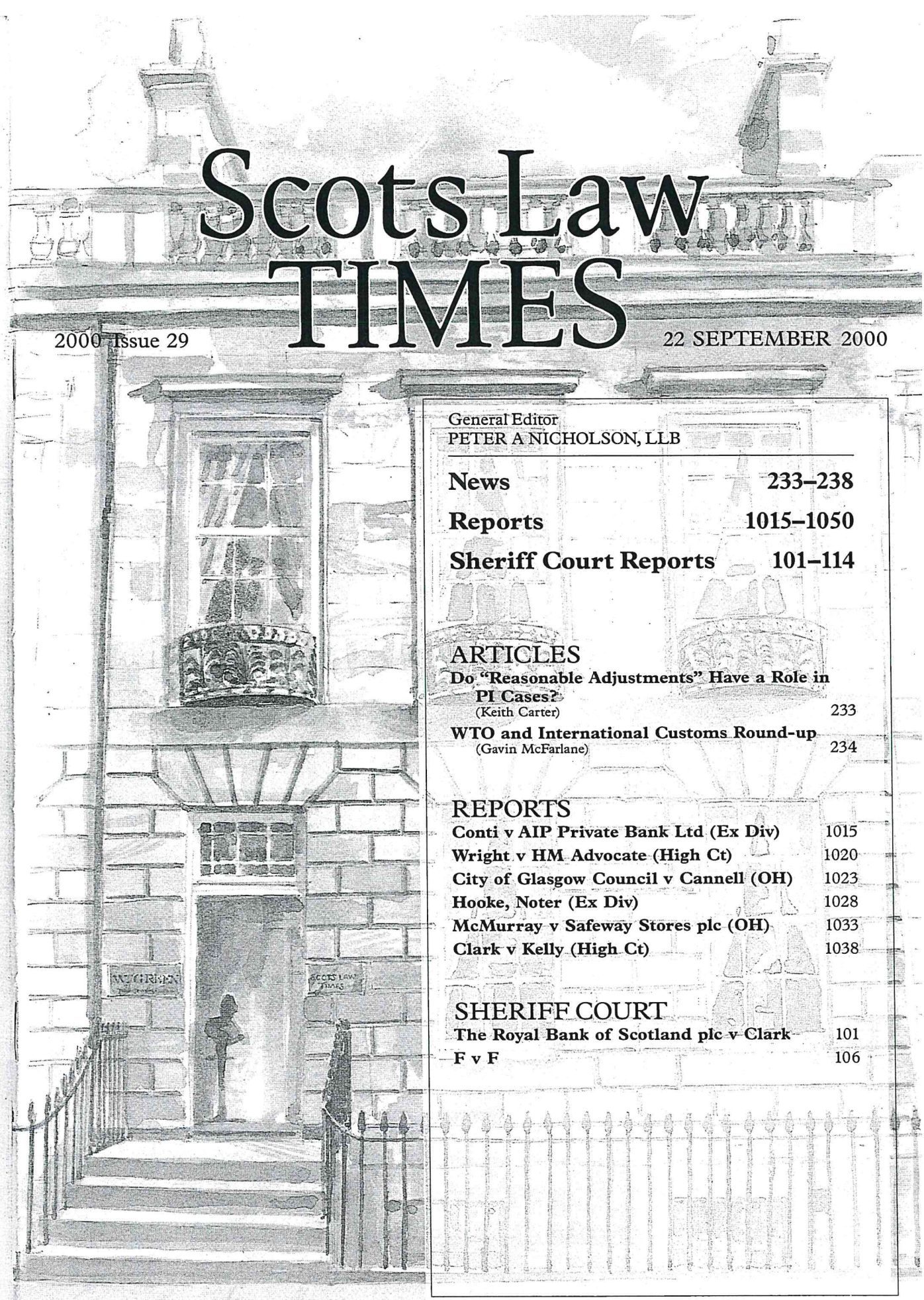

Scots Law TIMES

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Do "Reasonable Adjustments" Have a Role in PI Cases?

Keith Carter,
Keith Carter & Associates,
Employment Consultants.

Mr Carter, who has worked as an employment expert in England and Scotland since 1984, argues that insufficient attention has so far been paid in personal injury cases to the effects of the Disability Discrimination Act 1995.

The Disability Discrimination Act 1995 (DDA) introduced new rights for disabled people against discrimination in employment — both in the recruitment process and as an employee. The Act defined employment discrimination in two main ways: first, an employer discriminates against a disabled person if he or she treats the person less favourably because of their disability and without justification. Secondly, discrimination occurs if an employer fails to comply with the duty to make "reasonable adjustments" to facilitate the employment of a disabled person, for example by removing physical barriers or adjusting work practices.

Since the implementation of the DDA, thousands of cases have been registered under the employment section of the Act but the number of cases which succeed at tribunal continues to be low. Indeed, research undertaken by the Department for Education and Employment showed that only one in six (around 16 per cent) such cases are successful.

Why do so many cases fail? The immediate answer might be a lack of knowledge and awareness of this new legislation. This view is given weight by the fact that many disability discrimination cases fail because they do not meet the DDA definition of disability. This can be a difficult area to assess, as is illustrated in the case of *Vicary v British Telecommunications plc* [1999] IRLR 680, EAT, where a tribunal found that a woman who had an upper arm condition was not disabled even though she could not undertake a number of "day-to-day activities".

