Health&Safety news

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THOMPSONS SOLICITORS
STANDING UP FOR YOU

Standing up for you

Brexit has implications that will have an impact on personal injury claims explains Gerard Stilliard, head of personal injury strategy

Not necessarily better out than in

IN JUNE 2016, the UK voted to leave the European Union (EU). We have already started to see some of the consequences of that decision but in many areas we will not see the results for some time.

Personal injury (PI) and health and safety law is one such area. In this article, we look at the connection between the EU and PI law, and the extent of the changes we may expect.

Introduction

In order to leave the EU, the UK must invoke the now (in)famous Article 50. Doing so will trigger a period of negotiations that will last no more than two years before the new relationship is determined.

"Invoking Article 50 will trigger a period of negotiations that will last no more than two years before the new relationship is determined"

In terms of domestic law, the UK's membership of the EU has been governed by the European Community Act 1972 (ECA). The consensus of opinion is that the ECA will have to be repealed for Brexit to occur. However, a simple repeal would result in a highly unstable legal position and so it is likely that some form of replacement will be passed, at least temporarily.

What sort of negotiated settlement will result? Possibilities include the Norwegian model where the UK retains membership of the European Economic Area or the Swiss model with membership of the less closely associated European Free Trade Area only.

Relevance for personal injury and health & safety law

Part of our domestic law currently comes from directives that are created by EU Treaty and imported directly into UK law.

It was the European Framework Directive on Safety and Health at Work (Directive 89/391 EEC), adopted under Article 118 of the Treaty on the Functioning of the European Union, which led to the UK's introduction of the "6-pack" of health and safety regulations in 1992.

Those regulations have gone on to provide the foundation for work-related PI claims, including the landmark cases of: **Stark -v- The Post Office**, **Allison -v- London Underground** and **Dugmore -v- Swansea NHS Trust and Morriston NHS Trust**, all cases that would have been lost by the workers involved had the regulations not operated to impose a stricter duty on the employer.

Most recently, in **Kennedy -v- Cordia** [2016], the Supreme Court set out that:

Article 153 [the successor of Article 118] requires the EU to support and complement the activities of the member states in a number of fields, including "improvement in particular of the working environment to protect workers' health and safety", and permits the European Parliament and Council to adopt Directives for that purpose. It is clear

from the case law of the Court of Justice that article 153, and in particular the concepts of "working environment", "safety" and "health", are not to be interpreted restrictively… safety is to be levelled upwards… Where possible, risk is to be avoided rather than reduced; means of collective protection are to be preferred to means of individual protection (such as PPE); and merely giving instructions to the workers is to be the last resort.

In practice, once a directive is made, EU States have a deadline to introduce it through domestic law. If that does not happen in time, a person has the right to bring a claim against the State for its failure to provide a remedy for a breach of the Directive; a Francovich claim. That safety net will, of course, be lost once the UK has left the EU.

