OUTER HOUSE, COURT OF SESSION

[2019] CSOH 101

CA71/18

OPINION OF LORD ERICHT

In the cause

GLASGOW CITY COUNCIL

Pursuers

against

FIRST GLASGOW (NO 1) LIMITED

Defenders

Pursuers: A Smith QC, Gardiner; BLM
Defenders: Dunlop QC, Pugh; Clyde & Co

10 December 2019

Introduction

[1] This case arises out of the tragic events of 22 December 2014, when a bin lorry owned and operated by the pursuers crashed in the centre of Glasgow causing death and injury to a large number of pedestrians. The lorry was being driven by Harry Clarke, an employee of Glasgow City Council.

[2] These events have given rise to a variety of legal proceedings.

[3] A Fatal Accident Enquiry was held before Sheriff Beckett (as he then was) who issued his determination in 2015 ([2015] FAI 30). However, the Sheriff's determination is not

admissible and may not be founded upon in the current proceedings (*Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016* section 26(6)).

[4] The families of two of the deceased sought to bring a private criminal prosecution against the driver, but their Bills for Criminal Letters were refused by the High Court (*Stewart* v *Payne* 2017 JC 155). The family with which this case is concerned was not one of those who sought a private prosecution.

[5] A number of damages claims were made against the Council by those injured and the families of those killed. The Council considered, on advice, that it was unlikely that the actions could be defended successfully. The present case arises out of the claims made by the family of the late Stephanie Tait. Her life partner, mother, father and sister raised actions against the council in the All-Scotland Personal Injury Sheriff Court. In respect of these actions, settlement was reached for payment by the council of a total sum of £860,000 together with expenses of £43,714.40. In the current action, the council sought to recover these sums in their entirety from the defenders, who had been the previous employer of Mr Clarke.

[6] The sole ground on which this case is pled is a narrow one. The case is pled solely on the basis of section 3 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940* (C 42). During the course of the debate, I allowed the pursuers to amend the summons to clarify that the pursuers' case was founded not in negligence but only on section 3. The amendment introduced a conclusion for a declarator in the following terms:

> "For declarator that the pursuers are entitled to such contribution by the defenders pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, in respect of the sums sued for in conclusions 2 and 3 hereof, as the court may deem just"

[7] The amendment also replaced the sole substantive plea in law with the following plea:

> "The defenders, being persons who, if sued, would have been liable for the breach of duties owed by them to the pedestrians who were killed or injured when Harry Clarke lost control of his vehicle, as condescended upon, are liable to contribute in such proportion as the court may deem just to the damages and expenses which the pursuers have had to pay and decree of declarator should accordingly be pronounced as first concluded for"

[8] Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 provides as follows:

> "**3 – Contribution among joint wrongdoers.**
>
> (1) Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just: Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable.
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> (2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, 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.
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> (3) Nothing in this section shall—
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> (a) apply to any action in respect of loss or damage suffered before the commencement of this Act; or
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> (b) affect any contractual or other right of relief or indemnity or render enforceable any agreement for indemnity which could not have been enforced if this section had not been enacted."

The pursuers' case

[9] The pursuers pled that prior to being employed by the pursuers, Mr Clarke had been employed for some years by the defenders as a passenger service vehicle driver. They averred (article 5):

> "On 7 April 2010, Clarke lost consciousness whilst driving a bus when engaged in the course of his employment with the defenders. The type of episode from which he suffered was similar to that which was ultimately suffered by him during the events [of 22 December 2014]. The incident was investigated by the defenders and it was known by them that he could present a risk to passengers and others should there be a repetition of the event. In the course of the investigation by the defenders, Clarke changed his story about where and how he had suffered the fainting episode. Any reasonable investigation would have revealed that he was being dishonest to those trying to assess his ability to drive."

[10] They further pled (article 7):

> "Prior to offering Clarke employment, as is invariable practice, the pursuers would have sought to obtain a written reference from the former employer (*viz* the defenders). Although the reference document has been lost, it would have sought and obtained information to the effect that the employee was reliable, and in particular that there were no issues (in particular health issues) which may affect his ability or suitability to be engaged in a driving job. Despite being aware of the fainting episode referred to above, the defenders did not disclose that to the pursuer. Had it been disclosed, the pursuer would either not have employed Clarke at all or were he to have commenced his employment before the reference came in, would terminate his employment or redeploy him in a non driving job, or only employed him in a non driving job on account of the obvious danger to the public and other employees should he faint once again whist in charge of a vehicle… The references were obtained prior to 25 March 2011. Had accurate references (disclosing the matters referred to above) been received prior to an offer of employment being made, then no offer would have been made for a driving job, or in the alternative, no offer of any employment with the pursuer. Had accurate references been received after employment commenced, his employment would have been terminated, failing which he would have been deployed in a non driving job. The failure by the defenders to provide an accurate reference permitted Clarke to continue to drive a vehicle which would not have been permitted by the pursuer had they known that Clarke had fainted previously when employed by the defenders, that he had lied about the circumstances, and had therefore lied in his application to the pursuer. Each of these factors individually and cumulatively would have rendered Clarke to be unsuitable for employment as a driver with the pursuer.

