OUTER HOUSE, COURT OF SESSION

[2016] CSOH 176

PD2285/11

OPINION OF LADY WOLFFE

In the cause

MD

Pursuer;

against

AMEC GROUP LIMITED

Defenders:

Pursuer: Di Rollo QC et Blessing; Thompsons

Defender: Shand QC et McConnell; Morton Fraser LLP

16 December 2016

Introduction

[1] In this action for personal injury the pursuer, MD, sues his former employers, AMEC Group Limited, for chronic Post Traumatic Stress Disorder ("PTSD") said to have been suffered as a result, and in the aftermath, of a fire on Absorber Unit 3 ("Absorber 3" or "the Absorber" as the context requires) at the Longannet Power Station on 23 March 2009. The pursuer did not sustain any physical injury.

[2] On the pleadings, the pursuer's positive case is narrowly cast. The only factual averments going to fault assert that there was only one exit from the roof of the Absorber at the material time. As will become clear, at the proof the pursuer sought to lead evidence in support of a number of additional grounds of fault and for which, the defenders contended, there was no record.

[3] The pursuer, aged 59 at the date of the proof, had worked as a labourer since about 1972. He had worked mostly on construction sites or in dockyards in Fife. He has previously worked for AMEC on several occasions. Prior to the date of the fire on 23 March 2009, the pursuer had been working for AMEC on the Longannet Power Station site continuously since about 2006 as a labourer. The pursuer's recollection is that he commenced on site in June 2006.

[4] The pursuer's main job with AMEC had been to work with the safety team and on environmental matters. This was at ground level. He assisted in the labelling of skips used for disposal of certain forms of materials (eg wood, metal etc) and he would clean up oil spills on site. He was also a labourer and assisted others as "mate", a role he was engaged in on the day of the fire.

Absorber Unit 3

[5] The pursuer's case on record concerns an asserted failure on the part of the defenders to have sufficient means of egress from the Absorber structure on which the pursuer was working on the afternoon of 23 March 2009. In order to understand where the pursuer was working and what means of egress were available to him, it is first necessary to explain the structure on which the pursuer and others were working on the day of the fire.

[6] As a consequence of the fire, Absorber number 3 was demolished and rebuilt. A considerable amount of time was taken up at the proof with evidence, and objections to evidence, to try to establish the features of Absorber number 3 as they were at the material time, and in particular, the fixed and any temporary horizontal walkways, scaffolding and the point or (if more than one) points of vertical access on and off the structure. There were in excess of twenty external photographs taken of the structure at some point during the fire on 23 March 2009. Only three of these were subject to agreement in the joint minute. In addition, there were some isometric drawings (to which objection was taken), and one or two more stylised overhead figures (to which objection was also taken).

[7] The efficient or clear presentation of the evidence on this significant aspect of the case was bedevilled by the following:

(i) the lack of a key to the colours used for figures 6 and 6A of the Report of Mr Sylvester-Evans (No 7/62 of process) providing an overhead view of certain features of the structure;

(ii) the failure to provide the opposing party with colour copies of those figures;

(iii) the failure to provide the opposing party with copies of those isometric drawings containing an architectural legend (with descriptions, scale and other data), (Nos 7/19 and 7/22 of process); and

(iv) the failure to provide any drawing or plan with simple marked reference points to assist the examiner in posing concise questions, or to assist the witness or the court in understanding the questions posed, about the physical features of what is a complex structure. An attempt to provide the latter was finally lodged, at the behest of the court, as 7/68 of process. Unfortunately, the pursuer did not have the benefit of this for the purpose of his evidence.

Absorber Unit 3: Its Purpose

[8] As reliance is placed on features of the Absorber to explain why certain desiderated fire precaution steps or systems would not be reasonably practicable, it is necessary to describe its proposed operation and, so far as possible on the evidence available, its external physical features at the material time.

[9] Absorber 3 was one of three such Absorber units, described as flue gas desulpherisation units (or FGDs), being constructed at the Longannet Power Station. In brief, the purpose of an Absorber was to remove or reduce the amount of sulphur in the gas emissions from Longannet Power Station, as part of an initiative to generate cleaner or, at least, less pollutant energy. The process relied on the chemical reaction of combining alkaline seawater with acidic flue gases with the intended result of producing pH neutral emissions.

[10] The means by which this was done involved the construction of a large concrete box structure in the immediate vicinity, just to the south, of the Longannet Power Station. In operation this would be sealed and was referred to in evidence as "the chamber". As designed, there was only one access door to the chamber, on the south face, and situated relatively low down on that face. The Absorber was comprised essentially of this chamber, together with the external features on that structure.

[11] Gas emissions from the Longannet Power Station were pumped into the sealed chamber of the Absorber, through an inlet duct, which fed the gases in near the bottom of the concrete part of the chamber. The gases

would then rise up and, once treated, would be removed via the outlet duct. The flue gasses would then be directed to the chimney, which was west of the Absorber structure. Meantime, large volumes of seawater were pumped to the top of the Absorber. Through a series of pipes with branched arms or splays, the seawater would be sprayed onto what was described as "packing material" to wet it. The packing material consisted of polypropylene, a flammable material. The polypropylene packing material was structured in such a way so as to maximise the surface area which could be wetted with the seawater. As the gases rose up through this wet material, the desired chemical reaction would take place. The seawater flowing down through this packing material would then be pumped away. In normal operation, the chamber would effectively be a sealed concrete box filled with sea water and to which no worker would require to have internal access.

[12] Situated above the concrete chamber of the Absorber was the gas heat exchanger ("GGH"). The GGH was designed to extract heat from the flue gases as they entered the Absorber. It was cylindrical structure of about 18 metres in diameter and, when in operation, rotated on a central shaft. The circular cover of this, referred to as the flange, was situated in the sloping roof (described further below).

[13] At all material times, the movements of the pursuer and others was on the external parts of the Absorber, that is, the parts exposed to a greater or lesser extent to the outside air. I turn to describe those external features in more detail.

Absorber Unit 3: External Features in Outline

[14] The Absorber was, externally, a complex structure with a series of fixed horizontal walkways circumnavigating most of the structure. In addition, at the material time, there was a great deal of scaffolding around some of the Absorber's external faces. The two large inlet and outlet ducts are best described as each forming a rounded "M" at the point where they surmounted the concrete chamber of the Absorber, oriented on a north-south axis, and with the south ends of each fixed to the top of the large concrete box structure that comprised the enclosed chamber of the Absorber. The top surface of the two ducts was higher than 29 metres. The two ducts were bisected on an east-west axis by expansion joists. The outlet duct was to the west of the inlet duct. The inlet and outlet ducts were not simple "M" structures, running on north-south axis, as I have already described. Each duct also had a section running perpendicular to the "M", with the east-west running section of the outlet duct running beyond the Absorber, to the west, into the chimney. The east-west portion of the inlet duct protruded beyond the Absorber at the other side, at its north-east most corner. This part of the inlet duct is only relevant as, on the evidence of Mr Sylvester-Evans, if one reached the north side of that part of the inlet duct, the solid feature of that duct afforded sufficient protection from the fire that that area could be regarded as a place of safety (for fire safety purposes). This is the area shown between letters G and H of No 7/68.

Absorber Unit 3: The North Passageway between the Inlet and Outlet Ducts

[15] The structure of the inlet and outlet ducts representing two "M"s on a north-south axis were parallel to each other, but not abutting, so that, at a certain level, there was a walkway between the two ducts, again running on a north-south axis, heading to the north away from the Absorber. This walkway is signified by the yellow passageway between letters "E" and "F" on 7/68. Apart from the sloping roof I will describe in a moment, the only accessible parts of the Absorber at any height was by a series of external horizontal walkways fitted to the structure of the Absorber at various points. I describe these in more detail below.

Absorber Unit 3: The Sloping Roof

[16] The west part of Absorber 3 had a gently sloping roof, sloping down from the central part of the Absorber to the western face of the Absorber unit. The purpose of the slope was to facilitate the direction of the gas within the chamber as it rose towards the outlet duct. As will be seen, the pursuer was rescued from the sloping roof. The sloping roof at its highest, that is where it joined the main part of the concrete box structure of

the Absorber, was a little below 21 metres above ground level. The circular top or flange of the GGH was also situated on the sloping roof.

Absorber Unit 3: The Three Fixed External Horizontal Walkways

[17] Access to certain parts of the external structure of the Absorber was via a series of three fixed horizontal walkways. In broad terms, there was no dispute on the evidence that there were three fixed horizontal walkways, at the heights, respectively, of 21, 23 and 29 metres above ground level and which were fixed along the length (or most of the length) of the west, south and east faces. The part of the walkway designed to be walked on was comprised of "Kennedy" grating: thick diamond-shaped metal grating which readily allowed air to flow through and around it. An example of this may be seen at photos 5 and 7 of No 7/62. There was no clear evidence as to the north face of the Absorber at the point it joined to the power station. The inlet and outlet ducts were also situated on this side. In any event, there were no photographs, drawings or other plans or figures produced or spoken to in evidence showing the north face of the Absorber at the material time.

Absorber Unit 3: The Horizontal Walkways along the East and North Faces

[18] If one travelled from the southeast corner of the structure, along its east face, heading north, the ducting interrupted the two lower walkways (ie those at 21 and 27 metres above ground level) about half-way along the east face. So far as the evidence disclosed, the highest walkway (at 29 metres) was able to continue along the whole east face of the Absorber, i.e. it was able to continue as it was just above the ducting that blocked the two lower walkways from proceeding in a straight line along the east face. While the evidence was not entirely clear, it would appear that if one started from the south east corner of either of the two lower walkways and headed along the east face toward the north, the inlet ducting that came in at a right angle as it joined the east face would block any further progress along those two lower walkways. Instead, one would turn left and would then be heading west on an east to west axis.

Absorber Unit 3: The Valley as an East-West Route under the Ducts at the Level of the Two Lower Walkways

[19] At this point, while still external to the Absorber chamber, one would be surrounded by features of the Absorber structure. In particular, the two lower walkways passed through the underside of the south-most arches of the two "M"s formed, respectively, by the inlet and outlet ducts. There was ducting to the right, or north side of each of these lower walkways. This passageway running on an east-west axis along the north side of the Absorber, and semi-enclosed by the south-most of the arches of the inlet and outlet ducts, was known as the "valley". It is depicted in photo number 8 of No 6/15 of process. At the material time, the two lower walkways passed through the valley. By reason of the ducts arching overhead, the valley was not open to the elements above. However, it was open to the outside at both its west and east ends. While in one sense it was tunnel-like, there was a significant degree of clearance above the walkways. This part of the Absorber may be described as semi-enclosed. (The physical characterisation is relevant to the calculation of safe travel distances, as will be discussed in the context of the expert evidence, below.)

Absorber Unit 3: The East-West Route under the Ducts at the 29 Metre Level

[20] From the lowest walkway one could look up through the open "Kennedy" grating of the middle walkway. At the point where the highest walkway was on an east-west axis it was not above the other two walkways. By reason of the fact that the highest walkway was above the level of the inlet duct feeding into the east side of the Absorber structure, it was possible on the highest walkway to travel further along the east face of the Absorber structure than was possible to do on the two lower walkways.

Absorber Unit 3: The Southeast Stair

[21] It was not disputed that the main vertical access and egress from ground level to the walkway at the 21 metre level was the southeast stair. This was a permanent metal stair fixed to the south-most part of the east face of the Absorber. While one of the isometric drawings (No 7/18 of process) bears to show a further external stair from ground level up to the 21 metre walkway, it was accepted that this was never in fact built - either on the Absorber at the material time or on the rebuilt Absorber. It was assumed, rather than a matter of clear evidence, that at some point on the structure one could access the 27 metre walkway via a further single stair from the 21 metre level; and that the 29 metre level could also be accessed from a stair leading up from the 27 metre level. There was no clear evidence as to whether there was more than one stair giving access between the 21 and 27 metre levels, or between the 27 and 29 metre levels.

Absorber Unit 3: Circumnavigation of the Outside of the Absorber via the Walkways at 21 and 27 Metre Levels

[22] Parties proceeded on the basis that for someone at the northwest corner of one of the two lower walkways, it was possible to access the southeast corner of the Absorber unit (and hence the southeast stair) either:

(i) by going east along the north face, before turning right (or south) and heading along the east face ("route (i)"), or

(ii) by going south along the west face, before turning left and heading east along the south face ("route (ii)").

If one took either of these routes along the fixed walkway at the 21 metre level, one would arrive at the top of the southeast stair and, using those stairs, could reach ground level. If one went via route (i), then part of this journey entailed going through the semi-enclosed "valley", described in paragraph [19] above. If one used route (ii), the walkway at all points was external to the structure. While from the northwest corner, either of these two ways of going led to the same place - namely the southeast corner and the southeast stair, it appeared to be a common ground between the experts that for the purposes of escape this constituted two separate routes albeit with a shared end part.

[23] While the permanent features and walkways of the Absorber have been described, there were also temporary structures or scaffolding in place on and around the Absorber.

Absorber Unit 3: The "Dance Floor"

[24] There was some limited evidence that there was a large scaffold platform to the north of the Absorber. By reason of its size, it was given the name "the dance floor". So far as the evidence went, while this provided a space to retreat to below the level of the fire, there was no evidence that one could directly access the ground level from the dance floor.

Absorber Unit 3: The Stage at which the Construction had Reached

[25] The construction of the Absorber was essentially complete, although there were snagging works ongoing such as that on which the pursuer and John Robinson were engaged. The pursuer himself commented that most of the scaffolding had been taken down. The Absorber was in the process of being prepared for commissioning, which was imminent. On the morning of 23 March 2009, one of the pumps – situated about a kilometre away - had been activated and very large quantities of seawater pumped into the Absorber chamber.

Scope of the Pursuer's Proof on Record

[26] It must be noted that in the first few days of this proof, a considerable amount of time was taken up with hearing objections. From the Report of the Commissioner, it would appear that this was also the position in respect of one of the pursuer's experts, Mr MacGillivray, whose evidence was taken on commission a week before the proof. (Accompanying the Commissioner's Report there are 12 papers apart containing the objected to lines of evidence.) Throughout the proof, the defenders took objection to lines of evidence that the pursuer sought to elicit, essentially on the basis that there was no Record. The lines of evidence objected to include the following: an asserted lack of certain safety provisions on the Absorber, such as deluge systems, fire escape signage, fire alarms, personal safety equipment, personal safety instruction for or training of the pursuer about what to do (or which exits to take) in an emergency, and so on, on the basis that there was no Record. Objection on the same basis was also taken to lines of enquiry directed to the cause of the fire, and to criticisms of the defenders' risk assessments. The pursuer's reply in short, was that this was a personal injury action and that, consistent with the latitude of pleading associated with that form of procedure, the pursuer's pleadings sufficed. The arguments on these objections to all of these lines of evidence were broadly the same. It will suffice, therefore, to address these collectively and to collate parties' arguments, rather than to set out each of the many objections individually.

The Parties' Pleadings

[27] Before noting the parties' arguments in detail, it is appropriate to set out the parties' pleadings. The pursuer's positive case was in short compass and to the effect that there was only one route off the Absorber. The only averments of fact capable of supporting a case of fault were as follows:

"Prior to the fire there had been exits at a number sides of the building. At the time of the fire the only way to exit the roof was to use the stairs at the east side of the building. It was impossible to use those stairs to exit the roof due to smoke and fire."

The pursuer's legal averments of fault, reproduced in full, are as follows:

"STAT 6. The said claim is based on the defenders breach of the statutory duties imposed upon them by section 53 of the Fire (Scotland) Act 2005, regulations 4, 5, 6 and 7 of The Work at Height Regulations 2005, regulations 4 and 5 of the Provision and Use of Work Equipment Regulations 1998, regulation 3 of the Management of Health and Safety at Work Regulations 1999, and regulations 13, 26, 38, 39, 40 and 41 of the Construction (Design and Management) Regulations 2007. The defenders' averments in answer are denied except insofar as coinciding herewith."

[28] In submissions at the end of the proof, the pursuer's senior counsel abandoned any case based on the Work at Height Regulations 2005 and the Provision and Use of Work Equipment Regulations 1998. He maintained his case based on:

(1) section 53 of the Fire (Scotland) Act 2005 ("the Fire Act 2005")

(2) regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations 1999"), and

(3) regulations 13, 26, 38 to 41 of the Construction (Design and Management) Regulations 2007 ("the CDM Regulations 2007").

There was no case based on common law fault.