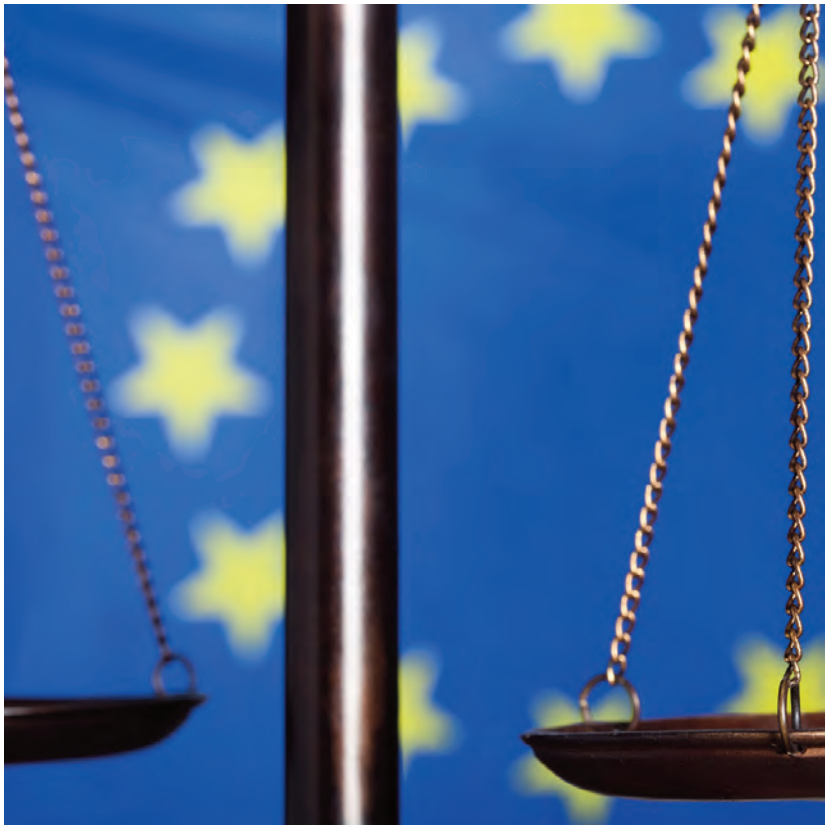
The 6-pack regulations were introduced into UK law through the Health and Safety at Work etc Act 1974 (HSWA). That means that they would not be immediately affected by Brexit and/or a repeal of the ECA 1972. However, they would no longer have the underpinning of the Directive and would be vulnerable to future change by a "deregulating" government.

Other regulations, including The Control of Substances Hazardous to Health Regulations 2002 (COSHH), are made under both the ECA and the HSWA and would therefore have to be recast on repeal of the former.

Changes already afoot

We have already seen the desired direction of travel of this government in the introduction, under the coalition, of the Enterprise and Regulatory Reform Act 2013 and its notorious section 69 which removed civil liability on the part of employers for breach of health and safety regulations.

It is clear in practice that there are a swathe of employers' liability claims that are now significantly more difficult to win because of section 69, despite the protestation of Viscount Younger, the relevant minister, in the House of Lords' debate on the clause which became section 69 ERRA, that:



"We acknowledge that this reform will involve changes in the way that health and safety-related claims for compensation are brought and run before the courts. However, to be clear and to avoid any misunderstanding that may have arisen, this measure does not undermine core health and safety standards. ➲

The 6-pack regulations

UK regulations	Derived from
The Management of Health & Safety at Work Regulations 1992	Framework Directive 89/391
The Workplace (Health, Safety, Welfare) Regulations 1992	Workplace Directive 89/654
The Manual Handling Operations Regulations 1992	Manual Handling of Heavy Loads Directive 90/269
The Health and Safety (Display Screen Equipment) Regulations 1992	Display Screen Equipment Directive 90/270
The Provision and Use of Work Equipment Regulations 1992	Work Equipment Directive 89/655 (now 2009/104/EC)
The Personal Protective Equipment at Work Regulations 1992	Personal Protective Equipment Directive 89/656 (now 96/58)

➲ *"The government is committed to maintaining and building on the UK's strong health and safety record. The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence"*

Section 69 means that workers now have to prove that their employers were at fault, for instance in providing defective equipment, and should have foreseen a risk of injury.

It is worth noting that, although not yet tested in the courts, it is arguable that where the defendant employer is an emanation of the State, an injured worker can rely on the higher standard imposed by the Directive.

If so, it is likely Brexit will directly impact that protection.

In the Autumn Statement of 2015, the government also indicated its intention to make a two-pronged attack on the ability to bring personal injury claims by (a) raising the limit on small claims in road traffic accidents, and hence the amount at which legal costs are recoverable, from £1,000 to £5,000 and (b) removing the right to bring a claim for damages for "minor soft tissue injuries" worth below £5,000.

These moves will extend the changes introduced in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 to remove recoverable success fees and insurance premiums and operate to tilt the playing field in personal injury litigation yet further in the favour of the government's financial backers in the insurance industry.

One consequence, not of Brexit itself but of the focus on campaigning for the referendum and the political confusion the Leave vote has caused, has been a delay in implementation of these further attacks.