[11] They further averred (article 8):

> "The defender knew or ought to have known that the purpose in the pursuer seeking a reference was to assess Clarke's suitability as a driver of heavy vehicles (which would have been made clear on the request for information). They knew or ought to have known that this information was being requested to *inter alia* allow the pursuer to assess whether Clarke could or should be employed, and if so whether he would be permitted to drive heavy vehicles. It was accordingly their duty to either not provide a reference at all (which would have resulted in Clarke not being engaged) or if they did so, to provide a reference that was accurate. An accurate reference would have stated that he had suffered the fainting episode in April 2010. Had either or both of these facts been disclosed, Clarke would not have been employed by the defenders in the capacity of a heavy vehicle driver, and the accident in December 2014 would not have occurred."

Debate

[12] The case called before me for a debate. The defenders invited me to dismiss the case. The pursuers invited me to allow a proof before answer.

[13] There were two main issues in the debate:

1. Whether it is necessary for a claim under the 1940 Act that both the pursuers and the defenders be under a duty of care to the injured person.
2. If the answer to the first issue is yes, did the defenders in this case have a duty of care to the injured person.

1. Whether it is necessary for a claim under the 1940 Act that both the pursuers and the defenders be under a duty of care to the injured person.

Submissions for the defenders

[14] Counsel for the defenders submitted that the claim under the 1940 Act was irrelevant. For a claim to arise thereunder, both parties required to be under a relevant duty to the injured person. The pleadings did not set up any relevant suggestion that, when giving the alleged reference in which the claim was predicated, the defenders owed a duty of care to those victims (which in the present circumstances would amount to a duty of care

to at least the entire population of and any visitors to Glasgow at any point during the anticipated working life of Clarke).

Submissions for the pursuers

[15] The pursuers submitted that for the pursuers to obtain a relief under section 3 the pursuers required to establish negligence on the part of the defenders. That negligence could be either because the defenders were liable to the injured parties or because the defenders were liable to the pursuer (*Comex Houlder Diving Ltd* v *Colne Fishing Co Ltd* 1987 SC 85). Subsection (2) should be read as a standalone provision which entitled the pursuers to make a direct case against the defenders. (*Farstad Supply AS* v *Enviroco Ltd* 2010 SC (UKSC) 87.)

Discussion and decision

[16] As Lord Keith explained in the *Comex* case at p 121:

> "Section 3 of the Act of 1940 changed the law in a number of ways. First of all, it made it possible, where two or more persons had been convened as defenders in an action seeking damages against them jointly and generally on the ground of wrongful acts or negligence, for their liability *inter se* for the damages to be apportioned among them in that action. Further, it enabled the apportionment to be made not on a *pro rata* basis but in such proportions as might seem just. These changes were a development of the law as stated in *Palmer's* case. Then by subsec. (2) a person who had been found liable in damages in an action on similar grounds was given the right to recover a just proportion of the damages he had paid from any other person who, if sued, might also have been held liable for the same loss. This gave statutory force to the law as it had been held to be by Lord Murray in *Glasgow Corporation* v *John Turnbull & Co*., but extended it so as to enable recovery not merely of a *pro rata* proportion of the damages, but of such contribution thereto as might seem just."

[17] In *Farstad Supply AS* v *Enviroco Ltd*, Lord Clarke referred to Lord Keith's explanation and went on to say that "the essential purpose of the section was to replace the common law

pro rata rule with a flexible rule of apportionment according to the court's view of what was just".

