBTAIN PL INSURANCE
Glaister and others v Appleby-in-Westmorland Town Council, 09.12.09, Court of Appeal

No council insurance duty

In June 2004 the first claimant, C1, had taken his wife and daughter, the other two claimants, to the Appleby Horse Fair, an annual event in the small Cumbrian town. A country road outside the defendant's boundary was used for racing and showing horses. The claimants were at the verge when a horse broke loose nearby and someone called for C1 to take its lead. As he did so, the horse kicked him in his head, causing him serious injuries. He was aged 44 at the time.

The claimants claimed damages, C1 for his injuries and his wife and daughter for psychological injuries from witnessing the incident. They abandoned their original allegation that the defendant was negligent in failing to tether the horse – the defendant neither owned the horse nor organised the event and its owner was unknown.

The claimants pursued their claim alleging that the defendant's failure to ensure that the organiser had appropriate public liability insurance (PL insurance) in place to cover this type of incident resulted in economic loss to them.

At trial, the Recorder held that there was no single body controlling the fair but the defendant should have ensured that suitable PL insurance was in place – the fair largely took place on its land although the accident did not.

The defendant appealed. It contended that it was under no duty to ensure that PL insurance was in place by the organisers and that, even if it were, its failure did not cause any loss to the claimants.

The Court of Appeal held that the defendant was not the occupier of the area where the incident occurred, nor was it responsible for the activities taking place on land outside its boundary. Further, for the defendant to be liable, the parties had to have a special relationship – something that involved economic consequences for the claimants from which they could expect the defendant to protect them if the defendant breached its duty of care to them. There was no special relationship between them or between the defendant and the thousands of other visitors to the fair. The defendant was not under a duty to ensure that PL insurance was in place, nor was it responsible for the horses being tethered or supervised.

The defendant could not be held responsible for C1's accident because that would render it liable for the negligence of a third person for whom it was not directly legally responsible. The appeal was allowed.

This is a robust Court of Appeal judgment concerning the responsibility of local authorities for certain activities at local fairs and festivals. The Town Council was held not responsible for a tragic accident at its annual horse fair. Although the fair mostly took place within its boundary, the accident occurred on a road outside it. Further, the Council was not the organiser of the event in relation to which the incident happened, it had no duty to ensure the safe conduct of the activity, nor was it under a duty to ensure that the organisers had suitable public liability insurance in place to cover their particular activities.

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LOCAL SAFEGUARDING BOARD – ASSAULT Of SCHOOL PUPIL
R (Webster) v Swindon Local Safeguarding Board, 22.10.09, High Court (1) Webster, (2) Webster and others v Ridgeway Foundation School, 05.02.10, High Court

Harm from attack 'not foreseeable'

"The court held that the school had not breached its duty of care by not fencing the school perimeter."

One afternoon in January 2007, 11 Asian men arrived at the school that the claimant, W, attended. The claimant is white and was aged 15 at the time. The Asian men repeatedly kicked and punched W and struck him with a hammer, fracturing his skull. The men were later imprisoned for offences relating to the attack.

W's mother sought a review of the incident by the Swindon Local Safeguarding Board (LSCB). LSCBs were established by the Children Act 2004 to safeguard the welfare of children. They are governed by the LSCBs Regulations 2006 (the Regulations). LSCBs may carry out reviews or investigations, including Serious Case Reviews in cases of known or suspected abuse or neglect, where the child has either died or been seriously harmed. Government Guidance for carrying out Serious Case Reviews includes a timetable for the review process.

W, through his mother, also brought a civil claim against the school, alleging that despite knowing of racial tensions at the school it had failed to take measures to prevent the attack.

The respondent only agreed to carry out a Serious Case Review after the intervention of the Secretary of State for Children, Schools and Families. However, given the ongoing civil claim, the respondent initially limited its review to exploring lessons that could be learned.

W applied for judicial review of that decision. The court held that the review should have been promptly instigated and not limited to matters after the attack. Further, it was unnecessary to delay a full review by awaiting the outcome of the civil case.

