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**Scots
Law** In
Practice

Hello

A very warm welcome to this first edition of our new publication, Clyde and Co's Scots Law in Practice, the spiritual successor to the Simpson & Marwick Information Bulletin.

Despite the change in title, the aim of our publication remains to present you with the most interesting case highlights relevant to personal injury law in Scotland, in a succinct and easy to digest fashion. Issued quarterly, we hope this communication will continue to be an informative and useful update for you.

This issue is particularly appealing (pardon the pun) as nearly all of the cases discussed involve decisions from appeal courts, including two from the Supreme Court. The recent decision in *Kennedy v Cordia*, in particular, could have a significant impact on employers who require employees to carry out duties in wintry conditions, while *Mohamud v Morrisons* appears to broaden the scope of vicarious liability significantly.

We also take a first look at how the new All-Scotland personal injury court is likely to deal with awards of expenses in cases where litigation seems premature, and how the court may approach the important question of sanction for counsel.

Finally, we consider an important appeal court ruling on who might classify as a secondary victim, as well as a rather amusing case involving what happens when a bacon roll run goes wrong.

We welcome your feedback and subscribe requests. Please send to : [Jennifer Campbell](mailto:jennifer.campbell@clydeco.com), Global Communications Manager, UK E: jennifer.campbell@clydeco.com

Enjoy this first issue.



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A slippery slope?

Would the Supreme Court overturn the Inner House's decision regarding the value of health and safety expertise?

Tracey Kennedy v Cordia (Services) LLP [2016] UKSC 6

The issue

When Ms Kennedy slipped on snow and ice, her employers, Cordia (Services) LLP, were held liable at a hearing before a Lord Ordinary in the Court of Session.

Cordia appealed successfully, the Extra Division of the Court of Session holding that the health and safety expert's evidence was inadmissible, and that in any event there was no breach of the regulations or common law.

A further appeal was taken to the Supreme Court, with Ms Kennedy asking the court to overturn the finding of the Extra Division.

The facts

The winter of 2010 in Scotland was severe. On 18 December 2010, Ms Kennedy was visiting a terminally-ill elderly housebound person during the course of her employment with Cordia. To reach the person's house, she had to navigate a path which was covered with snow and ice. As she did so, she slipped and fractured her wrist.

Before the Lord Ordinary, she led evidence from a "health and safety expert." In evidence, he expressed the opinion that Cordia had not adequately assessed the risk, nor had they provided the correct work equipment – in this case, a clip-on attachment for shoes called "Yaktrax".

The expert stated that this meant that the defenders were in breach of Regulation 3 of the Management of Health & Safety at Work Regulations 1999 (failure to carry out suitable risk assessments), and Regulations 4 and 10 of the Personal Protective Equipment at Work Regulations 1992 (requiring employers to provide suitable equipment to their employees to avoid risks to their health and safety, and ensure the equipment is properly used).

Cordia had objected to the expert's evidence, arguing it was inadmissible as the expert had no relevant special skill nor specialised learning.

The decision

The Supreme Court unanimously allowed the appeal, overturning the Extra Division's findings.

The Extra Division had expressed concern at the apparent common practice of producing "expert" reports in personal injury actions that do not actually display any expert quality.

Lord Clarke put it succinctly: "If the opinion of a witness is not based on the principles of some recognised branch of knowledge in which he has particular experience and expertise, it is useless 'expert' evidence and should be held to be inadmissible."

"Health and safety" experts such as the one employed by Ms Kennedy in this case failed on both counts. Not only was "health and safety" not a recognised body of science or experience suitably acknowledged as being useful and reliable, but the expert's opinion evidence was unnecessary. His evidence was only his own personal view, and thus the Extra Division held it as inadmissible.

The Supreme Court disagreed. The expert had the necessary experience and qualification to explain how anti-slip attachments reduced the risk of slipping. The expansion of the statutory duties imposed on employers in the field of health and safety has given rise to a body of knowledge and experience in this field which creates the context in which the court has to assess an employer's performance of its duty of care.

Insofar as some of the expert's statements might be viewed as inadmissible expressions of opinion on legal duties, "an experienced judge could...readily treat the statements as opinion of a skilled witness as to health & safety practice, and make his own mind up on the legal question."