[18] Lord Clarke then gave consideration to section 3(2). He stated:

> "[11] I turn to section 3(2). It applies to a claim for contribution by a person who has been held liable "in any such action as aforesaid". The reference to "any such action" is a reference to the action identified in subsec (1) and is thus a reference to an action by a pursuer against a defender "in respect of loss or damage arising from any wrongful acts or negligent acts or omissions" by the defender. If a defender, as such a wrongdoer, has been held liable to pay damages or expenses to a pursuer and if he pays the damages he has a right to recover such contribution, if any, as the court may deem just 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".
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> [12] As I see it, the subsection is specifically intended to deal with the position where there are two actions. In the first action a wrongdoer A is held liable in damages or expenses to the pursuer and A then pays the pursuer and begins a separate action against a second person B who, if sued in the first action, might have been held liable to the pursuer in the first action. However, no one suggested that the subsection was limited to such a case. It was not suggested that the claim for contribution could not be made by third-party proceedings in the same action, even though no liability for contribution can arise until A has paid the pursuer."

[19] Lord Hope agreed with Lord Clarke and stated:

> "[37] The meaning to be given to the words "if sued" in sec 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 has puzzled generations of Scots lawyers ever since that provision was enacted. No doubt the draftsman saw no need to elaborate. He must have assumed that sec 3(1) and sec 3(2) would be read together, and it is obvious that the second subsection takes its meaning from the first. Although sec 3(2) does not say this in so many words, the phrase "found liable in any such action as aforesaid" is a sufficient indication. It must refer back to the phrase "in any action of damages" in sec 3(1). So the situation that is contemplated in both cases is one where the party who seeks the relief has been sued to judgment. "If sued" in sec 3(2) must therefore mean, in regard to the third party, that it is to be assumed that he has been sued to judgment also. But this approach to the meaning of these words still leaves some questions unanswered.
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> [38] It is normal practice for the third-party procedure to be used, as it has been in this case, by a defender to claim relief under sec 3(2) from a party whom the pursuer has not called as a defender in the same action ….
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> [39] This procedure enables questions arising out of one matter including claims by a defender for relief against a third party to be dealt with in one action, thus saving time and expense .... As Lord Clarke points out, sec 3(2) contemplates that no

> liability for contribution can arise until the defender has paid the pursuer. But that is not how the third party procedure works in practice. It is not necessary for the defender first to be found liable and then to pay the pursuer before making his claim for contribution in the same action.
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> [40] As the Lord Ordinary has shown in his admirably succinct opinion, several points arising from the phrase "if sued" have been settled by judicial decision. First, as "if sued" means "if sued to judgment", the defender is not deprived of his right of relief if the pursuer, having originally sued the third party as well, abandons his action against the third party so that he is released from the process without having a judgment pronounced in his favour: *Singer* v *Gray Tool Co (Europe) Ltd*. As Lord President Emslie described this situation in that case at (p 151), the third party has merely been the beneficiary of a formal order pronounced as a result of the pursuer's decision to prosecute the action against him no further. Secondly, the defender is not disabled from seeking relief against the third party by reason of the fact that the pursuer's claim against him has been held to have been, or would be, time-barred: *Dormer* v *Melville Dundas & Whitson Ltd*. This is because the words "if sued" assume that the third party has been "relevantly, competently and timeously sued" by the pursuer – in other words, that all the essential preliminaries to a determination of the other party's liability have been satisfied *Central SMT Co Ltd* v *Lanarkshire County Council* per Lord Keith p 460,; see also *Singer* p 151; *Comex Houlder Diving Ltd* v *Colne Fishing Co Ltd* p 19; *Taft* v *Clyde Marine Motoring Co Ltd* per Lord Dervaird p 175,. The question whether the third party has been sued "relevantly, competently and timeously" falls to be tested at the date when the pursuer sued the person who is seeking relief. It is enough that he could have sued the third party at that date: (*George Wimpey & Co Ltd* v *British Overseas Airways Corp*, per Lord Reid p 186, *Dormer* v *Melville Dundas & Whitson Ltd*, pp 299-300)."

[20] In my opinion for the 1940 Act to apply both parties must be liable to the injured person. Section 3(2) operates in situations where both A and B are liable to C. It does not operate where only A is liable to C, but B is liable to A.

