

# **CIBSE LIFTS GROUP**

**Could LOLER “*become a danger to persons*” {LOLER r10(1)(a)} ?**

## **INTRODUCTION**

**by**

**Dr Gina Barney**

**[Expert for Defendant –GVA]**

**Regarding the incident  
in 12 Cock Lane, London, EC1A 9BU  
on 16 June 2010**

## TIME LINE

Maintenance contractor arranges service visit of their mechanic to coincide with the visit of Thorough Examiner (TE) to carry out a LOLER examination.

|                              |       |   |
|------------------------------|-------|---|
| Wednesday<br>16 June<br>2010 | 08:00 | Mechanic attends at 12 Cock Lane to undertake a routine service visit. He carried out his work and left mid morning noting the TE was late. |
|                              | 11:40 | TE attends at 12 Cock Lane to undertake a Thorough Examination of the two lifts   |
|                              | PM    | Security Guard at 12 Cock Lane contacts the GVA Building Manager (BM), to advise him that the TE has left behind two Site Defect Notices.   |

## The TE's Site Defect Notices

For the left hand lift his handwritten site notice read:

*“When the Lift is ~~at~~ Mainly at the 6<sup>th</sup> And 5<sup>th</sup> floors the Suspension Ropes Contain Over 10 Broken wires Predominate (Over 6 Rope diameter) in 1 & 2 Strands. There are Signs of Rouging and the diameter has reduced over 3%. Ropes to be replaced immediately.”*

For the right hand lift his handwritten site notice read:

*“When the Lift is Mainly at the 5<sup>th</sup> And 6<sup>th</sup> floors the Suspension Ropes Contain Over 10 Broken wires Predominate in 1 & 2 Strands (over 6 Rope Diameters). This Section is heavily Rouged and the diameter has reduced over 5%. Ropes to be replaced immediately. The Motor Room 1<sup>st</sup> Emergency Stop Switch and the Pit Upper Switch do not always hold in stop Position. To repair Immediately”*

Reproduced as written.

## TIME LINE

|                             |       |   |
|-----------------------------|-------|---|
| Thursday<br>17 June<br>2010 | AM    | BM, attends 12 Cock Lane to collect the Site Defect Notices   |
|                             | 12:04 | BM emails the Site Defect Notices to Lift Contractor Service Manager (SM)   |
|                             | 14:48 | SM emails BM attaching a quote for the works.   |
|                             | 16:54 | BM emails SM authorising the works and issuing Purchase Order Number.   |
|                             | 16:57 | SM emails BM to advise him to contact the TE to advise that the works would take 14 working days.   |
| Friday<br>18 June<br>2010   |       | Insurance Brokers write to the Landlord, with a copy of the Thorough Examiners Report. This report was not forwarded to GVA Grimley until 28 June 2010. |

## TIME LINE

|                            |       |  |
|----------------------------|-------|--|
| Tuesday<br>22 June<br>2010 | ???   | EHO at City of London, visits 12 Cock Lane and finding the lifts still in service issues two Prohibition Notices.            |
|                            | PM    | Whilst the EHO was still on site a Maintenance Contractors mechanic attended to take the lifts out of service.               |
|                            | 13:59 | SM emailed BM to advise him that he had spoken with the EHO to ask him to get the TE to lift the “immediate” time frame.     |
|                            | 15:16 | Email from SM to GVA advising to contact EHO to see if the TE would lift the “immediate” time scale.                         |
|                            |       | Maintenance contractors send an mechanic to the lifts so that ropes could be ordered.  |
|                            | 15:40 | Email from BM to SM advising that he had spoken with TE who confirmed that the works did need to be carried out immediately. |

## TIME LINE

|                              |       |   |
|------------------------------|-------|---|
| Wednesday<br>23 June<br>2010 | 11:23 | Email from Maintenance Contractors to GVA advising that a set of ropes had been located to replace the suspension ropes on one lift |
| Thursday<br>24 June<br>2010  |       | Ropes replaced on the left hand lift.   |
| Friday<br>25 June<br>2010    |       | Left hand lift put back into service with the approval of the EHO   |
| 23 July<br>2010              | 14:57 | Email from SM to BM advising that the ropes had been replaced on the right hand lift and is ready to go back into service.          |
| 29 Sept<br>2011              |       | Summons under HSWA and LOLER  |
| 19 March<br>2012             |       | Prosecution dropped “immediate” on ropes charge as result of my report but continued on stop switch.                                |
| 5 July<br>2012               | 10.30 | In Court  |
|                              | 16.00 | GB+AT visit RH at SAFed   |

## **“Professional” Rules/Codes of Conduct**

### **IET Rules of Conduct**

8 Members shall at all times take all reasonable care to limit any danger of death, injury or ill health to any person that may result from their work and the products of their work.

