ISSUE 05
WINTER 2017

A View from the Bridge

The Newsletter from
The Conway Accident Law Practice

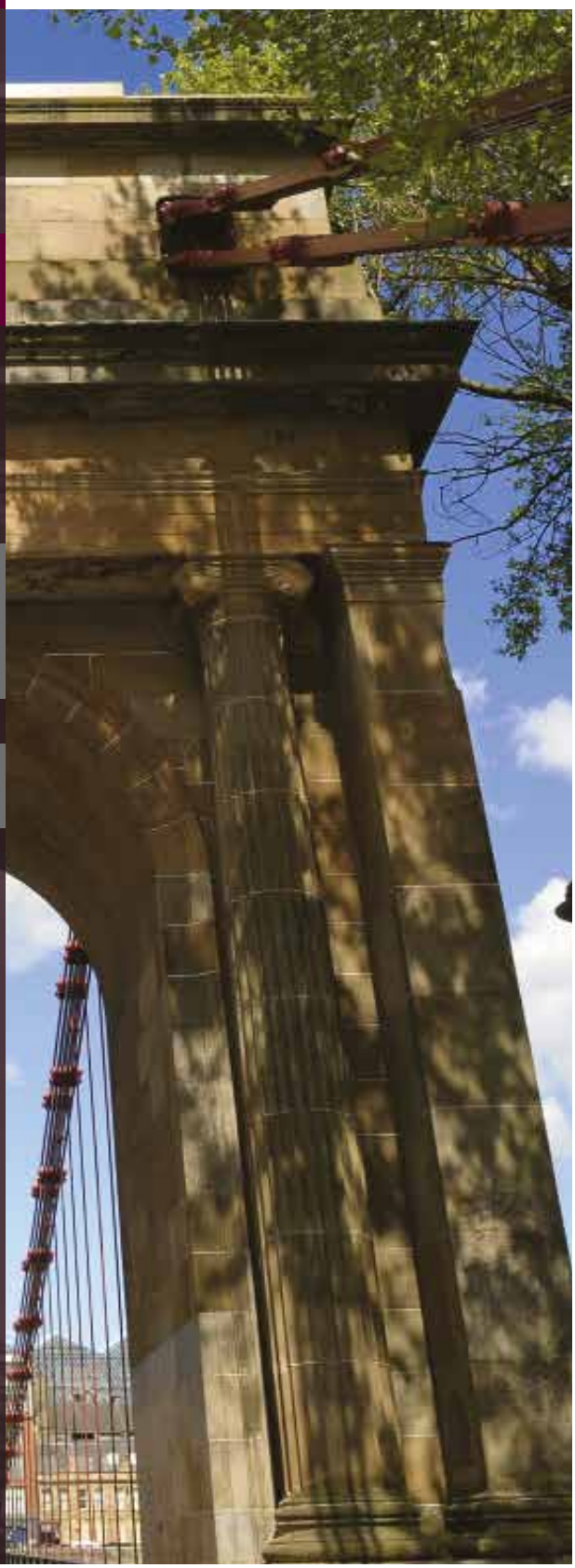
CONWAY
Accident Law Practice

www.accidentlawscotland.com

INSIDE THIS ISSUE

CAN'T PAY, SHAN'T PAY
The Dundee Parking Wars

CASEWATCH 2017



Get in touch
Tel: 0141 319 8240
email: info@accidentlawscotland.com

Can't Pay, Shan't Pay!

The Dundee Parking Wars

My daughter lives and works as a nurse in Dundee. Even if I did not know this already, I could work it out from the occasional parking fine notices I get as registered keeper of the car she drives.

"Nobody in Dundee pays these," she airily informed me, "You can ignore these in Scotland".

That is certainly what Dundonian Carly Mackie thought. She routinely parked her Mini on a spot in front of her family's garage in a major new residential development in the Waterfront, Dundee. The area comprises a number of different housing developments with a common parking area. Parking permits were available free of charge for residents, and factors were appointed to supervise the parking facilities. Ms. Mackie lived there with her parents from time to time, but crucially was not a proprietor. The parking management scheme entitled only proprietors to park free of charge. Parking fine notices were served on all non-permit vehicles. The charge was £100 reduced to £60 if paid up within 14 days. Ms. Mackie was a long-standing parking refusenik, and racked up fines totaling £24,500. Vehicle Control Services Limited, the parking management company, finally took her to court, and they won.

The case is on the Scotcourts website *Vehicle Control Services Limited v Mackie [2017] DUN 24*

Sheriff Way was keen to scotch the "online myth" that parking fines in Scotland were unenforceable. This was a "ticket case" in the line of McCutcheon v Macbrayne, a reference which conjures in my mind dim ancestral memories of looking out the window during the Contracts class. He found that clear notices had been in place. Ms. Mackie had effectively entered into a contract with the factors whereby she knew that she was parking without permission and that would attract a fine. Parking was a commodity and the Supreme Court had already visited the issue in *Parking Eye v Beavis [UKSC] 2015/0116* where the amounts involved were similar and held not to be a penalty or unreasonable.

