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Insurance News

Does size matter?

In *Pocock v Highland Council [2017] CSOH 40* the Pursuer sought damages for injuries sustained after he tripped and fell over a raised paving slab which he alleged was over 20mm in depth. His proposition was that liability ought to attach to the Defenders at common law. He argued the 'defect' in the paving slab ought to have been rectified within seven days, failing which twenty one days as the Defenders had identified it in an inspection prior to the accident. His claim was that the defect posed a tripping hazard for pedestrians and the failure to repair it caused him to sustain injury.

The Defenders' roads and pavements maintenance policy required that monthly safety inspections be carried out in the area in which the Pursuer's accident occurred. The policy provided that defects found during inspections had to be categorised depending on the level of risk attributed to the defect. The response time for repairs to be carried out was dictated by the level of risk posed by the defect. However, the Defenders' policy did not specify the depth a defect had to be to identify which repair category it would fall within.

There was a dispute between the parties' experts over the depth of the defect, particularly on whether it was more or less than 20mm in depth. The experts also disagreed on whether it ought to have been repaired within seven or twenty one days. Notwithstanding this, by the time of the accident, some fifty one days had passed since it had been identified as a defect without being repaired.

The key issue for the court was whether the Pursuer had established that the Defenders as a roads authority of ordinary competence exercising reasonable care, should have taken steps to correct the defect prior to the accident. Whilst the Court held that the Defenders had not followed their own policy, that fact in itself was not sufficient to establish a failure to exercise reasonable care. The purpose of the policy was to '*provide the basis for a maintenance strategy and enable the prioritisation of works activities*' and was *'a tool to determine where resources should be prioritised.'* There was no evidence presented to the Court that it was unreasonable for the Defenders not to have remedied the defect prior to the accident. The Court quoted the Inner House authority of *McDonald v Aberdeenshire Council [2013]* CSIH 83 in stating *'the Pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and have taken steps to correct it…'*

In *Pocock*, the Pursuer had not established that the defect involved a height difference of greater than 20mm, or 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.

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 establishing liability in public liability claims, particularly those against a Local Authority. 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.

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The best of friends

The recent Sheriff Court decision from Forfar Sheriff Court in *PA v RK & UK Insurance Limited T/A Direct Line [2017] SC FOR 6*, provides a welcome example of the Court taking a firm stance against claims in which fraud is suspected.

PA concerned an allegation of a fraud arising from a staged road traffic accident. The Pursuer raised proceedings in which the Defender did not enter an appearance. However, his insurers did enter process as Party Minuters to protect their interests as his motor insurers. In *PA*, the Defender accepted responsibility for the accident, claiming to have pulled out from a side junction and failing to see the Pursuer's vehicle due to foggy conditions. Despite not having entered the action, he was called as a witness for the Pursuer. The parties claimed not to have known each other prior to the accident. However, at proof the Party Minuters produced photographs, obtained from the Defender's Facebook page, showing that the Pursuer had in fact attended the Defender's wedding four months prior to the accident.

The Pursuer then accepted that he had attended the wedding, but still claiming he did not know whose wedding it was and it was a pure coincidence that the groom just so happened to be the Defender in this case. The Defender also maintained he had not met the Pursuer prior to the accident and could not recollect him attending his wedding. He also admitted that he had the Pursuer's telephone number stored on his mobile phone, which he subsequently deleted on the morning he was due to give evidence at Court in an effort to distance himself from the events.

In light of the above, and perhaps unsurprisingly, the Sheriff did not consider either the Pursuer or the Defender to be credible or reliable witnesses. In addition, the Sheriff considered conflicting engineering evidence from experts for both the Pursuer and the Party Minuters. He doubted whether the accident really occurred as alleged by the parties. It followed therefore that the Pursuer had failed to prove his case. Decree of Absolvitor was granted in the Defender's favour and expenses were awarded in the Party Minuter's favour.

The Sheriff also requested that a copy of his judgment be sent to the Procurator Fiscal as the circumstances of the case gave rise at least to the suggestion that an attempt has been made to obtain compensation by means of deception.