In addition, the school had notified the respondent that it would not be able to co-operate with the respondent due to instructions from its public liability insurers. The court held that this frustrated and further delayed the review process, which is not what the Regulations intended. The application was granted.

The second case is the judgment on the civil claim. The claimants, W and members of his family including his mother, claimed damages from the school for personal injury, alleging they suffered post-traumatic stress disorder from witnessing the aftermath of the attack. The claimants alleged the school had negligently failed to keep out intruders by, for example, fencing the boundaries. They also alleged the school had failed adequately to address racial tensions and failed to do more to protect W on the day he was attacked.

The court held that the school had not breached its duty of care to W by not fencing the school perimeter – the dangers were not so serious that the school should have gone to the expense of doing so, and it would have had to spend time and resources dealing with matters such as planning permission.

The harm from the attack was not reasonably foreseeable, irrespective of how the school dealt with race matters. There was no evidence that the attack was caused by any alleged omissions by the school and the personal injury claims failed.

A Serious Case Review under these fairly new regulations should proceed promptly and a LSCB does not need to await the outcome of any related civil proceedings before instigating it. The court criticised the school's PL insurers for delaying and frustrating the review process. The LSCB could itself have asked the insurer for reasons for their stance, emphasising to the insurer that the Review was not an exercise to establish fault or liability. If insurers could effectively thwart statutory Serious Case Reviews, this could potentially have such a significant effect on public policy as to require the matter to be referred, ultimately, to the FSA.With regard to the civil claim, the court emphasised that where schools and local education authorities adopt policies such as the Race Equality Policy, they are not responsible for ensuring they are implemented; failure to implement will not alone be evidence of negligence. Further, where those policies are implemented after an incident such as in this case, that is not necessarily evidence of pre-incident negligence.

HSE PROSECUTION – ACCIDENTS IN CLASS – PLASTER OF PARIS
Governing Body of the Giles School, Boston, Lincolnshire, 12.10.09, Boston Magistrates Court

Risk assessments vital in schools

"A risk assessment for the handling of hazardous substances had not been carried out."

This prosecution was against the school's governing body, the school having foundation status; it was therefore not against the local education authority.

During an "A" level art and design lesson, a 16-year-old student, S, was making a cast of her own hands using plaster of Paris. She asked her teacher for guidance. S placed her hands directly into the mixture to make the cast, the mixture quickly began to set and S's hands were stuck.

Unbeknown to S, when plaster of Paris is mixed with water a chemical reaction occurs, creating extreme heat. Paramedics were called to try to remove the plaster of Paris from S's hands but it set further, while her hands were burning. S was taken to hospital then to a specialist burns unit. Her hands were burned so severely that all but two of her fingers, as well as both thumbs, had to be amputated.

It later emerged that a risk assessment for the handling of hazardous substances had not been carried out, students had not been warned of the potential dangers of plaster of Paris, nor had they been instructed to wear any protective equipment when handling it. Further, the defendant did not report the incident to the Health and Safety Executive (HSE).

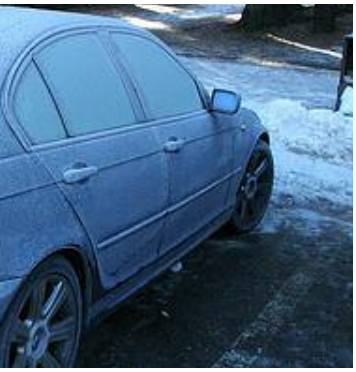
The HSE warned of the "dreadful consequence" of failing to carry out risk assessments in schools and failing to inform and prepare pupils for the risks involved in using hazardous substances.

The defendant pleaded guilty to breaching both s.3(1) of the Health and Safety at Work Act 1974 and regulation 3(1)(c) of the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (failing to report an accident relating to work which resulted in injury requiring hospital treatment). It was fined £16,500 with £2,500 costs.

This serious accident in the classroom highlights the importance of schools and local education authorities ensuring that risk assessments in educational establishments are properly carried out. The HSE warned that these "must not be viewed as burdensome, but instead, paramount to pupil safety". Doing so will obviously assist in the avoidance of exposure of such establishments to civil claims for personal injury and loss.

