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bto Insight

Insurance News

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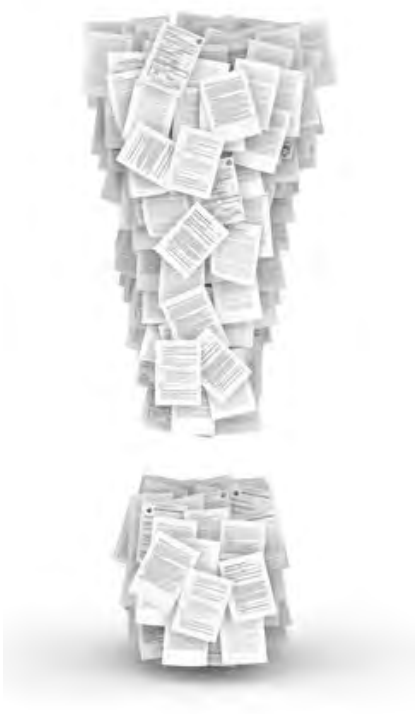
The Expenses and Funding of Litigation Bill



The analysis of the Scottish Government's Consultation on the Expenses and Funding of Litigation Bill was published in August 2015. The Consultation sought views on Sheriff Principal Taylor's recommendations in respect of Damages Based Agreements, Speculative Fee Arrangements and Qualified One-Way Costs Shifting. It also considers certain issues highlighted by Lord Gill in the Scottish Civil Courts Review such as Multi-party Actions and the Auditor of the Court. Finally, the Consultation considered a number of outstanding matters related to Expenses and the Funding of Civil Litigation such as Counsel's Fees, the Conduct of Legal Representatives, Legal Aid for Legal Persons and the Funder of Last Resort.

Reponses to the Consultation were varied and, in total, 40 responses were received. These came from solicitor firms and solicitors' organisations, the insurance industry, local authorities, court auditors and medical defence organisations amongst various other bodies and individuals.

The Bill was not included in the legislative programme for 2015/2016. The Scottish Government have indicated that they hope to be able to introduce the Bill early in the next session of parliament.

This has allowed the Government to introduce an additional step in the consultation process to "*develop our proposals and to assess their potential impact and cost*". To assist in that exercise, the Government have set up an impact reference group to assess the impact of the proposed changes being introduced by the Bill.

The Government have produced a further paper setting out the provisions they propose, a rough assessment of the likely impact on particular groups and some questions relating to the potential impact and costs of implementing the core proposals for the Bill. Initial responses are invited by 29 January 2016, although the Government have indicated that they anticipate issuing further papers inviting views on additional matters as they arise. They are also likely to seek views on proposals still being developed and not covered in the initial paper e.g. Multi -party Actions and the Auditor of Court.

bto are actively involved as part of the impact reference group and will provide further updates throughout the additional consultation process.

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In this edition

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Kept in the Dark?

MacDonald v Comhairle Nan Eilean Siar [2015] CSOH 132

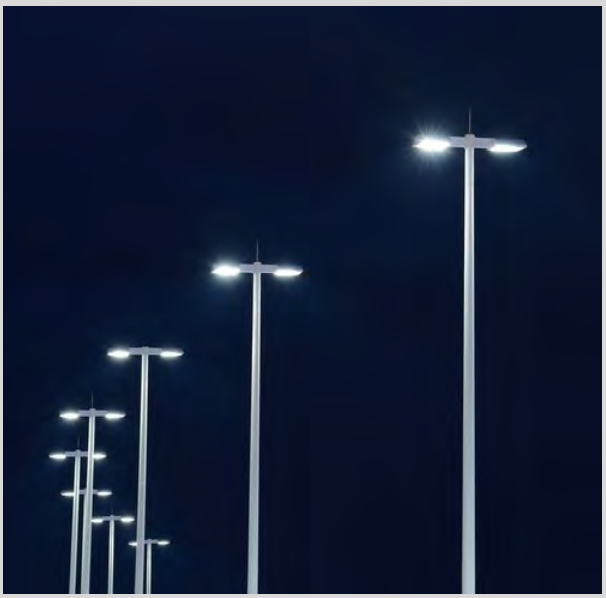
The Pursuer lived in the village of Lochboisdale, South Uist. On 27 November 2011, he was returning home from work at around 2am, when he fell on the pavement and suffered a broken ankle. The Pursuer raised an action against the Defenders as the 'local roads authority' under the Roads (Scotland) Act 1984. The Pursuer claimed that the Defenders had failed in their duty to provide and maintain street lighting.

Ultimately, this case turned upon questions of fact. The Pursuer alleged that the Defenders had changed the street lighting policy in Lochboisdale resulting in the street lights being switched off between midnight and 6.30am. The Pursuer claimed that this change had not been properly publicised and that the local community was not given an opportunity to be consulted. A number of witnesses who also lived and worked in Lochboisdale generally agreed that there had always been some street lighting in the middle of the night. However, there was some uncertainty as to how long, if at all, the street lights would go off for and also, how and when the policy change was implemented.

