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Insurance News

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Out with the New – In with the Old

Bell v Alliance Medical Limited & Others [2015] CSOH 34

The Defenders were contracted by the Health Board to provide scanning services. During a scan the Pursuer's artery was punctured during a cannulation procedure. There was a factual dispute in the case concerning whether the failure to notice a spurt of blood was negligent, it being accepted that striking the artery itself was not negligent per se.

The interesting aspect of this case is the fact that the Defenders sought a right of relief / contribution from their radiographer employee who had carried out the procedure. She in turn brought the Health Board into the action, arguing that they owed non-delegable duties of care and similarly sought a right of relief.

The Defenders relied upon the elderly House of Lord's authority of ***Lister v Romford Ice & Cold Storage Ltd [1957] AC 555***. In *Lister,* which split the bench 3:2, the Lords held that the Defenders were entitled to recover damages from their employee who had driven negligently during the course of his employment, the employee having an implied term in his contract of employment to exercise due care.

Counsel for the employee argued that the attempt to rely on *Lister* was misconceived as it only applied in circumstances where one employee had injured another. In any event, it was submitted that *Lister* was founded on the idea of vicarious liability from a bygone age, if it ever formed part of the Law of Scotland.

The Court was urged not to follow *Lister* and Lord Boyd commented, in giving his judgment, that the language used in *Lister* was '*redolent of a bygone age'* and the judgment proceeded on the fiction that both parties had equal bargaining power which was to ignore the economic strengths of employee and employer and also the power of organised labour.

Nevertheless, whilst Lord Boyd made clear that the considerations underpinning *Lister* were outmoded and outdated, the ratio remained part of the law. Accordingly, he held that the Defenders were entitled to a right of relief from the employee and also held that the employee was not entitled to rely on her own negligence to secure a right of relief from the Health Board. He also commented that the effect of holding the employee liable may be to shift the economic burden from employer to employee, and a prudent employee would now seek insurance themselves.

Notwithstanding the above, the decision seems unlikely to be of a wider application given that employers / insurers have, for some time, had the ability to rely on their employees' breaches of contract, yet have chosen not to convene them to actions.

The decision acts as a useful reminder to Defenders / insurers when considering their positions and the potential of seeking to pass on a liability to an individual employee, in circumstances where the employee may have the benefit of a separate policy of insurance as was the case in *Bell*.

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In this edition

Out with the New – In with the Old

A look at the potential for passing on liability from employer to employee.

Eyes Wide Open

An update on the case of ***Hayward v Zurich Insurance Company PLC.***

Accidents do Happen...

Horse trainer raises action for damages against his employers for injuries sustained at work.

Is Orange the New Black when it comes to the New System for Appeals in Scotland?

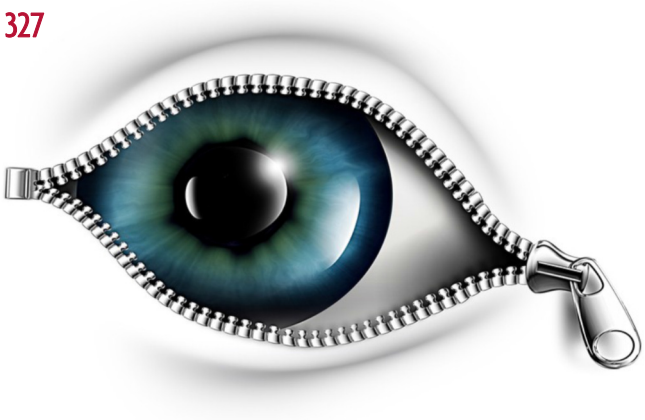
An overview of the new Sheriff Appeal Court.

Update

The advisory panel for setting the discount rate for personal injury damages has been appointed.

Eyes Wide Open - Case Development

Hayward v Zurich Insurance Company PLC[2015] EWCA Civ 327



In our last update, we commented upon the case of ***Hayward v Zurich Insurance Company PLC***. The case involved a claimant who raised an action for damages against his employers for a back injury sustained in the course of his employment. Despite obtaining surveillance footage which showed that the claimant may have been exaggerating his injury, the claim was settled extra judicially with his employer's insurer for £135,000. The insurers were tipped off some two years later by the claimant's neighbours that the extent of the injuries had been exaggerated. The insurers therefore raised action against the claimant based on fraudulent misrepresentation, seeking damages or rescission of the settlement agreement.

At first instance, the Court agreed with the insurers and set aside the agreement. The Court of Appeal, however, disagreed and reinstated the original agreement. In the ruling, Lord Justice Underhill commented that Zurich had agreed the settlement with "eyes open" and as such, the award should stand because of the "wider principle" of finality of settlements. Lord Justice Underhill commented "*that parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later*.'

We understand that the insurers have now lodged a further appeal with the Supreme Court, with the hearing likely to be later this year.

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Accidents do Happen...

