

# SMIB:

SIMPSON AND MARWICK Information Bulletin

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## HELLO

In the last issue of SMIB we offered you a pick-n-mix of eight short articles; this time we have a slightly heavier meal of five more complex cases. We are sure, however, that you will find much to savour.

In *Woodland v Swimming Teachers Association*, the court was asked to determine the extent of a school's duty of care to its pupils. *Sutton v Syston Rugby Football Club* concerned liability following an accident during a game of rugby. A pre-match pitch inspection should have taken place and did not – but was this the cause of the accident?

In *Greenlees v Allianz Insurance plc*, liability was not in question. However, the pursuer had entered into a credit hire agreement for a new car and incurred costs as a result; the court was asked to determine whether he had failed to mitigate these and how much should be paid to him in damages.

We also have some thoughts on the recent report on streamlining health and safety legislation. Enjoy this issue of SMIB – and may I also wish you a very happy and prosperous 2012.

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# THE LENGTHS OF LIABILITY

*Is a school responsible for the actions of non-employees who work with pupils during the school day?*

**The case** WOODLAND V SWIMMING TEACHERS ASSOCIATION AND OTHERS [2011] EWHC2631

## The issue

The court was asked to determine as a preliminary point whether the liability of a school to its pupils extends to the actions of non-employees who have dealings with children of that school during the course of the school day.

## The facts

The claimant (W) was a ten-year-old girl. She attended a swimming lesson, arranged by her school, at a swimming pool run by the fifth defendant. The lesson was provided by the second defendants and was supervised by a swimming teacher and a lifeguard who were employed by them. An accident occurred during the lesson and W suffered severe hypoxic brain injury as a result.

W brought a claim against the local education authority (LEA) which ran her school, on the basis that the school was liable for the negligence of both the second defendants and the lifeguard as it had owed her "a non-delegable duty of care in the capacity of *loco parentis*." The precise nature of the alleged non-delegable duties were not set out beyond this phrase.

The LEA accepted that they owed common law duties of care to the claimant, including

the obligation to ensure that the second defendant was an appropriate and reasonably competent contractor for the purpose of providing and supervising swimming lessons. They denied that they were liable or that their duty was non-delegable.

## The decision

The court agreed with the LEA. Mr Justice Langstaff said: "I have come to the conclusion that the claim that the defendant school authority owed a non-delegable duty to the claimant in the pleaded circumstance of this case is bound to fail. This is because I do not accept that any court could reasonably be persuaded on policy grounds to uphold such a duty."

He went on: "Even if ... a school may be liable on a non-delegable basis for the actions of non-employee contractors providing educational services directly to children within its premises, this would in itself be an extension of the present common law. It would be a double extension beyond that, for those who are not teaching (but lifeguarding) and in premises under the regular control of others well away from the school itself to be found liable."

## The court took other influential factors into account. In particular:

- i) There was no special reason in policy to impose such a duty (such as the desire to avoid inequities caused, for example, by the absence of a right of action in direct or vicarious liability).
- ii) It was reasonable that a parent would entrust their child to a public swimming pool under the supervision of a reasonably and carefully chosen lifeguard. Therefore to argue that the school should be responsible for any failure of the lifeguard to exercise due care would be to extend the duty owed beyond that of the parent. ■



**Nicola Brown**

*It appears clear from this decision that liability will not fall against a school where an accident occurs off the premises if they can establish that they have taken reasonable care to ensure that independent contractors who were engaged to carry out tasks in respect of pupils were reasonably competent to carry out that task.*

*Similarly, where reasonable care has been taken, incidents involving independent contractors on school premises are unlikely to give rise to a non-delegable liability. The court refused to dismiss the concept in all situations, however, as*

*the judge stated: "I could not conclude that in all and any circumstances the proposition that a school authority owes a pupil a duty to ensure that reasonable care is taken of him or her whilst on school premises is unarguable."*

*The court also acknowledged that societal expectations move on and that "the categories of negligence are never closed," leaving the way open for potential findings of non-delegable duties in the future. Although this is a decision of the English courts, it is in line with Scottish case law and will certainly be persuasive.*



# TOO MUCH INFORMATION, NOT ENOUGH PRECISION

*A teacher successfully sued her local education authority after being attacked by an autistic pupil. The defenders then appealed, partly on the basis that the decision had been based on general duties of care which had not been claimed by the pursuer.*

*The case* MCCARTHY V HIGHLAND COUNCIL [2011] CSIH 51

## The issue

In the original case in the Sheriff Court, the pursuer had set out at least twenty-five particular duties of care said to have been owed to her by the defenders. The sheriff had grouped these into four categories and found for the pursuer in three of them. On appeal, one of the defenders' submissions was that the sheriff had based his findings of negligence on vague general duties, not pled by the pursuer, and that had those general duties appeared on record, the defenders would have challenged them.