"It is interesting to note that, in recent years, the volume of regulations coming from the EU has lessened as the idea of a Social Europe has retreated"

The future

Do these legal changes, in a context of chronic underfunding of the Health & Safety Executive, mean that the whole modern philosophy of risk assessment and management is itself at risk of extinction? Perhaps not; after all, successful employers recognise that, such philosophy is beneficial to them as well as their workers.

No doubt, however, we can expect some degradation of protection; removing the need for formal risk assessments in smaller businesses categorised as lower risk and removing the right to free eye tests for display screen users have already been mooted.

New regulations from the EU will no longer necessarily apply to the UK. It is interesting to note here that, in recent years, the volume of regulations coming from the EU has lessened as the idea of a Social Europe has retreated, under pressure from the UK and similar free market governments. One unintended outcome of Brexit might even be that the UK, through its membership of the EEA, is subject to increased regulation from an EU which reverts to a more social democratic philosophy.

Finally, it is worth noting the existence of other Directives which provide for EU harmonisation and which, while not applying exclusively to the field of work, often prove relevant to health and safety and personal injury issues.

For instance, on motor insurance, the Codified Directive (2009/103/EC) allows a UK worker, injured by a French driver in Spain, ease of proceedings against the relevant motor insurers in the UK. Brexit may result in the loss of this right. Similarly, the Consumer Protection Act 1987, which was introduced through the Product Liability Directive 85/374/EEC, allows claims against suppliers and importers of defective products.

Again, this is now part of domestic law and will not be lost automatically through Brexit but the rights it establishes could now be considered afresh by parliament and, perhaps, lost.

How to prevent brain injuries and how to treat an empoyee recovering from one is considered by David Robinson, professional support lawyer and senior serious injuries solicitor

More than "just a bump on the head"

THE SIGNIFICANT impact of head injuries does not discriminate between status and wealth. Earlier this year Cilla Black became the latest in a line of high profile individuals who died, or suffered life-changing symptoms, as a result of head injuries.

Others include TopGear presenter Richard Hammond, who crashed at high speed when filming in 2006, Formula 1 legend Michael Schumacher who suffered a severe head injury skiing in 2015, and gold-medal Olympian James Cracknell, who was placed in an induced coma following a serious cycling accident in 2010.

So, with such serious consequences flowing from what are often wrongly perceived to be innocuous bumps to the head, what should employers be doing to reduce the prevalence of head injuries in the workplace, and how can those who are injured be supported?

Managing the risk

Managing risk is key to any business, but when it comes to health and safety it is more than just a tick-box exercise. Crucial to ensuring good health and safety is understanding just what the risks might be. The greater the risk, the greater the measures needed to reduce or eradicate that risk.

For example, an assessment for a cleaner's duties may – at first glance - consider them to be low-risk. However, when in practice the particular cleaner stands each day on a two-foot high box and then has to stretch to be able to reach the corner of a window to clean it, that is an activity that needs to be managed as the risk of falling and sustaining a head injury is vastly increased.

The likes of EU Leave campaigner Boris Johnson, who has referred to "*health and safety maniacs*" and "*this terrible sickness of health and safety*", will undoubtedly scoff at the suggestion for a more detailed management of risk, but such dismissive responses fail to appreciate the seriousness of the situation and the duty of employers to protect their workers from foreseeable risks of harm.

In the case of the cleaner, the risk of falling is high and can very easily be reduced by a combination of training and equipment *if* the employer knows what is happening in practice. Risk assessments should therefore be undertaken in real-time and not just be a desk-based exercise.

Assessing risks does not stop in the ordinary workplace either. In a recent High Court case, a member of the armed forces participating in adventurous training suffered a serious brain injury when his head was struck; the responsibility for that injury rests with the employer and the buck cannot simply be passed to the external provider of the training.

➲

"Such dismissive responses fail to appreciate the seriousness of the situation and the duty of employers to protect their workers"

➲ There is no definitive checklist for identifying a head injury, and they can occur in the most innocent of scenarios, including seemingly simple slips, trips and falls. However, precursors will include any degree of working at height or work that is unfamiliar and new.

How are injuries caused?