On Friday 13th October the Daily Mail reported that Carly Mackie had been declared bankrupt.

It's a Dundee Thing…

Indigo Services Limited run the Dundee Ninewells Hospital car park. In September 2017 they took 3 nurses to court for fines relating mainly to overstaying at the car park. Nurse Julie Lindsay, a breast cancer specialist nurse, was held liable to pay £2,040 plus costs along with 2 other colleagues. After the written judgement was issued, Indigo Parks indicated that they now intended to pursue dozens of other nurses. At the time of writing the nurses' union is seeking an urgent meeting with NHS management.

The Position in England

Contrast this with *"Driver's Legal Victory Is One in The Eye for Rogue Private Firms"*, the Guardian, 15th September 2017. Nicholas Bowen, Q.C., took an overnight nap in a motorway services car park. He exceeded the 2-hour limit and a parking notice fine of £85 was imposed. Bowen defended the small claim, stating that the parking notices were in a different part of the car park, and that the firm had no right to charge consumers for use of a virtually empty car park. He was successful, but on closer examination, there is a good deal less to this than at first glance.

Welcome to the fifth 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). If you want to refer a case under our lawyer fee share agreement call **0141 319 8240** or email **info@accidentlawscotland.com**

Parking Eye forgot to turn up at the County Court so the judgement against them is in absence with none of the arguments decided.

So, what exactly is the position regarding parking fines or notices in Scotland and are there any practical steps you can take to minimise your risk?

Parking on Public Land

Typical areas are designated local authority car parks or public roads which have been adopted by the local authority. Tickets can be issued by a local authority parking attendant, a traffic warden or a police officer. These are fines. In terms of the Road Traffic Act 1991, they are payable instantly. If you don't pay sheriff officers can serve a payment charge on you without going to court to constitute the debt. If there are extenuating circumstances eg. medical or other emergency, it is always worthwhile contacting the local authority direct and they may be sympathetic to a sob story. Otherwise, the advice is to pay up. And yes Dear Reader, I received one and I have paid up.

Private Roads

Some residential areas have private roads which have not yet been adopted by the local authority. The residents are responsible for the maintenance and upkeep of the roads (and will be liable to persons who may be injured as a result of their condition). They are entitled to impose reasonable restrictions including parking, but in practical terms, you are not going to get a ticket from a private resident, although you may get a ticking off. In major developments, what the residents or factors may do is to engage a private parking company to manage the area and to enforce restrictions. That is what happened in the Carly Mackie case.

Managed Parking Areas

This is now a multi-million-pound business. Parking Eye has a turnover of over £25 million. We are talking about areas which are on private land e.g. supermarkets or NHS facilities where a parking management firm has been put in charge, and where they intend to make a profit. Automated number plate recognition as you leave the parking areas means that the company can track your car and then check with the DVLA for the registered keeper. The legal theory is that when you enter a pay Car Park you also enter into an agreement that you will pay for the privilege, under the ticketing cases jurisprudence. The management company are entitled to issue a demand for payment for breach of contract. This is an invoice. It is not a fine and the general rules of contract apply so e.g. signage must be prominent and clear.

But you are dealing with a well organised corporation and highly profitable business model, and generally, the signage will be clear.

If you park without paying or if you overstay, you will get a Parking Charge Notice inviting you to pay a charge, usually of around £60.00 rising to £120.00 if you don't pay within 28 days.

The Supreme Court in the case of *Beavis -v- Parking Eye* held that a charge of £85 for parking is not unreasonable so there is unlikely to be a legal challenge available down the route of excessive charges or contract penalties.

But you can't have a contract with a car, only with a person, and it is the driver and not the registered keeper who will be in breach.

Where you have not been the driver, the Parking Charge Notice *invites* you to identify the driver.

This is not an invitation which you are required to accept, and there is no legal requirement that you do so.

If (like me) you are in that situation there is a useful handout issued by the Aberdeen Trading Standards authority at https://www.aberdeenshire.gov.uk/media/2610/parkingchargesleafletforwebsite.pdf

The Road and the Miles to Dundee

I have received a Penalty Charge Notice. It is not stated to be an invoice but that is what it is. I was not the driver at the material time and will be declining the "invitation "to identify him or her." I await a small-claims summons with interest.

I'll let you know.

