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XXIII. Scotland

Martin Hogg

A. Legislation

1. Damages (Scotland) Bill

The Damages (Scotland) Bill addresses certain matters relating to awards of damages for wrongful death. The current law is found mainly in the Damages (Scotland) Act 1976 (the principal parts of which will be re-enacted in the proposed Bill), a statute to which the Scottish Law Commission recommended amendment in its Report on Damages for Wrongful Death (2008). Many of those recommendations are given effect to in the terms of the Bill, though some proved sufficiently controversial to be excluded during Parliamentary progress of the Bill (see discussion below). Though the Damages (Scotland) Bill is a Member's rather than a Government Bill, its broad aims are supported by the Scottish Government. **1**

The Bill proposes a number of changes to the current law, among them the following: **2**

- (a) as regards the rights of a victim who is still alive but who is likely to die earlier than he or she would have, as a result of the injury sustained, the Bill proposes changes to the way in which such a victim's claim for future patrimonial loss is to be calculated. In assessing what sum is to be awarded to the victim, an amount has always been deducted to represent what would have been the victim's reasonable living expenses during the period by which life has been foreshortened. Previously this figure has been left to the court to calculate; the Bill proposes a new method, adopting a fixed figure of 25 % of the victim's projected net income during the foreshortened period. During debate on the Bill, this inflexible single rate deduction was criticised by some as too inflexible and therefore, at Stage 2 of the Parliamentary proceedings, a caveat to the provision was added providing that, if the court considers that a 'manifestly and materially unfair' result would

- be produced by application of the fixed percentage, it may apply a percentage reduction other than 25 %.
- (b) as regards claims by a qualifying relative of a deceased person for damages for loss of financial support, the Bill proposes that, where the person making the claim is the deceased's spouse, civil partner, cohabitant or dependent child, the deceased should be taken to have used 75 % of his or her net income to support his or her family, and the income of the person making the claim should be ignored entirely (such figure of 75 % may, following amendment to the Bill, be varied by the court if to apply it would lead to a 'manifestly and materially unfair' result). Another change relating to the calculation of loss of financial support by relatives relates to the use of a multiplier in calculating the claim. Compensation for future loss of earnings is currently based on the product of (i) the victim's net earnings at the time of the injury, and (ii) a 'multiplier', that being a figure taken from tables of actuarial data known as the 'Ogden Tables'. At present a multiplier is applied from the date of death, not from the date of the proof (ie the date of the main court hearing). However, clause 7 of the Bill creates a distinction between past loss and future loss and further provides that a multiplier should be applied from the date of the court order awarding damages in respect of future loss only.
- (c) as regards relatives' claims for non-patrimonial loss, the Bill provides that such a claim should in future be called a 'loss of society award', such award being for emotions ordinarily experienced on the death of a loved one and for loss of non-patrimonial benefits that might have derived from the deceased's society and guidance. The wording of the proposed provision makes it clear that any mental illness suffered by a relative as a result of the deceased's death will have to form the substance of a distinct legal claim.
- 3 The Bill as originally presented had also proposed restricting the category of persons entitled to claim patrimonial damages in respect of wrongful death: the proposed new rule would have limited the class to a spouse or civil partner (or one who lived with the deceased as if in such a relationship), a parent or child (or one who accepted the deceased as a child of the family, or was accepted by the deceased as a child of the family), a brother or sister (or one who grew up in the same household as the deceased, and was accepted as if a child of the family in which the deceased was a child), or a grandparent or grandchild. This proved controversial however, so the decision was taken at the Second Reading of the Bill to reinstate those relatives of the deceased currently entitled to claim (ascendants or descen-

dants, aunts or uncles, nieces or nephews, and former spouses or civil partners of the deceased).

(Shortly before the Yearbook went to press, the Bill was enacted and brought into force as the Damages (Scotland) Act 2011. Reference will be made in next year's Yearbook to the final form which the legislation, in force from 7 July 2011, took.) 4

B. Cases

1. Trustees of the WTL International Ltd Retirement Benefit Scheme v Edwards [2010] Court of Session Outer House (CSOH) 34: Professional Negligence; Negligent Advice; Causation of Loss

a) Brief Summary of the Facts

The pursuers, trustees of a pension scheme, sought damages for breach of contract and negligence in respect of alleged negligent advice given by the defender in relation to the switching of assets of the pension scheme from a deferred annuity contract with Scottish Widows plc to a managed fund contract with the same party. The pursuers alleged that the defender failed to give an impartial and balanced assessment of the advantages and disadvantages of the switch, and failed to give a detailed analysis of the options. 5

