ENTERPRISE HEALTH & SAFETY CHANGES - UPDATE

Section 69 came into effect as expected for accidents on and after 1st October 2013. Accepting that pursuers can no longer specifically run claims based directly on breach of the regulations the big issue will be to what extent can the regulations still be used as evidence of what is reasonable when a negligence claim is pursued? Only time will tell but there are some pointers.

Viscount Younger statement on behalf of the government in the House of Lords is very helpful[1]:

> "…*The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence.*"

In the same debate, another Conservative peer, Lord Faulks, stated:

> "*A breach of regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence.*"

They Regulations impose a statutory duty. Compliance is still required by the criminal law. As Lord Reid said in *Boyle v Kodak:*

> *"*Employers are bound to know their statutory duty"

So surely that must mean if there is a breach of statutory duty the duty holder must have fallen below the standards of behaviour established by law and accordingly be negligent[2].

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[1] Lords debate on 24 April 2013

[2] Additional support for this view can be found in *Griffiths v Vauxhall Motors Ltd* [2003] EWCA Civ 412 notwithstanding that in *Robb v. Salamis (M & I) Ltd* (Scotland) [2006] UKHL 56 Lord Hope expressed reservations about some of the comments that were made about the assumptions that the employer is to make when he is considering what is required of him by Regulation 4 of PUWER.

NEW CASES OF NOTE

MCLAUGHLIN[3] v MORRISON & ANOR[4]
OHCS (Lord Jones) 16/10/2013
[2013] CSOH 163

John Rennie was seriously injured on or about 22 May 2010, when he was standing in Royston Road, Glasgow. It was alleged that suddenly and without warning Pauline Morrison[5] drove a car at him at speed, hitting him and knocking him to the ground. On 19 July 2011, Pauline Morrison was convicted of assault to severe injury, permanent disfigurement, permanent impairment and to the danger of John Rennie's life.

Damages of £8 million were claimed on behalf of John Rennie on the basis that he sustained a serious brain injury and requires full-time care. Pauline Morrison's insurers, Esure Services Limited were sued as the second defender, relying upon the terms of regulation 3[6] of the European Communities (Rights against Insurers) Regulations 2002 on the basis that they were directly liable to compensate Rennie to the same extent as the their insured driver. The insurer accepted that Pauline Morrison was convicted as alleged by the pursuer. Nevertheless they sought to defend the action on the merits.

This was their case. The accident occurred in the vicinity of premises known as the Ranza Bar. The licensee of the premises was Pauline Morrison's uncle. Shortly prior to the accident a group of individuals had been involved in an attack on the

[3] Frances McLaughlin as guardian of John Rennie
[4] Esure Services Limited
[5] The first defender
[6] Right of action -(1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, and that cause of action arises out of an accident. -(2) Where this paragraph applies, the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.

premises. Stones and other items were thrown at the premises. The group of individuals had arrived in two cars, a Volkswagen Golf and a Landrover Discovery.

After an initial attack on the premises by the occupants of the Volkswagen, one of the occupants was shot. Then the Landrover Discovery was brought to a halt in the offside lane of the eastbound carriageway of Royston Road, close to the Ranza Bar. Mr Rennie was a known associate of the occupants of the vehicle. He alighted from the vehicle and the Volkswagen pulled up in the offside lane of the eastbound carriageway. At the time of the accident, he was standing at the nearside front window of the Volkswagen. He was engaged in conversation with the occupants of the vehicle.

Their defence stated that “Mr Rennie was at the locus of the accident to engage in criminal conduct. In particular, he was at the locus in order to involve himself in the attack on the premises." The insurer avered, among other things the defence of "*Ex turpi causa non oritur actio".* The pursuer applied for summary judgment against the insurer[7] and an interim payment of damages.

Lord Jones held that the insurer’s ex turpi causa defence was bound to fail. The attack on the licensed premises involved no attack on any person. Pauline Morrison had not been in the premises at the time of the attack but had been nearby, she had not been assaulted by Rennie. It was not alleged that she had been or even felt under threat.

The judge held that against that background she had taken it upon herself to assault Rennie with a vehicle, with severe consequences, and in the circumstances as averred by the insurers, the cause of Rennie's injuries had been the assault upon him, not any criminal activity on his part. Lord Jones concluded that it could not be said that, although the damage would not have occurred but for Pauline Morrison's illegal conduct, it had been caused by Rennie's criminal act. Rather, although the

[7] The first defender did not enter an appearance. The pursuer applied for a summary decree against the second defender, under the provisions of Rule of Court 21.2.

damage would not have happened without his alleged criminal act, it had been caused by her illegal act[8].