### **CIBSE Code of Conduct**

Members shall:

Have due regard to the safety, health and welfare of themselves, colleagues and the general public.

## **“Trade” Code of Conduct/Practice**

### **LEIA Code of Practice for Maintenance**

#### **5.6 Removal of plant from service**

In the event that the maintenance contractor has reported that the plant is in a condition where it should be removed from service, the responsible person should not reinstate the plant until sufficient measures have been taken to allow the plant to be returned to service.

### **SAFed Code of Practice**

Members are required to

4 maintain and operate procedures aimed at ensuring the health and safety of their employees



## THE LAW

HSAWA: 1974

S3 'it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, as far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risk to their H&S'

S7 'It shall be the duty of every employee while at work – to take reasonable care for the H&S of himself and of other persons who may be affected by his acts or omissions at work'

Remember that there is an

EMPLOYER of the Inspection Body carrying out the Thorough Examination (maybe the Owner)

and

an EMPLOYER of the Thorough Examiner.

# Loopholes in LOLER

Anthony Taylor (Chair)  
Managing Agent's Property H&S Forum

## Background

- GVA operate a Facilities Management organisation
- Some 800-1000 properties under FM contract
- Forum (18 Member organisations) probably responsible for the majority of all (non-domestic) lifts in the country
- All services, including M&E, generally now outsourced
- Managing Agent's are not party to contracts between Contractors and Client
- Thousands of Contracts in place with indeterminate term before renewal
- **Engineering Insurance (generally) :**
  - linked to Property (Property Damage/Business Interruption [PD/BI]) Insurance
  - Managed by Clients Insurers/Insurance Broker
  - Broker/Insurer employs competent persons to undertake Thorough Examinations
  - Reports made to Broker, issued to Client then to FM
  - Reports made available through Inspection Bodies websites (but client permission needed for each policy)
  - Asset lists of insured items often out of date due to change in ownership/replacement etc

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## Background

### Cock Lane – London

- X2 Lifts
- TE appointment made for 16<sup>th</sup> June 2010
- Maintenance Contractor on-site (but leaves having undertaken their checks)
- Examiner deems both lifts of 'immediate danger to persons'
- 'Immediate Danger' Notice given to Security Guard (sub-contractor)
- FM picks up Notice following day and issues to Maintenance Contractor (No Advice given)
- EHO Visits 22 June 2010 (5 working days later) – Issues x2 Prohibition Notices
- TE Full Report arrives at GVA 12 days after TE undertaken

Decision to Prosecute January 2011 (risk x2@£20K Fines + Costs)  
Legal Advice taken

Admitted x2 Breaches  
Fined x2 £3,500 + Costs (total bill was £70,000, inc EHO's Costs of £19K)

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## We are Asking....That any Competent Person immobilises a dangerous lift...and..

- 1) Duties of 'Competent Person' ( S3 [employers] & S7 [employees] HSAW) are included in ACOP as a 'reminder'
- 2) 'Standard' Notices/Thorough Examination (TE) are included as an appendix
- 3) Introduction of the concept of a 'Person in Control' (ie the Building / Facilities Manager)
- 4) Advice as to Insurance of a Lift (NOT a legal requirement but advised !)
- 5) That TEs and other notifications/reports also be addressed to the PIC
- 6) That 'Immediate' Notices be placed in the hands of an appropriately competent person
- 7) That there is a duty /Guidance for Examiners to make appropriate appointments (30 days)
- 8) The creation of a 'Lifts' database to include records of Competent Individuals register.

🔴 I Will address First Last !!!