The Defenders submitted that a policy of turning off street lights between 1am and 7am had been in place since the local authority was formed in the mid-1970s. The policy change in 2011 simply altered the period, which became midnight to 6.30am. The Defenders led evidence from two engineers on the previously outdated street light mechanisms which could have meant the street lights were not always switched off as intended and which may explain why the local residents had previously seen street lighting in the small hours of the morning.

The Defenders further argued that there was no obligation on them to publicise policy changes but in any event, they had made reasonable efforts to consult the public. Two consultations had been held in late 2010 and early 2011 respectively, and thereafter, press statements were published by the local press, the BBC and on the Defenders' website. Furthermore, the changed street light policy would have been in force since the beginning of November, therfore the Pursuer ought to have realised there was no longer street lighting at the point he finished work.

Whilst accepting the Pursuer had suffered an accident as averred, Lord Matthews generally accepted the Defenders' evidence regarding the street light policies. He took the view that the lights would have been off by 1.15am since the policy change came into force at the start of November 2011. Lord Matthews therefore held that the policy change altering the times of the street lights could not have caused the Pursuer's accident and the Defenders were assoilzied.



The Defenders had also raised a number of points in relation to the duties incumbent on local authorities. In particular, they relied on the cases of ***Hamilton v Dumfries and Galloway Council (No 2), 2009 SC 277***, and ***MacDonald v Aberdeenshire Council, 2014 SC 114*** to argue that the 1984 Act enabled local authorities to provide street lighting but did not create a statutory duty requiring them to do so. They argued that the case of ***Keogh v City of Edinburgh Council, 1926 SC 814*** made clear that no common law duty of care existed in respect of street lights either.

In his obiter comments, Lord Matthews accepted that there was no common law duty to provide lighting. Drawing on the ***MacDonald*** case, Lord Matthews stated that liability goes beyond the foreseeability of injury and requires a degree of proximity between the parties. For example, the situation may be different where a local authority becomes actively involved with a particular area by undertaking road works or by some other action.

Noting Lord Drummond Young's comment in the ***MacDonald*** case that there was no obligation on local authorities to protect drivers from anything obvious, Lord Matthews stated that darkness could not be anything other than obvious. However, he did take the view that it could be possible to make a case for common law liability on the part of a local authority where it could be proven that a Pursuer came to rely upon street lights and the lights were negligently switched off by the local authority without taking reasonable care to ensure those relying upon the lights were aware of any changes.

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Beware of the Bus!

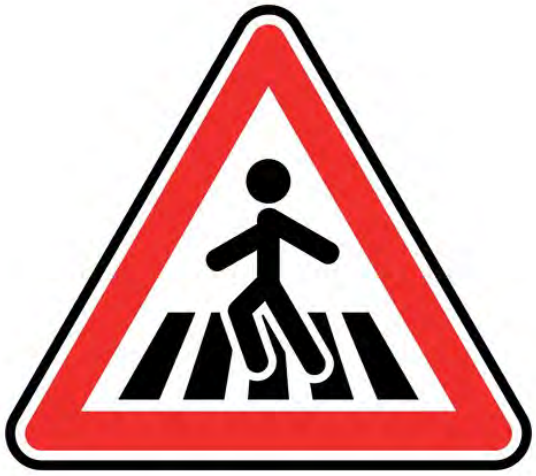
McCreery v Letson & Others [2015] CSOH

In the case of ***McCreery v Letson & Others [2015] CSOH 153,*** the Pursuer was struck by the First Defender's van when attempting to cross the road. Moments before the accident the Pursuer had disembarked from a bus which had stopped in a lay-by on the opposite side of the road. The Pursuer did not give evidence as she had no memory of the accident. The Pursuer accepted that the court ought to make a finding of contributory negligence for her failure to keep a proper lookout for oncoming traffic.

The Pursuer's proposition was that the First Defender's driving was negligent as he knew or ought to have known that there was a risk of pedestrians seeking to cross the road or otherwise be on the road and the First Defender ought to have moderated his speed accordingly. The Pursuer's argument was that the First Defender failed to pay proper attention to a warning sign prior to the lay-by (warning of pedestrians crossing) and failed to react to the presence and movements of the bus, demonstrated by his swerving around the bus.

Liability was repudiated on the basis that the First Defender braked when he saw the bus and by the time he saw the Pursuer, he was travelling between 30 to 35mph. The First Defender's evidence was that he was driving well below the 60mph speed limit of the road.

The court was persuaded that there was a foreseeable risk that pedestrians who had disembarked from the bus might cross the road behind the bus. The court held the First Defender did not foresee this risk and took no action in light of this risk and ought to have been aware of the risk given the preceding warning sign highlighting the presence of pedestrians. The court was also satisfied that the First Defender's speed was greater than the speed he gave in evidence of 30 to 35mph. The fact that the First Defender had to swerve in order to get round the bus was suggestive of the fact he was travelling too fast. The court held that the First Defender should have reduced his speed in order to avoid having to swerve around the bus.