[21] The purpose of section 3 is to apportion liability between joint wrongdoers so that each wrongdoer pays a share of the damages. It permits one wrongdoer who has paid out in full to recover an appropriate proportion from another wrongdoer. This is apparent from the wording of section 3(2) which states that "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**". "Action" is a reference back to the wording of section 3(1) which states "any action of damages in respect of loss or damage arising from any wrongful

acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable" Such wording makes it clear that the action referred to is one where two or more persons are jointly and severally liable. Such wording can apply only where both wrongdoers are liable to the same injured parties. If only A is liable to C, but B is liable to A, then it cannot be said that A and B are jointly and severally liable. As Lord Clarke said in *Farstad* (para [17]):

> "For the reasons I have explained, the whole basis of the right to contribution under subsecs (1) and (2) of sec 3 is that both.. the defender and…the second party or third party as the case may be, are liable to the [injured party]. If the [second party] is not liable to the [injured party] the whole basis of its liability to contribution is removed"

2. If the answer to the first issue is yes, did the defenders in this case have a duty of care to the injured person.

Submissions for the defenders

[22] Counsel for the defenders submitted that it was not the case that when an employer gave a reference the employer owed a duty of care to anyone with whom that employee might interact whilst working with the new employer. He referred to *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605, *Spring* v *Guardian Assurance plc* [1995] 2 AC 296, *Thomson* v *Scottish Ministers* 2011 SLT 628, *NRAM Ltd* v *Steel* 2018 SC (UKSC) 141, *Farraj* v *King's Healthcare NHS Trust* [2010] 1 WLR 2139, *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21 and *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736.

Submissions for the pursuers

[23] Counsel for the pursuers invited me to allow a proof before answer. It could not be said at this stage that no duty of care arose: the case was not bound to fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44). What the pursuers offered to prove was that a reference was

requested, the defenders chose to provide it, and the reference failed to mention the prior fainting episode and the dishonesty surrounding it. The purpose of the reference was the suitability to drive. The event leading to the loss, injury or damage was intimately connected to the absence of a full and accurate reference. He referred to *Caparo Industries Plc* v *Dickman*, *Spring* v *Guardian Assurance Plc* and *Thomson* v *Scottish Ministers*.

Discussion and decision

[24] In order to succeed in its claim under section 3, the pursuers will have to establish that the defenders were directly liable to the injured party in negligence in respect of a reference given by the defenders to the pursuers. The issue which came before me for debate was whether as a matter of law, in the circumstances of this case, a previous employer who gives a reference to a new employer can be liable in negligence to a third party who is injured by the employee during the course of his new employment.

[25] It is noteworthy that in this case the pursuers have not produced the reference which they rely on and instead aver that it has been lost. Indeed, they do not directly aver that a reference was given at all or what it said. Instead, they aver that a reference would have been sought and it would have sought and obtained information that there were no health issues which may affect Mr Clarke's ability or suitability to be engaged in a driving job. For the purposes of debate, I require to take the pursuers averments *pro veritate*, in other words on the assumption that they are true. At this stage I have heard no evidence and come to no conclusion as to whether the pursuers averments are true or not, and in particular have come to no conclusion whether any reference was in fact given and if so what in fact it said. I have had no regard to the determination of the Fatal Accident Inquiry, which is inadmissible in the current action. The test is whether the pursuers' case will necessarily fail

even if all the pursuers' averments are proved (*Jamieson* v *Jamieson*). If I find that the test is met, the case will fall to be dismissed. If I find that the test is not met, the case will proceed to a proof before answer at which evidence will be led.

[26] The question of whether the giver of an employment reference owes a duty of care to a third party, being neither the employee nor the new employer, for omitting, in the reference, to warn the new employer of a risk of physical injury to the third party, is a novel one. I was not referred to any authorities or academic discussion on the issue.

[27] The case of *Spring* v *Guardian Assurance* established that an employer giving an employment reference owes to the employee who is the subject of the reference a duty of care and would be liable to the employee in negligence if he failed to do so and the employee suffered economic damage. In the present case, the court is being asked to go further and find that there is a duty of care to a third party who is neither the employee nor the recipient of the reference. This is an exercise which must be approached with great care. As Lord Goff said in *Spring*:

> "I wish further to add that it does not necessarily follow that, because the employer owes such a duty of care to his employee, he also owes a duty of care to the recipient of the reference. The relationship of the employer with the recipient is by no means the same as that with the employee; and whether, in a case such as this, there should be held, as (as was prima facie held to be the case on the facts of the *Hedley Byrne* case itself) a duty of care owed by the maker of the reference to the recipient is a point on which I do not propose to express an opinion, and which may depend on the facts of the particular case before the court." (p 320D-E)

Nor does it necessarily follow that the maker of a reference owes a duty of care to a third party who is not the recipient of the reference. When one looks at the circumstances which led Lord Goff to conclude that a duty was owed to the employee, these are very far from the circumstances of a third party:

> "The employer is possessed of special knowledge, derived from his experience of the employee's character, skill and diligence in the performance of his duties while

