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bto Insight

Insurance News

Putting out the fire

In the case of *D v AMEC Group Ltd* [2017] CSIH 75, Scotland's appeal court (the Inner House) considered the extent of liability for pure psychiatric harm in the context of a claim for breach of statutory duty. In *D,* the injured employee appealed against the decision of the judge at first instance to absolve his employer of liability following an accident at work. He sought damages in respect of chronic post-traumatic stress disorder arising from his being trapped on the roof where he was working as a result of an outbreak of fire. He did not suffer any physical harm. His case centred on the alleged failure of the employer to ensure his safety in respect of the harm caused by the fire i.e. the psychiatric harm. Although other provisions were pled, he relied upon a breach of section 53 of the Fire (Scotland) Act 2005 and Regulation 40 of the Construction (Design and Management) Regulations 2007.

The judge at first instance held that the employer had not breached these regulations (albeit the appeal court found it was perhaps not as simple as that). It had also been argued before the trial judge by the employer that even if there had been a breach of the relevant provisions, the particular provisions at issue did not impose any liability in respect of pure psychiatric injury where there was no associated physical injury. The judge at first instance did not make a formal determination of this issue in the original judgment.

The appeal saw the employee arguing that the judge was wrong in holding there to have been no breach of statutory duty and the employer arguing that the judge was wrong in failing to hold that the statutory claims could not include psychiatric injury. The employer won the day in persuading the appeal court that the judge had not substantively erred in her findings on

liability. However, that victory did not extend to securing a judgment that claims for pure psychiatric harm could not arise from a breach of the particular statutory provisions relied upon.

Had the employer's part of the appeal succeeded, the judgment would likely have been regarded as a potentially far reaching and controversial one. It highlights, however, that careful scrutiny of regulatory provisions and their parent laws can provide compelling arguments for defenders. However, the ever decreasing field of statutory duties which can be directly relied upon by claimants might see the argument in this case ultimately regarded as a historical curiosity.

One other matter of note arising from the case is the importance of causation. The appeal court was careful to demonstrate that even a breach of duty as critical as a failure to carry out a risk assessment is of no consequence *unless* it can be proved that the presence of a risk assessment would have avoided the particular harm complained of. This is a useful warning against the sometimes simplistic approach of claimants in arguing that breach = damages. There is always a step in between – causation – which defenders should always carefully consider and deploy where appropriate.

Karina Manson kms@bto.co.uk

In this edition

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

www.bto.co.uk

Are a jury fit to determine the issue at hand?

The recent opinion of Lord Brodie in the case of *Joseph Glen v Lagwell Insulation Company Limited*, *[2017] CSOH 153* addresses the recurring issue of whether a case involving future losses is to be regarded as suitable for determination by a jury.

The first point to bear in mind here is that it is a pursuer's statutory right to have their personal injury damages action tried before a jury. The onus lies upon the defender to displace that statutory right which can only be done where 'special cause' is shown. 'Special cause' has generally been held by the courts to be something that is a particular feature to the case under consideration as opposed to a consideration which is general in character.

In *Glen*, the pursuer, an apprentice thermal insulation engineer, suffered traumatic amputations of the tips of the index, middle and ring fingers of his left hand when using an unguarded guillotine. Liability was admitted. The quantification of damages was the sole issue in dispute. The pursuer offered to prove that had the accident not occurred he would have followed a career as such an engineer; that because of the injuries he was no longer able to continue in his intended career path and that it was likely he would secure alternative employment at a resultant lower skill level. The effect of this would lead to a loss of income of just over 40% per annum compared to what he would likely have earned but for the accident. He also argued that his job security was reduced as a result of his disability.

The defenders' principal argument was that the case was not suitable for a jury on account of the complexities arising from the selection of the appropriate multiplier for calculating (i) his life-time earnings but for the accident and; (ii) his life-time earnings in lower skilled alternative employment.

"In Lord Brodie's commentary he noted that there was no question of assessing a split multiplier as proposed by the defenders."

Lord Brodie found that 'special cause' had not been established. He thus rejected the defenders' argument that the wage loss claim was so complex that it required to be determined at Proof. He commented that there was nothing inherently complex in the pursuer's claim for future wage loss. He therefore allowed the pursuer's motion for the case to be heard by a jury.

