SPECIMEN SCHEDULE OF PAST AND FUTURE LOSSES AND EXPENSES FOR A CASE SUCH AS F4-001

Specimen schedule of loss[7]

F4-004 IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
ASSIGNED to MASTER BUZFUZ
B E T W E E N :

Claim No:

ARABELLA NIGHTINGALE

Claimant

- and -

Defendants

SCHEDULE OF LOSS
SERVED ON BEHALF OF
THE CLAIMANT

1. Material dates etc.

Claimant's date of birth:	[*date*]
Date of accident:	[*date*]
Service of Claim Form:	[*date*]
Date of Trial:	[*date*]
Date up to which schedule runs:	[*date*]
Claimant's age at Trial:	[.....]

2. Summary

(1) This is a schedule of loss and damage in the Claimant's action for damages for personal injury suffered by her on [*date*] caused by the negligence of the Defendants or by their breach of statutory duty as occupiers of their Oxbridge Superstore, in the respects pleaded in the Particulars of Claim herein, as a result of which she fell, so badly injuring her left leg that the same was amputated above the knee at Oxbridge Royal Infirmary on [*date*].

(2) The Claim, calculated to the date of trial, is summarised as follows:

Section	Head of loss	Schedule total (£000)
	(Past)	
1	Material Dates etc.	[£.....]
2	Summary	[£.....]
3	General damages	[£.....]
4	Interest on general damages	[£.....]
5	Past care	[£.....]
6	Past travel, accommodation, and equipment[8]	[£.....]
7	Past loss of earnings	[£.....]
8	Interest on Past Loss	[£.....]
	(Future)	
9	Multipliers	[£.....]
10	Future care	[£.....]
11	Future loss of earnings	[£.....]
12	Future prostheses and associated costs	[£.....]
13	Future physiotherapy	[£.....]
14	Future aids, equipment,[9] transport etc	
15	Heating, maintenance etc. additional costs	[£.....]
16	Future housing costs	[£.....]
	Total	£*x*,000,000

(2) Note: The claims for future loss are put upon the basis that the court will make lump-sum awards, and the same are therefore calculated using (a) published life expectation statistics[10] and (b) a discount rate of y%.[11]

Past Losses

3. General Damages

(1) Following the above knee amputation on [*date*], the Claimant remained as an in-patient at Oxbridge Royal Infirmary for rehabilitation. Whilst the amputation wound healed without infection, the Claimant suffered severe pain in the stump, which diminished only after 2 weeks, and also suffered severe (and continuing) phantom limb pain.

(2) The Claimant was fitted with a basic prosthetic leg on [*date*]. She has continuing discomfort in her stump, and from time to time suffers from blisters and associated pain.

(3) The Claimant was discharged from hospital on [*date*]. She was unable to return to her flat because it could only be reached by negotiating three flights of stairs. The Claimant therefore rented a bungalow some 2 miles from the home of Rosalind Nightingale, (hereafter "Rosalind") in Bognor Regis, Sussex.

(4) The Claimant is unable to lead an independent life, and requires the support of Rosalind.

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[7] This edition contains this single specimen only. Space does not permit a sufficient number of examples of schedules and counter-schedules of loss which would adequately reflect the breadth of claims for damages for personal injuries. A first-class work devoted to such materials is to be found in William Latimer-Sayer QC's *Personal Injury Schedules: Calculating Damages* (4th Ed, Bloomsbury Professional) 2018, which contains many precedents and checklists. *Facts & Figures Tables for the Calculation of Damages* (2019 Ed., Sweet & Maxwell/PNBA) provides masses of invaluable detail for accurate calculation of relevant items.

[8] Including prosthetic costs to date

[9] Excluding future prosthetic costs

[10] See Facts and Figures (Tables for the Calculation of Damages) Sweet & Maxwell/PNBA, 2019

[11] Facts and Figures (Tables for the Calculation of Damages) Sweet & Maxwell/PNBA, 2019

(5) The Claimant had previously worked as a freelance writer of fiction and journalism, and she was able to return to writing only in [*month/year*]. She continues to write when she can but pain and fatigue limit her ability to do so for a maximum of two hours a day.
(6) The Claimant has acquired a number of prostheses and has recently purchased the latest form of prosthetic leg which is equipped with a "Genium" microprocessor.
(7) The Claimant is occasionally well enough to drive an automatic car, but she continues to need to rely heavily on Rosalind as a driver. She can now walk unaided indoors, but is unable to walk long distances without assistance from Rosalind. As a result of her injuries the Claimant has suffered from bouts of anxiety and depression, and has been prescribed anxiolytic rugs by her consultant psychiatrist, Dr S. Freud, FRCPsych, MD (Vienna) whose report is attached to the Particulars of Claim, and by her general practitioner.
(8) The Judicial College Guidelines [*date/edition*]: suggest for an above-knee amputation [£x000] to [£y,000] The Claimant will contend for an award at the upper end of the bracket.

4. Interest on General Damages

(1) The appropriate rate for interest on general damages[12] remains at 2 per cent per annum from the date of service of proceedings to date of trial.
(2) From [*date*] to [*date*] the rate is 4 per cent.
(3) The total interest which the court should award on general damages is therefore 4 per cent of £*x*00,000.00 = £*z*,000.

5. Past Care

See, generally, the reports and joint experts' statement of the nursing care experts Sister Doll Tearsheet, RGN, (who reports on the instructions of the solicitors for the Claimant) and Mistress Quickly, RGN (who reports on the instructions of the solicitors for the Defendant.)

(1) The Claimant was visited by Rosalind every day while in hospital and was provided with daily support by her. Rosalind also made arrangements for the Claimant to move into the bungalow in Bognor referred to above.
(2) After discharge, Rosalind assisted with the move to the bungalow where the Claimant has (to date) been cared for exclusively by Rosalind who makes 2 visits per day from her own home 2 miles distant, near Rustington on Sea.
(3) Doll Tearsheet and Mistress Quickly agree that a reasonable average between their respective assessments of the number of hours of gratuitous care provided by Rosalind might be selected by the court. The midpoint, if so selected, would be [z] hours per week.
(4) As to the appropriate rate, the Claimant contends that the aggregate rate should be applied: care is not confined to weekdays, nor is it confined to working hours but frequently involves assistance being given to the Claimant at "unsocial hours."
(5) The aggregate rate applied to the midpoint above produces a total cost of care to date of £y000).

[12] *L (A Patient) v Chief Constable of Staffordshire* [2000] P.I.Q.R. Q394 CA

(6) A 10 per cent reduction is conceded by the Claimant to allow for the fact that care was provided gratuitously, but such care was not provided in Rosalind's home and no further reduction is appropriate, giving a figure of £[y000 – 10 %].

6. Past Travel, Accommodation, Aids & Equipment

(1) Rosalind's travelling expenses to and from hospital .....
£.....
(2) Rosalind's motoring expenses incurred (a) daily in travelling from her home to the Claimant's bungalow; and (b) when taking the Claimant to outpatient and limb-fitting appointments etc. (a) £..... and (b) £.....
£.....
(3) At the time of the accident, the Claimant owned an MGB GT "classic car", with manual transmission, which she had owned for 25 years. She became unable to drive the same as a result of the accident and was forced to substitute a VW Golf under the "Motability" scheme [*give details of any net loss and/or relevant figures for surrender of the mobility component of DLA which it may be conceded are appropriate to bring into account.*]
(4) Accommodation costs [*set out costs to date, e.g. of bungalow rental, adaptations etc.*]
See, generally, the report of Augustus Pugin, F.R.I.B.A. attached.
£.....
(5) Aids and equipment :
Equipment to manage the Claimant's disability has so far been provided to the Claimant by the NHS and by social services. Additional items are as follows.
(a) Electric wheelchair .....
£.....
(b) Wolfgang Plato patent Genium prosthetic leg .....
£.....

7. Past Loss of Earnings

The loss of earnings in terms of royalties, fees for "one-off" journalism and lecture fees has been analysed by Thomas Gradgrind, FCA, of the accountancy firm of Gradgrind & Co, whose report is annexed hereto, showing a net loss of past earnings of £z,000.00

CRU and applicable benefits: The CRU certificate [*dated* .....] shows a net liability of £y000.

Net loss
£.....

8. Interest on Past Loss

(1) Interest on past loss accrues at half the special account rate from the date of the accident to the date of trial (*see dates above and show itemised calculations.*)
(2) [*Details of any interim payment etc.*]

(3) [*Set out consequent calculation of total interest on past loss to date of trial.*]
Total
£.....

Future Losses

9. Multipliers

(1) The Claimant was born on [*date].*
(2) The discount rate is [*x* %].
   a. The Ogden Tables[13] show a multiplier for pecuniary loss for life for a woman of the Claimant's age at trial as [*y*].
   b. The agreed medical evidence is that the Claimant's life expectation is normal, *i.e.* [*a*] years.
   c. The multiplier to age 75 is [*b*]; from age 75 to age 85 it is [c]; from age 85 for life is [*d*].

10. Future Care

See the report of Doll Tearsheet, RGN
a. Doll Tearsheet has valued future care continuing by Rosalind on a gratuitous basis as follows: [*set out summary of future care needs as assessed.*]
b. When the Claimant reaches the age of [*xx*], Rosalind will herself be [*yy*] and cannot be expected to provide the same level of care. Thereafter Doll Tearsheet's assessment of care requirements is as follows: [*set out.*]
Total
£.....

11. Future Loss of Earnings

The Claimant has no intention of fully retiring and intends to continue writing for as long as she lives. Her future capacity has reduced as the result of the effects of her injuries. The loss of future earnings (in terms of reduced royalties for novels, reduced fees for "one-off" journalism, lecture fees, television and radio interviews and other sources of income) has been analysed by Thomas Grogind, FCA, whose supplementary report is annexed hereto, showing projected loss of future earnings to age 75 as [*b*]; from age 75 to age 85 as [c] and thereafter as [d].
Total
£.....

12. Future Prostheses and Associated Future Costs

See, generally, the reports of Mr Thomas Gray, FRCS, and of Professor John Silver FRCS.
a. Mr Thomas Gray, FRCS, recommends that the Claimant have [*x*] prostheses for everyday use and an additional prosthesis designed for use in activities in water.
b. The costs at current prices of each prosthesis are [*£a; £b; £c.*]

[13] See Facts and Figures (Tables for the Calculation of Damages) Sweet & Maxwell/PNBA, 2019

c. An allowance for travel to prosthetic fitting appointments, as detailed in Mr Gray's report, at an average of [*x*] visits a year, is claimed at [£*y*] per visit.
d. The Claimant claims the cost of prosthetics as supplied by private surgical suppliers, to provide up-to-date technology and to avoid delays and NHS budget constraints.
e. The future cost of the prostheses is calculated over the Claimant's life as follows [*set out calculations based upon multiplier etc.*]
Total
£.....

13. Future Physiotherapy

See the reports of Pam Stretch, MCSP, physiotherapist; and Doll Tearsheet, RGN,
(1) Pam Stretch's opinion (see paragraph [a] of her report is that the Claimant will need intensive physiotherapy to allow her to reach her maximum potential, as follows [.....]
(2) The costs assessed by Ms Stretch are set out in her report are set out at [.....]
Total
£.....

14. Future Cost of Aids, Equipment and Transport

See the reports of Doll Tearsheet, RGN, and Augustus Pugin, FRIBA
(1) [*Crutches; wheelchairs; shower fittings; commodes; emergency call system; etc.*]
(2) [*car replacement costs*]
(3) [etc]
Total
£.....

15. Future Extra Costs

See the report of Doll Tearsheet, RGN
[*Set these out: e.g. heating and energy; home maintenance; additional holiday costs etc.*]
Total
£.....

16. Future Housing Costs

[*See the discussion of this head of claim in the commentary*[14] *in the light of the reduction in the discount rate. Awards of damages for accommodation might be claimed, and pleaded, upon the basis of mortgage costs to be paid by an order for periodical payments, or upon the basis of an award of capital for purchase of a suitable house to be occupied by the claimant upon the basis only of a life interest with a reversion to the defendant. Alternatively, a claim might be made for funds to be provided by the defendant to enable the claimant to buy such a house subject to a charge in favour of the defendant. In the still further alternative, it has been sug-*

[14] above at 4-010 to 4-012.

gested that a variation on the Roberts v Johnstone method might provide a solution to the problem if the notional loss of investment income approach was replaced by the notional cost of mortgage interest.][15]

See the report of Augustus Pugin, FRIBA, attached.

