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### Delict in Scotland in 2012

**Citation for published version:**

Hogg, M 2013, 'Delict in Scotland in 2012' European Tort Law Yearbook, vol 2012, pp. 577-608., 10.1515/etly.2013.3.1.577

**Digital Object Identifier (DOI):**

[10.1515/etly.2013.3.1.577](https://doi.org/10.1515/etly.2013.3.1.577)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher final version (usually the publisher pdf)

**Published In:**

European Tort Law Yearbook

**Publisher Rights Statement:**

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Martin Hogg

## **XVIV. Scotland**

### **A. Legislation**

There is nothing to report by way of new legislation in the field of delict this 1 year.

### **B. Cases**

#### **1. *Hamilton v Ferguson Transport (Spean Bridge) Ltd (and conjoined action)*, Court of Session Inner House, 8 June 2012, [2012] CSIH 52: Bringing Regularity and Consistency to Jury Awards of Damages in Cases of Death and Personal Injury; Judicial Guidance to Juries in making such Awards**

##### **a) Brief Summary of the Facts**

In two actions considered together by a five judge appeal bench of the Court of 2 Session, defenders against whom awards had been made for 'loss of society' under the Damages (Scotland) Act 1976<sup>1</sup> appealed against the awards made as being excessive, and enrolled motions for new trials. In each case, the level of damages had been determined by a civil jury following a trial of the evidence, damages in the first case being set at £ 142,060 and in the second at £ 90,000.

##### **b) Judgment of the Court**

The five members of the appeal bench unanimously held the two awards to be 3 excessive, and ordered a new trial in each case. Of more general significance,

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<sup>1</sup> Loss of society awards are available to specified relatives of family members killed as a result of delictual conduct. The 1976 Act has now been superseded by the Damages (Scotland) Act 2011, discussed in *M Hogg*, Scotland, European Tort Law (ETL) 2011, 555, no 1.

the court considered the issue of how greater consistency in jury awards might be achieved. The Lord President of the Court proposed that, for the future, judges should address the jury as to the spectrum of reasonable awards which might be made on the facts of the particular case before them.

### c) Commentary

4 The specific disposal of the two cases before the court was not the significant feature of these conjoined cases. What was significant was that the Court of Session has finally grappled with the nettle of the wide variance in damages awards handed down by juries in cases of death and personal injury. A five member appeal bench had been specially convened to give added weight to the court's judgment (three being the standard size of the appeal bench).

5 In the lengthy leading judgment, the Lord President of the Court narrates the controversy surrounding excessive and widely varying damages awards made by juries. He sets this controversy within an historical analysis of the different approaches to the use of jury trials in Scotland and England. Civil jury trials came rather late to Scots law, as the Lord President narrates:<sup>2</sup>

The Jury Trials (Scotland) Act 1815 introduced to Scotland civil jury trials upon the model of what had long been established in England and Wales.

6 Scotland's introduction of the civil jury trial had brought a degree of harmony to Scots and English practice for some considerable time. But things changed in the middle of the twentieth century:<sup>3</sup>

In England and Wales trial of personal injury actions by juries was effectively abolished by judicial decision in the 1960s.

7 Thereafter, in England civil awards of damages by juries were replaced by the judicial determination of awards by reference to a judicially evolved scale for such awards. This led to greater uniformity in English cases, but not in Scots ones.

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<sup>2</sup> Para 37.

<sup>3</sup> Para 46. His Lordship referred to this development as stemming from the new practice founded on the approach set out in *Sims v William Howard & Son Ltd* [1964] 2 Law Reports, Queen's Bench (QB) 409.

In this case, the Inner House accepted that the time for change had arrived **8** in Scotland. The court did not, however, wish to abolish civil jury trials in personal injury cases, accepting the recognised significance and importance of jury determination of awards in the Scottish legal tradition. In this regard, the Lord President quoted<sup>4</sup> from an earlier judgment of the Court of Session from 1988, in which it had been said that:

the ‘overall philosophy’ of Scottish practice is that the assessment of damages is first and foremost a matter for a jury. We, ourselves, might go further and suggest that it is this very philosophy which gives to awards of damages in this area their essential legitimacy. These awards, as it seems to us, should in the end reflect the expectation of the society which the legal profession serves and represents, rather than be simply an invention of that profession.

Rather than abolishing civil jury awards, the Lord President suggests the **9** following new procedure of judicial guidance to juries on appropriate damages awards:<sup>5</sup>

‘There was a broad consensus that, at the conclusion of the evidence, the parties should, in the absence of the jury, briefly address the trial judge on their suggestions as to the level of non-pecuniary damages which would be appropriate. In light of these submissions and having regard to his own experience and judgment, the trial judge would, in addressing the jury, suggest to them a spectrum within which their award might lie. That spectrum, he would inform them, was for their assistance only; it was not binding on them.’

His Lordship added that, it may be that in time rules of court could be devised to **10** fix the procedural aspects of the new process, but that this possible development need not hinder the immediate implementation of the proposed changes.<sup>6</sup>

The outcome of this case is a radically new, judicially mandated procedure **11** for the determination of jury awards in cases of personal injury and death, one designed to ensure consistency in awards and the avoidance of excessive awards. Whether these aims will be achieved will doubtless be disclosed in the coming years.

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**4** Para 47 (the quotation is from the judgment of the Court in *Shaher v British Aerospace Flying College Limited* 2003 Session Cases (SC) 540).

**5** Para 76.

**6** Para 78.

## **2. *Kirkham v Link Housing Group Ltd*, Court of Session Inner House, 4 July 2012, [2012] CSIH 58: Liability of Occupier of Premises for Injuries Sustained as a Result of Occupier's Failure to Inspect and Correct Uneven Paving Stones**

### **a) Brief Summary of the Facts**

- 12 In December 2006 the pursuer tripped and fell on uneven paving stones on her garden path, injuring her shoulder. Neither the pursuer nor her landlords, the defenders, had known of any danger on account of uneven paving stones on the path. The pursuer sued the defenders in both contract and delict. A trial of the facts took place in February 2010. Damages were agreed at £ 92,393. Ultimately, however, the defenders were found not liable in law for such damages. The pursuer appealed against that decision.

### **b) Judgment of the Court**

- 13 The appeal court held, in relation to the claim in delict, that the defenders had not been in breach of their statutory duty (under secs 1 and 2 of the Occupiers Liability (Scotland) Act 1960, 'the 1960 Act') to take such care as was in all the circumstances of the case reasonable to see that any person entering on to their property (including the pursuer) would not suffer injury or damage by reason of any danger which was due to the state of the property (or anything done or omitted to be done on the property). As the defenders had not known of the danger, the pursuer could only succeed in her claim if she were able to show a breach of the defenders' duty of care because, for instance, they had failed to set up an adequate system of inspection or had failed properly to implement a system of inspection already in place. The Inner House agreed with the judge at first instance that the pursuer had not proven a failure on the defenders' part of such a sort. Accordingly, the appeal was refused.

### **c) Commentary**

- 14 Occupiers' liability in delict has in Scotland, since 1960, been a statutory matter, governed by the 1960 Act, but it is to be noted that this Act does not establish a strict standard of liability: the liability of occupiers (such as landlords of property) remains fault-based, the standard of care being that narrated in the immediately preceding paragraph. In cases where a landlord has a danger reported to

it, and fails to correct the defect within a reasonable time, it will be reasonably easy to demonstrate a breach of the duty of care. But in cases where this has not happened, unless the danger is so patent that it ought to have been obvious to the landlord, recourse will likely be necessary (as in this case) to an allegation that the landlord did not have a suitable inspection regime in place by virtue of which dangers could periodically be identified.