In Lord Brodie's commentary he noted that there was no question of assessing a split multiplier as proposed by the defenders. He did not find the issue of whether the pursuer was considered as "disabled" to be so difficult to render the case unsuitable for jury trial. He accepted that the trial of a claim for future wage loss under reference to the Ogden Tables was likely to be a more demanding exercise for all those concerned before a jury than a proof before a judge. He commented, however, that this could be addressed with full and precise explanations in Counsel and the Judge's speeches and directions to the jury respectively.

The decision in *Glen* is another example that the routine complexities of applying the Ogden Tables in assessing multipliers for future loss claims will, in itself, not suffice to establish 'special cause'. There has to be something more than this. Defenders thus require to carefully consider whether to oppose a motion for trial by jury to be sure that there is something out of the ordinary in the case which might be fairly anticipated to perplex a jury.

Joanne Farrell jfa@bto.co.uk

Fatal Claims: Scotland v England & Wales

In the case of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others [2017] EWCA Civ 1916* the Court of Appeal in England and Wales recently held that bereavement awards should be extended to cohabitants in circumstances where the parties to the relationship had been cohabiting for two years prior to the deceased's death.

In *Smith*, the claimant and her partner had been living together for some 11 years prior to his death which arose as a result of clinical negligence. She was unable to make a claim for a bereavement award under the Fatal Accidents Act 1976 ("the Act") as the Act only extended such awards to the surviving wife, husband or civil partner of the deceased person or, where the deceased was a minor, his or her parents.

The claimant argued that this distinction was incompatible with the right to family life enshrined in Article 8 of the European Convention on Human Rights (ECHR) and, as a consequence, this breached Article 14 (prohibition on discrimination). The Court of Appeal found that the distinction in the Act was incompatible with the ECHR and that there was no justification to discriminate against such long-standing co-habitees, particularly when they would have been entitled to make a claim for dependency. The Act therefore requires to be amended to bring it in line with this decision.

"The Scottish equivalent of a bereavement award is more generous."

The Scottish equivalent of a bereavement award is more generous. Under the Damages (Scotland) Act 2011, a claim for loss of society (the broad equivalent of a bereavement award) can be made by 'immediate family members'. Its purpose is to compensate them for the distress and grief caused by the death of their loved one and for the loss of society of the deceased.

The Damages (Scotland) Act 2011 defines immediate family as spouses, civil partners, cohabitants, parents, children, siblings, grandparents and grandchildren. The net is cast far more widely in Scotland on who can potentially make a claim. This sits in stark contrast to the limited class of claimants who can claim a bereavement award in England and Wales.

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The other point which *Smith* serves to remind us of is that, unlike the situation in England and Wales, the level of a loss of society award in Scotland is not fixed by statute and instead has developed through case law. The tariff in England & Wales is now capped at £12,980 for all claimants cumulatively.

Recent cases in Scotland have seen a marked rise in awards in fatal claims. For example, the highest award made to date to the surviving partner of a deceased person was an award by a jury of £140,000 in *Anderson & others v Brig Brae Garage Ltd*, 2015.

The result is that loss of society awards are higher in Scotland than their nearest equivalent south of the border, and significantly so. It is therefore apparent why Scotland is considered to be an expensive forum and *Smith* serves a pointed reminder of that fact.

Rhona Cameron rca@bto.co.uk

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

The Justice Committee reported at the turn of the year on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill"). The Bill was presented to Parliament last summer. Its purpose was to address the perceived "access to justice" problem for Pursuers in Scotland. Following that the Bill then went to the first stage of debate on 16 January 2018. The Bill passed the first stage of the legislative process without the need for debate. It has now moved onto stage two where proposed amendments to the Bill are presently being considered. The next stage (stage 3) will be for the Bill to be considered by Parliament as a whole.

Part 1 of the Bill seeks to introduce damaged based agreements and speculative fee arrangements on a capped scale arrangement.

Part 2 of the Bill concerns expenses in civil actions. This is particularly pertinent for the insurance industry. In particular, this part of the Bill recommends that Qualified One Way Cost Shifting (QOCS) be implemented in personal injury claims to mirror the position in England and Wales.