> working for the employer. Moreover, when the employer provides a reference to a third party in respect of his employee, he does so not only for the assistance of the third party, but also, for what it is worth, for the assistance of the employee. Indeed, nowadays it must often be very difficult for an employee to obtain fresh employment without the benefit of a reference from his present or a previous employer. It is for this reason that, in ordinary life, it may be the employee, rather than a prospective future employer, who asks the employer to provide the reference; and even where the approach comes from the prospective future employer, it will (apart from special circumstances) be made with either the express or the tacit authority of the employee. The provision of such references is a service regularly provided by employers to their employees; indeed, references are part of the currency of the modern employment market. Furthermore, when such a reference is provided by an employer, it is plain that the employee relies upon him to exercise due skill and care in the preparation of the reference before making it available to the third party. In these circumstances, it seems to me that all the elements requisite for the application of the *Hedley Byrne* (1964) AC 465 principle are present."

[28] In the current action, the pursuers' case, taking their averments as true, is that the giver of a reference has failed to warn the recipient of the reference about potential physical danger to third parties. It is instructive therefore to consider other cases where the courts have considered whether there is a duty to warn of physical danger and whether there is a duty of care towards third parties in respect of physical harm.

[29] In *Mitchell* v *Glasgow City Council*, a local authority tenant died from wounds received in an assault on him by another tenant who had previously threatened to kill him. His widow and daughter raised an action for damages against the local authority on the ground *inter alia* that the authority had not warned the deceased of the possible risk from his attacker. That ground was held to be irrelevant.

[30] In rejecting a "beguilingly simple" submission that there was a duty to warn and that duty arose because the harm to the deceased was reasonably foreseeable, Lord Hope said:

> "[15] Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care: see, for example, *Dorset Yacht Co Ltd* v *Home Office* [1970] AC 1004, 1037 - 1038, per Lord Morris of Borth-y-Gest; *Smith* v *Littlewoods Organisation Ltd* (reported in the Session Cases as *Maloco* v *Littlewoods Organisation Ltd*) 1987 SC (HL) 37, 59, per Lord Griffiths; *Hill* v *Chief Constable of West Yorkshire*

> [1989] AC 53, 60, per Lord Keith of Kinkel. Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu* v *Attorney General of Hong Kong* [1988] AC 175,192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith* v *Littlewoods Organisation Ltd*, 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith* v *Littlewoods Organisation Ltd*, 77- 83, per Lord Goff.
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> [16] The context is therefore quite different from the case where a person is injured in the course of his employment or in a road traffic accident. In cases of that kind it can be taken for granted that the employer owes a duty of care to the person who is in his employment or that a duty is owed to other road users by the driver of a vehicle which causes an accident. If commonplace situations of that kind had to be analysed, the conclusion would be that the duty is owed not simply because loss, injury or damage is reasonably foreseeable. It is because there is a relationship of proximity between the employer and his employees and the driver and other road users. This is sufficient in law to give rise to a duty of care. The duty is created by the relationship, and the scope of the duty is determined by what in the context of that relationship is reasonably foreseeable. In such cases this is so obvious that there is no need to ask whether it is fair, or whether it is just and reasonable, that the pursuer should recover damages …
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> [20] We are dealing here with an allegation that it was the defenders' duty to prevent the risk of harm being caused to the deceased by the criminal act of a third party which they did not create and had not undertaken to avert. The point at issue is whether the defenders were under a duty in that situation to warn the deceased that there was a risk that [the other tenant] would resort to violence. I agree that cases of this kind which arise from another's deliberate wrongdoing cannot be founded simply upon the degree of foreseeability. If the defender is to be held responsible in such circumstances it must be because, as Lord Reed suggests in para 97 the situation is one where it is readily understandable that the law should regard the defender as under a responsibility to take care to protect the pursuer from that risk."

[31] The House of Lords applied the tripartite test articulated by Lord Bridge in *Caparo Industries* (p 618), namely (1) foreseeability (2) proximity and (3) fairness, justice and reasonableness. They found that the test had not been met in the circumstances of the case (Lord Hope at paras [26]-[29], Lord Rodger at para [62-3], Lady Hale at para [74-77]). Lord Hope went on to say:

> "The situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship. But it is not suggested in this case that this ever happened ... I would conclude therefore that it would not be fair, just or reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking, and that the common law case that is made against them is irrelevant. I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk." (para [29])

