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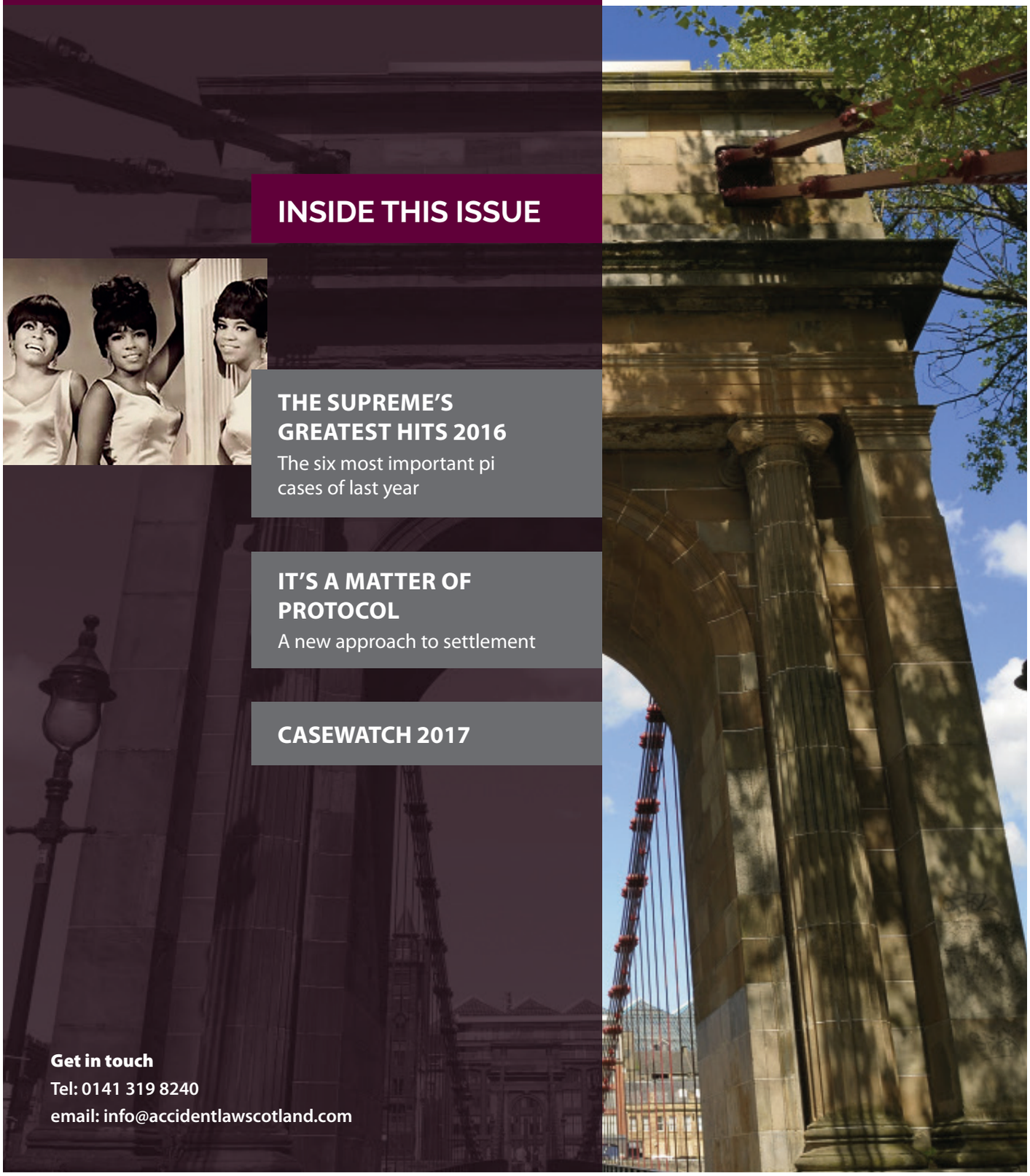
A View from the Bridge

The Newsletter from
The Conway Accident Law Practice

CONWAY
Accident Law Practice

www.accidentlawscotland.com



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The Supreme's Greatest Hits 2016

The Supreme Court emerged relatively unscathed from the eye of the storm and the Brexit judgement. Of the commentariat only Ian Duncan Smith fulminated to Victoria Derbyshire about "who is supreme, Parliament or a self appointed court?" betraying in a single sentence his colossal ignorance of both the constitutional law and the mechanics of the judicial appointments system.