The problem for the pursuer in this case with such an allegation was that she had failed to specify what an adequate system of inspection would have amounted to. Without such specification, the court had no standard by which it could judge the adequacy or inadequacy of the system that was in place (the specification of which was also lacking in detail). Lady Paton (delivering the judgment of the Inner House) noted that this difficulty had been highlighted by the judge at first instance, who had said that the ‘evidence about the *ad hoc* system of inspection and the frequency of visits to properties was vague. There was no satisfactory evidence as to what a reasonable inspection of common parts or a reasonably diligent implementation of the *ad hoc* system would have amounted to.’<sup>7</sup> The problem caused by a failure to specify what sort of management system a defender should have had in place in order to discharge a duty incumbent upon it was highlighted in last year’s Yearbook in relation to the case of *Campbell v Borders Health Board*,<sup>8</sup> in which a pursuer’s claim for damages against a health authority failed for lack of specification of the sort of system for dealing with patients of her class which the authority ought to have had in place. That this problem has arisen again in this case indicates that pleaders appear not to have appreciated the courts’ insistence on the importance of such specification in cases in which the essence of a pursuer’s delictual claim is alleged to be the poor management of risk.

In this case, it might be that a simple plea that an *ad hoc* system of repairs was inadequate, and that, say, a quarterly system of inspection of all properties in the landlords’ portfolio should have been implemented, would have improved the pursuer’s chances of success.<sup>9</sup>

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<sup>7</sup> Cited in the judgment of the Inner House at para 32.

<sup>8</sup> [2011] CSOH 73.

<sup>9</sup> In the tenancy agreement between the parties, the landlords had agreed to inspect the ‘Common Parts’ at ‘reasonable intervals’, though as the pursuer’s garden path was not one of the defined Common Parts it is somewhat difficult to assess to what extent a court might properly have had regard to the ‘reasonable intervals’ requirement in the agreement when considering the appropriate frequency of any competent system of inspection for the purposes of a duty of care in delict in relation to the garden path.

### **3. *Anton v South Ayrshire Council and North Ayrshire Council*, Court of Session Outer House, 11 May 2012, [2012] CSOH 80: Whether Liability to make Reparation in Delict Transmitted from a Local Authority to its Successor**

#### **a) Brief Summary of the Facts**

- 17 The pursuer in this action was the widow of a man who had died from mesothelioma contracted as a result (it was averred) of the inhalation of asbestos during the course of his employment between 1948 and 1971 by a local authority, Ayr County Council, which had been dissolved in a local government reorganisation of 1975. The statutory functions of Ayr County Council were, during various subsequent local government reorganisations, transferred to a number of successor bodies, until eventually being taken over in 1996 by the defenders (in both of whose present territorial areas the deceased had worked whilst employed by Ayr County Council). The deceased had not developed symptoms of mesothelioma until 2007.<sup>10</sup> The pursuer sued the defenders for damages in delict in respect of the death of the deceased. The defenders argued that no liability which Ayr County Council might have had in respect of the death of the pursuer's husband had transmitted to any successor local authority.
- 18 The question of the transmissibility of any liability turned primarily upon the interpretation of the legislation effecting the original transfer of Ayr County Council's liabilities, the Local Authorities etc (Miscellaneous Provisions) (Scotland) Order 1975,<sup>11</sup> regulation 3 (1) of which provided that:

All rights, liabilities and obligations which, immediately before 16th May 1975, were rights, liabilities and obligations of an existing local authority shall on that date, by virtue of this order, be transferred to and vest in the new authority ...

- 19 The question for the court was whether, immediately before 16 May 1975, Ayr County Council was under any 'liabilities' or 'obligations' to the deceased in delict which might transmit to its statutory successor(s). The defenders argued that, as the deceased had not suffered from any illness in 1975 in respect of which he might at that time have sued Ayr County Council, the defenders had been under no liability or obligation to him capable of being transmitted to the

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<sup>10</sup> The date of his death is not recited in the judgment.

<sup>11</sup> And subsequent legislation, namely the Local Government (Transitional Financial Provisions) (Scotland) Order 1996.

defenders. For any such liability or obligation to have been in existence, there would (as recognised in important previous judgments such as *Rothwell v Chemical Insulating Co Ltd*<sup>12</sup>) have had to have been a concurrence of both *injuria* (an act or omission giving rise to liability) and *damnum* (harm), but no harm had been caused until the emergence of the deceased's mesothelioma. The law of delict did not recognise any such notion as 'contingent liability' which might be transmitted under the relevant legislation. By contrast, the pursuer argued that, looking to the history and purpose of legislation dealing with local government since the Local Government (Scotland) Act of 1889, 'liabilities' should be interpreted to include liabilities to which (in the words of the 1889 Act) 'any authority are or would be, but for the passing of this Act, liable or subject, whether accrued due at the date of the transfer by this Act, effected or subsequently accruing'.

## b) Judgment of the Court

Giving judgment, Lady Clark held that: (i) there was no existing cause of action 20 on the part of the deceased against Ayr County Council immediately before 16 May 1975; (ii) it would be inappropriate to interpret 'liabilities' in the broad sense argued for by the pursuer by reference to the terms of the 1889 Act; (iii) the terms 'liabilities' and 'obligations' in the 1975 Order were not synonymous; (iv) the word 'liabilities' in the 1975 Order did not necessarily or obviously have the restricted meaning of liabilities which could be immediately sued upon (if it did, then contingent contractual liabilities would be unable to be transferred); (v) in two previous cases (one Scots, one English), liability had been held to transmit in respect of claims in which the damage had not begun to manifest itself until after the date of transmission; (vi) while a concurrence of *damnum* and *injuria* was required before a claim in delict could be raised, it could well be the case that there might be several years between the concurrence of the two elements. Considering all of these matters, Lady Clark held that the word 'liabilities' had a meaning which was wide enough in scope to cover potential liabilities in delict. She held this to be consistent with the historical observation that the

reorganisation of local government was a complicated statutory exercise but it was no part of the purpose of the resultant legislation to take away remedies from individuals which

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12 [2008] 1 Appeal Cases (AC) 281.



they would have had but for the reorganisation. In the present case, but for the reorganisation, the pursuers would have had a remedy against Ayr County Council for the death of the deceased if that local authority had not ceased to exist as a result of local government reorganisation.

- 21 In consequence, Lady Clark held the pursuer entitled to proceed with her action against the defenders and ordered a further procedural hearing to be held to determine the appropriate method for the litigation to proceed through the courts.

### c) Commentary

- 22 There has been much litigation, as well as some legislation, in Scotland and England in recent years in relation to liability for asbestos-related injuries, some of which has been reported in recent Yearbooks. Importantly, Scottish public and parliamentary opinion has been in favour of ensuring that employers who have exposed employees to asbestos dust should not be allowed to escape from liability on account of what are perceived (rightly or wrongly) as ‘legal niceties’. Judicial decisions which have stood in the way of recovery have met with parliamentary action: the denial of joint and several liability in respect of mesothelioma in *Barker v Corus*<sup>13</sup> resulted in the restoration of such liability in sec 3 of the (UK) Compensation Act 2006; the denial of liability for pleural plaques in *Rothwell v Chemical Insulation* (referred to no 19 above) resulted, in Scotland at least, in a parliamentary reversal of that position in the Damages (Asbestos-related Conditions) (Scotland) Act 2009. While there is no suggestion that Lady Clark’s judgment in this case was in any way reached with the pressure of such public opinion in mind, it was doubtless met with a general sense of approbation in wider society.
- 23 So much for the general background to the decision. As for the judgment itself, Lady Clark faced a difficult interpretative question. There was not a great deal of useful precedent to assist the determination of the word ‘liabilities’ within the specific statutory context before the court. Indeed, in search of the correct answer, her Ladyship went so far even as to raise with counsel in the case the idea of a possible Hohfeldian interpretation of the term.<sup>14</sup> However, as

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13 [2006] United Kingdom House of Lords (UKHL) 20.