## The facts

The pursuer was a teacher working with autistic children at a school in Inverness. The class comprised five pupils with learning and behavioural difficulties, including a thirteen-year-old autistic boy known as 'M'.

M first assaulted the pursuer on 7 June 2001, then on a further three occasions in August and September 2001. During this time the only class staff were the pursuer and one female learning support auxiliary. In late September 2001 a package of measures was introduced for M, including the employment of a male support worker. M's episodes of violence then ceased. In August 2002, the pursuer suffered a depressive episode, with secondary symptoms of phobic anxiety about her workplace. She raised a case against the defenders, which was heard in Inverness Sheriff Court.

The sheriff grouped the alleged duties into four main categories, namely:

1. Duties to assess and manage risks to the pursuer and other staff members both generally and in relation to specific pupils.
2. Duties to ensure that violent incidents were reported and measures to avoid or respond to recurrence were identified and implemented.
3. Duties, knowing that there was an increased risk of injury or harm to staff, to enable them to prevent such incidents,
4. Duties to enable the pursuer safety to deal with such incidents, including a duty to make available a male support worker prior to the harmful events.

The sheriff found that the defenders had failed to comply with all but the third category following the incident on 7 June 2001 and that as a result thereof, M had subsequently attacked the pursuer further.

The defenders appealed, and the case was heard in the Inner House of the Court of Session before the Lord President (Hamilton), Lady Paton and Lord Hardie.

## The decision

The court noted that the extensive pleaded duties made the sheriff's task more difficult and that it was understandable that he felt it necessary to attempt to rationalise those duties into four main groups. The Inner House accepted that the "re-categorised duties" were unspecific and did not define what the defenders should or should not have done to avoid negligence. They noted that it was doubtful whether the re-categorised duties would have survived challenge at a debate on relevancy and specification.

The court agreed with senior counsel for the defenders that the finding of negligence should indicate clearly in what respect(s) the defenders

had failed in their duty or duties. They noted that such clarity had not been achieved in this case, but stated: "The evidence is out. Findings in fact have been made, and are available to the appeal court. Specific duties are pled on record. This court has therefore the option of assessing afresh the pleadings and findings in fact. We shall adopt that course."

The Inner House went on to hold that there was a breach of duty because the defenders had a duty to provide the pursuer with a dedicated male support worker and they had failed to do so. In relation to causation, it was noted that the findings in fact gave rise to the inference that the provision of a dedicated male support worker following upon the attack of 7 June 2001 would, on a balance of probabilities, have protected the pursuer either wholly or to a significant extent from the distress and physical injuries suffered by her during the subsequent attack. ■



**Caroline Cassidy**

*The greatest interest in this case lies in the approach that the Inner House took to the pleadings. The court noted that that the sheriff's judgement was to be looked at as a whole, without "too detailed a forensic analysis." Although the court was critical of the "undue plethora of pleaded duties," they also noted that a finding of negligence should indicate clearly in what respect the defenders had failed in their duty.*



The more readily understandable reasoning is that the level of foreseeability required was informed by the requirement to risk-assess.

## A STICKY SITUATION

Regular readers of SMIB may recall our previous article on *Wallace v Glasgow City Council* ('Foreseeability is not bog standard', August 2010). The case has now been considered by the Inner House of the Court of Session.

*The case* WALLACE V GLASGOW CITY COUNCIL 2011 CSIH 57



### The issue

Mrs Wallace was a school teacher who was injured after standing on a toilet to reach a high window. Her initial claim against the council failed because the court found that she had not established that an employee would be "more likely than not" to attempt to open the window in this way. She then appealed to the Inner House of the Court of Session.

