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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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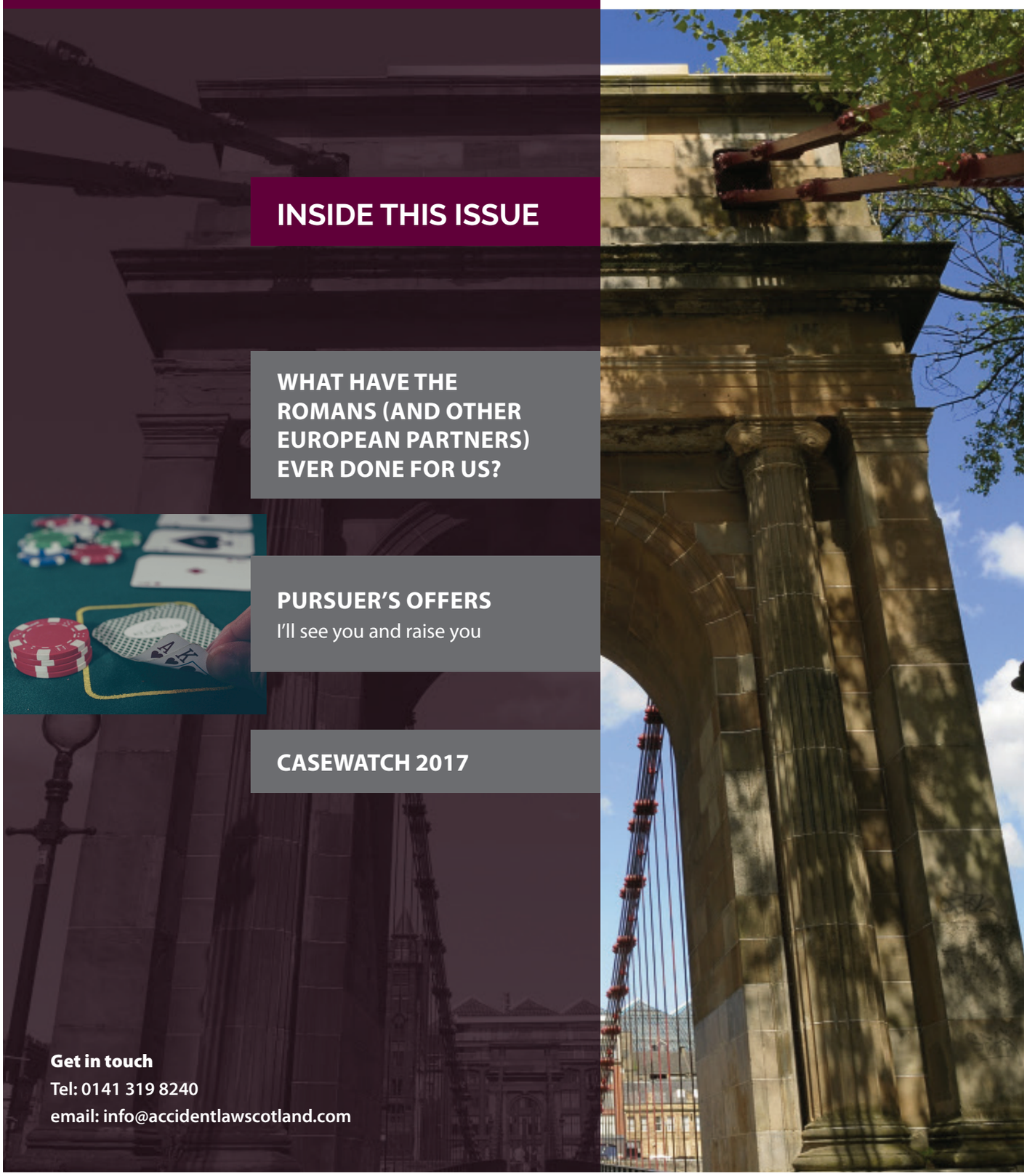

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What have the Romans (and other European partners) ever done for us?