Based on the evidence available, the Lord Ordinary had been entitled to conclude there was a breach of regulation 3 of the 1999 Regulations as a suitable and sufficient risk assessment had not been prepared.

It was incorrect to say, as the Extra Division had, that the PPE Regulations did not apply because Ms Kennedy was not "at work" when travelling between clients. Travelling from one client's home to another's was an integral part of her work. The phrase "while at work" in the Regulations referred to the time when she was exposed to the risk; that is, during the time when she was in the course of her employment. It did not refer to the cause of the risk.

The evidence available, including the expert evidence, allowed the Lord Ordinary to conclude that on the balance of probabilities she would not have fallen if she had been provided with the "Yaktrax". He had therefore been entitled to hold there had been a breach of regulation 4(1).

As to the alleged negligence under common law, while the Supreme Court understood the concern that the law should not be excessively paternalistic, it was wrong to compare Ms Kennedy to an ordinary member of the public. An ordinary member of the public could choose to stay in and avoid the snow and ice, or choose to travel only on footpaths which had been treated or cleared. Ms Kennedy, as part of her employment, had to travel on the untreated footpath to reach the client's door.

A reasonably prudent employer would have carried out a risk assessment – and had they done so, they would have learned that attachments were available at a modest cost to reduce the risk, and had been used by other employers in a similar position.

Finally, the Supreme Court considered the question of causation. There was a causal component to the concept of "suitability" in terms of regulation 4(1) of the PPE regulations; namely that the protection offered must make the risk of injury "highly unlikely". Therefore, where there was evidence that the PPE would have been used if provided, as Ms Kennedy said she would here, and the employee was injured, then it would be reasonable to infer that the failure to provide the anti-slip attachments materially contributed to the accident.

They did however rule that consideration of causation at common law was more problematic, and there was no proper foundation for the Lord Ordinary's decision that Cordia were liable in damages at common law – but this was of no practical significance given their findings in relation to the regulations.

Our view

The decision of the Extra Division had been hailed by defenders as curbing the instruction of experts in cases where they were not required.

The Supreme Court decision is likely to reverse that trend, and demonstrates that it will be very difficult to argue against the instruction (and therefore expense) of health & safety "experts" in the future.

The decision is of vital importance to any employer who requires employees to traverse footpaths and carriageways in icy conditions. It will likely be used by trade unions to argue that in such circumstances the failure to provide shoe attachments in icy conditions is a breach of both the regulations and the common law duty of care, and where employees sustain injury as a consequence of a trip or fall on ice or snow, liability should follow. It should be noted however, that the Supreme Court's decision depended upon the factual findings made by the judge who initially heard the case. Those factual findings are not binding in future cases.

The comments on causation also appear to signal a shift in the usual approach to causation in cases under the regulations – moving from a "but for" test to one more akin to a material increase in risk test. The differentiation of causation under the regulations, and causation at common law, is also a development which will have to be watched closely.

Marco Rinaldi

Second thoughts

A mother came across the scene of a car accident, and later discovered the accident involved her son. Could she recover damages for nervous shock as a “secondary victim”, significantly inflating her award?

Martha Sarah Young v Arthur Macvean [2015] CSIH 70

The issue

Regular readers will recall the earlier decision in this tragic case when the court ruled that Mrs Young could recover damages as a result of being a secondary victim, after happening across the aftermath of a car accident in which her son was killed.

Mr Macvean appealed on the basis that Mrs Young had wrongly been categorised as a secondary victim as the evidence indicated she had not been aware of her son being involved in the accident until she was advised later.

The facts

Mrs Young was not a stranger to tragedy in her life. When she was twenty-one, her father had died of a sudden stroke. In 1992, her husband had died in a North Sea Helicopter accident. She told the court that before her husband had left for that job, he had reminded the then young David to look after his mother and sister while he was gone.

These tragedies had brought her and her son very close. David was, she said, “a model son” whom she saw nearly every day, and who was always trying to help her.