[29] The totality of the factual averments made by the pursuer were as follows:

"STAT. 4 On or about the 23rd of March 2009 the pursuer was engaged in the course of his employment with the defenders. The pursuer was working within the defenders' site at Longannet Power Station, Alloa, Clackmannanshire FK10 4AA. The said site was a construction site. The defenders were the principal contractors on the site. He was working on a roof of a building that the pursuer knew as, 'The Absorber'. The building was very large. The roof had scaffolding to access it. The scaffolding was approximately 28 metres high. Whilst on the roof the pursuer noticed smoke coming from the building beneath him. A co-worker shouted to the pursuer, "Mel, there is a fire, get down." The pursuer went to the south end of the scaffold on the west side of the building, but he couldn't get down that way. He then went to the north side, but couldn't see through the smoke. The pursuer was agitated and afraid. He considered running through the smoke, but decided against it. He then went to where the roof was at its lowest, about 20 metres high at this point. He shouted on a co-worker to get a cherry picker to rescue him. The fire seemed to get worse. The pursuer thought that he would die. Whilst waiting on the cherry picker one of his colleagues shouted on him to jump. Whilst waiting on rescue the pursuer noticed that the fire was making a loud roaring noise. He saw flames. The pursuer became concerned that the building would explode. After some time rescue personnel from OPUS Industrial Services Limited attended at the scene and managed to get to the pursuer. As the area was thick with black smoke they attached a 15-minute oxygen canister to the pursuer's face. They were about to lead him back through the smoke to the scaffold when a cherry picker arrived and rescued the pursuer. As a result of the said accident the pursuer suffered loss, injury and damage. Prior to the fire there had been exits at a number of sides to the building. At the time of the fire the only way to exit the roof was to use stairs at the east side of the building. It was impossible to use those stairs to exit the roof due to the smoke and fire. The defenders' averments in answer are denied except insofar as coinciding herewith. Explained and averred that after the accident a Panel of Inquiry was set up to examine the causes of the accident and to make recommendations to avoid a recurrence. Membership of the Panel consisted of […..] The Panel produced an interim report dated the 16th of June 2009 which noted that, 'Access to and from the absorber is via a single stairway on the east side of the absorber.'. It concluded, inter alia, 'A thorough review of the access/egress arrangements to/from the FGD absorbers is required to be undertaken to ensure that staff have a clear route to ground from any level in the event of an evacuation.'" (Emphasis added.)

[30] After making certain admissions, the defenders' response (insofar as it concerned the number and means of egress from the Absorber) to this part of the pursuer's case was as follows:

"Admitted that after the accident a Panel of Inquiry was set up under explanation that that was done to investigate the cause of the fire (as distinct from "the accident" which might refer to the fire or to the pursuer's circumstances) and to make recommendations to prevent the recurrence of a similar incident. The interim report is referred to for its terms**, under explanation that there were in fact multiple routes of egress from the absorber as condescended upon below.** The details of the pursuer's movements and thought processes are not known and not admitted. Quoad ultra denied. The pursuer is called upon to aver which level of the Absorber he was on when he first noticed smoke. **He is called upon to aver why he did not exit the Absorber by the stairway in the northwest corner, or by the scaffold to the north of the building, in light of his averment that he went to the north** side of the building. He is called upon to aver where he contends that there had previously been exits, and why he was unable to use those exits (with the exception of the exit to the southeast of the building which he contends was obscured by smoke). Explained and averred that the site is owned and operated by Scottish Power plc, 1 Atlantic Quay, Glasgow, G2 8SP. The Absorber was around twenty eight metres high and around fourteen metres square. It was encircled by two steel walkways. One was at a height of approximately twenty one metres, the other was at a height of approximately twenty eight metres**…… The defenders organised sufficient emergency access and egress routes. There were multiple access and egress routes at the Absorber. One was through a main stairway at the southeast corner of the Absorber. That stairway could be accessed by following the walkway around the Absorber. The walkway could be followed in either a clockwise or an anticlockwise direction. Another was a stairway at around the**

northwest corner of the Absorber. It was also possible to exit by using the scaffold at the north side of the Absorber." (Emphasis added.)

[31] The defenders' response to the pursuer's averments of fault was as follows:

"…Explained and averred that the defenders took all reasonably practicable steps to ensure the pursuer's safety. It is not possible, far less reasonably practicable, to ensure that all exit routes from a building remain smoke free in the event of a fire.

From the foregoing, it is clear that the only positive case the pursuer was offering to prove was that there was only one means of egress off the Absorber. It is also clear that this is what the defenders understood the pursuer's case to be, as they aver a positive case in reply in relation to a number of routes of egress they say existed. They also pled the statutory defence of reasonable practicability which is available under some of the statutory provisions cited by the pursuer.

The Defenders' Objections Based on the Absence of Record

[32] In moving these objections, Miss Shand referred to the following:

(i) the procedural history in this action, including the multiple abortive attempts by the pursuer to amend,

(ii) an undertaking said to have been given to the court upon receipt of one of the abortive minutes,

(iii) the closed record, and

(iv) a number of cases concerning pleadings.

(i) Procedural History

[33] Miss Shand first canvassed the extensive procedural history of these proceedings. This case had already had one diet of proof allocated in April 2014, for three weeks, but which had been discharged on the first day of the proof on the opposed motion of the pursuer. The pursuer's then senior counsel, Mr Hadjudki, sought a discharge on the basis that he required to instruct an expert witness. That proof was discharged, with expenses in favour of the defenders. (As at the date of the second diet of proof those expenses remained unpaid.) In due course a second diet of proof, of three weeks, was fixed and commenced on 9 February 2016. In the intervening period, the defenders' agents repeatedly wrote to the pursuer's agents enquiring about progress or about the pursuer's proposed expert report. In particular, they did so by email or letters dated (or by the occasional call on): 3 June, 15 June, 8 August, 21 September, 26 October, 8 December (all in 2014); and on 11 January, 5 February, 9 February, 21 August, 9 and 28 September, 19 October and 2 November (all 2015). The only response by the pursuers' agents was by an email on 3 June 2014, explaining that they expected matters to take some months; and in 2015 by an email on 5 February 2015, which was non-committal, and a further email on 2 November 2015, advising that the report was still awaited. On the information presented to me, the pursuer's agents made no reply. No attempt was made by Mr Di Rollo in submissions to explain or excuse the failure (at the very least of courtesy) on the part of the pursuer's agents to reply to these queries or to explain the apparent delay in instructing an expert.

[34] From the perspective of the defenders, little happened until the pursuer produced a minute of amendment (No 39 of process). This was received on 6 November 2015. Paragraph 2 of this sought to introduce a number of new averments of fact about the following: two prior fires on site, smoking by workmen, the presence of polypropylene within the building and its combustibility, that polypropylene was a "dangerous substance" in terms of section 2 of the Fire Safety (Scotland) Regulations 2006, the inaudibility of the alarms, the absence of deluge systems, constant changes to the scaffolding on site, the failure of the defenders to update

their risk assessments, the absence of signage, and the want of adequate training of the pursuer for emergencies. In addition, paragraphs 3 and 4 of the minute sought to add references to regulations 3 and 6 to 20A inclusive of the Fire Safety (Scotland) Regulations 2006 and a case of vicarious liability under regulation 22 of those same regulations, as well as at common law, in respect of a failure by fellow employees to take steps more quickly to raise the alarm. This minute represented, in Miss Shand's description, a complete change of front by the pursuer

[35] That minute of amendment was not accompanied by any supporting expert's report. It would appear that at a hearing on 6 November 2015, the pursuer's then junior counsel (who was not the same junior counsel who appeared at the proof) moved for receipt of this minute of amendment and which was, I am advised, strenuously opposed by the defenders. It is noted in the minute of proceedings that the pursuer's then junior counsel "expressly conceded in court that the averments in paragraph 2 of the Minute of Amendment were not intended to aver a causal reference for the fire, and that no such case was to be made". This is the "undertaking" referred to by Miss Shand. After extended argument at the time when this minute of amendment next came before the court, on 4 December 2015, the pursuer ultimately dropped that minute.

[36] In the week before the proof there was another attempt by the pursuer to amend his pleadings. This matter called before me on 28 January 2016 on the pursuer's motions to have a minute of amendment (No 40 of process) received and to ordain the defenders to lead at proof. The second proof was due to take place in 10 days' time. Although by this time different counsel appeared for the pursuer, the minute of amendment (No 40 of process) was in identical terms to the abortive minute which had been the subject of the hearing before the court on 4 December 2015. As it was noted in the minute of proceedings relative to the hearing on 28 January 2016, Mr Di Rollo dropped this motion late in the afternoon. In respect of the undertaking, his position was noted in the minute of proceedings to be that the undertaking had not been properly made and, in any event, extended only to the previous minute of amendment (No 39 of process).

[37] Miss Shand next referred to the timing at which one of the pursuer's expert's reports was received. This concerned the report of Mr Kidd. (So far as I have it noted, she took no issue with the timing of the report of Mr MacGillivray, dated 2 November 2015.) Coming up to the diet of proof, the pursuer's agents intimated their Inventory of Productions on 24 December 2015. This bore to include a report by a Mr Kidd. The defenders were not able to obtain sight of the actual productions themselves until after the Christmas holidays. By this time the defenders had consulted with their own expert, Mr Sylvester-Evans, which they did on 18 December 2015. The signed version of Mr Kidd's report was dated 23 December 2015.

[38] It was not entirely clear what was Miss Shand's purpose in rehearsing the procedural history. While the procedural history may be relevant where the court is exercising a discretion, an objection based on the absence of record is assessed by reference to the pleadings. It may have been to reinforce the limited character of the pursuer's case on record, in comparison to the matters sought from time to time to be added by amendment and which, by implication at least, would suggest did not form part of his pleadings.

(ii) The Undertaking

[39] In relation to the undertaking noted in the minute of proceedings on 6 November 2015, which I have set out four paragraphs above, Miss Shand's position was that this precluded the pursuer raising any issue about the cause of the fire or leading any evidence concerning the possible causes for the outbreak of the fire. There was no record about this and it ran contrary to the undertaking. In the course of giving that undertaking, she said that the pursuer's then counsel had disavowed any case even based on the cause of the fire and which was unknown. Her position was that that undertaking subsisted.

(iii) The Closed Record

[40] After referring to the relevant part of the pleadings, which I have set out above, Miss Shand argued that the pursuer had advanced his case on a very narrow basis. Essentially, it was whether or not there were sufficient means of egress from the Absorber. The pursuer's position on record was that there was only one way

off. This was the narrow case that the defenders had to meet, the number of exits being the only substantial issue of fact going to liability. She referred to some of the statutory provision. Section 53 of the 2005 Act was in the broadest terms. Even so, her position was that the pursuer was not entitled to lead positive evidence to show that the defenders should have done something in the absence of positive pleadings about this.

(iv) The Cases

[41] Turning to the cases, Miss Shand first referred to *Gibson* v *British Insulated Callenders Construction Co*. 1973 SC(HL) 15, and within that case, to the case of *Nimmo* v *Alexander Cowan & Sons* 1967 SC(HL) 79. *Gibson* concerned the failure of a defender to plead a case about what was (or was not) reasonably practicable. In *Gibson,* the court had held that in the absence of averment, it was not open to the defender in that case to try to lead positive evidence to show that a desiderated step or precaution was not reasonably practicable. Applying *Gibson*, Miss Shand argued that on the issue of reasonable practicability, it was open to a pursuer to cross-examine the defenders' witnesses as to whether some additional step was reasonably practicable. However, if a pursuer wished to lead evidence that a particular step or precaution was reasonably practicable and one which a defender employer should have taken, then it was incumbent upon a pursuer to plead the particular precaution. She referred to passages in the speech of Lord Kilbrandon in *Gibson* at pages 32, 35 and 36. From these she argued that if a pursuer wished to contend that there was some alternative or additional step or precaution that a defender employer could have taken, then the pursuer had to plead a positive case.

[42] Miss Shand challenged Mr Di Rollo's argument that it sufficed for a pursuer to say he had been harmed and then simply to list a variety of statutory provisions. *Gibson*, she argued, remained good law. She also cited a decision of Lady Smith, in the Outer House, of *Clifton* v *Hays Plc and Another,* unreported, 7 January 2004, as support for the proposition that even in a Chapter 43 case, the pursuer remained obliged to give some notice of his case. She referred to paragraphs 5, 6, 8, 10 and 11. At paragraph [11], Lady Smith said:

"[11] Whilst the rules contained in that chapter are designed to simplify written pleadings and avoid complexity where possible, I do not understand anything in those rules as detracting from the principle that defenders are entitled, when presented with a summons, to be able to ascertain without undue difficulty the nature of the case against them. More importantly, I do not understand anything in those rules as detracting from the fundamental principle that a pursuer ought not to raise an action against a defender except in circumstances where he has information upon which he is able to make a relevant case. That is the approach that professional responsibility demands. The new rules are directed towards relieving pursuers of the burden of setting out in the pleadings all the flesh needed to clothe the bare bones of the case but they are still, in my opinion, obliged to set out those bones in the summons. Unless they do so, I cannot see that they are complying with the requirement to state the facts necessary to establish the claim, as set out in Rule of court 43.2."

Reference was also made to a decision of Lord Glennie, in the Outer House, in *Weir* v *Robertson Group (Construction) Limited* 2006 Rep LR 114.

[43] In the light of these cases, Miss Shand argued that it was incumbent upon a party to set out the facts "necessary" to establish his claim. It was therefore necessary for the pursuer to do more than to say "I was harmed by the fire", as the pursuer appears to here. The only averment by the pursuer was to say that there was only one route off the Absorber. In reply, the defenders pled that there was more than one. It was too late for the pursuer to say that, for example by reason of a lack of signage or training, he was unaware of other exits that may have existed. The pursuer had pled a narrow case, and that was all that the defenders were obliged to meet. They had not advanced a defence based, for example, on any instructions or training as to which route the pursuer should have used to get off the Absorber. It was not open to the pursuer to try to lead positive evidence about matters extraneous to his pleadings.

[44] She also referred to paragraphs 5, 6, 9 and 13 from the decision of the Inner House in *McGowan* v *W & J R Watson Ltd* 2007 SC 272. In that case, the defenders had failed to give sufficient notice in their pleadings of

contributory negligence. That case supported the proposition that Chapter 43 had not dispensed with the requirement of fair notice. It was not enough, therefore, for the pursuer to refer to statutory provisions. If there were no factual averments on which a statutory case rested, the pursuer could not lead positive evidence. So, for example, if the pursuer referred to a statutory provision about work equipment but did not plead any failure to supply work equipment, she argued that no positive evidence could be led to try to establish such a case.

The Pursuer's Reply to the Defenders' Objections Based on the Absence of Record

[45] Mr Di Rollo offered no reply to Miss Shand's references to the procedural history or the abortive attempts to amend the pursuer's pleadings. He did not seek to excuse or explain why the pursuer's pleadings had effectively remained unchanged since the discharge of the last proof some 22 months previously or why the expert reports were produced so late.

[46] In relation to the undertaking, he argued that it was not to be construed as Miss Shand suggested. In any event, he also argued that it was either not properly given or it related to a previous minute of amendment. His position was that it did not preclude him putting in issue the fact and cause of the fire, which he wished to do.

[47] In relation to the pleadings, Mr Di Rollo could only refer to the pursuer's averments of fact concerning the number of means of egress and which I have set out above at paragraph [27]. However, he also referred to the statutory provisions contained in the pursuer's pleadings. So, for example, section 53(2) of the 2005 Act referred to risk assessments. That section also required that all fire safety precaution steps be taken. These were set out in Schedule 2 to the 2005 Act, although Schedule 2 was not referred to on record. Paragraph 1(f) of Schedule 2, for instance, concerned instructional training. In response to a question from the court, Mr Di Rollo accepted that there was nothing in statement 4 of the record about training, or any of the other matters set out in Schedule 2. His position, however, was that there was only one means of escape off the Absorber. He then turned to consider Regulations 39(1), 40 and 41 of the CDM Regulations 2007, which dealt with emergency procedures and routes. The pursuer had set out enough, he said, to enable him to elicit evidence in support of these lines. Mr Di Rollo also referred to parts of the defenders' pleadings as support for the proposition that he was entitled to lead positive evidence about these matters.

[48] In addition, Mr Di Rollo argued that this was a personal injury case brought under Chapter 43 of the Rules of Court. The defenders had never asked for more specification or more detailed pleadings. From the Practice Note (no 2 of 2003) he noted that the pursuer required only to set out "the briefest" of statements.

[49] In respect of *Gibson*, he argued that it was misconceived to look at that case: it pre-dated the Chapter 43 regime and was no longer relevant. All that the pursuer required to prove, he said, was that he had been harmed by fire. It was for the defenders to establish that they had done all that was reasonably practicable to "ensure" the pursuer's safety (the section 53 duty) and the onus shifted to the defenders. Mr Di Rollo's sought to distinguish *Clifton*. In that case there was no material against the second defender. Here, the employer was bound by certain statutory provisions. In *McGowan*, the defenders failed to do anything other than to assert contributory negligence and they had not cross-examined the pursuer on basis of specifics of that defence. That case was about a failure to cross examine, as much as about a failure to plead. Here, one had to test the fairness by looking at the whole pleadings. It was, he said, incumbent upon the defenders to set up a complete defence. This included the information given to the pursuer about which exits to use in the event of a fire. He noted that in their pleadings, at 12B, they assert that all other employees got off the Absorber. The pursuer's position was that he did not know where else to go. This all had to be looked at in a practical way.

Determination of the Objections Based on no Record

[50] In considering the requirements for pleadings in personal injury actions under Chapter 43, I begin by noting the terms of the Practice Note No 2 of 2003, which, under the rubric of "Summons and pleadings", states as follows:

"The question of pleadings was discussed in the original Working Party Report and in the Supplementary Report on pleadings. In the original report it was pointed out that, in the past, it had proved difficult to restrict pleadings even though it had for very many years been the rule that pleadings should be short and simple. It was therefore emphasised that for the purposes of these rules pleadings should be kept to a basic minimum. The Working Party stated:

'The discussions in the Working Party tended to the conclusion that, realistically speaking, **what it is required in most cases in relation to liability is the briefest description of the events on which the claim is based, together with a brief indication of the ground of fault alleged and a specific reference to any statutory provision which may be founded upon.'** (Emphasis added.)