It was held that on the available material, the insurer was bound to fail in its defence[9], and a summary decree was granted against Esure.

MACDONALD v ABERDEENSHIRE COUNCIL
CSIH (Lady Paton; Lord Drummond Young; Lord Wheatley) 19/10/2013
[2013] ScotCS CSIH_83

A tragic road traffic accident occurred at about 5.30 pm on 8 May 2006 on the A97 Banff to Aberchirder Road at Mill of Brydock. Ruth Margaret MacDonald (then aged 27 years) was driving her Volkswagen Golf car westwards on the unclassified C2L Pole of Mintlaw to Brydock road. This was in the course of her journey from Turriff to Inverness, with her mother and aunt as passengers in the car. She approached at about 30 mph a point on the road where it formed a crossroads with the A97.

Buildings and yards on the east side of the A97 straddled the junction with the road she was travelling n. The A97 was a two way single carriageway running north to south. Both it and the road on which she was travelling were rural single carriageway roads with a speed limit of 60 mph. White lines along the middle of the A97 at the junction indicated that traffic on the A97 had right of way at the junction.

As a Transit van was proceeding along the A97 at the junction MacDonald drove her car straight through the crossroads into the path of the Transit van and collided with its offside. As a result of the accident she was injured and her mother and aunt were killed.

MacDonald was clearly the driver at fault for the accident however she sued Aberdeenshire Council. The claim was for damages for loss and injury as well as for statutory damages for the death of her mother and aunt.

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[8] *Gray v Thames Trains Ltd* [2009] UKHL 33, considered
[9] See: *Hardy v MIB* [1964] 2 Q.B. 745; *Gardner v Moore* [1984] AC 548; *Charlton v Fisher* [2001] EWCA Civ 112; *Keeley v Pashen and another* [2004] EWCA Civ 1491; and *Delaney v Pickett & Anor* [2011] EWCA Civ 1532

MacDonald said that she was not aware that she was approaching a junction where she was to give way to traffic on the other road. The road along which she was travelling dropped into a dip and there was a rising left hand bend just before the junction. There was no advance view of the junction. She expected that there would be a give way sign if she came to a junction where she had to give way.

Both roads were minor rural roads and visibility of the junction was poor. She claimed that there were insufficient signs and markings on the road to alert drivers to the presence of said junction and that they were to give way to traffic travelling on the other road. There was a Give Way sign but it was offset to the left and at an angle and not obvious to road users approaching the junction. It was not visible at all until she was less than 40 metres from the junction.

MacDonald alleged that poor maintenance of road markings and improper placement of signage indicating the presence of a road junction and right of way had been the cause of the accident. There had been road markings, double white lines and a triangle marked on the road by the defenders but they had been 'scrubbed' by traffic passing over them over a period of time. All that remained were lines at the extreme ends of the mouth of the junction. There were no lines in the centre of the road in her path. As a result, she said that the road markings did not give a clear and effective warning of the approaching junction, and the need to give way. She claimed that the Council owed a duty of care towards highway users to maintain markings and signage as the statutory road authority.

Section 1(1) of the Roads (Scotland) Act 1984, so far as relevant, provides:

> "...a local roads authority shall manage and maintain all such roads in their area as are for the time being entered in a list...prepared and kept by them under this section; and for the purpose of such management and maintenance (and without prejudice to this subsection's generality) they shall, subject to the provisions of this Act, have power to reconstruct, alter, widen, improve or renew any such road or to determine the means by

which the public right of passage over it, or over any part of it, may be exercised."

MacDonald relied upon *Bird* v *Pearce*[10]. In *Bird* the first defendant was involved in a collision when he drove his car from a minor road into a major road. The white road-markings had been obliterated during resurfacing work. No temporary warning signs were in place. Having compromised a claim by an occupant of the other car, the first defendant claimed an indemnity from the highway authority for failing to provide temporary warning signs. Wood, J. found the authority to be in breach of its duty of care and one third responsible for the accident. The Court of Appeal[11] confirmed that a highway authority's failure to provide temporary warning signs pending replacement of road markings after re-surfacing could amount to a breach of its duty of care to road users as that failure caused or increased dangers to road users.

