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Insurance News

Note on the Apologies (Scotland) Bill

A Member's Bill aimed at encouraging apologies in civil legal disputes has recently been passed by the Scottish Parliament.

The **Apologies (Scotland) Bill** renders evidence of an apology inadmissible in court. The idea is that the legal certainty offered by the Bill will allow more cases to be resolved out of court as apologies will be more forthcoming, particularly in forums such as mediation where apologies can be considered essential to settlement. It is aimed at parties who feel aggrieved by a wrongful act against them but are not interested in the financial award that the court can order should they be successful.

Critics of Bill

Critics from both the Faculty of Advocates and the Law Society of Scotland have suggested that the new law might cloud the distinction between expressing regret and admitting liability.

Changes arising from the Bill

The Bill is seen as more of a clarification of the existing law and less of an innovative measure. The law as it stands dictates that an apology cannot in itself amount to an admission of liability. Authority on the matter, namely Lord Thankerton in ***Muir v Glasgow Corporation***, warned that undue weight should not be given to a witness who expresses regret when giving evidence but instead that the apology should be admitted as one of a number of pieces of evidence on which liability may be found. Similarly, in ***Bryson v BT Rolatruc Ltd***, Lord Osborne noted that the court must consider all the evidence of what happened before the event, and not the subsequent apology. Lady Smith agreed with this approach in ***George King v Quarriers***, stating that the fact that an apology was made was "quite irrelevant".

Considering these points, the Bill will simply render this one piece of evidence inadmissible: the court will still be able to consider other evidence in order to determine liability. The intention is that defenders cannot ''hide behind'' the new rules. Despite this assertion, the Faculty of Advocate have raised concerns that an admission of liability that would normally be admissible as evidence may now become inadmissible if it is 'wrapped up' in the form of an apology. It remains to be seen how the courts will deal with this issue.

It should be noted that the Bill will not apply to criminal cases, Fatal Accident Inquires or defamation actions.

Conclusion

It would appear that the purpose of the Bill is not so much to change the law but to influence people's perception of the law. It is hoped that apologies may be more forthcoming in an environment where people are less fearful of falling into a legal trap which will in turn help to foster better relations between the disputing parties and allow for more cases to be settled out of court.

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The Vexing Issue of Summary Applications in Scotland

Within the evolving legal landscape of personal injury, lies a piece of legislation to which Pursuers' firms are becoming more alive when considering the merits of an injured party's claim, particularly in the pre-litigation stage.

The Administration of Justice (Scotland) Act 1972 is, perhaps, an underappreciated piece of legislation. It confers extensive powers on the Court to make a variety of orders in relation to the recovery of documents and property both pre and post-litigation.

The mechanics of making an application under the Act involve the applicant lodging the application in the form of an Initial Writ in which he seeks an order from the Court for the recovery of the documentation sought. The factual and legal basis for seeking to recover the documents must be clearly pled. The respondent is then provided an opportunity to lodge answers to the application and the matter will then call before the Court for an initial hearing. At that hearing the Court can then assign an evidential hearing to discuss the substantive merits of the application.

In terms of s.1 (2) of the Act, the Court has to be satisfied there exists an intelligible *prima facie* case before an application will be granted. It also requires to be satisfied that proceedings are **likely** to be brought but does not require an assurance that proceedings **will** be brought. If a relevant case is not pled or if the court is not satisfied that proceedings are likely to be brought, the application ought to be refused. So far so good.

However, the Act is sometimes used by Pursuers' firms as a vehicle to recover documents in cases in which they do not have enough information in order to plead a relevant case against an insured or be sure of success if the claim itself is litigated. In those cases, the 'would be' Pursuer may elect to bring an application under s.1 (2) of the Act to recover the documentation they may need to properly formulate their claim against an insured. However, to do so would be to misuse the Act given that it requires a *prima facie* case to be pled. If that cannot be done then the application should be refused.

The applicant ought not to make a speculative application on the hope that it may disclose helpful information. That would not be the proper basis for an intended claim. It has been said that hope or suspicion is not enough to support an application.