### The facts

On 13 June 2007, Mrs Wallace was working at a Glasgow school when she suffered an unfortunate accident in one of the school toilets. Having made use of the facilities Mrs Wallace considered it appropriate to ventilate the relatively small, cubicle-sized room by opening the window. No window pole was available to her. As she was only 5'1" tall, she stood on top of the ceramic bowl of the toilet in order to reach the window.

As she was opening the window, the toilet bowl became detached from the floor and she fell, suffering injury. No risk assessment in relation to employees using the toilet had been carried out. Mrs Wallace sought damages for her injuries from her employers. Her claim failed.

Regulation 15 of the 1992 Management of Health & Safety at Work regulations provides that: "No window ... which is capable of being opened shall be likely to be opened ... in a manner which exposes any person performing such operation to a risk to his health or safety." Lord Tyre considered that it was "likely" that the window would be opened in the manner in which it was. In particular he considered that "likely" was intended to mean "more likely than not." Therefore, he considered that the pursuer required to establish that an employee wishing to open the window was more likely than not to stand on the toilet bowl.

The Inner House held that Mrs Wallace's case, based on the lack of risk assessment and regulation 15, succeeded. However, it is not entirely clear whether the Inner House held that it was more likely than not that the window would be opened in this way, or that the level of foreseeability required under the regulation was lower than that suggested by Lord Tyre.

The more readily understandable reasoning is that the level of foreseeability required was informed by the requirement to risk-assess. However, there is also discussion in the judgement about the reasonable practicability of the pursuer seeking alternative ways to open the window.

The Inner House's comments upon regulation 5 will be of more assistance to those defending claims. Mrs Wallace argued that there was a breach of that regulation as the toilet had not been maintained in an efficient state, efficient working order or good repair. However, the Inner House disagreed. They considered that the fact that the toilet broke when it was not being used for its intended purpose was not indicative of a lack of maintenance. An "abuse" by an employee of equipment for a purpose for which it was never designed did not establish that the equipment was not maintained in an efficient state, efficient working order or in good repair. ■

### The decision

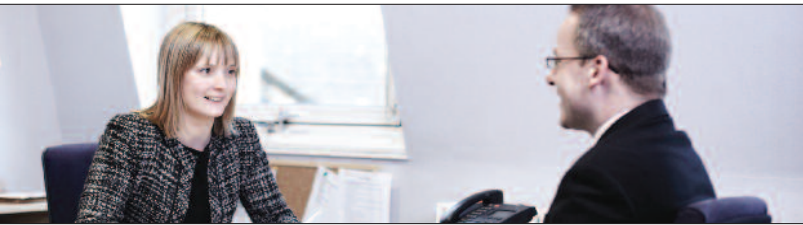
The Inner House pooh-pooed this reasoning. In their view, regulation 15 required the employers to address the question of how the window in question might be opened, closed or adjusted by risk-assessing the task. Had a proper risk assessment been carried out, the employers would have discovered a risk of injury to employees attempting to open the window in the way the pursuer did. As the only means of ventilating the toilet area was by opening the window, suggesting that the pursuer should have refrained from opening the window ignored the duty under regulation 20 of the 1992 regulations to keep such areas adequately ventilated.



**Duncan Batchelor**

*The Inner House's decision is an important reminder to employers to carry out and document risk assessments, even for the most mundane of tasks. If the defenders had been able to demonstrate that they had considered the potential risks then the outcome might have been different.*

*Failure to risk-assess may create a mess which employers have difficulty cleaning up.*



# MUST TRY HARDER?

*A rugby club should conduct pre-game pitch inspections as part of its duty of care to the players using its grounds, but how thorough must those inspections be?*

*The case* SUTTON V SYSTON RUGBY FOOTBALL CLUB [2011] EWCA CIV 1182

## The issue

A young rugby player was injured during a game when his knee hit an object below the surface of the grass. A pitch inspection had not been carried out – but even if it had, would the object have been found, and was the rugby club liable? Having lost at first instance, the rugby club appealed.

## The facts

On 2 July 2007, two youth rugby teams were playing touch rugby at Syston Rugby Club's grounds. No inspection of the pitch had been undertaken by any of the three club coaches present before the game began.

