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Insurance News

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Contributory Negligence?

In the recent case of ***Louise Williams v The Estate of Dayne Joshua Williams (deceased)***, the mother of a 3 year old child who was seriously injured in a car accident was found to be 25% responsible for her child's injuries as a result of placing her child in a booster seat which was unsuitable for her size.

Louise Williams was a rear seat passenger in a car being driven by her mother in August 2006. The vehicle was struck by a car being driven on the wrong side of the road by a driver under the influence of drugs and alcohol. The driver of the other vehicle, who died as a result of the accident, was found 100% to blame for the collision. However, the child's mother was deemed to be partially responsible in terms of the extent of the injuries sustained by her daughter. In deciding that the mother was 25% to blame for her daughter's injuries, the Court of Appeal took the view that there were clear and explicit guidelines provided by the manufacturer of the booster seat regarding its proper use. The manual together with the label on the bottom of the seat referred to 5 qualifications for the use of the seat. The child, however, had only satisfied 3 of the 5 qualifications in that she was too short and at 3 years old, was younger than the recommended age for use.

The Court of Appeal upheld the decision of the Judge at first instance in taking the view that regardless of how well intentioned Miss Williams was in her actions, if her child had been placed in a seat with a proper restraint system, her injuries would not have been as serious. On that basis, the Court held the child's mother negligent in failing to follow the clear safety instructions.

Andrew Jones adj@bto.co.uk

Don't Drink and Dive...

The case ***Cockbill v Riley***, involved a catastrophic spinal injury to a then 16 year old Claimant. The Claimant attended a barbeque organised by a friend. When he arrived he saw two paddling pools were set up in the back garden at his friend's house. Whilst everyone else was eating, the Claimant changed into a pair of borrowed swimming trunks and went across to the pool and attempted to do a belly flop.

The Claimant entered the paddling pool head first which caused him to fracture his spine, rendering him tetraplegic. The Claimant claimed against the organiser of the party, claiming that he had been negligent in, amongst other ways, not earlier or more forcefully intervening when 6 or 7 boys were running and jumping into the pool.

In dismissing the Claimant's claim, the Court held that the use of the paddling pool at the party and allowing the guests to consume modest quantities of alcohol did not create a foreseeable risk of significant injury. The Court took the view that even after a number of the boys had jumped into the pool feet first, it was not reasonably foreseeable that someone would attempt to carry out a dive. The danger of diving into a paddling pool was obvious. The Court held that the defendant was not under a duty to give an instruction not to run or jump into the pool.

Claire White cwh@bto.co.uk

In this edition

www.bto.co.uk

48 St. Vincent Street Glasgow G2 5HS
T: 0141 221 8012 F: 0141 221 0288

One Edinburgh Quay Edinburgh EH3 9QG
T: 0131 222 2939 F: 0131 222 2949

Action Against Cornwall County Council

In the case of ***Tacagni v Cornwall County Council and Others***, the Claimant brought an action against Cornwall County Council in terms of the Occupiers' Liability Act 1957.

After consuming 8 drinks over a "long" evening, the Claimant was walking home in the dark with her partner. She had no torch and was wearing uncomfortable shoes. The pair walked along a raised path which ran approximately 2 metres above and alongside a road, until they decided it was too dark and turned back. The Claimant's partner left her to go and call a taxi. The Claimant set off on her own using a fence to guide her along a patch. Following the line of the fence the Claimant left the path, crossed 4.8 metres of grass and fell off the edge of the raised section onto the road below.

The fence had been erected around an area of the pathway's retaining wall which had collapsed in 2001. At first instance, the Claimant was successful, subject to a 2/3 deduction for contributory negligence. On appeal, the Court of Appeal dismissed the Claimant's claim. The Court of Appeal took the view that the evidence as a whole did not warrant the Judge at first instance's finding that the local authority had unreasonably failed to guard

against the risk of accident that in fact befell the Claimant.

The Court took the view that it would be hard to envisage that a person would be using the fence as a guide and it would not have been obvious to the local authority that someone would depart from the path and cross a significant proportion of the grass. Accordingly, the Court took the view that the evidence did not warrant the conclusion that the local authority breached its duty of care and the Claimant's case was dismissed.