It is worth noting, however, that the Sheriff did not explicitly make a finding that the parties involved had made a fraudulent claim. It is not known whether criminal proceedings will be taken against either the Pursuer or the Defender. However, the decision is a welcome victory in the continued battle against fraudulent claims.

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Is pain real?

The interface between pain and psychiatric conditions was recently considered by the Outer House of the Court of Session in *Santhong Phensrisai v Anong Yutikan, [2017] CSOH 48.*

In *Santhong,* the Pursuer sustained multiple orthopaedic injuries in a road traffic accident which occurred on 24 December 2012, including a sternal fracture, rib fractures and spinal fractures (at C6/7 and T6 and T7). His orthopaedic injuries were managed in hospital conservatively. He was discharged home just under three weeks after the accident.

Both parties secured expert reports from orthopaedic surgeons. The experts largely agreed on the injuries the Pursuer had sustained in the accident but the Pursuer's expert, Margaret McQueen, was quite forthright that her clinical examination revealed evidence of abnormal illness behaviour. She mentioned the possibility that his psychological state may be influencing his perception of his symptoms and disabilities. The Defender's expert, Arthur Espley, agreed and found some evidence of inappropriate behaviour upon examination. He felt the Pursuer's stated level of pain was greater than ought to be expected for the injuries sustained.

"….there must be more than a tenuous relationship between pain and psychological complaints for compensation to be awarded."

Turning to the psychiatric injuries, the Pursuer's expert, Dr Colin Rodger found him to have sustained a chronic adjustment disorder which was ongoing at a mild level at the time of assessment in May 2014. His view was that the Pursuer's mental condition was amplifying his perception of pain and disability which was impeding his functioning and promoting ongoing psychological stress. He recommended a course of anti-depressants to treat the disorder.

Curiously, it was not until almost five months later that the pursuer consulted with his GP about Dr Rodger's report and the fact that he recommended a course of anti-depressant medication. The GP did not find the Pursuer had any depressive illness and did not prescribe anti-depressant medication. His rationale was that the Pursuer was doing well. He was coping with the pain without analgesia. He was using meditation and had adjusted his sleeping posture so he could sleep pain free. His appetite and energy levels were good and his motivation was good.

The Court was ultimately satisfied that the physical injuries sustained by the Pursuer were as stated by the two orthopaedic experts, with the exception of the continuing left sided chest pain for which there was no organic cause. The Court was not convinced that Dr Rodger was correct in his diagnosis of a mild chronic adjustment disorder in light of the fact that the Pursuer's clinical history and presentation to his GP were inconsistent with adjustment order or depressive illness. The Court held Dr Rodger was too pessimistic in his diagnosis. Solatium fell to be assessed by leaving out of account the continuing left sided chest pain and chronic adjustment disorder. It was assessed at £30,000 plus interest.

There was some discussion as to the future wage loss position as it was argued that the accident had delayed the Pursuer in securing his PhD qualification with a consequent delay in him securing full-time employment, most likely as a lecturer. No award was made under this head of claim given it was held to be entirely speculative as to what the Pursuer would have done after obtaining his PhD. The claimed loss of earnings by reason of any delay in securing this qualification (which the Court assessed to be a period of one year) had not been established. The Court's view was that there had been no loss of earnings capacity.

The judgment in *Santhong*, although fact dependent, is a welcome result for Defenders in a case in which the sum concluded for was initially £250,000.

It illustrates that there must be more than a tenuous relationship between pain and psychological complaints for compensation to be awarded. Indeed, the case provides a useful reminder that there has to be a diagnosable psychological illness for it even to be considered as a factor which might be precipitating a 'real' pain.

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Do two houses make a home?

In *Lamarieo Manna v Central Manchester University Hospitals NHS Foundation Trust, [2017] EWCA Civ 12 ('Manna')* the Court of Appeal recently considered the question of when two houses make a home in the context of a *Roberts v Johnstone, 1998* ('*R v J*') calculation.

At first instance, the Claimant was held to be entitled to recover the costs associated with the acquisition of a second property in which he would live with his father (he lived with his mother most of the time who remained his principal carer). It was against that conclusion that the appeal was taken.