Total

£.....

Statement of Truth

The Claimant believes that the facts stated in this Schedule of Loss and Damage are true.

I am duly authorised to sign this Schedule of Loss on behalf of the Claimant.

.....

Name: [ ] (Solicitor)

Dated: [*date*]

Served this [*date*]

by Monsoon and Fogg,

Chaplain's Close,

Oxbridge,

Solicitors for the Claimant

DEFENCE TO FORM F4-001

F4-005 IN THE HIGH COURT OF JUSTICE

Claim No:

QUEEN'S BENCH DIVISION
ASSIGNED to MASTER BUZFUZ
B E T W E E N :

ARABELLA NIGHTINGALE

Claimant

- and -

TROLLOPE EXPLOITATION PLC

Defendants

Defence

1. Paragraphs 1 and 2 of the Particulars of Claim are admitted.

2. In respect of para.3 of the Particulars of Claim the following matters are admitted:

[15] The suggestions made Robert Weir QC in his article in JPIL referred to in Chapter 4, in briefest summary, are: (1) PPO to fund interest-only mortgage; (2) *payment of a loan to meet the extra capital cost with a charge over the claimant's property* - the Law Commission considered this to be the best option for reform, as the claimant's loss is a capital expense and not an annual loss. (3) *Rental arrangements:* cases have been approved under which the rental costs have been paid by way of a PPO. (4) *Capital sum to meet mortgage interest costs i.e. the* annual cost of interest on the mortgage providing the capital sum multiplied by the claimant's life expectancy. (5) *Capital sum simpliciter:* if defendants fail or refuse to offer a PPO or loan secured on the property, the only logical alternative is payment of the entire capital sum, "there being no other way in which the court can provide the claimant with the funds to purchase the special accommodation" subject to arguments about mitigation. Faced with that, it was conjectured that insurers might well re-consider a PPO or loan-charge.

(i) that in the vicinity of the dairy products counter, at the relevant time, a small quantity of yogurt was upon the floor;

(ii) that as the Claimant was walking upon the floor she fell over.

The Claimant is put to strict proof of the fact that she fell as a result of slipping upon the yogurt. Save as above, no admissions are made as to para.3 of the Particulars of Claim.

3. Breach of statutory duty, negligence, and causation, as alleged in para.4 or otherwise, are each denied.

4. If, which is not admitted, the Claimant's accident was caused by slipping upon yogurt, the Defendants deny that it was on the floor as the result of any fault on their part or on the part of their employees. The yogurt was dropped upon the floor by a child of approximately four years of age, and appropriate action to deal with it was taken forthwith by a member of the Defendants' staff, Miss Pring.

5. Further, the Defendants contend that at all relevant times a member of their supervisory staff was employed to patrol the whole area of the retail part of the store, constantly inspecting the same for spillages.

6. Further or alternatively if (which is not admitted) the accident occurred as claimed, the same was either caused wholly, or in part, by the Claimant's own negligence.

Details of the Claimant's Negligence

(i) Failing to see and avoid the yogurt upon the floor.
(ii) Failing to keep a proper look-out.
(iii) Failing to look where she was walking.
(iv) Failing to notice that the child referred to above was eating yogurt from a pot with his fingers and that he had spilled, or was about to spill, yogurt upon the floor.
(v) Failing to heed a warning given orally by Miss Pring.
(vi) Stepping on to the yogurt.
(vii) Overbalancing, stumbling, or slipping, and falling over.

7. The Claimant is put to strict proof of each and every matter alleged to constitute personal injury loss and damage. Further it is specifically denied that the physical or psychological effects of the accident upon the Claimant were such as to prevent her from working, from enjoying congenial work as a writer, or from any loss of earnings, past or future.

Details of Basis of Denial[16]

(i) The Defendants will contend that the Claimant had failed to publish any

[16] Such particulars are now a mandatory requirement in a case where Defendants intend to put forward "an alternative version of events": see CPR Pt 16.5(2)(a) and (b). The practice adopted here is that recommended in the Chancery Guidelines Appendix 2 To The Chancery Practice Guide under the CPR "5. Where the CPR require a party to give reasons (see CPR rule 16.5(2)), the allegation should be stated first and then the reasons listed one by one in separate numbered sub-paragraphs": see Civil Procedure 2008 Vol.2 para.1A-208.

significantly original work for several years before the accident which is the subject of her claim against them.

(ii) Each of the works published by the Claimant since the detective story published in [*year*] entitled "The Five Men from China" has been based upon the plot or story-line of one or more of the novels written by the Claimant in the period [*year*] to [*year*]: for example, "The Five Men from China" has a plot which is identical to the Claimant's work "The Five Samurai" [*year*].

(iii) Sales of the Claimant's recent works have been very small by comparison with the continuing popularity of her work published between [*year*] and [*year*].

(iv) The Claimant had frequently stated to journalists and television and radio interviewers within the period [*year*] to [*year*] that she intended shortly to retire from writing.

(v) The Defendants contend that the Claimant had suffered from clinical depression from at least [*year*] (as appears from the clinical notes referred to in an addendum to the psychiatric report annexed to the Particulars of Claim) and that her underlying condition, and not the effects of the accident, are and were at all relevant times the cause of the psychological and psychiatric symptoms pleaded.

8. The Claimant's entitlement to interest upon such damages as she may be awarded is admitted. No admissions[17] are made as to the appropriate rate of interest, and the Claimant is put to strict proof of her entitlement to interest at the full special account rate.

WALTER BOHUN

Statement of Truth

The Defendants believe that the contents of this defence are true.
WALTER BOHUN
SIGNED .....
DATED .....
Drivensnow LLP,
Purity Place,
Oxbridge
Solicitors for the Defendant.

COUNTER SCHEDULE TO F4-004

F4-006 The counter-schedule should follow the same structure as the Claimant's schedule of loss, and deal with each point as advised by the relevant expert (Care Expert, Architect, Chartered Surveyor etc)

IN THE HIGH COURT OF JUSTICE

Claim No:

QUEEN'S BENCH DIVISION
ASSIGNED to MASTER BUZFUZ

[17] See CPR Pt 16.5(4) which provides that "Where the claim includes a money claim, a Defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation."

BETWEEN:

ARABELLA NIGHTINGALE — Claimant

- and -

TROLLOPE EXPLOITATION PLC — Defendants

COUNTER-SCHEDULE OF LOSS
SERVED ON BEHALF OF
THE DEFENDANT

1. Material dates etc.

Claimant's date of birth:	[*date*]
Date of accident:	[*date*]
Service of Claim Form:	[*date*]
Date of Trial:	[*date*]
Date up to which schedule runs:	[*date*]
Claimant's age at Trial:	[.....]

2. Summary

The Claim, calculated to the date of trial, has been summarised as follows:

Section	Head of loss	Counter schedule total (£000)
	(Past)	
1	Material Dates etc.	[£.....]
2	Summary	[£.....]
3	General damages	[£.....]
4	Interest on general damages	[£.....]
5	Past care	[£.....]
6	Past travel, accommodation, and equipment[18]	[£.....]
7	Past loss of earnings	[£.....]
8	Interest on Past Loss	[£.....]
	(Future)	
9	Multipliers	[£.....]
10	Future care	[£.....]
11	Future loss of earnings	[£.....]
12	Future prostheses and associated costs	[£.....]
13	Future physiotherapy	[£.....]

[18] Including prosthetic costs to date

claimant went to the bar on a number of occasions asking for glasses of neat spirits: when her requests were refused by the defendants' bar staff, in light of her condition, the claimant resorted to consumption of spirits available on her employers' table;

(3) As a result the Claimant became unstable and liable to overbalance, and was unable to negotiate a simple and straightforward staircase which was free from any defect.

5. Save that it is admitted that the Claimant suffered some injury, the nature and extent of which is not admitted, paragraph 5 of the particulars of claim is admitted, but causation is denied.

6. Should the Claimant be awarded damages, it is admitted that she would be entitled to interest thereon. It is denied that interest at full rate as alleged or at all would be appropriate on the ground that [*set out reasons - e.g. delay etc.*]

7. The Defendants neither admit nor deny, but require the Claimant to prove all other facts and matters alleged in the Particulars of Claim, save and to the extent as is admitted above.

DATED this day of .....
W. BOHUN

Statement of Truth

[I believe] [The Defendant believes] that the facts stated in this Defence are true. I am duly authorised by the Defendant to sign this statement.
Full Name: .....
Signed: .....

Drivensnow Law LLP
Purity Place
Liverpool
Solicitors for the Defendant

PUBLIC HOUSES

CLAIMANT BARMAID INJURED WHEN DEFENDANT'S MISCHIEVOUS DOG RAN INTO HER CAUSING HER TO FALL

F16-006 [NAME OF COURT]

Case No.

B E T W E E N :

A. B.

Claimant

– and –
C. D.

Defendant

Particulars of Claim

1. At all relevant times the Claimant was employed at the Defendants' public house known as the Bard's Retreat, Oxbridge, as a barmaid.

2. Late at night on [insert date], the Claimant was leaving the premises at about midnight when a large dog owned and kept by the defendant at the premises ran into collision with the Claimant, causing her to fall and to be injured, as detailed below.

3. The dog was of a mischievous and abnormal nature and the Defendant wrongfully kept the dog, well knowing that it had such characteristics.

4. Further, or alternatively, the Claimant's accident was caused by the negligence of the defendant, his employees or agents.

Particulars

(a) Allowing the dog to run outside the public house on the highway and elsewhere without a lead, with the result that it was able to and did run into the Claimant as she was leaving the public house.
(b) Keeping the dog confined within the public house for several hours beforehand and then releasing the dog outside without any form of restraint when the same was in an excitable condition.
(c) Exposing the Claimant to a risk of injury of which he knew or ought to have known.
(d) Failing to take any or any adequate precautions for the safety of the Claimant.
(e) Failing to wait until the Claimant had left the premises before releasing the dog.
(f) Failing to cause the dog to be exercised within an area in which it could cause no risk of injury to the person.
(g) Failing to have the dog properly trained.
(h) Failing to prevent the dog colliding with the Claimant.
(i) Failing to ensure that he accompanied the dog, or caused another person to accompany the dog when allowing the same out onto the public highway.
(j) Failing to heed complaints made to the Defendant by one Edwin Drood concerning the dog's behaviour and of the nuisance caused to customers at the premises by the dog [give details.]
(k) In the circumstances the Defendant failed to take any or any adequate precautions for the safety of the Claimant and exposed her to an unnecessary risk of injury.

5. As a result, the Claimant has suffered personal injury and consequential loss.

Injury, loss and damage caused

6. As a result the Claimant has suffered personal injury, loss and damage.

Particulars of Injury

[*Complete e.g. as in F1-002 above*]

Particulars of Special Damage

Details are set out in the attached schedule of loss and damage.

Claim for interest

7. Further, the Claimant claims interest upon such damages as may be awarded under the provisions of [*insert statutory provision relied upon.*]

Details of Claim for Interest

[*Insert appropriate claim—see F1-002 above*]
Prayer
AND the Claimant claims:
(a) Damages exceeding [*£x0,000.*]
(b) Interest upon damages, as set out above, at the discretion of the court.
SIDNEY CARTON/SIDONIE CARTON
[*i.e. if the pleading has been settled by counsel, his or her signature appears here.*]
DATED this day of
Statement of truth

Statement of Truth

[I believe] [The Claimant believes] that the facts stated in this Particulars of Claim are true.
I am duly authorised by the Claimant to sign this statement.
Full Name: .....
Signed: .....
Solicitors' name and address

Monsoon & Fogg,
10, Archdeacon's Close,
Jericho,
Oxbridge,
Solicitors for the Claimant

MOTORISTS' LIABILITY

1. INTRODUCTORY NOTE

17-001 The use in practice of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol') is now well established. Its original upper limit (£10,000)[1] was extended in April 2013 to claims up to £25,000.[2]

A more detailed discussion of the "RTA Protocol" is provided within Ch.6, but the basic position is that the scheme applies fixed recoverable costs to each of three stages of the litigation process. The scheme is supported by the claims portal,[3] which provides a secure medium for the electronic transfer of information between the parties at the various stages of the process.

Stage 1 of the scheme requires the claimant's solicitors to gather information about the accident and complete the claim notification form ("CNF") to be sent electronically via the portal to the defendant's insurer who must then admit or deny liability within three weeks. If liability is denied, the claim exits the scheme.