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## Standard Notices/TE are included as an appendix

- ⊙ **We contend that many TEs do not comply with Schedule 1**
  - Every Examining Body uses their own Format
  - Unclear Language generally
  - No prioritisation/dates by which defects should be remediated
  - Generally not appropriate for non-expert lift engineers
  - Confusing for EHO's and PICs
- ⊙ **We contend that many 'Immediate Notices of dangerous defects' are unclear as to their purpose**
  - 'Pussy-footing' language – no CLEAR instruction to immobilise
  - Every Examining Body uses their own Format
  - They are delivered to the wrong people
- ⊙ **Suggested Format for both, agreed by EHOs and Forum submitted to HSE for inclusion as a 'recommended format' in ACOP appendix**

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## Introduction of the concept of a 'Person in Control' (ie the Building / Facilities Manager)

- **The Person In Control (PIC)** For the purposes of this guidance the PIC refers to the individual primarily responsible for the safe operation of the equipment. This may include a Managing Agent, Building Manager, or Facilities Manager. However it should be noted that other 'Duty Holders' (ie the owner) will remain responsible. The PIC will also be responsible for ensuring that those servicing and maintaining the equipment are competent to do so (while, in some cases, they may not have actually instructed the contract, the PIC will be responsible for ensuring that the equipment they are responsible for is maintained effectively).
- ⊙ The PIC is likely:
  - To arrange for the servicing and maintenance of the equipment
  - In the event that the person identifying a major defect does not disable the lift, will need to make immediate alternative arrangements
  - Will retain authority to turn off, or arrange the turning off, or if necessary any isolation, of the equipment and remove it from service.
- ⊙ The PIC will also be the person responsible for making sure that adequate access and the appropriate facilities, e.g. barriers, are used by the servicing and maintenance contractor or the examiner when they visit the site to undertake the examination

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## Advice as to Insurance of a Lift (NOT a legal requirement but advised !)

- On our finding a lack of current TE on a site, and subsequent to a 'discussion' with the tenant (with a legal background) he refused to take out insurance for his lift – thus not on Insurers 'radar'
- Discussion with SAFed ,and they with HSE, agreed no LEGAL requirement for insuring a lift
- May be foolish, but should be made clear in ACOP
- (Only legally required insurance EL)

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## That TEs and other notifications/reports also be addressed to the PIC

- Currently TE reports go to 'Employer' ie: the person who pays for the PD/BI and 'Engineering Insurance'
- Experience indicates long lag between issued to broker/insurer/client and then to PIC ( However, quick to EHO!)
- As Competent Person knows where they are examining – cannot TEs also be sent there?
- Particularly if they are asked to make appointments !
- Mutual Clients – can the industry not improve it's service to it's clients ?
- Evidence of weeks, if not months, for receipt by PIC if overseas / Fund Managers are Owner.
- Web based 'libraries' insufficient as each Lift under different policy requiring different log-in and permission from Client !!!!

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## That 'Immediate' Notices be placed in the hands of an appropriately competent person

### Ⓜ Currently industry practice to deliver to the nearest person !

- Likely to be a sub-contracted 'Front of House ' or security guard
- Unlikely to understand gravity of Notice
- May not have English as First Language
- Almost certainly not 'Competent'
- Examiners 'Industry' to be responsible to either 'Immobalise' or be responsible to FIND someone who understands what they are being given

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## That there is a duty /Guidance for Examiners to make appropriate appointments (30 days)

### • Why is the Examining Industry so resistant to basic customer service?

- Mutual Clients
- They know the dates for re-examination... and are scheduling them to their advantage, not necessarily their Clients, who are the prime Duty Holders under LOLER. (exceptions, obviously, where contracts /properties 'lost')
- An appointment would enable the PIC to arrange for their Maintenance Contractor to be on site too
- Far from 'unknown' for Examiners to undertake TE after expiry of the last (what about the smaller 'owner' who does not have the systems in place)

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## The creation of a 'Lifts' database to include records of Competent Individuals register.

- **We suggested a national database along lines of Energy Performance Certificates or Vehicles (DVLA )- Recording**
  - Individual Lifts, Location, O&Ms/Risk Assessments and associated documents
  - PIC
  - Thorough Examinations (and dates)
  - Recommendations
  - Potentially Service sheets
- **Also a record of Competent Persons with qualifications (including which models of Lift they are competent to work on) – We acknowledge SAFed are working on this.**
- **Administering depends on:**
  - Common TE and other Notices, Payment ( perhaps £2/ £5 on each and every TE ?)
- **Advantages**
  - All lifts known and maintained safe ( O&Ms/RAMS etc )
  - Access for Enforcers (time/money saved )
  - No problem with change in PIC/Contracts
  - 'Open Platform' would enable Managing Agents/Landlords/ 'Industry' to draw info into own systems

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## That any person with the appropriate competence render 'dangerous equipment' safe or immobilised - Including an Examiner.