The council relied upon *Murray* v *Nicholls*[12]. In *Murray* a car was driven out of a minor road without stopping into the path of a car approaching the junction on the major road. Injured passengers brought actions for damages against the representatives of the deceased driver and also against the roads authority. There had been white lines across the junction but they had been all but obliterated following road works some months before the accident. There had been prior accidents at that junction reported to the roads authority.

It was alleged that there had been a breach of duty on the part of the roads authority to take reasonable care that roads in their area were maintained in such a condition that persons using them could do so in safety by: (i) failing to repaint the lines as soon as was reasonably practicable after the roadworks and (ii) failing to erect and maintain road warning signs.

Lord Stott dismissed the action against the roads authority holding that, although the risk of a vehicle coming out of the minor road without stopping was foreseeable, there was no duty upon the roads authority in the absence of any special risk at that

[10] *Bird* v *Pearce* [1979] RTR 369
[11] Dismissing the appeal.
[12] *Murray* v *Nicholls 1983 SLT 194*

junction and that the averments of previous accidents at the junction were irrelevant and lacking in specification.

MacDonald argued that *Murray* was not binding on the court, and that the averments in that case were different to the present one. Her case was that after the Council had carried out their inspection and decided that repainting was required, they were under a duty to carry out the work in a non-negligent manner and they had failed to take reasonable steps to repaint the lines within an appropriate time after raising the relevant works order. She said that there was sufficient proximity between the Council and road users; the Council had assumed responsibility when they painted the road and erected signs, they exercised their statutory powers to set up the junction and inspect it monthly and their failure to act could constitute a failure to take reasonable care.

Lord Uist held that the circumstances of MacDonald's case were on all fours with the circumstances in *Murray*, and although not binding, the reasoning was persuasive, convincing and sound and ought to be followed and applied. In addition *Murray* had received strong approval in *Gorringe v Calderdale MBC*[13], in which it was said that by painting lines at the junction because of the perceived risk of collisions a roads authority had not somehow imposed on themselves retrospectively, a common law duty to paint the lines, or, prospectively, to paint them back if they were obliterated.

The judge held that *Gorringe* applied perfectly to the circumstances of MacDonald's case with the consequence that the Council were under no duty of care to MacDonald and her action was fundamentally flawed. The action was struck out[14]. There was an appeal.

The Inner House accepted that, in Scots law (if not in English law) the imposition of a common law duty of care owed to a road-user by the roads authority could exist in respect of operational matters. Lord Hamilton said in *Gibson v Orr*[15]:

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[13] *Gorringe v Calderdale MBC* [2004] UKHL 15
[14] *MacDonald v Aberdeenshire Council* [2012] ScotCS CSOH_101
[15] *Gibson v Orr* 2009 SC 420 , at page 435C

> "… The functions … of roads authorities in respect of the management and maintenance of public roads are laid down, commonly by statute, in similar 'public' terms. However it has never, so far as I am aware, been doubted in Scotland that as regards operational matters, a duty of care is owed by such authorities and their servants to road-users — a duty not directly under the statute but a duty arising out of the relationship between those authorities and road-users created by the control vested by statute in the former over the public roads in their charge …"

Here it was alleged that the authority aware by, at the latest, April 2006 that the painted lines at the junction had been worn away by traffic. It was alleged that they had issued an open works order including the repainting of the lines. So there was no question in this case of a lack of knowledge, nor any need to rely upon constructive knowledge. Drivers using the crossroads were held to be sufficiently proximate to the defenders to give rise to the imposition of a duty of care owed to them. But then it came to the question of reasonable foreseeability of risk of harm, and whether it would be fair, just and reasonable to impose a duty of care on the defenders in the particular circumstances.

The Inner House confirmed that the power given to a local authority to mark white lines on the roadway and erect warning signs did not imply a duty to do so. Taking into account that MacDonald averred that the wearing away of the paint lines was a gradual process, that she made no averments that over the period of the lines fading there had been any complaints about it or that there had been any accidents or near misses at the crossroads, and that on the averments there were no lines in the middle of the road on which she had been travelling, thus no indication that she had right of way, her averments, even if proved, would not entitle her to the remedy sought by her because it was not reasonably foreseeable that an accident was likely to occur at the junction.

They also held that it would not be fair, just and reasonable to impose a common law duty on the authority as the situation at the crossroads had not, prior to MacDonald's accident, presented as a high priority situation with obvious danger demanding prompt attention from them.