On the point of contributory negligence, the court found that the factual circumstances in ***McCreery*** were similar to those in ***Jackson v. Murray*** and applied the principles set out in ***Jackson*** by considering the relative blameworthiness and causal potency of the parties' actions in its assessment of contributory negligence. In the court's view, one factor which it ought to have regard to was the potential destructive disparity between the pedestrian and the person driving the vehicle. In light of this, the court apportioned liability on a 50/50 basis.

Separately, the court took issue with the First Defender's road traffic expert's report. The Pursuer's proposition was that the First Defender's expert was *"plainly going out of his way to assist the Defender at all costs"*. The Pursuer highlighted that the First Defender's expert had failed to narrate extensive proportions of the Highway Code relating to the obligations on a driver, whereas he had quoted in full those applicable to a pedestrian. He failed to mention the presence of the road sign warning of the hospital and the risk of persons crossing the road. Further, the First Defender's expert did not use throw calculations to assess the speed of the First Defender's vehicle at impact neither did he calculate the speed of the vehicle using co-efficient of friction on the basis of the stop distance.

The court agreed that there was force in the Pursuer's propositions. The failure to quote the relevant provisions of the Highway Code relative to the duties incumbent on the First Defender when those applying to the Pursuer were quoted in full was not acceptable. Such a presentation did not, for the court, give a full and balanced picture. The expert's failure to mention the warning sign suggested his report was not balanced. The failure to calculate the speed of the First Defender's vehicle by using the co-efficient of friction on the basis of the stop distance was surprising given that it was a well-recognised method for calculating the speed of a vehicle. No real explanation was given as to why it had not been used. Such a calculation would have produced a significantly less favourable speed to the First Defender's position. This demonstrated a lack of balance and even-handedness in the preparation of the report.

This aspect of the judgment, and the court's criticism of the expert's report provides a useful reminder to insurers and solicitors of the need to critically analyse the conclusions reached by any expert to assess whether the conclusions of the report are soundly based or whether they can be challenged on the basis of favouring the position of the instructing party.

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Provisional Damages

Fraser v Kitsons Insulation Contractors Limited [2015] CSOH 135

In the case of ***Fraser v Kitsons Insulation Contractors Limited [2015] CSOH 135,*** the Pursuer raised an action against his former employer seeking damages for the development of asbestos related pleural plaques as a result of his exposure to asbestos during the course of his employment.

The Pursuer averred that he was at an increased risk of developing a subsequent asbestos related condition. He sought provisional damages and to reserve the right to apply to the court for a further award of damages in terms of Section 12 of the Administration of Justice Act 1982.

Interestingly, although the Pursuer made averments to the effect that he was at risk of developing further asbestos related diseases such as asbestosis or diffuse pleural thickening, his own medical evidence did not support this and stated that he was at a three percent lifetime risk of developing mesothelioma or bronchial carcinoma.

A Minute of Tender for provisional damages was lodged and was accepted. The Pursuer then sought to enrol a motion for decree in terms of the Minute of Tender and their acceptance. The motion was opposed by the Defenders on the ground that it should be made clear that the Pursuer was only entitled to return for further damages in the event that he developed mesothelioma or asbestos related lung cancer, those being the only conditions, as stated in his own expert evidence, to which he was at risk of developing.

Lord Doherty stated that the court was not entitled to proceed on the basis of the Pursuer's averments, which were denied. The appropriate course of action for the court to take was to proceed on the basis that the Pursuer had pleural plaques, that there were accepted risks that he might develop mesothelioma or bronchial carcinoma and that the agreed sum for provisional damages had been arrived at on the assumption that he would not develop those diseases. It was therefore appropriate, in the circumstances, that the court should order that the Pursuer be entitled to apply for further damages in the event that he developed either condition.

The circumstances in this case are almost identical to that of ***Talbot v Babcock International Limited [2014] CSOH 160,*** however, Lord Doherty respectfully disagreed with the analysis of the Lord Ordinary in that case where it was stated that the court was only required to know that the parties had agreed that an award of provisional damages should be made, and it was unnecessary for it to be privy to the risk of development of a serious condition or to the risk of serious deterioration in the Pursuer's condition which underpinned the award.

Following the decision in the ***Fraser*** case, in pleural plaques claims where actions are settling by way of provisional damages, it must be made absolutely clear in the Joint Minute the serious disease or deterioration which would constitute a relevant risk for further application for damages and a Minute for Tender should, likewise, also contain that information.

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Update

November saw the Scottish Civil Justice Council issue a Consultation paper seeking views on draft rules of court for Simple Procedure - a new procedure to replace the Small Claims and Summary court procedures in the Sheriff Court. The stated intention is for Simple Procedure to be "*a speedy, inexpensive and informal procedure, usable by people who do not have legal representation to sort out problems about matters of lower monetary value*".

Responses are due by 2 March 2016. Following the closing date, the SCJC has indicated that all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on the Simple Procedure Rules. The SCJC has indicated that a consultation report will be published on the SCJC website, following the meeting of the SCJC on 16 May 2016.

Insurance Seminar - 11/2/16

Pushing the boundaries
Psychiatric injury - Secondary victims - the role of modern technology / social media

12:30 - 13:30 + lunch

48. St. Vincent Street, G2 5HS

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