b) Judgment of the Court

The judge (Lord Hodge) held (i) that the pursuers had failed to establish that the defender had been negligent, and furthermore (ii) that the court was not satisfied that the pursuers had established that, but for the advice which they had been given, they would not have acted as they did in any event, and that therefore the pursuers had failed to establish a causal connection between the loss alleged and any breach of duty by the defender. 6

c) Commentary

Although the judge held that a causal link had not been established between the harmful conduct and the alleged losses, he also added some further *obiter* remarks on the question of whether there should be a difference in the court's approach to causation in a case of negligently giving 7

of wrong advice and a case of negligent failure to advise (see para 77 f). Causation is not (says Lord Hodge uncontroversially) simply ‘a matter of common sense’: one has to look to the law to decide what losses are held to have been caused by a particular kind of breach of duty (para 78). More controversially, however, Lord Hodge goes on to question the utility of the distinction – drawn by Lord Hoffmann in the famous case of *South Australia Asset Management v York Montague*¹ – between a failure to advise and the giving of incorrect advice: such a distinction ‘may often be elusive in a particular case. It does not form the sound basis for different rules on causation.’ (para 79). In relation to the giving of negligent advice or information, what is important is that a court should consider the counterfactual question of ‘what would have been the advice or information which [the defender] would have given if he had performed his task with reasonable care’ (para 79).

- 8 The judge’s remarks noted above are *obiter*. Nonetheless, they cannot be allowed to stand without some comment. First, in the interests of fairness, it should be noted that Lord Hoffmann was *not* suggesting in the *South Australia* case that different rules of causation should apply to cases of failure to advise and negligent advice: he was merely pointing out that it is necessary to consider the nature of the duty undertaken by a defendant in order to discover what types of loss can properly be considered to have flowed from the breach of duty in question. Second, the suggestion by Lord Hodge that, in cases of failure to advise competently, one must consider what advice would have been given had the defender been acting competently, glosses over the problem that there may be a number of reasonable and competent counterfactual courses of action that a defender might have advised: how is one to choose between them?²

1 [1997] Appeal Cases (AC) 191.

2 This difficulty is discussed further in a chapter by M Hogg entitled ‘Developing Causal Doctrine’ in: R Goldberg (ed), *Perspectives on Causation* (Oxford: Hart Publishing, forthcoming October 2011).

2. *Farstad Supply AS v Enviroco Ltd* [2010] United Kingdom Supreme Court (UKSC) 18, 2010 Scots Law Times (SLT) 994: Contribution among Wrongdoers Applicable in Theory to Third Party, but Third Party's Liability can be Excluded under Contract with Injured Party

a) Brief Summary of the Facts

In the first of two Scottish delict cases to come before the Supreme Court in 2010, the owners of an oil rig supply vessel sued the defenders, a company engaged to clean the hold of the vessel, for damages for loss caused by a fire allegedly started negligently by the defenders. The defenders claimed that, assuming any negligence on their part, the fire was materially contributed to by the negligence of the owners and of the third party (charterers of the vessel). On the assumption, therefore, that the defenders were liable to the owners, they sought a contribution from the third party under sec 3(2) of the Law Reform Miscellaneous Provisions (Scotland) Act 1940, that subsection stating that: 'Where any person has paid any damages or expenses in which he has been found liable ..., he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.' It was argued for the third party that (i) the relevant provision of the 1940 Act was not intended to extend to third-party contributions; and (ii) in any event, even if it were, the charterparty contract between it and the owner excluded any liability for the loss arising in the action and that therefore it was not a party who 'if sued, might also have been held liable' for the loss (as required by sec 3(2) of the Act). 9

b) Judgment of the Court

The Supreme Court held that (1) while sec 3 of the 1940 Act was drafted in such a way that it seemed to envisage the question of a contribution towards damages arising in circumstances where there were two actions (the second being a claim by the party found liable in the first action to a contribution from a joint wrongdoer), the application of the section was not limited to such a case and it was perfectly capable of applying in circumstances where a contribution was claimed from a third party to an action; (2) the question to be answered, so far as the third party was concerned, was therefore whether, if the third party had been sued by the pursuers, it would have been liable, this depending on whether the third 10

party would have had a defence to the pursuers' claim under the charterparty; and (3) the effect of the relevant provision of the charterparty was to exclude the charterer's liability in respect of damage to the vessel caused by its own negligence and it followed therefore that the defenders were not entitled to any contribution from the third party under the 1940 Act because they could not establish that, 'if sued', the latter might have been liable to the pursuers in respect of the fire damage. The Supreme Court thus excluded the third party from any potential contribution to damages, and remitted the matter back to the judge at first instance to consider the pursuers' claim against the defenders.