After about thirty minutes, the claimant (aged 16½) saw an opportunity for a try. As he dived, he was tagged, fell onto his right knee and landed on the broken-off stub of a plastic cricket boundary marker. This had been left behind by a cricket club which had used the rugby club's facilities a few days before.

The broken marker did not obtrude above the surface of the grass. Its edge caused a severe gash to the claimant's right knee, which was painful over many months of healing. Although the claimant is now playing rugby again, his full participation is impeded, and he is likely to have progressive knee trouble as he ages. Quantum was agreed at £54,000.

The claimant blamed the club for failing to take reasonable care for his safety in using their premises. He argued that they had failed to carry out an inspection, which should have been exacting enough to find the stub in the grass.

The club ultimately accepted that an inspection should have been carried out and that it was not. However, they argued that a quick 'walk-over' would have been enough, and that this would not have found the broken off stub within the grass. A club

coach gave evidence that, after the accident, he found the stub, "Sticking out of the soil ... right down below the level of the grass." He later added, "You would have had to go down on your hands to see it."

The question for the judge was what reasonable care demanded of the club and whether a failure to take such care actually caused the accident, or whether it would have happened in any event.

The judge decided that the club should have inspected the whole pitch at a reasonable walking pace, not a quick walk, bearing in mind that cricket markers had recently been in use and that, while it was for the cricket club to remove markers, that did not absolve the rugby club from checking that none had been left. The judge added: "While not required to investigate below every blade of grass ... a slightly more careful degree of attention needed to be paid [to] the ... ends of the pitch, where players are to be expected to dive or fall."

The rugby club were held liable for failing to inspect and find the stub. They appealed this decision.

## The decision

The Court of Appeal agreed that inspection was required, noting that Rugby Football Union guidance recommends a check, before matches, for foreign objects, "such as glass, concrete, large stones, dog waste." The Court of Appeal also agreed that a reasonable walking pace was needed, but considered that the same level of care was needed over the whole pitch; in any training or game involving tackling, players may fall at any spot.

However, a walkover at a reasonable pace was enough. Would that have identified the stub? Considering the coach's evidence of a stub set in the soil without obtruding above the grass, the Court of Appeal decided it was not proven that, on the balance of probabilities, it would have been found. The failure to inspect was not the cause of the accident; the appeal succeeded. ■



“  
Lesley  
Allan

*The practical effects for claims handling are twofold. Firstly, there is a need, wherever a duty is owed, to consider closely exactly what that duty requires of a defender, in comparison with what was actually done.*

*Secondly, the case demonstrates the need to look beyond even a failure to take reasonable care. By exercise of reasonable care, would the*

*accident have been prevented? If the outcome would have been the same in any event, then it is not the failure to take reasonable care which caused the harm, and a defence on that basis should succeed.*

*While undoubtedly a disappointing decision for the injured young man, the decision highlights the "reasonable" in "reasonable care."*



# CREDIT CRUNCH

*A driver whose car had been damaged subsequently entered into a credit hire agreement. Liability was admitted by the other party – but how should the courts quantify the cost of the loss sustained?*

**The case** GREENLEES V ALLIANZ INSURANCE PLC [2011] CSOH 173

## The issue

In November 2008, the pursuer's parked and unattended Jaguar was struck by a driver who was insured by the defenders. Liability was admitted. The issue for the court to consider was quantifying the loss sustained.

## The facts

The pursuer entered into credit hire with Accident Exchange. He was not impecunious. It was accepted that he was entitled to hire a replacement vehicle, but with spot rates only applying. The hire lasted for just over three months.

The pursuer's vehicle was assessed as uneconomical to repair. He received payment for the pre-accident value in November 2008. He disputed the sum paid as he had installed a new engine. An additional payment was made in February 2009. The credit hire vehicle was handed back. He had thought he was using a courtesy car, and wished to return it when he discovered charges were approximately £11,000 a month.

Ultimately, his own car was repaired within four days at a cost of £1,200.

Spot rate evidence was led by both parties. The pursuer's evidence was provided by a representative from APU. He confirmed that APU was a wholly owned

subsidiary of Accident Exchange.