14 A Hohfeldian exploration of the meaning of liabilities might have been interesting, given that Hohfeld distinguishes the right-duty pairing of jural correlatives from the power-liability pairing: see *WN Hohfeld, Some Fundamental Legal Conceptions As Applied In Judicial Reasoning* (1913) 23 *Yale Law Journal* (Yale LJ) 16. However, if we were to accept that ‘liabilities’ in the

she dryly remarked in her judgment, ‘there appeared little enthusiasm by parties to pursue this jurisprudential analysis’.<sup>15</sup> Quite possibly, as her Ladyship noted, the reason for the uncertainty surrounding the issue of whether contingent liabilities were intended to be covered was that ‘the problem was overlooked by parliamentary draftsmen’.<sup>16</sup> Whatever the reason for an absence of legislative elucidation of the concept of ‘liabilities’, Lady Clark’s three main reasons for her decision require some comment, these being: (i) the support for her decision provided in two prior judgments which seemed to be of some relevance; (ii) the purposes underlying the reorganisation of local government and its facilitative legislation; and (iii) the idea that, even though it is only where *injuria* and *damnum* coincide that there can be an ‘obligation’,<sup>17</sup> one may still have (contingent) ‘liability’ prior to such concurrence, and that such contingent liability was sufficient to trigger the legislative transfer provision.

As to the first of these reasons – the authority provided by the Scots case of *Downie v Fife Council*<sup>18</sup> and the English decision *Walters v Babergh DC*<sup>19</sup> – the first case, *Downie*, was evidently the more pertinent, as it dealt with the same provision as that before Lady Clark and the same question of the transfer of liabilities to a successor local authority. In that case, the alleged transfer of liabilities had taken place in 1996 but no physical symptoms of illness (*damnum*) had manifested themselves until 1997. Given the court’s finding in favour of a transfer of liabilities, the case appeared to support the idea that provisional liabilities *can* be transferred under the legislation. The difficulty with the case is that the question of the non-concurrence of *injuria* and *damnum* was not raised before the court or specifically considered by the judge. Nonetheless, given the timing of the pursuer’s illness in *Downie* and the consequent effect that what was transferred, at the relevant time, was therefore only a contingent liability, reliance on the case by Lady Clark does not seem improper. The *Walters* case,

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legislative provision before the court created the Hohfeldian sense of a ‘power’ vested in the deceased at the time of the transfer of Ayr County Council’s demise, it is difficult to see exactly what ‘power’ the deceased might be thought to have had. At that point, he was merely someone who had been exposed to asbestos. He might or might not have gone on to contract mesothelioma (many exposed people never contract mesothelioma), but at the relevant date we would not know into which category he fell, so could not know whether he had any ‘power’ (of future litigation, perhaps?) or not.

<sup>15</sup> Para 49.

<sup>16</sup> Para 45.

<sup>17</sup> Para 38.

<sup>18</sup> 2001 SC 793.

<sup>19</sup> (1983) 82 Local Government Reports (LGR) 235.

dealing with similar though not identical legislation, did give rise to specific judicial approval by Woolf J of the idea that contingent liabilities were intended to be included within the legislative ambit:

‘I do not think that the meaning of the word [liabilities] can be limited ... to a present, enforceable liability, excluding any contingent or potential liability. Used simpliciter, the word seems to me to be fully capable of embracing the latter form of liability’<sup>20</sup>

- 25 Lady Clark’s observations as to the purposes of local government reorganisation (quoted above) also seem pertinent. However, her Ladyship’s third supportive reason for the decision takes us into the more difficult waters of legal theory and fundamental obligational language discussed at the beginning of this article. ‘Obligations’ and ‘liabilities’, she tells us, are *not* synonyms: ‘obligations’ can only arise when there is a concurrence of *damnum* and *injuria*;<sup>21</sup> by contrast, liabilities may be contingent or potential, and may arise where there is *injuria* but, as yet, no *damnum*. While such a conclusion supported her decision, it is unclear what if anything justifies this view that obligations may not be contingent, but liabilities may. As the discussion in relation to the next discussed case will show, there is authority from the Scottish Institutional Writers indicating that ‘obligations’ may indeed be described as contingent. Her Ladyship might alternatively have held that *both* obligations and liabilities can be contingent (such a conclusion would equally have supported her decision), though that would of course have begged the question as to what then distinguishes the two concepts (and the inclusion of both terms in the relevant legislation certainly suggested a difference). One answer might have been to suggest that ‘obligation’ was intended to mean an interpersonal legal bond or tie (the first sense of obligation discussed above), whereas ‘liability’ was intended to mean any legal responsibility, not necessarily one deriving from such an interpersonal bond (so, statutory liabilities would be covered). On such an approach, an obligation or a liability would be different things, though each could be either unconditional or contingent, as the circumstances required.
- 26 Despite concerns about this last of Lady Clark’s three reasons, her other two reasons make out a reasonable case for the conclusion reached. However, in the next case discussed, *Bavaird*, the judge reached the opposite conclusion in a quite similar case, thereby throwing this whole issue of the transfer of contingent liabilities into doubt.

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<sup>20</sup> *Walters v Babergh DC* (1983) 82 LGR 235, per Woolf J.

<sup>21</sup> Para 38.

#### 4. *Bavaird v Sir Robert MacAlpine Ltd & others*, Court of Session Outer House, 5 October 2012, [2012] CSOH 157: Whether Liability to make Reparation in Delict, for Death Caused as a Result of Mesothelioma, Transmitted from a Local Authority to its Successor

##### a) Brief Summary of the Facts

The executors of the estate of a deceased individual, together with various of his family members, sued his former employers, the defenders, including one defender (South Lanarkshire Council) which was the statutory successor of a previous employer, the East Kilbride Development Corporation ('EKDC'). The pursuers averred that the deceased had died in 2008 from mesothelioma contracted as a result of the inhalation of asbestos in the course of his various periods of employment by the defenders. The issue for the court was exactly the same as in the previous case of *Anton*<sup>22</sup> (discussed in no 17ff above), namely whether or not the successor local authority had had transmitted to it any liability to make reparation to the pursuers in respect of the deceased's death. As in *Anton*, the pursuers argued that the liabilities transferred to EKDC included contingent liability to make reparation for the deceased's death. 27

In this case, the relevant provision effecting the transfer of liabilities to EKDC was regulation 2 of the New Town (East Kilbride) (Transfer of Property, Rights and Liabilities) Order 1996 ('the 1996 Order'), which provided that '[a]ny property, rights or liabilities of the development corporation' were to vest in South Lanarkshire Council. 28

As in the *Anton* case, EKDC argued that there was no delictual liability towards the deceased extant at the relevant date of transfer: such liability could arise only upon the concurrence of *damnum* and *injuria* (reference was again made to the Supreme Court's decision in *Rothwell*). The pursuers argued that at the relevant time EKDC owed the deceased a contingent liability, and that such liability had been transferred to EKDC under the relevant legislative provision. 29

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<sup>22</sup> *Anton v South Ayrshire Council* [2012] CSOH 80.

## b) Judgment of the Court

30 Lord Brailsford gave judgment in favour of South Ayrshire Council. While regulation 2 of the 1996 Order transferred all liabilities of EKDC on the relevant date, a ‘liability’ properly so styled involved a party being bound or obliged to do something. For a liability to exist, there required to be a concursus of *injuria* and *damnum*, and such had not occurred until 2007 at the earliest. For there to be a ‘contingent obligation’, there had to be some form of obligation, and no such obligation to the deceased had existed at the time of EKDC’s dissolution. In consequence, Lord Brailsford dismissed the action against South Lanarkshire Council.

## c) Commentary

31 By way of a preliminary observation, it should be immediately noted that the decision of Lord Brailsford dismissing the action against South Lanarkshire Council did not leave the pursuers without a remedy in this case: there were still three other defenders against whom the pursuers could proceed (the first alone being a company of substantial means). So, Lord Brailsford’s decision was not as catastrophic for the pursuers as it might otherwise have been.

