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# DIFFERENT AND YET THE SAME? DELICTUAL LIABILITY OF ROADS AUTHORITIES IN SCOTLAND AND IN ENGLAND

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## Introduction

The “unsurprising...almost natural”<sup>1</sup> convergence of the Scots and English law of negligence was not long ago confirmed by the House of Lords in *Mitchell v Glasgow Corporation*,<sup>2</sup> in which Lord Brown went so far as to dismiss the possibility of crossborder difference in public authority liability as “bizarre”.<sup>3</sup> Yet from time to time we are reminded that liability rules have not always followed the same path, and that uniformity, even now, cannot be taken for granted. Particular uncertainty hangs over the liability of local authorities in relation to hazards occurring within their road networks. As acknowledged by Lord Rodger in the leading English case of *Gorringe v Calderdale MBC*, “The common law of Scotland is somewhat more generous to those injured due to the failure to maintain the roads than was English common law.”<sup>4</sup> The background to this remark, and its use of the past tense, is that until relatively recently public authorities in England, unlike in Scotland, enjoyed extensive immunity from liability for failing to maintain and repair highway. Although the principle of immunity has now been abandoned in England, there has been no attempt at harmonisation of the statutory and common law framework that underpins liability in the two jurisdictions. The continuing distinctiveness of Scots and English law in this regard was recently reaffirmed by the Inner House decision in *Macdonald v Aberdeenshire Council*, with Lord Drummond Young’s warning of the “dangers in adopting the law of one jurisdiction uncritically into the other”.<sup>5</sup> This article traces the history of divergence and convergence between the two jurisdictions and asks whether in practical terms difference still matters.

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<sup>1</sup> H. L. MacQueen and D. Sellar, “Negligence”, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol 2, (2000) 517 at 546.

<sup>2</sup> 2009 S.C. (H.L.) 21 per Lord Hope at para 25.

<sup>3</sup> Para 80.

<sup>4</sup> [2004] UKHL 15; [2004] 1 W.L.R. 1057 at para 84.

<sup>5</sup> 2014 S.C. 114 at para 54. In the same case Lady Paton, at para 39, recorded her agreement with Lord Macphail’s statement in *Burnett v Grampian Fire and Rescue Service* 2007 S.L.T. 61, at para 34, that the Scots treatment of acts and omissions did not directly reflect the English distinction between misfeasance and non-feasance. But see also Lord

## English law

### *The immunity principle prior to 1961*

The English common law traditionally imposed a duty to maintain public roads and bridges upon the adjacent parishes,<sup>6</sup> but while the obligation to repair might be enforced by criminal indictment, no civil action could be pursued against the parish when it neglected to do so. In the landmark case of *Russell v Men of Devon*,<sup>7</sup> the owner of a carriage damaged due to the parlous condition of a bridge attempted to recover compensation for his loss from the “men dwelling in the county of Devon”. Liability was denied, on the ground that the local community thus designated did not constitute a corporation and had no corporate estate out of which payment could be made.<sup>8</sup> By the early nineteenth century surveyors appointed as agents of the community had taken over the obligation to inspect and repair<sup>9</sup>, but the equivalent immunity from suit continued to be recognised. Similarly, no new liability was seen as having been created when these duties were transferred to corporate local authorities, and ultimately to the highway authorities created under the Highways Acts.<sup>10</sup> The courts distinguished misfeasance from non-feasance, allowing that responsibility in damages might flow from a positive act by which the roadway was made more dangerous,<sup>11</sup> but failure to address a hazard did not give rise to liability.<sup>12</sup> Thus the general rule as stated at the close of the nineteenth century was that:<sup>13</sup>

“By the common law of England...public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were...not

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Glennie’s remark in *Morton v West Lothian Council* 2006 Rep.L.R. 7, aff’d [2008] CSIH 18, at para 64: “Why the law should be different in this respect is unclear to me.”

<sup>6</sup> For background see W. W. Mackenzie (ed.), *Pratt’s Law of Highways, Main Roads and Bridges* 14th edn (1897).

<sup>7</sup> (1788) 2 Term. Rep. 667.

<sup>8</sup> Lord Kenyon also noted, at 671, that there was no precedent for civil liability in this context and that recognition of this claim “would have been productive of an infinity of actions”.

<sup>9</sup> In terms of legislation consolidated in the Highway Act 1835 (applicable to England and Wales only).

<sup>10</sup> (Consolidated in the Highways Act 1959.) See, e.g., *Parsons v St Mathew, Bethnal Green* (1867-68) L.R. 3 C.P. 56; *Gibson v Mayor of Preston* (1869-70) L.R. 5 Q.B. 218.

<sup>11</sup> E.g., *Dawson & Co v Bingley Urban District Council* [1911] 2 K.B. 149; *McClelland v Manchester Corporation* [1912] 1 K.B. 118; *Baldwin’s Ltd v Halifax Corporation* (1916) 14 L.G.R. 787.

<sup>12</sup> *Cowley v Newmarket Local Board* [1892] A.C. 345.

<sup>13</sup> *Municipality of Pictou v Geldert* [1893] A.C. 524 per Lord Hobhouse at 527.

liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.”

Eventually over the ensuing decades, however, increasing pressure for reform,<sup>14</sup> including a recommendation by the General Council of the Bar delivered after an especially problematic decision in the Court of Appeal,<sup>15</sup> led to the enactment of the Highways (Miscellaneous Provisions) Act 1961. Section 1 abrogated “the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways”, thus permitting actions to be brought against highways authorities.

### *Modern English law*

The current law is found in the Highways Act 1980 (applicable to England and Wales only) which in section 41(1) imposes a positive duty upon highways authorities to “maintain” the highway, including within the meaning of that term the obligation to repair.<sup>16</sup> This is not taken to mean that the road must be kept in “perfect” condition;<sup>17</sup> those making a claim against roads authorities will be required to show that:<sup>18</sup>

- “(a) the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;
- (b) the dangerous condition was created by the failure to maintain or repair the highway;
- and
- (c) the injury or damage resulted from such a failure”.