c) **Commentary**

- 11** The 1940 Act was a significant piece of legislation amending the prior common law rule on the apportionment of damages between wrongdoers, which had been to the effect that each joint wrongdoer was liable *inter se* to pay a *pro rata* share of the damages, and that such *pro rata* share might be claimed by one wrongdoer from another. The new position introduced under the Act was of (as Lord Clarke put it in his judgment) 'a flexible rule of apportionment according to the court's view of what was just'. However, the Act did not address the two matters considered in this appeal – whether the relevant provision extended to claims for contribution from third parties (it does, says the Supreme Court), and whether, in applying the rule, a court may (if the matter is raised) consider an exclusion clause in a contract between C (the person from whom a contribution is sought) and A (the pursuer) which might permit C to defend a claim by A in respect of the harm and thereby exclude any claim by B (a defender) for a contribution by C (a court may do so, says the Supreme Court). The judgment of the Supreme Court thus brings significant clarity to two issues which had hitherto been undecided in the law.

3. *Davis v Catto* [2010] CSOH 93: *ex turpi causa non oritur actio* – Not Pleadable by Third Party in Damages Contribution Claim by Defender

a) **Brief Summary of the Facts**

- 12** The pursuer was injured in an accident when a car driven dangerously by the defender crashed. In an action for damages by the pursuer, the defender claimed a contribution towards any damages payable from the third

party, a driver of another dangerously driven vehicle which was immediately in front of the defender's car at the time of the accident. The third party claimed that, because the defender had himself been driving dangerously at the time of the accident, the defender was prevented from asking for any contribution towards the damages due to the pursuer, because of the delictual rule *ex turpi causa non oritur actio* ('from a disgraceful cause, no action arises').

b) Judgment of the Court

The court held that the third party was not exempt from contributing to damages, the *ex turpi causa* defence being pleadable only in respect of a claim made by a pursuer, and not in respect of a claim for a contribution towards damages made by a defender against a third party. The third party was required to pay 20 % of the damages due to the pursuer. **13**

c) Commentary

The *ex turpi causa* rule is an established rule of Scots law that is commonly applied in damages claims to prevent one party engaged with another in jointly committing an unlawful activity from claiming damages from the other in respect of injuries sustained during the commission of the activity. The rule reflects a public policy against claims by wrongdoers for injuries sustained by them during the commission of the wrong. The rule has, for instance, previously been applied in cases where a thief is injured when a stolen car driven by his accomplice crashes, though it does not prevent claims in other sorts of case where the moral turpitude is very minor (as it was in *Weir v Wyper*,³ where the turpitude of the injured pursuer was knowledge on her part that the driver of a car in which she was a passenger held only a provisional driving licence). As the judge in the present case noted however, precedent goes only so far as to show that the rule can be pled as a defence against a party seeking to recover damages: there is no authority for its application in cases where it is pled by a third party against a defender. As the judge commented: 'The third party is attempting to evade his liability to the pursuer by his invocation of the maxim against a joint wrongdoer. That is not a proper application of the maxim, particularly when the maxim is rooted in public policy' (para 49). **14**

3 1992 SLT 579.

The judgment seems entirely correct. While it might seem unpalatable that wrongdoer A should seek a contribution towards damages from fellow wrongdoer B in order to reduce A's liability for those damages, to prevent such a claim by A against B might prejudice the wholly innocent injured party's claim to damages, a result which the public policy underpinning the *ex turpi causa* rule would not support.

- 15** It is worth noting that, while the *ex turpi causa* rule was held inapplicable in this case, it was successfully pled in a later judgment from 2010, *Anderson v Hameed*.⁴ In that case the rule was held to prevent the pursuer claiming for injuries sustained by him as a passenger in a car accident because he knew that the defender, the driver of the car, was aged only 16 at the time of the accident, and thus in possession of neither a valid driving licence nor insurance cover.

4. *McLeod v Crawford* [2010] CSOH 101, 2010 SLT 1035: Solicitor Owed no Duty of Care to Family of Deceased Client Regarding Negligent Advice Given to Client

a) Brief Summary of the Facts

- 16** The defender, a solicitor, entered into negotiations on behalf of his client concerning a personal injury claim in respect of exposure to asbestos at the client's workplace. An offer to settle the claim was made by the employer's insurers on the basis either of (i) a full final payment of £10,000, or (ii) provisional damages of £5,000 (under this second option, further losses might subsequently have been claimed if the pursuer had gone on to contract mesothelioma, which in this case he had). The solicitor relayed only the full and final settlement offer to his client, this being accepted by the client. Following the death of the client as a result of mesothelioma, the pursuers (the widow and children of the deceased) discovered what had happened and sued the defender and his fellow business partners for being unable to claim damages in respect of the mesothelioma, the acceptance of the full and final offer having precluded such a claim. The defender argued that he was under no duty of care towards the widow and children in respect of any negligence on his part.