Stage 2 involves the claimant's solicitor obtaining a medico-legal report from a suitable expert. This report, along with relevant information regarding the claimant's financial losses and a suitable offer, is then submitted electronically to the defendant's insurer. Thereafter a period of negotiation is permitted and, where settlement is not reached, the claimant's solicitor will complete a Court Proceedings Pack Form and send it to the defendant's insurer to check. This is then submitted to the court for the relevant amount of compensation to be determined by a judge.

Stage 3 is the process whereby the court determines the level of compensation to be awarded.[4]

Provision is made for a case to exit the process at various stages (the most common reason being that liability is in dispute). However, those cases which do exit the process are subject to a fixed costs regime.[5]

The case of *Brown v Ezeugwa*,[6] although not a binding authority, rewards read-

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1 The original RTA Protocol applied to a road traffic accident valued at no more than £10,000 where the accident occurred on or after 6 April 2010. It continues to apply only to claims where the claim notification form was submitted before 31 July 2013.
2 The Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol") also came into force in July 2013. It applies to EL/PL claims valued at no more than £25,000.
3 The portal can be found at *http://www.claimsportal.org.uk* [accessed 31 January 2019].
4 CPR PD 8B contains guidance on the Stage 3 Procedure.
5 See s.IIIA of CPR Pt 45.
6 Tunbridge Wells CC, HHJ Simpkiss sitting with DJ Lethem: 23 January 2014. An order for assessment of costs on the standard basis did not preclude an argument that the receiving party should only receive fixed costs from the paying party under CPR r.45.36. Westlaw document number 2014 WL

ing, for it contains instructive observations regarding both the Protocol and the costs consequences of non-compliance with it.

The "EL/PL" and "RTA Protocols" are at L3-001 and L3-049 respectively.

(2) The Motor Insurers' Bureau (MIB)

17-002 The MIB was founded in the UK in 1946 as a private company limited by guarantee. The first MIB Agrement (the uninsured drivers' agreement) was made with HM Government that year[7] in order to compensate the victims of negligent uninsured motorists.[8] Every insurer underwriting compulsory motor insurance is obliged, by virtue of the Road Traffic Act 1988, to be a member of the MIB and to contribute to its funding.

The MIB is also responsible for operating the Green Card System in the UK. The Green Card System makes sure that people who are victims of accidents, either in the UK or the European Economic Area, with foreign-registered vehicles are compensated.

The MIB also operates the Motor Insurers' Information Centre.[9]

(a) The Motor Insurers' Bureau Agreements

17-003 The MIB's own claim form (for all types of MIB claim) is available online at *http://www.mib.org.uk* under the "Submit a claim" tab. It is recommended that the *Guide to Making a Motor Insurers' Bureau Claim* (which is also available at the MIB's website) be read before any claim is submitted.

If the claim is within the scope of the "RTA Protocol" it should be submitted via the portal. The MIB's own claim form is not to be used in addition to a claim via the portal.

A form for a claim against the MIB after judgment is included as Form F17-027. A form of pleading for joinder of the MIB in an uninsured drivers claim is included at Form F17-032.

The MIB is a fund of last resort and is only responsible for compensation if other avenues which impose obligations upon insurers do not apply. These other avenues include contractual obligations under the policy of insurance, obligations imposed by the Road Traffic Act 1988 and insurers acting as art.75 Insurers. A more detailed discussion of these issues lies outside the scope of this work.

(b) Uninsured motorists

17-004 The current agreement and associated documents[10] is the 2015 Uninsured Drivers Agreement England, Scotland and Wales dated 3 July 2015 supplementing the

2194610.

7 As noted in Ch.10 on European matters, by contrast the French equivalent, *Les Fonds de Garantie Automobile*, first came into existence in 1951, and the MIB in the Republic of Ireland was not founded until 1955.

8 Later extended to include untraced drivers.

9 Access to the MIB's website is to be found at: *https://www.mib.org.uk/reducing-uninsured-driving/what-we-do/* [accessed 31 January 2019].

10 2017 Supplementary Uninsured Drivers Agreement England Scotland And Wales; 2015 Uninsured Drivers Agreement - Notes for guidance V2.0; 2015 Uninsured Drivers Agreement - Correlation table; 2011 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2008 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2003 Untraced Drivers'

original agreement.[11] This Agreement came into force on 1 March 2017 in relation to accidents occurring on or after that date. The 2003 Agreement continues in force in relation to accidents occurring on or after 14 February 2003 but before 1 March 2017.

By these Agreements, if judgment in respect of any compulsorily insurable driver's liability is obtained against any person, irrespective of whether in fact covered by insurance or not, and any such judgment is not satisfied in full within seven days from the date the same becomes enforceable, then the MIB will, subject to certain conditions,[12] pay to the person in whose favour judgment was given the sum awarded, or remaining payable, including costs. The Agreements and associated documents are to be found in the legislation and other materials section below at L17-76

(b) Untraced motorists

17-005 The current Agreement is dated 28 February 2017 and is supplemented by various other documents.[13] The Untraced Drivers Agreements apply to incidents which occurred on roads or public places in Great Britain and where no person who appears to be liable can be identified. Whilst most litigation will involve only the current agreement, it is conceivable that in a "late-onset" case it might be permissible to make a claim under a previous version: care should be taken to check the applicable dates. Under it, the MIB will pay compensation for personal injury equivalent to that which a court would have awarded, but there is no obligation to compensate victims for loss of earnings where the victim has been paid wages, or the equivalent in lieu, even when they have entered into an agreement to repay upon recovering damages. There is an insurance "excess" of £300 and an upper claim limit of £250,000 for property damage. By cl.4(3)(a)(i), the victim has three years from the date of the incident giving rise to the claim for compensation if claiming damages for personal injury. By cl.4(3)(a)(ii), if the victim makes a claim for damage to property: the limitation period is only nine months. This is so "whether or not injury has also arisen". Clause 4(3)(b) requires that any injured victim of an accident must report the incident to police no later than 14 days after its occurrence:

Agreement England, Scotland and Wales; 1996 Untraced Drivers' Agreement England, Scotland and Wales.

11 "Agreement made on the 31st of December 1945 between the Minister of War Transport and the insurers transacting compulsory motor insurance business in Great Britain by or on behalf of whom the said Agreement was signed and in pursuance of paragraph 1 of which MIB was incorporated".

12 For example, under para.10(4)(b) the claimant must, if he has not previously done so, and where reasonably requested by MIB, report the matter to the police as soon as reasonably practicable and co-operate with any subsequent police investigation. Claims for personal injury must be submitted within three years of an accident. In the case of injury to children the time limit follows the general limitation rule so that the three-year time limit does not commence until the child's 18th birthday.

13 2017 Untraced Drivers Agreement England Scotland And Wales; 2017 Untraced Drivers Agreement Correlation Table; 2017 Untraced Drivers' Agreement - Notes for guidance; July 2015 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; June 2015 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2013 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2011 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2008 Supplementary Untraced Drivers' Agreement England, Scotland and Wales; 2003 Untraced Drivers' Agreement England, Scotland and Wales; 1996 Untraced Drivers' Agreement England, Scotland and Wales. See *https://www.mib.org.uk/making-a-claim/claiming-against-an-untraced-driver/untraced-drivers-agreements/* [accessed 31 January 2019].

if not, the MIB claim may fail. The 2003 Agreement and the 2008 and 2013 Supplementary Agreements and the notes for Guidance are at L12-112 below.

(c) *Volenti*/Exclusion of Liability

17-006 The MIB will not pay a victim if they travelled voluntarily in the vehicle as a passenger and before getting in, or after having a reasonable chance to alight, they knew, or ought to have known, that the vehicle was stolen, uninsured or being used either in the furtherance of a crime or to escape arrest. The application will fail for these reasons if the applicant fails to produce evidence to the contrary and the MIB are able to prove that either the applicant was the owner or registered keeper of the vehicle or had permitted its use. However in *Phillips v Rafiq and MIB*[14] the Court of Appeal held that the MIB was obliged to satisfy a judgment in favour of the dependents of a deceased person who had allowed himself to be carried in an uninsured vehicle, because the literal wording of cl.6.1(e) referred only to the "claimant" allowing himself to be carried:

> "... a Claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle."

The Court of Appeal held that those who drafted the MIB scheme could be taken to have had a high degree of knowledge as to how the MIB scheme worked and it was unlikely that the wording was a flagrant linguistic mistake.

The MIB's entitlement to exclude claims continues to be challenged. In *McCall v MIB*[15] the claimant was involved in an accident caused by a negligent driver who turned out to be uninsured. The MIB compensated the claimant for his physical injury but relied upon various provisions within the 1999 Agreement to avoid paying his hire charges. The claimant argued that the Agreement did not comply with the relevant Directive and/or that in any event the MIB was an emanation of State such as to give him a direct clam under the Directive. The trial judge referred the issue to the ECJ and the Court of Appeal upheld that decision. Unfortunately, the claim was then promptly settled, so no determination of the issue took place.

In *Delaney v Pickett*[16] the claimant sustained serious injuries in a motor accident caused by the negligence of the driver in whose car he was a passenger. The claimant and the driver were found to be in possession of a commercial quantity of cannabis with intent to supply. The MIB successfully argued that their liability to the claimant should be excluded, under cl.6 of the 1999 Agreement, on the basis that he had known that the car was being used in the course or furtherance of a crime. The Court of Appeal upheld that decision. However, the claimant then commenced fresh proceedings (see *Delaney v Secretary of State for Transport*[17]), claiming that the relevant Directives did not permit such an exclusion and that he was entitled to damages. The claimant succeeded in that claim and the Secretary of State for Transport was ordered to pay him damages. At the time of writing, it is understood that the decision is still subject to appeal.

[14] [2007] EWCA Civ 74.
[15] *McCall v MIB* [2008] EWCA Civ 1313.
[16] *Delaney v Pickett* [2011] EWCA Civ 1532.
[17] *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB).

(3) Direct claims against insurers

17-007 EU Directive 2000/26/EC, commonly referred to as the 4th Motor Insurance Directive, came into force on 20 January 2003 and applies to accidents after that date. It was implemented in the UK by the European (Rights Against Insurers) Regulations 2002[18] and enables claimants to commence proceedings directly against the other driver's insurers, thus avoiding the need to obtain judgment against a driver before being able to enforce it against their insurer. A sample pleading in respect of such a claim can be seen at F12-010.

An important recent case in respect of insurers is the decision of the Court of Appeal in *Cameron v Hussain*.[19] C was injured in a collision with another car, a Nissan Micra, whose driver failed to stop, but the registration number was recorded. The police discovered that the Nissan was registered to Mr Hussain, who failed to co-operate with police enquiries and was convicted of failing to give information about the identification of the driver. He was not insured to drive the vehicle. The Nissan had insurance written by Liverpool Victoria Insurance Co ("LV"). LV filed evidence to show that its insured was a Mr Bahadur, a person now believed to be fictitious. It was therefore thought to have been obtained by fraud. However, it was agreed by the parties that LV could not avoid the policy under s.152 of the 1988 Act because it had failed to obtain a declaration within the relevant time limit, and was therefore bound by the policy. C issued proceedings for damages against Mr Hussain, believing he was the driver, but he later amended the proceedings to add LV as second defendant and to seek a declaration pursuant to s.151 of the Road Traffic Act 1988 that it was obliged to satisfy an unsatisfied judgment against Mr Hussain. LV denied liability, on grounds that Mr Hussain was not covered to drive the Micra and that C was unable to prove the identity of the driver. LV issued an application for summary judgment. C made a cross application for permission to amend her claim form and the particulars of claim so as to substitute, for the first defendant, a defendant identified only as "person unknown", responsible for driving the Nissan at the time of the collision. The district judge refused the application by C, and granted summary judgment against her. C's appeal to the circuit judge was dismissed, on the grounds that it would be unjust to allow a judgment against LV when there was no prospect of LV tracing the unknown defendant so as to attempt recoupment, whereas C could submit a claim to the MIB. C was subsequently granted leave to appeal to the Court of Appeal. She argued that English law permitted proceedings to be issued and orders made against unnamed parties where it was necessary to obtain justice; it was both necessary and efficacious to allow her to proceed in this case; and permitting her to proceed was consistent with the policy of s.151 of the 1988 Act.