The brain is a very delicate organ, which is why it is encased by the skull. So, how is it injured in workplace accidents? Brain injuries often occur by traumatic events that are sudden and unexpected, such as:

- **Concussion**: This occurs when there are direct blows to the head, such as being struck by a falling object or by falling and striking the head.
- **Bleeding or bruising on the brain**: This is known in the medical sense as a contusion. Contusions can also be caused by blows to the head when the force is great enough.
- **Shaking**: Injuries caused by shaking, such as in serious vehicle accidents (whether on the road or in a workplace workshop), occur when the skull moves ahead of the stationary brain causing parts of the brain to tear.
- **Penetration**: Perhaps the most direct injury to the brain is when an object penetrates the skull and forces hair, skin and bone into the brain.

The hidden disability

When someone does suffer a brain injury, there can be significant consequences of which employers and employees may not actually be aware, as their colleague looks exactly the same. It is because of this that these injuries are known as "the hidden disability".

> *"Brain injuries often occur by traumatic events that are sudden and unexpected"*

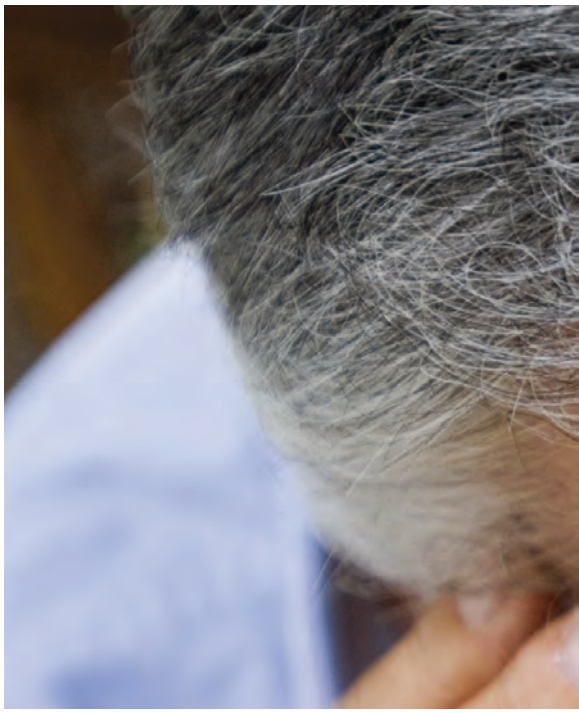
To understand how to support a colleague who has suffered a brain injury, it is necessary to understand the nature of the symptoms that can be caused.

Cognitive problems: These are symptoms that impact on how a person thinks. The brain is like a complex motorway network, and when an injury occurs it can cause a blockage which means processes are diverted to other roadways. Imagine you are diverted off a motorway following an accident, it will usually add a considerable length of time to your journey; the same is the case for a brain injury survivor who will take longer to process information and longer for the brain to be able to work out how to respond.Memory, speech, word-finding, concentration and impaired reasoning are all examples of some of the cognitive problems which can be suffered post-brain injury.

Therefore, rather than thinking a colleague is not pulling his or her weight, consider writing down what is needed to be done.

Also, because the brain is working faster and harder, a bit like a satnav trying to re-route, ensure additional breaks are provided with quiet space.

Executive dysfunction: This follows on from cognitive problems and relates to problems with being able to plan and organise effectively. Using the motorway example again, rather than being in three lanes, suddenly all of the information is in a single lane and so information can



sometimes only be absorbed slowly and difficulties with multi-tasking and problem solving can occur.

An occupational health assessment with support being put in place focussing on what an employee can do, rather than what an employee can't do, is vital to help a returning employee flourish and adapt to working life after a brain injury.

Personality changes: Personality changes can have a huge impact on a brain injury survivor and his or her colleagues. The once life and soul of the party may now be someone who is reserved and quiet, or the once caring and compassionate colleague now may seemingly blurt things out in a dispassionate fashion.

It must be remembered that the brain-injured employee has not consciously changed how he or she presents, it is the effects of the brain injury. Disowning a colleague because of this can be very isolating and can set back rehabilitation. Employers should seek to provide brain injury training to their staff before any colleague with a brain injury returns, as this will encourage understanding.