The appeal focussed on the fact that the Claimant had seen his father on a handful of occasions since 2013, there had been no contact since January 2014 and there was no guarantee the expressed intention to resume contact would endure. This argument was rejected on appeal. Whilst the Court of Appeal regarded the award of a second home as generous and emphasised that the award was '*intensely fact dependent',* it accepted that it was in the Claimant's best interest for the relationship with his natural father to be restored. It highlighted that the judgment at first instance ought not to be regarded as establishing a precedent. The award of *R v J* damages fell within the ambit of the reasonable decision making powers of the Judge at first instance. Accordingly, the Court of Appeal was not persuaded it would be justified in setting aside the award.

The other argument advanced by the Defendant related to the appropriate multiplier to be adopted when considering *R v J* damages. The Defendant's proposition was that the multiplier ought to have been assessed by reference to the Claimant's father's lifetime multiplier, as opposed to the Claimant's lifetime multiplier. The use of the Claimant's lifetime multiplier served to increase the level of the award. Nonetheless, at first instance the Defendants did not object to the use of the Claimant's lifetime multiplier. On appeal, they sought to justify not having raised the point at first instance on the basis that they had focused on simply defeating the claim on the grounds it lacked merit.

> ***"The decision in Manna again demonstrates the willingness of the Courts to consider the realities of modern living when assessing the basis / calculation of compensatory awards of damages."***

The Court dismissed the appeal commenting that it was optimistic on the part of the Defendants to seek to appeal against a critical aspect of the calculation which had not been challenged at first instance. The Defendant's challenge was an afterthought and was too late for them to be allowed to suggest that an alternative *R v J* model was appropriate.

The decision in *Manna* again demonstrates the willingness of the Courts to consider the realities of modern living when assessing the basis / calculation of compensatory awards of damages.

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Everyone loves (forum) shopping, right?

The case of *Louisa Docherty & Others v Secretary of State for Business, Innovation & Skills & Another*, which we previously commented upon, returned to Court in late March 2017. The question before the Court was whether to allow the First Pursuers (who were the executors of Louisa Docherty as she died between court hearings) to amend their pleadings to introduce a new claim or whether that claim was time-barred.

In *Docherty,* the deceased had died of asbestosis. He lived, worked and died in England where the Pursuers resided. The claim was raised in Scotland as the exposure had occurred during his employment in the 1940s in Scotland. Twenty two of the twenty four Pursuers raised claims for loss of society under the Damages (Scotland) Act 2011 ('the 2011 Act') which was not an option available to them under the English Fatal Accidents Act 1976.

The Second Defenders (who had not appeared at the prior hearing due to oversight) sought to have the claim against them dismissed on the basis that the remedy to which the Pursuers were entitled was regulated by the law of the place where the wrong had occurred, in this case, England. Their position was that the 2011 Act had no applicability in England and the Pursuers could not rely on it. The Court agreed with their proposition and dismissed the Pursuers' claim on the basis of relevancy.

The First Pursuers' Minute of Amendment sought to introduce new claims for solatium, services and loss of financial support. It sought to introduce claims under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. Both of those Acts apply in England, not Scotland. The Court was faced with the issue that although the case was raised within the triennium, the new claim in the Minute of Amendment was brought outwith the triennium.

The question of whether to allow the Minute of Amendment was a discretionary matter for the Court. The Court's view was that it ought to be slow to exercise its discretion in favour of permitting an Amendment after the expiry of the triennium. The Court considered that the proposed Minute of Amendment would radically alter the First Pursuers' case, stating "*For the first time the First Pursuer in this case is seeking to introduce a new foundation by introducing a new claim based on English law provisions which do not feature in the original pleadings. Without the amendment, the First Pursuers' case against the Second Defenders would be, like that of the second to twenty fourth Pursuers, irrelevant and would fall to be dismissed*."