Rather unusually, on 1 June 2010, she and David had not seen one another for a few days, but had arranged to meet at their local gym in Glasgow. On the way there, she came across a horrific accident in which a car had been crumpled into a tree. She began thinking of the families of those involved and was relieved that her children could not be involved as David did not drive and her daughter was at home.

However, over the course of the morning, when David did not arrive at the gym, she became very anxious. She was eventually told by police that David had been killed in the accident when Mr Macvean’s car had left the road and struck him.

The earlier decision held Mrs Young was a secondary victim. She had witnessed the immediate aftermath of the accident, and over a short period thereafter, a sense of dread had developed that her son was involved. This was then confirmed shortly after by the police.

Mr Macvean argued that her shock was caused not by witnessing the accident or its immediate aftermath, but by being told about the death. She did not realise at the time of seeing the wreckage that her son was involved; rather, she had been relieved to think her children could not be involved.

The line of authority established by *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, *Frost (White) v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, and followed more recently in *Taylor v A Novo (UK) Ltd* [2014] QB 150 was clear.

It was accepted in those cases that the categorisation of who was and who was not a secondary victim was by its very nature a somewhat arbitrary exercise, but set out “strict control mechanisms” for establishing who falls into the category. While Mrs Young’s case evoked sympathy, she fell outwith the category. She was too remote to be a secondary victim, the shock not having been caused by the trauma of witnessing the aftermath of the accident.

Mrs Young argued that the judge had not erred in categorising her as a secondary victim. This was not a case where she had viewed the accident scene and thought nothing more of it. She immediately had concerns. As the psychiatric expert had told the court, Mrs Young’s experience over a short period that morning had been “ghastly”. Her shock had been caused by her involvement in the immediate aftermath of the accident.

The decision

The appeal court ruled in favour of Mr Macvean.

While they accepted that Mrs Young’s experience over a short period was “ghastly”, it “did not involve the sudden appreciation by direct sight or sound of a horrifying event or of direct sight or sound of the horrifying immediate aftermath of such an event.”

Mrs Young was unaware of the connection to her son when she saw the crumpled vehicle. It was only with hindsight after being told of his death that she linked the two.

What was needed for a claim to arise was “the highly particular circumstances where the illness is the result of a direct perception of the distressing phenomenon.” That had not occurred here.

There was also a separate appeal point relating to the award of GBP 80,000 for loss of society. The court found that this was not excessive – somewhat surprising, as in another recent appeal in the case of *Currie v Esure Services Limited*, a significantly lower award of GBP 42,000 was not viewed as inadequate.

Our view

As was accepted by Lord Steyn in *Frost*, the categorisation of who and who is not a secondary victim is an arbitrary one, which can sometimes appear to defy logic. However, the policy reasons behind this approach are clear. To step away from the strict control measures would potentially open the floodgates.

However, it remains to be seen whether this matter may be appealed to the Supreme Court in order to challenge that policy.

Marco Rinaldi



Hammering home the point

A hammer-throwing incident at work led the court to consider whether the employer should be held vicariously liable for the hammer-throwing employee.

Christopher Somerville v Harsco Infrastructure Limited [2015] SCEDIN 71

The issue

Following a light-hearted exchange between a supervisor and a fellow employee, a hammer was thrown which accidentally struck Mr Somerville.

An earlier decision in the case ruled that Harsco were not vicariously liable for the supervisor. Mr Somerville appealed, arguing that the court had failed to take into account the seriousness of the incident, and the assertion of superiority made by the supervisor before he threw the hammer.

The facts

On 10 June 2013, Mr Somerville was working for Harsco in their yard. His colleague Mr Bazela was also in the yard, as was their supervisor, Stanley Smith.

Smith and Bazela started joking about going on the morning roll run. As Smith walked away, Bazela continued the banter, shouting something. Smith responded by saying, “I will teach you to speak to your manager like that,” and picked up a hammer that was nearby, before throwing it towards Bazela. The hammer travelled approximately 30 feet but rather than hitting Bazela, it hit Mr Somerville on the head.

Following the incident, Smith admitted his fault and was dismissed for gross misconduct.

Mr Somerville argued that the defenders should be found vicariously liable for the acts of Mr Smith as they were closely connected to his employment.