Section 58 of the 1980 Act further allows a “special defence” in actions based upon failure to maintain where the authority can show that it has taken “such care as in all the circumstances was

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<sup>14</sup> See G. Sawyer, “Non-Feasance Revisited” (1955) 18 M.L.R. 541 at 556, urging that “policy as well as *elegantia juris* will be best served if the courts whittle away the immunity doctrines as fast as the concepts permit, so forcing the legislatures to provide more detailed and appropriate protections where necessary”; see also A. T. Denning, Note (1939) 55 L.Q.R. 343 arguing that the scope of immunity had been misunderstood.

<sup>15</sup> In *Burton v West Suffolk County Council* [1960] 2 Q.B. 72. For an account of this process see G. Dworkin, “Nonsense and nonfeasance – reaction and reform” (1960) 23 M.L.R. 574.

<sup>16</sup> S 329(1).

<sup>17</sup> *Goodes v East Sussex County Council* [2000] 1 W.L.R. 1356 per Lord Hoffmann at 1361.

<sup>18</sup> *Mills v Barnsley Metropolitan Borough Council* [1992] P.I.Q.R. P291 per Dillon L.J. at 293.

reasonably required to secure” the highway.<sup>19</sup> In determining whether this standard has been met, the court is in particular directed to consider:

- “(a) the character of the highway, and the traffic which was reasonably to be expected to use it;
- (b) the standard of maintenance appropriate for a highway of that character and used by such traffic;
- (c) the state of repair in which a reasonable person would have expected to find the highway;
- (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
- (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed”.

The duty entailed under section 41(1) is readily regarded as encompassing due attention to specific physical hazards such as potholes,<sup>20</sup> loose or uneven paving,<sup>21</sup> or faulty drainage.<sup>22</sup> However, it does not extend to other safety improvement functions with which highway authorities are charged by statute, such the provision of information, whether by street furniture or painted signage.<sup>23</sup>

Aside from issues of maintenance and repair the courts have been reluctant to recognise that the creation of a power to make improvements also entails a duty of care in tort to individuals who may be affected if they are not made. As held in *Stovin v Wise*, decisions on safety enhancements are a matter for the authority’s discretion, which should not be displaced by

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<sup>19</sup> E.g. *Griffiths v Liverpool Corporation* [1967] 1 Q.B. 374; *Wilkinson v York City Council* [2011] EWCA Civ 207; [2011] P.T.S.R. D39.

<sup>20</sup> E.g. *AC v Devon County Council* [2013] EWCA Civ 418; [2014] R.T.R. 1.

<sup>21</sup> E.g. *Dalton v Nottinghamshire County Council* [2011] EWCA Civ 776.

<sup>22</sup> E.g. *Mitchell v Department for Transport* [2006] 1 W.L.R. 3356; *Vernon Knights Associates v Cornwall Council* [2013] EWCA Civ 950; [2014] Env. LR 6.

<sup>23</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 W.L.R. 1057 per Lord Hoffmann at para 15.

imposition of duty of care in tort.<sup>24</sup> By the same token, duty of care to individual road users does not normally follow where a statutory provision has imposed a general public law duty upon the roads authority. In the leading case of *Gorringe v Calderdale Metropolitan Borough Council* the claimant driver was injured in a collision with another vehicle as she attempted to negotiate a bend in the road at the crest of a hill where there had been no warning signs. The House of Lords was not persuaded that the local authority's neglect of signage was a culpable failure to maintain in terms of section 41(1). Nor did it consider that a duty to the claimant flowed from the authority's responsibilities under section 39(2)(3) of the Road Traffic Act 1988, requiring roads authorities to undertake measures "designed to promote road safety". The Act made no express provision for an action for breach of statutory duty, and it was "difficult to imagine" how such a duty could be founded "simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."<sup>25</sup>

Exceptionally duty may be recognised as deriving from the existence of a statutory power in this context, but the "minimum preconditions" are that it would have been "irrational" on the part of the authority not to have exercised the power, and that there are "exceptional grounds" for holding that compensation is due to those injured thereby; or alternatively duty might exist where the public authority had created "an expectation that the power would be used and the plaintiff had suffered damage from reliance on that expectation".<sup>26</sup> However, while authorities normally warn of potential hazards, such as the road configuration encountered in *Gorringe* there can be no expectation that they will always do so. As Lord Rodger remarked in that case "Drivers must take care for themselves and drive at an appropriate speed, irrespective of whether or not there is a warning sign."<sup>27</sup>

With the disappearance of the immunity principle the distinction between non-feasance and misfeasance has ceased to be crucial in relation to maintenance and repair, but plainly

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<sup>24</sup> [1996] A.C. 923 per Lord Hoffmann at 958. In that case the plaintiff motorcyclist was injured in a collision with a car as it exited a junction where visibility was obscured by a high bank on adjoining land. Section 79 of the Highways Act 1980 empowers authorities to require landowners to remove features that obstruct the view of road users but this statutory power did not provide the basis for a common law duty to remove the source of danger.

<sup>25</sup> [2004] 1 W.L.R. 1057 per Lord Hoffmann at para 32.

<sup>26</sup> [1996] A.C. 923 per Lord Hoffmann at 953 (citing the example of a lighthouse authority which, by exercising its power to maintain lighthouses, creates an expectation that the light will warn sailors of danger, so that it owes a duty not to extinguish the light without notice). See also *Gorringe v Calderdale* [2004] 1 W.L.R. 1057 per Lord Hoffmann at para 43.