32 That preliminary observation aside, a number of things will be obvious about this decision. First, there is no reference in the judgment (or the reported pleadings of counsel it narrates) to the decision in *Anton*. It can only be assumed that this is because, when counsel appeared before Lord Brailsford, the *Anton* decision had yet to be published (if it had, its omission from pleadings or judgment would be extraordinary). Second, it is to be noticed that the distinction in meaning drawn between ‘liabilities’ (contingent or otherwise) and ‘obligations’ made by Lady Clark in *Anton* is not drawn by Lord Brailsford in this case. The legislation with which Lord Brailsford was dealing did not narrate, as two separate things to be transferred on the dissolution of EKDC, ‘liabilities’ and ‘obligations’: instead it simply stated that (on the debit side) ‘liabilities’ were transferred. This clearly cast the debate in a different light. A legislative provision which distinguishes ‘liabilities’ from ‘obligations’ might be thought to give more scope to a pursuer to argue that a liability is something more provisional in law than an obligation; one which does not draw such a distinction makes a pursuer’s case harder, as a judge is more likely to assume (as Lord Brailsford does) that ‘liabilities’ and ‘obligations’ mean the same thing and that both *injuria* and *damnum* are required for either. Third, even though there is no distinction drawn between liabilities and obligations, it is perhaps somewhat disap-

pointing that neither of the cases discussed by Lady Clark are mentioned in Lord Brailsford's judgment (they appear not to have been cited to him). Those cases clearly give a different character to the debate about the transfer of delictual liabilities to successor local authorities than does the one case discussed in any depth by Lord Brailsford on the subject of the meaning of 'liabilities', *Liquidator of Ben Line Steamers Ltd, Noter*.<sup>23</sup>

In *Ben Line Steamers*, Lord Drummond Young discussed the concept of a 33 'contingent' obligation, distinguishing it from a 'pure' and a 'future' obligation. As Lord Brailsford noted, Lord Drummond Young had opined in *Ben Steamers* that, for an 'obligation' to be contingent, there had to be some obligation in existence to begin with. However, the matter is not quite as clear cut as this. The term 'contingent obligation' has been used in two distinct senses in Scots law. One is the sense identified by Lord Drummond Young – of a type of condition applying to an already constituted obligation – but there is a second sense in which the term has been used, namely to signify a condition which is suspensive of an obligation being undertaken at all, so that the very existence of the obligation is contingent. It was to this sense of 'conditional obligation' that Lord President Hope (citing the Scottish Institutional Writer Erskine) referred in *Costain Building & Civil Engineering Limited v Scottish Rugby Union PLC*<sup>24</sup> when he said:

Erskine states that a conditional obligation has no obligatory force until the condition is purified, because it is in that event only that the party declares his intention to be bound and consequently no proper debt arises against him until it actually exists. On his analysis the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself.

Clearly, the sense of 'contingent obligation' being argued for by the pursuers in the 34 case under discussion was of this sort, not the sort referred to by Lord Drummond Young for, at the time of the transfer of liabilities to EKDC, a binding obligation on the part of the transferee to make reparation to the deceased in respect of mesothelioma would come into existence if, and only if, he went on to contract mesothelioma. Given that there is a perfectly respectable tradition in the law of describing this sort of case as a 'contingent (or suspensive) obligation', Lord Brailsford's dismissal of the idea that such a possibility might reasonably be reflected in an interpretation of the legislative provision before him must be open to criticism.<sup>25</sup>

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<sup>23</sup> 2011 Scots Law Times (SLT) 535.

<sup>24</sup> 1993 SC 650 at 654.

<sup>25</sup> It should be noted that Lord Brailsford previously adopted the same approach to the concept of a 'contingent obligation' in *Grimshaw v Bruce* [2011] CSOH 212.

35 Whether or not Lord Brailsford reached the correct decision, there is the problem of how to reconcile the decisions in *Anton* and *Bavaird*. The latter decision will have been unpopular with the families of mesothelioma victims. One might attempt to explain it away as based upon different legislative provisions than those governing the facts of *Anton*, but that would not assist victims subject to legislative provisions of the type in *Bavaird*. It is clearly undesirable for victims' (or families') abilities to sue to be dependent upon the precise wording used in whichever specific legislative provisions govern their case. Either the Inner House will have to find a way of ensuring a single interpretation of such provisions regardless of their precise wording,<sup>26</sup> or else the Scottish Parliament may feel compelled to remedy the situation legislatively.

**5. *Macdonald v Aberdeenshire Council, Court of Session Outer House, 14 June 2012, [2012] CSOH 101, 2012 Scottish Civil Law Reports (SCLR) 620: Whether Road Traffic Accident the Result of a Breach of a Duty of Care on Roads Authority to Give Adequate Warning of Road Junction***

**a) Brief Summary of the Facts**

36 The pursuer was the driver of a car involved in a road traffic accident on a road (the A97) in rural Aberdeenshire on 8 May 2006. Her car collided with a van at a junction of the A97 when the pursuer, without giving way, drove straight on to the A97 from the smaller road on which she had been travelling, into the path of the van. The pursuer's mother and aunt, passengers in her car, were killed; the pursuer was injured in the accident.

37 The pursuer brought an action for damages in delict against the defenders, the local authority responsible for the maintenance of the road. She averred that the local authority had failed to post adequate signs or road markings indicating that the pursuer had been approaching a junction of the road at which she was required to give way; that what markings there were on the road had become indistinct and were not visible to the pursuer; and that a 'Give Way' sign was only visible to road users at the last minute, when it was too late to stop at the junction. The pursuer further averred: that the defenders had carried out an inspection of the junction in April 2006, and had planned to conduct certain re-

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26 An appeal in the *Bavaird* litigation was heard in July 2013.

pair works to the junction; that these had not occurred by the time of the accident; but that they had been carried out shortly after it (such works including the erection of a ‘Give Way’ sign in advance of the junction, and the re-marking of the road). The pursuer argued that the defenders owed her, as a user of the road, a duty to ‘devise, institute and maintain an effective system for the management of the roads for which they were responsible’ as well as a duty to ‘devise, institute and maintain a reasonable system of installation, inspection and repair of the road signs and markings’ at the junction, and that they had breached these duties owed to her. The defenders argued in reply that, while as a matter of fact they undertook to repaint road markings in terms of a policy for the purpose of managing and maintaining public roads, they owed no duties of care to the pursuer of the sort alleged. They further alleged that the layout of the junction and its signage and markings gave adequate warning of its nature, and that the pursuer had shown insufficient care in approaching the junction.

## b) Judgment of the Court

Lord Uist, giving judgment in the case, referred<sup>27</sup> to the well-known tripartite 38 test for the imposition of a duty of care in delict (set out by the House of Lords in *Caparo plc v Dickman*<sup>28</sup>) which requires courts to have regard to the issues of (i) foreseeability, (ii) proximity, and (iii) fairness, justice and reasonableness, when considering whether or not to impose a duty of care upon a defender. His Lordship also considered in detail prior authority in relation to the duties of care on road authorities in relation to road signage and markings,<sup>29</sup> as well as other cases where public bodies or officials had ‘taken control’ of a hazard and thus arguably come under a duty of care to members of the public in relation to the hazard. Having considered such authorities, and having had particular regard to the very similar prior case of *Murray v Nicholls*,<sup>30</sup> Lord Uist held that the defenders had not been under duties of the sort argued for by the pursuer.<sup>31</sup> While an accident of the sort which had happened might have been reasonably fore-

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<sup>27</sup> See Lord Uist’s judgment at para 8 f.

<sup>28</sup> [1990] 2 AC 605.

<sup>29</sup> Such prior authorities being: *Bird v Pearce* [1979] Road Traffic Reports (RTR) 369; *Murray v Nicholls* 1983 SLT 194; *Stovin v Wise* [1996] AC 923; *Gorringe v Calderdale MBC* [2004] 1 Weekly Law Reports (WLR) 1057.

<sup>30</sup> 1983 SLT 194.

<sup>31</sup> See Lord Uist’s judgment at para 49.



seeable, that was insufficient for liability to be established. By painting lines at the junction because of the perceived risk of collisions, the defenders had not somehow imposed on themselves, retrospectively, a common law duty to paint the lines or, prospectively, to paint them back if they were obliterated.<sup>32</sup> Furthermore, by placing an order for the work to be done, the defenders did not come under any duty to which they were not subject before placing the order.<sup>33</sup> His Lordship consequently dismissed the action.