Andrew Jones adj@bto.co.uk

Fiona Brown v East Lothian Council

In the case of **Fiona Brown v East Lothian Council**, the Pursuer, a gym instructor, hired the use of a hall from East Lothian Council. She was in the process of instructing a Zumba class when she tripped on an "undulation" of the wooden floor. She claimed that she sustained injury and raised a claim against the owners, East Lothian Council under the Workplace (Health, Safety and Welfare) Regulations 1992 and under common aw.

The Pursuer's case was based on regulations 5 and 12 of the Workplace Regulations. At debate, the defenders averred that no relevant case had been pled against them at common law or under the Workplace Regulations and sought dismissal of the action against them. The defenders' position was that the Town Hall was not a "workplace"' for the Pursuer in terms of the regulations.

The Pursuer was working at the time of the accident, but the Pursuer did not aver that the defenders knew it was going to be her place of work. The Pursuer argued that as the Town Hall had been made available as a place of work to others, such as the caretaker, it was a workplace as defined by the regulations.

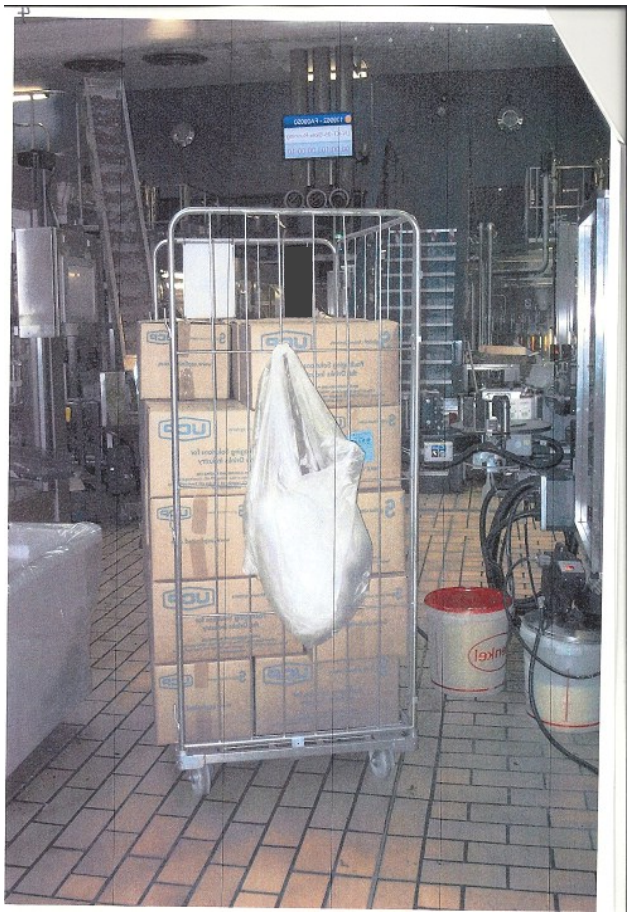
Lord Jones dismissed the Pursuer's claim insofar as it related to the Workplace Regulations. He found nothing to suggest that by virtue of the definition of workplace in regulation 2(1) someone who is present in premises which are made available to someone else as a place of work should enjoy the protection of the regulations for no reason other than they happen to be at work there. He held that the regulations were enacted for the protection of those workers to whom premises are made available as a place of work. As such, the defenders owed no duty to her in terms of regulations 5 or 12, because it could not be shown that the Town House was made available to her as a place of work, rather it was a place of recreation. If the defenders had been made aware that the Pursuer wished to hire the Town House in order to work there, they would have had the option of ensuring that the regulations were complied with in respect of her use of it as a place of work, or of declining to hire it to her.

Notably, the decision has provided some clarification on the application of the Workplace (Health, Safety and Welfare) Regulations 1992 and more specifically the position of an individual who works at premises made available to other persons as a place of work.

Jennifer MacKenzie jmk@bto.co.uk

Inner House Overturns Sheriff on Foreseeable Risk of Injury -

Kennedy v Chivas Brothers Ltd



Following an appeal to the Court of Session Inner House, damages have been awarded to a line operator at a whisky bottling plant. She was injured as she tried to push a wheeled metal trolley, loaded with boxes of bottle caps along the course of a bottling line.