But never had so much press attention been lavished on the judges who make up the court, with the online Daily Mail publishing pen pictures of each judge and pointing out any connection however tenuous, each might have with European law.

As ever willing to wound but now afraid to strike, it pointed out that ***"other judges might have decided differently"***, in much the same way that José Mourinho ***"refuses to criticise the ref"*** when a penalty call goes against Man U. And of course this comes on the back of the infamous Mail ***"Enemies of the People"*** headline, accompanied by front page individual photographs of the judges in the Court of Appeal.

As lawyers we are so inured to the idea that judges take off the man and put on the judge that it is second nature for us to know that personal sympathies and political views of the judiciary are irrelevant and play no part in any judicial decision.

And we all have to bat away the tiresome dinner party inquirers who badger us to know ***"How can you act for someone you know is guilty?"*** Answer ***"We can't act for someone we know is guilty, but are frequently obliged under a duty of zealous advocacy to put our best foot forward for persons we secretly believe might be guilty. That's the system."***

There is no controlling the internet so it is no great surprise to read that Gina Miller ***"should be hunted down and killed."*** But this newspaper and political rhetoric, from persons who really should know better, helps poison the well of public discourse. And such talk is not always harmless. In 1989 Douglas Hogg Q.C. then a Cabinet Minister (and later of expenses for duck ponds fame) said under the cloak of parliamentary privilege that some Northern Ireland solicitors were ***"unduly sympathetic to the cause of the IRA"***, presumably meaning they were trying too hard and were too successful in their legal duty to prevent their clients being convicted.

Within a few weeks of his widely reported remarks Belfast solicitor Pat Finucane was murdered by Loyalist paramilitaries at home in front of his wife and children. Of course there was no direct link. (There is never is, cf. the death of Jo Cox). What remains deeply shocking even now is that these remarks could have come, not from an ill informed member of the public, but from a Queens Counsel.

On a more prosaic note, working away at the day job, the Supremes have been exceptionally busy in the field of personal injury in 2016. A brief resume of the major cases is set out overleaf.

Welcome to the third newsletter of The Conway Accident Law Practice.

Ronnie Conway is the author of Personal Injury Practice in the Sheriff Court and The Civil Advocacy Skills Book. He is a Fellow of the Association of Personal Injury Lawyers (APIL). Like all APIL members he believes in and benefits from the APIL open source mentality. All APIL lawyers freely exchange information with others, and assist and co-operate to help injured people. If you want to refer a case under our lawyer fzee share agreement, call 0141 319 8240 or email info@accidentlawscotland.com

CASEWATCH
2017

The Six Most Important Cases of Last Year for Personal Injury Practitioners

Employer's Liability

Kennedy v. Cordia Services LLP [2016] SLT 209

The Scottish winter of 2010 was particularly severe. Tracey Kennedy worked for the defenders as a home carer. On 18th December 2010 she required to visit an elderly lady who was terminally ill and incontinent, to provide her with palliative and personal care. She slipped on a public footpath which had not been gritted or salted. She was wearing her own footwear. She broke her wrist. At first instance the court held that this was a case where a proper risk assessment would have identified the need for protective footwear and in particular an anti-slip footwear device known as a "Yaktrax". The decision was reversed by the Inner House. The pursuer succeeded on all fronts before the Supreme Court. The pursuer had to go where she was told and she was at work whilst on the pavement. The risk assessment was inadequate. Employers could not rely on a reactive system and were obliged to take positive steps to inform themselves or the risks of their undertaking and to put in place preventive measures. There is also a very useful discussion on the function of expert evidence.