So John Cleese famously asked in "The Life of Brian"

If you were to ask the proponents of Brexit the same question about EU legislation and the European Court of Justice, you will likely get a dusty answer. From diktats on the shape of strawberries and bananas, to the perils of the re-useable tea bag (all myths), the Brexiteers seek to portray an endless stream of mean spirited , busybody legislation.

EC Directives are binding on all member states, although it is left to the national state to transpose the Directive into its own legislation. The final arbiter on the meaning of the legislation is the European Court of Justice ("the ECJ") , so there is a certainly a diminution of UK sovereignty, at least in the sense that it has agreed to be bound by ECJ interpretation of EU legislation. Just like every other country in the EU, including the big hitters like Germany and France.

But how accurate is the Brexit picture of the EU legal landscape? The following is a whistle stop tour of some of the main ticket items of European legislation and jurisprudence.

Workers Rights and Health and Safety Directives

These Directives make provision for equal pay, equal treatment and equal opportunities for men and women; prohibition of racially based discrimination and harassment; maximum working hours; preservation of worker rights on company takeovers by way of transfer of undertaking regulations; the establishment of maternity and paternity rights and the prohibition of exploitation of agency and temporary workers. It is no exaggeration to say that these are reforms which have transformed the workplace and social landscape for all of us.

In the area of health and safety, Council Directive EC/89/391 was transposed into UK law as the Management of Health of Safety at Work Regulations 1992. These introduced the requirement for each undertaking to examine its activities, carry out a risk assessment and put in place preventive measures against risk.

As accident prevention measures go, this one has been spectacularly successful. In 1986/87 there were over 380 hundred fatal accidents to employees. By 2014/15 the annual death toll had been reduced to 92, and is part of a continuing downward trend for all kinds of workplace accident. Europe is one of the safest places in the world to work, and the UK workplace ranks amongst the safest in Europe. In the words of Bill Clinton, "This is not opinion, it's arithmetic."

The simple fact is that deregulation costs lives and limbs. In the wake of the Grenfell tragedy, let's agree never again to hear the phrase "bonfire of red tape."

The Consumer Rights Directives

The Consumer Protection Act 1987 gave effect to EC Directive 1985/374/ECC, and was the first such Directive to be transposed into UK law. For the first time ever, it imposed a strict product liability regime whereby manufacturers of products were liable to all persons injured by them. The thalidomide tragedy, (for which no civil damages have ever been recovered), was a formative influence.

Since the Directive there is no longer any requirement to prove fault, frequently an impossible task for any claimant.

All that is required to establish liability is that the level of safety of the product is below the public's legitimate expectation. The consumer is at the heart of the test. It has been applied in UK case law to products as diverse as HIV infected blood and child safety seats.

Other Consumer Directives have sought to harmonise consumer purchase rights for goods and services across the EU, recently addressing the sale of digital content, and preventing for the first time excess charges

Welcome to the fourth newsletter of The Conway Accident Law Practice

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for the use of debit and credit cards, or the imposition of premium rate hotlines.

The Motor Insurance Directives

The first EC Directive on Motor Insurance was in 1972 and the Sixth Directive has been passed recently. The UK transposed the Directives of the time into the Road Traffic Act 1988. The purpose of these Directives is to harmonise motor insurance law throughout the European Union. The overriding principle is that no innocent person involved in road traffic accident should go uncompensated and to that end each state must have a database of insurers. There must also be a safety net for all persons who are unfortunate enough to be involved with an uninsured driver. In the UK the Motor Insurers Bureau is the insurer of last resort charged with complying with the Directives. The recent UK Uninsured Drivers Agreement 2015 is the latest embodiment of the provisions.