The key points from the report are as follows:

Capping Success Fees and Damages Based Agreements

The Committee commented that the capping of success fees should apply to the cumulative total of all deductions whether made by solicitors or by a Claims Management Company. The Committee was "concerned" about deductions being made from future losses under a Damages Based Agreement and has asked the Scottish Government to consider whether future losses should be ring-fenced. If not, the Committee has recommended that the court must have the power to make a Periodical Payment Order, with reference given to the intended introduction of such powers in the Damages Bill currently proceeding through the legislative process before the Scottish Government.

QOCS

This is supported by the Committee. However, it has recommended that the effect on QOCS of a Pursuer failing to 'beat' a Tender (equivalent to a Part 36 offer) should be set out in the Bill, as should the effect of a Pursuer having their case summarily dismissed.

The Committee proposes that the Bill be amended to state clearly that the Pursuer would lose QOCS protection where they fail to beat a Defender's Tender or if the Pursuer's claim is summarily dismissed. The Bill does not directly deal with Tenders. Further consideration will have to be given to any proposed amendments to the Bill in this respect and any specific limit on the Pursuer's expenses in the event they fail to beat the Defender's Tender.

The Committee also raised the issue of fraudulent claims and claims lacking any real merit. Their suggestion was that sufficient safeguards should be installed to protect against these consequences, such as a ban on referral fees.

QOCS where the Defender is uninsured

The Committee has asked the Scottish Government to consider restricting the use of QOCS in respect of uninsured defenders or public bodies or by applying the same approach to an award of expenses as is used on individuals who are funded by Legal Aid.

Extending the Compulsory Pre-Action Protocol Limit

The Committee recommends that the Scottish Compulsory Pre-Action Protocol limit for injury claims be increased from £25,000 to £100,000 in order to reflect the jurisdiction of the All Scotland Sheriff Personal Injury Court.

Third Party Funding

The position is unclear on the definition of what is "Third Party Funding". There requires to be a more specific and accurate definition of Third Party Funders who may ultimately be liable for an award of expenses. The Committee has, however, offered clarification that Third Party Funders does not cover Trade Unions and staff associations or to solicitors acting under a success fee arrangement.

Class Actions

The Committee has welcomed the introduction of group procedure and the enabling of public funding to be made available for group proceedings.

Summary

Whilst the Committee recommends that the general principles of the current Bill are approved, there is also a recommendation from the Committee that the Bill should not be enacted into law until the UK Government has passed the Financial Guidance and Claims Bill which will establish a new financial guidance body and introduce changes to the regulation of Claims Management Companies in Scotland.

Omar Yassin oya@bto.co.uk

The Po-faced Pursuer

The Inner House of the Court of Session (Appeal Court) recently issued its judgment in the case of *Pocock v Highland Council* [2017] CSIH 76, a case in which the Pursuer's case against the Defenders' had failed at first instance.

In *Pocock*, the Pursuer sought damages for injuries sustained after he tripped and fell over a raised paving slab in Inverness town centre which, he alleged, was over 28mm in height.

At first instance the Court held that the Pursuer had not only failed to establish that the alleged defect involved a height difference greater than 20mm, but that he also failed to prove that it presented a material risk of injury to pedestrians. As a result, the Defenders' failure to have it repaired did not amount to a breach of its duty of reasonable care. The Pursuer's claim therefore failed.

On appeal, the Pursuer argued that the Judge at first instance had failed to resolve a conflict in the evidence over the height differential and there was no proper basis to conclude that it was less than 20mm. His further submission was that, even if the height differential was to be accepted as less than 20mm, the Lord Ordinary erred in failing to consider that such a defect constituted a trip hazard.

The Pursuer argued that there were a number of factors which the Lord Ordinary ought to have taken into account to deem the defect as hazardous, including its city centre location, the fact that the defect had been identified on two occasions prior to the accident (the first occasion some 51 days before the accident), and the fact that the Defenders' roads policy demanded repair within 21 days. All of this, he argued, gave rise to an inference that the Defenders had a duty of care to effect a repair before the Pursuer's accident.