CAR PARKS – ICE: N v Hertfordshire Police Authority, 09.06.09, Settlement

Minor injury led to major costs



The claimant worked as a licensing officer for the defendant. In November 2005, she had parked her car in a space reserved for employees and, as she stepped out from the car, she slipped on ice and fell. She sustained a soft tissue injury to her right elbow and injured her arm. She sought damages from the defendant, alleging breach of duty under the Occupiers' Liability Act 1957. She also alleged negligence of the defendant in failing to grit the car park.

The claimant alleged that, as a result of the accident, she was unable to drive, write or work.

The defendant did not dispute liability. It was aware that water would sometimes not entirely drain away and grit was available. The area had not been gritted before the claimant's accident.

The claimant received physiotherapy but in March 2006 was diagnosed with complex regional pain syndrome. The medication she received did not relieve her pain. The claimant became depressed and twice attempted suicide. She had no serious recent history of psychological illness. She underwent psychiatric treatment but her pain continued. Her expert medical witness suggested that she should receive further treatment including physiotherapy. The defendant's expert considered that a spinal cord stimulator would help her but the claimant was concerned about the risks of this surgical procedure. This was expected to relieve her pain but a tingling sensation would remain. The claimant did not intend to accept this treatment.

The parties settled with a total award to the claimant of £550,000. Of this, £50,000 was for pain, suffering and loss of amenity, £240,000 for future loss of earnings and £120,000 for future pension loss. The award included £100,000 for future care and £56,000 for past losses including loss of earnings.

This settlement illustrates how a seemingly minor injury can have significant consequences for the victim and can prove very costly for a defendant, particularly where complex regional pain syndrome develops. However, as the defendant indicated quickly that liability was not disputed, costs of a lengthy argument on that element of the claim were lessened.

PUWER – CHAIRS
Abubakar v Circle Anglia, 03.09.09, Mayor's and City of London County Court

Broken chair did not cause injury

"The judge held that the chair was not defective; the claimant simply missed it."

The claimant worked for the defendant at its east London premises. As she went to sit down in the office, the chair moved unexpectedly and the claimant fell to the floor, injuring her lower back and right shoulder. The claimant claimed damages from the defendant for personal injury and loss allegedly caused by its negligence and/or breach of statutory duty.

The claimant's allegations included that, in breach of regulation 5(1) of the Provision and Use of Work Equipment Regulations 1998 (PUWER), the chair was defective by reason of a broken or missing wheel. The chair was a type of swivel chair, common in offices, that had five legs, each with a wheel attached, fixed to a central column supporting the seat.

The claimant alleged that a colleague, X, also had a similar accident using the same chair earlier in the day of the claimant's accident. X had since retired abroad and only provided written evidence of her accident. However, a witness to that accident said that it occurred when X was sitting in the chair, leaning back on it.

The court noted from the medical evidence that there was no reference to a defective or missing wheel when the claimant was treated for her injury. The first reference to this was made in the letter of claim.

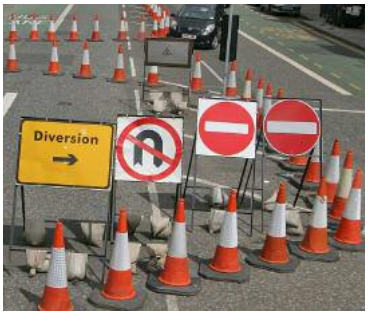
The court was referred to photographs of the chair but the claimant disputed that the chair in the trial bundle photographs was the chair that caused her injury. The judge accepted the evidence of two colleagues of the claimant, who confirmed that the chair in the photographs was the chair complained about.

With regard to the alleged defect, the judge considered that a defective or missing wheel would actually cause the chair to move or slide more slowly than had it not been defective. The judge held that the chair was not defective; the claimant simply missed it when going to sit on it. The accident to X earlier in the day occurred in a different way to that of the claimant and, had there been a defect with the chair as alleged, ie a broken or missing wheel, this, held the judge, would actually have made the chair's ability to roll more difficult. The claim was dismissed.