<sup>27</sup> [2004] 1 W.L.R. 1057 at para 93.

inaction has always regarded differently from action when an authority has failed to address a dangerous obstruction on the highway.<sup>28</sup> As Lord Nicholls reminded the court in *Stovin v Wise*, there must be special justification for compelling a person “to act, and to act for the benefit of another”, whether a private person or a public authority.<sup>29</sup> The outcome of *Stovin v Wise*, where the authority has failed to address a potential hazard, may thus be contrasted with cases where the authority itself has introduced the offending feature. In *Yetkin v Mahmood*,<sup>30</sup> for example, an authority which planted shrubbery at a pedestrian crossing in such a way as to obscure the view of oncoming traffic was found liable to an unsighted pedestrian who had stepped out into the path of a car. Similarly, the result of a case such as *Gorringe* would likely have been different if the authority had provided a misleading sign instead of no sign at all.<sup>31</sup> Unreasonable risks cannot be disregarded simply because they have been created by a third party.<sup>32</sup> Similarly, the law of nuisance may be invoked where an authority has unreasonably failed to address a hazard created by the forces of nature,<sup>33</sup> but it is rare for liability to be imposed on a highway authority for continuing a nuisance which it did not itself create.<sup>34</sup>

Finally, the English law of public nuisance provides a limited remedy where local authorities have been responsible for obstructions on public thoroughfares.<sup>35</sup> The key element is that a “common injury” should have been suffered “by members of the public by interference with rights enjoyed by them as such”,<sup>36</sup> but the right of action is narrowly confined to those claimants who can demonstrate that they have suffered “particular damage” over and above that suffered by the community more generally.<sup>37</sup>

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<sup>28</sup> On the narrow distinction between errors of omission and commission in this context, however, see *Valentine v Transport for London* [2010] EWCA Civ 1358; [2011] R.T.R. 24 paras 29-34.

<sup>29</sup> [1996] A.C. 923 at 930.

<sup>30</sup> [2011] Q.B. 827. See also *Kane v New Forest District Council* [2002] 1 W.L.R. 312.

<sup>31</sup> W. E. Peel and J. Goudkamp (eds.), *Winfield and Jolowicz on Tort* 19<sup>th</sup> edn (2014) para 5–071.

<sup>32</sup> E.g. *Simon v Islington Borough Council* [1943] K.B. 188; *Roe v Sheffield City Council* [2004] Q.B. 653.

<sup>33</sup> E.g. *Chapman v Barking and Dagenham London Borough Council* [1997] 2 EGLR 141 (diseased tree falling on highway).

<sup>34</sup> E.g. *Noble v Harrison* [1926] 2 K.B. 332 (instability of fallen tree would not have been apparent to ordinary inspection); *Ali v Bradford Metropolitan District Council* [2012] 1 W.L.R. 161 (accumulation of mud).

<sup>35</sup> E.g. *Penny v Wimbledon Urban District Council* [1899] 2 Q.B. 72; *Westminster City Council v Ocean Leisure Ltd* [2005] 1 P. & C.R. 25; *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 A.C. 1.

<sup>36</sup> *R v Rimmington* [2006] 1 A.C. 459 per Lord Bingham at para 6 (a case involving the criminal offence of public nuisance).

<sup>37</sup> See G. Kodilinye, “Public Nuisance and Particular Damage in the Modern Law” (1986) 6 *Legal Studies* 182.

The modern English rules are thus summed up in the words of Lord Scott in *Gorringe*:<sup>38</sup>

“...if a highway authority is in breach of its duty under section 41(1)... it can be sued if damage is thereby caused. If it is to escape liability it must bring itself within the section 58 defence. In addition, a highway authority may be liable at common law for damage attributable to dangers that it has introduced, or, in the case of dangers introduced by some third party, that it has unreasonably failed to abate. Members of the public who drive cars on the highways of this country are entitled to expect that the highways will be kept properly in repair. They are entitled to complain if damage is caused by some obstruction or condition of the road or its surroundings that constitutes a public nuisance. And they are, of course, entitled to complain if they suffer damage by the negligence of some other user of the highway. But an overriding imperative is that those who drive on public highways do so in a manner and at a speed that is safe having regard to such matters as the nature of the road, the weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety.”

### *Snow and ice*

Until recently the duty of public authorities to maintain the highway under the Highways Act 1980, section 41, was held not to extend to preventing the formation of ice or removing snow from the road, and there was, moreover, no common law duty so to do.<sup>39</sup> However, by amendment to the 1980 Act in 2003, section 41(1A) now encompasses “a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice”.<sup>40</sup>

### **Scots law**

#### *History of liability*

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<sup>38</sup> [2004] 1 W.L.R. 1057 at para 76.

<sup>39</sup> *Goodes v East Sussex County Council* [2000] 1 W.L.R. 1356, overruling *Haydon v Kent County Council* [1978] Q.B. 343 on this point. See also *Sandbar v Department of Transport, Environment and the Regions* [2005] 1 W.L.R. 1632 (accident in 1996).

<sup>40</sup> Highways Act 1980 s 41(1A), added by Railways and Transport Safety Act 2003, s 111.



“From time immemorial” the management and maintenance of streets in the Scottish royal burghs was by common law and usage vested in the Magistrates and Council of those burghs.<sup>41</sup> Outwith the burghs, statutory provision from the seventeenth century onwards placed responsibility for maintenance of public roads upon local Commissioners and Justices of the Peace who were empowered to order the “mending of all highways and passages” within their jurisdiction.<sup>42</sup> This means that from an early stage specific public officers were entrusted with this function, in contrast with England where responsibility traditionally rested with the parishes. In the eighteenth and early-nineteenth centuries, an increasing number of turnpike (toll) roads were added to the network, each enabled by Act of Parliament and managed by its own board of Trustees.<sup>43</sup> Eventually the Roads and Bridges (Scotland) Act 1878 provided a framework by which management and maintenance of the road network was placed within the remit of the relevant local authorities – at that time the County Councils and the Burgh Councils.<sup>44</sup>

Unlike in England, there was no suggestion in the early case law that immunity should be allowed to those charged with the maintenance of roads and bridges. In *Innes v Magistrates of Edinburgh*,<sup>45</sup> it was held that the local magistrates were liable to a person injured by falling into a hole in a city street. A pit had been dug and left unfenced overnight by workmen constructing what is now known as the Old College building for the University of Edinburgh. Although these works had been on the orders of the University, the court held the city magistrates liable, since it was the duty of the latter to “take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers. They are liable for the smallest neglect of this duty, and in this case, without some degree of *culpa* on their part, the pursuer could not have met with

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<sup>41</sup> D. Ferguson, *The Law of Roads, Streets and Rights of Way, Bridges and Ferries in Scotland* (1904) 181.