Emotional reaction: A brain injury can result in a sense of loss, and brain injury survivors can grieve for the person they once were. This can result in significant emotional and mental health problems on top of the organic nature of the brain injury itself. Recognising this and offering support by professionally trained therapists are actions of a supportive employer.

In addition, in practical ways, reference to how the employee used to be is not constructive, for example when conducting appraisals. A focus on the positives of his or her work now, and what he or she can achieve, is vital to boost self-esteem and self-worth.

The above is by no means exclusive or exhaustive, but it hopefully demonstrates the complex nature of the issues that can arise following a head injury. When a head injury is serious enough to impact on the functioning of the brain, this can have devastating consequences.

It is far better for an employer to manage the risk in the first place and seek to reduce or eradicate the risks of head injuries occurring, but when that fails, a responsible employer should promote support and understanding for a brain injured employee, and the wider workforce.

Linda Millband, national practice lead for clinical negligence, explains the workings of the coronor's court

Inquests in a healthcare setting

INQUESTS ARE organised by coroners pursuant to the Coroners and Justice Act 2009. Each county and large city in England and Wales will have a senior coroner and a number of assistant coroners.

The prime function of an inquest is to determine the identity of the deceased and the cause of his or her death. Although they are of interest to families pursuing fatal accident claims for accidents and clinical negligence, the inquest cannot seek to establish who may be responsible for the death.

The verdicts (cause of death) that can be reached by the coroner are:

- Accidental death
- Natural causes
- Death by misadventure
- Suicide
- A narrative verdict, so the coroner can give more detail about the cause of death
- Industrial disease
- An open verdict, where there is inadequate evidence to determine the cause of death
- Unlawful killing
- Neglect

In a healthcare setting a death aggravated by neglect will obviously be useful evidence for a civil claim for negligence, while a finding of unlawful killing should allow a police investigation to progress to a criminal prosecution.

To succeed in a clinical negligence case, the claimant has to prove that the standard of care received by the deceased fell below the reasonable standard expected from a qualified health worker.

The inquest does not investigate reasonableness, however it can clearly be seen how a finding of neglect at an inquest could have serious repercussions for a healthcare professional.

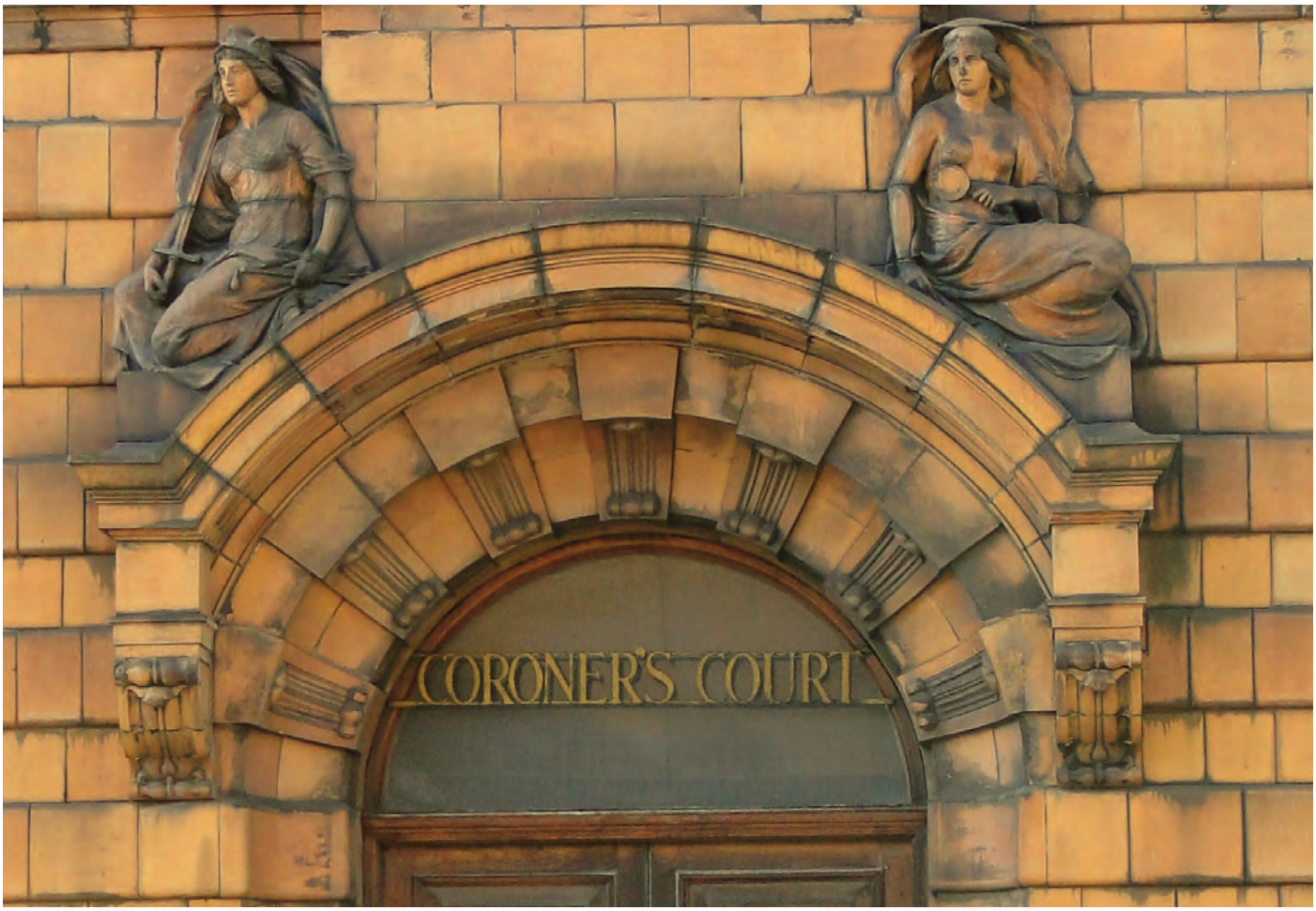
Coroners also have the right to refer a doctor to his or her regulatory body if they consider their intervention may assist in the prevention of a similar death in the future.

