ANNEX 1

Consideration of the Council's Duty to Grit Car Parks

Background

1. This paper considers the risks associated with not gritting Council car parks (The current policy at the Council). When reading the paper it has to be borne in mind that risk cannot be eliminated altogether and any recommendation may be based solely on financial implications.

2. Car Parks do not form part of the Highway so instead of the Highways Act the Council has a "common duty of care" and a duty under the Occupiers Liability Act 1957. The recent history of this kind of claim was very much affected by the decision in Goodes v East Sussex that treated snow and ice as a transient defect allowing Authorities to repudiate claims, as there was no liability under the Highways Act. Although this decision related to the Highway it became a generally accepted defence for most type of snow and ice claim.

3. The new 'Duty of Care' for Highway Authorities introduced in section 111 of the Railway and Transport Safety Act 2003 brought to an end the 'Goodes' defence giving Council's the responsibility to ensure 'so far as is reasonably practicable' that safe passage along a highway is not endangered by snow or ice.

4. As regards Car Parks the demise of the 'Goodes' defence meant that Council's were as vulnerable as ever to potential claims. It is worth looking at two claims which may help put things into perspective and assist in making any decision as regards future gritting of car parks:

   Webster v Cannock Chase.

   In Webster's case, the Council were occupiers of an unmanned 'pay and display' car park. There had been three to four degrees of frost overnight. The claimant was aware of the icy conditions and had noticed that there had been no salting/gritting of the car park. Having done some shopping, she slipped and fractured her ankle on returning to her car at 11am. The Council had no policy to grit car parks.

   At trial, it was argued that if salting/gritting were not reasonably practicable, the car park should be temporarily closed. Judge Mitchell retorted that the hazard was no more or less than might be encountered by a pedestrian on an untreated footpath. The hazard was not a concealed 'trap'. To close the car park (and also those controlled by supermarkets and shopping developments) would have profound implications for the public.

   Judgment for the Council. Leave to appeal was refused.

   Pajak v Bath & North East Somerset Council

The claimant fell over at a car park and has been awarded £47,614. Her fall was at 8.55am. Gritting operations had been started at 4am at another car park. This involved two men who were normally cleaners and their duties covered all the city car parks in Bath. The weather had been cold and deteriorating for two or three days beforehand. The forecast was for sub-zero temperatures with rain likely to freeze. The Highways Department is careful to note the forecasts but the warning was not conveyed to those responsible for car parks. The judge found this surprising.

The claimant noticed gritting being done as she drove into the car park. She realised that conditions were treacherous. Cars were sliding about and collisions had occurred. Mrs Pajak actually changed into training shoes to leave on foot. Snow had been compacted for some time.

The judge criticised the council for lack of flexibility. Gritting ought to have commenced even earlier but the men simply did their normal rounds in their usual way. Effective supervision should have taken into account that this was an open- air car park, the biggest in Bath with 1,176 spaces. As a commuter car park it would fill up first from 8am. That day, people would have got there earlier to allow for the bad weather. The car park generated considerable revenue, so it was a commercial enterprise and visitors were entitled to expect more effective steps to be taken. After the claimant's fall, one of the council men phoned for permission to close the car park. Permission was refused "because that would cause more trouble". Closure would have been a last resort but "the system did not permit the decision to be made by those with all the information".

When the cleaners first arrived at the car park they soon formed the view that it was dangerous. They did not communicate this until too late. Relying on the initiative of two cleaners was an inadequate system. The system has since been improved, to give greater flexibility to summon others.

The judge distinguished this case from Webster v Cannock Chase (previously reported in Court Circular). In that case the frosty conditions were little out of the ordinary and there was nothing unusual or concealed about the hazard. It was an "ordinary icy day" and to grit in all such circumstances would have been prohibitively expensive and not practicable. Priority was to be given to roads first.

5. It is clear from these cases that even if you grit a car park you may still end up with liability for any incident depending upon what the Judge deems to be reasonable. To put a financial perspective on this If the cost of gritting car parks in Bath was £1M a year by deciding not to do so they would have saved £1M yet had to pay out only £47K for breach of ‘duty of care’ under the Occupiers Liability Act.