The Inner House decision had been greeted with some enthusiasm by the insurance industry and its agents, who for a while cited it endlessly in court. Goodbye to all that. This is surely the most important employers' liability case in the last five years.

Employer's Liability Insurance

Campbell v. Peter Gordon Joiners Ltd and Another [2016] UK SC 38

The pursuer was injured using an electric saw in the course of his employment with a company controlled by a sole director, namely the second defender as an individual. The company had employers' liability insurance in place, but the policy excluded claims from the use of woodworking machinery powered by electricity. (Some policy for a woodworking factory!). There was an attempt to place personal liability on the director who had failed to obtain the compulsory Employers' Liability insurance. The pursuer succeeded at first instance, failed before the Inner House and then failed in the Supreme Court by a margin of three to two. There is therefore at present no civil liability on a director or company proprietor for failing to provide employers' liability insurance.

There have been almost no criminal prosecutions for failure to obtain Employer's Liability insurance in Scotland in the last 10 years. So this really is an area where rogue employers can ignore the law with complete impunity, and gain a business advantage over their competitors who have paid insurance premiums.

On 8th December last year Association of Personal Injury Lawyers representative Gordon Dalyell gave evidence before the Justice Committee on the failures of the prosecution service in this regard. Let's hope the Committee is prepared to tell the Lord Advocate that a more active prosecution policy should be followed.

Settlement Induced by Fraud

Zurich Insurance Company plc v. Hayward [2016] UK SC 48

Mr. Hayward was injured in an accident at work and claimed substantial damages. The employers' insurers, despite suspecting exaggeration, were unable to find evidence sufficient to prove their suspicions and the figure of £134,973.00 was paid out. The claimant made a miraculous recovery within a year. The insurers brought rescission proceedings and sought an order for repayment. At first instance the trial judge held that Mr. Hayward had exaggerated the effects of his injuries and that the insurers were entitled to rescind the settlement agreement. The Court of Appeal upheld the original settlement in Hayward's favour, but the Supreme Court restored the judgement at first instance. It was sufficient for the defrauded insurers to establish that the misrepresentation had been a material case of entering into the settlement. After the decision was issued there was a concern that many insurers would attempt to reopen their books on large extra judicial settlement cases , particularly where non-organic injury was involved. To date this does not seem to have happened, but don't rule it out for the appropriate case

Accidents Abroad

Moreno v. Motor Insurers' Bureau [2016] UK SC 52

The claimant, a UK resident, was seriously injured whilst on holiday in Greece. She was struck by a Greek registered car driven by an uninsured driver. She brought proceedings against the MIB in the UK. The MIB accepted that the driver was liable under the tort law of Greece. It was held on a preliminary issue that damages were to be assessed in accordance with the law of England and Wales rather than that of Greece. The MIB appealed to the Supreme Court.

The Supreme Court held that both issues of liability and also head of damages were to be determined by reference to the law of the place where the accident occurred . Good news for insurers who can pay out in Greek damages and for Greek lawyers who will have to be called upon as skilled witnesses to advise on liability and assessment of damages.

So much of motor law now depends on the EC Motor Directives. Where this leaves us post Brexit is anyone's guess.

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2017 CASEWATCH

Vicarious Liability

Mohamud v. Wm. Morrison Supermarkets plc [2016] UK SC 11 – 2nd March 2016

On 19th March 2008 Ahmed Mohamud visited Morrisons supermarket and petrol station in Birmingham. There was a small convenience store on the forecourt. Mohamud, who is of Somali descent, entered the kiosk and politely asked a Morrison's employee, Amjid Khan, if there was a printing facility? Mr. Khan replied in an abusive fashion including racist language. Khan then followed Mohamud into the forecourt where he proceeded to punch him in the head, jump on him and kick him whilst he was curled up on the forecourt.