<sup>42</sup> APS 1617, c. 8; APS 1661, c. 38. Subsequent legislation allowed for the commandeering of a labour contribution from the local population for road construction and maintenance (APS 1669, c. 16), a system which was not finally abolished until 1883 (Roads and Bridges (Scotland) Act 1878, s 33). For an outline of early history see *Report of the Commissioners for Inquiring into Matters relating to Public Roads in Scotland* (1859) xi-xvii; H. Barclay, *Law of Highways in Scotland* 4<sup>th</sup> edn. (1863).

<sup>43</sup> See e.g. Act 1713, c. 12, An Act for upholding and repairing the Bridges and Highways in the county of Edinburgh. This body of legislation was consolidated in the General Turnpike Act 1831, reproduced with commentary in H. Barclay, *Law of Highways in Scotland* 4<sup>th</sup> edn. (1863) 9-76.

<sup>44</sup> See s 11. For commentary on the 1878 Act see J. Eaton Dykes, *Manual of the Roads and Bridges (Scotland) Act, 1878* (1890).

<sup>45</sup> (1789) Mor. 13189.

the misfortune.”<sup>46</sup> The decision in *Innes* was delivered less than three months after that of the English court in *Russell v Men of Devon*, but an important point of difference in the Scottish case was that, unlike the Men of Devon, the defenders as the Magistrates of Edinburgh could be regarded as representing a corporate body with funds out of which the claim could be met. Thus the principle of immunity developed in the English case law did not initially take hold in Scotland, and *Innes* was followed by a number of further cases in which no suggestion was made that those parties charged with maintenance of the roads, in the burghs or elsewhere, were to be exempted from liability for errors of commission or omission.<sup>47</sup>

“Law from over the border”: *Duncan v Findlater*

For a brief period in the mid-nineteenth century, law was imported “from over the border”<sup>48</sup> following the decision of the House of Lords in the Scots case of *Duncan v Findlater* in 1839. In that case the pursuer claimed damages in respect of injuries suffered in an accident on a turnpike road in which he had been hurt and his son killed. Workmen employed by the road trustees to construct a drain had left a pile of stones unattended on the roadway overnight, and the pursuer’s carriage had collided with it. The Lord Ordinary, upheld unanimously by the Inner House, allowed his claim, holding that there was ample authority to support the imposition of liability upon the trustees “with full relief to them against the trust-funds levied for the roads.”<sup>49</sup> A contrary rule in English law was noted but seen as attributable to the different institutional framework south of the border.<sup>50</sup> The House of Lords, however, dismissed the “supposed...conflict” between English and Scots law on this point,<sup>51</sup> and reasoned that it was not the intention of the turnpike roads legislation<sup>52</sup> that the funds under the road trustees’

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<sup>46</sup> Reference was made also to D.43.8.2.24 (care of urban roads lies with the magistrates) and D.9.2.29.7 (municipal magistrates may be liable under the *lex Aquilia* if they do any damage unlawfully).

<sup>47</sup> E.g., *Mackay v Waddell* (1820) 2 Mur 201; *Maclachlan v Road Trustees* (1827) 4 Mur 216; *Millar v Road Trustees* (1828) 4 Mur 563; *Aitken v Douglas* (1836) 14 S 204; *Dauney v Maxwell* (1836) 14 S 1037.

<sup>48</sup> The House of Lords decision in this case was subjected to detailed criticism in A. Dewar Gibb, *Law from Over the Border* (1950) 109-112.

<sup>49</sup> (1838) 16 S. 1150 per Lord Corehouse at 1154.

<sup>50</sup> (1838) 16 S. 1150 per Lord President Hope at 1154: “attempts were made in England to render the trustees personally liable, and...these were very properly resisted and defeated. But there is no attempt here to make the trustees personally liable, but only to subject the trust-funds. I think it clear, that, according to the law of Scotland, the trust-funds are liable, and that the trustees, *qua* trustees, are liable.”

<sup>51</sup> (1839) Macl. & R. 911 per Lord Cottenham at 928 (distinguishing *Innes* and subsequent case law).

<sup>52</sup> General Turnpike Act 1831, ss 10-11.

management should be used to compensate those injured by the improper acts of trustees' employees.<sup>53</sup> The decision of the Court of Session was therefore set aside, and from then on the Scots courts followed *Duncan v Findlater* to deny liability on the part of roads trustees,<sup>54</sup> although they did not consider themselves bound by its reasoning outwith the context of turnpike roads. It remained competent to claim damages from magistrates in the burghs for failure to maintain roads within their control, and the authority of *Innes v Magistrates of Edinburgh* was upheld to that extent.<sup>55</sup>

Less than thirty later, however, English law took a different turn in regard to the liability of trustees. In *Mersey Docks v Gibbs*<sup>56</sup> the House of Lords ruled that the funds of a docks trust incorporated by statute might be applied to indemnifying the owners of a ship and cargo damaged due to the negligence of the trust's employees. Reference was made to *Duncan v Findlater* as based upon a "misapprehension" in precluding action against trustees for the negligence of the trust's employees.<sup>57</sup> Thereafter the Scots courts seized upon the authority of *Mersey Docks v Gibbs* once again to recognise liability on the part of statutory roads trustees and commissioners.<sup>58</sup>

The brief career of the immunity principle in Scotland was thus brought to an end, and no limitation of liability was read into the changes effected by the Roads and Bridges (Scotland) Act 1878,<sup>59</sup> just as in England no new liability had been entailed in the transfer of responsibilities

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<sup>53</sup> (1839) Macl. & R. 911 per Lord Cottenham at 936.

<sup>54</sup> As Lord Gillies observed in *Ainslie v Stewart* (1839) 12 *Scottish Jurist* 178 at 179, "We can do nothing else, since the reversal in Findlater's case; for it appears that what is the law of England is now the law of Scotland."

<sup>55</sup> *Dargie v Magistrates of Forfar* (1855) 17 D. 730; *Kerr v Magistrates of Stirling* (1858) 21 D. 169

<sup>56</sup> (1866) L.R. 1 H.L. 93. The plaintiffs had been "entitled to expect" that reasonable care would be taken that their property would not be exposed to danger (per Lord Blackburn at 107).