Tactically, you can envisage / encounter circumstances whereby prior to a formal claim being intimated Pursuers' firms make Subject Access Requests under the Data Protection Act 1998 as a vehicle to secure information which will allow them to assess liability. This is often done prior to a formal letter of claim being intimated. If the insured does not respond or does not provide the information being requested (whether it properly falls under a subject access request or not) then this can be used as the rationale justifying an application being made.

This causes an issue for both insurers and their insured. The issue for the insured is how to properly respond to often legitimate requests for personal data. It raises further questions surrounding data protection if the information being sought includes reference to other individuals. What about their rights as data subjects?

What becomes more difficult is also when the documents requested do not fall within the terms of the Subject Access Request and are not specific to the individual applicant. This can be problematic for the insured. If the s.1 (2) application is made it also raises the question of whether their insurers will pay for the defence of that application. This can cause an issue, particularly if the insured's policy only responds when a claim is made, and not in respect of matters arising prior to a claim being intimated.

The corollary of this, from the insurers' perspective, is how to deal with such applications and whether, as a matter of policy they wish or have the resources and time to deal with pre-claim issues, if the insured's policy of insurance is not yet engaged. If the insurer opts not to become involved until a claim is made, the potential arises for documents which ought not to be disclosed, being disclosed. This can prejudice the position if a claim is then made.

Whilst each application requires careful consideration on its own merits, insurers and their insured should take a robust stance given that if applications are made with increasing regularity and the costs are met by the insurer or the insured, the applicant's solicitor is effectively paid twice, once for bringing the application (should it be successfully argued at court or, compromised prior to the hearing) and then for making the claim proper.

Having proper training on the issues involved, together with a considered strategy to deal with Summary Application / Subject Access Requests ought to ensure that the issue is dealt with properly and cost effectively for insurer and insured alike.

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Post-Accident Investigations

Neil Cumming v Tayside Health Board, [2016] CSOH 58

After an accident, a party should be able to pursue their own investigations into the cause of the accident without the risk of the information being made available to the other side. However, this does not apply to reports by employees present at the time of the accident and made to their employers at or about that time. This well-known 'accident book exception' was highlighted in this recent Court of Session case. A link to the judgment can be found here.

The pursuer was detained in a state hospital having been acquitted, by reason of insanity, of the murder of his wife. After killing his wife on 15 July 2011, he attempted to commit suicide by driving his car into another vehicle, causing injury to other road users and to himself. Separate actions were raised by the other road users against both the pursuer and the defenders in the present action.

The pursuer claimed that a psychiatrist employed by the defenders, Dr McLaren, was negligent in failing to advise him of the availability of a bed at a hospital in Perth when he attended with her the day before he killed his wife. He claimed that had he been told of the availability of the bed in Perth, he would have accepted it and attended, and would not have killed his wife, or attempted suicide. He claimed *solatium* in respect of the loss of his wife and various other heads of damages.

The defenders' position was that the pursuer's preferred hospital was Carseview Centre. Dr McLaren offered him the bed in Perth as there was none available in Careseview. However, the pursuer declined as he wished to wait for a bed to become available in his preferred hospital. Having carried out a full assessment, Dr McLaren concluded that the pursuer did not meet the criteria for compulsory admission to hospital. The dispute centred on whether or not Dr McLaren offered the bed in Perth to the pursuer.

The case called before the Court in respect of the pursuer's motion for commission and diligence by way of a specification of documents. The pursuer sought to recover various documents prepared by Dr McLaren for the purposes of a "Significant Clinical Event Analysis Review" and sight of a Final Report, dated 24 August 2012. The defenders opposed this call in the specification. The Significant Clinical Event Analysis Review itself had been produced and lodged in process. The report was produced to the pursuer in line with NHS Tayside's policy.

The pursuer argued that it was crucial that he was able to prove that he was not offered a bed by Dr McLaren, and that the whole case turned on what happened at the meeting between the pursuer and Dr McLaren prior to the incident. The Significant Clinical Event Analysis Review report had been produced, and it was only fair that the pursuer should have the material upon which the conclusions were based.

The defenders argued that the policy allowing the release of the report had been implemented due to Freedom of Information and Data Protection legislation, and that it was not a waiver of privilege in respect of the underlying information used to compile the report. The call in the specification did not fall within the recognised 'accident book exception' and had the flavour of a fishing diligence.