The defenders' arguments were founded on the pursuer's failure to mitigate. In particular, the hire continued for a period of 85 days, even though the pursuer was waiting for a payment of no more than £1,000. His own car could have been repaired – and, in fact, it was. Accordingly, the pursuer had failed to mitigate his loss. Delay had been caused by Accident Exchange, who were acting as the pursuer's agents. The delay could not be said to be the fault of the defenders.

## The decision

Lord Matthews was satisfied the vehicle provided was equivalent to the pursuer's own vehicle. It was reasonable for the pursuer to enter into credit hire. On 27 November 2008, the pursuer received a cheque for £3,700, and he was told this was an interim payment. The hire continued. The pursuer thought he was being provided with a courtesy vehicle. He duly provided a receipt for the replacement engine, which Accident Exchange received some time after 14 January 2009 (most likely by around 30 January 2009).

So, what was the relevant hire period? It was reasonable for pursuers to wait until



cheques cleared before returning a hire vehicle. Lord Matthews was persuaded that Accident Exchange were acting as the pursuer's agents as per the agreement in place. Thus, the delay between 4 December 2008 and 30 January 2009 was the responsibility of the pursuer and his agents, and the defenders should not be held liable for that.

In terms of the appropriate spot rate, Lord Matthews found both rate assessors' evidence credible and reliable. He could detect no bias on the part of the APU witness. He thought it best to work out the average figure on the basis of the hire rates produced. He assessed the average daily rate at £174.14 over a period of 43 days, arriving at the sum of £7,488.02 for hire. He also allowed interest from the date when the final cheque for £1,000 was received by the pursuer on 11 February 2009. ■



**Lynne Macfarlane**

*The opinion of Lord Matthews forms part of a small but growing body of case authority dealing with the thorny issues surrounding mitigation in credit hire claims in Scotland.*

*The good news for insurers is that the majority of Scottish authorities accept the position set out in the English courts regarding impecuniosity: namely that recovery of credit hire rates is only possible where the pursuer is found to be impecunious at the time of hire. This particular case lends weight to the argument that it is the average spot hire rate, rather than the highest rate, which the courts should use to identify the suitable cost of hire.*

*Helpfully, from the point of view of insurers, Lord Matthews accepted the defenders' argument that*

*Accident Exchange were acting as agents for the pursuer during the course of the credit hire contract, and thus, the defenders did not require to establish who precisely was responsible for the delay. All that was required was for the defenders to establish agency. Once this was established, any delay caused by Accident Exchange was attributable to the pursuer himself.*

*The only concern raised by the case from an insurance point of view is that, contrary to the majority of cases in the English jurisdiction, Lord Matthews took the view that interest was applicable to the damages awarded. However, he was not specifically addressed on the issue, and if he had been, may have found differently.*



# THEY THINK IT'S ALL OVER-COMPLIANCE

*The independent review of health and safety legislation chaired by Professor Ragner Lofstedt was published on 28 November 2011, along with the government's response. They have some interesting implications, which are sure to attract considerable debate.*

Professor Lofstedt's review focuses on areas where "regulations are putting undue costs on business whilst doing little to improve health and safety outcome." It does not recommend a red tape bonfire, instead concluding: "The problem lies less with the regulations themselves and more with the way they are interpreted and applied."

A small number of regulations are identified for culling, however, either because they are duplicatory or outdated (when was the last time you referred to the Celluloid and Cinematograph Film Acts 1922 (Exemptions) Regulations 1980?). The report also states that parts of the HSE Approved Codes of Practice are too lengthy, technical and complex.

## Reasonable practicability

Professor Lofstedt notes that the "so far as is reasonably practicable" qualification of much health and safety legislation was overwhelmingly supported by those who responded to the consultation. He believes: "There are instances where regulations designed to address real risks are being extended to cover trivial ones, whilst the requirements to carry out a risk assessment has turned into a bureaucratic nightmare ... businesses are producing or paying for lengthy documents covering every conceivable risk, sometimes at the expense of controlling the significant risks in their workplace." That conclusion sits well with recent decisions, including *Wallace v Glasgow City Council* (see page 4).

He notes that the threat of being sued can be a key driver for employers going beyond what regulations require. He is particularly

critical of cases where employees have been awarded compensation despite employers doing everything reasonably practicable and foreseeable, where regulations impose strict liability. He states that this does not seem to be in line with the concept of reasonable practicability, nor is it clear that it is what is intended. He recommends reconsideration of those areas where regulations impose strict liability. Either those provisions should be qualified with reference to reasonable practicability, or civil liability should be excluded.

