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bto Insight

Insurance News

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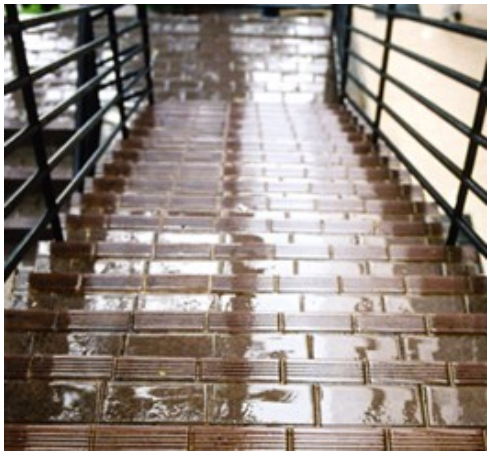
More Haste, Less Speed!



In the case of ***Emma Stalker v Greater Glasgow & Clyde Health Board***, Lord Pentland considered whether or not the Defenders, the Pursuer's employers, had breached their statutory duties under s12 of the Workplace (Health, Safety and Welfare) Regulations 1992. S12(1) and (2) apply to states of slipperiness of a traffic route which, though temporary, occur with a sufficient degree of frequency and regularity to give rise to a risk of health and safety of employees using it. S12(3) covers transitory conditions which occur less frequently.

The Pursuer claimed damages from her employers for injuries she sustained in an accident at work. She had slipped on wet outdoor steps which she had been descending to access her workplace.

Lord Pentland held that the Pursuer failed to establish the regularity or frequency with which the steps were liable to become so wet as to give rise to a risk of slipping. The Pursuer's position was simply that it rains in Glasgow and that the steps were, therefore, likely to get wet. This approach, in his Lordship's opinion, fell well short of showing that the steps were in a hazardous condition with such frequency and regularity as to make their surface "unsuitable for its use". Accordingly, he held that the Pursuer could not succeed under Regulation 12(1) or (2). Further, as Regulation 12(2)(b) applied to floors only it did not apply in this case.

His Lordship also concluded that the Pursuer failed to prove that there was a substance, namely rain water, on the step "which may cause a person to slip", as she had failed to prove that immediately prior to her accident there was a substance on the floor which presented a real risk that someone might slip. It followed that the Pursuer's case under regulation 12(3) could not succeed. He held that even if there was a substance on the steps which might cause a person to slip, he was satisfied that the Defenders took all reasonably practicable measures to prevent this.

The defence of reasonable practicability involves consideration of the nature, gravity and imminence of the risk and its consequences, and balancing that against the nature and proportionality of the steps by which it might be addressed.

In Lord Pentland's opinion, there were no reasonably practicable measures available to the Defenders to prevent rain water from landing on the stairway. He considered that rain water cannot be compared with a substance which has been spilled, dropped or knocked over. It is a wholly natural phenomenon and its presence from time to time on external steps cannot be avoided. In this case, the stairway was provided with a good hand rail on either side and the steps had a slip resistant surface. The Pursuer therefore failed to establish a breach of regulation 12(3).

Lord Pentland opined that had he found the Defenders liable, he would have held the Pursuer to be 50% contributory negligent based on the evidence that she appeared to be rushing down the steps at the time.

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bto saves £30,000+ on Damages Claim

The Pursuer claimed to have sustained an adjustment disorder in relation to fear that he may have contracted an illness, such as HIV or Hepatitis, via a needle stick. He claimed damages for solatium, past and future loss of earnings and services, and lodged a Statement of Valuation of Claim with the Court wherein he valued his claim in the region of £35,000. At Proof, the Pursuer was awarded only £3,500 as he failed in his claims for both wage loss and services following lengthy submissions being heard regarding quantum.

The Pursuer had returned to work immediately following the needle stick incident. Approximately two months later, the Pursuer was dismissed by the Defenders for threatening his supervisor with physical violence. It was the Pursuer's position that, as he was suffering from a psychological injury, his aggressive behaviour was out of character and attributable to the needle stick incident, which in turn was the fault of the Defenders.

It was successfully argued at Proof by **bto** that the Pursuer's aggressive behaviour was not linked to the needle stick incident of two months prior and that any award of damages would have been akin to an award for the Pursuer's own gross misconduct. As a result, the Pursuer was awarded nothing for past or future wage loss.

Detailed technical argument was also advanced by **bto** on behalf of the Defenders regarding the Pursuer's services claim. Again, the Court found in favour of the Defenders and made no award for services.

It was the Pursuer's position that he should be entitled to an award of expenses on the Court of Session scale and that it was reasonable for him to value his claim as potentially including awards for wage loss and services. In response, the Defenders moved that the Pursuer's expenses should be restricted to the Sheriff Court Ordinary Cause scale with no sanction allowed for Counsel.

It was submitted by **bto** on behalf of the Defenders that it should have been clear to the Pursuer's agents that the Pursuer had no reasonable claim for wage loss or services. As a result, at no time could the Pursuer's claim have been valued in such a way that it merited the case being raised in the Court of Session, nor was the claim sufficiently complex.

Lord McEwan accepted the Defenders' position and the Pursuer's expenses were restricted to that of the Sheriff Court Ordinary Cause without sanction for Counsel. This resulted in a marked saving in expenses for the Defenders, particularly in light of Counsel being heavily involved for the Pursuer throughout the course of his action and appearing at a 4 day Proof Diet.