<sup>57</sup> (1866) L.R. 1 H.L. 93 per Lord Westbury at 107. For commentary on *Duncan v Findlater* and *Mersey Docks v Gibbs* and their impact upon the practice of Scots courts see *Virtue v Commissioners of Police of Alloa* (1873) 1 R. 285 per Lord President Inglis at 292-297. For a robust defence of *Duncan v Findlater* see J. H. Tait, "Is *Duncan v. Findlater* not Law?" (1898) 10 *Jur. Rev.* 200.

<sup>58</sup> See *Virtue v Commissioners of Police of Alloa* (1873) 1 R. 285 (court of seven judges). Meanwhile William Guthrie, in editing the 6<sup>th</sup> edition of Bell's *Principles* in 1872, added the following text to § 2031 (retained in subsequent editions): "statutory trustees and local authorities, unless the statutes under which they act provide otherwise, are liable to make good in their corporate capacity and out of their corporate funds the damage caused by their own or their servants' fault, in the same way as individuals. The magistrates of a burgh, being charged with the duty of keeping the streets in good order, are liable in damages to persons injured by their being in an unsafe condition."

<sup>59</sup> See, e.g., *Greer v County Road Trustees of the County of Stirling* (1882) 9 R 1069; *M'Fee v Police Commissioners of Broughty-Ferry* (1890) 17 R 764; *Nelson v County Council of the Lower Ward of Lanarkshire* (1891) 19 R. 311.

to local roads authorities. *Duncan v Findlater* had therefore caused only a “temporary eclipse” in the general principle that:<sup>60</sup>

“parliamentary trustees and Local Authorities constituted by Act of Parliament, although performing their duties without remuneration and without any view to profit, are responsible for negligence in the same manner as railway companies or other corporations who carry on public undertakings for profit.”

By the end of the nineteenth century, therefore, the Scots and English law were manifestly not the same.<sup>61</sup> In England highway authorities were immune from suit in relation to failure to repair, while their Scots counterparts enjoyed no such protection in performance of their common law or statutory responsibilities. Moreover, the important distinction between misfeasance and nonfeasance, pivotal to the operation of the immunity principle in England, had no special significance in Scotland beyond the general principle of treating errors of commission more severely than those of omission. A further dissimilarity was that in England the existence of a statutory complaints procedure appeared to exclude the possibility of civil liability for non-fulfilment of duties under the same statute,<sup>62</sup> whereas the Scots courts enforced no such exclusionary rule where the two remedies were “manifestly... of a different kind”.<sup>63</sup> These points of difference were to continue up until the 1961 reform in England. The English textbooks would deal in brief with tort liability of roads authorities, since for the most part they were protected by immunity,<sup>64</sup> while in contrast the Scots texts instanced diverse categories of actionable failure to act.<sup>65</sup>

*The modern law: crossborder difference?*

### Maintenance and repair

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<sup>60</sup> *Strachan v County Council of Aberdeenshire* (1894) 21 R. 915 per Lord McLaren at 920.

<sup>61</sup> Contrast this statement with the dictum cited at text to fn 13. For a contemporary comparison see A. M. MacRobert, “The liability of public bodies for non-feasance” (1902) 14 Jur. Rev. 158.

<sup>62</sup> See *Robinson v Mayor and Corporation of the Borough of Workington* [1897] 1 Q.B. 619.

<sup>63</sup> *Strachan v County Council of Aberdeenshire* (1894) 21 R 915 per Lord President Robertson at 919

<sup>64</sup> E.g., R.F.V. Heuston (ed.), *Salmond on the Law of Torts* 13th edn (1961) § 69 (although it should be noted that the immunity principle, and its distinction between non-feasance from misfeasance, was directly relevant only to the repairing obligations of highway authorities).

<sup>65</sup> E.g., A.T. Glegg, *The Law of Reparation in Scotland* 4th edn by J.L. Duncan (1955) 301-304.

The role of the roads authorities in respect of the management and maintenance of public roads is now detailed in the Roads (Scotland) Act 1984. Section 1(1) states that local authorities “shall manage and maintain” all public roads within their area, with the exception of trunk roads, for which responsibility falls upon the Scottish Ministers.<sup>66</sup> The Scottish provisions, like the English, define maintenance as including “repair”.<sup>67</sup> The 1984 Act also empowers authorities to implement a variety of safety enhancements including footways, pedestrian bridges and subways, traffic “islands”, fencing, flood and snow defences, lighting and traffic calming, etc.<sup>68</sup> But while the duty of care owed by roads authorities to road users arises out of the functions now specified by statute, that duty was established at common law “well before the modern statutory system of roads legislation came into being” and unlike in England does not itself require to be “spelled out of any statutory power”.<sup>69</sup> That said, the list of hazards triggering the Scots common law duty to maintain and repair, such as uneven or insecure paving stones,<sup>70</sup> or craters or sinkholes on the carriageway,<sup>71</sup> bears a strong resemblance to list of those which have been held to give rise to duty under section 41(1) of the English Highways Act 1980.<sup>72</sup>

There is no Scots equivalent to the English “special defence” set out in section 58 of the 1980 Act in regard to failure to maintain and repair. The historical explanation is obvious. The English defence was introduced in order to counterbalance the abolition of immunity for non-repair in 1961, but since the Scottish roads authorities had not enjoyed such immunity their common law duties to road users had already been defined and delimited by the case law. But at the same time, breach of duty is in practice relatively difficult to establish in Scotland if a hazard has arisen due to a failure to maintain. Even if there was a foreseeable risk of injury, the pursuer must show that it was reasonable and practicable for the authority to have been alerted to the

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<sup>66</sup> S 2, and managed by Transport Scotland (<http://www.transportscotland.gov.uk/road/prioritising-and-maintaining-scotlands-trunk-road-network>).

<sup>67</sup> S 151(1).

<sup>68</sup> Ss 25-40.

<sup>69</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 per Lord Drummond Young at para 78; see also *Gibson v Orr* 1999 S.C. 420 per Lord Hamilton at 435 explaining that this is “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”.