The Court of Appeal held, allowing the appeal[20] that the court could and should exercise its procedural powers to permit the amendment of the claim form to allow C to substitute an unnamed defendant driver. It was entirely consistent with the policy of the 1988 Act that an identified insurer's liability under s.151 in relation to a policy of insurance, written in respect of a specific named insured, should not depend on whether, at the date of issue of the proceedings or thereafter, the claimant could identify the tortfeasor by name. There was nothing to say that, as a mat-

[18] European (Rights Against Insurers) Regulations 2002 (SI 2002/3061).
[19] *Cameron v Hussain* [2017] P.I.Q.R. P16 (Gloster LJ, Lloyd Jones LJ and Sir Ross Cranston).
[20] *Cameron v Hussain* [2017] P.I.Q.R. P16 (Sir Ross Cranston dissenting).

potency of the actions of the defendant and Y he could have concluded that they were equal. On this basis, they dismissed the appeal.

(c) Low velocity collisions

17-010 In *Kearsley v Klarfeld*[29] the Court of Appeal gave guidance as to the pleading of a defence where it is alleged that a low velocity impact could not have caused the injuries alleged. The court indicated that the defence was not required to plead fraud, and the practice of doing so which had emerged was not necessary. It was sufficient to plead the facts from which the defence intended to invite the court to infer that the claimant had not suffered the injuries alleged. The court observed that the claimant's advisers should offer the defendant's insurers access to the claimant's vehicle for the purpose of early examination, and give early disclosure of contemporaneous relevant medical notes to enable the defendant's insurers to obtain evidential material, and that it might be desirable for the defendant's insurers to state at an early stage that they regard the claim as a low velocity impact case in which they would be seeking more expensive advice than the claim would justify.

Kearsley was the subject of further explanation in *Casey v Cartwright*.[30] The court gave guidance relevant to whiplash cases in low velocity impacts to the effect that in ordinary whiplash cases, there would be no need for expert evidence on causation. It was only where a defendant contended that the nature of the impact was such that it was impossible or very unlikely that the claimant suffered any injury or any more than trivial injury and that accordingly the claimant had fabricated the claim that the causation issue would arise. If a defendant wished to raise the causation issue, he should:

(i) notify the other parties in writing within three months of receipt of the letter of claim that he considered the matter to be a low impact case and that he intended to raise the causation issue;
(ii) identify the issue expressly in the defence, supported in the usual way by a statement of truth;
(iii) within 21 days of serving such a defence, serve on the court and the other parties a witness statement which clearly identified the grounds on which the issue was raised, and which dealt with the defendant's evidence relating to the issue, including the circumstances of the impact and any resultant damage.

Based on the statement the court would, if satisfied that the issue had been properly identified and raised, generally give permission for the claimant to be examined by an expert for the defendant. If following such examination, the court was satisfied on the entirety of the evidence submitted by the defendant that it had properly identified a case on the causation issue which had a real prospect of success, then the court would generally give the defendant permission to rely on that evidence at trial.

In *Mahmood v Shaw*[31] the court dealt with two appeals in which it was claimed that there had been a failure by the lower court judges to follow the guidance in *Kearsley* and *Casey*. The court allowed the appeals, saying that the guidance should

[29] *Kearsley v Klarfeld* [2005] EWCA Civ 1510.
[30] *Casey v Cartwright* [2006] EWCA Civ 1280.
[31] *Mahmood v Shaw* Unreported 29 February 2008 QBD.

be followed in substance and spirit unless there were exceptionally good reasons for not doing so.

In *Golden v Dempsey*[32] the court penalised the claimant in costs for failing to follow the guidance in *Kearsley*.

(d) Fraud/staged accidents[33]

17-011 In *Mahmood v Shaw*[34] Akenhead J observed that it was a distressing feature of contemporary life that many people were willing to put forward bogus claims. That phenomena shows no signs of abating, and the court has on several recent occasions had to provide guidance as to how such issues are to be dealt with. In *Shah v Ul-Haq*[35] the Court of Appeal said that claimants were not to be deprived of damages that they were entitled to under their own genuine claim simply because they had supported a fraudulent claim made by another person. In *Locke v Stuart*[36] the court gave guidance on the case management and preparation of cases involving allegations of fraudulent or staged accidents. The court emphasised that it is for the defendant to prove that the accident was not an accident at all but had been manufactured to justify the making a claim for personal injuries. Insurers making allegations of this kind had to do so with care. Their legal advisers were reminded that they had professional obligations which required them to advance such allegations only on proper grounds. In terms of case management, the court recommended that the parties prepare a document which accurately and fairly summarised the evidence so far as primary facts were concerned. It could then identify, in the form of a Scott Schedule, which of the primary facts were in dispute, so that necessary material could be adduced to deal with that. It might also identify which inferences were agreed and which were not. Further, a document could be devised which set out in a short form how entries on social media sites such as Facebook were created and what inferences might safely be drawn from them.

In *Hussain v Amin*[37] the Court of Appeal said that a pleading which merely insinuated fraud, as opposed to alleging it clearly and unequivocally, should not be sanctioned. However, in *Safi v Baker*[38] the county court judge refused to exclude a defence that raised concerns about inconsistencies and discrepancies in a claim that might lead to an inference of fraud. He said that it was for the first instance judge to remain vigilant to ensure that a case did not develop in such a way that fraud was being alleged when it had not been pleaded, and to guard against concluding that a claim was fraudulent in the absence of such a pleading.[39]

As has already been explained in Ch.9, where allegations of fundamental dishonesty arise, the Court of Appeal in *Howlett v Davies*[40] has now given authoritative guidance as to the extent to which the issue is to be approached in terms of pleading. Essentially, where a defendant has material which justifies a clear suspicion over the veracity of a claim, it is appropriate for the claimant to be put

[32] *Golden v Dempsey* Unreported 1 December 2010 CC (Manchester).
[33] A fuller discussion of this topic is to be found at Ch.9 above.
[34] *Mahmood v Shaw* Unreported 29 February 2008 QBD.
[35] *Shah v Ul-Haq* [2009] EWCA Civ 542.
[36] *Locke v Stuart* [2011] EWHC 399 (QB) and see (2001) 2 P.I. Law C110-113.
[37] *Hussain v Amin* [2012] EWCA Civ 1456.
[38] *Safi v Baker* Unreported 1 July 2013 CC (Central London).
[39] See also the decision of Lewis J in *Aziz v Ali* [2014] EWHC 1846 (QB). This case featured many of the "factual inconsistencies" which arise in claims of this sort.
[40] *Howlett v Davies* [2018] P.I.Q.R. Q3.

on notice of a conditional intention to invite the court to make a finding of fundamental dishonesty if at trial such a finding may be made upon the evidence. A defendant motorist's solicitors and insurers may be in possession of evidence of suspicious circumstances, which may include coincidences (for example, evidence from an insurance database that the Claimant has been involved in five similar accidents within the 12 months preceding the accident) minor damage revealed in a vehicle inspection report inconsistent with a high-speed collision, and inconsistent accounts of the accident in contemporaneous documents, triage notes or reports to the police. If so, the claimant should be put on notice by the contents of the pleaded defence.[41] A specimen form of defence to this effect is included in the section on costs.

(e) Crossing the centre white line

17-012 In *R. v Warwickshire Police, Ex p. Mundi*,[42] an appeal by way of case stated against a decision of the Mid-Warwickshire Magistrates, it was held that crossing the centre white line without explanation was, in itself, evidence of careless driving. This indication accords with r.160 of the Highway Code which states that motorists should "keep to the left, unless road signs or markings indicate otherwise" or where the driver wishes to "overtake, turn right or pass parked vehicles or pedestrians in the road".

(5) Cyclists

(a) Cycle routes

17-013 Cycle routes can, according to r.61 of The Highway Code "make your journey safer". Cyclists must nonetheless "look well ahead for obstructions in the road" (r.67). These rules are illustrated in a number of cases. In *Foster v Maguire & Irwell*

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[41] For example:—
"1. No admissions are made that any accident occurred as pleaded in the Particulars of Claim or at all.
2. The Claimant is put to strict proof of each of the following matters:
(a) that he was involved in the accident,
(b) that the defendant was involved in the accident,
(c) that the accident was caused by the negligence of the defendant, and
(d) that the Claimant suffered any injury, loss or damage in consquence.
3. For the avoidance of doubt, the defendant avers that the minor damage to the Claimant's vehicle shown in the agreed vehicle inspection report (dated one week after the alleged accident) is wholly inconsistent with the allegation pleaded in the Particulars of Claim that the Claimant's vehicle was involved in a head-on collision at speed with the Defendant's vehicle. The clear possibility exists that the court may find on the evidence that any "accident" was staged or contrived or that no injury, or very minor injury, was sustained by the Claimant, and that the Claimant has grossly exaggerated any injury and the effects thereof. The Defendant may also rely upon the fact that, on the evidence of an insurance database, the Claimant has allegedly been involved in no less than 5 separate accidents in very similar circumstances in the 12 months preceding the alleged accident. Be that as it may, upon the evidence available to the defendant at this stage it is inappropriate to plead a positive case of fraud.
4. Should the court, upon the evidence given at trial, find that the Claimant has dishonestly advanced the whole of his claim or a substantial part of it, the court will be invited to make a finding of fundamental dishonesty, with the costs consequences that may follow."

[42] *R. v Warwickshire Police, Ex p. Mundi* [2001] EWHC Admin 448.

Construction Ltd,[43] a cyclist proceeding along a cycle lane collided with a van and trailer parked across her route. It was held that the cyclist was 70 per cent to blame as she failed to keep a proper lookout for her own safety.

In *Richards v Quinton*[44] the defendant motorist, in order to emerge from the driveway of his home onto the adjacent main road, reversed across a pavement and a cycle path and, in the process, collided with the claimant cyclist. The Court of Appeal apportioned liability as to 75 per cent upon the claimant and 25 per cent upon the defendant. It held that the claimant "had a much better opportunity of avoiding the accident than the defendant". His speed was such that he would have had a sufficient opportunity, during which time the car was emerging from the driveway, to take evasive action, "which might have involved slowing down and stopping or moving further over on the cycle track".

In *Clenshaw v Tanner*[45] the claimant was cycling along a designated cycle lane when he collided with the rear of the defendant's breakdown recovery vehicle that was turning left. The court held that the defendant was at fault by crossing the dedicated cycle lane without first checking to ensure that it was safe to do so. However, the defendant had slowed and was indicating his intention to turn left and therefore the claimant bore equal responsibility for the accident because he ignored the defendant's signal to turn.

(b) Cyclists and passengers

17-014 Cyclists should "not carry anything which will affect your balance or may get tangled up with your wheels or chain" (the Highway Code r.66), and "MUST NOT carry a passenger unless your cycle has been built or adapted to carry one" (r.68). The predecessors of these rules were applied in *Sousa v A&J Bull Ltd*.[46] In this case the claimant rode his cycle on a dual carriageway whilst carrying a passenger sitting on the crossbar; the claimant pedalled whilst the passenger steered. As the claimant manoeuvred to negotiate a parked car he "wobbled" and overbalanced into the path of the defendant's lorry. The Court of Appeal concluded that the accident was entirely caused by the claimant's negligence and dismissed the claim against the defendant.

(6) Emergency services

17-015 Despite statutory exceptions applicable to compliance with speed limits, traffic rights, pedestrian crossings and other road signs, the driver of an emergency vehicle owes the same duty of care as any other driver, a principle reaffirmed at first instance in *Nelson v Chief Constable of Cumbria*.[47] But what is the standard of care applicable to, say, a police driver? In *Gaynor v Allen*,[48] McNair J concluded that a police motor-cyclist should be "judged by the standard of an ordinary driver of a motor vehicle on his private occasions". But in *Scutts v Keyse*[49] it was held that this was "no longer to be regarded as accurate". The claimant, a 17-year-old student,

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[43] *Foster v Maguire & Irwell Construction Ltd* [2001] EWCA Civ 273.
[44] *Richards v Quinton* unreported 31 October 2000 CA.
[45] *Clenshaw v Tanner* [2002] EWHC 184 (QB).
[46] *Sousa v A&J Bull Ltd* [2001] EWCA Civ 1039.
[47] *Nelson v Chief Constable of Cumbria* [2000] C.L.Y. 4217.
[48] *Gaynor v Allen* [1959] 2 Q.B. 403.
[49] *Scutts v Keyse* [2001] EWCA Civ 715.

suffered catastrophic injuries when he stepped off the kerb and walked into the path of a police car—with blue lights and two-tone siren, and travelling at 50 mph on a road where a 30 mph speed limit was in force—driven by the defendant constable on an emergency call. The trial judge apportioned liability 75:25 in favour of the claimant. The Court of Appeal, in finding that liability was not established against the defendant, stated that the driver of an emergency vehicle was entitled to "assume that other road users will [follow the relevant advice in The Highway Code] and not ignore the unmistakable evidence" of an approaching siren. Such was the "conspicuous warning" afforded by modern lights and sirens that Gaynor—"perhaps simply because of the passage of time and the advancement of technology"—was no longer to be regarded as good law. Judge LJ concluded:

> "Depending on all the circumstances the speed at which such a vehicle may reasonably be driven is likely to be faster either than that of a vehicle not being deployed in an emergency or a vehicle, in an emergency, which does not or cannot highlight that it is being used for such a purpose."