The sheriff who originally heard the case considered that the act was not closely connected with Mr Smith’s employment and that he was on “a frolic of his own” when he threw the hammer. She dismissed the case.

Mr Somerville appealed. He argued that the original decision had given insufficient weight to the incident, and especially to the words that Mr Smith used as he was throwing the hammer. Essentially, he argued that the use of the words “your manager” was enough to establish the close connection necessary between the throwing of the hammer and Mr Smith’s employment duties.

Moreover, it was not simply a frolic or horseplay, as had been the case in *Wilson v Exel UK Limited* [2010] CSIH 35. Smith was “a senior employee ... asserting his dominant role”.

Harsco, on the contrary, argued that the incident was all part of a light-hearted exchange, and there was no exercising of a managerial function or assertion of superiority on the part of Smith. It was simply banter that had gone too far; there was no close connection between the wrongful act and Smith’s employment as was required to establish vicarious liability (*Lister & Others v Hesley Hall Limited* [2001] UK HL 22).

The decision

The appeal court found in favour of Harsco.

The words used by Smith were clearly part of light-hearted banter and “it strains common sense and language to interpret the words and behaviour of Mr Smith as having much, if anything, to do with his duties as supervisor.”

There was no close connection between the act of throwing the hammer and Mr Smith’s employment duties.

It was simply a prank which had gone too far, and reference was made to Mrs Justice McLachlin in *Bazley v Currie* [1999] 2SCR 534 where it was said:

“an incidental or random attack by an employee that merely happens to take place on the employer’s premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do.”

Our view

The decision is a victory for common sense, and was the final nail in the coffin of the pursuer’s case.

The argument advanced by Mr Somerville that the mere use of the words “your manager” in the context of a light-hearted exchange between colleagues was clearly insufficient to establish a close connection between the reckless act and the employment.

The case serves as a reminder that merely because one employee injures another at work, it does not always automatically lead to vicarious liability on the part of the employer. It is a further example of the Scottish courts refusing to make a finding of vicarious liability where one employee assaults another.

Whether that will remain the case in the future though remains to be seen in light of the recent Supreme Court decision of *Mohamud v Morrisons*.

Tom Brownlee of Clyde & Co’s Edinburgh office represented Harsco both at first instance and appeal.

Marco Rinaldi

Mohamud v Wm Morrison Supermarkets

Supreme Court decision on Vicarious Liability

Cook v McNeil [2015] EWCA Civ 1287

The issue

When Mr Mohamud was violently assaulted by a petrol pump assistant employed by Morrisons, he argued that the supermarket should be vicariously liable for his attacker's actions.

The claim failed at trial and before the Court of Appeal. The Supreme Court had to consider how the law in this area has developed and whether it was in need of significant change.

The facts

Mr Mohamud went to a Morrisons' petrol station in Birmingham. He asked whether the garage could print off some images from a USB stick.

Amjid Khan worked behind the counter. He responded to Mr Mohamud's request with foul and abusive language. Mr Mohamud protested at being spoken to in this manner, which led to another barrage of abuse from Mr Khan, who ordered Mr Mohamud to leave.

Mr Mohamud went to his car, but was followed by Mr Khan. Mr Khan opened the passenger door and told him in a threatening manner never to come back. When Mr Mohamud asked him to shut the door, he was punched by Mr Khan. Mr Mohamud got out of the car to close the passenger door. Mr Khan punched him to the ground and severely assaulted him, despite his supervisor telling him to stop.

At trial and appeal it had been held that Morrisons were not vicariously liable for Mr Khan's actions. Although his job involved some interaction with customers, it involved nothing more than serving and helping them. There was not a sufficiently close connection between what he was employed to do and assaulting a customer.

Mr Mohamud had died before the case went to the Supreme Court, but his family continued with the action and argued that the test of "close connection" was outdated. They sought a new, broader test of "representative capacity": was Mr Khan acting in the capacity of a representative of the employer at the time of the assault? Alternatively, was Mr Khan was acting within the "field of activities" assigned to him in dealing with Mr Mohamud?

The decision

The Supreme Court allowed the appeal, holding Morrisons vicariously liable for Mr Khan's actions.