4 [2010] CSOH 99, 20 July 2010.

b) Judgment of the Court

The court held that the defender owed no duty of care towards the widow and children of the deceased in respect of his failure properly to advise his client of the alternative offer. The claim was therefore dismissed. **17**

c) Commentary

The judgment is a significant one, as it touches on the same issue as was raised in the seminal House of Lords judgment *White v Jones*.⁵ There is significant discussion of that case by the judge (Lord Woolman) in *McLeod*. The House of Lords in the *White* case had held that a solicitor had assumed a responsibility in tort to the daughters of his deceased client in respect of the negligent performance of his professional duties to the client. That judgment had evident parallels with the case before Lord Woolman: why then did his Lordship think that the defender in the case before him had not assumed any duty towards the widow and children of his deceased client? Lord Woolman cited a number of reasons: (i) unlike *White*, the circumstances of this case might have revealed a conflict of interest between the deceased and his family, were careful advice to have been given; (ii) there was no proximity between the defender and the pursuers, because, unlike the case of the disappointed beneficiaries in *White*, an ill effect to family members would not necessarily accrue through breach of duty in a case such as this – on the contrary, had the defender died of natural causes, the acceptance of a full and final settlement by the deceased would have been beneficial to such family members; and (iii) a duty such as that argued for, requiring a solicitor to consider the possible effect of his actions upon the family of his client, ‘would result in a mushrooming of potential liability’ (the very spectre of indeterminate liability rejected as arising in *White*). Of these three stated reasons, the first two seem soundly based, the third perhaps less so: the point, surely, about the spectre of ‘indeterminate liability’ is that the class of those making claims, and thus the extent of overall liability, must be uncertain, whereas in this case it was quite clear that, while a finding of liability would lead to an increase in claims, this would only be by the limited class of person allowed to claim in respect of the wrongful death of a relative. Despite this minor criticism, the overall result in *McLeod* should be wel- **18**

5 [1995] AC 207.

comed, for reasons that have been advanced elsewhere against the soundness of the *White v Jones* decision.⁶

5. *Morrison Sports Ltd v Scottish Power* [2010] UKSC 37, 2010 SLT 1027, (2010) 1 Weekly Law Reports (WLR) 1934: Electricity Suppliers not Liable at Common Law for Fire Damage Resulting from a Breach of their Duties under Statutory Regulations

a) Brief Summary of the Facts

19 In the second of the two cases to come before the Supreme Court, the owners of premises raised an action against suppliers of electricity in respect of work undertaken by one of their employees on the electricity supply system at the premises, such faulty work resulting in a fire which destroyed the premises. The owners argued that the work was both negligent at common law as well as in breach of various provisions of the Electricity Supply Regulations 1988. The defenders argued that the statutory branch of the claim should be dismissed, as a simple breach of the regulations, of itself and irrespective of carelessness, did not give rise to any civil liability. At first instance, the Lord Ordinary allowed both branches of the case to proceed. On appeal to the Inner House of the Court of Session this decision was upheld. The defenders further appealed to the Supreme Court.

b) Judgment of the Court

20 The Supreme Court overturned the decision of the Inner House, holding that Parliament had intended no private right of action to arise for breach of the 1988 Regulations. Looked at as a whole, the legislative scheme, with its carefully worked out provisions for various forms of enforcement on behalf of the public, pointed against individuals having a private right of action for damages for contraventions of regulations made under it. This conclusion was reinforced by the fact that it was difficult to identify any limited class of the public for whose protection the 1988 Regulations were enacted, and on whom Parliament had intended to confer a private right of action for breach thereof. The Court therefore dismissed the case so far

⁶ See *M Hogg*, *Obligations* (2nd edn 2006) paras 3.113–3.120.

as based upon breach of statutory duty, and remitted the common law case to the court at first instance for determination.

c) **Commentary**

In this decision, the Supreme Court had to revisit a difficult question which had troubled the House of Lords before it on a number of occasions: if a statute (or subordinate legislation) imposes obligations on a public or private body, but omits to state whether a breach of those regulations is privately actionable by a member of the public suffering harm as a result of such breach, should a private action be permitted for any such harm caused? That question had been considered authoritatively by the House of Lords in *X v Bedfordshire County Council*,⁷ in which proceedings Lord Browne-Wilkinson had summed up the proper approach to be taken as follows: **21**

The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action ... However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach ...⁸

7 [1995] 2 AC 633.

8 [1995] 2 AC 633, 731 f.