### c) Commentary

- 39 Lord Uist's judgment is consistent with the decision upon which he relies most heavily, *Murray v Nicholls*. Dating from 1983, that decision evidently pre-dates the enunciation of the tripartite test in *Caparo*, but Lord Uist believes that the judge in that case, Lord Stott, 'effectively applied the *Caparo* test in reaching his decision'. What neither Lord Uist, nor Lord Stott, make particularly clear, however, is which of the two elements of *Caparo* other than foreseeability precludes liability in this sort of case: is it proximity, or is it 'fairness, justice, and reasonableness'? The latter consideration has often been used to deny the imposition of common law delictual liability on public bodies in relation to the exercise by them of statutory functions (such as the statutory duty and related power applicable to the defenders in this case<sup>34</sup>), on the ground that the imposition of a duty of care in respect of the exercise of such functions may have adverse consequences for the way in which duties are discharged to the public as a whole, or because the imposition of such a duty would unreasonably interfere with the discretionary exercise of powers given to the authority. Something of that sort was alluded to by Lord Uist in this case, who mentions approvingly Lord Stott's concerns in *Murray* that the imposition of a duty of care in such a case might well lead to the undesirable consequence of duties being imposed in other circumstances, such as in relation to a failure to provide a pedestrian crossing. This example, says Lord Uist, is effectively a 'fair, just and reasonable' consideration.<sup>35</sup>
- 40 It seems then, though it is not entirely clear, that the court's refusal to impose a duty of care on the defenders in this case was the result of a belief that it

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32 Para 46.

33 Para 47.

34 The defenders' statutory duty to maintain public roads, and the related power to make improvements to them, is found in sec 1(1) of the Roads (Scotland) Act 1984.

35 See Lord Uist at para 45.

would not be fair, just or reasonable to do so (the third limb of the *Caparo* test). It would have been helpful to have had that conclusion more conclusively stated by Lord Uist, as it would have been helpful had his Lordship mentioned whether he saw the defenders as being in a proximate relationship with the pursuer or not. It would also have been useful to have seen some discussion of other issues raised in previous cases, such as whether or not the defenders' failure to exercise its power to improve the road should be considered so 'irrational' as to impose a duty to act (it seems not), and the question of whether the absence of any mechanism in a statute for members of the public to seek redress for an alleged failure by a public body to fulfil a statutory duty mitigates for or against the imposition of a common law duty of care. Lord Uist omits any mention of these matters, though they form part of the discussion in a number of the prior authorities to which he refers.<sup>36</sup>

In short, though this judgment seems consistent with prior authorities, and reaches a conclusion which is not surprising given those authorities, the decision of the court is stated without as full a discussion of the important issues as one might have wished to have seen. 41

## **6. *Daly v Murray and Others*, Court of Session Outer House, 29 June 2012, [2012] CSOH 109: Action for Damages in Relation to Physical Abuse Subject to Triennium Limitation; No Sufficient Grounds for Exercise by Court of its Discretion to Waive Limitation**

### **a) Brief Summary of the Facts**

The pursuer had, between the ages of 6 and 12, been resident at a children's home run by the Poor Sisters of Nazareth in Aberdeen. The defenders in this action were the Poor Sisters Order, the Religious Superior of the Order during the period of the pursuer's residence, and Aberdeen City Council (who were the statutory successors of the now dissolved Grampian Regional Council, who had been responsible for the supervision of the home and the placing of the pursuer there<sup>37</sup>). The pur- 42

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<sup>36</sup> See for instance such discussion in *Stovin v Wise* [1996] AC 923.

<sup>37</sup> No question was raised in this case of any possible problem concerning the transfer of delictual liabilities to Aberdeen City Council of the sort raised in the cases of *Anton* and *Bavaird*, discussed at nos 17 ff and 27 ff above.

suer alleged that he had been subject to physical abuse and harsh punishments while he was a resident at the home, and in 2000 raised an action against the defenders for damages for the loss, injury and damage which he alleged he had suffered. Amongst other defences lodged by the defenders, they pleaded that the action was time-barred by virtue of the triennium limitation of actions in respect of personal injury imposed under sec 17 of the Prescription and Limitation (Scotland) Act 1973 ('the Act'). The pursuer argued that the triennium did not begin until May 1997 when he first became aware that (i) his injuries were sufficiently serious to justify his bringing an action for damages and (ii) the injuries were attributable in whole or in part to an act or omission of the defenders. He further argued that, in the event that the action was time-barred, the court should exercise the discretion given to it under sec 19A of the Act to waive the time bar,<sup>38</sup> and that the defenders would not be prejudiced by the court so doing.

## b) Judgment of the Court

- 43 Lord Drummond Young gave judgment in the case.<sup>39</sup> His Lordship held that the action was time-barred as a result of the triennium, which in his opinion had begun to run at the date when the pursuer attained majority (20 October 1985).<sup>40</sup> A postponement of the triennium under the conditions mentioned in sec 17(2) of the Act was not applicable, as at the date when the pursuer attained majority the evidence indicated that he had been aware of the nature of his injuries and the fact that they were serious. He had only failed to take action earlier because he did not think, until 1997, that anyone would believe his story. Given his awareness of the nature and seriousness of the injuries he had suffered when he attained majority, this precluded a plea by the pursuer under sec 17(2) that he

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38 Section 19A provides that the triennium may be disregarded by the court, and the action allowed, if 'it seems equitable to the court' to permit this.

39 His Lordship had decided an earlier case of the same sort against the same defenders: *B v Murray*, 2005 SLT 982.

40 Section 17(2) provides that the triennium runs either from the date when the injuries were sustained, or at such later date when the pursuer became so aware, or could reasonably practicably have become so aware, of the fact that (i) his injuries were sufficiently serious to justify his bringing an action of damages, (ii) they were the result of an act or omission, and (iii) the defender was the party to whom the act or omission was attributable. Section 17(3) adds the caveat that, in respect of injuries to minors, the calculation of the period specified in sec 17(2) is not to begin until the age of majority.

had not become aware of the seriousness of his injuries until 1997, and thus there could be no postponement of the running of the triennium.

As to the question of an exercise by the court of its discretion under sec 19A 44 to waive the triennium, Lord Drummond Young noted that previous cases disclosed a judicially adopted principle that, if there is a likelihood of significant prejudice to the defender as a result of the delay, this will usually result in a decision in favour of the defender, as well as a further principle that the passage of time may in itself result in significant prejudice to a defender. His Lordship did not agree that ‘the pursuer belongs to a particular category of persons who might be taken to be “silenced” as a result of childhood abuse’ such that membership of such class might reasonably justify a delay in their bringing of claims in respect of such abuse.<sup>41</sup> The pursuer had provided no cogent explanation for the delay in bringing his claim, and there was a significant risk of prejudice to the defenders in an action being maintained so long after the events were alleged to have occurred and memories of them were likely to be unreliable.

His Lordship added that, in relation to the case against Aberdeen City Council, there were no sufficient averments by the pursuer of any fault on the part of the Council in placing the pursuer in Nazareth House, so that the case against them was in any event irrelevant. 45

### c) Commentary

This case concerns the very sensitive question of historic child abuse committed 46 many years ago against children whilst in residential accommodation or otherwise under the care and supervision of non-family members. This troubling issue is not confined to Scotland: many jurisdictions have had to deal with the question of liability in such cases, and most jurisdictions have some sort of ‘statute of limitations’ which might conceivably prevent claims for abuse being brought many years after the time of the abuse. There was available to the court in this case a number of prior cases dealing with similar sorts of abuse and from which the court could thus seek guidance.

The Scots law dealing with cases of time bar in relation to such claims for 47 personal injury is doubly interesting from a legal point of view in that it contains both a provision allowing for postponement of the start of the triennium limitation in cases where the victim lacks knowledge of the existence or seri-

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<sup>41</sup> Para 18.

ousness of the injuries and of the fact that they have been caused by the act or omission of an identifiable defender, as well as a provision granting the power to courts to waive the triennium altogether in cases where it would be demonstrably equitable to do so. These provisions are difficult to apply in the case of historic child abuse, however, for the reasons identified by Lord Drummond Young. In the case of the postponement provision, the very specific requirements permitting postponement do not seem apt to apply to many if not most cases of child abuse: most victims know that they have been the victim of serious injuries, but have simply been unwilling for many years to raise a claim out of fear of public shame, disbelief, or incredulity at their allegations. Recent events may well be changing victims' attitudes towards making their abuse public, but do not change the fact that the terms of the relevant provision concerning postponement of the triennium are not worded so as to allow postponement merely because of a sense of guilt or a 'culture of silence' in the minds of victims. If a change of the law is needed, then it ought properly to derive from Parliamentary action rather a strained judicial reading of the existing law.