This illustrates the importance of obtaining evidence of the mechanism of an accident, not only concerning workplace accidents but in general. Witness evidence can be of critical importance to establishing how an incident occurred, either supporting a claimant's version or giving cause to challenge it and so offering a potential line of defence. In appropriate circumstances, handlers will recall the useful tool of requesting further information under Part 18 of the CPR.

HEALTH AND SAFETY PROSECUTION – ROADWORKS – CONTROL SYSTEMS
Balfour Beatty Infrastructure Services Ltd, 18.09.09, Chelmsford Crown Court

Road layout 'not appropriate'



In June 2006 the defendant company was carrying out repairs to an "A" road near Chelmsford. It had reduced the road width to a single carriageway to be shared by traffic travelling in each direction.

One of the defendant's employees was controlling the flow of traffic with a Stop/Go board, allowing traffic travelling in one direction a certain amount of time to pass through while traffic travelling in the opposite direction awaited its turn.

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The HSE emphasised the importance of companies contracted to carry out road works ensuring that sufficient warning signs to motorists are put in place and that those signs are prominent, accurate and clear. This is important for both motorists and the workers themselves and the HSE said it would "not hesitate to take action against any business with this level of responsibility that fails to comply with the law". Highways authorities will wish to ensure that their contractors operate traffic systems, during roadworks or construction, that meet the highest safety standards to avoid the risk of later possible civil claims, even where they might be able to seek an indemnity from the contractor concerned in the event of such an incident.

The defendant said it had also arranged for signs warning of the roadworks to be set in place to warn drivers in advance.

A motorcyclist was travelling along the open side of the carriageway when a car travelling in the opposite direction collided with him. The motorcyclist suffered serious injuries.

The Health and Safety Executive (HSE) investigated the accident. It found that the road layout which the defendant had operated was not appropriate for the traffic using this road. It also found that there was no road sign set up to give motorists advance warning of the roadworks ahead and there was no supervisor in charge of the workers on site.

The HSE prosecuted the defendant under s.3(1) of the Health and Safety at Work etc Act 1974, which requires "every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety". The defendant pleaded guilty and was fined £15,000 with costs of just over £31,000.

ROAD TRAFFIC ACCIDENT – ICE – S.41(A) DUTY
Sheridan v Solihull Metropolitan Borough Council, 18.09.09, Coventry County Court

Council not liable for icy road

At about 7.30am one morning in December 2007, the claimant was riding his motorbike along a road in Solihull when the vehicle skidded on ice and crashed. The claimant, who was aged 30 at the time, sustained various soft tissue injuries. He claimed damages from the defendant for personal injury as well as for repairs to his motorcycle and replacement of damaged clothing.

He alleged that the defendant was negligent and/or had breached its duty under s.41(A) of the Highways Act 1980 (the Act). His allegations included causing or permitting the road surface to be dangerous, and failing to detect and remedy the danger of blocked drainage gullies allowing standing water to freeze.

The defendant denied liability arguing that, under s.58 of the Act, it had taken all such care as was reasonably practicable to ensure safe passage along the highway was not endangered by snow, ice or standing water. The defendant submitted evidence of its winter service plan. The road in question was gritted the evening before the accident and a regular gully cleansing system operated, the last cleansing before the accident being a week earlier.

This is an example of the need to examine the circumstances of an accident carefully. The highway authority took its highway and drainage responsibilities very seriously and could produce documentary evidence of the operation of a proper winter maintenance policy. Examining a claim in detail and obtaining in-depth witness evidence might reveal that the circumstances are not as straightforward as they first appear.

The defendant's drainage engineer gave evidence that, in the winter of 2008, he observed that water would sometimes trickle on to the road from adjoining land. Vehicles passing through would spread this water across the road and, when it was sufficiently cold, it would freeze on the surface. The defendant did not previously know about this and argued that it was an unforeseeable transient condition not caused by its negligence or any breach of statutory duty.