Firstly, the Inner House addressed the conflict over the height of the defect, concluding that the Judge at first instance was correct in accepting that the Pursuer failed to prove that it was over 28mm, as alleged. He had accepted evidence from the Defenders' roads inspector who had been present at two separate inspections and who presented as a credible and reliable witness. The Pursuer's expert, on the other hand, based his measurements and opinion on photographs taken by the Pursuer two weeks post-accident, in which the Pursuer had used a matchbox as a reference for scale.

Secondly, and on the issue of the standard of care, the Inner House also agreed with the Judge at first instance. He did not rule out the existence of a tripping hazard of some sort, however he correctly took into account the fact that the Defenders' failure to

follow its own policy was not, of itself, sufficient to establish a failure to exercise reasonable care. The Defenders had a duty to balance resources and whilst its policy was not irrelevant to the question of whether its duty of care to the Pursuer had been breached, it could not be determinative of the issue. In all the circumstances, the Inner House found that, the Judge at first instance had not erred in law.

In the context of this case, it seems that size really did matter after all. *Pocock* serves as another demonstration of the difficulties faced by Pursuers in public liability claims, particularly those against a Local Authority.

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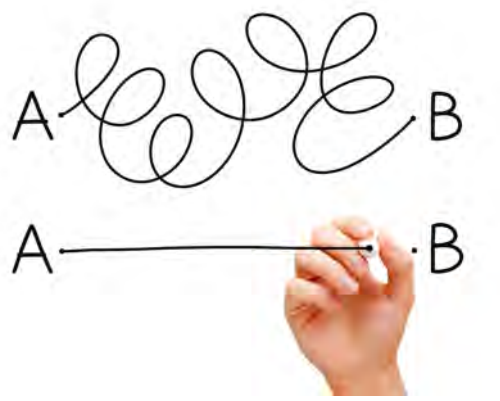
It also highlights that, even where a Local Authority has failed to adhere to its own policies and procedures, liability will not always necessarily follow, given the onus incumbent upon the Pursuer to establish negligence at common law.

However, the Inner House's judgment may not be the last word, the Pursuer having told the press that "*this case is not done*". Watch this space…

Calum Sweeney csw@bto.co.uk

Simple Procedure



It has been over a year now since the introduction of the core Simple Procedure rules in Scotland. The rules were aimed at providing a speedy, inexpensive and informal procedure for the resolution of non-personal injury civil disputes of a cash value up to £5,000.

The introduction of the Simple Procedure Special Claims Rules, which will extend the rules to other types of civil actions (such as actions for damages arising out of personal injury, eviction and aliment actions) was initially scheduled for April 2018. However, this deadline has now been pushed back to autumn 2018.

This revised deadline was agreed by the Making Justice Work Programme Board ("the Board") to allow additional time to consider feedback from court users, evaluate the Core Rules and to incorporate any improvements before introducing the Special Case Rules.

The core Simple Procedure rules are currently being reviewed to identify areas where improvements can be made before the procedure is extended to personal injury claims. It is hoped that the Board will identify the need to further simplify the rules relating to expenses in simple procedure cases during this period.

The current expenses position is uncertain and open to interpretation. This has resulted in certain claimant firms testing the rules before the courts to try and maximise their expenses entitlement in simple procedure claims.

The courts have already produced a number of inconsistent decisions on simple procedure expenses and, for so long as there is a lack of guidance and clarity in relation to these rules, the lifespan of certain simple procedure claims will continue to be unnecessarily prolonged.

The result is likely to be the court's time and energy being increasingly focused on attempting to resolve expenses disputes between solicitors. This seems far removed from the stated aims of simple procedure.

Angus Gilles agi@bto.co.uk

Disclosure and the Recovery of Evidence in Scotland

This free session will cover the rights and obligations of insurers and policyholders in relation to the disclosure and recovery of evidence from a civil and criminal perspective, including formal pre-litigation procedures such as Subject Access Requests and applications to the court under the Administration of Justice Act.

SCHEDULE:

11:30-12:00 Registration
12:00-12:45 Seminar
12:45 Lunch & Drinks

LONDON: 15.3.18
Venue: The Andaz Studio
Andaz London
40 Liverpool Street
London, EC2M 7QN

TO BOOK:
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MANCHESTER: 26.4.18
Venue: The Walters Suite
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