In the Supplementary Report, it was stated that the Committee remained of the view that the approach of the Working Party was correct, notwithstanding some observations which had been made upon it. The Committee stated:

'Essentially, therefore, we agree that what is necessary is a method of pleading which encourages brevity and simplicity and discourages technicality and artificiality.'"

[51] In short, the practice note requires that, although the terms may be brief, a pursuer must still set out the description of the event on which the claim is based and an indication of the ground of fault. The passage I have highlighted in bold from the pursuer's pleadings, set out in paragraph [29] above, corresponds to this latter requirement.

[52] In my view, the case of *Nimmo* was concerned as much with the onus of proof as with rules about pleading (see Lord Pearson at page 115), in relation to statutory provisions which impose a duty qualified by reasonable practicability. The majority held that in such cases the onus was on a defender to plead and prove it had made a place of work safe so far as reasonably practical, or that some desiderated precaution was not reasonably practical. And, as the House of Lords held in *Gibson*, a pursuer's failure to prove the ground of fault relied on does not relieve a defender of this onus once it is shown a place of work was unsafe. This is because in terms of some statutory provisions, once it is shown that a work place was unsafe, the onus then shifts to a defender and issue of reasonable practicability arises. However, in my view, none of this relieves a pursuer of the obligation to give fair notice in his pleadings of the case against the defenders. As the practice note makes clear, a pursuer requires to do so by setting out the factual basis of his case: by specifying "the ground of fault", and by referring to the breach of duty, whether that duty is statutory in origin or arises at common law.

[53] Leaving aside the question of onus, the rule about pleading is clearly set out in the speech of Lord Kilbrandon in *Gibson* at page 35, where he stated:

"There is really no mystique about Scottish rules of pleading. If a pursuer wishes to call substantive evidence of practical methods, he must give notice of them, since the defenders must be in a position to have in readiness witnesses who may refute that evidence in the course of their proof of impracticability."

After then dealing with the question of onus, Lord Kilbrandon returned to the obligations of the pleader:

"My Lords, if I have rightly apprehended the rules of pleading in these cases as they now stand in consequence of the decision of your Lordships' House in Nimmo , they do not seem to be open to serious criticism. Pursuers

are for the most part advised by experts, although it is in the nature of things that their facilities are often not as wide as are those available to employers. These experts may advise that a certain safety measure has been neglected. In such a case, **the pursuer must specify that neglect** as part of his grounds of fault **if he wishes to lead evidence about it.** But if no such specific ground is alleged, or if, being alleged, it fails of being proved, that does not affect the onus incumbent on the defenders of proving that it was impracticable to make a dangerous place of work reasonably safe, nor is the pursuer's Counsel inhibited from challenging the evidence given by a defender's witness by asking him about the practicability of any method which that witness may expressly, or impliedly by ignoring it, have repudiated. (Emphasis added.)

In my view, that summary remains good law and is applicable to personal injury cases brought under Chapter 43.

[54] It is clear in the light of the more recent cases, such as *Clifton* (*per* Lady Smith at paragraph [11]); *Weir* (*per* Lord Glennie (at paragraph [7])), and *McGowan* (*per* Lord Nimmo Smith, giving the decision of the court, at paragraph [13]), that sufficient pleadings are required of a party in order to give fair notice to the other party of the case to be met. The obligation rests as much upon defenders (eg in giving notice of a plea of contributory negligence (*McGowan*) or of the particular manner in which a defender wishes to contend that a pursuer was contributorily negligent (*Weir*)), as upon pursuers (*Clifton*). As is clear from the observations of the court in *McGowan* and the terms of the practice note, set out above, how much detail is required to satisfy the requirement of fair notice depends very much on the circumstances of the case. In a simple slip and trip case, for example, not much may be required in the pleadings for the pursuer to put in issue the liability of the defender employer for, say, an obstruction, or for the defenders to put in issue any contributory negligence, if they wished to contend that the pursuer failed to take due care for his own safety because any obstruction was obvious or because he failed to look where he was going. A quite different level of detail may be required in respect of a case with a complex factual matrix or, indeed, if multiple statutory provisions governing a wide variety of duties are relied upon in relation to such factual circumstances. The overarching concern is not one of technicalities; it remains one of fairness. Has the pursuer given the defenders fair notice of the positive case in respect of which he proposes to lead evidence, and on the basis of which he invites a finding of liability by the court? As a close reading of the cases of *Nimmo* and *Gibson* make clear, this is a distinct issue from the question of onus.

[55] The thrust of Miss Shand's objection, in the light of these *dicta*, was that if the pursuer wished to lead positive evidence about certain omissions or failures, eg in respect of signage or training or risk assessments, then he had to give some notice of this in his pleadings. Yet, there was nothing about such matters in the pursuer's pleadings. She accepted, as I understood it, that, consistent with the observations of Lord Kilbrandon toward the end of his speech in *Gibson*, it remained open to a pursuer to cross-examine a defenders' witnesses about precautions or protections which those witnesses repudiated, even in the absence of any pleadings about this on the part of the pursuer.

[56] In substance, Mr Di Rollo sought to rely on the statutory grounds of fault, particularly the broadly-based one under section 53 of the 2005 Act. He appeared to proceed on the basis that reference to section 53, by implication, brought in train the application of the whole fire safety regime in Schedule 2 to the 2005 Act. His position was that the defenders could have discerned the pursuer's case from these references.

[57] While I accept that the purpose of Chapter 43 proceedings is to avoid prolix pleadings, in the circumstances of this case, Mr Di Rollo's proposition goes too far. It is not sufficient, at least in a case of considerable factual complexity such as this, for the pursuer simply to list a string of statutory provisions. Consistent with the practice note, some attempt must be made to set out the factual averments and particular grounds of fault which the pursuer offers to prove, and which relate to and instruct the breach or breaches of statutory duty founded on.

[58] In looking at the pursuer's whole pleadings, the pursuer's case is narrowly cast: his pleadings only afford him the opportunity to lead a positive case about the number of exits, and no more. There is no further

particularity. There is no other averment of any kind specifying any further factual basis or ground of fault to instruct a positive case about a failure in any other respect, such as a failure of training, risk assessment, signage, deluge systems and so on on the part of the defenders. In my view, no notice has been given to the defenders that the pursuer wished to put any of these other matters in issue. Furthermore, in my view, these are not matters of impression but would, at the least, require investigation and instruction of the appropriate experts. In short, the pursuer's pleadings as they stand, do not satisfy the requirement of fair notice such as to enable the pursuer to lead positive evidence about these issues. To the extent that the procedural history is relevant, it suggests that the pursuer's legal advisers have been aware for some time of the inadequacy of the pursuer's pleadings.

[59] It follows that I uphold the defenders' objections to the positive evidence the pursuer sought to elicit from his witnesses in support of these lines of enquiry. However, it is important to bear in mind the limit of that constraint. It remained open to Mr Di Rollo to cross-examine the defenders' witnesses about the reasonable practicability of certain precautions or steps, even where his own pleadings were silent, in accordance with the *dictum* of Lord Kilbrandon in *Gibson*. Furthermore, this is also without prejudice to the onus on the defenders in respect of reasonable practicability, already referred to, should it arise.

The Undertaking Issue

[60] The issue of the undertaking is, in practical terms, a secondary or supporting argument to exclude the lines of questions about the cause of the fire. My determination of the objections based on no record has, in effect, also effectively determined this issue. The absence of any record precludes the pursuer leading positive evidence about this.

[61] While the undertaking bears to relate to the minute of amendment (no 39 of process), what was said on that occasion does, it seems to me, reasonably represent the pursuer's analysis of the scope of the pursuer's case. What counsel for the pursuer is there recorded as saying is that he is not (by that minute) intending to aver the cause of the fire. By implication, he is accepting that he has not put that in issue on record for the purposes of liability. While that was said in relation to, and to justify receipt of, the minute forming No 39 of process, the pursuer's then junior counsel is recorded as stating that "no such case was to be made". Whether that is characterised as a concession, assurance or an undertaking, in my view the defenders were entitled to proceed on the basis of that understanding that any liability arising out of the cause of the fire was outwith the scope of the pursuer's case. Accordingly, had this been a live issue, I would have determined this in favour of the defenders and excluded any evidence inconsistent with this understanding or undertaking.

The Incident Giving Rise to the Pursuer's Claim

[62] Having described the Absorber in some detail in the first part of this opinion, the facts of the incident may be briefly stated. It should be noted that the defenders strenuously contested the pursuer's account of where, precisely, he was at the point when he first became aware of smoke. Accordingly, I first set out the pursuer's evidence before determining that matter.

The Pursuer's Account of his Movements and Rescue on 23 March 2009

[63] On 23 March 2009, the pursuer was assisting as mate and firewatcher to John Robinson, a welder, and who was also employed by AMEC on the construction project at Longannet Power Station. The work on which the pursuer and John Robinson were engaged was essentially snagging work.

[64] In order to reach the place where he was working that afternoon as mate to John Robinson, the pursuer described going up the southeast stair to the 21 metre level walkway. From there he went north, that is along the east face of the Absorber until he reached the valley. (He did not describe it as such, but from the totality of the other evidence, this is where he must have gone.) He would have emerged from the valley at the west face of

the Absorber, and near its northern end. This corresponds to route (i) set out in paragraph [22], above. To access their place of work that day, the pursuer and John Robinson had had to climb up three 8 foot ladders. The ladders were not permanent features of the Absorber. The upper two ladders were situated one immediately above the other. The top of the third, ie lowest, ladder was situated a couple of paces away from the bottom of the middle ladder, possibly a little to the north of the two upper ladders. The distance between the top of the lowest ladder and bottom on the middle ladder could be covered in a matter of seconds. It was not entirely clear on the evidence where, precisely, these ladders were on the structure nor to which levels they gave access. So far as the pursuer could recall, the upper two ladders were on the west face of the Absorber. He did not demur from the suggestion that the two upper ladders were between the metal struts shown in photo 1 of No 7/62 of process and the lowest ladder somewhat to the north of these other two. The bottom of the middle ladder gave onto an area of scaffolding at some height above the 21 metre walkway, but did not give access directly onto any fixed walkway. So far as the pursuer could recall, this third ladder came down onto or inside a walkway which was enclosed. This corresponds to the valley. The pursuer had been up and down the ladders twice that day: for a break at 10.00am and for a dinner break.

[65] The pursuer says that that afternoon, sometime after 2.00 or 2.30pm, he and John Robinson had been working on a scaffold at a height just below the top or 29 metre walkway on the west face of the Absorber. The area where they were working was not part of the permanent structure but was variously described as a "skid platform", a "lift" or a "hop up".

[66] John Robinson needed to go down to ground level (or "grade" level, as some of the witnesses described it) to secure a grinder. While he did so, the pursuer went down to the 21 metre level to source a cable to power the grinder. He returned back up onto the scaffold platform on which he was working and threw one end of the cable down to some DSL workers working below, on the sloping roof, to be plugged into a power source. In cross-examination he maintained his position that he had re-ascended all three ladders.

[67] While waiting for John Robinson to return, the pursuer noticed what he first took to be a cloud of dust coming from above the Absorber. He walked along the scaffold to have a look and he quickly realised ("within 5 seconds") that it was smoke not dust. In cross he described this as "a massive black cloud." It was coming from the north. He described a very strong, blustery wind blowing from west to east. He heard John Robinson shout to him from a lower level, *"*there's a fire*"* and that he should "get going off of there*"*. His first thought was to get down the ladders. He got down the first two ladders. He intended to get down the third (ie the lowest) ladder and head east in what he had described as the semi-enclosed walkway (ie the valley) to reach the southeast stair. However, when he came to the top of the third, ie the lowest, ladder he could not see down to the bottom of it. He described it as pitch black with smoke. Looking east into the semi-enclosed walkway he described it as also thick with smoke.

[68] The pursuer said that he then went south along the scaffold that was above the 21 metre walkway to the south-west corner. He said that from the south-west corner he looked east along the south face of the Absorber and saw smoke half-way along the south face of the Absorber and said to himself "I can't go there". The pursuer was asked in chief why he had gone to the south-west corner and looked along and he said "to try and see if I could get access". He said that his intention was to get to the south-east stair. At the south-west corner, looking east, he found that he could not go that way either, due to smoke. At that point, he thought that he was stuck and could not get off the Absorber. So far as he was aware, the route off via the southeast stair was the only route off the Absorber. No other route was designated or signposted in any way. He thought he was in serious trouble at this point. As he explained in cross-examination, he would not consider going through the smoke because he knew that smoke would kill him more quickly than fire would.

[69] The pursuer said that he went back along the scaffold on the west side to the ladder "and it was in smoke". He then went back to the south side again and the smoke "was all along the east". He said that the wind was blowing from west to east so he decided to get onto the sloping roof on the west side of the Absorber away from the smoke. The pursuer said that he climbed over the handrail from the scaffolding onto the sloping roof. (He did not suggest that this was a significant drop.) He wanted to get down to the sloping roof to see if there was any scaffold access down to the ground from that point. He did so by climbing over a scaffold handrail and dropping onto the sloping roof, or possibly, dropping onto the lowest walkway and then onto the

sloping roof. Whatever the precise means, this was not a designated route off the Absorber. The sloping roof was at a height of about 21 metres, or possibly a little higher, from ground level. Unfortunately, he found that there was no scaffold access from the sloping roof to the ground.

[70] There was a large flange on part of the sloping roof. The pursuer described smoke coming out through it. The pursuer feared that with excessive pressure it might blow. He was fearful that this would happen and that everything would cave in. He could hear crackling noise. He went to the south-west corner of the sloping roof and shouted down. He briefly contemplated jumping down from there but, given that he was at the height of about 21 metres, he considered that this would be suicide. He stated that he was in fear for his life. He shouted down, or someone else shouted up, to use a nearby cherry picker to rescue him from the roof. He was in, or was told to go to, the south-west corner. Almost immediately steps were taken to move the cherry picker closer to the structure to effect a rescue. The cherry picker soon reached him. At the same time several men from the OPUS rescue team came up to him, wearing breathing apparatus and carrying spare breathing apparatus for the pursuer. He was given the option of coming down with the specialist OPUS team or coming down on the cherry picker. He opted for the latter. He soon reached the ground without physical harm. The pursuer estimated that he was up on the structure waiting for between 15 and 25 minutes.

[71] He described being sent home, but being taken for a drink first. He took one sip of his beer and then went outside, up a close and cried for 30 minutes.

[72] The cross-examination of the pursuer lasted for a full day, beginning a little after 2.00pm on the second day and extending to shortly before 3.00pm on the third day of the proof. He was cross-examined to establish that there had been an alarm sounded and that the timeline of events from the alarm being raised to the pursuer's rescue was of a shorter duration than the pursuer's perception of events. That evidence showed that the pursuer was rescued within about 13 minutes of the fire alarm first being sounded. I do not regard this feature as affecting the credibility or reliability of the pursuer. He was also questioned under reference to statements he had given the next day and as subsequently recorded in various medical records by medical personnel whom he consulted in the months after the fire. While there were differences of detail, eg such as the mention of fire or flames in later accounts, the pursuer's account overall remained consistent from his first statement (given the day after the fire) and up to and including his oral evidence at the proof, nearly seven years later.

[73] A number of questions were put to the pursuer in cross to try to establish where the pursuer was immediately before he became aware of the fire. The pursuer maintained that while he was waiting for John Robinson to return, he had gone down to secure an extension lead. He said that he then went back up the three ladders and dropped the cable down to the DSL men working on the sloping roof. Under reference to photo 7 of 7/62, showing stairs going down to the 21 metre level, the pursuer was adamant that he was higher up than the 21 metre level.

[74] The evidence concerning the location of the three ladders referred to was not entirely clear. The pursuer could say broadly where these were along the west face but not how far up or down they were in terms of height, or relative to the fixed walkways. So far as he could recall, the bottom of the middle ladder was about 8 feet above the 21 metre walkway and gave onto a temporary scaffold level which was not a fixed walkway. The distance between the bottom of the middle ladder and the top of the lowest could be covered in a few seconds. So far as he could recall, the bottom ladder was not on the west face of the Absorber, but part-way into an enclosed area (ie the valley).

[75] In endeavouring to determine at what level the pursuer was when he became aware of the smoke, several statements were put to him. Part of a statement he had given the next day (No 6/539 of process) was put to him, to the effect that he said in that statement that, after noting the smoke and walking back and forth along the west face he was "back to where [he] started coming along the 21 metre level scaffold". His position in evidence was that this was a misprint and that he was higher up. At a later point in cross, however, he appeared to accept that he did get down to the 21 metre level, albeit he remained adamant that this was scaffolding and not the 21 metre walkway. By this point, the smoke was halfway along the walkway to the end. He could not see the end of it.

[76] The whole of the first page of the pursuer's written statement (No 6/539 of process) was put to him. He accepted all of the passages put to him, apart from the passage where he is recorded as saying he had got down to the 21 metre level. In his statement he is recorded as seeing the dust, realising it was smoke and then almost immediately hearing John Robinson shout to him to get down. It was also put to him that he had not stated in his witness statement that he could not see down to the bottom of the lowest ladder. Notwithstanding this, the pursuer reiterated the evidence he had given in chief: he could not see the bottom due to smoke and he would not descend into it.