They considered the development of vicarious liability. The test for many years was whether the employee's conduct was "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master."

However, in *Lister v Hesley Hall Ltd* [2001] 1 AC 215, the court recognised that the second leg of this test was ineffective. It introduced the "close connection" test to remedy this. In *Lister*, children had been abused by a warden employed by a school boarding house. Lord Steyn had posed the question as to whether the warden's abuse was so closely connected with his employment that it would be just to hold the employer liable. In that case, the court ruled there was a sufficiently close connection.

The court saw no need to alter the test in the way proposed by Mr Mohamud. The close connection test was sufficient. Mr Khan's job was to attend to customers and respond to their inquiries. His foul-mouthed response and ordering Mr Mohamud to leave was inexcusable but within the "field of activities" assigned to him. There was no break in the chain by Mr Khan then following Mr Mohamud to his car. In Lord Toulson's view, "It was a seamless episode." Further, when he opened the passenger door, he ordered Mr Mohamud to keep away from his employer's premises, which was reinforced by the assault. It was not something personal between them.

The fact that it was a gross abuse of his position was irrelevant, as was Mr Khan's true motive. Morrisons had entrusted him to deal with members of the public and it was just that they should be responsible for his abuse of this trust.

Our view

On the face of it, this is a surprising decision which arguably broadens the scope of vicarious liability. From a Scottish perspective, the decision is at odds with recent decisions such as *Vaickuviene v J Sainsbury plc* 2014 SC 147. There, Sainsburys were held not to be vicariously liable when one employee murdered another.

The approach taken here was to consider what was just in the circumstances, and the Supreme Court was at pains to point out that each court will need to make an evaluative judgement in each case. One would therefore hope in a situation like the *Somerville v Harsco* case, discussed above, the court's decision would not change. Nonetheless, the danger from an employer's point of view is that any link to an employee carrying out his "field of activities" will be sufficient to establish that the employer should be held liable.

Marco Rinaldi

Child's Play? The Question of Sanction for Counsel in the All-Scotland Sheriff Court

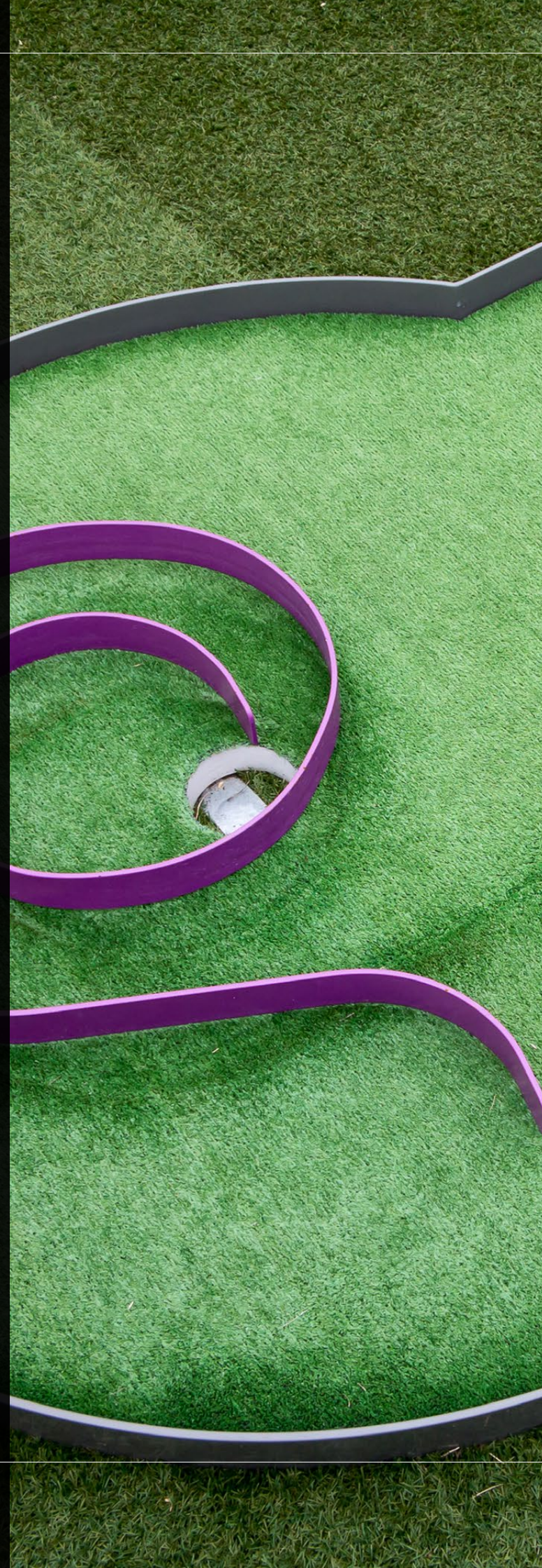
When a case settles for a low amount in the new All-Scotland Personal Injury Court, how will the court apply the new test for sanction for counsel?

