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A View from the Bridge

The Newsletter from
The Conway Accident Law Practice

CONWAY
Accident Law Practice

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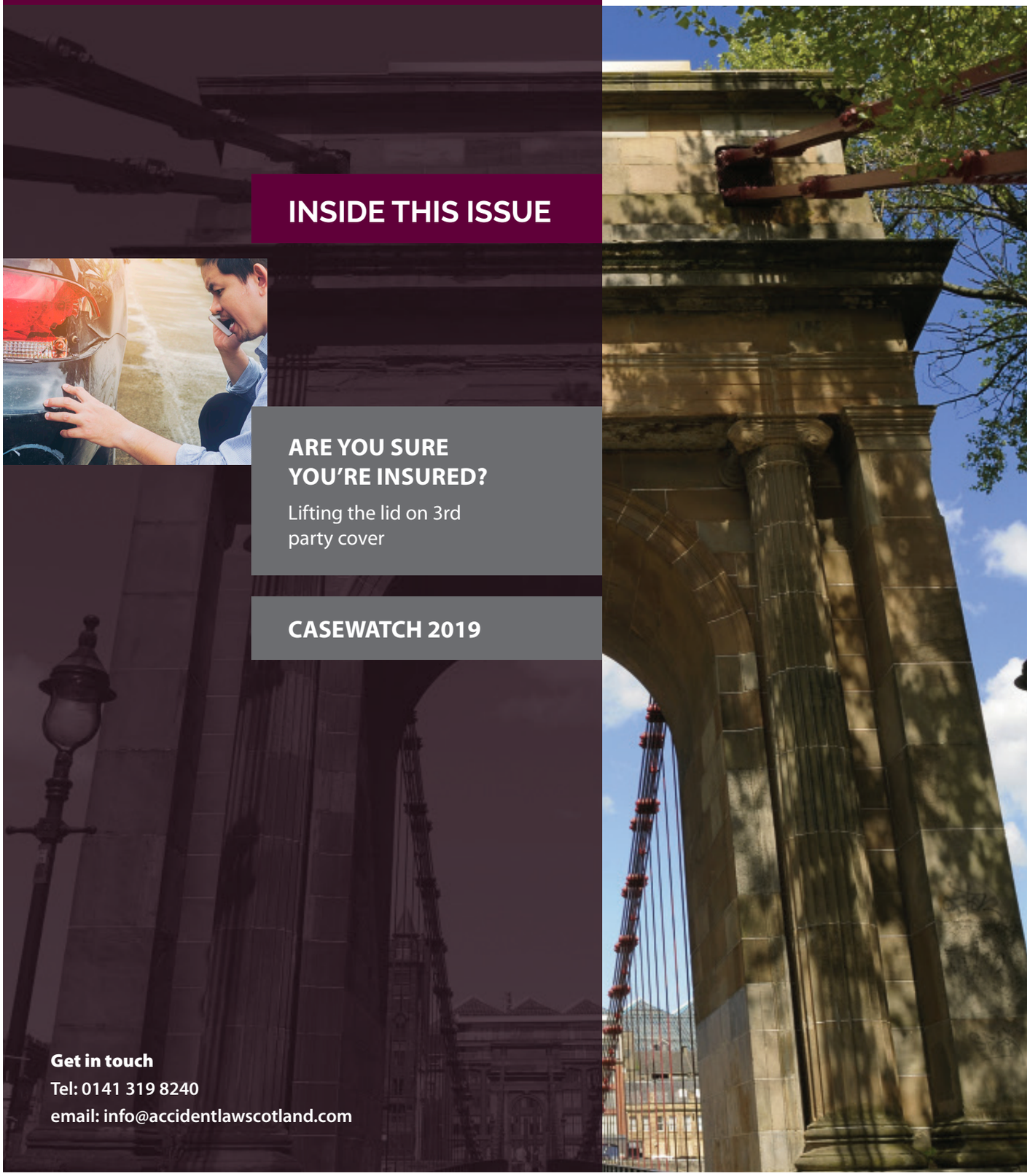

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Get in touch
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Are you sure you're insured?

There are downsides to personal injury practice. Is there anyone else out there who watches Jean Valjean in Les Misérables heroically saving the life of a man being crushed to death, by lifting a cart off his chest, who thinks, "That's a manual handling operation with a risk of injury not reduced to the lowest level reasonably practicable?" before speculating on does he have an employer, or is there a separate right of action as a rescuer?

And that's not the only drama recently which has been spoilt...

'Cold Feet' is 'Friends' for the over 50s, replete with a glamorous cast of lead actors, some highly unlikely plots, and a great set of one liners.

My current favourite is when Pete (John Thomson) silences one of his critics by exclaiming, "Who died so they made you Akela?"

But guys, what message are you sending out about uninsured driving?

The first wrong message was sent out in Episode One. Jenny (Fay Ripley) and Pete decide to bunk off on a wedding afternoon for a romantic interlude, borrowing the bride's high end sports car.

Pete, you are not insured for this. It is just possible that your own Certificate of Motor Insurance might allow you to drive other vehicles, but that cover will extend only if you are the policy holder (and not simply a named driver), and critically will be 3rd party only. So you are insured only for injury and damage to other vehicles. What it does not cover is the cost of repair or replacement when you have totalled the bride's Lamborghini.

You are on your own.

Newspaper reports show that insurers have surreptitiously reduced the extent of Driver of Other Vehicles (DOV) cover with an exclusion mission creep. Get it wrong, and you're looking at 6 penalty points, a fine of up to £5,000, higher insurance premiums, and paying back your friend at £15 a week for the rest of your life.