At first instance it was held that Khan acted out of purely personal reasons. There was no close connection between the tort and the employee's duties. The Court of Appeal found likewise. The Supreme Court held otherwise. It was Khan's job to deal with customer enquiries. His response to the request was within the field of duties assigned to him. There was an unbroken sequence of events. It was a mistake to regard Khan as having metaphorically taken off his uniform when he followed the claimant into the forecourt. The appeal was successful and vicarious liability established.

Cox v. Ministry of Justice [2016] UK SC 10.

This case was issued at the same time as Mohamud. Susan Cox was the Catering Manager at H.M. Prison Swansea. She was injured at work in an accident caused by the negligence of a prisoner who was carrying out paid work under her supervision. She had day to day charge of prison catering. It was held that whilst there was no employment relationship the prisoner and Cox had a business relationship akin to employment but that the work carried out by the prison kitchen workers was essential to the functioning of the prison.

It was sufficient that the activities were carried out in furtherance of the undertaking's own interest. The defendants could not avoid liability by technical arguments about the employment status of the wrongdoer.

Although both these cases are fact sensitive, they clearly represent an expansionist view of the law. ■

It's a Matter of Protocol

The Act of Sederunt (Sheriff Court Rules) (Amendment) (Personal Injury) (Pre-Action Protocol 2016) will revolutionise the way that cases under £25,000.00 are dealt with in future.

The big ticket changes are as follows:

The Protocol is compulsory where the cause of action arises after 28th November 2016 and the value of the claim is under £25,000.00. Where a later estimate puts it over that figure, parties can come out of the Protocol. The claimant must be represented. The Protocol does not apply to cases involving clinical negligence, professional negligence or disease cases. The aims of the Protocol are to encourage:

- Fair, just and timely settlement prior to litigation.
- Early and full disclosure.
- Investigation of the circumstances surrounding the dispute.
- Narrowing of the issues to be determined through litigation where cases don't settle.

The compulsory Protocol is inserted into the Ordinary Cause Rules by a new Chapter 3(A) and a new Appendix 4. It is inserted into the Summary Cause Rules by a new Chapter 4(A) and a new Appendix 3. All parties are expected to follow the Protocol.

It invests the court with the power to punish parties who do not follow the Protocol.

In particular the sheriff may:

- Sist the action to comply with the Protocol.
- Award expenses against the defaulter.
- Modify any award of expenses.
- Make an award of interest.

Specific behavioural steps are set out in Appendices 4 and 3. Notable points are:

- Documents wherever possible should be sent by email.
- The claimant should use the standard claim form.
- The defender should acknowledge the claim form within 21 days of receipt.
- The defender has a maximum of 3 months to investigate the claim after which they must send a reply and state whether liability is denied or admitted or where negligence is alleged.
- There is a detailed list of standard disclosure.
- If liability is admitted the claimant should instruct a medical report within 5 weeks of that admission plus disclose it within 5 weeks of its receipt. If the defender intends to rely on any medical report it must be disclosed within 5 weeks of receipt. The claimant must then send a Statement of Valuation of Claim in form PI6, as soon as possible after receipt of all information. An offer of settlement may be made within 5 weeks of the date of receipt of the Statement of Valuation. The claimant must either accept the offer or issue a reasonable response within 14 days of receipt of the offer.
- There is a 14 day "stock taking" period after the defender receives the claimant's reasonable response, during which proceedings should not be raised.
- Protocol expenses in terms of a negotiated fee on the settlement table must be paid within 5 weeks of settlement with interest payable thereafter at the judicial rate.

Behavioural change is an easy thing to call for and a difficult thing to effect. The Compulsory Protocol represents a brave attempt to effect fair just and timely settlements at a much earlier stage. Watch this space. ■

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