<sup>70</sup> *Laing v Paull & Williamsons* 1912 S.C. 196; *Rush v Glasgow Corporation* 1947 S.C. 580.

<sup>71</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 per Lady Paton at para 36.

<sup>72</sup> See fnn 20, 21, 22 above.

danger and to have taken action before the accident occurred.<sup>73</sup> In respect of potholes and irregularities in the road surface, for example, this would require the pursuer to prove that an “inspection in accordance with a practice common to roads authorities would have revealed the defect or that some special and exceptional circumstances, such as numerous previous complaints about the defect, made it reasonable and practicable to inspect the *locus* before the accident occurred”.<sup>74</sup> The pursuer is expected to specify such matters as the intervals at which inspection ought reasonably to have taken place,<sup>75</sup> although the failure by a roads authority properly to implement its own repairs and maintenance policy is likely to be considered significant in this regard.<sup>76</sup> In sum, the considerations expressly brought to the English courts’ attention by section 58 overlap very significantly with the factors relevant to determining the common-law standard of care for Scots authorities. Indeed a non-statutory code of practice used across the UK, *Well-maintained Highways: Code of Practice for Highway Maintenance Management*,<sup>77</sup> endorsed by the Scottish Government, has been recognised as a suitable benchmark in English and Scots cases.<sup>78</sup> In both jurisdictions, therefore, the authority may escape liability where it has exercised reasonable care in maintenance and repair, although there remains the important practical difference that in England the onus is upon the authority to prove that it has done so, whereas in Scotland it is for the injured party to prove that it has not.<sup>79</sup>

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<sup>73</sup> *Gibson v Strathclyde Regional Council* 1993 S.L.T. 1243.

<sup>74</sup> *Hutchison v North Lanarkshire Council* [2007] CSOH 23 per Lord Brodie at para 16, agreeing with the defenders’ submissions; see also *Nugent v Glasgow City Council* [2009] CSOH 88; 2009 G.W.D. 24-392.

<sup>75</sup> *Letford v Glasgow City Council* 2002 Rep.L.R. 107 per Sheriff Principal Bowen at para 3.

<sup>76</sup> In *McGovern v Glasgow City Council* [2009] CSOH 148; 2010 Rep.L.R. 2 the defenders failed in their duty where their own practice had been to fix potholes deeper than 40mm and an inspection of the locus shortly before the accident did not identify the 70 mm pothole into which the pursuer subsequently fell. See also *Thorpe v Aberdeen City Council* 2007 Rep.L.R. 105.

<sup>77</sup> Compiled by the Roads Liaison Group and endorsed by the Department of Transport, Scottish Government and others. The 2005 edition, revised in 2013 is available at <http://www.ukroadsliaisongroup.org/en/utilities/document-summary.cfm?docid=C7214A5B-66E1-4994-AA7FBAC360DC5CC7>.

<sup>78</sup> See e.g. *Ryder v Highland Council* 2013 S.L.T. 847; *Wilkinson v York City Council* [2011] EWCA Civ 207; [2011] P.T.S.R. D39. Evidence of compliance with the *Code* suggests that the authority has met the appropriate standard, but it does not do so conclusively, and, by the same token, the *Code*’s recommendations cannot be regarded as mandatory: see *AC v Devon County Council* [2013] EWCA Civ 418; [2014] R.T.R. 1. See also discussion in *Nugent v Glasgow City Council* [2009] CSOH 88; 2009 G.W.D. 24-392.

<sup>79</sup> See *Goodes v East Sussex County Council* [2000] 1 W.L.R. 1356 per Lord Clyde at 1368, explaining with regard to section 58 that “Such a reversal of the onus...is justifiable by the consideration that the plaintiff is not likely to know or be able readily to ascertain in what respects the authority has failed in its duty.”

## Dangerous obstructions

Aside from entailing maintenance and repair, the Scots common-law duty requires care to be taken “to see that there shall be no dangerous obstruction” on roads or pathways under the authority’s control,<sup>80</sup> regardless of whether that source of danger was introduced by the roads authority itself or another party,<sup>81</sup> and whether it is attributable to fault of design or construction or to decay.<sup>82</sup> Duty is construed narrowly, however, and only in relation to “significant risk” – in particular those hazards that the careful road user could not be expected to detect.<sup>83</sup> In addition to faults of design or construction,<sup>84</sup> or failure to make a site safe after building works,<sup>85</sup> this might include, for example, trees collapsing upon the highway,<sup>86</sup> or low bridges with insufficient warning that they make the road impassable for high vehicles.<sup>87</sup> In *McKnight v Clydeside Buses*, for example, the pursuer’s young daughter was killed when the double-decker bus in which she was travelling smashed into a low railway bridge across a city street. In the absence of warning signs the height of the bridge was a “manifest danger to road users”, and the roads authority had failed in its “duty to take steps to remedy the obvious hazard which is known to exist: it cannot ignore its duty to act in the interests of public safety”.<sup>88</sup>

The “critical question” in determining the scope of duty is whether the alleged hazard presented “a significant risk of an accident to a person proceeding along the road in question with due skill and care”.<sup>89</sup> Duty does not therefore extend to the introduction of safety improvements in relation to dangers which the careful road user might in any event be expected to notice in time and negotiate without incident. In contrast with the low bridge in *McKnight*,

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<sup>80</sup> *M’Fee v Police Commissioners of Broughty-Ferry* (1890) 17 R. 764 per Lord Justice Clerk Macdonald at 767.

<sup>81</sup> *Laing v Paull & Williamsons* 1912 S.C. 196; *Brierley v County Council of Midlothian* 1921 1 S.L.T. 192; *McKnight v Clydeside Buses Ltd* 1999 S.L.T. 1167; see also *Black v Glasgow Corporation* 1959 S.C. 188.

<sup>82</sup> *Laing v Paull & Williamsons* 1912 S.C. 196.

<sup>83</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 per Lord Drummond Young at paras 64 and 80.