Armes v. Nottinghamshire CC [2017] UK SC

As a 7 year old the claimant was taken into care by the defendant local authority. In 1985 she was placed by them in the care of foster parents Allison. She was physically and emotionally abused by Mrs. Allison who inflicted grossly excessive violence on her. She was then placed in foster care with the Blakely family. Mr. Blakeley sexually abused her over a period of around two years. The child had been fostered in terms of a care order under the Child Care Act 1980. The statutory duty was to safeguard her and promote her welfare throughout childhood.

The Supreme Court were faced with three questions:-

(i) was the local authority under a non-delegable duty of care (analogous to an employer's obligation to provide a safe system of work) and therefore directly liable in damages for a failure to safeguard.

(ii) if not, were they vicariously liable for the deliberate abuse by both sets of foster parents? i.e. was the strict liability inherent in a vicarious liability finding to be imposed in a situation where they were not at fault?

(iii) otherwise were they simply liable in the law of negligence i.e. a failure to take reasonable care in either the selection of foster parents or the supervision of those parents.

continued on back page >

The role of foster parents was described in the judgment as that of "home-based professionals – acting as public parents in a private household". The leading judgement was delivered by Lord Reed. He found no scope for a non-delegable duty, thus affirming the status quo. But in a break with authority he did impose vicarious liability, following the recent Supreme Court case of Cox v. Ministry of Defence [2016] UK SC 60.

He rejected the floodgates argument, turning it on its head. If there were a flood of claims arising from this kind of behaviour, then the public interest demanded to know about them. In the one dissenting judgement, Lord Hughes stated that local authorities in reality committed the children to independent carers. Any liability should be fault based.

It remains to be seen whether the floodgates will open. One can only hope that the circumstances for the Armes child were wholly exceptional. It is not difficult to imagine negligence based cases for lesser acts or omissions against local authorities by persons in foster care. And of course in Scotland the Limitation (Childhood Abuse) Act 2017 means that even historic cases can now be taken.

Tomczak -v- Reid [2017 SC Edin 63]

Yet another ASPIC expenses case, but a highly important one which has already thrown a complete spanner in the works for the pre-litigation settlement regime.

The case had proceeded under the Voluntary Pre-Action Protocol. The principal sum was agreed at £4,700.00 "subject to fees and disbursements in full". Objection was taken by the insurers to the cost of a Police Report (£93.00) and to the amount charged by the well known psychiatric expert, Colin Rodger (£960.00). An impasse was reached. The pursuer raised proceedings. A tender in the figure of £4,700.00 was lodged. This was accepted and the case came before Sheriff McGowan on the question of expenses. At the hearing it was pointed out the defenders had the benefit of Mr Rodgers' report, and in fact had recommended Cognitive Behavioural Therapy following its terms. If the defenders could escape paying expenses in this case they could simply agree a principal sum and then refuse to pay any expenses in all cases.

The defenders pointed out that the principal sum tendered and accepted was what had been agreed pre-litigation, so there was nothing for the court to decide upon. The pursuer had got nothing out of the litigation. The insurers had taken this case very seriously. Submissions were made about the necessity of a Police Report, and whether Dr Rodger was part of a medical agency. They had gone to considerable lengths into investigating the Companies House status of Insight Psychiatric Services, which they claimed was and is a medical agency. This summary cause motion was argued by senior counsel on their behalf. They specifically prayed in aid that this was a floodgates case.

In the event the sheriff simply refused to engage with any of this. Expenses were "a mere accident of process". Parties could have agreed a joint remit to the auditor. The pursuer was not able to attach conditions to pre-litigation settlement where "reasonable expenses" had been offered. The sheriff concluded by saying this kind of dispute should strongly be discouraged. He found no expenses due to or by.

In fact, this kind of *de haut en bas* hands off approach will ensure that ASPIC is inundated with cases about expenses, with no real lead having been given by anyone. The defenders in the present case had all the benefits of the protocol regime, had settled their liability, and have now emerged without even paying a protocol settlement fee. It was once observed that:-

"Law is where life and logic meet".

This decision has plenty of the latter but little of the former. Of course expenses are important to the parties. The observations of Sheriff Principal Stephens in the case *Burns -v- Royal Mail Limited SF 29/12* at Paragraph 18 are rather more to the point .Expenses are not simply "accidents of process." "They have a separate crave because it goes without saying that expenses are an important part of court procedure".

It is not known if this case is being appealed. In the meantime, my own experience is a kind of reverse floodgates situation; emboldened insurers are taking all kinds of spurious points in the belief that pursuers have no legal recourse or route to adjudication.

Watch this space.

CONWAY
Accident Law Practice

www.accidentlawscotland.com

This Newsletter is published by
The Conway Accident Law Practice
71 Oxford Street
Glasgow G5 9EP
t **0141 319 8240**
e **info@accidentlawscotland.com**

Accredited Personal Injury Specialist Fellow

Ronald Conway is a Fellow of the Association of Personal Injury Lawyers