V (as parent and guardian of J (a Child)) v M&D Leisure Limited [2016] SC EDIN 22

The Issue

The All Scotland Personal Injury Court is still in its infancy, and there has been some speculation as to how the court will deal with sanction for counsel now that there is no automatic right in cases below GBP 100,000.

This recent decision involving a claim brought on behalf of a child which settled within the adjustment period gives some indication as to the approach the court may take.



The facts

J, a 10 year old boy was playing crazy golf at M&D's theme park at Strathclyde Country Park. As he was moving from one hole to another, he had to use some wooden steps. When he did so, he slipped, and his chin came into contact with the end of the putter he had been given. The rubber had been worn away, and as a result, he sustained a nasty laceration to his chin.

He said that the slip was due to the steps being wet, and the laceration was due to the poor state of the rubber grip on the club.

Liability was denied by M&D, but before the end of the adjustment period, a tender for GBP 12,500 was lodged, and accepted. In accepting the tender, V moved for sanction for counsel, who had consulted with J, prepared adjustments and a valuation. This was opposed by M&D, who argued that sanction for counsel should not be granted.

V argued that the case was more complicated than normal as it proceeded under both common law and the Occupier's Liability (Scotland) Act 1960, and involved complex issues of both breach of duty and causation. There was not just one causative breach of duty but an interaction between two such breaches.

It was also argued that it the case was very important to J, having been left with a permanent scar, and that while GBP 12,500 wasn't a large amount in the grand scheme of personal injury claims, it was to a boy of J's age.

Finally, consulting with and taking the evidence of a boy of J's age merited the employment of counsel.

V also pointed out that the wording of section 108 of the Courts Reform (Scotland) Act 2014 was such that the sheriff's discretion was limited to whether employment of counsel was reasonable in all the circumstances; if it was, then sanction must be granted.

Against this, M&D argued that this was no more than a standard personal injuries action. The legal points were not complicated, and the firm acting for J was an experienced personal injury firm. As to importance, every case is important to each pursuer, but this one was no more important to J than any other case. And even if taking evidence of a child may, in some circumstances, require more skill than from a normal adult witness, there had in any event been no need to instruct counsel at such an early stage.

The decision

The court found it was reasonable in all the circumstances to have instructed counsel, and granted sanction.

Sheriff Braid did however hold that case was no more complicated, important or valuable to J than any other standard case. The issues of law were of no more than moderate complexity and could be dealt with by a competent solicitor. Nor was the case of a particularly high value, and he found that the case was of no greater importance to J than to any other pursuer. It was not, for example, a case in which damages were required so that he could be cared for throughout the rest of his life.

However, the fact that J was a child did make a difference. More skill would be required to take his evidence. It was reasonable to instruct counsel for that purpose, and it would not have been reasonable to wait until just before the proof for counsel to be instructed.

Having found that it was reasonable, in all the circumstances, then in terms of the wording of section 108 of the 2014 Act, he was bound to grant sanction.

Our view

While the decision is a blow for defenders, the effects of the case are limited. In large part, Sheriff Braid agreed with the submissions of M&D that such a case would not normally merit employment of counsel; the only reason it was allowed here was that the pursuer was a young child.

While the wording of section 108 does limit the court's discretion in considering sanction for counsel, it is still open in each individual case to argue why it was not reasonable for counsel to be instructed.