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

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Cold Feet got it wrong again when woebegone charmer David (Robert Bathurst) takes his ex-wife Karen's (Hermione Norris) car to drive his distraught daughter to her afternoon GCSE exam. David won't be a named driver on his ex-wife's car (this is Karen after all!) In fact, he is unlikely to be covered at all as his own car was impounded in the previous episode, and most policies have an exclusion that you must still have your own car. At best David just might have 3rd party liability cover.

These fictional characters are in good company.

On the 30 November 2016, the then Scottish Transport Minister, Humza Yousaf was driving a friend's car to St Andrew's Night Dinner in Ullapool. He was pulled over for a routine check on the A835 near Dingwall. Humza was named driver on a comprehensive policy which he believed enabled him to drive vehicles other than his own. He wasn't. As a named driver he remained insured to drive his own car at all times, but he was not the policyholder and so did not have all vehicle cover.

Although he was driving his friend's car with the owners permission, he was in fact uninsured. He put his hands up immediately and in February 2017 was fined £300, with 6 penalty points.

A chastened Humza has advised everyone to check and double-check the small print before getting behind the wheel of someone else's car. His other excellent piece of advice was that if you botch up, then fess up right away. People will forgive you. Words which disgraced MP Fiona Osanyana can consider at her leisure, having been imprisoned for 3 months for lying to the police about a speeding offence. ■

2019

CASEWATCH

Kay Gibson & Others -v- Babcock International Limited [2018] CSOH 78

Adrienne Sweeney died from mesothelioma in 2015. Her late husband had worked for the defenders between 1962 and 1971 and was exposed to asbestos. He routinely returned from work in clothing which was covered with asbestos dust. Mrs Sweeney brushed down the overalls each day, and washed them around 2 or 3 times a week. Her relatives claimed damages arising from her death.

This was the first secondary exposure asbestos case which had been heard in Scotland. The pursuer assumed a burden of proof of showing:

(i) That Edward Sweeney had been exposed to harmful quantities of asbestos dust;

(ii) That his employers knew that such exposure was harmful during his period of employment;

(iii) That Adrienne Sweeney had been exposed to asbestos dust from his clothing;

(iv) That between 1962 and 1971, the defenders should have been aware of the risk.

These were significant hurdles. In the past few years, defenders in Scotland and England had been greatly encouraged by the case of Williams -v- The University of Birmingham [2012] PIQR P4, which seemed to suggest that the court should take a rigorous and wholly unrealistic post factual attitude to the quantity of asbestos exposure, and separately, the date of knowledge of what harmful exposure consisted in.

In Gibson, the pursuer succeeded on all issues. Mr Sweeney had been negligently exposed to asbestos dust during his employment, although it was impossible to state with precision what was the exact measure of exposure. The duty was to reduce exposure to the lowest level reasonably practicable. The Sunday Times had printed an article on the dangers to spouses

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of secondary exposure in 1965, and that was taken as the date of knowledge.

In a lengthy, detailed and indeed luminous judgement, Lady Carmichael effectively consigned the Williams approach to the legal dustbin. A few weeks later, the High Court in England in case of Carey -v- Vauxhall, did much the same, citing Gibson with approval.

But for the writer, perhaps the most poignant fact contained in the judgement is the ongoing frequency of mesothelioma victims. This is a disease which is invariably fatal, with the agents in the Gibson case stating that they received around 3 sets of new mesothelioma instructions every week.

A & Others -v- Glasgow City Council [2019] CSIH 6

The George Square bin lorry tragedy took place on 21st December 2014. Six persons were killed. The pursuers were relatives of one of the deceased.

In October 2017, GCC agreed that their claims would be settled. The pursuers were invited to raise proceedings which would then be sisted for settlement. A decree would have to be taken as GCC wished to exercise a right of relief against an unnamed 3rd party.

The summons was lodged with the General Department on 11th December 2017, but by reason of procedural oversight, was not lodged timeously for calling. The instance fell, leaving the claim prima facie time barred.

At first instance, the Lord Ordinary held that this was "a serious and culpable failure" and that an alternative remedy against the Edinburgh agent was likely to succeed. On the other hand, there would be material prejudice to the pursuers. They would require to instruct other agents, and there was evidence that the delay and distress would cause a detrimental effect on their mental health. There was no defence to the action. The Lord Ordinary held that it was equitable that the case should proceed against GCC under Section 19A.

The defenders reclaimed. Their exposure to damages was estimated at between £400,000 to £2m. The Inner House refused the appeal. The delay and mental distress to the claimants were relevant considerations. Whilst there was no doubt a prima facie case of professional negligence against at least the Edinburgh agents, it was arguable that there were some imponderables. The availability of the alternative remedy was only one factor. The Lord Ordinary had not taken into consideration any irrelevant matter and was entitled to reach his conclusion.

A year or so earlier in Jacobsen -v- Chaturvedi [2017] CSIH 8, the Inner House had upheld a first instance decision to refuse a Section 19A application. They stated "the stronger a pursuer's case against the solicitor, the more likely it is that the court will refuse the application". Certainly, in the writer's experience, that is the default position, and the recent case represents a significant deviation. No doubt that the defenders will wish to restrict its ambit to the special facts. But in England, in Cain -v- Francis [2009] WLR 551, Lady Janet Smith has held that the availability of an alternative remedy is irrelevant and that the principal consideration for the court should be forensic prejudice i.e. can a fair trial take place?

In Scotland, we still await the implementation of the Law Commission's report on Limitation in Personal Injury Actions which has lain on the stocks since 2007. It is high time it became law. The current position on 19A is so inchoate as to defy analysis, leaving it impossible for agents to predict the result in any particular case. ■

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