In addition they concluded that MacDonald's averments, or lack thereof, had the result that the summons failed to set out a sufficiently relevant and specific case against the authority, accordingly, the summons should have been dismissed both as irrelevant and lacking in specification. The case was struck out.

WOODLAND v ESSEX COUNTY COUNCIL
SC ((Lady Hale JSC, Lord Clarke JSC, Lord Wilson JSC, Lord Sumption JSC, Lord Toulson JSC) 23/10/2013
[2013] UKSC 66

On the 5th of July 2000 schoolgirl Annie Woodland was then 10 years old. She went with her class to the Gloucester Park swimming pool in Basildon. The class was divided into groups, according to their ability to swim. She was in a group of better swimmers, who used the deep pool. In groups of three or four abreast, at 5 to 10 second intervals, they were to dive into the pool at the deep end, swim the length to the shallow end, exit the pool, and return by the pool side to the deep end ready to swim the next length when it was their turn to do so. The swimming lesson was supervised by a swimming teacher Ms. Burlinson, who was in the pool, and by a life guard Ms Maxwell, who was at the side of the pool.

The swimming pool facilities were not those of the Education Authority. They were run by Basildon Council, the Fifth Defendant. Nor were the life guard (the Third Defendant) and swimming teacher employees of the school. They were employees of the second defendant, Beryl Stopford , who traded as Direct Swimming Services, which provided swimming lessons for school children, and which organised the arrangements under which the children had their lessons, including the availability of the pool for that use.

When Annie was in the pool, she had been swimming front crawl toward the shallow end. At some point during the lesson Annie was seen no longer swimming but was hanging vertically in the water. There was a dispute of fact as to whether others of her classmates drew the life guard's attention to this, or whether she noticed it for

herself. Annie was pulled from the pool too late to prevent her suffering severe hypoxic brain injuries as a result.

The local authority accepted that it owed a common law duty of care to Annie, which included obligations to take such care as would be exercised by a reasonably careful parent and to take reasonable steps to ensure that independent contractors who were engaged to carry out tasks in respect of pupils were reasonably competent to perform those tasks. However they denied the existence of a non-delegable duty. Their view was supported at the trial of a preliminary issue both at first instance[16] and on appeal[17].

The Supreme Court held that if the highway and hazard cases were put to one side, the following were the criteria which would give rise to the existence of a non-delegable duty of care.

First, the claimant was a patient or a child, or for some other reason was especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples were likely to be prisoners and residents in care homes.

Second, there was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the actual custody, charge or care of the defendant, and from which it was possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, not just a duty to refrain from conduct which would foreseeably damage the claimant. It was characteristic of such relationships that they involved an element of control over the claimant, which varied in intensity from one situation to another, but was clearly very substantial in the case of schoolchildren.

Third, the claimant had no control over how the defendant chose to perform the relevant obligations (whether personally or through employees or third parties).

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[16] [2011] EWHC 2631 (QB)
[17] [2012] EWCA Civ 239

Fourth, the defendant had delegated to a third party some function which was an integral part of the positive duty which he had assumed towards the claimant; and the third party was exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that went with it.

Fifth, the third party had been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

In *A (A Child) v Ministry of Defence*[18], the court had suggested that a non-delegable duty had only been found to exist where the claimant suffered an injury while in an environment over which the defendant had control. Control of the environment in which injury was caused was not an essential element in the kind of case with which the court was presently concerned; rather, the essential element was control over the claimant for the purpose of performing a function for which the defendant had assumed responsibility[19].

In this case, the local authority had assumed a duty to ensure that Annie Woodland's swimming lessons were carefully conducted and supervised, by whomever it might get to perform those functions. Annie was entrusted to the school for certain essential purposes, which included teaching and supervision. The swimming lessons were an integral part of the school's teaching function. They did not occur on school premises, but they occurred in school hours in a place where the school chose to carry out that part of its functions.

The teaching and the supervisory functions of the school, and the control of the child that went with them, were delegated by the school to Beryl Stopford and through her to Ms. Burlinson, and probably to Ms Maxwell as well, to the extent necessary to enable them to give swimming lessons. The alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform and

[18] [2004] EWCA Civ 641, [2005] Q.B. 183
[19] *A (A Child) considered*, *Myton v Wood Times*, July 12, 1980 and *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, [2010] 1 W.L.R. 2139 approved

delegated to its contractors. It had to follow that if the latter were negligent in performing those functions and Annie was injured as a result, the local authority was in breach of duty. The appeal was allowed.