[77] In cross, the pursuer was repeatedly pressed as to why he did not go down the third ladder as he knew it would give onto the 21 metre walkway. He refused to do so, he said, because it was thick with smoke. He could not see the bottom of it. It was suggested he might face various ways, perhaps away from the smoke, in order to descend, the third ladder. The pursuer remained adamant that he would not go down through thick smoke that he could not see through, even if for a drop of only 8 feet. It led down to an enclosed area, and so far as he could see that area was also was filled with thick smoke. He steadfastly maintained that the only way he knew to get off was the east side, that is via the southeast stair.

[78] It was put to him that instead of going east, he could have gone south (presumably along the west face) and from there to the southeast stair. (The route being put to him corresponded to route (ii).) As the pursuer explained it, his intention was to go east (through the valley) as that was the only way he knew off the Absorber. His mind was racing. So far as he could see, the only way off was to the east and he could not get off that way. The ladder giving access to this was filled with smoke. At one point the pursuer appeared to accede to the proposition that if he had gone down the ladder, into the black smoke-filled area, and faced west as he did so (ie his face turned away from the direction of the smoke), he could have got to a walkway. However, his position was that the ladder led into an enclosed area filled with smoke he would not go down the ladder into thick smoke and where he could not see the foot of that ladder. He repeated that he had been trained that smoke will kill more quickly than fire.

[79] An observation from a witness statement (though not the statement itself) was put to the pursuer, to the effect that the pursuer appeared disoriented and that this individual told the pursuer there was a ladder, which the pursuer then descended. Mr O'Hagan's witness statement continued, to the effect it is recorded that he told the pursuer to climb over onto the roof of the Absorber and to go to its southwest corner. Mr O'Hagan is recorded in his statement as describing the pursuer doing what he had suggested. The pursuer denied being disoriented. He denied that he could just have gone down the bottom ladder and got off.

[80] It was put to him that there were 20 or so other men on the Absorber, all of whom got off. He was not aware of this nor of how they got off. Nor could he explain this. He had not seen them immediately before the fire and had not seen their route of escape. They had not passed him on their way off.

[81] John Robinson had also given a statement, although he was not called as a witness.

In his statement John Robinson had indicated that they had started work in the morning up at the 29 metre level. However, it is recorded in his statement that there came a point where he could not reach high enough. The work stopped and he and the pursuer had waited two and one-half hours for a hop up to be built. By the time of the outbreak of smoke, they had been working at the 21 metre level. The pursuer did not recall the long hiatus referred to in Mr Robinson's statement. He could not recall a hop up being constructed. He was adamant, however, that Mr Robinson was mistaken and that they were working higher up than the 21 metre level, that is just below the third walkway at 29 metres.

Other Ways to North: Scaffold Tower and Dance Floor

[82] Under reference to figure 8 of 7/62, one of the isometric drawings, it was put to the pursuer (without objection) that he could have got off by going under the ducts, so as to emerge at the area marked with a "1" in a yellow triangle. (The actual yellow markings on this figure were not put to him.) The pursuer denied that there was a route off in that direction. Miss Shand next endeavoured to put this route to him under reference to

photos numbered 7 to 9 of No 7/67 of process. The pursuer did not recognise or was not sure of the walkways depicted on these photos. This was entirely understandable, as there was no attempt at this stage of the proof to relate these photos to any of the figures or drawings produced. This passage of evidence is illustrative of the difficulties I referred to above, at paragraph [7]. A similar difficulty was encountered when photos numbered 12 and 13 were put to him, without the benefit of any markings to assist.

[83] At a later point in cross-examination, on day three, and under reference to certain features shown on figure 6A of 7/62, and under objection, it was put to the pursuer that he could have got off by going east and then north, away from the Absorber. (This would be via the passageway between the two parallel ducts, on the north-south orientation, and shown between points E and F on 7/68, although 7/68 was not available to the pursuer.) This route was said to lead to a scaffold tower on the north side tucked into the corner of the inlet duct, some distance away from the Absorber structure (or the valley along its north face) itself. The scaffold tower is depicted as an orange square on figure 6 and 6A of 7/62 and 7/68. The pursuer could not recall any scaffold tower to the north or that it could give access to the ground. He could not recall a large area of scaffolding at a lower level known as the "dance floor". He was not aware of where this was or what it was meant to signify. It was not suggested to him that this would have afforded a route all the way down to ground level.

[84] Mr Di Rollo's objection (referred to in the preceding paragraph) was that there was no record for an exit at the northeast point of the Absorber. As I have them noted, however, Miss Shand's questions related to a route or routes (if one included the dance floor) to the north. She has sufficient pleadings to put these matters to the pursuer. I repel this objection. As it happens, the pursuer's own evidence is inconclusive as regards any egress from the Absorber reached by going north. So far as he could recall, there were no other workmen in the vicinity at the point when he became aware of the smoke.

[85] A number of witness statements of others on the Absorber that day were put to the pursuer. Mr McAllister was a DSL Scaffolder who, in his statement, described being one of a three-man squad building a hop up at the 29 metre level for some AMEC welders – ie Mr Robinson and the pursuer. The pursuer could not recall this. The pursuer agreed with those parts of Mr McAllister's statement as regards the rapidity with which the smoke spread. Mr McAllister is recorded as saying that the smoke "began to engulf" the area, and had come from out of the duct at the 29 metre level. The pursuer confirmed that neither Mr McAllister or others in his squad (Paul McCluskey or Mick Rennie) passed him. He surmised that they may have got round on a different level. Mr McAllister is also recorded as calling to the "insulators who were working on different levels of scaffold" to get down. Mr McAllister is recorded in his statement as stating that he heard the evacuation alarm by the time he reached the ground. Mr McCluskey is recorded in his statement as stating that he could hear the alarm as they were leaving. In his statement, Mr Rennie also described hearing the alarm, but that it lasted only for 5 or 10 seconds.

The pursuer's understanding of access to and egress from the Absorber

[86] The pursuer's position, and which he steadfastly maintained over the course of cross-examination extending over two days, was that he was only ever aware of one route on and off the Absorber. In relation to other possible routes, including via temporary scaffolding, the pursuer's evidence was that this changed from day to day, as scaffolding went up and down. He said one could get access and egress for a couple of months and then the scaffolding would be taken down. He was adamant that the workmen were never told of any changes.

[87] In respect of fire alarms, it was put to the pursuer that there were fire alarms every Friday. He could not recall this. He accepted that there were separate alarms (by Scottish Power and another on site), but his evidence was that these were confusing and those working could never work out which alarm was which. In relation to permits to work, he accepted that the defenders operated a permit to work system. No particular documentation about this was put to him, notwithstanding that documentation bearing to relate to the specific task on which the pursuer and Mr Robinson were engaged in on the day of the fire was in process, and which was put to a later witness, namely the defenders' expert Mr Sylvester-Evans.

[88] When asked if there were any signs on the scaffolding, the pursuer replied that there were none.

Other Witnesses Working on the Absorber on 23 March 2009

[89] The pursuer also led evidence from James William Stewart. He was employed by DSL. His job entailed inspecting scaffolding as it was put up and taken down. He inspected the scaffolding on a weekly basis. He was referred to as a "tagman". By the time of the fire, he had been working on the construction project at Longannet Power Station for about three and one-half years.

[90] He was working on site on 23 March 2009. He remembered the day of the fire vividly. At some point in the afternoon, while he was working at the north side, someone had drawn his attention to the smoke. He could see that there were three DSL insulators working at height and who could not get off. They did not know the way down. By reason of his role, this witness knew the ladder access "inside out". The photos taken on the day show the west and south faces of Absorber 3 encased in scaffolding. He described it as a "maze" of scaffolding. He went up and led three DSL insulators down to safety.

[91] After he had returned to ground level, he became aware of another individual traversing the grating at about the level of 22 or 24 metres. (This was the pursuer.) He could see this person's feet through the Kennedy grating, pacing back and forth. He became upset at the recollection of this because he knew this person could not get off from where he was. This witness tried to re-ascend to see if he could help, but he was beaten back by the flames, which he described as terrible.

[92] In order to try to orient this witness, Mr Di Rollo put a number of photos from the bundle of photos at No 6/15 to him. In particular, he put photos numbered 31, 32, 49, 51, 57 and 60. This witness had no particular recall of Absorber 3. He could not relate what was in these photos to the Absorber or to his own evidence. Under reference to photo No 50 of 6/15, he could not really confirm if there was a means off at the southeast corner. He said there had been scaffolding around the Absorber but that some of it had been stripped away. He accepted that if scaffolding were in place, it might afford a way down. At one point, he mentioned going up the ladder "at the back", which he confirmed was on the north side. Figures 2 and 3 of 7/62 were put to him (without objection). From there he believed he was to the north of the ducting. It was from this position that he said he saw the three individuals trapped. He described the Kennedy grating as "way high up" and these three men were below that. He used scaffolding to go up. Under reference to figure 6A of 7/62, he believed he was on the north side of the Absorber, but behind it. He described the area between the ducting as quite tight.

[93] So far as he could recall, when possible other routes off the structure via scaffolding were put to him, his recollection was that these had already been stripped away by then. He could not recall if there was the scaffold tower still *in situ* to the north of the inlet duct. He spoke to some scaffolding being in that area, but that it did not go up that high and, in any event, flames were coming out at that area. He also described flames shooting out of the south west area. He said that the thought that continually ran through his mind on the day, as he observed the pursuer, was that there was only one way down from where he was, but that the pursuer was trapped.

[94] At a later point, this witness described flames from the west side. After a further series of questions, the witness accepted that he might have got his directions muddled up. So far as the photos show, such as photos Nos 32 to 36 of 6/15, put to the pursuer, these showed a view taken of the south face from the vantage of someone to the south. The flames then visible, would be from midway along the south face. The timing of these photos was, however, never established.

[95] The pursuer also led evidence from Hugh Pollock. He was a DSL employee working on the site as an insulator. He was one of the three workers whom the previous witness, James Stewart, had rescued. He was working on the east face of the Absorber, possibly at the middle level and about half-way along the east face. He described someone coming from the north end, down some stairs and shouted him to get down. Initially, Mr Pollock thought this was a joke but this other person said "*no"*, and that there was a "*helluva lot of smoke"*. Mr Pollock said, initially, that there was no smoke where he was. However, when he went and peered through part

of the structure, he could see plenty of smoke. While he did not describe it as such, from other evidence about the structure and his evidence of his location, it is likely that he was peering through the valley from its eastern part, looking west. He described seeing smoke there coming from his right side, that is coming from the north. He and the other two men he was working with were guided down by Mr Stewart. They got down via the southeast stair. Once down on the ground he could also see the pursuer, whom he described as stuck. He never heard a siren that day.

[96] The last witness led by the pursuer who had been working on the Absorber was Pat McAllister. He was one of several DSL scaffolders working behind a gantry protruding from the west face of the Absorber. He was about two-thirds of the way up the height of the structure. He confirmed, in cross-examination, that he and other scaffolders were building the extra scaffolding required by Mr Robinson. He became aware of black smoke coming toward them. He and the other two men he was working with went around toward the south and then east, to get off the structure at the southeast stair. The witness statement he gave the next day (No 6/148) was put to him in chief and in cross-examination. He accepted the reference there to an alarm being sounded for a very short period of time. Mr McAllister accepted all parts of the statement put to him, to the effect that he was one of three DSL scaffolders working on the west face of the Absorber that afternoon. They were modifying scaffolding for an AMEC welder. At around 3.00pm he heard a sound as if an engine had started. He then described a large plume of smoke coming out of the 29 metre level and that it had come out of the duct with force. This occurred at the same time that he had heard the rumbling noise. He said the smoke began to engulf the area so he and his other two scaffolders decided to evacuate the area. He said he raised the alarm by shouting down to someone at grade level to use a radio to call the 222 emergency number. He also said he called to the insulators who were working on different levels of scaffolding to get down off the Absorber. He did not mention coming across the pursuer at this time.

The Panel of Inquiry Interim Report

The Panel of Inquiry Interim Report: The Cause of the Fire

[97] Alan Dickson was the last witness to fact led on behalf of the pursuer. He was an engineer employed by Scottish Power. After the fire, he was appointed by Scottish Power to chair the Panel of Inquiry ("POI") into the cause of the fire. The Panel of Inquiry's membership was drawn from Scottish Power (the owners and operators of the Longannet Power Station), Alstom (the designers), AMEC (the principal contractors) as well as others engaged on the project. Mr Dickson was employed by Scottish Power. No final report was ever produced. The *interim* report was lodged as No 6/538 of process ("the POI report"). Questions were put to a number of witnesses about the POI report for the purpose of exploring the cause of the fire, but also to try to establish the pursuer's whereabouts on the Absorber at the time of the outbreak of the fire. I will deal with the findings of the POI, below.

[98] For the purposes of the POI, a large number of witness statements had been taken from those working on site at the time. As noted above, a number of these were put to the pursuer. Several of these were also put to Mr Dickson. In particular, Mr Di Rollo read out to him a short statement of a Mr E Fitzpatrick (contained among the unnumbered pages in No 6/298 of process). In that statement, Mr Fitzpatrick is recorded as having been working at "section 5" when he got a shout about the fire. He stated that he had tried to get down the stairs but that he could not get down. He tried to get down "from the back" but the wind had changed and "the flames were coming round the back end". His statement continued: "there was no other way but to jump on the roof and try to get down the scaffold which was not suitable to get down to ground level". Mr Dickson was not able to state where "section 5" was. He was not asked any further questions about this witness statement.

[99] Mr Di Rollo also read out the entirety of the witness statement of John Robinson (produced at 6/225 and also included at pages 46 to 47 of No 6/539 of process), the substance of which I have already recorded at paragraph [81] above. No questions were put to Mr Dickinson about the contents of Mr Robinson's witness statement, apart from asking him to try to relate certain features of it to the timeline in the POI report.

[100] In cross-examination Mr Dickson was referred to a number of additional witness statements. He confirmed that he was unable to say where "section 5" was, the area in which Mr Fitzpatrick is recorded as having stated that he was working. Miss Shand put to Mr Dickson the short witness statement of David O'Connor. This was that Mr O'Connor was working under section 5. In Mr O'Connor's statement it is recorded that he saw smoke coming from the expansion joint. He is also recorded as stating that another workmate, a G Simpson, shouted to him to get down and they "proceeded down the back of the section 5 scaffold". All that Mr Dickson could confirm was that someone else (ie apart from Mr Fitzgerald) appeared to be working at section 5. He did not know where "Section 5" was.

[101] In the context of a line of cross about the fire alarm systems, Mr Di Rollo also put passages of certain statements to Mr Richardson, the defenders' principal health and safety witness. While I will deal with the evidence concerning alarms at a later point, the statement from a Mr Stewart (which is found in the unnumbered sixth and seventh pages of No 6/198 of process) was put to Mr Dickson. In this statement, this individual referred to having been up on the 29 metre level at the east side bagging debris. He named four labourers (David Dickson, Jim Kirkland, George Simpson and Paul Linton) working close by. In this statement, this Mr Stewart is recorded as describing smelling smoke and deciding to evacuate the area. He told the others to do the same. He referred to being aware that there were two other workmen working on the same side and wanting to tell them, but they were already away. He stated that he shouted down to Jim Heresford and Jamie Fairlie to contact 222 because there was a fire. It is recorded that at that point he was approached by an AMEC welder (whom he did not name but which must have been Mr Robinson) asking if he had seen his fire watch, Mel. They both shouted his name but as the smoke was too bad he and Mr Robinson went down the stairs, passing the safety team on their way up. It was not suggested at the proof that this Mr Stewart was the same person, also named James Stewart, called as the pursuer's second witness. The description in the statement of the tasks on which he was engaged, this individual's location at the time he became aware of the fire and his subsequent movements are quite different from those described by the Mr Stewart who gave evidence at the proof.

[102] The POI report recorded that the cause of the fire was unknown. On the limited evidence led at proof about this, it would appear that the fire took hold inside the chamber of the Absorber. There was no hot work or other active process ongoing as would be the explicable cause of the fire. Indeed, the POI report had excluded hot work, discarded cigarettes, tarpaulin and internal lighting within the chamber as possible causes of the fire. Some 47 tests had been conducted on a variety of materials, using a number of forms of ignition, to try to identify how the fire might have started. Two of those tests disclosed that polypropylene was combustible, meaning capable of igniting and remaining alight, albeit that it required exposure to a naked flame for a minimum of 8 seconds and up to 20 seconds before it would ignite and sustain combustion. There was no evidence led at proof to indicate that the defenders or Scottish Power were aware at the material time of the combustibility of polypropylene.

[103] The provisional conclusion of the POI report was that the root cause of the fire was likely to be attributable to a chemical reaction within the Absorber chamber or some form of direct or indirect human agency. In relation to the former, it was noted that the period of higher risk during the construction phase associated with the application of chemicals in lining the Absorber chamber had passed. These chemicals had last been applied in December 2008 and under highly controlled conditions. In relation to human agency, deliberate human agency was considered to be unlikely. The provisional conclusions of the POI report did not suggest or support an inference adverse to the defenders in relation to the outbreak of the fire.

Other Causes of the Fire?

[104] There was some limited evidence, heard under objection, possibly relevant to the cause of the fire. There was evidence about an email sent in July 2009 (No 6/500 of process) and which referred to someone appearing on video footage and whose movements were described as "strange". There was also passing reference in the evidence to one or two minor fires on the site some months before the fire. Nothing can be reasonably inferred from this material. In any event, the POI report had considered, but not accepted, the possibility of fire being caused by human agency. Yet there was no challenge to the conclusions contained in

the Report of the POI. Furthermore, had this evidence been relevant, it falls to be excluded as a consequence of my ruling on the defenders' objections based on no record and as inconsistent with the undertaking.