Marco Rinaldi of Clyde & Co appeared for M&D Leisure.



Pre-action disclosure and premature litigation in Scotland

If medical reports are available pre-litigation, but not disclosed, will the All Scotland Personal Injury Court view litigation as premature, and withhold expenses as a result?

Steven Gibson v Menzies Aviation (UK) Ltd [2016] SC EDIN 5

The Issue

The Voluntary Pre-action Protocol is designed to provide structure to the pre-litigation process, but what happens when a claimant fails to abide by the Protocol, and instead, rushes headlong into litigation?

Scottish courts have grown more receptive to the argument that in such cases, a claimant's expenses should be restricted. This case was the first in the new All Scotland Personal Injury Sheriff Court to deal with the issue.

The facts

A claim was intimated on behalf of Steven Gibson in November 2014. At the same time, Mr Gibson's solicitors requested sight of earnings information, at least some of which was produced by February 2015. Liability was admitted early, and insurers of Menzies confirmed that they would deal with the claim in terms of the Voluntary Pre-Action Protocol.

In June and August 2015, Mr Gibson's solicitors obtained medical reports, but did not disclose them. Instead, they wrote to insurers at the end of August saying they still required some further wages information.

When Mr Gibson's solicitors received no response within four weeks, they raised an action in the Court of Session. Menzies' solicitors indicated they felt this was premature: they were concerned that medical reports had not yet been disclosed. Mr Gibson's solicitors indicated that they needed the wages information to properly value the claim.

As it turned out, the action had been raised against the wrong defenders, so a fresh action was raised in October in the new All Scotland Personal Injury Court. Only after this new action was raised were the medical reports lodged with the court.

Shortly thereafter, a tender was intimated, and accepted.

Menzies argued that the failure to disclose the medical reports, which were available before proceedings were raised, meant the case could not be settled pre-litigation when otherwise it likely would have been. The argument that the missing wages information meant proceedings were necessary was a smoke-screen; as it happened, loss of wages comprised only 4% of the level of the accepted tender. Had the medical reports been available, a sensible offer would have been made. They had disclosed the vast majority of wages information.

On that basis, any expenses awarded to Mr Gibson should be modified to nil.

Mr Gibson argued that, on the contrary, the missing wages information was needed to properly value his claim. Even if medical reports had been disclosed, the wages documents were required. Litigation was necessary, and was not premature.

The decision

Sheriff McGowan was unwilling to modify expenses awarded in Mr Gibson's favour to nil, but did reduce them by two thirds.

It was clear this was a case in which Menzies' insurers had been seeking to obtain information to try and resolve the claim. Wages information had been disclosed early by insurers, albeit there was some dispute about the extent of that information. Nevertheless, it was clear from what had been disclosed that by December 2014, Mr Gibson appeared only to be losing approximately GBP 30 a month. In any event, Mr Gibson himself would clearly have been able to estimate his further wage loss between January and May 2015.

No warning had been given that proceedings would be raised if the remaining wages information was not produced. There was no issue of limitation, and therefore it was not reasonable to commence court proceedings without further warning.

Further, there was no sound reason for failing to disclose the medical evidence as soon as it was available. It should have been disclosed before the Court of Session action was raised. Thereafter, it certainly should have been disclosed before the action in the All Scotland Court. Sheriff McGowan said, "the failure to disclose it until some ten days after the [All Scotland Court] action was raised is inexcusable."

The disclosure of the medical reports timeously would have allowed an offer to be made, and even if some wages information was outstanding, a view could have been taken on an overall valuation.

However, it was impossible to say for certain what the level of any pre-litigation offer would have been, and whether that would have been accepted. It could also not be said that the failure to disclose the reports was the sole reason for litigation.

Our view

This first decision on the issue of premature litigation from the All Scotland Personal Injury Court is a good one from a defender's point of view. Where a claimant fails to abide by the Protocol and rushes to litigation it seems likely the Court will be inclined to penalise the claimant by way of modification of expenses, which should encourage disclosure of documents as per the Protocol and, importantly, discourage unnecessary litigation.

Marco Rinaldi

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