The expenses of the motion for expenses were awarded against the Pursuer.

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Out in the Cold... Drummond Cox v Dundee City Council

The Pursuer, a trainee rugby coach, who was participating in a course to gain a qualification to coach junior rugby, sued **Dundee City Council**, who were responsible for the pitch at **Panmure Rugby Club** where the course took place.

The Pursuer fractured a metatarsal bone during the training course, which took place on a frozen pitch in February 2010. The course involved practical training outside on the grounds of the club after an indoor presentation.

The Pursuer gave evidence that prior to going outside he was told to wear trainers by the event organiser who ran the training course. The Pursuer and some of the other participants wore trainers, while others wore boots with moulded studs.

During a game of touch rugby, the Pursuer was in possession of the ball and in order to avoid contact from players coming towards him he side-stepped, but when planting his foot on the ground to do so, he heard a crack and fell to the ground. The Pursuer hobbled off the pitch, claiming that the pitch was unsuitable for use, but that officials ignored the freezing conditions. The event organiser told the court that he inspected the pitch before the session.

However, the judge, Lady Scott, was not convinced by the event organiser's evidence that he had carried out a thorough risk assessment, concluding that the underfoot conditions were frozen and accepting the evidence of the Pursuer's expert that "the ground would not take a stud".

Delivering her opinion, Lady Scott said: *"Accordingly having concluded on the evidence that these conditions existed at the relevant time, I was satisfied that such conditions present an obvious risk of injury and the risk assessment undertaken here by the Defenders' employee, in the course of his employment, was inaccurate or inadequately conducted."*

"I was also satisfied on the evidence as to cause. The Pursuer's evidence of attempting to side step and planting his foot on the ground, immediately hearing a crack and then falling to the ground was consistent with hard and uneven or rutted conditions underfoot."

Lady Scott held that the description of the conditions was "*entirely consistent with the nature of the injury sustained".* She held that the Pursuer had proved his case and damages were awarded in his favour for which the Defenders were found vicariously liable.

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Failed Psychiatric Injury Claim

A 63 year old housing association manager, failed in his claim for damages from his former employers for psychiatric injury, allegedly caused by the way he was treated while off work due to non-work related stress.

For around a year or so prior to mid-2006, the Pursuer had been greatly distressed by a series of events in his personal life. He claimed that these had not impacted on his work. However, in May 2006, he was called to a disciplinary meeting during which certain criticisms were made of his performance.

The Defenders led evidence, which was accepted by the court, that there had been legitimate concerns about his performance for some time, however, they were not aware of the family issues at the time of the meeting as the Pursuer had not discussed them.

The Pursuer maintained that receipt of the file note of that meeting was the "last straw" as far as his health was concerned. Shortly after the meeting, the Pursuer saw his GP who certified him as unfit for work due to anxiety. He never returned to work and resigned in January 2007.

The Pursuer did not seek to criticise the Defenders for holding the disciplinary meeting, but claimed that during the period of his absence up until his resignation, the Chief Executive of the housing association conducted a course of correspondence with him relating to his return to work, the tone and content of which caused his depressive condition to become chronic.

The Defenders argued that there was nothing unreasonable in their dealings with the Pursuer during his absence. It was perfectly legitimate for them to write to him to enquire of his condition and to make a referral to an occupational health specialist in order to obtain an independent view of when the Pursuer might be able to return to work. This was particularly so, given that as far as they were aware, the causes of the Pursuer's anxiety were family related issues and not work-related.

In finding in favour of the Defenders, the Judge, Lord Armstrong, stressed that while cases of this sort must be determined on their own facts, the general test is still as set out in 2004 by the House of Lords in the case of **Barber v Somerset County Council** – "*whether the employer acted reasonably and prudently, taking positive thought for the safety of their workers in the light of what they know or ought to know.*"

Lord Armstrong pointed out that an employer can only be judged against the standard of a reasonable employer with a lay person's understanding of psychiatry and that they should not be expected to have the informed knowledge of a psychiatrist.

He found that the Defenders' actions did not amount to a breach of their duty towards the Pursuer. He preferred the view expressed by the Defenders' expert psychiatrist, that the tone and content of the correspondence, viewed objectively, would not reasonably be expected to have an adverse impact on the Pursuer's recovery. The Pursuer was not justified in viewing the correspondence as malicious. Accordingly, the Pursuer's claim failed.

George Moncrieff v Wishaw and District Housing Association and others

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Update

Last month, the Scottish Government confirmed that as part of the proposed Damages Bill, they intend to:

- ☐ Increase the limitation period for raising an action for damages for personal injury from 3 years to 5 years;
- ☐ Provide a list of factors to assist the courts with the exercise of their existing discretion under the 1973 Act to allow an action to proceed when raised after the expiry of the limitation period;
- ☐ Clarify that it should not be possible for a bereaved relative to secure damages for psychiatric injury under the Damages (Scotland) Act 2011;
- ☐ Provide that courts should have the power to impose periodical payments in relation to awards of damages for personal injury.

bto will be closely monitoring the progress of the Damages Bill and will provide further updates regarding its progression through the legislative process in due course.

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