Claims History

6. It is perhaps worth looking at the number and cost of claims incurred by the Council for this type of incident in recent years:

Policy Year	Location	Cost
1997/98	Castle Car Park	£5,783
2000/01	Bootham Row	£0
2000/01	Park & Ride DO	£0
2003/04	Kent Street	£3,000 (Not Yet Settled)
2003/04	Union Terrace	£0
2004/05	St Georges Field	£65
2005/06	Piccadilly	£1,090

7. The above table shows that over the last seven years there have been a total of seven claims costing £9.938. This equates to an average of one claim a year costing just short of £1,500.

8. This does not mean that the Council's car parks are safer than anywhere else or that we will not encounter a claim of much higher value but puts into context the scale of the risk in terms of attritional losses.

Risk Assessment

9. Annex A shows a risk assessment recently carried out at one of the city's car parks (Marygate) looking specifically at the snow & Ice hazard. It is clear from this assessment that over a number of years the likelihood of a claim occurring is very high (Interestingly none reported from this car park on our records). The type of injury is unlikely to be catastrophic but a broken limb may well occur with any unexpected slip.

10. This car park is particularly vulnerable to frost given its relatively exposed location the problem been further exacerbated by the car parks impervious surface. There are however naturally occurring factors that go some way to reducing the risk including its flat surface and exposure to sunlight this is further complemented by its good state of repair.

11. The Council has some 55,000 square metres of car park to maintain which would have a considerable affect on revenue should a decision be made to grit them, which puts the importance of any decision into context.

12. There may be relatively low cost options available to mitigate the risk these include closing the car parks during severe weather this however would have a detrimental affect on car park revenue and can most probably be discounted. A second option may be to put up a sign indicating that the car park is not gritted. Although warning signs may mitigate liability in relation to the Highway there is no guarantee that it will help when a claim is brought under the Occupiers Liability Act. However in the scenario where a car loses control and hits or even pins a pedestrian against another vehicle causing injury the cause may be attributable to the driver of the offending vehicle as he was driving without regard to the conditions. It is unlikely that the Council would escape any contributory negligence.

13. As part of this review both ASDA and TESCO were approached to elicit information on their policies. Interestingly both stores confirmed that car parks were gritted at all stores as part of a national contract. However in

must be borne in mind that these are for profit organisations that have the budget to pay for this type of service. As the 'Pajak' case above shows this does not mean they will escape liability just that they are trying to fulfil their 'duty of care. No enquiries have been made with regards to claims attributable to snow and ice and this is information they will probably be unwilling to provide.

Legal/Insurers Views

14. This paper looks very much at the risk as a 'cost benefit analysis', which is likely to indicate that money spent on gritting, could be better allocated elsewhere. This does however mean that we would no doubt be found in breach of our duty of care should a claim arise. Although the financial cost of this is likely to be low there may be other risks to the Council such as reputation, which cannot be costed. To add some balance both Solicitors (Berrymans Lace Mawer) and insurers (Zurich Municipal) were approached for their view.

15. Berrymans concur that on a cost benefit basis not gritting the Car Parks may prove economically beneficial to the Council they do however point out that:

- Work place car parks should have a rigorous system in place to ensure they are gritted before employees arrive at work
- School car parks also need to be treated before staff arrive. The caretaker however needs to be fully trained to risk assess the situation
- As regards Pay & Display car parks any decision not to grit should have supported documentation e.g. Risk assessment
- Signs and notices may help mitigate claims but when conditions are exceptionally sever consideration should be given to closing the car parks
- The risk of a high value claim e.g. head injury exists

Recommendation

The decision that the Council has to make needs to be guided by the scale of risk. This in recent years seems to be very low and as in the 'Pajak' claim even if you do grit liability may still rest with the Council. Are we in breach of our 'duty of care'? To answer this we need to consider the claims history. Common sense tells us that we should not spend more money on a risk than what it is worth and we should allocate funds to where there are needed most (Priorities). Can this be used as a defence? The answer to this is no because we are in breach of our 'duty of care' but we are insured and providing the problem does not escalate there should be no material affect on premium. The risk should merely be monitored on an annual basis