- 22** The Supreme Court pointed out in this case that the Inner House had erred in applying these guiding rules: it had concluded that, because in sec 29(3) of the Electricity Act 1989, a provision dealing with statutory fines for anyone breaching the 1988 Regulations, the subsection concluded by stating that ‘nothing in the subsection shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention’, these words indicated that Parliament had intended to reserve to such injured persons a right to sue at common law for any such damage or injury. But Lord Rodger, delivering the judgment of the Court, pointed out that sec 27(5) already made provision for private law claims in respect of losses caused by breach of other provisions under the legislative scheme (though not of the provisions relating to the action before the Court), and noted that ‘where Parliament has made specific provision of this kind ... , the natural inference is that it does not intend there to be a right to damages or compensation for loss or injury caused by other breaches of the statute or of subordinate legislation for which no such specific provision is made’ (para 13).
- 23** The difficulty with determining the correct result in cases such as these stems, of course, from ambiguity created by inadequate statutory drafting: a properly drafted statute would explain whether or not private liability in delict was applicable in the case of the breach of particular statutory provisions or not. While, on one view, a statutory provision providing for criminal fines for its breach which adds that ‘nothing in the subsection shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention’ might be taken to be suggesting that Parliament is at least hinting that a private law right to compensation may exist, the Supreme Court took the opposite, more cautious view, holding that any liability for compensation hinted at in the section was only as to possible *statutory* liability which may or may not be provided for (para 27):

it does not follow [from the wording of sec 29(3)] that Parliament is saying that someone who contravenes any provision of any regulations made under the section is automatically liable to pay compensation for any resulting damage or injury. Rather, it will all depend on the terms of the regulations which the Secretary of State decides to make ... [S]ection 29(3) simply provides that, if in terms of any regulations made under the section a person is to be liable to pay compensation for damage or injury caused by a contravention of some provision of the

regulations, then the person's liability to pay that compensation is not affected by his liability to pay a fine for the selfsame contravention.

Such a cautious view is consistent with the approach taken in *X v Bedfordshire* and previous cases. This judgment reinforces a judicial unwillingness to create private liability for breach of statutory duty where the existence of such liability can be said to rest only on a vague statutory provision hinting, on one interpretation, at such liability but, on another equally plausible interpretation, at compensation under the legislation rather than at common law. **24**

6. *Reid v EWS Railways, Sheriffdom of Lothian & Borders, at Edinburgh, 6 August 2010, Reported on LexisNexis as (2010) Scot (D) 12/8: Injured Workman Unable to Prove that Medical Condition Caused by his Working Conditions*

a) Brief Summary of the Facts

The pursuer was a workman employed by the defenders, a railway company. His duties involved manually closing railway carriage doors after coal had been discharged from the carriages. The pursuer developed a medical condition known as plantar fasciitis (an inflammation of tissue at the base of the foot) which he claimed was caused by the strain of his work, and he sued the defenders for alleged breach of statutory regulations relating to manual handling operations. The defenders admitted breach of the regulations, but denied that such breach had caused the pursuer's condition: plantar fasciitis was, they argued, an age-related condition, and that the pursuer had been at significant risk of contracting the condition given his age and his existing physical characteristics. At first instance, the Sheriff held that the pursuer's employment conditions had 'accelerated the condition' by a few months, but that it would have developed in any event. For such acceleration the Sheriff awarded damages totalling £7,376. Both parties appealed against the decision to the Sheriff Principal. **25**

b) Judgment of the Court

The Sheriff Principal refused the pursuer's appeal, allowed the cross-appeal, and absolved the defenders. The present facts did not amount to one of those which would trigger the exception set out in *Fairchild v* **26**

*Glenhaven*⁹ to the usual test for causation-in-fact (the ‘but for’ or *sine qua non* test). Applying therefore the ordinary rules on causation, the Sheriff had been right to conclude that the evidence did not indicate that the pursuer’s work activities were the probable cause of the condition from which he suffered. However, the Sheriff had then gone too far in concluding that such work had nonetheless accelerated the pursuer’s condition: all that the evidence indicated was that there were a number of possible causes of the pursuer’s plantar fasciitis, namely his work duties (which may or may not have involved the defender’s breach of duty), limited ankle dorsiflexion (a pre-existing physical condition from which he suffered), and age-related degeneration. Given these multiple possible causes, causation had not been made out.

c) Commentary

- 27 The decision of the Sheriff Principal considers the application of the *Fairchild* principle to a case where each of multiple possible causes of different types were potential causes of an injury. As *Fairchild* and later cases¹⁰ indicate, where causation cannot be established on an ordinary ‘but for’ basis, a limited exception operates in circumstances of causal indeterminacy to permit an increase in risk to constitute a factor sufficient to indicate that something caused the loss of a chance of avoiding an injury. However, this exceptional route can only operate where the various possible causes of an injury all operate in a similar way – where the mechanism by which they operate is different (as was the case with the three factors identified in this case), there is no room for the operation of the *Fairchild/Barker* exception. That conclusion is correctly reached by the Sheriff Principal, though his summary of the recent developments in the field of causation is not always expressed entirely accurately: for instance, his suggestion that *Fairchild* is an exceptional way to demonstrate causation of loss ignores the fact that the *Fairchild* decision, which revisited *McGhee v NCB*, was itself revisited in *Barker v Corus* in such a way that, where the exception now applies, it is taken to mean that a claimant caused the loss of a chance of avoiding injury, not (as the Sheriff Principal seems to suggest) the injury itself. *Fairchild* (modified by *Barker*) is thus not really an exceptional way of proving a causal connection to an injury, but rather an exceptional route which allows a claimant who cannot prove a

9 [2002] UKHL 22.