> ***"It illustrates the difficulties that can be faced if Pursuers indulge in forum shopping"***

The Court commented that the First Pursuers could have avoided the difficulties faced by bringing an action based on English law in England within the limitation period. The Pursuers accepted that the action was raised in Scotland in order that they might seek a remedy under the 2011 Act which would have been unlikely to succeed in English Courts. It was therefore clear they had made a conscious decision to litigate the claim before the Scottish Courts. It was not until the Court held that original claim to be irrelevant that they sought to introduce the new claim based on English Law. The Court also quoted the Lord President in *McElroy v McAllister, 1949* when he said, *"If a Pursuer chooses to sue not in the primary Court but in some other Court of his own selection, he has only himself to thank if he finds himself encumbered by difficulties which prove insuperable."*

The Court held the Defenders would suffer prejudice if the Minute of Amendment was allowed and therefore refused the First Pursuers' application to amend. While parts of the claim remain ongoing in relation to the First Defenders, the judgment underlines the necessity that Pursuers raise claims in the correct forum. It illustrates the difficulties that can be faced if Pursuers indulge in forum shopping. The refusal of the Pursuers' Minute of Amendment also demonstrates that Pursuers should not assume they will be able to substantively recast their claims late in the day, should their primary claim face difficulties, which is a welcome outcome for Defenders.

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Bitesize News

Discount Rate

The Discount Rate has been cut from 2.5% to -0.75%. This is unlikely to be the final word on the matter as a joint Consultation between the Ministry of Justice and the Scottish Government was launched on 30 March 2017. The Consultation focussed on the methodology employed in setting the rate and how it ought to be set in future. Responses were due by 11 May 2017. Further discussions were put on hold due to the upcoming snap General Election. It is a case of 'watch this space'.

All-Scotland Personal Injury Court

The All-Scotland Personal Injury Court recently saw its first Jury Trial. The case concerned a fall in a school playground. Damages were agreed at £15,000. The Trial proceeded on the basis of liability alone. The Jury found in favour of the Pursuer but also found that the Pursuer was 96.5% contributory negligent. The Pursuer was therefore awarded £525, but the Defenders had no tender in process, the result of which is that the Pursuer is entitled to the full expenses of process. The result is another illustration of the unpredictability posed by a Jury. It is understood that the case is being appealed by the Pursuer on the basis of the Sheriff's charge to the jury.

Pursuers' Offers

Pursuers' offers returned to the table as of 3 April 2017. This brings Scotland into line with Part 36 procedure in England & Wales in which both Claimants and Defendants are able to lodge offers with the Court.

The return of Pursuers' offers is intended to encourage early settlement of cases and they are expected to operate in a similar manner to the present Scottish Tender system.

If a Defender delays in accepting a Pursuer's offer, or should the Court ultimately find the Pursuer entitled to a sum equal to or higher than the figure put forward in the Pursuer's offer, a Defender can be found liable for payment of a 50% uplift in the Pursuer's Account of Expenses attributable to the period following the offer.

It is open to a Defender, on cause shown, to argue that there should be no uplift.

Arguably, the absence of vouching to support the Pursuer's offer may be one reason for the Court to refuse an uplift.

GDPR

According to a recent YouGov survey less than half of senior decision makers are aware of the new GDPR rules while over a third surveyed believe GDPR is not an issue for the sector they work in.

GDPR stands for the **General Data Protection Regulation** and all businesses that use personal data have until 25 May 2018 to comply with the new GDPR legislation. With GDPR fines of up to 20 Million Euros or 4% of annual global turnover, whichever is greater, the risk of falling foul of this legislation is not something that businesses should put off considering.

There is no exemption for any sector or size of organisation. GDPR compliance is not optional and the GDPR changes will come into force well before Brexit. Now is the time to consider how you will comply with GDPR.

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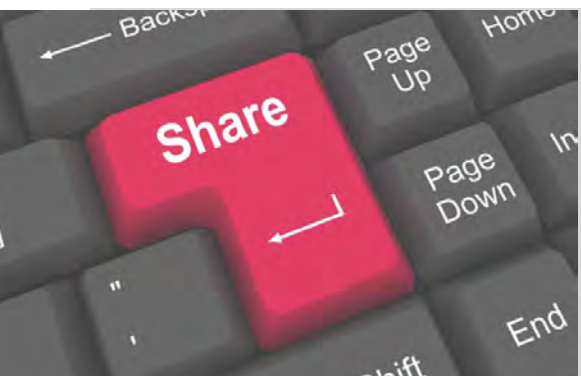

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