The POI Report: Recommendations in Relation to Safety Issues

[105] Part of the remit of the POI report was to undertake a review of certain safety aspects. These were recorded in section 10 of the POI report. In paragraph 10.2 it was noted that one member of the consortium staff had had to be rescued as *"*he was unable to gain safe access to ground level due to the density of the smoke*."* That paragraph continued as follows: "As there is only one access and egress point to/from the Absorber, the potential exists for a similar situation to occur." The recommendation following this observation was for a thorough review of the access/egress arrangements "to ensure that staff have a clear route to ground from any level in the event of an evacuation".

[106] A further question put to Mr Dickson in cross-examination and under reference to this passage, as to whether or not there was another access point to the north of the Absorber, was vigorously objected to on several grounds. The question was too inspecific and more fundamentally, this had not been put to any of the witnesses to fact such as the pursuer, Mr Stewart, Mr Pollock or Mr McAllister. The question was rephrased to reflect a more specific route, and which I allowed under the usual reservations. The alternative route suggested was as follows: starting from a point on the west face at the level of the 21 metre walkway, and heading north,

(i) one could ascend a stairway leading up to a raised walkway;

(ii) once that raised walkway was reached, one could turn right (or east), and head into the west part of the valley, and which corresponded to (and proceeded under) the southmost arch of the lefthand duct (ie the outlet duct) as it ran at this point on a north-south axis;

(iii) before reaching the south-most arch of the next duct (the inlet duct), one could turn left, that is north, and travel between the external walls of the inlet duct (to the right) and the outlet duct (on the left). (This is the passageway referred to in paragraph [15] above);

(iv) one could then proceed between these two ducts for a distance until the north-most arch of the right-hand (i.e. inlet) duct was reached;

(v) at this point, one would turn right (that is east) and proceed under this north-most arch of the inlet duct; and

(vi) even after emerging from under that arch, one would continue a further distance to the top of what was said to be a scaffold tower leading to ground level.

[107] In relation to the pursuer's objection, while Miss Shand did not put the existence of a route to the north to Mr Pollock or Mr McAllister, she had record for this and she had put this route to the pursuer and to Mr Stewart. I therefore repel this objection.

[108] This route corresponds to the route going from points B to C (heading north), from C to E (heading east), from E to F (heading north again) and from F to G to H (heading east) on 7/68 of process (hereinafter the "zig-zag north route"). This witness, however, did not have the benefit of 7/68. It was figure 6A that was put to him.

[109] In answering this question, Mr Dickson explained that at the time of the POI report, he believed that there was only one access route off the Absorber (as recorded in section 10.2 of the POI report, and quoted at paragraph [98], above). However, he said that he had since learned that a route existed down to ground level from the north side. He could not recall having ever been up on Absorber 3 before the fire. The zig-zag north route was put to him and he could recall that "there was a walkway to that north side*"*. He could not "specifically" recall that it lead to a scaffold tower. As he explained, there was a lot of scaffolding around the

Absorber at this time. When pressed, he accepted that he could not really follow what was sought to be depicted in figure 6A of 7/62. (He was not the only witness to have this difficulty.) He now understood that there was a route to the north, with a number of different turns that could lead to a way down to ground level. He volunteered that this was "*quite a convoluted route"* to go to the north side and down to ground level. He could not recall a walkway being there previously. However, at the time of the POI report he believed there was only one route off the structure from the scaffolding, and this was down the southeast stair.

The POI Report: Timeline

[110] Having considered a significant amount of material, including witness statements, some CCTV evidence and reports of the fire brigade, the POI established a fairly precise timeline of the events. The first signs of fire or smoke were detected at about 14:57 (the earlier time of 14:50 recorded in section 6 of page 9 of the *interim* report was accepted to be incorrect). The station emergency control centre for the site was contacted at 15:01. The station fire team, who were based on site, were mustered to investigate the fire. At 15:07 notification was given to the emergency control room for the site to be evacuated. The evacuation alarm was sounded. At the same time the emergency services, including the fire brigade, were called. The fire brigade's own log recorded this call coming in at 15:02. The fire brigade arrived on site at 15:16. The pursuer had been rescued with the cherry picker before the fire brigade arrived. The decision was quickly reached that it was not practical or safe for the fire brigade to try to extinguish the fire. It was left to burn itself out. To facilitate this, one of the seawater pumps was re-activated at about 15:30 to pump sea water into the concrete chamber. While this was described as having an immediate impact of reducing the fire within the Absorber's concrete chamber, the fire continued to burn in the area above the pipework within the Absorber and within the GGH.

[111] From this timeline, it was shown that the pursuer was rescued within about 13 minutes of the alarm first being raised.

Defenders' Evidence as to the Location of the Pursuer at the Time of the Outbreak of the Fire

[112] The defenders led three witnesses: Mr Liam Richardson, who had health and safety duties with the defenders, Mr Andrew Foubister and Mr Sylvester-Evans. Mr Sylvester-Evans was the defenders' expert witness. Mr Foubister's evidence was in short compass, and concerned the sounding of the alarms. Mr Richardson was the principal witness of fact for the defenders. I will record his evidence regarding the defenders' health and safety regime, risk assessments and the related documentation at a later point in this opinion.

[113] Miss Shand sought to put figure 6A of 7/62 to Mr Richardson. This was objected to on the basis that the defenders had not produced any documentation in response to a specification relating to the Absorber prepared by this witness or anyone else. Mr Di Rollo objected to this document as being a copy and where no original was produced. Miss Shand did not understand the objection. Figure 6A was not a plan of escape routes. There had been oral evidence, drawings and photos to illustrate the Absorber and the walkways.

[114] I reserved the objection meantime and this witness' evidence continued. He explained that he was not sure if he had first seen figure 6A before or after the fire. He had created something like this after the fire. He explained it was created as a document on a computer. He then spoke to what was depicted on this document. In determining this objection, I note that this document has been put to a number of other witnesses without objection. I note that what is depicted in schematic form has also been spoken to in evidence, as augmented from time to time by photographs. The schematic figure 6A had a utility in facilitating taking the evidence of the witness. It was not relied on directly by the defenders as evidence of the route or routes to the north. On that basis, the objection to this document is beside the point. Insofar as one can use the concept in respect of a computer-generated document, Mr Richardson is its "author". I repel this objection.

[115] The defenders also put a number of witness statements to Mr Richardson that had been given by other individuals who were on the Absorber on the day in question, but who were not called to give evidence at proof.

Miss Shand's purpose, as I understand it, was to try to establish the location of the pursuer on the Absorber at the time of the outbreak of the fire.

[116] Mr Richardson spoke to the passages of the statement given by Mr Robinson (No 6/539 of process) in which Mr Robinson had stated that while he and the pursuer had been working at the 29 metre level earlier that day, they had had to come down while additional scaffolding could be put up, at that upper level, to enable the welding work to continue. In his statement, Mr Richardson had described this as entailing a wait of between one and one-half to two hours, and so Mr Robinson had decided to do some welding at the 21 metre level. It was in the course of this work that he had had to go to grade to get a grinder. It was during his return that he became aware of the fire.

[117] Mr Richardson also spoke to a witness statement given by a Vinny O'Hagan to the POI. Mr Richardson confirmed that it was he who had noted the statement. In his statement Mr O'Hagan described himself as an electrical supervisor employed by AMEC. He had heard a muffled bang and on looking up noted black smoke billowing out from the area of the expansion joint. In his statement he had said that within seconds the smoke had started to pour out of the south access door underneath the 21 metre level. He is recorded as stating that he could see guys exiting off the scaffold on the west side and heading east toward the southeast stair. In his statement he also said that he could see the pursuer trying to exit the scaffold but, "it seemed to me that he became disorientated by the thick smoke". The statement also recorded Mr O Hagan as stating:

"I shouted to Mel that there was a ladder that he could descend. Mel then climbed down to the 21 metre level. I then told him to climb over the handrail onto the Absorber roof and head to the south west corner which he done. So I spoke to Harry Clark (AMEC) to try to keep him (Mel) calm while I organised a cherry picker to the area and started to reach up to the roof."

The Location and Movements of the Pursuer at the Time he became aware of smoke

[118] At the time of the outbreak of the fire, the pursuer believed he was at, or just below, the 29 metre level. As noted above, under reference to Mr Robinson's statement, the pursuer was cross-examined on the basis that he and Mr Robinson had already come down earlier that day to work at a lower level, being no higher than a single 8 foot ladder-height above the 21 metre walkway. The pursuer was subjected to extended cross-examination on this point. In her written submissions, Miss Shand also set out in great details those parts of the evidence she relied on to show that the pursuer was lower down, namely at or just above the 21 metre walkway.

[119] Other than as a basis to challenge the credibility or reliability of the pursuer, it is not clear what other point Miss Shand sought to make about this. It may have been part of her contention that the pursuer had failed to prove it was "impossible" to exit off the Absorber. Whether at the time he became aware of the fire the pursuer was working at the top level of all three ladders, as the pursuer says, or whether he was lower down, working near the top of the lowest of the three ladders, it is clear that the pursuer was able to arrive at the top of the lowest of the three ladders very shortly after he became aware of the smoke. Accordingly, in my view, nothing turns on where, precisely, the pursuer was in terms of a particular level, at the point when he first became aware of the smoke. Even if the pursuer were at the higher level, as he believes, within moments he was down the two uppermost ladders. This would place the pursuer at about no more than 8 feet above the 21 metre level. So far as the evidence disclosed, the pursuer was not able to travel any great distance, horizontally, along the scaffold level. It is for this reason that the pursuer was endeavouring to get down to the 21 metre level.

[120] On a balance of probabilities, I find that the pursuer was not at or near the 29 metre, as he believed, when he first became aware of the smoke. While it was the pursuer's firm belief that he was at this higher level, this is not consistent with the statement he gave the day following the incident. Common sense suggests that he is likely to have a better recollection of the details of the incident in its immediate aftermath rather than some seven years later. Furthermore, his evidence on this point is not consistent with the statements or evidence of other witnesses, in particular of Mr Robinson or of Mr McAllister. Mr Robinson explained why he and the pursuer had had to come down from the 29 metre level, for some hours, while a hop up was being built,

although the pursuer had no recollection of this. Mr McAllister was one of the DSL scaffolders working on the west face of the Absorber modifying the scaffolding for the AMEC welder, that is for Mr Robinson. He was at this location at about the 29 metre level when he became aware of the smoke. He does not mention the pursuer being in the vicinity. Equally, the other evidence would suggest that the pursuer was lower down than 8 feet above the 21 metre level.

[121] In submissions, Miss Shand contended that the pursuer had failed to prove that it was impossible to descend off the Absorber. The basis for this submission was that all of the other 40 or so workmen working on the Absorber did get off. That may be so, but none of the other workmen who gave evidence at the proof, or whose statements were referred to, mentions the pursuer being with them, or near them, at the time they became aware of the smoke. None of these witnesses mentions coming across the pursuer in the course of their evacuation off the Absorber. It was only Mr O'Hagan who spotted the pursuer, and this was from his position at ground level looking up. At the time from when the pursuer first became aware of the outbreak of smoke, until his rescue from the roof of the Absorber, he was alone. There is therefore nothing to suggest he was lagging behind one or more other workmen, as they made their way off. The pursuer's description of his immediate response and movements do not support any inference that he was delaying his descent.

[122] What the preponderance of the evidence did disclose is that, whatever his starting point may have been, in the short period of time between the pursuer becoming aware of smoke and either reaching the top of the lowest ladder, or being just above the 21 metre walkway, the smoke had developed and spread to such an extent that it was sufficiently thick ("pitch black" in the words of the pursuer) to cut off any route that entailed going through it. More importantly, the smoke had also reached the west side of the valley and was visible from the other, eastern side, of the valley. Looking east into the valley, the pursuer described this as "thick with smoke". The smoke had also reached the area to the west and south of the pursuer, and it precluded his travelling further in that direction. The spread of the smoke was consistent with the evidence about the wind direction, which was described as blustery and blowing from west to east.

[123] Indeed, there is a striking coherence in the description provided by all of the workmen who gave evidence, or whose statements were referred to in the course of the proof, of the extremely rapid development of smoke very shortly after they first became aware of it. Mr McAllister was one of the DSL scaffolders working on the west side at the height of about 29 metres. He described smoke coming from the north and out at force at high level from the ducts and engulfing the area. This was the smoke that Mr Rennie "could taste". Mr Pollock was one of the three DSL insulators working on the east face of the Absorber, and who had to be rescued by Mr Stewart. The area where he described smoke emerging was from the north and west, viewed in the area where the pursuer was working, or at least waiting for Mr Robinson. If he were at the top of the third, or lowest ladder, this would place him at the northwest corner near to, or possibly just inside, the valley and where others had also described the smoke. The statements of some of the other workmen support the evidence about the rapidity with which the smoke spread. Those working on the east side refer to this, as in the witness statements of Jim Stewart (No 6/298 of process), as well as Mr Pollock who gave evidence at the proof. Those working in "section 5", such as Mr Fitzpatrick, also referred to their way being blocked by flames.

[124] As noted above, a number of photos from the bundle lodged at 6/15 were put to the pursuer, as were photos of him being rescued from the roof with the cherry picker as depicted in No 7/24/12, 7/24/14 and 7/62/59 of process. Another photo, No 6/15/46 of process, shows the pursuer on the northwest corner of the roof of the Absorber, and before the cherry picker has approached the structure. This photo shows quite graphically the thick black smoke enveloping the structure from above, but with the smoke reaching down to just above the level where the pursuer is standing. At a higher level the smoke appears to surround the whole structure, and it extends down at the southeast corner to ground level. The only face of the Absorber clear of smoke is the west face, where the pursuer had positioned himself.

[125] Unless the pursuer were compelled to go through the smoke he described, he was unable to access the southeast stair, regardless of whether he could have gone north, turned east into the valley and then turned south once he emerged from the eastern edge of the valley (via route (i), described at paragraph [22] above), or whether he had gone the other way by heading south and then east along the south face of the Absorber (via route (ii), described at paragraph [22] above). It follows that, even on the hypothesis that the zig-zag north route

existed, the first part of this route entailed going through the valley; an area the pursuer described as thick with smoke. In doing so, he would be entering into a semi-enclosed area. The consequence of all of this evidence is that, in the absence of a route to the ground situated on and accessed from the west face, the pursuer was unable to reach the southeast stair. In the particular circumstances of the rapidly developing thick smoke, he would have been unable to reach any route off the Absorber located to the north that required the pursuer to pass through the valley.

[126] While the pursuer was cross-examined extensively on his not getting down more quickly, in my view there is no evidence to support this criticism. I refer to my observations above, at paragraph [121]. In the circumstances in which the pursuer found himself, some allowance must be made for the possibility that an individual may panic, or at least may pause to try to assess his options. Miss Shand also criticised the pursuer for being unwilling to go down through smoke to the bottom of the last ladder. The pursuer's evidence was that he would not go through the smoke, because he had been trained that smoke kills more quickly than fire. Miss Shand did not challenge this answer, but in submission she criticised this, because the pursuer did not elaborate on what he meant by that "or the manner in which that smoke could harm – if indeed he had formed a belief at all that the smoke would harm him." I find, however, that the pursuer genuinely believed that the smoke posed sufficient danger to justify his declining to go down into it, especially when (on his evidence) he could not see down the ladder and where the route was through the valley. I also find that his concern was well justified and reasonable in the circumstances.

[127] As part of her criticism of the pursuer's reluctance to go through smoke, Miss Shand relied on the evidence of Liam Robertson, who had indicated, in response to a question from the court, that in an emergency he would have gone through the smoke. However, the later health and safety witnesses confirmed that the advice about how quickly smoke can kill, referred to by the pursuer, was the standard advice. This was also the tenor of Mr Richardson's evidence in chief on this topic. There is no plea of contributory negligence. If all of this was to advance a criticism of the pursuer, such a criticism is in my view unjustified.

Would Other Routes off the Absorber Have Been Available to the Pursuer?

[128] The pursuer's case has been conducted on the basis that there was only one means of egress. The defenders' case has been conducted on the basis that there were at least two routes off the Absorber, being the southeast stair and the zig-zag north route, and that this sufficed to meet the pursuer's case. In addition, the defenders endeavoured to lead evidence to show that the dance floor provided a means to get down to some unspecified lower level, even if this did not afford a means of escape all the way down to the ground.

[129] Neither party tried to relate their approaches to the evidence about the rapid development and spread of the smoke. Nor did they appear to take into account the pursuer's evidence about his attempts to go in several directions and his having encountered thick smoke in any direction he was able to proceed. On the evidence I have accepted, smoke cut off the pursuer's retreat from the northwest corner where he found himself. On the whole evidence, I find that by reason of the rapid development and spread of thick smoke the pursuer was unable to retreat along route (i), being to retrace his route east through the valley before heading south along the east face to the southeast stair, or along route (ii). It is clear, too, that smoke in the valley, or in the western part of it, would also have prevented the pursuer from accessing the zig-zag north route or any other area or egress to the north (if it existed) accessed via the valley.