[32] *Mitchell* v *Glasgow City Council* was considered in *Thomson* v *Scottish Ministers*. A prisoner on leave from prison murdered a childhood friend. The friend's mother sued the prison authorities for damages on the ground that the Scottish Prison Service owed a duty of care to the deceased and other members of the public not to release prisoners on short term leave if such prisoners presented a real and immediate danger to the public. The action was dismissed as irrelevant. The Lord Justice Clerk, giving the opinion of the Second Division, endorsed the "tripartite test" as trite law (para [48]). He went on to warn about the dangers of relying on statements of principle at a high level of abstraction para [48] and stated:

> "Each of the elements of foreseeability and proximity are necessary, if not sufficient, ingredients for the imposition of a duty of care. Policy considerations inform both of these two discrete but interlinked elements (*Mitchell* v *Glasgow City Council* Lord Hope para [16]). Although it would be possible to make a theoretical appraisal of the pursuer's situation by the pure application of principles of high abstraction, the practical solution for the courts in a specific case lies in analysing the particular circumstances of the case according to the category into which it falls; that category in the pursuer's case is, as already noted, that involving the liability of public custodians for the criminal actions of those in their care."

[33] The Lord Justice Clerk analysed the cases in that category, summarising the law as follows:

> "[56] The court is content to proceed on the basis of the *dicta* expressed in all of the cases quoted, even if there is some variance in the language used. In order to succeed, the pursuer must establish a special relationship which exposed the

> deceased to a particular risk of damage as a result of negligence by the defenders in the context of that relationship (ie *Dorset Yacht Co*, Lord Diplock at 1070) or, put in another way, that she was the subject of a special or distinct risk as a consequence of the defender's actions (ie the majority in *Couch* v *Attorney General* at para [112]). Where there is an immediate risk to a person's life as a consequence of a third party's predictable activity, it may not be necessary to identify a particular class of persons beyond those under immediate threat (eg *O'Dwyer* v *Chief Constable, Royal Ulster Constabulary*, at 412)."

[34] Further reference to categories of previous cases can be found in *Caparo Industries*. Lord Oliver at p635B-D attempted a non-exhaustive broad categorisation of the type of situation in which liability had been established. His first category was cases where what was complained of was the failure to prevent the infliction of damage by the act of the third party (such as *Dorset Yacht Co. Ltd.* v *Home Office* [1970] AC 1004, *P. Perl (Exporters) Ltd.* v *Camden London Borough Counci*l [1984] QB 342, *Smith* v *Littlewoods Organisation Ltd*. [1987] AC 241, *Anns* v *Merton London Borough Council* [1978] AC 728). His second category, which is not applicable in the current case, was failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as the *Anns* case, *Ministry of Housing and Local Government* v *Sharp* [1970] 2 Q.B. 223, *Yuen Kun Yeu* v *Attorney-General of Hong Kong* [1988] A.C. 175). His third category was the making by the defender of some statement or advice which had been communicated, directly or indirectly, to the pursuer and upon which he had relied. The *Caparo* case fell into the third category. In *Caparo*, shareholders and potential future investors in a company sought damages from the company's auditors claiming they were negligent in carrying out an audit and in a report to the company. Lord Bridge reviewed the case law then drew a distinction between liability to the recipient of a statement and a third party:

> "The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would

> rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an indeterminate class:" see *Ultramares Corporation* v *Touche* (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism … imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence" rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind." (p 620H to 621F)

[35] Another example of Lord Bridge's third category is *NRAM Ltd* v *Steel*. In that case, a lender sought damages from a borrower's solicitor in respect of a misstatement in an email sent by the borrower's solicitor to the lender. Lord Hope identified the governing principle as assumption of responsibility (para [25]). He went on to inquire into the existence of an assumption of responsibility by a solicitor to the opposite party and restored the Lord Ordinary's interlocutor dismissing the claim.

[36] In *Robinson* v *West Yorkshire Chief Constable*, a passer-by was injured during an attempted arrest of a suspected drug dealer by police officers. The court held that the police

officers had owed a duty of care towards pedestrians, including the claimant, in the immediate vicinity when the arrest had been attempted. Lord Reed stated:

> "34. ... public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson JSC stated in *Michael's* case [2015] AC 1732 para 97 'the common law does not generally impose liability for pure omissions' (para 97). This "omissions principle" has been helpfully summarised by Tofaris and Steel, 'Negligence Liability for Omissions and the Police' (2016) 75 CLJ 128:
>
> > 'In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.'
>
> 35. As that summary makes clear, there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: see, for example, *Barrett* v *Enfield London Borough Council* [2001] 2 AC 550 and *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619, as explained in *Gorringe* at paras 39-40. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body: see, for example, *Smith* v *Littlewoods Organisation Ltd* [1987] AC 241, concerning a private body, applied in *Mitchell* v *Glasgow City Council* [2009] UKHL 11; [2009] AC 874, concerning a public authority …
>
> 37. A further point ... is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith* v *Littlewoods Organisation Ltd* and *Mitchell* v *Glasgow City Council*. In *Michael's* case [2015] AC 1732 para 97 Lord Toulson explained the point in this way:
>
> > 'It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.' (para 97)
>
> There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The first type of situation is illustrated by *Dorset Yacht*, and in relation to the police by the case of *Attorney General of the British Virgin Islands* v *Hartwell* [2004] 1 WLR 1273, discussed below. The second type of situation is

> illustrated, in relation to the police, by the case of *An Informer* v *A Chief Constable* [2013] QB 579, as explained in *Michael's* case [2015] AC 1732 at para 69."

[37] Lord Reed also gave guidance on how courts should approach the question of whether a duty of care exists:

> "29. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

[38] Lord Mance summarised the position as follows:

> "83. As Lord Reed JSC demonstrates, it is unnecessary in every claim of negligence to resort to the three-stage analysis (foreseeability, proximity and fairness, justice and reasonableness) identified in *Caparo Industries Ltd* v *Dickman* [1990] 2 AC 605. There are well-established categories, including (generally) liability for causing physical injury by positive act, where the latter two criteria are at least assumed. The concomitant is that there is, absent an assumption of responsibility, no liability for negligently omitting to prevent damage occurring to a potential victim."

[39] The duty of care for which the pursuer contends for in this case is a duty of care owed by the giver of an employment reference to a third party, being neither the employee nor the new employer, for omitting, in the reference, to warn the new employer of a risk of physical injury to the third party. The question of whether that duty of care exists as a matter of law has not been previously decided. Nor in my opinion does it fall within, nor be closely analogous to, one of the categories of cases previously decided. It bears similarities but also dissimilarities to categories of duties of care which have been established in previously decided cases. The alleged duty arises out of a reference, but unlike *Spring* the duty is not owed to the employee. The alleged duty arises out of negligent misstatement, but unlike *Caparo* the misstatement was not relied on by the person to whom the duty is said to be owed. Like *Robinson*, the source of danger was not created by the pursuer, but in the

present case the injured party did not rely on the pursuers for safety. The duty of care contended for also bears similarities to categories of duties of care which previous cases have found not to exist. The alleged duty was in respect of physical injury by an ex-employee to members of the public, and, like *Mitchell*, the pursuers had neither created nor undertaken to avert the risk of that injury.

[40] As the duty of care contended neither falls within nor is closely analogous to categories in pre-existing cases, it is necessary to consider the matters identified by Lord Mance in the passage quoted in para [38] above, namely the tripartite C*aparo* test of (1) foreseeability, (2) proximity and (3) fairness, justice and reasonableness, and also assumption of responsibility.

[41] In my opinion the test of reasonable foreseeability is met in respect of the duty of care contended for by the pursuers in this case. It is reasonably foreseeable that if a reference omits reference to a risk of the employee causing harm in the course of employment, then that harm may occur in the course of his work with the new employer. However, as Lord Hope identified in the passage from *Mitchell* quoted in para [30] above, foreseeability is not enough for the imposition of a duty of care. There requires to be a relationship of proximity. In my opinion in the current case there is no such proximity as would give rise to a duty of care. The giver of the reference is not in a relationship of proximity with the injured person. The injured person is not injured by the giver of the reference. The injured person is not the recipient of the reference. The injured person is not injured by the recipient of the reference. The injured person is not aware that the reference has been given. The injured person is not aware of what the reference says. The injured person has not relied on the reference in any way. The injured person has not taken the reference into account in deciding to be in central Glasgow that day. The relationship is far

less proximate than that in *Mitchell*, where the court held that there was no duty of care despite the defender being the landlord of both the injured party and the attacker and the defender being aware of prior threats.