The decision was subsequently overturned by an employment appeal tribunal which noted that the list of examples of everyday activities in the DDA guidance was not exhaustive and, therefore, difficulties with other tasks could constitute disability. The EAT also stated that whether someone was disabled within the terms of the DDA was not a medical decision but a decision for the tribunal. It stated: "it is not for a doctor to express an opinion as to what is a normal day-to-day activity". While there needs to be medical input to identify the restrictions of the person, whether these amount to disability, it concluded, is for tribunals to decide. The tribunal in this case was also informed that it should ignore any steps that Ms Vicary could take herself to mitigate her disability. Other judgments have also stated that a person's impairment must be measured without reference to the assistance aids or appliances might bring, including drugs which control a disability or, for example, a prosthesis.

Reasonable adjustments

Another problem area of the DDA is what tribunals consider to be "reasonable adjustments" in the workplace. In the case of *Kenny v Hampshire Constabulary* [1999] IRLR 76, EAT, some guidance was given on this aspect of the legislation. Mr Kenny had cerebral palsy and needed assistance when using the toilet. When he applied for a job with Hampshire Constabulary, his application was rejected. The employment appeal tribunal in this case pointed out that the employer's duty was restricted to the organisation and structure of the job. While the DDA's code of practice refers to the provision of a support worker and assistance from colleagues, this only relates to activities associated with the job. Employers have a duty to provide suitable toilets for disabled staff, but not assistance with personal needs.

There has been further confusion about when the need to make reasonable adjustment has to be considered. In *Clark v TDG Ltd (t/a Novacold Ltd)* [1999] IRLR 318, the Court of Appeal decided that the employer had to consider adjustments during recruitment and during employment, but not after a contract was terminated. However, employers have a duty to consider adjustment during employment before proceeding to dismissal.

The question of reasonable adjustment is especially pertinent in personal injury cases when a pursuer's disability prevents them returning to their former employment. Yet, it is still rare to find a claim under the DDA being run alongside a PI case.

One reason could be the possible conflict for PI lawyers, namely whether it is preferable for a pursuer to receive a large award for loss of earnings following an accident or better to have the opportunity to return to work. Perhaps there is also concern that the DDA is not an appropri-

ate venue to seek remedies because of the complexities surrounding the interpretation of "reasonable adjustments".

Examples of good and bad practice employers

In two recent personal injury cases in Scotland, examples of good and bad practice emerged.

In the first case a young man who had suffered a serious injury in a road traffic accident was subsequently dismissed from his job because of inappropriate behaviour. His personal injury solicitor, armed with neurological and psychological evidence, brought a disability discrimination case and, with the assistance of the employer, was able to introduce a programme of support which resulted in his client being reinstated.

Reasonable adjustment here involved an extensive training and education programme which had the benefit of assisting a severely disabled man continue in some gainful employment. It is worth recalling here the ruling of Judge Braussard on the value of work in the case of *Foley v Interactive Data* (1988) 254 Cal Rep 211 which states: "a man or woman usually does not enter into employment solely for the money: a job is status, reputation, a way of defining one's self-worth, and worth in the community".

The second case involved a man who suffered injuries to his leg and arm in an accident at work and then found his employment terminated as a result of ill health. He approached his employers for alternative desk based employment but, despite the defenders' employment expert arguing that the pursuer had the ability and aptitude to retrain into administrative or computing work, they gave no consideration to "reasonable adjustments". The matter was not pursued. It is perhaps ironic that the bad practice employer effectively increased the damages awarded to his former employee.

The argument that the Disability Discrimination Act will reduce a future loss of earnings in a personal injury action was discussed in the case of *McLaughlin v Shaw*, 2000 SLT 794. Lord Cameron of Lochbroom found that the defenders were entitled to make the point before the jury that there are certain events relating to the future deterioration of a person's condition which may bring him within the statutory protection and thus to that extent avoid his being subjected to a redeployment which led to a loss of earnings.

It should be noted at this stage that there are no provisions in the DDA to protect a person's earnings in the event of redeployment. In the case of *Arboshe v East London Bus & Coach Co*, transcript EAT/877/98, the appellant was unable to continue working as bus driver because of a serious diabetic condition. His employers offered him alternative employment as a bus conductor, which paid £85 gross per week less than his driving job. It is reported that Mr Arboshe turned down the post because he did not feel well enough to carry out the duties, but his manager considered that his rejection was for financial reasons. The EAT found: "had Mr Arboshe taken the job as a bus conductor there would have been no disability discrimination (and, for that matter, no dismissal); the position is the same on the basis of sincere offers of that job not taken up for financial reasons". Therefore, even though a disabled person is offered some protection in employment by the DDA, if redeployment takes place a person's wages may be reduced and a loss of earnings can occur.

The setting up of the Disability Rights Commission in April this year may go some way to assist in providing education, information and possibly financial support to improve the employment rights of people with disabilities. In the meantime, there may need to be an equally intensive campaign to assist lawyers to become fully conversant with the Act and through case law establish a consistent interpretation of "reasonable adjustments".

The role lawyers have in shaping the Disability Discrimination Act can perhaps be best illustrated by research undertaken by the Department for Employment and Education which found that those who were legally represented at tribunal were more likely to win their cases than those not. Despite this, only 34 per cent of Disability Discrimination Act, Pt II applicants were legally represented and only 59 per cent of respondents.

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WTO and International Customs Round-up

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Professor McFarlane's latest report focuses on the escalating litigation between the European Union

2000 ISSUE 29

22 SEPTEMBER 2000

SCOTS LAW TIMES

Publishers
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21 Alva Street
Edinburgh EH2 4PS
Telephone: 0131-225 4879
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The SCOTS LAW TIMES (SLT) provides a full service of information and comment on current practice, procedure and developments in Scots Law.

Published weekly during term since 1893, it is unique in supplying comprehensive, full text reports of cases decided in all the Scottish courts, both civil and criminal, from the sheriff court to the House of Lords.

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