### Our Contention and Request

- **Duties of 'Competent Person' ( S3 & S7 HSAW) are included as a 'reminder' in ACoP**
  - HSAW S3 *'it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, as far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risk to their H&S'*
  - HSAW S7 *'it shall be the duty of every employee while at work – to take reasonable care for the H&S of himself and of other persons who may be affected by his acts or omissions at work'*

**NOTE: Members of the Forum do NOT seek to absolve themselves from these duties, rather ask others in the Industry to embrace them**

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## LOLER - The 'Employer' and who has 'Control'

- The Advice is that either (or both) the Examiner's Corporate Body, and the individual Competent Persons are responsible to render the dangerous equipment safe :
- Advice contends that Duties are placed upon the commonly recognised 'Employer' (being the owner) and or 'Person in Control' but will also mean the 'Employer' of the Examiner and the Examiner himself:
- LOLER Reg:3 (2) – *requirements imposed by these regulations on an employer in respect of lifting equipment shall apply in relation to lifting equipment provided by or used by an employee of his at work*
- LOLER Reg 3 (3)(b) i/ii/iii – *The requirements imposed by these regulations on an employer shall also apply To a person who has control to any extent of:*
  - (i) lifting equipment
  - (ii) a person who uses or supervises or manages the use of lifting equipment or
  - (iii) the way in which lifting equipment is used and to the extent of his control
- LOLER Reg 3 (4) – Any reference in paragraph (3) (b) to a person having control is a reference to a person having control in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)

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## LOLER – Who's to Immobilise it?

- LOLER Reg 10 - does not refer to the Competent person but to the '*person making the TE for an employer under regulation 9*' Thus we contend the individual thorough examiner is responsible under Reg 10 (1) [to notify their 'employer']
- The 'Employer' is responsible Reg:10 (3) to '*ensure that the lifting equipment is not used*'
  - (a) before the defect is rectified
  - (b) .....after a time specified under (Schedule1) ..and before the defect is rectified
- LOLER ACOP (para 294/295) suggests the thorough examiner is the competent person (in house or otherwise)- the employer of the competent person has a duty, when notified, to take action required by Reg 10(3) *ensure that the lifting equipment is not used*
- Effectively - during the examination the Examiner will have exclusive control of the equipment and thus become the PIC
- THE EXAMINER IS ON SITE, IS AN EMPLOYEE and is COMPETENT – IMMOBILISE IT !

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## Advice Conclusion

**In conclusion, on the narrow issue which we are asked to consider, it is our opinion that :**

- It is arguable that LOLER would require the competent person engaged to carry out a Thorough Examination of a passenger lift to ensure that an unsafe passenger lift is not brought back into operation at the conclusion of a thorough examination;
- Even if the proposition in the above paragraph were not correct, there is a very strong argument that the duty imposed by section 3(1) of HSAW would require a similar outcome; and
- The duty imposed on the individual employee engineer by section 7(a) HSAW would also require the individual engineer to ensure a similar outcome.

**6 January 2014 David Travers QC**

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## Our Request

- **Please support the basic principles**
    1. HSAW applies to thorough examiners, service mechanics etc, and their Employers (as well as everyone else!)
    2. Any Competent Person has a DUTY to immobilise dangerous (lift) equipment
    3. The 'Authority' to immobilise a Lift is vested in the nomination 'Competent'
    4. There will often be exceptions where the matter is more 'complicated' thus the employment of competent people – to assess risks SFAIRP "so far as is reasonably practicable" and deal with them
    5. The Forum accepts that 'immobilising' may cause problems for them – especially from tenants affected – thus 'Communication' will be swift. We ACCEPT our duty to deal with the consequences.
- And  
The other matters raised in your hand-out – Please respond to the HSE consultation

**Thank You**

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# LOLER – as applied to Lifts with Imminent Danger Defects

CIBSE 11 Feb 2014

Richard Hulmes – CE SAFed

## Approach

- What Problem are we trying to fix?
- What does LOLER say?
- Who has primary responsibility?
- Cock Lane Case 2010/11
- Legal Advice
- Conclusion - options



## What Problem are we trying to fix?

- Preventing unsafe lifts from being used.
- Communication
- FM not involved in the contract
- Training and competence
- Understanding primary responsibility
- Implications of a lift 'out of use'



## What does LOLER say?

A lift (lifting equipment) is thoroughly examined:

- 9(1) – before first use (unless it has an EC declaration of conformity)
- 9(2) – after installation and before being put into service for the first time