48 Any change to the law would, of course, face the problem identified by Lord Drummond Young in his discussion of the provision allowing for a court to waive the triennium: the passage of time may seriously prejudice a defender's entitlement to a fair trial. Memories may become very faded, reliable documentary or forensic evidence may be lacking, witnesses may have died. The current law seeks to tread a difficult balance between protecting the rights of victims of personal injuries and the need to ensure alleged wrongdoers a fair trial. At present, there seems to be no clear sense that Parliament feels the current balancing of these considerations is the wrong one, or that leaving it to courts to make the best assessment they can on the equities of waiving the time bar is not producing generally fair results, even if that means that some vulnerable parties, such as the victims of child abuse, are left without a remedy.

49 The best solution to this tricky issue may well be found in the change in victims' attitudes which is already underway: a greater willingness to bring claims in a public climate where the victims of abuse are encouraged and supported, rather than shunned. In relation to the application of the present law undertaken by Lord Drummond Young in this case, his Lordship's conclusions seem to be sound ones based upon a body of cases<sup>42</sup> supportive of his interpretation of the Act.

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42 See eg, *CG v Glasgow City Council* 2011 SC 1; *AS v Poor Sisters of Nazareth* 2007 SC 688; 2008 Session Cases, House of Lords (SC (HL)) 146.

**7. *Board of Managers of St Mary's Kenmure v East Dunbartonshire Council*, Court of Session Outer House, 27 December 2012, [2012] CSOH 198: Local Authority Liable in Delict to Owners of 'Secure Units' when Troubled Youngsters Rioted causing Damage to the Premises**

**a) Brief Summary of the Facts**

The unusual statutory background to this litigation is sec 10 of the Riotous Assemblies (Scotland) Act 1822 ('the 1822 Act'), which provides (in its amended form) that:

In every case where any damage or injury shall be done to any church, chapel, or building for religious worship, or to any house, shop, or other building whatsoever, or any fixtures attached thereto, or any furniture, goods, or commodities therein, by the act or acts of any unlawful, riotous, or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such unlawful, riotous, or tumultuous assembly, the party injured or damnified thereby shall be entitled to recover full compensation for the loss or injury, by summary action against the council (being a council constituted under section 2 of the Local Government etc (Scotland) Act 1994) within whose area the loss or injury shall have been sustained; which action shall and may be brought before any competent court in Scotland.

In March 2008, disturbances broke out at two 'secure units' to which troubled youngsters had been sent by the Children's Panel (the body which determines the appropriate disposal of criminal conduct by those in Scotland too young to be tried as adults). Both premises suffered damage as a result of these disturbances. The owners and operators of the two secure units sought to recover the costs of the damage done from the defenders, the two local authorities in whose areas the secure units were located. The pursuers' claims were based upon sec 10 of the 1822 Act. The defenders denied liability on the basis that the disturbances which occurred at the units were not 'unlawful, tumultuous or riotous assemblies' and, separately, that the provisions of sec 10 were not intended to indemnify parties who had custody of any party engaged in such assemblies. The court was therefore faced with the task of determining the proper interpretation and application of sec 10 of the 1822 Act.

**b) Judgment of the Court**

Temporary Judge Morag Wise, Queen's Counsel (QC), giving judgment in the matter, held that the provision of the 1822 Act required to be interpreted against

a background of developments having taken place that were unforeseen at the time.<sup>43</sup> The two issues facing her were (i) whether the words ‘the party injured’ might reasonably be taken as used by Parliament to include those owning or operating an institution whose inmates have rioted, and (ii) whether, in relation to the words ‘unlawful, tumultuous or riotous assembly’, the assembly requires to have a public content, given the historical background of the need to quell assemblies of the populace, usually those with a political aim, whose coming together became violent with consequent threat to disturbance of the public peace followed by actual damage. Following a historical and legislative survey of statutes dealing with riots, including the 1822 Act, and an examination of English law (including the important case of *Yarls Wood v Bedfordshire Police Authority*<sup>44</sup>), the judge held that (i) the words ‘the party injured’ were apt to include the owners and/or operators of an institution such as a secure residential unit in which young people are detained, and (ii) as it is not a pre-requisite of the Scottish criminal offence of mobbing and rioting that it take place in the street or some other form of public place, the formation of a group within a secure residential unit for the purpose of unlawful and riotous acts causing damage to property was capable of falling within the definition of ‘riotous assembly’.

- 53 The judge therefore ordered a proof before answer (a trial of the facts before application of the law to them) in relation to both claims.

### c) Commentary

- 54 This judgment is of interest not only for the little known statutory provision which provides for, in essence, community compensation for property damaged during riots, but also for the challenge faced by the court in deciding how to interpret and apply a statute from 1822 on damage caused by riots to circumstances never envisaged by Parliament at the time (the ownership and operation of detention facilities by a party other than the Crown, and thus a party whose private law interests might be adversely affected by riotous behaviour by inmates of such facilities). While the judge noted that counsel were largely agreed that a ‘purposive interpretation’ ought to be applied to statutory provisions,

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<sup>43</sup> Para 38.

<sup>44</sup> [2010] QB 698, which concerned the permissibility of a claim under the Riot (Damages) Act 1886 by a body of a similar sort to the pursuer in *St Mary's Kenmure*. In that case, the Court of Appeal held the claim to be permissible.

they were not so agreed on what consideration of the historical context and purpose of the Act meant for its application to an injured party who had control of the persons causing the damage, and to events not occurring in a public place.

The judge's decision of these two issues seems reasonable, given that (i) because the continuing purpose of the Act was to provide for compensation by the community (in the present form of the local authority) and not by those responsible for maintaining law and order, there seems no good reason why (so long as the claimant under the Act is not in some sense a party to the riot<sup>45</sup>) a private party responsible for the custody of persons should not qualify for losses caused by rioters; and (ii) the crime of 'mobbing and rioting' need not occur in the street or some other form of public place: all that is necessary is that there be a 'realistic risk of [the conduct] being discovered'<sup>46</sup> by the public (a description perfectly applicable to the facts before the judge). Both of these factors support the correctness of the judge's decision in this case. 55

## **8. *French and Dempsie v Strathclyde Fire Board*, Court of Session Outer House, 9 January 2013, [2013] CSOH 3: Breach by Employer of Common Law Duty of Care and of Strict Liability Duty under Employment Legislation towards Firefighters Employed by it**

### **a) Brief Summary of the Facts**

Two firefighters were injured during the course of their employment when brickwork above a doorway of a burning building which they had been instructed to force open by their watch commander collapsed on them. The firefighters alleged that their employer (the defenders), and their superior officer, the Watch Commander, for whom their employers were vicariously liable, had been in breach both of (i) a common law duty of reasonable care owed to them 56

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<sup>45</sup> As the judge notes, a claim by a rioter himself would be excluded by the maxim *ex turpi causa non oritur actio* (see para 43 of the judgment). She also recognises, however, that a party having custody of rioters which failed to mitigate the damage caused in the riot (presumably by putting a swift and efficient end to it) might, after an examination of the facts of the case, not qualify for recovery (para 43).

<sup>46</sup> *Harris v HMA*, 2012 Justiciary Cases (JC) 245, para 25.



regarding their safety at work, in having instructed them to enter the building in an unsafe manner, as well as of (ii) the Personal Protective Equipment at Work Regulations 1992<sup>47</sup> and the Provision and Use of Work Equipment Regulations 1988, in respect of the equipment given for their use.

- 57 The defenders answered that (i) the type of injury suffered by the pursuers was not foreseeable by the Watch Commander, and in any event, that his actions had met the standard of care of a skilled firefighter exercising reasonable care, and (ii) that no evidence had been led that the defenders were in breach of the 1992 Regulations, and that, so far as the 1988 Regulations were concerned, there was no evidence that tools of the type supplied for use by the pursuers to open premises had ever caused injury to anyone before and therefore that the equipment supplied was ‘suitable for the purpose for which it [was] used or provided’, as the Regulations required.