The swivelling wheels on the trolley became stuck and the Pursuer attempted to pull the trolley so that its wheels would realign. The trolley then suddenly lurched forward and the Pursuer's hand became trapped between the trolley and an adjacent machine.

The Sheriff at first instance found no liability on the part of the Defenders on the basis that moving the trolley was a simple task which did not involve a real and foreseeable risk of injury.

The Pursuer appealed. The Pursuer's case was based on regulations 4 and 5 of the Provision and Use of Work Equipment Regulations 1998 and regulation 4 of the Manual Handling Operations Regulations 1992.

On appeal the Court accepted that the trolley was of a type commonly used throughout various industries. It was also accepted that no defects had been reported with the trolley prior to the accident and no specific defect was found afterwards. However, this did not necessarily mean that it could be inferred that the trolley was safe and suitable for all tasks solely on the basis that it was standard in the industry.

The Court stressed that the Regulations relied upon by the Pursuer were that employers are required to consider the *specific* circumstances of every task, and ensure that their employees are provided with suitable training, guidance and equipment to allow them to carry the task out safely. The Defenders had only carried out a general manual handling risk assessment that did not address the specific risks associated with moving the trolley.

Photographs of the accident locus, and the specific trolley were referred to during the initial Proof. It seems that these photographs were of crucial importance as the Inner House examined them in detail and used them to re-assess the factual circumstances of the accident and reach a different opinion from the Sheriff.

In light of these photographs, the Inner House considered that the risk of injury was "clear and obvious". The Defenders were therefore in breach of Regulation 4 of both PUWER and the Manual Handling Regulations.

Andrew Jones adj@bto.co.uk

Sharp v Top Flight Scaffolding Ltd

In the case of ***Sharp v Top Flight Scaffolding Ltd***, the Claimant claimed damages for injuries sustained in the course of his employment with the Defendants after he suffered severe injuries when he fell from scaffolding which he was in the course of erecting.

The scaffolding was erected without the insertion of any ladders between the scaffolding levels and when the structure was complete, the Claimant was left at the top of the scaffolding with no means of descent.

The Claimant fell whilst trying to climb down the outside of the scaffold. Primary liability was found against the Defendants on the basis of a failure to carry out a proper risk assessment and lack of adequate training. However, the Court took the view that the Defendants' breaches of duty were to be balanced against the Claimant's decision to build the scaffolding without any means of safe access or egress which the Claimant must have realised exposed him to a risk of danger and his deliberate decision to climb down the outside of the scaffolding knowing that it was dangerous to do so.

The Court held the Claimant 60% responsible for the accident.

Calum Fife cfi@bto.co.uk

Re-defining Psychiatric Injury

The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–5) has been published recently.

The new DSM-5 has been particularly criticised by psychiatrists and psychologists. Some are concerned that the new edition re-classifies as mental illness "normal human experiences". For example, the new DSM edition widens the diagnostic criteria for grief reactions so that symptoms which might previously have escaped classification – being considered instead a "normal" human experience – may now be re-labelled as a clinical disorder.

The classification system for psychiatric illness has the potential to increase the number of people eligible to bring a compensation claim for psychiatric injury where there has been no physical injury.

In order to recover damages in such circumstances, there has to be a diagnosis of a "recognised psychiatric condition".

As the new classification system continues the trend towards the increasing classification of symptoms, more conditions may fall within the definition of psychiatric injury and consequently more Pursuers may potentially be entitled to recover compensation where they have had an adverse reaction to a shocking event.

Garry Ferguson gfe@bto.co.uk

Update

Personal Injuries Actions

The Court of Session issued a new Practice Note, No 1 of 2013, on 24 April 2013, relating to Personal Injuries Actions. The Practice Note makes it clear that the Court is concerned that the Personal Injuries Rules introduced almost 10 years ago, are not being properly applied.

The purpose of the Practice Note is to *"to inform practitioners of the Court's renewed approach to several procedural matters and, in turn, what the Court expects of them".* It is made clear that parties may struggle to get any sist or variation of the timetable without "special cause". The use of skeletal defences will also be cracked down upon. Defenders will therefore require to front load all preparation, including ordering expert reports, obtaining precognitions and other liability and quantum information. The test of "special cause" is a high one to meet.

The clear message is that the Court expects frontloading of all Personal Injury Actions.

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