10 Such as *Barker v Corus* [2006] AC 572.

causal connection to an injury to claim instead for a loss of a chance of avoiding the injury. Such an exceptional claim was unavailable in the present action, where the presence of multiple possible causes of different types was reminiscent of the facts in the unsuccessful action of *Wilsher v Essex Area Health Authority*.¹¹

7. *Hines v King Sturge LLP* [2010] Court of Session Inner House (CSIH) 86: Damages Claim by Tenant against Owner's Property Agent in Respect of Fire Damage Caused by Agent's Negligent Supervision of Leased Premises

a) Brief Summary of the Facts

The two appellants operated businesses from leased premises in Glasgow which were heavily damaged by a fire which began on the first appellant's premises. The respondents were a property management company who had been contractually engaged by the owner of the building to manage the building. The appellants argued that the respondents had failed to maintain properly the fire alarm system for the building, with the result that it had failed to activate when the fire commenced. They further argued that this failure was in breach of a duty of care which the respondents owed to the appellants as tenants of the building. They sued the respondents in damages for the losses caused by the fire. At first instance, the appellant's claims were dismissed by the Outer House of the Court of Session on the basis that no duty of care had been owed by the respondents to the tenants. The tenants appealed to the Inner House. **28**

b) Judgment of the Court

The Inner House of the Court of Session overturned the dismissal of the claims, and ordered a proof before answer (a trial of the facts, before a determination of the relevant law) on the whole case. The judgments of the appeal court focused on the applicability of the tripartite test for the existence of a duty of care in delict laid out by the House of Lords in *Caparo Industries plc v Dickman*¹² to the facts of the case before them. **29**

11 [1988] AC 1074.

12 [1990] 2 AC 605.

c) Commentary

- 30** The case raises the perennially difficult issue of when responsibility will arise in delict for property damage suffered by a pursuer with whom a defender may have had little or no direct contact. While in a case such as this the property agent may well have broken a contractual duty owed to its client (the owner of the property), it is far from clear that it ought to be held to come under any additional duty in delict to tenants of the building, who may conceivably have a contractual claim against the owner or indeed a delictual claim against the particular tenant on whose property the fire began.
- 31** In the leading judgment of the Inner House (delivered by Lord Osborne), there is a lengthy discussion of the proper test to be applied in determining the liability, if any, of the managing agent: was it (following *White v Jones*) one of testing a ‘special relationship’ between the parties?; was it ‘the extended *Hedley Byrne* test’ of reliance?; or was it the ‘tripartite test’ of *Caparo*? Were, moreover, these three tests ‘distinct alternatives’ which might be tried in turn? Lord Osborne thought that they were *not* alternatives (see discussion at para 45 of his judgment), commenting rather that ‘[i]t appears to me that, in order to achieve justice in widely differing situations, the courts have devised different tests apt to the particular situations with which they were dealing. In these circumstances, the problem is to reach a view as to which of the several tests is in fact appropriate to the kind of circumstances with which the court has to deal.’ In so stating, Lord Osborne quoted in support a lengthy passage from the speech of Lord Mance in *Customs and Excise Commissioners v Barclays Bank*,¹³ and concluded that ‘this passage indicates that the relationship between the different tests is not simple and that they cannot properly be seen as strict alternatives the one to the other’ (para 45). Lord Osborne considered that ‘the *Caparo* test is a useful guide in the circumstances of this case’, holding that the element of reasonable foreseeability was present (para 48), proximity might well also be so (para 49), as also the fairness, justice and reasonability of holding a duty of care to be present (para 53).
- 32** The view that there are different tests for the establishment of a duty of care cannot go unchallenged. This view is not supported by earlier authority, and its adoption leads to undesirable results when applied by Lord Osborne to the facts of the case before him: for instance, his Lordship

¹³ [2007] 1 AC 181.