### **b) Judgment of the Court**

- 58 Having heard expert evidence on the circumstances of the accident and of the nature of the equipment used, Lord Drummond Young gave judgment in the case.
- 59 In relation to the common law case, he held that the two elements of crucial importance were foreseeability and the relevant standard of care,<sup>48</sup> adding that, in assessing these elements, ‘[t]he probability of an event is clearly important, in the sense of the level of likelihood that it will happen’ and that also important was ‘the seriousness of the consequences if that event does in fact happen’.<sup>49</sup> His Lordship held that an accident of the type which had occurred had been reasonably foreseeable to the Watch Commander, and that the Watch Commander had failed to exercise the care required of him (that being the care to be expected of ‘a skilled firefighter exercising reasonable care’<sup>50</sup>). In consequence, the defenders were in breach of the common law duty owed to the firefighters.
- 60 In relation to the statutory claims (of strict liability), his Lordship held that there was evidence that the pursuer suffered relevant injuries in relation to the 1992 Regulations, and also that the tools supplied to the firefighters were not

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47 These Regulations were cited only by the second pursuer in his case.

48 See para 37 of his judgment.

49 Para 37.

50 Para 41.

suitable as required by the 1988 Regulations, and that, in consequence, liability was also established under these Regulations.

Lord Drummond Young held the defenders liable to pay the first pursuer £ 113,000 and the second pursuer £ 332,500 (such amounts having been agreed by the parties).

### c) Commentary

This judgment is perhaps most interesting in what it says about the level of care required at common law to be shown by a supervising fire officer (the Watch Commander) in respect of the firefighters operating under him or her at the scene of a fire. Lord Drummond Young identified the requisite standard of care as that of ‘a skilled firefighter exercising reasonable care’. His Lordship added that there had been some debate before him of whether the relevant standard was either that of an ordinary employer or else a version of the test for professional negligence laid down in the famous Scottish case of *Hunter v Hanley*.<sup>51</sup> His Lordship was unwilling to concede that there was a strict dividing line between these two tests, such that individuals might fall clearly into one camp or the other:

‘In my opinion there is no sharp dividing line between these tests; there is rather a spectrum of situations ranging from a case where the person responsible for safety has clear professional or technical qualifications to cases where he has no particular qualifications but is under an ordinary common law duty of care. The extent to which specialist expertise must be brought to bear will vary according to the circumstances of the particular case.’<sup>52</sup>

Such an approach might be said to have the benefit that it recognises that there are occupations and undertakings which, while not strictly professions, nonetheless involve the exercise of a high degree of skill and care which tends towards the professional standard, if not strictly falling under it. Clearly, in Lord Drummond Young’s view, a Watch Commander at the scene of an emergency

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<sup>51</sup> 1955 SC 200. The test established in the case comprises three elements: (1) it must be proved that there is a usual and normal practice in the profession in question; (2) it must be proved that the defender did adopt that practice; and (3) it must be established that the course the defender adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

<sup>52</sup> Para 41.

falls into that middle ground. As His Lordship commented of the standard to be expected of the Watch Commander:

‘That is not a professional qualification, and accordingly the *Hunter v Hanley* test does not apply in its ordinary form. Nevertheless this standard does require the officer in charge to exhibit a special level of skill and care, which differs from that of an ordinary employer.’<sup>53</sup>

- 64 It may be questioned however whether this conclusion justified Lord Drummond Young’s view that there is no sharp dividing line between the test for professional negligence and the test for ordinary negligence. While the law doubtless accepts that those in the non-professional class might be required to act with either an ordinary or a ‘special’ level of care, as the circumstances dictate, the reported decisions on professional negligence continue to emphasise a characteristic of professional practice (not emphasised in this case) which merits, in the view of the courts in general, the special treatment of professional negligence cases: the idea that there may be a number of reasonable ways in which a member of a profession may undertake certain professional tasks, there being no single or uniform way of properly undertaking such a task. This is the defining quality of the professional negligence test, and not simply the use of ‘specialist expertise’. Whether a separate test for professional negligence should continue to be deployed may merit debate, but there was no reason for it to be challenged by Lord Drummond Young in this case: as he rightly decided, it may be entirely appropriate to hold someone such as a Watch Commander of a fire station to a special level of skill and care appropriate to his rank, responsibility and experience, to which it would not be appropriate to hold an ordinary fire-fighter.
- 65 Despite the remarks made by Lord Drummond Young, this judgment ought not to be seen as casting any serious doubt on the continued division between the ordinary and professional tests of negligence.

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53 Para 41.

**9. *Ruddy v Chief Constable of Strathclyde and the Lord Advocate*, United Kingdom Supreme Court, 28 November 2012, [2012] UKSC 57: Procedural Propriety of Conjoining Two or More Defenders in an Action combining Claims for Damages in Delict and for Damages for Breach of an ECHR Right**

**a) Brief Summary of the Facts**

The pursuer alleged that he had been assaulted by a number of police officers 66 employed by Strathclyde Constabulary. The first defender was sued for damages in delict on the basis that he was, as the employer of the police officers, vicariously liable for their conduct. The pursuer further argued that (i) the conduct of the officers constituted degrading treatment which violated the pursuer's rights under art 3 of the European Convention on Human Rights; (ii) the police force had failed properly to investigate the matter following a complaint by the pursuer to the Police Complaints Branch; and (iii) this failure to investigate amounted to a further breach of the pursuer's art 3 rights. The second defender, who was responsible for all criminal prosecutions in Scotland, was also sued as having breached the pursuer's art 3 rights by wrongfully failing to prosecute the offending police officers. The pursuer argued that both defenders ought to be found 'severally' liable for the damages sought. The pursuer failed in his claim at first instance before the Sheriff, and on appeal before the Sheriff Principal (who removed the second defender from the action). The pursuer further appealed to the Inner House of the Court of Session, who rejected his appeal on the procedural ground that it was improper for a pursuer who was suing two or three defenders for separate causes of action to put into his summons a claim for a lump sum coupled with a request that the court split up such lump sum and give a several decree for whatever amounts the court thought proper. The pursuer appealed to the Supreme Court.

**b) Judgment of the Court**

The Supreme Court disagreed with the Inner House's characterisation of the 67 action. Lord Hope, delivering the leading judgment, said that this was not a case where a pursuer was seeking to hold separate defenders liable for a single lump sum. There were two claims in which the pursuer was seeking an award of

damages: the first claim, based on allegations of assault at common law and a breach of the substantive obligation under art 3, was directed against the Chief Constable only; the second claim, based on allegations that the procedural obligation under art 3 had been breached, was directed against the Chief Constable and the Lord Advocate. In Lord Hope's view, it was clear that the two claims related to separate wrongs, committed at different times by different people, and that the pursuer was not asking for the defenders to be found liable for a single lump sum in respect of these separate wrongs. His Lordship therefore held that the objection to the competency of the action was misconceived and should be rejected.

- 68 The Supreme Court ordered the case to be returned to the Inner House for an appeal against the Sheriff Principal's decision on the substance of the law to be heard.

### c) Commentary

- 69 This case raises a point of procedural rather than substantive law, and for that reason was not included in last year's Yearbook. However, as the case is the only Scots one with any delictual element in it to go before the Supreme Court in 2012, it seems appropriate to mention it briefly at this point.