The Package Tour and Package Holidays Directives

Council Directive EC/90/314 (Package Holidays etc.) was transposed into UK law by the Package Travel, Package Holiday and Package Tour Regulations 1992. The driver is that consumers have the right to the holiday that they paid for. So if your hotel is a mile from the beach, if your holiday is ruined by building work or where otherwise you are a victim of a misleading brochure ad, you are protected under this Directive. The critical point is that your legal remedy is not simply against the foreign hotel but against the tour operator with whom you booked. A further Package Travel Directive 2015 has newly been issued, and has to be transposed into UK law by 2018. This is in reaction to the proliferation of online travel booking where agencies claim to offer a so called "dynamic package" going online from component to component, which they consistently state is not covered by the Package Tour Regulations. For everyone else in Europe they soon will be.

In a similar vein the EU has struck at airline delay and the historic refusal of airlines to compensate passengers. The Denied Boarding Regulations provide that where there are flight delays and cancellations, you are entitled to both assistance and compensation. The rules apply to all flights from EU airports irrespective of the airline, and to all flights to EU airports operated by airlines based in the EU.

End of Roaming Charges

In what must be one of the supreme acts of chutzpah of recent years Vodafone are currently running an advert with white suited wedding guest Martin Freeman proclaiming the virtues of free roaming, as if this was an idea of Vodafone's own invention. The truth is that at any time in the past Vodafone et al could have slashed roaming charges but chose instead to milk a profit opportunity, landing hapless customers with bills of hundreds of pounds.

The reason we no longer have the worry of a large mobile phone bill on our return from holiday in an EU country, is that European Commission has forced providers to slash data roaming charges throughout the EU.

It is instructive to see who is against this kind of legislation. As early as 1986 businesses lobbied to water down the terms of the Consumer Protection Act to make it fault based and not subject to strict liability. UK road traffic insurers consistently delayed to implement the Motor Insurance Directives in their entirety. The online travel industry (Travel Republic and the like), refuse to accept that they are subject to the Package Tour Regulations as they offer a "dynamic" not a "tour" package. This a huge hole in consumer protection, which will only be filled by an EC Directive.

Michael O'Leary the notoriously abrasive CEO of Ryanair stated, ***"We don't want to hear your sob stories. What part of no refund don't you understand?"***

That was before passengers like Denise McDonagh took Ryanair and other airlines to the ECJ. Their victories are the reason that you see airport delay and cancellation guidance in every airport in Europe.

And it is difficult to detect any enthusiasm from hard Brexiteers for the health and safety legislation.

Instead we hear jibes about Elf'n'Safety, the Nanny State, and the overreaching EU bureaucracy. The present UK Government has already done its best to undermine these rights by imposing swingeing charges on persons pursuing employment tribunal rights, resulting in an 80% decrease in employment claims, and by attempting to uncouple the health and safety regulations from compensation rights in the Enterprise Act 2013.

In "The Life of Brian", having posed the question, John Cleese is floored by a litany of the benefits of imperial civilisation.

There is a common thread in EU lawmaking. This is legislation and jurisprudence which is consistently weighted in favour of workers and consumers, from a law making body with the appetite, the inclination, and the fire power to face down vested and corporate interests.

The Prime Minister has promised that her "Great Repeal Act" will not dilute consumer or worker rights. But what she cannot promise is that the UK on its own has anything like the EU muscle needed to face down multinationals and global corporations, and to guarantee effective protection for workers and consumers. ■

Pursuer's Offers

Pursuer's Offers rules came into force on 3rd April 2017 introducing formal pursuer's offers into both the Court of Session and the Sheriff Court Ordinary Cause procedure. The new provisions do not apply to Summary Cause cases and will not apply to the Simple Procedure (Special Claims) cases. Put short, they enable a pursuer to offer to settle the case in a way which is similar to a defender's Tender. Where the court issues a final decision which beats the pursuer's own Offer, the pursuer (not the agent) is entitled to an uplift on the sum payable, which is to equate to 50% of the pursuer's judicial fees from the date of the tender. This is to be calculated with regard to the relevant period of time after which the offer could reasonably have been accepted. There is quite a lot for agents to think about here. Simon Hammond of Digby Brown has done a very useful article which can be accessed via the ***Journal of the Law Society*** online. ■