felt, when mentioning the fact that heavy reliance appears to have been placed by the appellants upon the proper management of the fire alarm system by the respondents, that he was in mentioning this fact somehow departing from matters relevant to the tripartite *Caparo* test, focusing instead on the *Hedley Byrne* test. Yet reliance is simply one way of demonstrating the relationship of proximity between parties required in the *Caparo* test. That this is so emphasises that the *Caparo* approach should *not* be seen as a different sort of approach to establishing a duty of care to that adopted in *Hedley Byrne*. On the contrary, an orthodox view of the development of this field of delict would posit that both the *Donoghue v Stevenson* focus on reasonable foreseeability of harm, as well as the *Hedley Byrne* focus on reliance, are both elements that were subsequently gathered into the later, more developed, tripartite test expounded in *Caparo*. One gets the impression that Lord Osborne was led by counsel in the case to adopting a view that the various approaches of earlier cases disclosed different tests for a duty of care, whereas the better view is surely that these earlier cases were merely staging posts along the road of the development of the comprehensive test expounded in *Caparo*, a comprehensive test which subsumes within it earlier elements of relevance to the question of whether such a duty should exist. Certainly, the passage from the speech of Lord Mance quoted by Lord Osborne makes no reference to separate tests for a duty of care, but merely to different ‘denominators’ which may be relevant in particular cases for testing whether a duty of care should be said to arise.

So, while *Hines* is a noteworthy decision applying the *Caparo* reasoning to a case of property damage caused by improper management of tenanted property by a third party, the suggestion of Lord Osborne that there are three different tests for the establishment of a duty of care (a suggestion which is also made by another of the judges, Lord Carloway) is somewhat suspect, though seemingly encouraged by the pleadings of counsel before the court. As a ‘proof before answer’ was ordered, we do not have (as yet) any final determination of whether any duty of care *did* rest upon the respondents in the case. On that specific question, Lord Carloway was much less encouraging in his judgment, making the point that there is ‘an obvious need for certainty in the field of commercial, and indeed other, leases. Parties to a property relationship will seek to define their rights and responsibilities by reference to the terms, express or implied, of their leases. Were they to do otherwise, there is a substantial risk of “unacceptable circumvention” of established principles of the law of contract’ (para 75), a point concerning the ‘primacy of contract’ which, though it has become somewhat unfashionable of late (following decisions such as *White*

v Jones), may yet sway the court when a final determination of liability is made in this case.

8. Personal Injury

- 34** One major theme running through many of the personal injury cases in 2010 has been the importance of carrying out risk assessment exercises: these have now become standard for many employers and other parties, and this is reflected in the way that courts routinely refer to whether or not such exercises, properly carried out, would have disclosed a course of action that a defender ought to have undertaken but did not.
- 35** Such risk assessment language features heavily in the decision of the Outer House in *Brown v North Lanarkshire Council*,¹⁴ a tragic case of a child who suffered severe brain damage when he fell onto a sharp paintbrush in a school classroom, the paintbrush being forced through his eyeball and into his brain (the case generated some media interest: see, for instance, this report on the BBC website¹⁵). The court in this action held that a proper risk assessment by the school would have indicated that there was an evident risk of injury which could easily have been minimised by alternative courses of conduct which the school failed to adopt (such as the use of other, less sharp, types of paintbrush). Risk assessment was also discussed by the court in another Outer House decision which generated a lot of media attention,¹⁶ *Valentine v Ministry of Defence*,¹⁷ another case of a tragic accident, in which a soldier serving in Iraq was crushed to death when a trench in which he was working at his army base collapsed upon him. Lord Bonomy, finding the defender liable in damages, held that the deceased soldier's superiors had failed to carry out an adequate risk assessment in relation to the work which the soldier had undertaken, and had in consequence breached the common law duty of care which they owed to the soldier. Discussion of the failure to carry out a proper risk assessment may also be seen in another judgment of Lord Bonomy, *Johnstone v Amec Construction Ltd*,¹⁸ concerning a security guard injured when he tripped over a barrier fence which had blown over.

14 [2010] CSOH 156.

15 <http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/8391687.stm>.

16 See eg <<http://thescotsman.scotsman.com/wariniraq/Justice-for-soldier--buried-6161311.jp>>.

17 [2010] CSOH 40, 2010 SLT 473.

18 [2010] CSIH 57.

Moving beyond the field of risk assessment, one judgment¹⁹ considered **36** the infrequently arising question of whether a personal damages action ought to have been withdrawn from jury trial. Civil jury trials are uncommon in Scotland, only being available in the Court of Session. In this case, the appeal court held that the judge at first instance had improperly withdrawn the case from jury trial: while the Lord Ordinary appeared to have taken the view that no negligence had been established and therefore that no reasonable jury could have found fault on the part of the defender, the appeal court decided that, though it *might* have been that the jury would have agreed with the Lord Ordinary, there was some evidence upon which the jury could have found the defender at fault. That being so, the matter should have remained one for the jury.