<sup>84</sup> E.g. *Kemp v Glasgow City Council* 2000 S.L.T. 471, in which the pursuer tripped on the raised edge of the kerb. The court was persuaded that the authority had not met the appropriate standard of care and that “the absence of any recognised design [in any design manual] for such a feature militates against the wisdom of constructing it” (per Lord Osbourne at 474).

<sup>85</sup> *Letford v Glasgow City Council* 2002 Rep.L.R. 107 (pothole left after removal of a lighting column).

<sup>86</sup> *Brierley v County Council of Midlothian* 1921 1 S.L.T. 192; *Mackie v Dumbartonshire County Council* 1927 S.C. (H.L.) 99.

<sup>87</sup> *M’Fee v Police Commissioners of Broughty-Ferry* (1890) 17 R. 764.

<sup>88</sup> 1999 S.L.T. 1167 per Lady Cosgrove at 1172.

<sup>89</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 per Lord Drummond Young at para 85.

examples of features in this latter category include missing road markings and warning signs at junctions.<sup>90</sup> In *Macdonald v Aberdeenshire Council*, the pursuer had been injured and her passengers killed in a collision when she drove out of a minor road on to a trunk road without stopping. The double white lines on the roadway had become eroded, and the pursuer alleged that the roads authority had breached its duty of care towards road users in failing to attend to inadequate signage at the junction. However, the court took the view that the road configuration was suggestive of an obvious danger, so that a careful driver would have approached it slowly, keeping a careful look out.<sup>91</sup> There was therefore no hazard in the sense indicated above, and a duty of care to reinstate markings and signage was not made out. Taking a broader view, Lord Drummond Young explained that the system of insurance deals with accidents caused by careless driving, but not those which are “caused by a hazard that a careful driver would not see”, and it is therefore in those circumstances that the imposition of duty upon the roads authorities “fulfils a useful, if limited, function in the system of accident compensation”.<sup>92</sup>

If comparison is now made with English law in this area, it is difficult to identify significant divergence in the criteria by which hazardous situations are judged to give rise to duty. The English immunity rule did not operate in this context, so that in both jurisdictions duty might be imposed in relation to features which the authority was itself responsible for introducing. However, Scots law, like English law,<sup>93</sup> has traditionally recognised common law duty only sparingly in relation to dangers introduced by a third party, or caused by natural forces.<sup>94</sup> Notwithstanding statutory powers and duties to make good potential risk, the premise in both jurisdictions is that the statutory functions of roads authorities do not relieve road users of the obligation to take care for their own safety, and duty of care is unlikely to be imposed in relation to features which should readily have been navigated safely. As Lord Drummond Young remarked in *Macdonald*, “much of what is said in *Gorringe v Calderdale Metropolitan Borough Council* supports the general approach of the Scottish common law”.<sup>95</sup>

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<sup>90</sup> *Murray v Nicholls* 1983 S.L.T. 194.

<sup>91</sup> Cf *Bird v Pearce* [1979] R.T.R. 369 in which the roads authority had itself obliterated the white lines during road works in such a way as to create a kind of “trap” for drivers.

<sup>92</sup> 2014 S.C. 114 at para 80.

<sup>93</sup> Text to fnn 32-24 above.

<sup>94</sup> E.g. falling trees where a reasonable inspection procedure would have identified the threat of accident: *Brierley v County Council of Midlothian* 1921 1 S.L.T. 192; *Mackie v Dumbartonshire County Council* 1927 S.C. (H.L.) 99; *Chapman v Barking and Dagenham London Borough Council* [1997] 2 E.G.L.R. 141.

<sup>95</sup> 2014 S.C. 114 at para 83.



Finally, the term “public nuisance” is sometimes used loosely in Scots law where a number of proprietors have been affected, but unlike in English law it does not denote a criminal offence in Scots law, nor a category of civil liability distinct from the general law of nuisance.<sup>96</sup> Since this is a relatively narrow doctrine in English law, this does not represent a major source of crossborder difference. In any event, Scots proprietors whose premises front on to a street affected by an obstruction on the carriageway have title and interest to sue in nuisance,<sup>97</sup> although in practice, the common law liability of roads authorities has traditionally been regarded as governed not by nuisance but by the ordinary principles of negligence.<sup>98</sup>

### Snow and ice

Numerous Scots cases have involved the hazards presented by snow and ice. Section 34 of the Roads (Scotland) Act 1984, requiring roads authorities to “take such steps as they consider reasonable to prevent snow and ice endangering the safe passage of pedestrians and vehicles over public roads”, does not in itself create an additional statutory remedy for road users where snow or ice has not been cleared. At the same time it is uncontroversial that the common law duty owed by roads authorities to road users may in principle extend to this task.<sup>99</sup> It is also clear that black ice in particular may constitute a hazard in the sense discussed above since it can take even the most careful driver by surprise.<sup>100</sup> Nonetheless, it has proved extremely difficult for accident victims to establish that the roads authority has failed in a duty of care to treat a particular locus.<sup>101</sup>

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<sup>96</sup> Bell, *Prin* § 974.

<sup>97</sup> E.g. *Ogston v Aberdeen District Tramways Co* (1896) 24 R. (H.L.) 8; *Globe (Aberdeen) Ltd v North of Scotland Water Authority* 2000 S.C. 392.

<sup>98</sup> N. Whitty, “Nuisance”, in T. B. Smith et al (eds.), *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001), § 166.

<sup>99</sup> *Syme v Scottish Borders Council* 2003 S.L.T. 601; *Rainford v Aberdeenshire Council* 2007 Rep.L.R. 126. This was also a matter of concession in *Ryder v Highland Council* 2013 S.L.T. 847.

<sup>100</sup> Although Lord Drummond Young observed in *Macdonald v Aberdeenshire Council* 2014 S.C. 114 at para 70 that careful drivers will “drive in such a way as to minimise the risk of skidding on black ice”, the evidence in cases such as *Morton v West Lothian Council* 2006 Rep.L.R. 7, aff’d [2008] CSIH 18 indicates that careful driving cannot eliminate that risk; in that case there was no suggestion that the pursuer was driving carelessly when her car skidded on black ice, and witnesses spoke to a series of vehicles skidding at the scene thereafter, even although they had been alerted to the need to drive with care.