[130] As a consequence, if there were one or more additional means of egress from the Absorber on or via the north face, in the circumstances in which he found himself the pursuer would not have been able to avail himself of it (or them). On the evidence, the rapid development and spread of the smoke from the north, and blowing east across the northern half of the Absorber, meant that the pursuer's route off via these means was cut off by the smoke. Accordingly, even if there was only one means of egress (being the southeast stair) and if this were a breach of duty, such a failure was unlikely to be causative of the circumstance in which the pursuer found himself.

Conclusion on number of means of egress

[131] For completeness, I should record my conclusions as regards the number of means of egress. The evidence about the dance floor was very thin and there was no cogent evidence to indicate that, even if it existed, it afforded a means of access down to ground. On the other hand, on a consideration of the whole evidence, I find that on a balance of probabilities there was another route off the Absorber, other than from the southeast stair. The existence of this second means of egress was spoken to by Mr Richardson, by Mr Dickson and also Mr Stewart. While in his evidence it was clear that Mr Stewart was confused about his orientation, he referred to going up to effect the rescue via scaffolding- that is by some means other than the southeast stair. In addition, the two workers who gave statements about working in "section 5", both stated they got off "the back", ie as opposed to getting off via the southeast stair. Even if it is not clear where "section 5" was, that evidence is suggestive of a means other than the southeast stair. All of this evidence, together with the evidence of Mr Stewart, coupled with the fact that no other witness suggested there was a means of egress via the south or west faces, supports an inference that that second means of egress was, indeed, to the north. This conclusion is based on the evidence of these witnesses. In reaching this conclusion, I place no reliance on the isometric drawings objected to, or on figure 6A in 7/62 or 7/68. These documents were not agreed. They had no evidential value in themselves and, in any event, they were superseded by the oral evidence of the witnesses just referred to.

The defenders' health and safety regime

[132] The defenders' first witness was Liam Richardson. He eventually became a health and safety manager with the defenders. He had a number of certificates and other qualifications in health and safety. He had been employed by the defenders at Longannet since about January 2007, initially in the capacity of a health and safety administrator. He was led to speak to the documentation produced by the defenders relating to their health and safety regime, to the risk assessments and to the permit to work systems as operated by the defenders. He also gave evidence about certain physical features of the Absorber at the material time and spoke to a number of the photographs and to some of the figures appended to the report by Mr Sylvester-Evans at No 7/62 of process.

[133] As a health and safety administrator his role had involved reviewing reports, conducting inspections, providing talks to workmen, looking at risk assessments and ensuring these were followed. Once he was promoted to manager he described his responsibilities as involving less time on the construction site and being involved in more "high level" planning matters.

[134] Mr Richardson knew the pursuer from his time at Logannet. He confirmed that the pursuer was a general labourer but also that his responsibilities included sorting refuse into the correct containers and cleaning up small spills on site using a spill kit. This constituted the extent of the pursuer's health and safety responsibilities. He also explained the role of a fire watch, which was to assist a welder and keep a look out for the inadvertent start of any fire caused by the welding work. While so engaged, a fire watch would be provided with a hand-held fire extinguisher.

[135] In terms of general safety management, this witness explained that, apart from designated smoking areas, the defenders had a no-smoking policy on site. The defenders enforced this policy with a yellow card system. The ultimate sanction was removal from the site.

[136] In order to explain the defenders' health and safety practices, a number of documents were put to Mr Richardson. Some of these were of a general character (such as the "Fire Prevention SHE Procedure 11") while others were specific to the Longannet site (eg the "Construction Phase Health and Safety Plan"). Some materials were said to demonstrate the operation of the safety systems in place, such as a potential hazard reporting log.

[137] In particular, Mr Richardson spoke to the defenders' "Fire Prevention SHE Procedure 11" (No 7/58 of process) ("the SHE Procedure 11"). This was a 14-page document dated 8 January 2007. It bore to be general

guidance produced by the defenders and setting out the defenders' approach in order, it was said, to comply with governmental and statutory requirements for fire safety risk assessments. It made express reference to the Regulatory Reform (Fire Safety) Order 2005 ("the 2005 Order"). It noted that while the 2005 Order took effect in England and Wales, compliance with the 2005 Order would meet the requirements in Scotland as well. Part 4.4 thereof concerned "fire safety arrangements". It stated that a fire and emergency plan must be produced for every site or location. It further stipulated that where that site was associated with a construction project, the fire and emergency plan should form part of the project construction phase health and safety plan. That emergency plan should, it stated, specify rules to minimise the potential for fire and specify actions to be taken should a fire occur. Such a plan should include, but not be limited to: fire detection and warning, evacuation and means of escape, provision for adequate firefighting equipment, arrangements for reducing fire load, smoking policy and site rules, permit to work, site security and exclusion of unauthorised personnel and appointment of persons to assist in the application of the plan.

[138] Mr Richardson explained that the general guidance set out in the SHE Procedure 11 was a foundational document and would be used when producing a construction-phase plan for a specific project. It would inform documents such as the Construction Phase Health and Safety Plan.

[139] Mr Richardson next considered the "Construction Phase Health and Safety Plan", fourth issue, dated 18 March 2009 lodged at 7/30 ("the Construction Phase HSP"). This related to the construction and integration of the three FGD absorbers into the Longannet power station. Passing reference was made to sections 1, 2, 3 and 4, comprising the introduction, overview of the project, SHE aspirations and SHE policy. ("SHE" stands for Safety, Healthy Environment.) Sections 14, 17, 18 and 23 were gone into in a little more detail in evidence.

[140] Section 14 dealt with risk assessments. The first three paragraphs of this section were put to Mr Richardson. These paragraphs referred to the obligation to undertake risk assessments as imposed by regulation 3 of the Management of Health and Safety at Work Regulations 1999 and that all work must have a suitable risk assessment in place before any such work took place. It also stated that the defenders' management systems were designed to identify risks and to promote an active health and safety culture. Mr Richardson confirmed that the use of a risk assessment was the biggest process to assess a risk on site. It was a dynamic process.

[141] By way of illustration of that process, Mr Richardson explained that the defenders operated a system for reporting problems and these were logged. An extract of such a log was produced at No 7/49. This was in table form and contained brief entries setting out the date, location and brief description of the problem or risk identified, together with the details of the remedial work undertaken and issue raised. So, for example, on 21 February 2007 it was reported that hot sparks were coming down on an area that was not protected by a barrier. The remedial action was to stop work until this was done.

[142] Mr Richardson explained that at all times workmen carried pre-printed cards to enable them to make reports of such potential hazards and the submission of these cards was encouraged by the giving of monthly prizes. To publicise this, the defenders also produced notices to encourage reporting of potential hazards and to announce prize winners. Examples of these notices were produced at no 7/57 and spoken to by Mr Richardson.

[143] Returning to the Construction Phase HSP, Mr Richardson was referred to section 17, concerning SHE audits and inspections. This stated that SHE auditing would be undertaken throughout the project to ensure a high standard as regards health, safety and environmental matters. It stated that SHE audit matrices will be compiled and consortium participants made to participate. It also stated that all members of the consortium will conduct regular SHE audits. There would be scheduled audits as well as inspections by the consortium management team. The scheduled audits included, *inter alia*, fire protection and prevention. Examples of these audit matrices were produced, at 7/50, 7/51 and 7/52 of process. The document produced at 7/50 was an example of a daily SHEQ inspection report. Mr Richardson could speak to this because part of his responsibilities included conducting the daily inspections. The pro forma SHEQ inspection report included a tick box for fire precautions equipment and housekeeping/material storage. So, for example, on the audit sheet for 7 January 2009 it was noted that there were burning activities in middle section of GGH 3. The area was described as well protected with fire blankets but it was noted that there was no fire extinguisher on hand. In

the corresponding column it was noted that the operatives were spoken to immediately and a fire extinguisher retrieved. The documents at 7/51 to 7/52 were pro forma reports for other types of audits. These were not scheduled for specific dates but undertaken when required and were directed to auditing specific matters. So, for example, 7/52/5 listed a planned safety audit inspection directed to "fire protection and prevention". On this form, which related to an inspection on 20 January 2009, it was noted that the provision of alternative means of escape was marked as "satisfactory" (as opposed to "not satisfactory"). Mr Richardson confirmed that the audits proposed in section 17 of the Construction Phase HSP were carried out.

[144] Section 18 of the Construction Phase HSP covered site emergency procedures. This stipulated that project-specific emergency procedures would be prepared and agreed with Scottish Power. This was because, as Mr Richardson explained, it was a Scottish Power site and it was a live power station. Scottish Power controlled the alarms and they liaised with the external fire brigade. It was also stated in this section that emergency procedures would be discussed with all personnel at induction. Specific muster points were to be agreed with Scottish Power. Section 18 of the Construction Phase HSP also stated that any subsequent changes made in emergency procedures would be "cascaded to the workforce" through toolbox talks, a site safety bulletin or newspaper. This section of the Construction Phase HSP also specified regular trial emergency evacuations and test alarms. Mr Richardson explained that the trial evacuations were conducted once a year. Fire alarm tests were weekly.

[145] Mr Richardson was referred to the defenders' "Emergency Response Plan" for Longannet, third issue, dated 28 February 2008, and produced at No 7/42 of process, as demonstrating the implementation of what was set out in section 17 of the Construction Phase HSP. This was the defenders' document but, as Mr Richardson explained, it had to dovetail with Scottish Power's own procedures for Longannet. Part 2 covered station evacuation procedures. This section explained that a warbling tone was used to signify evacuation of the plant whereas a steady tone signified the outbreak of a fire. Sections 3 and 4 explained what action was to be taken in the event of, respectively, an alarm for evacuation or for a fire. In either event, the advice was the same: all machinery was to be switched off and the workmen were to go to the contractor's compound by the "shortest route without putting yourself at risk". At this point, Mr Richardson was asked if scaffolding on the Absorber changed regularly. He agreed that it did and that it was necessary to provide means of egress and access of the Absorber. However, it was not possible to give more detailed information than that set out in sections 3 and 5 of the Fire Emergency Plan – to use "the shortest route" - because the route could be different for workmen in different areas.

[146] Section 23 of the Emergency Response Plan related to fire precautions and was comprised of six paragraphs. It was expressed in general terms and required the consortium, which included the defenders, "to provide sufficient fire-fighting equipment in and around the temporary facilities and work areas, including the provision of fire detectors and fire escape routes where deemed necessary." It also specified that "[h]ousekeeping standards will be maintained to a high standard to eliminate the risk of combustible oddments from the building to cause a particular hazard". Mr Richardson explained that the document was required under the Construction Design and Management regulations. Its purpose was to outline all of the risks at a high level.

[147] Mr Richardson also explained about the "permit to work" ("PTW") system operated by the defenders. Before certain types of work would be undertaken, an application had to be made to the defenders for a PTW. Part of this included a risk assessment of the proposed work. For hot work, for example, the permit would have to identify where this work was to take place. Part of the assessment also involved considering whether any other ongoing work presented a conflict with the proposed work.

[148] There was some reference in the evidence of the pursuer's witnesses to fact to the OPUS team. Mr Richardson explained that they were third party contractors employed to provide rescue services, including for those working at height.

[149] In cross it was put to Mr Richardson that the Construction Phase HSP (No 7/30 of process) did not contain a fire risk assessment relating to the construction phase. Mr Richardson accepted this. In relation to the FGD Fire Risk Assessment, No 7/36 of process, it was put to him that, as it stated (at section 3.1) that non-process fires in buildings was outwith its scope, it did not relate to the construction phase of the project. Again,

Mr Richardson accepted this. It was not a fire risk assessment concerned with the construction phase of the project. Paragraph 4.3 of the same document was put to Mr Richardson, to the effect that there was a concession request by the project designers (Alstom) "to reconsider the requirement for a deluge system within the absorbers". He was not aware of having seen this passage before. When pressed, he explained that in his view a FGD works as a deluge, as it involved spraying sea water into the chamber. He couldn't see what a deluge system would do beyond what was already in place. When water was pumped in, the Absorber became (in his words) a concrete box filled with water.

[150] The following documents were also put to Mr Richardson in cross examination: the fire evacuation plan (No 7/38), which was described as a "Fire Emergency Evacuation Plan; the "Fire Procedure" (No 7/37 of process); the "Emergency Response Plan", third issue dated 28 February 2008 (No 7/42 of process); and the "Emergency Response Plan", fourth issue dated 26 March 2009 (No 7/43 of process). He was asked if any of these constituted a fire risk assessment relating to the construction phase of the project. Mr Richardson accepted that none of these was of that character. When asked if he had ever seen such a document, he replied that he hadn't.

[151] In respect of the manner of the pursuer's rescue, it was put to Mr Richardson that there was no mention of the use of a cherry picker in the Emergency Response Plan that was in force as at the date of the fire, being No 7/42 of process. Mr Richardson accepted this.

[152] Under reference to 7/51 and 7/55, Mr Richardson confirmed that these were examples of daily inspection sheets. There were three day shifts and one night-time shift. An inspection would be conducted and documented at least once per day.

[153] Mr Di Rollo then turned to the defenders' SHE Procedure 11, No 7/58 of process. Mr Richardson accepted that this was not specific to Longannet. It was an internal document of the defenders. He accepted that there was no reference in that document to the version of the HSG 168 in force at the time. He also accepted that No 7//58 of process was not a fire risk assessment relating to the construction phase of the project. He accepted that none of the defenders' documents put to him constituted fire risk assessments covering the construction phase of the project. He accepted that the defenders would be required to have a fire risk assessment for the construction phase of the project under the Construction Design and Maintenance Regulations. He had seen a fire risk assessment for the construction phase of the Absorber. However, having not been with the defenders for some time, Mr Richardson could not say where that fire risk assessment was.

[154] It was suggested to Mr Richardson that there was an increased risk of fire at the commissioning stage of the Absorber. Mr Richardson rejected that proposition. It was put to him that the operation of the pumps posed an increased risk of fire. Again, Mr Richardson rejected this: the pumps were situated over one kilometre away from the Absorber. They did not pose a fire risk. The commissioning exercise entailed pumping water into a concrete box. This did not pose an increased risk of fire.

[155] Mr Richardson was cross examined in relation to risk assessments and what generally these should disclose. He readily accepted that a risk assessment for fire risks should seek to reduce the risk of fire, to reduce the spread of fire, to deal with means of escape, to deal with the means of fighting a fire, alarms and the operation of emergency procedures.

[156] However, there was no cross examination of Mr Richardson on the basis that, notwithstanding the totality of the documentation produced by the defenders and to which he had spoken, there was some specific deficiency as regards the defenders' safety procedures on site. For example, it was not put to him that the lack of a fire risk assessment relating to the construction phase resulted in any particular omission of a safety procedure or precaution, much less one that had any causal consequence for the pursuer. It was not put to him that the number or location of the means of escape was inadequate or insufficient.

[157] In respect of the fire alarm systems, Mr Richardson explained that there was an evacuation alarm as well as a fire alarm on site, though not specific to the Absorber. He confirmed that the fire alarm was site-wide. An alarm was operated by the men phoning the emergency number, which was 222. This call would come through

to the central control room, manned by Scottish Power, and they would liaise with the fire team. The fire team would assess what response was appropriate. If an evacuation was necessary, they would activate the evacuation alarm. This could be heard all over the site. Scottish Power would also liaise with the external fire brigade, if necessary. On the day of the fire, the site had been evacuated and men gathered at the muster points. The single exception was the pursuer. In Mr Richardson's view, the evacuation alarm was audible from all locations. He accepted that if it couldn't be heard everywhere on the Absorber, then something was wrong.

[158] In a series of questions it was put to Mr Richardson that there should have been an alarm specific to Absorber 3. Mr Richardson did not accept this. The Absorber was a "concrete box". It would not be feasible or practicable to put an alarm inside that box, or to do so during the construction phase. If there was a fire in a duct, there already was a fire system in place. It was not simply a question of fitting an alarm or a temporary one to the Absorber. It was a Scottish Power site and any alarm system had to be tied in with the system operated by Scottish Power and controlled through their central control room. Furthermore, he explained that during the construction the structure was continually evolving. In his view, it simply was not reasonably practicable to have a temporary alarm system specific to Absorber 3 during the construction phase. This was not something he had seen on other sites. If one balanced all of the relevant factors, including costs, time and the benefit, he suggested it would entail scaffolding costs of about £10,000,000 for an alarm system costing £1,000,000. Once the Absorber was completed, there would be a permanent alarm system. This was not reasonably practicable to achieve during the construction phase. The building continued to evolve and it was not feasible to run the cables and then re-position these as the structure changed. It was difficult to put an alarm system in until the Absorber was complete.

[159] Mr Di Rollo also referred Mr Richardson to a bundle of five witness statements from DSL men who had been on site. These bore to be statements from David O'Connor, John Craig, Jim Stewart, Robert Teven and E Fitzpatrick. These statements were very short. All but one of these comprised a single paragraph each. Some of these short statements were put to Mr Richardson for the purpose of noting that either there was no mention of a fire alarm (David O'Connor or John Stewart) or that any alarm that sounded did so for no more than 30 seconds (John Craig). Mr O'Connor and Mr Craig had been working together in the same area, namely "section 5". At the time of becoming aware of smoke, Mr Stewart was bagging debris from the 29 metre level on the east side. Mr Richardson could not comment on the omission of reference to hearing a fire alarm. He was not on site on the day in question. Mr Richardson accepted that the system in operation depended on a verbal safety report of a fire and a call to the central control room.

[160] In relation to deluge systems, Mr Richardson was not aware of whether this had been considered for use during the construction phase.