Where, however, the claimant motorist heard the siren but in the "agony of the moment" incorrectly guessed the direction of approach, and the defendant officer had no explanation for failing to have seen the claimant's car, the defendant was wholly liable for the subsequent collision: *Methven v Metropolitan Police Commissioner*.[50]

In *Craggy v Chief Constable of Cleveland Police*[51] the court had to deal with the consequences of emergency vehicles colliding with each other. The claimant was a fire engine driver responding to an emergency. He approached a traffic light controlled junction. The lights were red but he treated them as a give-way signal, as he was entitled to.[52] The defendant's employee was a police driver, attending a different emergency. Both the claimant and defendant's employee had their sirens on and blue lights flashing. The defendant's employee had the traffic lights in his favour and as he proceeded through the junction a collision occurred between the two emergency vehicles. In apportioning liability the trial judge held that the defendant's employee had been negligent as he had been obliged to drive in such a manner that he could stop in the event that another emergency vehicle emerged. He held the defendant's employee one-third liable for the accident. The defendant appealed. The Court of Appeal allowed the appeal, holding that the possibility that another emergency vehicle might drive into the junction against a red light at the same moment as the police driver had done so was remote in the extreme. The standard of care imposed upon the defendant's driver by the trial judge went well beyond what could be expected of a reasonable and prudent driver in the circumstances.

In *McIntosh v Harman*[53] a road traffic accident occurred in which a driver had "collided"[54] head-on with a police car which had been parked on the wrong side of a road and facing oncoming traffic. It was held that the accident had been due to the driver's lack of attention or excess speed or a combination of both. He should

[50] *Methven v Metropolitan Police Commissioner* Unreported 10 October 2000 CA.
[51] *Craggy v Chief Constable of Cleveland Police* [2009] EWCA Civ 1128.
[52] As per reg.36(1)(b) of the Traffic Signs Regulations and General Directions 2002.
[53] *McIntosh v Harman* [2018] EWHC 726 (QB).
[54] The term "collided" is quite inappropriate to describe an impact caused by a moving vehicle coming into contact with a stationary one, and particularly risible when describing a car being driven into a tree. Use of the term is road traffic cases, however, is entrenched, and as a shorthand term it will no doubt continue to be used for the foreseeable future.

have appreciated that there was a hazard in his path with enough time to take evasive action. The level of contributory negligence of the officer in control of the police car was 30 per cent as she had accidentally switched off the car's side lights.

(7) Helmets

17-016 Rule 59 of the Highway Code states that "You should wear … a cycle helmet which conforms to current regulations, is the correct size and securely fastened".

Although there is no "legal compulsion" for cyclists to wear helmets, there can be no doubt that the failure to wear a helmet might expose the cyclist to the risk of greater injury; accordingly, the failure to wear a helmet is not normally sensible and may, subject to causation, expose a cyclist to a finding of contributory negligence. That being said, in *Smith v Finch*[55] the court declined to make a finding of contributory negligence against a claimant cyclist who sustained serious head injuries when his bicycle collided with a motorcyclist. The claimant was not wearing a helmet. The evidence suggested that he had hit the ground at a speed greater than 12mph so the wearing of a helmet would have made no difference to the injuries sustained. Moreover, the defendant had adduced no medical evidence to support his case that the claimant's injuries would have been reduced or prevented by his wearing a helmet.[56]

(8) Leading and following vehicles

17-017 In a "rear-end shunt" liability usually attaches to the driver of the following vehicle; the duty to keep a sufficient distance between vehicles was stated almost 70 years ago in *Brown & Lynn v Western SMT Co Ltd*.[57] But the obligation is limited to the anticipation of "foreseeable emergencies"—see *Thompson v Spedding*.[58] Four reports illustrate the importance of considering each case on its own facts.

First, in *Transports Frigoriphiques Laurent v Transportes Olloquiegui*,[59] where one lorry driving on a motorway collided with the rear of another lorry forced to execute an emergency stop after a mechanical breakdown, the claim against the following driver was dismissed on the grounds that the "abrupt and immediate halt of the leading lorry was not a foreseeable consequence on a motorway".

Secondly, in *Luffman v Coshall*,[60] the Court of Appeal held that no liability attached where another vehicle suddenly cut in front of the defendant, causing him to lose control and collide with the claimant.

Thirdly, in *Nelson v Chief Constable of Cumbria*,[61] a police officer in a transit van followed what he genuinely but incorrectly believed to be a stolen car. He collided with the rear of the car when the suspect performed an emergency stop. It was held that, whilst the officer was primarily responsible for the collision, an unexpected emergency stop was also negligent in the circumstances and the leading driver was 25 per cent to blame.

[55] *Smith v Finch* [2009] EWHC 53 (QB).
[56] See also *A (a Child) v Shorrock* (2001) 10 C.L. 386 QBD; *Phethean-Hubble v Coles* [2011] EWHC 363 (QB); *Malasi v Attmed* [2011] EWHC 4083 (QB).
[57] *Brown & Lynn v Western SMT Co Ltd*, 1945 S.C. 31, 1945 S.L.T. 329.
[58] *Thompson v Spedding* [1973] R.T.R. 312.
[59] *Transports Frigoriphiques Laurent v Transportes Olloquiegui* (2000) C.L. 489.
[60] *Luffman v Coshall* Unreported 23 March 2000 CA.
[61] *Nelson v Chief Constable of Cumbria* (2000) C.L. 390.

clist's excess speed was the principal cause of the accident and for this reason the damages awarded to the claimant were reduced by 80 per cent.[73]

In *McPherson v Smith*[74] it was held that liability should be apportioned two-thirds:one-third in favour of a driver following a collision between his vehicle and a motorcycle. Although the driver should have seen the motorcyclist coming towards him before carrying out a right turn across his path, the motorcyclist had been travelling at a grossly excessive speed.

(11) Passengers—opening car door

17-020 Can the driver of a vehicle be held liable when his passenger negligently opens a door into a passing car or pedestrian?

Rule 239 of The Highway Code states "You MUST ensure that you do not hit anyone when you open your door. Check for cyclists or other traffic". In *Brown v Roberts*[75] a pedestrian was struck and injured by a van door opened by a passenger in the vehicle. Megaw J was satisfied that the defendant "opened the door without taking due and proper care for pedestrians on the pavement". So, the negligence of the passenger usually speaks for itself.

In *Edelman v Harcott*,[76] a first instance case at Ilford County Court, the court considered whether the driver could also be held liable for the action of his passenger. The defendant, a taxi driver, brought his vehicle to a halt outside a station in an area designed for dropping passengers off. His passenger opened a rear door into the path of another vehicle. The court held that; (a) the passenger was clearly negligent in opening the rear door; and (b) the driver could also, depending on the circumstances, be held responsible. The defendant had "some degree of control over unlocking the rear doors" and "should have taken steps to prevent the passenger opening the door into a line of traffic".

In *Burridge v Airwork Ltd*[77] it was held that it could not be said that all cyclists who collide with car doors opened in their path are necessarily contributorily negligent. On the facts the cyclist was not at fault where the driver of a van stopped and immediately opened his door without warning.

(12) Pedestrians

17-021 The driver of a motor vehicle owes a duty of care to other road users, including pedestrians, and the standard required extends to an obligation to "exercise a particularly high degree of vigilance to the young, infirm and foolish people". Thus, in *Watson v Skuse*,[78] where the claimant pedestrian's "folly" comprised a failure to wait for the green light to appear at a pedestrian crossing, the defendant lorry driver was held to be 20 per cent liable on the grounds that had he looked to his left earlier "he probably would have seen the claimant and assessed his progression across the road". But a motorist was completely exonerated where "there was no reasonably apparent possibility" that a young pedestrian would alight from a bus and immediately run into the road: *B (A Child) v Wynn*.[79] Nor was a motorist travelling at 25 mph at fault for failing to anticipate that one of a group of men larking about on the pavement might suddenly run out into the road: *Barlow v Smith*.[80] In *Stewart v Glaze*[81] the claimant was seriously injured when he ran out in front of the defendant's car. The claimant had been out drinking. The claim failed as the evidence established that there was nothing in the claimant's actions to alert the defendant to the fact that he would run suddenly out into the path of his vehicle. This was especially so as the claimant had been sitting at a bus stop and this would have caused the defendant to infer that he was waiting for a bus.[82]

A pedestrian crossing the road should always follow the Green Cross Code (reproduced at r.7 of the Highway Code) and, particularly when the carriageway is hazardous, "go straight across the road". In *Ingram v Woodhouse*,[83] where the claimant pedestrian "paused" on seeing the defendant's approaching car, contributory negligence was assessed at 30 per cent, whilst in *White v Chapman*,[84] a pedestrian who crossed a busy urban road "in stages" was 20 per cent at fault when she found herself "marooned in the centre of the road".

In *Eagle v Chambers (No.1)*[85] the claimant, a girl of 17, sustained serious injuries when she was struck by a car driven by the defendant. The accident happened at about 11.30pm on a main road in Great Yarmouth, a dual carriageway with two rows of parking spaces between the carriageways. The road was virtually straight, there was good street lighting, the weather was fine and visibility was good. The claimant, who was dressed in light clothing, was walking down the southbound carriageway. She had been doing so for long enough for bystanders and other drivers to be concerned for her safety and to urge her to stop. The trial judge found that she was drunk and in an "emotional state" and that she was not walking in a straight line. She was struck by the offside of the defendant's car which was in the offside lane. The defendant had been driving at about 30–35 mph. Following the accident he failed a roadside breath test but at the police station he was under the drink driving limit. Moses J (as he then was) found that had the defendant exercised the standard of care of a reasonable driver he would have seen the claimant earlier and could have taken avoiding action. However, he held that the claimant was 60 per cent to blame. The claimant appealed against the finding of contributory negligence. The Court of Appeal held that it was rare for a pedestrian to be found more responsible than a driver unless the pedestrian had suddenly moved into the path of an oncoming vehicle. There was no evidence in this case that the claimant had staggered or changed direction suddenly. They pointed out that the court had consistently placed a high burden on drivers to reflect the fact that the car was potentially a dangerous weapon. They held that the driver's conduct was very much more causatively potent than that of the claimant. They stated that car drivers had to be on the lookout for pedestrians in the road and it was to be expected that there might be pedestrians in that particular road at that time. They found that the claimant's carelessness for her own safety was sufficiently blameworthy to justify a finding of contributory negligence. They held that the defendant was at least if

[73] See also *Burton v Evitt* [2011] EWCA Civ 1378; *Ringe v Eden Springs (UK) Ltd* [2012] EWHC 14 (QB).
[74] [2018] E.W.H.C. 1433 (QB).
[75] *Brown v Roberts* [1963] 2 All E.R. 263.
[76] *Edelman v Harcott* (2001) 10 C.L. 402.
[77] *Burridge v Airwork Ltd* [2004] EWCA Civ 459.
[78] *Watson v Skuse* [2001] EWCA Civ 1158.
[79] *B (a Child) v Wynn* [2001] EWCA Civ 710.
[80] *Barlow v Smith* unreported 15 May 2000 QBD.
[81] *Stewart v Glaze* [2009] EWHC 704 (QB).
[82] See also *Pursoty v Clarke Construction Security Ltd* [2013] EWHC 989 (QB).
[83] *Ingram v Woodhouse* [2001] EWCA Civ 1057.
[84] *White v Chapman* unreported 15 May 2001 QBD.
[85] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107.

ently orderly group of pedestrians waiting for her to pass them and it was not negligent of her to have failed to slow down or stop.