The Court ultimately agreed with the defenders and refused to grant the pursuer's motion. In doing so, they reiterated that an organisation should not be inhibited from carrying out legitimate investigations after an incident, and that it would be undesirable to limit the ability to take remedial measures which may be identified by such investigations.

The case highlights the need for careful consideration when faced with requests for disclosure of documents from pursuers' agents. Whilst a report itself may be disclosed due to Data Protection/FOI requirements, not all documentation relied upon will necessarily be recoverable under commission and diligence in the course of a litigation. Advice should always be sought, particularly in cases in which the Defender is a public body.

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Look – No Hands!

The arrival of driverless cars is racing towards us with testing already underway in the UK. Cars with a limited level of automation are anticipated to be on our roads from around 2018. These vehicles will be capable of undertaking increasingly large proportions of journeys autonomously whilst retaining the need for a driver to take manual control some of the time. The arrival of fully 'driverless' cars (vehicles which physically do not require a driver) are not expected until at least 2020 at the earliest.

The suggestion seems to be that fully autonomous vehicles have the potential to improve road safety by removing the 'human error' from accidents. This raises the issue of how liability will be determined in accidents involving driverless vehicles in the future.

Initially, vehicles with high automation can be expected. These vehicles will require drivers to be present and will request that the driver take manual control of the vehicle due to certain traffic, road or weather conditions. These vehicles will include features such as automatic braking and lane assistance systems. As technology progresses, vehicles may become increasingly autonomous with the potential for 'fully automated' vehicles which do not require drivers in all traffic, road and weather conditions.

In terms of liability, it seems likely that drivers will remain responsible for the overall safe operation of the vehicle, even if it has high automation. It is therefore important that the process of a driver safely resuming manual control of the vehicle is clear, easy to understand and easy to execute.

In 2014, the Department for Transport consulted on review of the regulatory framework in anticipation of the introduction of driverless cars. One of the Government's aims is to clarify how liability ought to be determined in the event of an accident involving a driverless vehicle.

Fully automated vehicles are anticipated to allow drivers to completely disengage from driving to allow the driver to undertake other tasks. In other words, the control of vehicles will transfer from human to computer. Standing this, can we anticipate liability to follow that transfer of risk? Unfortunately, the issue is not likely to be so simple.

If a driver is no longer expected to monitor road conditions, a move toward to product liability could be envisaged. Potentially responsible parties could include the vehicle manufacturer, the manufacturer of one of the components in the vehicle or the software engineer who programmed the autonomous vehicle. Should we see the introduction of intelligent road systems, this list has the potential to include the road designer.

Some manufacturers, including Volvo, have already stated that they would accept liability should one of their autonomous vehicles be involved in an accident. The apportionment of liability between vehicle and driver may vary from case to case depending on the facts and who was, or ought to have been, in control of the vehicle either at or just prior to the accident. Respondents to the Government's consultation recommended the use of independent event data recorders and camera systems to address this issue.

Driving matters forward, the Department for Transport aims to review the existing legislation and clarify how liability passes between the driver and vehicle manufacturer by the summer of 2017. Draft Regulations on this issue are expected to be published in 2018. It is, therefore, a case of on your marks, get set…. to wait and see how this area of technology and the law develops.

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Update

In its recent Spring Edition of 'Supreme Court News' the Court of Session recently reported a marked decrease in Personal Injury claims being raised. This has been attributed to the Court Reforms, the implementation of the All Scotland Personal Injury Court and the change in Jurisdictional limits which came into force on 22 September 2015 under the Court Reform (Scotland) Act 2014.

Prior to the reforms, on average over 200 personal injury actions were lodged per month. Post reform, the average number of actions received per month dropped to approximately 34. Sheriff Mackie recently presented the statistics for actions raised in the All Scotland Personal Injury Court which has, on average, received over 200 Initial Writs per month this year. The majority of claims in the new Court are accidents at work, followed by RTA actions.

The Court of Session has reported that the waiting period for four day personal injury proofs is currently seven months and, as it stands, there is no wait on civil jury trials being assigned dates.

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