[161] Mr Richardson accepted that any fire escapes should be designated and signed as such. It was put to him that information about changes of fire emergency routes should be provided to workmen. Mr Richardson accepted that this should happen for any material change, but his position was that this had been done via the toolbox talks. If there were to be a change, then the supervisor would explain this when briefing a particular job. At the same time, any necessary personal protective equipment would be provided. The toolbox talk included a briefing on the safety aspects of the task in question. He confirmed that other than fire extinguishers, there was no other equipment provided to stop the spread of fire. Fire extinguishers were provided for any hot work.

[162] Under reference to the fire risk assessment for Longannet, Mr Richardson accepted that there was no mention of polypropylene tiles in the section dealing with "control of ignition sources and combustible materials". He now understood that polypropylene was combustible.

[163] In re-examination, Mr Richardson accepted that scaffolding external to the structure might afford a route for escape in the event of a fire. He also said that he would not expect temporary scaffolding to be sign-posted in the same way as buildings are for fire escapes and exits.

[164] Mr Richardson was asked to confirm that none of the documents put to him in his evidence had been a fire risk assessment for the construction phase of the Absorber. He did so, but he also confirmed that the

defenders' procedures took into account all that was required about safety matters. Documents such as those looked at had their limits. The assessment of risk was an iterative process. The health and safety documentation Mr Richardson had spoken to would, on his evidence, have assisted the defenders in their identification and assessment of the relevant risks. Documentation that had been gone through in court would have a helped the defenders to address the risk. The procedures followed by the defenders constituted a verification of what would have been in a risk assessment.

[165] In relation to the possibility of putting fire alarms in ducts, Mr Richardson's position was that it was hard to envisage how this could be done, given that the function of the ducts was to conduct the emissions from the flue gas desulpherisation process.

[166] In respect of fire alarms on the Absorber structure, in his view it was not usual to install fire alarms on a part-built building.

Expert Evidence in relation to principal issue of liability

The experts and their reports

[167] Two experts gave evidence in support of the pursuer's case, Mr McGillvray and Mr Kidd. Mr McGillvray produced a report dated 2 November 2015 and lodged as No 6/530 of Process. It was 51 pages in length, including 3 pages for his CV. Mr McGillvray's evidence was taken on commission over the course of a day shortly before the diet of proof. Mr Kidd produced a report, lodged as No 6/637 of process, and dated 23 December 2015. This totalled 12 pages, including three pages of glossary, references and his CV. His evidence was split over days 4 and 7 of the proof. The defenders led Mr Sylvester-Evans. His report was dated 14 March 2014 and lodged No 7/62 of process. It totalled 39 pages, including three pages of glossary, references and CV. Mr Sylvester-Evans' evidence was heard over three days.

Principal Issue on Liability

[168] The principal issue on liability, as reflected in the pleadings, was whether or not there were a sufficient number of means of egress from the Absorber in the event of a fire. The pursuer's position was that there was only one, namely the southeast stair, whereas the defenders' position was that there was at least one, if not two, other means of egress off the Absorber. The pursuer did not plead a case that the means of egress were insufficient in some way. As matters were developed at proof, considerable reference was made to Health and Safety Guidance 168, the relevant edition of which was the one produced in 2007 ("HSG 168"). As will be seen, the sufficiency of the means of egress in terms of HSG 168 is addressed in terms of the number of fire exits required as well as the appropriate travel distance to a place of safety. It was implicit in the manner in which this whole body of evidence was taken that parties assumed that liability could be determined by reference to whether or not the defenders complied with HSG 168. Neither party sought to link HSG 168 to any of the statutory duties the pursuer founded upon. There was no broader attack on the sufficiency of any egress route apart from the issue of what was the appropriate travel distance.

[169] Mr McGillvray did not refer to HSG 168 either in his report or in his evidence on commission. To the extent that Mr Kidd did so, it was principally to criticise Mr Sylvester-Evans' application of HSG 168 in the identification of what was an acceptable travel distance to a place of safety. In particular, the parties joined issue on the competing views of their experts, Mr Kidd and Mr Sylvester-Evans, as to the assessment of factors (identified in HSG 168) that informed whether a particular travel distance was appropriate. There was a subsidiary issue as to what constituted a place of safety.

Irrelevance of much of the Expert Evidence

[170] Mr Di Rollo endeavoured to lead evidence from his expert witnesses about matters falling within the

scope of defenders' objections on the basis of no record. For example, in his report Mr MacGillivray expressed certain views on the following: the defenders' fire risk assessment and fire procedure plan, the effectiveness of the alarm(s), signage, additional risk factors, deluge system (said to be a specialist area outwith his expertise), escape routes and training. Most of the evidence Mr Di Rollo sough to elicit from this witness at commission was objected to. It was allowed subject to competency and relevancy and recorded in 12 papers apart to the commissioner's principal report. Mr Kidd's report covered deluge systems and also commented on aspects of the report produced by the defenders' expert, Mr Sylvester-Evans. Objections on the basis of lack of record were taken throughout Mr Kidd's evidence.

[171] In the light of the ruling that I have made, upholding the defenders' many objections to evidence led by the pursuer on the basis of no record, most of this expert evidence is irrelevant. Indeed, the parties made only the scantest reference to the expert evidence in the course of the four days of their submissions. For the pursuer see the single finding in fact no 47 at Appendix C to this Opinion, unnumbered page 4. For the defenders, see Appendix E to this Opinion at p 43. Accordingly, in this section of the opinion, I deal with the expert evidence only to the extent there was record for it, namely, the issue about the number of means of egress. In any event, given my findings regarding the extreme rapidity of the development and spread of the smoke, it is unlikely that any breach of duties in relation to signage, training and instruction, the preparation of a specific fire risk assessment for the construction phase, or alarms would have had any causal significance. In other words, the provision of any or all of these steps (and therefore breach of duty in respect of any of these steps) would not have made any difference to the circumstances in which the pursuer found himself.

Pursuer's Expert Evidence

[172] Mr MacGillivray is a Fire Risk Management Consultant. Prior to that, he had had 34 years of service in the Strathclyde Fire Brigade and Glasgow Fire Service, from 1974 to 2006. In the latter years of that service he had held the post of Deputy Director of Operations and of Assistant Chief Fire Officer. He undertook a site visit to Longannet in October 2014, which included inspection of the rebuilt Absorber 3, as well as having examined certain photos. Part 9 of his report bore to comment on factual information of potential relevance within the papers provided to him.

[173] In relation to fire escape routes, Mr MacGillivray fairly accepted in his report, at paragraph 12.24, that his understanding of the escape routes was limited. Accordingly, all he offered were statements of "principle and general observations". While he has referred to certain Health and Safety Guidance, chiefly for the distinction made between general fire precautions and process fire precautions, on this issue he did not refer to HSG 168 in his report. Nor was he referred to this in the course of his evidence taken on commission. In his report he expressed the view, stated at a level of generality, that it would be inadequate to have only one means of escape going directly to ground level (paragraph 12.25). He also stated that when a person enters an escape route he should be able to continue on that route directly to safety unaided. A person working at height, should be able to turn his back on a fire incident and walk away to the next nearest escape route. He accepted (at paragraph 12.27) that he was not sure what the primary route was. He referred to a secondary escape route, which to him appeared to be no more than a series of unconnected ladders and stairs, but he did not set out what that route was. This lack of knowledge of specific features of the Absorber was confirmed in his evidence on commission. His information about escape routes was derived from the initial fire plan from two years prior to the fire, but which he would have expected to change. He had no information on the pursuer's normal access route nor on any other escape routes as there might have been at the time of the fire. He was unable to identify these from plans that he mentioned (but which he did not, and was not asked to, identify). He commented on statements he had seen from other workers (whom he was not asked in his evidence to identify), that either they could not find their way down or had to be directed by other people.

[174] In relation to the number of routes, in his view it was important to have more than one route in case one was knocked out by fire. In his view, it was inadvisable to go through smoke because of the danger it posed. In response to a question as to how many escape routes there should have been, he stated that the minimum required was two but, due to the complex nature of the site, three was more "appropriate".

[175] Mr Kidd was the pursuer's second expert witness. Mr Kidd's qualification and experience were as follows. He had 40 years' experience in providing practical advice and expertise in the application of loss prevention techniques. He had experience in the UK and abroad he had a particular experience in power generation land and very large construction projects and high rises. He had advised on the construction of cola fired power stations (including the erection f FGD units) in Europe, the former East Bloc and in the Far East. He drafted the first issue of the standard UK insurers' guidance document on fire safety on construction sites. He was a former director of the UK's national fire association, the Fire Protection Association. He sat on a number of US, UK and European working groups and standards committees (including water-based suppression systems). He was also a member of the US committee responsible for NFPA 850, the standard governing fire protection for power generating plants in the UK. He held positions in a number of UK institutes concerned with fire safety, including having been secretary general of the British Automatic Sprinkler Association, from 2000 to 2015. He was a member of *inter alia* the Institution of Fire Engineers, the Institution of Industrial Security, and a fellow of several other institutions concerned with fire safety and security.

[176] He had a specialism in deluge systems, something that Mr MacGillivray stated to be outwith his expertise. He accepted in cross that he had an association with trade association that promoted deluge systems. Mr Kidd had visited the site in 2010, while dealing with a different matter. He had returned sometime in 2014 but, again, this was not in connection with the pursuer's case. However, it was only shortly before the proof, that Mr Kidd was instructed to prepare a report in connection with the pursuer's claim. Mr Kidd's report dealt with two topics: deluge systems (from paragraphs 2.1 to 2.8) and, so far as he was able, his comments on the conclusions reached by Mr Sylvester-Evans with regard to the means of escape and the level of hazard in the Absorber (in sub-paragraphs 1 to 10 of paragraph 2.10). The latter topic was covered in just over two pages in Mr Kidd's report.

[177] Mr Kidd's evidence was elicited principally in the form of criticisms of the views expressed by the defenders' expert, Mr Sylvester-Evans. It may assist, therefore first to set out the terms of HSG 168 and Mr Sylvester-Evans' conclusions in relation to that guidance, before turning to Mr Kidd's criticisms of Mr Sylvester-Evans' approach.

[178] Mr Sylvester-Evans produced a detailed report. He assumed the existence of the following exit routes: (i) the exit route off via the southeast stair, reached from the 21 metre walkway which circumnavigated the structure, and (ii) the zig zag north route, as shown on figure 6A appended to his report. While Mr Sylvester-Evans recorded a possible further route off, to the northwest, via the dancefloor to further or lower scaffolding going to ground, Miss Shand did not put this third route to him, or those parts of his report where it was mentioned, when taking his evidence.

The assumed relevance of HSG 168

[179] In his report Mr Kidd chides Mr Sylvester-Evans for not making it clear that the defenders' reliance on the English Guidance entitled "Fire Safety Risk Assessment: Office and Shops" in some of their documentation was irrelevant. Mr Kidd accepts that HSG 168 is of UK-wide application. He did not express a view in respect of any other guidance or legislative provisions. Indeed, the conclusions he expresses at the end of his report (in section 3 at page 9) were never taken from him in evidence. Accordingly, as I observed earlier in this opinion, both parties proceeded on the basis that the principal issue of liability was assessed by reference to the defenders' compliance or otherwise with HSG 168. Mr Kidd focused his efforts on attacking the conclusions reached by Mr Sylvester-Evans when applying the guidance in HSG 168. No other standard was offered as a basis to assess the number or suitability of the means of egress from, or places of safety on, the Absorber.

HSG 168

[180] HSG 168 was the principal guidance on the means of escape from construction sites produced by the

Health and Safety Executive ("HSE"), first published in 1997. While a second edition was published in 2010, it is the first edition that is applicable for the purposes of this case.

[181] The relevant parts of HSG 168 are paragraphs 87 to 89 (providing the guiding principles); paragraphs 91 to 93 (dealing with travel distances) and paragraphs 103 to 104 (dealing with external escape and ladders). So far as relevant, these paragraphs are as follows:

"Means of escape

87 Escape routes need to be available for everyone on the site. On open-air sites and unenclosed single-storey structures, such routes may be both obvious and plentiful. However in more complicated structures, especially where work is above or below ground, more detailed consideration will be needed.

(a) Proper provision is needed for all workers wherever they are and however transient the activity, eg workers on the roof or in a plant or lift gear room.

(b) During the course of construction, escape routes are likely to change and possibly become unavailable. It is important that replacement routes are provided and identified early.

(c) Building designs often incorporate fire escape routes for the eventual occupiers. For new buildings these should be installed at the earliest stage possible. For buildings being refurbished, try and arrange the work to make use of existing escape routes and keep them available.

(d) In an emergency, escape via a scaffold is difficult. Try to minimise reliance on it. Where possible, provide well-separated alternative access from a scaffold to escape routes in the main building floor. (If this is not possible see paragraph 104.)

(e) There should normally be at least two escape routes in different directions.

88 Escape routes need to be clear uncomplicated passageways, properly maintained and kept free of obstruction.

89 A basic principle of escape routes is that any person confronted by an outbreak of fire, or the effects from it, can turn away from it or pass it safely to reach a place of safety.

[…]

Travel Distance

91 In a fire the effects of smoke and heat can spread quickly. It is important not to over-estimate how far people can travel before they are adversely affected by fire. Appropriate distances to reach safety will depend on a variety of matters including how quickly the fire grows, the structure and layout of the building, the location of the fire and where people are relative to this.

Table 1: Travel Distances

	Fire hazard		
	Low	*Normal*	*High*
Enclosed structures:			
Alternative	**60 metres**	**45 metres**	**25 metres**
Dead-end	**18 metres**	**18 metres**	**12 metres**
Semi-open structures:			
Alternative	**200 metres**	**100 metres**	**60 metres**
Dead-end	**25 metres**	**18 metres**	**12 metres**

Notes

Semi-open structures are completed or partially constructed structures in which there are substantial openings in the roof or external walls, which would allow smoke and heat from any fire to readily disperse.

Alternative escape routes should, where possible, proceed in substantially opposite directions. The principle is that they are sufficient apart that any fire should not immediately affect both routes. As such they should not be less than 45^{o} apart.

Dead-end travel distances are significantly restricted. This is so people have time to negotiate their way past any fire between them and the exit, before it threatens their escape.

Low hazard areas are those where there is very little flammable to combustible material present and the likelihood of fire occurring is low. Examples could be steel or concrete clad framework or structures in pre-fitting out stages.

Normal hazard areas will cover the majority of situations. Flammable and combustible materials are present but of such a type and disposition that any fire will initially be localised.

High hazard areas are locations where significant quantities of flammable or combustible materials are present of such a type that in the event of a fire rapid spread will occur, possibly accompanied by evolution of copious amounts of smoke or fume. As such, normal precautions discussed previously to minimise the fire load, should

ensure that such areas are rare on construction sites. Examples of where they might occur are demolition or refurbishment work involving oil contaminated wooden floors or linings, and fixing floor and wall coverings using flammable adhesives.

92 Table 1 gives maximum travel distances which experience has shown can be considered acceptable for a variety of situations. The distances given are from the fire to an exit from the structure, typically a door, leading to the outside at ground level; or to a stairway or compartment protected against fire (see Stairways, paragraphs 94 and Compartmentation, paragraph 134).

93 The travel distances are measured as the person walks and not as the crow flies. Care should be taken to minimise obstructions so that maximum travel distances are not exceeded. It is sensible to arrange the work and keep travel distances as short as possible.

[…]

External escape stairs and ladders

103 If the nature of the works means it is not reasonable to provide or maintain an internal protected stairway, external temporary escape stairs may be provided instead. Adequate stairways can be constructed from scaffolding; you can use wooden treads and platforms. The important requirement is that the external wall against which the stairway is erected should be imperforate and afford a nominal period of 0.5 hour fire resistance for 9 metres vertically below the stairway and 1.8 metres either side and above, as measured from the stair treads. This means that all doors, apart from the uppermost one leading on to the external stairway should have 0.5 hour fire resistance and be self-closing. Any other openings, including windows which are not of fire-resisting constructions, should be suitable protected, eg with plasterboard, proprietary mineral fibre reinforced cement panels or steel sheets.

104 In the open air, such as work on the initial framework of a structure, it is unlikely that an imperforate barrier will be available to separate the escape stairway from the work area. In such circumstances, unless the travel distances are well within those given in Table 1 for dead-end travel, at least two alternative routes should be provided. These should be well apart, ideally at opposite ends. If the structure or building is within a sheeted enclosure, eg for weather protection, environmental or safety reasons, at least one of the routes should be outside the enclosure.

105 The escape route should lead away from the enclosure where possible.

106 While stairways, etc, may be adequate for normal entry and exit, it is important not to over-estimate their capacity in an emergency, when ‘bottle-necks’ can easily occur. Recommended widths are related to the number of people expected to use them in an emergency. For example, a stairway (in a building under construction) serving two floors should normally be a minimum of 1000 millimetres wide to adequately cater

for about 200 people. However, if the door leading to or from this is only 750 millimetres wide, the escape route via this door is only considered adequate for about 100 people.

107 More detailed advice on the size of escape routes can be found in the BS 5588 (Parts 0-10) series of standards, and in Approved Document B and the Technical Standards which support the Building Regulations and Building Standard (Scotland) Regulations respectively. The majority of structures will be built in compliance with one of these. Therefore, in most cases the early installation of these escape routes will provide adequate means of escape during construction work. However, if during the construction work the number of people present is greater than the design maximum of the finished building, additional escape routes, or increased sizing of these might well be necessary."