In *Birch v Paulson*[92] the Court of Appeal held that the trial judge had been entitled to find the defendant motorist not liable for the collision in which the claimant pedestrian suffered serious injury. The trial judge had been entitled on the evidence to conclude that a reasonable driver could not have foreseen that the claimant would attempt to cross the road when he did, and that the defendant had exercised reasonable care.

17-024 In *Rehill v Rider Holdings Ltd*[93] the Court of Appeal held that the defendant bus company was liable for the personal injury sustained by the claimant pedestrian who would not have been run over had the defendant's driver braked promptly. However, the claimant, in attempting to cross a pedestrian crossing against a red light, was held to be equally responsible for the accident.

The case of *Ayres v Odedra*[94] involved a claimant pedestrian being run over in a pedestrianised city centre zone. The defendant was driving through the area late in the evening, unaware that he was in a pedestrianised area and not permitted to drive there. The claimant had been drinking and was larking about with his friends, dropping his pants at passers-by. As the defendant approached the claimant left his friends and walked into the carriageway. He dropped his pants and stood in front of the defendant's car. The defendant stopped the car but at some point drove it forward and over the claimant, who fell to the ground, struck his head on a kerb and suffered a serious brain injury. The court found the defendant liable, holding that his priority should have been to observe the claimant's movements and to wait until he was safely clear of the car before moving forward. However, the defendant could not be absolved of all responsibility for the accident: his drunkenness and dropped trousers had hampered his ability to move freely and at a normal speed out of the path of the defendant's car. For this reason, he was found 20 per cent contributorily negligent.

Boyle v Commissioner of Police of the Metropolis[95] also involved a drunken pedestrian. The claimant had spent the evening drinking in a pub with a friend. At 2am the following day he fell into a road in front of the defendant's police car. The defendant's driver applied full emergency braking but still hit the claimant, causing him to suffer catastrophic injuries. The speed limit was 30mph and the experts agreed that the defendant's vehicle was travelling at between 33 and 35mph. The court held that the defendant acted in breach of the duty he owed to the claimant. Had he been on the way to an emergency the situation would have been different but the fact that he had a job to do which did not require him to arrive at his destination with any particular promptness put him in no different position to any other driver. A reasonably prudent driver would have driven about 5 mph slower, taking into account that he was driving at night in an area in which it was at least foreseeable that the occasional intoxicated pedestrian might be. However, the evidence was not strong enough to find that the defendant's driver had failed to keep a proper look out. It would be a counsel of perfection to require a motorist to treat pedestrians on the footway in the early hours of the morning as an actual as opposed to potential hazard in the absence of particular features such as obvious drunkenness or horseplay. There was no evidence to assist the court in determining what difference the lower speed would have made to the claimant's injuries. The claimant had not provided expert medical evidence on liability despite having been ordered to do so. The court was not prepared to embark upon a process of pure speculation. Such an approach would not be permissible. Accordingly, the claimant had failed to establish what loss, if any, had been occasioned by the defendant's breach of duty and for this reason the claim was dismissed.

[92] *Birch v Paulson* [2012] EWCA Civ 487.
[93] *Rehill v Rider Holdings Ltd* [2012] EWCA Civ 628.
[94] *Ayres v Odedra* [2013] EWHC 40 (QB).
[95] *Boyle v Commissioner of Police of the Metropolis* [2013] EWHC 395 (QB).

In *Ramirez v Maheashwari*[96] the claimant was crossing the road in order to join her partner who was in a stationary car parked just ahead of a bus. The defendant was approaching the bus, travelling at about 15mph. As the defendant passed the bus the claimant emerged from his offside and was struck. The defendant gave evidence that he had checked his near side as he passed by the bus. The sun was low in the sky and there was a suggestion that it may have dazzled the defendant. The court did not accept this. The court held that the defendant had reduced his speed as he approached the bus. The claimant would only have been visible to the defendant for a short space of time which would not have allowed him to take action to avoid hitting her. The cause of the accident was the thoughtless manner in which the claimant entered the defendant's path and for this reason the claim was dismissed.

17-025 In *Sabir v Osei-Kwabena*,[97] it was held that in determining the correct balance to be struck between both causative potency and blameworthiness when apportioning liability for a collision between a motorist and a pedestrian, the court should take into account the point that motorists would generally be found to have higher levels of both because of the destructive potential of a car.

In *Bruma (A Protected Party) v Hassan*,[98] where the claimant was crossing a main road close to a London Underground station and was struck by the defendant's vehicle, which was being driven at approximately the speed limit of 30 mph, it was held that even though the degree of fault on the defendant's part did not amount to dangerous or reckless driving, it fell below the standard to be expected of a reasonably competent motorist in the conditions which prevailed at the time. The appropriate division of responsibility was 80 per cent on the defendant's side with contributory negligence of 20 per cent on the claimant's part.

(13) Passengers on public transport

17-026 The driver of a bus fitted with appropriate safety supports "cannot sensibly be expected to wait" for all passengers to be seated before properly driving away from the stop, unless the passenger is elderly, infirm or "particularly encumbered" with, for example, shopping or young children: *Phillips-Turner v Reading Transport Ltd*,[99] applying *Fletcher v United Counties Omnibus Co Ltd*.[100] Nor, in the same general way, was the driver negligent where a passenger elected to step off a slow-moving bus, as the:

[96] *Ramirez v Maheashwari* unreported 1 May 2014 QBD.
[97] *Sabir v Osei-Kwabena* [2015] EWCA Civ 1213; [2016] R.T.R. 9; [2016] P.I.Q.R. Q4.
[98] *Bruma (A Protected Party) v Hassan* [2017] EWHC 3209 (QB).
[99] *Phillips-Turner v Reading Transport Ltd* (2000) C.L.Y. 389.
[100] *Fletcher v United Counties Omnibus Co Ltd* [1998] P.I.Q.R. P154.

Repeal of section 24 of the Factories Act 1961

L25-203 **18.**— Section 24 of the Factories Act 1961 is repealed.

Revocation of instruments

L25-204 **19.**— The instruments specified in column 1 of Schedule 8 are revoked to the extent specified in column 3 of that Schedule.

CONSTRUCTION (HEAD PROTECTION) REGULATIONS 1989/2209

L25-205 The Secretary of State, in exercise of the powers conferred on him by sections 15(1), (2), (5)(b) and (9) of, and paragraphs 1(1)(c), 11, 15(1) and 21(a) of Schedule 3 to, the Health and Safety at Work etc. Act 1974[97] ("the 1974 Act") and of all other powers enabling him in that behalf and for the purpose of giving effect without modifications to proposals submitted to him by the Health and Safety Commission under section 11(2)(d) of the 1974 Act after the carrying out by the said Commission of consultations in accordance with section 50(3) of that Act, hereby makes the following Regulations:—

Citation, commencement and interpretation

L25-206 **1.**—(1) These Regulations may be cited as the Construction (Head Protection) Regulations 1989 and shall come into force on 30th March 1990.

(2) In these Regulations, unless the context otherwise requires, suitable head protection means head protection which—

(a) is designed to provide protection, so far as is reasonably practicable, against foreseeable risks of injury to the head to which the wearer may be exposed;

(b) after any necessary adjustment, fits the wearer; and

(c) is suitable having regard to the work or activity in which the wearer may be engaged.

Application of these Regulations

L25-207 **2.**—(1) [Subject to paragraph (2) of this regulation, these Regulations shall apply to construction work within the meaning of regulation 2(1) of the Construction (Design and Management) Regulations 2007.][98]

(2) These Regulations shall not apply to a diving project within the meaning of regulation 2(1) of the Diving at Work Regulations 1997.

Provision, maintenance and replacement of suitable head protection

L25-208 **3.**—(1) Every employer shall provide each of his employees who is at work on operations or works to which these Regulations apply with suitable head protection and shall maintain it and replace it whenever necessary.

[97] Sections 15 and 50 were amended by the Employment Protection Act 1975 (c.71), Sch.15, paras 6 and 16 respectively.

[98] Substituted by Construction (Design and Management) Regulations 2007/320 Sch.5 para.1.

(2) Every self-employed person who is at work on operations or works to which these Regulations apply shall provide himself with suitable head protection and shall maintain it and replace it whenever necessary.

[(3) Any head protection provided by virtue of this regulation shall comply with any enactment (whether in an Act or instrument) which implements any provision on design or manufacture with respect to health or safety in any relevant Community directive listed in Schedule 1 to the Personal Protective Equipment at Work Regulations 1992 which is applicable to that head protection.

(4) Before choosing head protection, an employer or self-employed person shall make an assessment to determine whether it is suitable.

(5) The assessment required by paragraph (4) of this regulation shall involve—

(a) the definition of the characteristics which head protection must have in order to be suitable;

(b) comparison of the characteristics of the protection available with the characteristics referred to in sub-paragraph (a) of this paragraph.

(6) The assessment required by paragraph (4) shall be reviewed if—

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the work to which it relates,

and where as a result of the review changes in the assessment are required, the relevant employer or self-employed person shall make them.

(7) Every employer and every self-employed person shall ensure that appropriate accommodation is available for head protection provided by virtue of these Regulations when it is not being used.][99]

Ensuring suitable head protection is worn

L25-209 **4.**—(1) Every employer shall ensure so far as is reasonably practicable that each of his employees who is at work on operations or works to which these Regulations apply wears suitable head protection, unless there is no foreseeable risk of injury to his head other than by his falling.

(2) Every employer, self-employed person or employee who has control over any other person who is at work on operations or works to which these Regulations apply shall ensure so far as is reasonably practicable that each such other person wears suitable head protection, unless there is no foreseeable risk of injury to that other person's head other than by his falling.

Rules and directions

L25-210 **5.**—(1) The person for the time being having control of a site where operations or works to which these Regulations apply are being carried out may, so far as is necessary to comply with regulation 4 of these Regulations, make rules regulating the wearing of suitable head protection on that site by persons at work on those operations or works.

(2) Rules made in accordance with paragraph (1) of this regulation shall be in writing and shall be brought to the notice of persons who may be affected by them.

(3) An employer may, so far as is necessary to comply with regulation 4(1) of these Regulations, give directions requiring his employees to wear suitable head protection.

[99] Added by Personal Protective Equipment at Work Regulations 1992/2966 Sch.2(X) para.23.

(4) An employer, self-employed person or employee who has control over any other self-employed person may, so far as is necessary to comply with regulation 4(2) of these Regulations, give directions requiring each such other self-employed person to wear suitable head protection.

Wearing of suitable head protection

L25-211 **6.**—(1) Every employee who has been provided with suitable head protection shall wear that head protection when required to do so by rules made or directions given under regulation 5 of these Regulations.

(2) Every self-employed person shall wear suitable head protection when required to do so by rules made or directions given under regulation 5 of these Regulations.

(3) Every self-employed person who is at work on operations or works to which these Regulations apply, but who is not under the control of another employer or self-employed person or of an employee, shall wear suitable head protection unless there is no foreseeable risk of injury to his head other than by his falling.

[(4) Every employee or self-employed person who is required to wear suitable head protection by or under these Regulations shall—

(a) make full and proper use of it; and

(b) take all reasonable steps to return it to the accommodation provided for it after use.][100]

Reporting the loss of, or defect in, suitable head protection

L25-212 **7.**— Every employee who has been provided with suitable head protection by his employer shall take reasonable care of it and shall forthwith report to his employer any loss of, or obvious defect in, that head protection.

Extension outside Great Britain

L25-213 **8.**— These Regulations shall apply to any activity to which sections 1 to 59 and 80 to 82 of the Health and Safety at Work etc. Act 1974 apply by virtue of article 7 of the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 1989 other than the activities specified in sub-paragraphs (b), (c) and (d) of that article as they apply to any such activity in Great Britain.

Exemption certificates

L25-214 **9.**—(1) Subject to paragraph (2) below, the Health and Safety Executive may, by certificate in writing, exempt any person or class of persons or any activity or class of activities from any requirement imposed by these Regulations and any such exemption may be granted subject to conditions and to a limit of time and may be revoked by a certificate in writing at any time.