This is known as a section 43 report. Doctors are also under an obligation to inform NHS England if they are criticised at an inquest.

Civil standard

The standard of proof relied on at an inquest is the civil standard "on balance of probabilities", unless there is an allegation of unlawful killing when the evidence then has to be tested on the criminal standard of "beyond all reasonable doubt".

An inquest is held wherever the cause of death is uncertain, violent or unnatural,



where the death is still uncertain after a post mortem, or where there is a death in custody.

As the inquest is held to find the cause of death, it is an informal "inquisitorial process". A jury will be appointed if the inquest concerns death while under State detention (including while under the Mental Health Act). There are no formal allegations, charges or pleadings involved. The coroner decides which witnesses and experts to call. Any witness is entitled to have legal representation.

The deceased's family is also able to ask questions and obtain legal representation. The coroner leads the questioning and will often ask witnesses to prepare statements that are read out at the inquest. Questions asked by legal representatives must be relevant to the cause of death and no cross-examination of witnesses is allowed.

If healthcare professionals receive requests for a statement, or are asked to give evidence at an inquest, they should inform their professional body, as they will often organise professional representation and advise on any potential difficulties that may arise. Evidence must be honest and trustworthy, and it must not be misleading. Relevant information must not be left out in an attempt to protect colleagues.

Following the inquest, interested parties are entitled to obtain copies of the inquest depositions and the post mortem, which can be used as evidence in civil proceedings.

The very nature of an inquest can make it very difficult for everyone concerned, and the ultimate aim is that, by its conclusion, it provides answers to questions that enables a family to have greater understanding of what happened to their loved one and for the healthcare providers to learn from any mistakes identified.

"The deceased's family is also able to ask questions and obtain legal representation"

David Robinson, professional support lawyer and senior serious injuries solicitor, provides some guidance on ensuring the safety of trainee workers

The Apprentice

AS AUTUMN is upon us, and with applications closed for its twelfth series, the BBC's hit show The Apprentice is due an imminent return to television screens. Although the candidates presented are perhaps chosen for viewing figures rather than ability, the show nevertheless acts as a reminder of the benefits of apprentices in the workplace.