- 70 Though the point raised is a procedural one, it is of some practical significance. There are many instances of wrongdoing where a number of wrongdoers may be alleged to have harmed a victim through the commission of more than one instance of delictual conduct. Courts are somewhat wary of the difficulties which may arise from conjoining all of the claims in such cases into a single action, but this decision serves as a reminder that doing so is not improper so long as the pursuer specifies the damages sought in respect of each separate wrong (doing so avoids the rule, established from the cases, that one pursuer cannot claim from two or more defenders, in respect of separate wrongs, a lump sum of damages and ask a court to split up such lump sum by giving a several decree against the various defenders for such amount as the court thinks proper<sup>54</sup>). As noted above, the Supreme Court did not think that a lump sum was being asked for here, so the exclusionary rule was inapplicable. While recognising the appropriateness of this rule, in his judgment Lord Hope issued a re-

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<sup>54</sup> As to this rule, see eg: *Ellerman Lines Ltd v Clyde Navigation Trs*, 1909 SC 690; *Barr v Neilson* (1868) 6 Macpherson (M) 651; *Maclaren*, Court of Session Practice, 266.

minder about the limits to which procedural arguments should curtail the ability of pursuers to seek redress before the courts:<sup>55</sup>

The guiding principle, where an objection to competency is taken on these grounds, is whether the way the action is framed is likely to lead to manifest inconvenience and injustice. The court must, of course, seek to be fair to all parties. It must take a pragmatic approach to the question whether the way the case is presented is so complex and disconnected that, despite the opportunities that exist for case management, it will not be possible to conduct the case in a way that meets the requirements of justice. The same is true if a motion is made for two actions to be heard together, or for two actions to be conjoined. Each case will have to be looked at on its own facts. There is no absolute rule one way or the other, so long as the rule which says that it is incompetent for a pursuer to ask for a decree in a lump sum for separate wrongs is not broken. Rules of procedure should, after all, be servants, not masters, in matters of this kind.

This is a useful guide for future courts dealing with complex delictual claims: 71 the overarching consideration in such litigation is whether the conjoining of claims for separate wrongs against multiple defenders will adversely affect the ability of the court to do justice in the case. A proper specification of the nature of the individual wrongs alleged to have been committed by each defender, coupled with an avoidance of any claim by which the pursuer seeks to hold each defender liable for the totality of the harm suffered as a result of the separate wrongs, should ensure that the aims of justice are served and that the so-called ‘omnibus action’ may proceed.

## 10. Personal Injury

As in every other year, the majority of reported personal injury cases concerned 72 road traffic accidents, cases of medical negligence, and actions in respect of injuries sustained at work.<sup>56</sup> The latter class in particular raise issues of ‘health and safety’ legislation commented upon in earlier years.

Apart from the cases in two of these three common categories discussed in 73 detail earlier (*Macdonald*, a road traffic case, discussed no 36 ff above; *Anton, Bavaird, French and Dempsie*, all claims relating to workplace injuries, discussed in Cases 3, 4 and 8 (nos 17 ff, 27 ff, and 56 ff, respectively above), and the important new procedure for civil jury awards set out in *Hamilton* (discussed

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<sup>55</sup> Para 32.

<sup>56</sup> For two examples of employee claims, see *McDougall v Emtec Building Services Ltd* [2012] CSOH 90 and *Winn-Pope v ES Access Platforms Ltd* [2012] CSOH 87.

no 2 ff above), a number of other personal injury cases are worthy of note. *McGlone v Greater Glasgow Health Board* [2012] CSOH 190 is a good example of the complex and lengthy trials of factual evidence often required in personal injury damages (the litigation concerned injuries sustained during a hysterectomy). Judgment in the case runs to 357 paragraphs and a number of appendices. Also of interest, particularly for litigants tempted to represent themselves, is *Connelly v Whitbread plc* [2012] CSIH 51, in which the Lord Justice Clerk, refusing the injured party's appeal, made some pertinent comments on some of the dangers that can arise when a party represents him- or herself.<sup>57</sup> Future party litigants would do well to reflect on these words of warning.

- 74 Further cases worthy of note last year include *McGee v RJK Building Services Ltd* [2013] CSOH 10 (of note for the helpfully set out quantification of damages in a claim by the family of a man who died as result of a fall down stairs caused by a faulty handrail installed at his home), *Jackson v Murray* [2012] CSIH 100 (another road traffic accident, in which a teenage girl was knocked down having alighted from a school minibus, the court noting that the defender should have noticed that the minibus might have been a school one and thus have driven with a degree of caution appropriate in such a situation), *Smith v James Strang Ltd* [2012] CSOH 173 (in which the pursuer, who was injured at work while engaged in carrying out fencing work for his employer, was held 50% contributorily liable for his injuries), and *Murphy v East Ayrshire Council* [2012] CSIH 47 (an unsuccessful appeal against the decision reported in last year's Yearbook by a wheelchair bound man, who, having unbuckled his seatbelt during the course of a journey in a minibus, was injured when the vehicle braked sharply; while the appeal court gave reasons somewhat different from those stated by the judge at first instance, they reached the same conclusion of no liability on the part of the defender).

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<sup>57</sup> The Lord Justice Clerk stated (at para 24): 'In my opinion, the appellant's lack of legal representation has been unfortunate for at least two reasons. The first is that it appears that certain of his witnesses whom he expected to be favourable to his case gave evidence favourable to the respondent. This clearly had an unsettling influence on the appellant at the proof and, I have little doubt, made his conduct of the case even more arduous. The second reason is that the appellant has placed before us certain evidence that he has found in the course of researches that he has carried out since the proof ... Unfortunately, this evidence comes before us far too late and is not the subject of a motion to have it received as *res noviter veniens ad notitiam*.'

## C. Literature

### 1. *Elsbeth Reid, English Defamation Reform: A Scots Perspective, Scots Law Times (SLT) 2012 (News) 111–114*

This article examines the 2011 Consultation by the UK Ministry of Justice on the English law of defamation, and explores whether there are any lessons to be learned from it in relation to the Scots law of defamation. The author concludes that: (i) while the proposed English Bill would not be wholly appropriate as a basis for reforming Scots law, the English consultation has stimulated valuable debate which contains much of interest, and (ii) in preparing for any reform of Scots law, it would be appropriate both to clarify the law of ‘verbal injury’ as well as fundamentally to review the interests that defamation should seek to protect. 75

### 2. *William W McBryde, Contract Law: A Solution to Delictual Problems?, SLT 2012 (News) 45–48*

This article, by the author of the leading work on contract law in Scotland, presents some interesting reflections on the interaction between contract and delict. The author presents these reflections within the context of an historical development of delict law since *Donoghue v Stevenson*, reminding the reader that there was a contract between the cafe owner in that case and Mrs Donoghue’s friend. Such a contract might, under Scots law, have been argued to give rise to a third party right (*jus quaesitum tertio*), and contractual options were possible avenues of redress in later delict cases too. The author seeks to remind delict lawyers not to forget contractual options when they are pleading cases. This short article serves as a useful reminder of the interface between the two obligations of contract and delict, especially in Scotland with its long tradition of third party rights and its recognition of gratuitous contracts. 76

### 3. *Andrew Hajducki, Informing the Jury: A Critical Look at a Five Bench Decision, SLT 2012 (News) 145–150*

In this article, the author considers the Inner House’s decision in *Hamilton v Ferguson* (discussed no 2ff above). The author argues that there is a widespread feeling that the judgments perhaps raise more questions than there are satisfac- 77



tory answers for. Some of what is suggested by the author as being uncertain about the new guidance will likely however be settled quite swiftly by judicial usage and practice, and the author's remarks do not seem to undermine the fundamental good sense of the reform instituted by the Inner House.

#### **4. *Martin Hogg, Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict, Edinburgh Law Review 16 (2012) 246–253***

- 78 The author examines the question, inter alia, of whether a party inviting tenders for a contract may be in a proximate relationship to the tenderer for the purposes of liability for pure economic loss in delict. While any such liability was peremptorily denied in the recent case of *Petition of Sidey Ltd for Judicial Review of a Decision of Clackmannanshire Council*,<sup>58</sup> the author argues that the matter should have been subject to greater scrutiny by the court, and explains elements of such a pre-contractual relationship which might be characterised as demonstrating sufficient proximity for the purposes of delict.

#### **5. *Craig Callery, A Note on the Recent Changes to Jury Trials, Juridical Review 2012, 315–318***

- 79 The author offers a short summary of the changes to the evaluation of damages awards by civil juries in the light of the decision of the Inner House in *Hamilton v Ferguson* (discussed no 2ff above). The author is cautious as to whether these judicially imposed changes will improve the perceived problems concerning jury awards.

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58 [2011] CSOH 194.