On the subject of simplifying the regulatory framework, he recommends that the HSE undertakes sectors specific consolidations and that the government and the EU work to ensure that health and safety legislation is risk-based and evidence-based. The HSE should be given authority to direct all health and safety inspections and enforcement activity to ensure consistency and targeting on the most risky workplaces.

## The government's response

In its response, the government highlights several key recommendations from the report and responds to those. It undertakes to take urgent action to draw up proposals to remove health and safety burdens from self employed and low risk occupations. It will ask the HSE to review its Approved Codes of Practice by June 2012.

It will aim to reduce the number of health and safety regulations by fifty per cent without reducing the protection offered to the employees and the public. It will work with the HSE and Local Government to develop a national code on a consistent

and proportionate enforcement. It will review all regulatory provisions imposing strict liability, and "look for ways to address what could be a significant driver of over compliance with health and safety law."

Insurers will be interested in particular in this last aspect. The government response states that it recognises the unfairness of employers being found liable to pay damages despite having taken all reasonable steps, and that it will look at preventing civil liability from attaching to a breach of these provisions. This is an aspect on which we can no doubt expect considerable lobbying from claimants and this undoubtedly will be a space to watch.

## Working fast

The government has set out an ambitious timetable for implementing the recommendations of the report. By June 2012 the first stage of review of the ACoPs should be complete. By the summer of 2012 they aim to have simplified health and safety guidance for small businesses. By 2013 the self-employed undertaking work which poses no threat to others will be made exempt from health and safety law and the revised ACoPs will be published. By 2014 there should be a simpler accident reporting regime, consolidation of regulations by industry sector and reduction of the total number of regulations by fifty per cent.

It is notable that the government timetable does not give a timeframe for amending legislation on strict liability.

We will keep a close eye on this issue as it develops, and will report on it in future issues of SMIB. ■

# GROWTH BY THE POWER OF THREE

*Simpson & Marwick welcomes not one, not two, but three new partners, who will greatly develop our offering to clients in family and employment law.*

Simpson & Marwick already boasts first-class family and employment law teams, serving clients across Scotland and the rest of the UK. Both teams have enjoyed a significant boost with the appointment of three new partners.

Lisa Girdwood joins our family law team. Her expertise will enhance the team's ability to advise clients in all contentious and non-contentious areas of practice and to develop the team's skills in mediation, arbitration and collaboration.

Previously head of Bonar Mackenzie's family law practice, Lisa says: "I am delighted to be joining Simpson & Marwick at this stage in my career and look forward to developing its family law services across Scotland."

We will now be able to service directly three geographic areas with three accredited family law specialists, as Lisa joins existing partners Richard Smith and Shaun George.

## Working well

Meanwhile, our expanding employment team welcomes Robert King from HBJ Gateley and Chris Phillips from Maclay Murray & Spens. Both are accredited specialists in employment law, and bring with them reputations for excellence. Like the existing team, they will work with clients across Scotland and beyond.

We now have an impressive total of six accredited specialists in employment law, and two Solicitor Advocates, with our team having unequalled experience in representing clients in Tribunals across the UK, at the Employment Appeal Tribunal, Inner House of the Court of Session, and Supreme Court.

Robert told us: "I am delighted to be joining a team with such a strong reputation for excellence in employment law and I look forward to developing our employment law services throughout Scotland."

Chris added: "Simpson and Marwick has a formidable reputation in the market and already boasts some of the best employment lawyers in the country. The opportunity to further enhance the firm's offering in this key area, particularly for business clients, is a tremendous one."

## Broad scope

All three of these are significant appointments for Simpson & Marwick. We are now ideally positioned to provide a comprehensive range of solutions and services to clients throughout Scotland and the United Kingdom in these expanding areas of practice. ■



Gainfully employed: Sandy Kemp, Sarah Jeffrey, Helen Light, David Hughes, Robert King, Alan Cowan, Susan Lockhart, Chris Phillips, Deborah Miller, Robert Phillips.

Growing family: Susie Smith, Donna McKay, Richard Smith, Sophie Jones, Lydia McLachlan, Shaun George, Lisa Girdwood.

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