Apprentices can be invigorating in the workplace, causing existing employees to sharpen their own skills so to share their knowledge and experiences with their newest colleagues. Apprentices are also often key to succession planning and sustaining businesses.

"There is an almost innocence which surrounds apprentices, and it is this which makes them much more vulnerable members of the workforce"

However, there is an almost innocence which surrounds apprentices, and it is this which makes them much more vulnerable members of the workforce. There is therefore a much greater burden on employers to protect not only its apprentices, but those working with apprentices.

A duty to supervise

Apprentices are, by their very definition, inexperienced. In some workplaces this inexperience may not be the cause of too much concern, in others it could result in life-changing or fatal consequences. Therefore there is a very clear duty on employers to provide effective supervision of apprentices.

A highly pertinent illustration of this, from earlier in 2016, came in the form of the High Court considering whether a college was liable for a trainee tree surgeon when he fell and sustained significant back and ankle injuries (**MacDonald -v- Myerscough College**).

The trainee was undertaking a two-year BTEC course with the aim of becoming a tree surgeon. On the climb in question, there were two supervisors in the vicinity, one who was climbing in nearby trees and one, who had been standing at the base of the tree, who passed over his duties to his colleague in the trees as he left the area temporarily.

The trainee continued with the climb but in doing so had mistakenly released a device aimed at securing him; the trainee subsequently got into difficulty and fell.

The High Court considered whether it was sufficient to only have a supervisor in the vicinity, or whether the trainee should have been more closely monitored.

Giving its judgment, it was said that a supervisor "*has to monitor the movement of the trainee and continually assess the trainee's progress. A dynamic risk assessment was what was needed. The tutor needs to be fully involved in this*".

The college had a duty to supervise, and to effectively supervise, and it had breached that duty. The college was liable.

This case highlights the fundamental requirement for employers to provide a higher degree of monitoring and supervision to its apprentices and trainees. The question is, what does that higher level

look like in practice, and what should employers be doing?

A checklist for employers

Just as learner drivers owe the same level of duty to other road users as experienced drivers, apprentices have the same duty under the Health and Safety at Work etc Act 1974 as other workers to look after their own safety. However, as the above case illustrates, apprentices require employers to 'step up' and consider the wider impact on the workforce. Below is a checklist of some aspects employers should consider.

- **Induction training**: An apprentice is often someone who may never have been in any workplace before, and therefore nothing should be presumed about his or her prior health and safety knowledge. A detailed and documented health and safety programme is key at the earliest opportunity (ideally on the first day). A variety of techniques should be used to embed learning, and that learning should be tested to ensure there has been understanding.
- **Risk assessment**: Risk assessments should be dynamic and should reflect the competencies of those performing the activities in question. If apprentices are to be used, then consideration should be given to what additional risks might be involved, and how to minimise those risks. For example, a key preventative measure would be to ensure adequate supervision is in place.
- **Personal Protective Equipment**: Before an apprentice enters a workplace, he or she should have the correct personal protective equipment. If this is employer-issued, the right size should be provided, and apprentices should be given accurate instructions in its use. This may involve early communication between a workplace's stores department and the human resources department so that each know when apprentices are starting at work and what is required; **preparation is the key to prevention**.
- **Refresher training**: Once apprentices have spent time getting to know the nature of the job, it is of vital importance for refresher training to be provided. Apprentices are absorbing new information daily and so something they learnt on their first day may quickly be forgotten. In addition, refresher training will help to iron out any bad habits they may have picked up from existing employees!
- **Safety representatives**: A good way of promoting the health and safety of everyone is ensuring the appointment of 'safety reps' within the workplace. Whenever apprentices are recruited, such safety reps should then be used to specifically monitor and supervise safety matters around apprentices, identifying any areas of concern as well as good practice.