(2) The Executive shall not grant any such exemption unless having regard to the circumstances of the case, and in particular to—

(a) the conditions, if any, which it proposes to attach to the exemption; and

(b) any other requirements imposed by or under any enactment which apply to the case,

[100] Substituted by Personal Protective Equipment at Work Regulations 1992/2966 Sch.2(X) para.24.

it is satisfied that the health and safety of persons who are likely to be affected by the exemption will not be prejudiced because of it[and that any provision imposed by the European Communities in respect of the encouragement of improvements in the safety and health of workers at work will be satisfied.][101]

CONTROL OF NOISE AT WORK REGULATIONS 2005/1643

The Secretary of State, in the exercise of the powers conferred on him by sections 15(1), (2), and (5), and 82(2) and (3) of, and paragraphs 1(1)(a) and (c), 8(1), 9, 11, 13(2) and (3), 14, 15(1), 16 and 20 of Schedule 3 to the Health and Safety at Work etc. Act 1974[102] ("the 1974 Act") and of all other powers enabling him in that behalf, for the purpose of giving effect without modifications to proposals submitted to him by the Health and Safety Commission under section 11(2)(d) of the 1974 Act after the carrying out by the said Commission of consultations in accordance with section 50(3) of that Act, hereby makes the following Regulations: L25-215

Citation and commencement

L25-216 **1.**— These Regulations may be cited as the Control of Noise at Work Regulations 2005 and shall come into force on 6th April 2006, except that—

(a) for the music and entertainment sectors only they shall not come into force until 6th April 2008; and

(b) subject to regulation 3(4), regulation 6(4) shall not come into force in relation to the master and crew of a seagoing ship until 6th April 2011.

Interpretation

L25-217 **2.**—(1) In these Regulations—

daily personal noise exposure means the level of daily personal noise exposure of an employee as ascertained in accordance with Schedule 1 Part 1, taking account of the level of noise and the duration of exposure and covering all noise;

emergency services include—

(a) police, fire, rescue and ambulance services;

(b) Her Majesty's Coastguard;

[enforcing authority means the Executive, local authority or Office of Rail Regulation, determined in accordance with the provisions of the Health and Safety (Enforcing Authority) Regulations 1998 and the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006;] [103]

the Executive means the Health and Safety Executive;

exposure limit value means the level of daily or weekly personal noise exposure or of peak sound pressure set out in regulation 4 which must not be exceeded;

[101] The full stop is omitted and words inserted by Personal Protective Equipment at Work Regulations 1992/2966 Sch.2(X) para.25.

[102] Sections 11(2), 15(1) and 50(3) were amended by the Employment Protection Act 1975 c.71, Sch.15, paras 4, 6 and 16(3) respectively.

[103] Definition substituted by Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006/557 Sch.1 para.14.

health surveillance means assessment of the state of health of an employee, as related to exposure to noise;

lower exposure action value means the lower of the two levels of daily or weekly personal noise exposure or of peak sound pressure set out in regulation 4 which, if reached or exceeded, require specified action to be taken to reduce risk;

the music and entertainment sectors mean all workplaces where—

(a) live music is played; or

(b) recorded music is played in a restaurant, bar, public house, discotheque or nightclub, or alongside live music or a live dramatic or dance performance;

noise means any audible sound;

peak sound pressure means the maximum sound pressure to which an employee is exposed, ascertained in accordance with Schedule 2;

risk assessment means the assessment of risk required by regulation 5;

upper exposure action value means the higher of the two levels of daily or weekly personal noise exposure or of peak sound pressure set out in regulation 4 which, if reached or exceeded, require specified action to be taken to reduce risk;

weekly personal noise exposure means the level of weekly personal noise exposure as ascertained in accordance with Schedule 1 Part 2, taking account of the level of noise and the duration of exposure and covering all noise; and

working day means a daily working period, irrespective of the time of day when it begins or ends, and of whether it begins or ends on the same calendar day.

(2) In these Regulations, a reference to an employee being exposed to noise is a reference to the exposure of that employee to noise which arises while he is at work, or arises out of or in connection with his work.

Application

L25-218 **3.**—(1) These Regulations shall have effect with a view to protecting persons against risk to their health and safety arising from exposure to noise at work.

(2) Where a duty is placed by these Regulations on an employer in respect of his employees, the employer shall, so far as is reasonably practicable, be under a like duty in respect of any other person at work who may be affected by the work carried out by the employer except that the duties of the employer—

(a) under regulation 9 (health surveillance) shall not extend to persons who are not his employees; and

(b) under regulation 10 (information, instruction and training) shall not extend to persons who are not his employees, unless those persons are present at the workplace where the work is being carried out.

(3) These Regulations shall apply to a self-employed person as they apply to an employer and an employee and as if that self-employed person were both an employer and an employee, except that regulation 9 shall not apply to a self-employed person.

(4) These Regulations shall not apply to the master or crew of a ship or to the employer of such persons in respect of the normal shipboard activities of a ship's crew which are carried out solely by the crew under the direction of the master, and

for the purposes of this paragraph ship includes every description of vessel used in navigation, other than a ship forming part of Her Majesty's Navy.

Exposure limit values and action values

L25-219 **4.**—(1) The lower exposure action values are—

(a) a daily or weekly personal noise exposure of 80 dB (A-weighted); and

(b) a peak sound pressure of 135 dB (C-weighted).

(2) The upper exposure action values are—

(a) a daily or weekly personal noise exposure of 85 dB (A-weighted); and

(b) a peak sound pressure of 137 dB (C-weighted).

(3) The exposure limit values are—

(a) a daily or weekly personal noise exposure of 87 dB (A-weighted); and

(b) a peak sound pressure of 140 dB (C-weighted).

(4) Where the exposure of an employee to noise varies markedly from day to day, an employer may use weekly personal noise exposure in place of daily personal noise exposure for the purpose of compliance with these Regulations.

(5) In applying the exposure limit values in paragraph (3), but not in applying the lower and upper exposure action values in paragraphs (1) and (2), account shall be taken of the protection given to the employee by any personal hearing protectors provided by the employer in accordance with regulation 7(2).

Assessment of the risk to health and safety created by exposure to noise at the workplace

L25-220 **5.**—(1) An employer who carries out work which is liable to expose any employees to noise at or above a lower exposure action value shall make a suitable and sufficient assessment of the risk from that noise to the health and safety of those employees, and the risk assessment shall identify the measures which need to be taken to meet the requirements of these Regulations.

(2) In conducting the risk assessment, the employer shall assess the levels of noise to which workers are exposed by means of—

(a) observation of specific working practices;

(b) reference to relevant information on the probable levels of noise corresponding to any equipment used in the particular working conditions; and

(c) if necessary, measurement of the level of noise to which his employees are likely to be exposed,

and the employer shall assess whether any employees are likely to be exposed to noise at or above a lower exposure action value, an upper exposure action value, or an exposure limit value.

(3) The risk assessment shall include consideration of—

(a) the level, type and duration of exposure, including any exposure to peak sound pressure;

(b) the effects of exposure to noise on employees or groups of employees whose health is at particular risk from such exposure;

(c) so far as is practicable, any effects on the health and safety of employees resulting from the interaction between noise and the use of ototoxic substances at work, or between noise and vibration;

(d) any indirect effects on the health and safety of employees resulting from the interaction between noise and audible warning signals or other sounds that need to be audible in order to reduce risk at work;

(e) any information provided by the manufacturers of work equipment;
(f) the availability of alternative equipment designed to reduce the emission of noise;
(g) any extension of exposure to noise at the workplace beyond normal working hours, including exposure in rest facilities supervised by the employer;
(h) appropriate information obtained following health surveillance, including, where possible, published information; and
(i) the availability of personal hearing protectors with adequate attenuation characteristics.

(4) The risk assessment shall be reviewed regularly, and forthwith if—
(a) there is reason to suspect that the risk assessment is no longer valid; or
(b) there has been a significant change in the work to which the assessment relates,

and where, as a result of the review, changes to the risk assessment are required, those changes shall be made.

(5) The employees concerned or their representatives shall be consulted on the assessment of risk under the provisions of this regulation.

(6) The employer shall record—
(a) the significant findings of the risk assessment as soon as is practicable after the risk assessment is made or changed; and
(b) the measures which he has taken and which he intends to take to meet the requirements of regulations 6, 7 and 10.

Elimination or control of exposure to noise at the workplace

L25-221 **6.**—(1) The employer shall ensure that risk from the exposure of his employees to noise is either eliminated at source or, where this is not reasonably practicable, reduced to as low a level as is reasonably practicable.

(2) If any employee is likely to be exposed to noise at or above an upper exposure action value, the employer shall reduce exposure to as low a level as is reasonably practicable by establishing and implementing a programme of organisational and technical measures, excluding the provision of personal hearing protectors, which is appropriate to the activity.

(3) The actions taken by the employer in compliance with paragraphs (1) and (2) shall be based on the general principles of prevention set out in Schedule 1 to the Management of Health and Safety Regulations 1999[104] and shall include consideration of—
(a) other working methods which reduce exposure to noise;
(b) choice of appropriate work equipment emitting the least possible noise, taking account of the work to be done;
(c) the design and layout of workplaces, work stations and rest facilities;
(d) suitable and sufficient information and training for employees, such that work equipment may be used correctly, in order to minimise their exposure to noise;
(e) reduction of noise by technical means;
(f) appropriate maintenance programmes for work equipment, the workplace and workplace systems;

[104] As amended by SI 2003/2457.

(g) limitation of the duration and intensity of exposure to noise; and
(h) appropriate work schedules with adequate rest periods.

(4) The employer shall—
(a) ensure that his employees are not exposed to noise above an exposure limit value; or
(b) if an exposure limit value is exceeded forthwith—
(i) reduce exposure to noise to below the exposure limit value;
(ii) identify the reason for that exposure limit value being exceeded; and
(iii) modify the organisational and technical measures taken in accordance with paragraphs (1) and (2) and regulations 7 and 8(1) to prevent it being exceeded again.

(5) Where rest facilities are made available to employees, the employer shall ensure that exposure to noise in these facilities is reduced to a level suitable for their purpose and conditions of use.

(6) The employer shall adapt any measure taken in compliance with the requirements of this regulation to take account of any employee or group of employees whose health is likely to be particularly at risk from exposure to noise.

(7) The employees concerned or their representatives shall be consulted on the measures to be taken to meet the requirements of this regulation.

Hearing protection

L25-222 **7.**—(1) Without prejudice to the provisions of regulation 6, an employer who carries out work which is likely to expose any employees to noise at or above a lower exposure action value shall make personal hearing protectors available upon request to any employee who is so exposed.

(2) Without prejudice to the provisions of regulation 6, if an employer is unable by other means to reduce the levels of noise to which an employee is likely to be exposed to below an upper exposure action value, he shall provide personal hearing protectors to any employee who is so exposed.

(3) If in any area of the workplace under the control of the employer an employee is likely to be exposed to noise at or above an upper exposure action value for any reason the employer shall ensure that—
(a) the area is designated a Hearing Protection Zone;
(b) the area is demarcated and identified by means of the sign specified for the purpose of indicating that ear protection must be worn in paragraph 3.3 of Part II of Schedule 1 to the Health and Safety (Safety Signs and Signals) Regulations 1996; and
(c) access to the area is restricted where this is practicable and the risk from exposure justifies it,

and shall ensure so far as is reasonably practicable that no employee enters that area unless that employee is wearing personal hearing protectors.

(4) Any personal hearing protectors made available or provided under paragraphs (1) or (2) of this regulation shall be selected by the employer—
(a) so as to eliminate the risk to hearing or to reduce the risk to as low a level as is reasonably practicable; and
(b) after consultation with the employees concerned or their representatives

Maintenance and use of equipment

L25-223 **8.**—(1) The employer shall—

(a) ensure so far as is practicable that anything provided by him in compliance with his duties under these Regulations to or for the benefit of an employee, other than personal hearing protectors provided under regulation 7(1), is fully and properly used; and

(b) ensure that anything provided by him in compliance with his duties under these Regulations is maintained in an efficient state, in efficient working order and in good repair.

(2) Every employee shall—

(a) make full and proper use of personal hearing protectors provided to him by his employer in compliance with regulation 7(2) and of any other control measures provided by his employer in compliance with his duties under these Regulations; and

(b) if he discovers any defect in any personal hearing protectors or other control measures as specified in sub-paragraph (a) report it to his employer as soon as is practicable.

Health Surveillance

L25-224 **9.**—(1) If the risk assessment indicates that there is a risk to the health of his employees who are, or are liable to be, exposed to noise, the employer shall ensure that such employees are placed under suitable health surveillance, which shall include testing of their hearing.

(2) The employer shall ensure that a health record in respect of each of his employees who undergoes health surveillance in accordance with paragraph (1) is made and maintained and that the record or a copy thereof is kept available in a suitable form.