## What does LOLER say?

- 9(3)(a) – if exposed to conditions causing deterioration
  - (i) – every 6 months if lifting persons
  - (ii) - every 12 months for other lifting equipment
  - (iii) – in accordance with an examination scheme
  - (iv) – exceptional circumstances – eg following damage caused



## What does LOLER say?

- 9(3)(b) – *if appropriate for the purpose, is inspected by a competent person at suitable intervals between thorough examinations.*



## What does LOLER say?

- 10(1)(a) – *A person making a thorough examination for an employer under Regulation 9 shall – notify the employer forthwith of any defect in the lifting equipment which in his opinion is or could become a danger to persons*



## What does LOLER say?

- 10(2)(a) – *A person making an inspection for an employer under Regulation 9 shall – notify the employer forthwith of any defect in the lifting equipment which in his opinion is or could become a danger to persons*

..... Includes lift maintenance inspections



## What does LOLER say?

- 10(3)(a) – *Every employer who has been notified under paragraph (1) shall ensure that the lifting equipment is not used – before the defect has been rectified ...*



## What does LOLER say?

Interpretation of '*employer*' includes

- 3(3)(b) – a person who has control to any extent of
  - *Lifting equipment*
  - *person who uses or supervises or manages the use of lifting equipment*
  - *the way in which lifting equipment is used*

... arguably a bit vague ... but



## Who has primary responsibility?

- 10(1)(a) & (2)(a) – CP/Examiner/ person inspecting the lift notifies the 'employer'
- 10(3)(a) – employer shall ensure that the lifting equipment is not used – before the defect has been rectified



## LOLER does not say

- Primary responsibility can be transferred
- CP/Examiner/ person inspecting the lift shall ensure that the lifting equipment is not used – before the defect has been rectified



... And it is very unlikely that it ever will



## Other examples

- MOT inspector does not disable your car – he advises you it is unsafe
- No other (LOLER/PUWER) work equipment is put out of use by the CP – why just Lifts?





## Cock Lane Case

- 16 June 2010 – 2 lifts examined - both advised as 'imminent danger to persons'
- Lift maint crew had left, no PIC on site, concierge handed notice
- Concierge informed PIC who picked up notices next day



## Cock Lane Case

- Either notice unclear or PIC not aware what action to take on lift being 'imminent danger to persons'
- PIC informed Lift maint crew but did not specify take lift out of use
- 22 June – LA EHO visited – lifts still operating – despite lift maint crew on site - prohibition notice



## Cock Lane Case

Jan 2011 – decision to prosecute?

- Regulators Compliance Code/CPS Guide
- Prohibition notice served
- Defect in process of being rectified
- No persistent or deliberate breach
- Delay in decision
- Petty – minimal fine



## Cock Lane Case

Conclusions

- Imminent danger lift allowed to run
- PIC unaware of seriousness - HSWA s3 & 4
- Value of having lift maint crew & PIC on site (or contactable) for TE
- Commercial interest – cost of calling out lift maint crew to put lift out of use



## Legal Advice

- Acknowledged as very narrow view
- Everyone has responsibilities
- Does not consider primary responsibility
- Ignores contractual service
- Some confusion over:
  - 'competent person' or inspection company
  - What is 'imminent danger'
  - Insurer and insurance broker



## Legal Advice

- Some weak arguments:
  - CP does not have ultimate control of lift
  - Inspection company responsibility as 'employer' of the CP who 'uses' the lift – only extends to 'ceasing examination'.
  - Work equipment irrelevant – HSWA



## Legal Advice - Conclusions

- If the key criteria is 'control' there are significant limitations as to how far CP is subject to such duties (47)
- CP does not have 'employer' responsibilities in relation to the thorough examination
- Facilities manager, aware of imminent danger defect is responsible for ensuring lift is not used (65)
- Advice very general and 'arguable'



## Conclusions

- Need to ensure dangerous lifts not used
- Need to ensure responsibilities and instructions are fully understood
- Need to improve communication
  - FM/owner/broker/CP/Lift maint company
- Need to fully understand the implications of putting a lift out of use.
- Not just a CYA solution



## Possible Solutions

- CP can put lift out of use – if provided for in the contract
- FM should be involved in the contract
- FM review in house E&M Services
- Train FM/PIC on putting lifts out of use

..... Changing LOLER or the ACOP is not the solution



Any Questions?