[42] Further, in my opinion it would not be just, fair and reasonable to impose the duty of care contended for. Employment references perform a valuable function in the employment field, for the reasons explained by Lord Goff in *Spring* and referred to in para [27] above. A good reference can be of considerable benefit both to an individual seeking work and to a potential employer assessing which applicant is best placed to become a useful and valued employee. The giver of a reference naturally has in mind the individual who is the subject of the reference and the recipient of the reference. The giver of the reference does not naturally have in mind all the persons who will come into contact with the employee during the course of his new employment. In the case of the driver of a bin lorry, that would include not only the driver's co-workers but also any member of the public who was out on the streets of Glasgow at any time on any day when Mr Clarke's route took him to that same street. It could be expected that employers, reluctant to expose themselves to the unpredictable risk of such extensive potential liability to such a great number of unknown persons, might no longer be prepared to give references, in which case the benefits to employees and employers of the availability of references would be lost. Further, to hold that the duty of care contended for does not exist gives rise to no unfairness or prejudice to the injured party: as has happened in the current case, the injured party can recover from the person who was the employer at the time the injury was inflicted.

[43] Finally, I turn to consider whether there has been an assumption of responsibility by the giver of the reference to the injured party. In my opinion this is not a case where there has been an assumption of responsibility. As Lord Reed explained in *Robinson*, in the

passages set out in para [36] above, private individuals generally owe no duty of care towards individuals to prevent them being harmed by the conduct of a third party. However such a duty can be owed where a person has assumed responsibility for an individual's safety on which the individual has relied. The defenders have not assumed responsibility for the safety of the injured party in the current case. There require to be limits on the scope of those to whom the giver of a reference assumes responsibility. In my opinion, the safety of third parties whom the subject of a reference may come across in the course of his new employment falls outwith that limit. The reference is being given for the benefit of the subject and the new employer. The injured person, being entirely unaware of the existence and the contents of the reference, has not in any way relied on it. It cannot be said that by granting a reference which makes no mention of an extremely broad class of members of the public and of which the members of the public were unaware, that the defenders have assumed responsibility to these members of the public.

[44] For all these reasons I find that the defenders did not owe a duty of care to the injured party.

[45] It follows from this that section 3 of the 1940 Act does not apply and the action falls to be dismissed.

Other matters

[46] In the light of my decision, it is not necessary to decide the other submissions raised by counsel for the defenders. However for the sake of completeness I shall deal with these briefly.

[47] Counsel for the defenders submitted that *esto* the defenders owed a duty of care and the duty was to take reasonable care in all the circumstances. The pursuers had admitted

the defender's averments that doctors examining Mr Clarke prior to the giving of the reference considered it unlikely that he would suffer another similar episode. In these circumstances there was no duty to disclose the first episode in the reference.

[48] Had I not found the action to be irrelevant, I would found that this was a matter for proof before answer. This matter cannot be resolved without inquiry into the facts and circumstances surrounding the medical opinions, including the pursuers' averments to the effect that Mr Clarke was dishonest to the doctors.

[49] Counsel for the defenders also criticised the pursuers' averments in relation to certain matters of specification which had been identified in calls in the defences which had not been answered. I would not have dismissed the action on these points of specification but would have taken the question of specification forward through commercial court procedure.

[50] The issues covered in these calls included the way in which the pursuers had pled their loss. The pursuers sought to recover the sum for which they had settled the sheriff court action. Particular criticism was made of lack of specification as to how that settlement figure had been arrived at. In my opinion it is not enough for the pursuers to settle an action with the injured party and then assume that whatever figure they settled at is recoverable by the pursuers from another party. There are many reasons, operating on both parties to a settlement, which can result in an agreement being made for a figure different from that to which a party is entitled as matter of law and so would ultimately be awarded by the court if the action proceeded. However, I would not have dismissed the action on this ground at this stage. I would have used the commercial court procedures to ensure that the pursuers' averments were expanded to give full specification of the quantification of the claim.

Order

[51] The logic of the foregoing is that I should uphold the defenders' first plea in law and dismiss the action. However, while the case was at *avizandum*, there were further developments. At debate, the pursuers' position was clear: they periled their case on the 1940 Act, and were not pleading direct case against the defenders on negligence. Indeed, during the course of the debate they tendered the Minute of Amendment which clarified their pleadings and substituted a new first plea in law to put beyond any doubt that that was their position. I allowed the amendment. The debate, and indeed this opinion, proceeded on the basis of that position. Subsequently, while the case was at *avizandum*, the pursuers lodged a minute of amendment introducing a new alternative direct case of negligence. The pursuers enrolled a motion to allow the minute of amendment to be received. When the motion called before me, parties were agreed that I should continue the motion to a date to be afterwards fixed subsequent to the issue of this opinion. In the light of these developments, I shall make no substantive order at present, but will put the case out by order for discussion as to how to proceed in the light of this opinion and the continued motion.