Bowes and Others v. Highland Council [2017] CSOH 53

This was a proof on liability in a fatal case. The deceased had lost control of his Toyota pick up truck whilst crossing the Kyle of Tongue bridge. The vehicle mounted the kerb, crashed through the parapet and was then submerged in the waters below. Tragically David Bowes could not escape and was drowned. The allegations of fault against the Council were that the parapet was unsafe in that it was ineffective to contain the vehicle, that monitoring of its containment features had been discontinued, and that no pre-accident risk assessment had been carried out. The pursuer argued that at least temporary measures including speed restrictions and warning signs should have been put in place. The defenders argued no duty of care. The pursuers were successful. This case seems to me a relatively unusual and expansive articulation of local authority duty. It is bound to be reclaimed. Prediction ; this will end up in the Supreme Court and will be a delict exam question in under 5 years.

Peter Dewar v. Scottish Borders Council [2017] CSOH 68

The pursuer was seriously injured when he lost control over his motorbike due to a damaged area of road surface. The defenders averred that they had a reasonable system of inspection, and that although there were some areas of erosion it was not a "Category 1" defect. The pursuer had the support of the investigating police officers, one of whom described the condition of the road as horrendous. The pursuer failed. In broad terms the pursuer had shown that a hazard existed on the roadway, but not shown that the hazard constituted a "Category 1" defect which required repair. Further they had not shown that any inspection was defective. Although the pursuer had led an ordinary civil engineer, that person had no experience of roads repair and maintenance policies. It was held that an expert in roads authority inspections would have had to be led The test then would have been the Hunter v. Hanley professional negligence test.

A consistent theme in litigation in recent years has been criticism of the proliferation of experts. If you ever wondered why pursuers' agents seem sometimes to load up the list, this case tells you why.

PA v. RK and Direct Line [2017] SC FOR6

This is a sheriff court case regarding an alleged road traffic accident. The unusual aspect is that the defence was that claim was fraudulent. The alleged accident was said to have occurred when the pursuer's Honda car was struck by a car driven by the defenders from an unclassified side road. The defender did not enter the process, but the insurers did as Party Minuters. For the insurers the allegation was that the pursuer and defender were in collusion to obtain money by deception. The pursuer's case fell apart as evidence was led. He initially denied knowing the defender, but was then confronted with a photograph showing him present at his wedding. From the report the defender appears to refuse to answer a question on the grounds that it might incriminate him in a fraudulent scheme! The sheriff could not accept either pursuer or defender as credible, which meant that any factual evidence regarding the nature of the collision could not be founded upon. He refused to make any Findings in Fact relating to the accident, granted absolvitor with expenses, and for good measure referred the matter to the Procurator Fiscal to consider criminal proceedings based on fraud.

Catherine Boyle v CIS Limited and Another [2017] SC EDIN 36

This was an opposed sheriff court motion for certification of the case as suitable for the employment of Counsel, and for certification of four skilled witnesses including Dr. Carson, the well known consultant neuropsychiatrist. The motion was opposed in respect of Dr. Carson. There was an extensive and useful discussion of the rule of court regarding skilled witnesses and a resume of the current authorities. The sheriff found that the mover has to show that the person instructed was skilled, and also that it was reasonable to employ that person. In the event there was no doubt of Dr. Carson's expertise, but it was not clear what Dr. Carson had been asked to advise on. The sheriff was greatly hampered in that Dr. Carson's report had not been produced and was not before the court. The motion was refused. The sheriff observed in passing that motions for certification of skilled witnesses tend to include the name and designation of the witness with a brief description of work carried out e.g. preparation of report. The sheriff believes that is the wrong emphasis and the motion should address the reasonableness of instructing the expert witness. This is certainly not the current practice where of course many of these motions proceed on the basis of a Joint Minute. Certainly where there is any dispute, agents should now be alert to address the question of reasonableness.

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