McShane v Burnwynd Racing Stables Ltd [2015] CSOH 70

In the case of ***McShane v Burnwynd Racing Stables Ltd*** **[2015] CSOH 70,** the Pursuer raised an action for damages against his employers for injuries sustained in the course of his employment as a racehorse trainer. The case was raised under negligence at common law and breaches of the Workplace (Health, Safety & Welfare) Regulations 1992 and the Work at Height Regulations 2005.

The Purser sustained an injury to his left arm when a horse he was training fell and landed upon him. He sustained a significant injury to his arm and was left with a permanent impairment to his left side. The Pursuer argued that his horse fell as a result of a number of deficiencies in the layout, construction and maintenance of the training ground.

The Defender contended that there were no deficiencies in the training ground and the Pursuer himself had even provided the owner of the yard with advice as to the proper layout of the gallop during its initial construction. No one (the Pursuer included) had informed those responsible for the upkeep of the training area of the alleged deficiencies. The Defenders argued that in his capacity as trainer, the Pursuer had responsibility for ensuring the surface was adequately maintained before any horses rode out.

Lord Glennie concluded that there was no defect in the gallop as alleged by the Pursuer. On consideration of the facts it was concluded that Pursuer's case under the common law, the Workplace Regulations and the Work at Height Regulations all failed. The action was dismissed. According to Lord Glennie: *"accidents do happen without actionable fault on the part of another party*." In Lord Glennie's view: "*the horse fell simply because horses do fall sometimes*."

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Is Orange the New Black when it comes to the New System for Appeals in Scotland?

The overriding purpose of the Court Reform (Scotland) Act 2014 is stated as improving efficiency and effectiveness of the Court system. Lord Gill said; "*These reforms will safeguard the integrity of Scots law by creating an efficient court structure. Every case will be heard by the appropriate court. The system will be accessible and cost effective for the litigant.*"

The newly constituted Sheriff Appeal Court, which will sit in Edinburgh, is designed to remove a great deal of litigation from the local Courts, focusing appeals litigation in Edinburgh. The new Court will replace appeals to the Sheriff Principal in civil cases and will assume appellate criminal jurisdiction in summary criminal appeals. It is scheduled to start hearing appeals in civil cases from January 2016.

The effect of the reforms is to remove the ability of an appellant to choose whether to appeal to the Sheriff Principal or directly to the Inner House of the Court of Session. This was a key aim of the reforms. The new system will require appeals to be directed to the Sheriff Appeal Court. Those appeals will be heard by the newly titled Appeal Sheriffs. The role of the Sheriff Principal as adjudicator for determining appeals is abolished.

The Court's first President is Mhairi Stephen Q.C. who also retains her position as Sheriff Principal of Lothian & Borders. Craig Scott, Sheriff Principal of Glasgow and Strathkelvin is the Court's Vice President. There will be ten Appeal Sheriffs appointed in total.

The new court is likely to be made up of three Appeal Sheriffs, but this may change depending on the type of appeal. If it is a procedural appeal, a panel of three Appeal Sheriffs may not be required as this may be seen as unnecessary and contrary to the idea of cases being dealt with quickly and efficiently.

Whilst there remains an unfettered right to a first appeal of final judgments without leave to the Appeal Sheriffs, onward appeals from the Sheriff Appeal Court to the Court of Session will be heavily circumscribed. A prospective appellant will only be allowed an onward appeal to the Court of Session if either the Sheriff Appeal Court, whom failing, the Court of Session itself grants permission.

If a party applies directly to the Court of Session, a single Court of Session Judge will sift appeal proceedings and consider whether the appeal is arguable. One can anticipate that a good deal of cases will not survive '*the sift*' process which emphasises the need for well-crafted Notes of Argument being lodged in support of the appeal.

The legal test is whether the appeal would raise an important point of principle or practice or whether there is some other compelling reason to hear the appeal. This looks like it will be a difficult test to meet.

Insurers will be familiar with appeals to Sheriff Principals producing, at times, conflicting decisions in different Sheriffdoms. Consistency and proportionality was a driver of Lord Gill's review. Those aims may well be met given that judgments of the Appeal Court will be binding at a national level and will bind future benches of the Appeal Court unless a larger bench is convened to deal with an appeal.

It remains to be seen how the new system for civil appeals in Scotland will bed in and whether the aims of court reform will be met. Nevertheless, the aim of promoting consistency and quality of decision making is to be welcomed.

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Update

The Ministry of Justice announced that the panel to advise the Lord Chancellor on setting the discount rate for personal injury damages has been appointed and is scheduled to provide its recommendations within the next six months.

The panel comprises of:

- John Pollock of Pollock and Galbraith, actuaries – who will consider rate issues;
- Richard Cooper of Personal Financial Planning (PFP) Ltd – who will consider what services and advice is given to claimants;
- Dr Paul Cox of the Department of Finance, University of Birmingham – who will consider the working of the financial services market and the economic cycle.

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