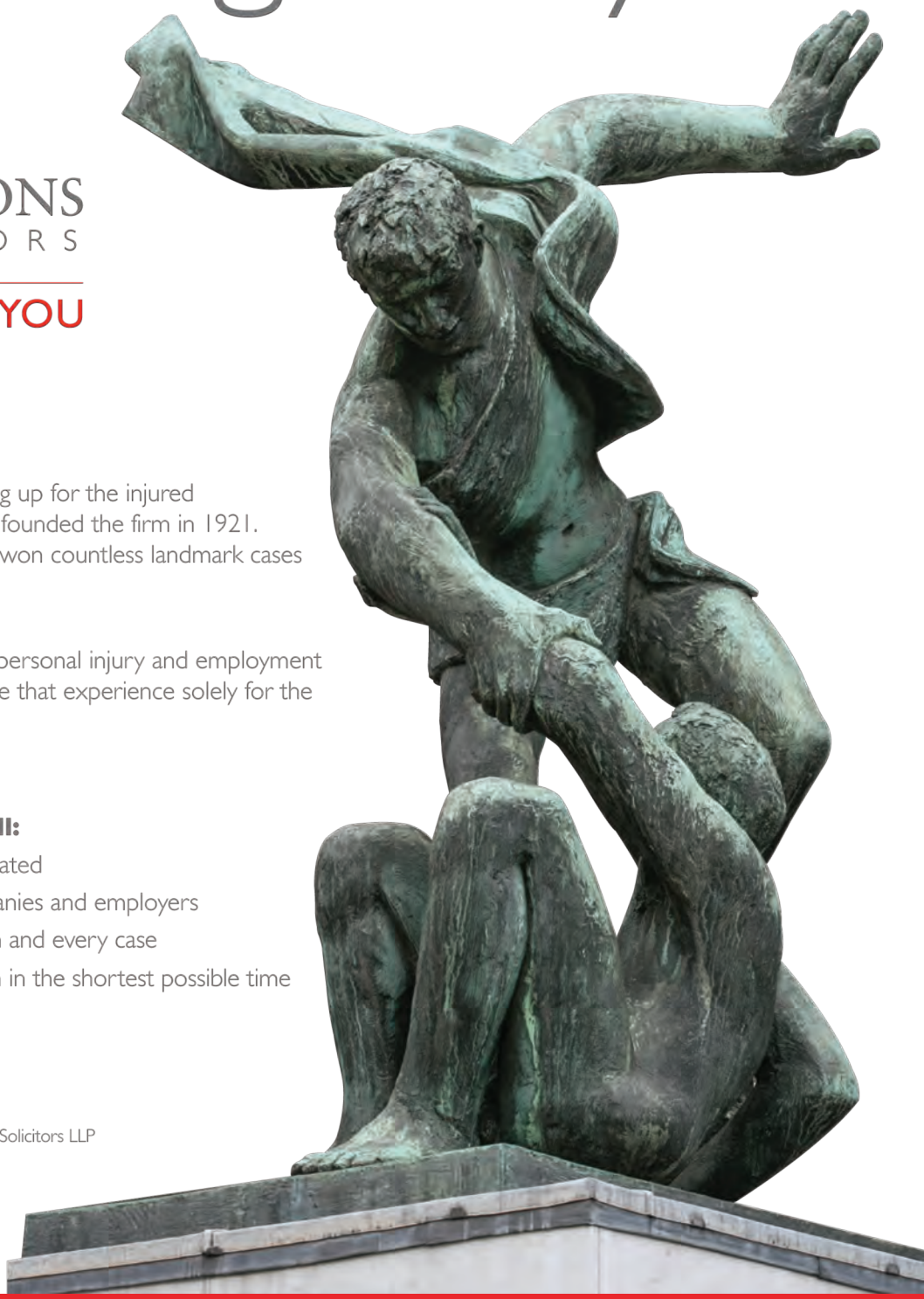
"You're fired"

Lord Sugar's infamous parting words and finger-point delivers a cold finality to unsuccessful candidates during the show. In the real world, that finality can all too often manifest itself in serious or fatal injuries, and can lead to prosecution and fines progressed by the Health and Safety Executive.

Getting health and safety right when it comes to apprentices is therefore essential and should not be overlooked or down-played; today's apprentices are tomorrow's leaders and instilling an appreciation of the importance of health and safety from day one can only add value to a business.

> *"Getting health and safety right when it comes to apprentices is therefore essential and should not be overlooked or down-played"*

Our pledge to you



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The Spirit of Brotherhood by Bernard Meadows

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