The judge held that the water, which had trickled on to and spread across the surface of the road from the adjoining land, was a condition that arose independently of the alleged blocked gulley. Further, had the claimant established that standing water arose from the blocked gulley, causing the accident, the defence of reasonable practicability would be accepted – the defendant had reasonably believed that any blockage in the gulley would have been cleared by its cleansing method (jetting).

With regard to the other steps the defendant had taken, the area was not a "known wet area" and salting the road at 7pm on the previous evening was a reasonable measure. There was no foreseeable risk of the salt being washed away overnight.

The judge accepted that these circumstances were unusual and there was no reason why the defendant could or should have known that salting the evening before the accident would not have remained effective until 9am the following morning. The claim was dismissed.

KERBSTONES – LIGHTING – NUISANCE
Seymour v Milton Keynes Council, 22.10.09, Milton Keynes County Court

Kerbstone was not dangerous

One evening in February 2006, the claimant was walking through a bus station car park towards the pedestrian exit when she tripped over a four-inch high kerbstone which ran across the exit. The claimant, aged 64 at the time, sustained a soft tissue injury to her lower back, aggravating a pre-existing condition. She also felt pain in both her legs.

She sought damages from the highway authority, alleging breach of duty to repair or maintain the highway under s.41 of the Highways Act 1980 (the Act). She also alleged negligence and that the presence of the kerbstone amounted to a nuisance caused or permitted by the defendant. She alleged, in particular, failure to remove the kerbstone or ensure the area was safe for pedestrians and failure to warn of the kerbstone or to provide suitable lighting so that pedestrians would be better aware of it.

The defendant denied liability, arguing that the kerbstone's presence did not constitute a nuisance. It also argued that failure to remove the kerbstone did not render the area unsafe for pedestrians. Its inspections had not identified the kerbstone as dangerous or defective.

Further, there had not been any previous similar incidents. The defendant alleged that the claimant was responsible for her fall and injury due to her failing to look where she was going.

The judge noted that the kerbstone created a step in what was a narrow path but this layout could be found anywhere along the pathway. The kerbstone was not a defect caused by lack of repair and s.41 of the Act did not apply. With regard to nuisance, the judge held that a mere inconvenience was not a public nuisance. The kerbstone was a nuisance in the ordinary sense but not a dangerous obstruction.

With regard to lighting, the judge held that while it was inadequate there was a certain amount. Not all the lights in the area had failed and there was no negligence in failing to light the kerbstone.The judge noted that the claimant had walked across this car park on several previous occasions in the daylight and the kerbstone was not out of the ordinary. The claim was dismissed.

This is another example of a normal feature of a highway not being regarded as a hazard or defect. The claimant, familiar with the area, was unable to succeed in alleging that a trip over a kerbstone, of which she was aware and had crossed on several occasions, rendered the defendant liable under s.41, that it constituted a nuisance or that the defendant was negligent for the poor lighting of the feature itself. The court also distinguished between negligent and inadequate lighting. This ruling shows that the matter as a whole will be considered to decide whether the line has been crossed between imperfections on or of normal features of the highway, and a fault engaging civil liability.

"The judge held that a mere inconvenience was not a public nuisance."

UNDERPASSES – POTHOLES
Kendrick v Solihull Metropolitan Borough Council, 21.07.09, Birmingham County Court

Inspection regime 'reasonable'

In June 2007, the claimant was walking along an underpass in Birmingham when she tripped in a hole in a paving slab. Most of the lights were not working and the area was fairly dark but the claimant had used this route many times before and had not earlier noticed a hole in the pavement. The claimant said the hole was about three inches wide and two and a half inches deep.

The claimant fractured a bone in her forearm and was aged 60 at the time.The claimant claimed damages from the defendant highway authority, alleging it was responsible for her injury and loss. She alleged that the defendant had failed to maintain, repair or properly inspect the footpath, contrary to s.41 of the Highways Act 1980 (the Act) and that it had negligently caused or permitted the footpath to be in a dangerous condition.