In a significant Outer House judgment touching on the purpose of a **37** statute and the relevance of the Human Rights Act 1998 in interpreting the application of statutory provisions, Lord Pentland held in *Mykoliw v Botterill*²⁰ that the provisions of the Damages (Scotland) Act 1976 should be construed in such a way that a step-parent who had accepted a deceased person as a child of the family was an entitled 'relative' under the Act and thus able to claim damages in respect of the deceased's wrongful death. In so interpreting the Act, Lord Pentland held that the defender's contrary position would lead to an 'absurd and unjust' position, that the position argued for by the pursuer must have been the intention of the Scottish Parliament when it amended (albeit ambiguously) the provisions of the Act in 2006, and that the Human Rights Act 1998 required the 1976 Act to be interpreted in a way which was compatible with the pursuer's Convention Rights, especially his art 8 right to family life.

Notice ought also be taken of the decision of the Inner House in *Wilson v Excel UK Ltd*,²¹ **38** in which the court held that an employee who had, for a prank, pulled a fellow employee's ponytail, causing her injury, had not been acting in the course of his employment, so that his employer could not be vicariously liable for the delict committed. It is worth noting that, in reaching his decision, the Lord President referred to 'seminal judgments' of the Supreme Court of Canada in the field of vicarious liability, as it is not often that judgments of the Canadian courts are cited in Scottish actions.

19 *Stainsby v Fallon* [2010] CSIH 64.

20 [2010] CSOH 84.

21 [2010] CSIH 35, 2010 SLT 671.

- 39 To finish on a somewhat comic (albeit unfortunate) note, the decision of the Outer House in *Wallace v Glasgow City Council*²² makes the (fairly obvious, one would have thought) point that it is contributorily negligent for the user of a lavatory to stand on the lavatory bowl after use in order to open a window. The pursuer in this action, a teacher at a Glasgow local authority school, had done just this, and had been injured when the lavatory bowl had been wrenched free and toppled over, causing the teacher to be injured. As the court pointed out, there were other reasonable courses of action which the teacher might have taken in order to achieve her purpose (for instance, using a window pole to open the window) rather than standing precariously on the edge of the lavatory bowl. Holding that the school had not breached any duty of care owed to the teacher (noting that, to return to an earlier topic, a satisfactory risk assessment would have been unlikely to have disclosed the risk of lavatory users standing on the bowl in order to open a window), the court added that, even had the school been negligent, the teacher would have been 50 % contributorily negligent for her own injuries. So, remember the tale of Mrs Wallace the next time you are tempted to stand on the loo.

C. Literature

1. *E Reid, Personality, Confidentiality and Privacy in Scots Law* (W Green, 2010, Scottish Universities Law Institute Series)

- 40 Though this new and important book (the SULI series contains the most influential, and most judicially cited, modern legal works in Scotland) is not concerned solely with the law of delict, as a study of the contents discloses it is within the law of delict that personality rights, including the right to privacy, find their principal locus in Scots law. As the idea of ‘personality rights’ is a fairly new one in Scotland, this text has the potential to become an influential work in the field.

2. *LA Barnes, Children and Contributory Negligence (2010)* *Juridical Review* 195

- 41 This article presents an overview of certain issues suggested as significant in respect of contributory negligence and child victims. The matter has

22 [2010] CSOH 88.

traditionally been assessed on a case by case basis in Scotland, and the author suggests that there is little clarity in the approach of the law.

3. S Arnell, Employers' Vicarious Liability – Where Are We Now? (2010) Juridical Review 243

The author reviews the law on employers' vicarious liability in the light of the *Wilson v Excel* case referred to earlier, examining both English and Scots law in the process. The author argues that the Scottish courts are taking a more pronounced approach of keeping the 'close connection' test anchored in the 'course of employment' test, rather than taking the former as a stand-alone test. **42**

4. J Kerrigan, Negligence in Will-Making – a Line in the Sand? 2010 Scots Law Times (News) 77

The author reviews the current position taken by the Scottish courts of the liability of solicitors to disappointed beneficiaries, concluding that (i) negligent advice given in relation to the disposition of a client A's estate during A's lifetime and unconnected with the preparation of a will, appears not to be actionable on the part of disappointed beneficiaries; and (ii) even when advising A in relation to a will, negligent advice given by A's solicitor may not be actionable by disappointed beneficiaries if, prior to A's death, matters could have been put to right. **43**

5. E Russell, Contribution Causes Confusion, 2010 Scots Law Times (News) 169

The author considers the statutory provisions regarding contribution between wrongdoers, particularly in the light of the decision of the Supreme Court (discussed above) in *Farstad v Enviroco*.²³ **44**

6. R Rennie, Solicitors' Negligence – New Developments, 2010 Scots Law Times (News) 159

A short, but useful, review of recent case developments relating to solicitors' professional negligence. **45**

²³ [2010] UKSC 18.