(3) The employer shall—

(a) on reasonable notice being given, allow an employee access to his personal health record; and

(b) provide the enforcing authority with copies of such health records as it may require.

(4) Where, as a result of health surveillance, an employee is found to have identifiable hearing damage the employer shall ensure that the employee is examined by a doctor and, if the doctor or any specialist to whom the doctor considers it necessary to refer the employee considers that the damage is likely to be the result of exposure to noise, the employer shall—

(a) ensure that a suitably qualified person informs the employee accordingly;

(b) review the risk assessment;

(c) review any measure taken to comply with regulations 6, 7 and 8, taking into account any advice given by a doctor or occupational health professional, or by the enforcing authority;

(d) consider assigning the employee to alternative work where there is no risk from further exposure to noise, taking into account any advice given by a doctor or occupational health professional; and

(e) ensure continued health surveillance and provide for a review of the health of any other employee who has been similarly exposed.

(5) An employee to whom this regulation applies shall, when required by his

employer and at the cost of his employer, present himself during his working hours for such health surveillance procedures as may be required for the purposes of paragraph (1).

Information, instruction and training

10.—(1) Where his employees are exposed to noise which is likely to be at or above a lower exposure action value, the employer shall provide those employees and their representatives with suitable and sufficient information, instruction and training. L25-225

(2) Without prejudice to the generality of paragraph (1), the information, instruction and training provided under that paragraph shall include—

(a) the nature of risks from exposure to noise;

(b) the organisational and technical measures taken in order to comply with the requirements of regulation 6;

(c) the exposure limit values and upper and lower exposure action values set out in regulation 4;

(d) the significant findings of the risk assessment, including any measurements taken, with an explanation of those findings;

(e) the availability and provision of personal hearing protectors under regulation 7 and their correct use in accordance with regulation 8(2);

(f) why and how to detect and report signs of hearing damage;

(g) the entitlement to health surveillance under regulation 9 and its purposes;

(h) safe working practices to minimise exposure to noise; and

(i) the collective results of any health surveillance undertaken in accordance with regulation 9 in a form calculated to prevent those results from being identified as relating to a particular person.

(3) The information, instruction and training required by paragraph (1) shall be updated to take account of significant changes in the type of work carried out or the working methods used by the employer.

(4) The employer shall ensure that any person, whether or not his employee, who carries out work in connection with the employer's duties under these Regulations has suitable and sufficient information, instruction and training.

Exemption certificates from hearing protection

11.—(1) Subject to paragraph (2), the Executive may, by a certificate in writing, exempt any person or class of persons from the provisions of regulation 6(4) and regulation 7(1) and (2) where because of the nature of the work the full and proper use of personal hearing protectors would be likely to cause greater risk to health or safety than not using such protectors, and any such exemption may be granted subject to conditions and to a limit of time and may be revoked by a certificate in writing at any time. L25-226

(2) The Executive shall not grant such an exemption unless—

(a) it consults the employers and the employees or their representatives concerned;

(b) it consults such other persons as it considers appropriate;

(c) the resulting risks are reduced to as low a level as is reasonably practicable; and

(d) the employees concerned are subject to increased health surveillance.

except—

(a) asbestos cement, asbestos coating or asbestos insulating board; or

(b) any article of bitumen, plastic, resin or rubber which contains asbestos and the thermal and acoustic properties of that article are incidental to its main purpose;

the control limit means a concentration of asbestos in the atmosphere when measured in accordance with the 1997 WHO recommended method, or by a method giving equivalent results to that method approved by the Executive, of 0.1 fibres per cubic centimetre of air averaged over a continuous period of 4 hours;

control measure means a measure taken to prevent or reduce exposure to asbestos (including the provision of systems of work and supervision, the cleaning of workplaces, premises, plant and equipment, and the provision and use of engineering controls and personal protective equipment);

emergency services include—

(a) police, fire, rescue and ambulance services;

(b) Her Majesty's Coastguard;

employment medical adviser means an employment medical adviser appointed under section 56 of the 1974 Act;

"enforcing authority" means the Executive, local authority or Office of Rail Regulation, determined in accordance with the provisions of the Health and Safety (Enforcing Authority) Regulations 1998 and the provisions of the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006

ISO 17020 means European Standard EN ISO/IEC 17020, "General criteria for the operation of various types of bodies performing inspection" as revised or reissued from time to time and accepted by the Comité Européen de Normalisation Électrotechnique (CEN/CENELEC);

ISO 17025 means European Standard EN ISO/IEC 17025, General requirements for the competence of testing and calibration laboratories as revised or reissued from time to time and accepted by the Comité Européen de Normalisation Électrotechnique (CEN/CENELEC);

licensable work with asbestos is work—

(a) where the exposure to asbestos of employees is not sporadic and of low intensity; or

(b) in relation to which the risk assessment cannot clearly demonstrate that the control limit will not be exceeded; or

(c) on asbestos coating; or

(d) on asbestos insulating board or asbestos insulation for which the risk assessment—

(i) demonstrates that the work is not sporadic and of low intensity, or

(ii) cannot clearly demonstrate that the control limit will not be exceeded, or

(iii) demonstrates that the work is not short duration work;

medical examination includes any laboratory tests and X-rays that a relevant doctor may require;

personal protective equipment means all equipment (including clothing) which is intended to be worn or held by a person at work and which protects that person against one or more risks to that person's health, and any addition

or accessory designed to meet that objective;

relevant doctor means an appointed doctor or an employment medical adviser. In relation to work with asbestos which is not licensable work with asbestos and is not exempted by regulation 3(2)relevant doctor also includes an appropriate fully registered medical practitioner who holds a licence to practice;

risk assessment means the assessment of risk required by regulation 6(1)(a);

textured decorative coatings means decorative and textured finishes, such as paints and ceiling and wall plasters which are used to produce visual effects and which contain asbestos. These coatings are designed to be decorative and any thermal or acoustic properties are incidental to their purpose, and

the 1997 WHO recommended method means the publication "Determination of airborne fibre concentrations. A recommended method, by phase-contrast optical microscopy (membrane filter method)", WHO (World Health Organisation), Geneva 1997.

(2) A reference to work with asbestos in these Regulations includes—

(a) work which consists of the removal, repair or disturbance of asbestos or materials containing asbestos;

(b) work which is ancillary to such work; and

(c) supervision of such work and such ancillary work.

(3) For the purposes of these Regulations, work with asbestos is not "short duration work" if, in any seven day period—

(a) that work, including any ancillary work liable to disturb asbestos, takes more than two hours; or

(b) any person carries out that work for more than one hour.

(4) For the purpose of these Regulations, no exposure to asbestos will be sporadic and of low intensity if the concentration of asbestos in the atmosphere, when measured in accordance with the 1997 WHO recommended method or by a method giving equivalent results to that method and approved by the Executive, exceeds or is liable to exceed the concentration approved in relation to a specified reference period for the purposes of this paragraph by the Executive.

(5) For the purposes of these Regulations, except in accordance with regulation 11(3) and (5), in determining whether an employee is exposed to asbestos or whether the extent of such exposure exceeds the control limit, no account must be taken of respiratory protective equipment which, for the time being, is being worn by that employee.

(6) In these Regulations the provisions of Appendix 7 to Annex XVII of the REACH Regulations, which determine the labelling requirements of articles containing asbestos, are reproduced in Schedule 2 (with minor changes reflecting the practical implementation of the requirements).

Application of these Regulations

3.—(1) These Regulations apply to a self-employed person as they apply to an employer and an employee and as if that self-employed person were both an employer and an employee. L25-233

(2) Regulations 9 (notification of work with asbestos), 18(1)(a) (designated areas) and 22 (health records and medical surveillance) do not apply where—

(a) the exposure to asbestos of employees is sporadic and of low intensity; and

required by sub-paragraphs (a) and (b).

(3) Where it is not reasonably practicable for the employer to reduce the exposure to asbestos of any such employee to below the control limit by the measures referred to in paragraph (1)(b)(i), then, in addition to taking those measures, the employer must provide that employee with suitable respiratory protective equipment which will reduce the concentration of asbestos in the air inhaled by that employee (after taking account of the effect of that respiratory protective equipment) to a concentration which is—

(a) below the control limit; and

(b) as low as is reasonably practicable.

(4) Personal protective equipment provided by an employer in accordance with this regulation or with regulation 14(1) must be suitable for its purpose and—

(a) comply with any provision of the Personal Protective Equipment Regulations 2002 which is applicable to that item of personal protective equipment; or

(b) in the case of respiratory protective equipment, where no provision referred to in sub-paragraph (a) applies, be of a type approved or must conform to a standard approved, in either case, by the Executive.

(5) The employer must—

(a) ensure that no employee is exposed to asbestos in a concentration in the air inhaled by that worker which exceeds the control limit; or

(b) if the control limit is exceeded—

(i) immediately inform any employees concerned and their representatives and ensure that work does not continue in the affected area until adequate measures have been taken to reduce employees' exposure to asbestos below the control limit,

(ii) as soon as is reasonably practicable identify the reasons for the control limit being exceeded and take the appropriate measures to prevent it being exceeded again, and

(iii) check the effectiveness of the measures taken pursuant to sub-paragraph (ii) by carrying out immediate air monitoring.

Use of control measures etc

L25-242 **12.**—(1) Every employer who provides any control measure, other thing or facility pursuant to these Regulations must take all reasonable steps to ensure that it is properly used or applied as the case may be.

(2) Every employee must make full and proper use of any control measure, other thing or facility provided pursuant to these Regulations and—

(a) where relevant take all reasonable steps to ensure that it is returned after use to any accommodation provided for it; and

(b) report any defect discovered without delay to that employee's employer.

Maintenance of control measures etc

L25-243 **13.**—(1) Every employer who provides any control measure to meet the requirements of these Regulations must ensure that—

(a) in the case of plant and equipment, including engineering controls and personal protective equipment, it is maintained in an efficient state, in efficient working order, in good repair and in a clean condition; and

(b) in the case of provision of systems of work and supervision and of any

other measure, any such measures are reviewed at suitable intervals and revised if necessary.

(2) Where exhaust ventilation equipment or respiratory protective equipment (except disposable respiratory protective equipment) is provided to meet the requirements of these Regulations, the employer must ensure that thorough examinations and tests of that equipment are carried out at suitable intervals by a competent person.

(3) Every employer must keep a suitable record of the examinations and tests carried out in accordance with paragraph (2) and of repairs carried out as a result of those examinations and tests, and that record or a suitable summary of it must be kept available for at least 5 years from the date on which it was made.

Provision and cleaning of protective clothing

14.—(1) Every employer must provide adequate and suitable protective clothing for any employee employed by that employer who is exposed or is liable to be exposed to asbestos, unless no significant quantity of asbestos is liable to be deposited on the clothes of an employee while at work. L25-244

(2) The employer must ensure that protective clothing provided in pursuance of paragraph (1) is either disposed of as asbestos waste or adequately cleaned at suitable intervals.

(3) The cleaning required by paragraph (2) must be carried out either on the premises where the exposure to asbestos has occurred, where those premises are suitably equipped for such cleaning, or in a suitably equipped laundry.

(4) The employer must ensure that protective clothing which has been used and is to be removed from the premises referred to in paragraph (3) (whether for cleaning, further use or disposal) is packed, before being removed, in a suitable receptacle which must be labelled in accordance with the provisions of Schedule 2, as if it were a product containing asbestos or, in the case of protective clothing intended for disposal as waste, in accordance with regulation 24(3).

(5) Where, as a result of the failure or improper use of the protective clothing provided in pursuance of paragraph (1), a significant quantity of asbestos is deposited on the personal clothing of an employee, then for the purposes of paragraphs (2), (3) and (4) that personal clothing must be treated as if it were protective clothing provided in pursuance of paragraph (1).

Arrangements to deal with accidents, incidents and emergencies

15.—(1) In the event of an accident, incident or emergency related to the unplanned release of asbestos at the workplace, the employer must ensure that— L25-245

(a) immediate steps are taken to—

(i) mitigate the effects of the event,

(ii) restore the situation to normal, and

(iii) inform any person who may be affected; and

(b) only those persons who are responsible for the carrying out of repairs and other necessary work are permitted in the affected area and that such persons are provided with—

(i) appropriate respiratory protective equipment and protective clothing, and

(ii) any necessary specialised safety equipment and plant,

which must be used until the situation is restored to normal.