The defendant denied liability, relying on a defence under s.58 of the Act, that it operated a reasonable inspection and maintenance system by means of an annual, walked inspection. It denied that the area was

Continued on next page

This claim of a defect in a footpath on the highway illustrates a s.58 defence succeeding. The court accepted that the frequency and nature of the inspection system was "probably reasonable" and that the defect had suddenly arisen. Where claimants allege defects on the highway it is generally appropriate to consider their use of the area in question, their knowledge of it and for how long they had been aware of the alleged defect, compared with the highway authority's inspection and maintenance records and the reasonableness of the frequency and type of inspection operated.

dangerous and produced evidence that a walked inspection took place about 11 weeks before the accident, with no defects identified. The defendant also alleged that the accident occurred because the claimant failed to look where she was going.The court accepted that the claimant fell and injured herself but concentrated on the nature of the alleged defect. The judge noted that the claimant walked along the underpass each week and, before her fall, had never noticed a defect in the footpath. The judge accepted that annual, walked inspections constituted a reasonable inspection system and that the hole must have developed quite suddenly. The claim failed.

RISK MANAGEMENT

Not in my back yard - the new planning risk

For local authorities, (LAs) nimbyism (nimby stands for 'not in my back yard') is on the increase. There is now organised opposition throughout Britain to developments perceived to be a threat to the local environment and a community's way of life. Whether it's seen as nimbyism or justified public concern, organised opposition is proving a major challenge for LAs and a risk to reputation as community groups publicly confront councils.

When it comes to planning new waste treatment and renewable energy facilities in communities, LAs are squeezed from two sides. "On the one hand," says Andrew Jepp, Head of Local Government, Zurich Municipal, "there are environmental targets to achieve; on the other, local residents to convince."

Environmental pressure

A trigger for action by LAs is to meet a range of tough climate change targets. The European Union (EU)'s Renewable Energy Directive includes a target of 15% of energy from renewable methods by 2020. According to the Department for Energy and Climate Change, a huge benefi t of achieving this will be £100 billion worth of investment opportunities and up to half a million jobs in the renewable energy sector. The Climate Change Act (2008) commits the UK to reducing its greenhouse gas emissions to 80% of 1990 levels by 2050. While the Landfill Allowance Trading Scheme encourages cost-effective ways to reduce biodegradable waste sent to landfill and the EU Landfill Directive targets landfill by 2020 to be 35% of that produced in 1995.

Momentum for change comes from all directions. In October 2009, planners, countryside and environmental groups launched a campaign urging the Government to put climate change at the heart of the English planning system. Their aim is to make the system fairer in how the UK reduces carbon emissions to meet Climate Change Act targets. This includes a duty on LAs to map out green energy opportunities, in particular community-based schemes. Support to help LAs is growing, too. WRAP (Waste & Resources Action Programme), for example, works with LAs, businesses and households to prevent waste, increase recycling and develop markets for recycled and sustainable products.

Assess the risks

The process of consultation and fighting challenges to plans takes time. LAs need to reduce the risk of failing to obtain planning permission. It can result in increased costs, lost revenue opportunities, loss of reputation and an impact on long-term local development plans.

The public rejects development of renewable and waste plants because they may:

- Increase noise and pollution levels
- Increase traffic levels
- Decrease house prices
- Ruin the countryside or local environment
- Adversely affect public health and safety.

Continued on next page

"They need to address nimbyist issues by asking how many people benefit positively rather than negatively from a project"

The challenge facing LA risk managers is to mitigate, transfer or remove risk when environment strategies include building new renewable energy and waste facilities. "They need to address nimbyist issues by asking how many people benefit positively rather than negatively from a project," says Andrew. "For example, a waste recycling plant that reduces landfill and generates income as well as possibly energy, benefits most people, except those living very close to it."

But public reaction to building large-scale facilities is not wholly negative. According to the *Beyond Nimbyism* report by a consortium of UK universities led by Professor Patrick Devine-Wright, School of Geography, University of Exeter, 'there is substantial social consent, both for renewable energy generally and for specific projects'.