<sup>101</sup> See discussion by Lord Drummond Young in *Macdonald v Aberdeenshire Council* 2014 S.C. 114 at para 70.

Clearance of snow and ice present particular logistic problems for the Scottish roads authorities,<sup>102</sup> and therefore any attempt to challenge an authority's scheme of priorities in treating its roads is vulnerable to the objection that roads authorities must have discretion to decide in these matters in the light of the resources and specialised information available to them. Unless it has acted unreasonably, for example in ignoring that information, the courts are reluctant to interfere in the authority's exercise of its discretion by ruling that the authority was under a duty to treat the accident locus earlier,<sup>103</sup> although a claim may have greater prospects of success if, rather than disputing the authority's system of priorities, the accident victim can show that it has failed properly to implement that system in the light of the information available.<sup>104</sup>

Even where duty is recognised, however, the transient nature of winter road conditions means that establishing breach of duty is problematic. In *Morton v West Lothian Council*,<sup>105</sup> for example, the pursuer allowed that gritting lorries had passed by the locus of the accident, but invited the court to infer from the presence of black ice shortly afterwards that they had negligently failed to spread salt over that particular stretch of roadway. Given competing explanations for this phenomenon, including the possibility that rainfall has washed the salt from the road surface, this was not accepted. Similar challenges are met in specifying the steps which might reasonably have taken to have prevented the occurrence of the accident.<sup>106</sup> In *Ryder v Highland Council* for example, even if the pursuer had succeeded in his argument that defenders had a duty to operate their gritting lorries round the clock, it was by no means evident that such treatment would have stopped the formation of ice at the accident locus, especially in the light of other weather variables, again including the possibility of rain washing salt from the road.<sup>107</sup>

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<sup>102</sup> *Macdonald v Scottish Ministers* 2004 Rep.L.R. 16 per Lord Clarke at para 8, noting the impossibility in large areas such as the Highlands of ensuring that all black ice is treated simultaneously and continuously so as to avoid the risk of skidding.

<sup>103</sup> *Cameron v Inverness-shire County Council* 1935 S.C. 493; *Grant v Lothian Regional Council* 1988 S.L.T. 533; *Syme v Scottish Borders Council* 2003 S.L.T. 601. See also *Ryder v Highland Council* 2013 S.L.T. 847 in which the pursuer's mother was killed when her car skidded off an untreated road in the early morning. His argument that the roads authority had a duty to maintain a 24-hour system for gritting, rather than interrupting its service overnight, was similarly rejected as raising an issue of operational priorities that was non-justiciable

<sup>104</sup> *McGeouch v Strathclyde Regional Council* 1985 S.L.T. 321 allowing proof before answer on this point.

<sup>105</sup> 2006 Rep.L.R. 7, aff'd [2008] CSIH 18; see also *Gibson v West Lothian Council* [2011] CSOH 110; 2011 Rep.L.R. 84, aff'd [2012] CSIH 62.

<sup>106</sup> *Macdonald v Scottish Ministers* 2004 Rep.L.R. 16.

<sup>107</sup> 2013 S.L.T. 847 per Lord Tyre at paras 56-57.

Earlier dicta in Scots cases to the effect that there is no right to sue English roads authorities in these circumstances plainly no longer hold good,<sup>108</sup> but up-to-date comparison with English law is difficult since few reported cases have followed from the 2003 reform by which English authorities were charged with duty to clear snow and ice from the highway.<sup>109</sup> Since the obligation imposed upon English authorities is expressed as ensuring safe passage “so far as is reasonably practicable”, it seems probable that the developing English law will be shaped by similar concerns to limit the justiciability of the authorities’ decision-making on allocation of resources. And it goes without saying that the practical problems of proving breach of duty are likely to replicate those already encountered in the Scots common law.

## Conclusion

“English law is different from Scots law”<sup>110</sup> in determining the delictual liability of roads authorities. The statutory sources from which the authorities’ powers and duties are derived are quite separate, and the interplay between those sources and the common law rules dissimilar. In the past this has meant major substantive difference between the two jurisdictions. A century ago some Scots argued in the pages of this journal for harmonisation by assimilating Scots with English law and returning to *Duncan v Findlater*,<sup>111</sup> In the event it was English law that aligned itself closer to Scots law, with the abandonment of immunity for failure to repair, and, more lately, with the integration of liability for failure to clear snow and ice within the general rule on maintenance. This is perhaps why Lord Rodger used the past tense when noting the relative generosity of Scots law towards the pursuer,<sup>112</sup> for a survey of the modern law provides little hard evidence of a more exacting approach in the English courts, even in relation to the omissions of highways authorities. Concern for a fair allocation of risk within a common insurance framework means that in both jurisdictions duty is narrowly construed. Moreover, the factors determining standard of care demonstrate a similar concern for reasonableness, albeit with a difference in

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<sup>108</sup> See e.g. *Syme v Scottish Borders Council* 2003 S.L.T. 601 at para 5; *Macdonald v Scottish Ministers* 2004 Rep. L.R. 16

<sup>109</sup> Text at fn 40 above.

<sup>110</sup> *Macdonald v Aberdeenshire Council* 2014 S.C. 114 per Lord Drummond Young at para 54.

<sup>111</sup> J H Tait, “Is *Duncan v. Findlater* not Law?” (1898) 10 Jur. Rev. 200; see also A M MacRobert, “The liability of public bodies for non-feasance” (1902) 14 Jur. Rev. 158. This proposal is now incompatible with Lord Drummond Young’s assessment in *Macdonald v Aberdeenshire Council* that “Scots law is quite coherent as it stands and has no need to move into line with English law” (2014 S.C. 114 at para 54).

<sup>112</sup> Cited above at text to fn 4. Indeed it is not clear why, e.g., Lady Paton recorded her views on the subject in the present tense: see fn 5 above.

onus in regard to failure to repair that is if anything more helpful to English litigants. English law now provides an invaluable source of comparative authority, as long as the respective sources are properly contextualised and the *praesumptio similitudinis* does not blind us to their differences.