The report adds that there is little evidence to support the continued use of the nimbyism argument to explain why people object to proposals. Patrick: "Our project found that it was an inaccurate and pejorative label that hinders understanding and does not help to manage social conflict."

Positive action

To help gain public consent, LAs should:

- Create a good case for a new facility
- Articulate the argument well
- Mitigate concerns expressed by the local community
- Set up a programme of engagement, discussion and education well in advance of seeking planning permission.

Patrick explains: "Instead of dismissing objectors, policymakers should instead focus on nurturing social consent. People who oppose a scheme might have good grounds for doing so and it is unwise to write them off; they may have useful things to say and it's not a good way to deal with a conflict of interests."The report's conclusions led the authors to advocate that LAs and private developers work to maintain a rather fragile social consent for renewables that already exists rather than focus on so-called nimbyism.

Local authorities need to reduce the risk of failing to obtain planning permission. It can result in: increased costs, lost revenue opportunities, loss of reputation and the impact on long-term local development plans.

A priority for LAs should be to play a greater role in the communication process with the public, making processes transparent and information available as early as possible. "One of the problems," Patrick explains, "is that although the UK has ambitious carbon reduction and renewable energy targets the public is usually not aware of them until someone turns up saying they want to build something."

Win the debate

Clear communication plans for new facilities are essential. WRAP advises developers and LAs to:

- Use the planning process to help educate all parties about what is involved and what life would be like living around the site once it is operational
- Engage with the local community at an early stage as it's a positive step towards preventing opposition to a project
- Discuss the project with the local planning department on an informal basis before submitting an application to ensure open communication from the outset.

LAs may be reluctant to engage with the public for fear they may be accused of being too close to site developers. "Instead, they should jump on board quickly and explain about the low carbon challenge rather than wait for others to get messages across at a local level," says Patrick. "In fact, LAs are in the best position to get the debate going and can drive change, for example by building and running renewable energy facilities themselves or in partnerships, rather than wholly relying on the private sector to propose energy initiatives."

The council gratefully acknowledges the contribution made by its insurers, Zurich Municipal, in providing articles for this publication.

If you want further information or advice, please contact the insurance and risk management team.

NOTICEBOARD

Fraud Focus

Internal audit have recently launched the first of their quarterly fraud newsletters called 'fraud focus'. This quarter's newsletter contains tips on how to protect your identity as well as details of recent scams.

To view a copy, simply type in the words 'fraud focus' on the council's intralinc site and view, or download a copy.

If anyone suspects that fraud is being committed, trained audit staff will respond to the allegations in a confidential manner. You can report suspicions of fraud by ringing the council's confidential hotline on 01724 296666 – see page 2 of the above publication for further details.

Generic competencies

The council launched its review of staff competencies in March 2010 and asked for the generic competencies to be completed and returned to the Learning and Development Team by 31 May 2010.

The idea is for staff, in conjunction with their supervisor/manager, to identify, against a range of competencies, where they meet the requirements necessary to do their job and, perhaps more importantly, where they need more training to assist them in carrying out their job.

One of the competencies involves risk management and as soon as the results are known and passed to the Insurance and Risk Manager. He will link the training with any highlighted in the new service plans and commission risk management training to fill the gaps in competencies and offer training courses to staff accordingly.

Quarterly Performance Review

The Quarterly Performance Review (QPR) exercise requires you to review your Operational Risk Registers (ORRs) every quarter. This is to ensure that all significant risks that would prevent you providing your service are recorded and, more importantly, managed. Are you reviewing your ORRs at least quarterly and when you have done so have you amended the date to the latest review date?

ORRs are dynamic documents. Is your ORR up to date?

SRMG Intralinc site

There is a wealth of risk management information on the council's intralinc site. Access the site via: councilwide issues, groups, strategic risk management group.

Strategic Risk Registers (SRRs) Updates.

Is your Strategic Risk Register up to date?

As with ORRs, your SRRs are dynamic documents and need to be regularly reviewed.

Designed by North Lincolnshire Council Publications Unit Ref 8188