The HSG 168 travel distance factors

[182] Table 1 from the 2007 edition of HSG 168 (set out in the preceding paragraph) contained three variables to determine the appropriate travel distances to places of safety. These three variables or factors (collectively, "the travel distance factors") were:

(i) whether the place of work was a "dead-end" (meaning there was only one exit from a room) or had an alternative exit:

(ii) the level of fire hazard (low, normal or high); and

(iii) whether the structure was "enclosed" or "semi-open".

In the notes to this table, it is stated that

"alternative escape routes should, where possible, proceed in substantially opposite directions. The principle is that they are sufficiently apart that any fire should not immediately affect both routes. As such they should not be less than 45 degrees apart."

There was no definition of what constituted a "confined structure" but a "semi-open" structure was described as "completed or partially completed structures in which there are substantial opening in the roof or external walls, which would allow smoke and heat from any fire to readily disperse." The relevant definitions for "low", "normal" and "high" fire hazard are found in the notes to Table 1.

[183] Mr Kidd and Mr Sylvester-Evans joined issue on travel distance factors (ii) and (iii), concerning what was the appropriate level of risk of fire and what was the proper characterisation of the structure in question. (In terms of the number of escape routes (ie being the first variable, and whether there was only one or whether there were alternatives), this was not a matter of opinion for the experts.) There was a subsidiary dispute as to what constituted a "place of safety" and whether this necessarily had to be to ground level.

Dispute between the experts in relation travel distance factors in HSG 168

[184] Parties focused their attention on sections 3.3, 4.2 and 4.4 of Mr Sylvester-Evans' report, concerning guidance on escape routes, fire safety and evacuation planning and procedures, and escape routes and signage.

He also noted the presence of the OPUS rescue team and the provision of an elevated rescue platform. In part 3.3 of his report, Mr Sylvester-Evans set out the relevant parts of HSG 168, namely paragraphs 87 to 89, 91 to 98 and Table 1, and paragraphs 103 to 104. His discussion of these matters is contained in section 4 of his report. Section 4.4 covered the issue of travel distances.

[185] Mr Kidd criticised Mr Sylvester-Evans' report in several respects. In order to understand those, it is helpful to summarise Mr Sylvester-Evans' conclusions on this issue. In Mr Sylvester-Evans' view, it would be reasonable to assess the hazard as "normal" for fire and to characterise the structure as a "semi-open" one. He also proceeded on the basis that there were alternative routes (a matter the pursuer disputes but which I have already determined above, at para [131]). In the light of his assessment of these factors, Mr Sylvester-Evans concluded that at the material time the travel distances to a place of safety were in accordance with the guidance in HSG 168.

[186] Mr Kidd criticises this conclusion. In relation to the assessment of hazard, he said that Mr Sylvester-Evans had proceeded on the basis that the construction activity involved little flammable and combustible materials outwith the Absorber. But, Mr Kidd says, this was at odds with the fact that the fire could not be extinguished but was allowed to burn itself out. Furthermore, in his view the polypropylene material within the chamber of the Absorber constituted a significant fire hazard. This, he said, was well known in power generation operations, when such structures were drained of water and where works were being undertaken around or within them.

[187] Next he criticised Mr Sylvester-Evans' conclusion that the chamber was semi-open. In his view, this was a confined space. This affected, and in practice shortened, what was an acceptable travel distance to a place of safety. Having regard to Mr Kidd's application of the factors (high risk for an enclosed structure with no alternative means of escape), in his view the travel distances to a place of safety from the Absorber were too long and did not comply with the guidance in HSG 168. In resolving this dispute between the experts in relation to the level of risk travel distance factor, it is relevant to note the stage of construction reached and also to consider whether the risk of fire was foreseeable at that stage in order to determine what level of hazard was appropriate.

Stage of construction reached by the time of the fire

[188] There was some evidence from Mr Richardson and Mr Dickson about the stage that the project had reached by the date of the fire. Under reference to a confidential Scottish Power briefing paper dated 26 March 2009, Mr Dickson confirmed that the Absorber was just three days from completion. Mr Richardson also confirmed that the Absorber was nearing completion. As part of the pre-commission testing undertaken on the morning of the fire, sea water had been pumped from some distance in order to run it through the FGD system. In effect, the chamber of the Absorber had been pumped full with sea water on the morning of the fire. This invites consideration of whether the risk of fire was foreseeable and what was the appropriate level of hazard. Miss Shand contends that at the stage of construction reached the risk of fire was not foreseeable, and therefore was low. Apart from eliciting Mr Kidd's view to the contrary, Mr Di Rollo did not refer to or lead any other evidence relevant to this issue.

Was the outbreak of the fire foreseeable?

[189] Miss Shand relied on the following evidence in support of her submission that the outbreak of fire was not reasonably foreseeable:

(i) Mr Dickson had confirmed that at the time of the fire the work on the Absorber was nearly complete, and completion was due to take place three days after the fire.

(ii) Mr Richardson had also given evidence that the construction of the Absorber chamber was finished and that there were no operatives working in the chamber by the date of the fire. He also gave evidence that on the

morning of the fire, a very great volume of sea water had been pumped through the Absorber soaking the polypropylene packing.

(iii) Mr Richardson had explained that the defenders and Scottish Power operated a "No Smoking" policy on the Absorber. After a battery of tests, the POI report ruled out a discarded cigarette as a cause of the fire. This was recorded at appendix G of No 6/538 of process.

(iv) Mr Dickson had spoken to the POI report. The POI report did not find any reason to believe that work being carried out on the Absorber was the cause of the fire. A hot work review had been carried out by the POI. There was no hot work ongoing at the time which the authors of the POI report considered could account for the fire. Mr Richardson had also explained the defenders' system of hot work, which required any operatives carrying out hot work to wait at their workstation for 30 minutes after finishing the hot work to ensure that there had been no ignition of anything.

(v) The higher risk stage of the construction had passed. This was covered in the POI report, at paragraphs 9.1 and was spoken to by Mr Dickson. While at an earlier stage of the construction chemical compounds were used to line the inside of the Absorber and flue gas duct work. This was to prevent corrosion. When these chemicals were applied strict controls had been in place to ensure that the quantities used were minimal. When these chemical applications had set the lining material was deemed to be stable. This higher risk work had been undertaken some months previously. No application of lining material had taken place since December 2008. Furthermore, inspections involving Alstom, the defenders and Scottish Power had been carried out at regular intervals as part of the quality assurance of the construction to ensure that no debris remained within the Absorber.

(vi) Mr Dickson also gave evidence that one of the consortium partners, Alstom, had global experience with seawater scrubbing plant (absorbers). Their investigations post-dating the fire to identify whether any similar incidents had ever occurred had drawn a blank. Mr Dickson spoke to two emails he had sent on 26 and 30 March 2009 about this. Mr Dickson had also carried out some research into this but he could not find any report of any similar incident.

[190] For his part, Mr Di Rollo did not particularly seek to challenge any of this evidence. Rather, he relied on the observations by Mr Kidd at paragraphs 2.10.6 of his report (No 6/637 of process), to the effect that Mr Sylvester-Evans had incorrectly assessed the risks inherent in the contents of the Absorber. Mr Kidd had there stated that the polypropylene packing and rubber lining of the Absorber "constituted a significant fire hazard and, as is well known in power generation operations, such structures are at great risk of fire at all times they are drained of water and when work is taking place in and around them".

[191] The basis for this opinion, as Mr Kidd makes clear, was his reliance on the observations made by Mr MacGillivray at paragraphs 10.4 to 10.11 of his report (lodged as No 6/530 of process). In a section of his report addressed to "industry knowledge", Mr MacGillivray had noted that the defenders and Alstom had world-wide experience of working on power generation construction projects. Mr MacGillvray referred to an American standard, "NFPA 850: Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Convertor Stations 2015" as being of potential relevance. In his report, after noting passages from the 2015 edition of that document (which post-dates the date of the fire), Mr MacGillvray referred to three instances of "major fires involving scrubbers with plastic lining" taken from the 2015 version of this NFPA 850 document. These three instances are summarised in paragraphs 10.8 to 10.11 of his report. It is not necessary to repeat the details of these, save to note that in each instance the absorber in question was empty and there was ongoing hot work or welding, the sparks of which started the fire in each case. From these examples, Mr MacGillivray had highlighted in his report the following common factors: (i) all had polypropylene inside the absorber chambers; (ii) all were out of commission at the time of the fire; (iii) all three fires were detected quickly; (iv) all three fires spread rapidly; (v) the rapid spread of the fire prevented access to the interior for fire-fighting purposes, and (vi) in each the fire damage was considerable. (As will be seen from his evidence on commission, Mr MacGillvray appears to have assumed work was ongoing inside the Absorber chamber itself on the day of the fire.) Mr Kidd essentially adopted these observations as his own. He offered no additional analysis or explanation. From this Mr Kidd concluded that "anyone involved in the

erection of a FGD plant should have been alert to a very significant risk of fire at all times while the Absorber Chambers are being lined and completed".

[192] For completeness, I should note that at the commission to take his evidence, Mr MacGillivray was not asked to speak to any of these detailed examples. He was referred to the fact that his report dealt with how fires developed "in similar structures on previous occasions". And, on this topic, he was simply asked if he would expect that a body like the defenders "to have some understanding and information about these matters", to which Mr MacGillvray assented. This was put on the basis that the defenders worked on an "international basis" and they either were aware or should have made themselves aware, if they were taking on a project of this nature. In a later passage of his evidence in the commission, taken at the end of cross-examination, Mr MacGillvray provided his understanding of what was being done on the day of the fire. In particular, it was his understanding that machinery was going into the Absorber as part of the commissioning process. He was pressed to explain what this was. He was unable to. It was put to him that the Absorber had been flooded with sea water on the day of the fire. He seemed unaware of this. It was put to him that he hadn't been advised as to what machinery, if any, was going into the Absorber. He accepted that this was correct.

[193] Mr Kidd had also criticised Mr Sylvester-Evans for incorrectly assessing the risks "inherent in the contents" of the Absorber chamber and his conclusion that the construction activity involved little flammable and combustible materials outwith the Absorber: paragraph 2.10.6 of Mr Kidd's report. He maintained this position in his evidence in chief. This was explored in cross examination. It was put to him that at the material time, the polypropylene was inside the Absorber chamber. Mr Kidd cavilled, arguing that at some point it must have been outside because it had to come from somewhere. He resisted considering the proposition that at the material time the polypropylene packing material was *in situ* within the Absorber. He did not approach matters from the stage reached, namely that the construction was substantially concluded and the Absorber being commissioned. He justified this by arguing that he was focusing on the "whole picture". He eventually accepted that at some point there would have been no polypropylene packing material on the scaffolding or external to the chamber. Nonetheless, he resisted the proposition that this was the state of affairs as at the day of the fire. It was put to him that on that day the packing material inside the Absorber chamber had been soaked with water and that work was not taking place inside the chamber itself. Again, he would not consider this proposition, saying that this was what was alleged but there was no confirmation of this.

[194] In relation to the three instances of fires in other absorber chambers abroad, as detailed in Mr MacGillivray's report, it was put to Mr Kidd that the significant point of distinction in those cases was that hot work had been ongoing inside those chambers which caused those fires. His reply was to assert that these were all fires in operating power stations.

[195] Miss Shand countered this evidence by referring to Mr Sylvester-Evans' further research into the three instances identified by Mr MacGillivray in his report. Mr Sylvester-Evans noted that a common feature of all three examples was that these were fires in scrubbers which had been taken out of commission. As a consequence, their internal packing material was dry. More importantly, each fire resulted from hot work being carried out in or above the chamber.

[196] From all of this, Miss Shand invited me to accept Mr Sylvester-Evans' conclusions that, by reason of the nature of the construction and the stage the work had reached, the risk of fire was normal. There was no hot work going on that could have been responsible for the fire. The POI report had established this. There were no chemicals in use that could cause fire. The Absorber was a concrete structure and there was no-one doing work inside it which could have caused ignition. The packing material was of a type that did not easily combust, as was evidenced by the fact that tests after the fire showed that it would only ignite if a naked flame was held to it for a number of seconds. The packing material had been soaked with a huge amount of water that day. The rapidity of the fire and the amount of smoke it generated was unusual.

Conclusion on level of risk of fire on the day in question

[197] I accept Miss Shand's submissions and the evidence of Mr Sylvester-Evans on this issue. It is clear that

Mr Kidd's views are derivative and dependent on the report of Mr MacGillvray. Mr MacGillvray's opinion was flawed because whatever limited basis he had been provided with did not reflect the correct factual position. There was no evidence to support his assumption that there was machinery being moved into, or any processing being carried on within, the Absorber such as to render the circumstance of this fire similar in circumstance to the three incidents he had identified. Indeed, there was unchallenged evidence inconsistent with this, namely that the Absorber had been pumped full of sea water on the morning of the fire. There was no attempt to fix the defenders with actual knowledge of these other incidents. If they had international experience which they proclaimed on their website, this was not produced.

[198] Furthermore, neither Mr Kidd nor Mr MacGillivray provided a cogent basis for instructing a case (if this were being made) that the defenders ought to have known of, and to have guarded against, this source of risk of fire. It was not put to the defenders' witnesses that the defenders had knowledge of, or should have had knowledge of, these matters at the relevant time. More fundamentally, the pursuer did not lead any evidence with a view to establishing any actual or imputed knowledge by the defenders of these matters.

[199] In relation to the three examples offered by Mr MacGillvray, I accept Mr Sylvester-Evans' evidence and analysis that the three instances identified arose in quite different circumstances. In contrast to the fires in those cases, no internal work and no welding work was being undertaken in the chamber of the Absorber on the day of the fire. I accept Mr Richardson's evidence, given in reply to a question in cross about deluge systems, that when Absorber was full of water (as it was on the morning of the fire) it operated as a *de facto* deluge system.

[200] Furthermore, Mr Sylvester-Evans had reviewed a considerably greater amount of material than Mr Kidd. He had, for example, considered the POI report. There is no mention of this in the body of Mr Kidd's report and, to the extent he was asked any questions about this at the proof, Mr Kidd demonstrated a very limited knowledge of it. He seemed effectively to ignore any evidence about the stage that the work had reached, at least if this was inconsistent with his conclusions. He tried to justify this on the basis his approach was to consider "the whole picture". However, this appears to betray a misunderstanding of HSG 168. This is guidance that bears to govern fire risk on construction sites. By their nature, construction sites will present ever-changing structures. This will give rise to risk scenarios that will vary over the course of a construction project. HSG 168 expressly envisages this, as it stated that not all of the safeguards identified will be relevant in all circumstances. Mr Kidd's approach appears to have been to select the highest level of risk that might arise at any stage of the project, and then to adhere to that even if the circumstance giving rise to that highest risk had passed. This, it seems to me, is a static and un-nuanced approach. If that were the approach enjoined by HSG 168, there would be no need for table 1 or for the several variables used to generate the matrix of different travel distances to reflect the differing risks as they might arise during the evolution of a construction project.

[201] From the totality of this evidence, I conclude that the risk of fire at the stage of construction reached was not foreseeable to the defenders and, further, that at that stage reached the risk of fire was "normal", for the purposes of HSG 168, as Mr Sylvester-Evans has opined.

Characterisation of the structure for the purposes of the travel distance factors

[202] The next factor relevant to the calculation of safe travel distances for the purposes of HSG 168 is the characterisation of the structure.

[203] Mr Sylvester-Evans characterised the Absorber as a "semi-open" structure. Mr Kidd criticised that conclusion. As Mr Kidd stated at paragraph 2.10.8 of his report (No 6/637 of process), the "Absorber chamber was an enclosed structure". In a footnote to this paragraph he quotes the definition of "confined space" from the HSE website, as meaning "a place which is substantially enclosed (though not always entirely), and where serious injury can occur from hazardous substances or conditions within the space or nearby". On the basis that the site posed a high fire risk and that it concerned a closed structure, then in terms of HSG 168 the maximum travel distance to a place of safety was either 25 metres (assuming there was more than one escape route) or 12 metres (if there was only a single escape route). The defenders had not provided a place of safety within these travel distances.

[204] Mr Kidd maintained his position in his evidence in chief that the correct characterisation was a "confined space". In cross, Miss Shand put to him that the pursuer was not working within the chamber of the Absorber, but outside it. Mr Kidd appeared to accept this.

[205] In relation to what constituted a safe place, Mr Kidd's position was that a place was only safe if it was on the ground or was protected from smoke penetrating it. This is what he described as a protected route. There were no protected routes to ground. He did not accept that workmen could be safe on the scaffolding. The scaffolding cladding was made of wood. When he had attended on site in 2010 there had also been plastic sheeting. He said he had no reason to believe that these sorts of items were not there at the time of the fire. While Mr Kidd appeared to associate the structure of the Absorber with the definition of a "dead end", meaning a room with only one route out, he did ultimately accept that an open air structure with a stair to the ground was not a "dead end". He nonetheless maintained his opinion that the level of risk was high and that the Absorber was a confined space. He was incapable of considering, as a proposition, that the correct structure to analyse was not the Absorber chamber itself, because it was closed off and had no workmen in it, but that the correct structure to be characterised was the external part of the Absorber, with its permanent walkways and temporary scaffolding, and on which the pursuer was working on the day of the fire. Mr Kidd persisted in justifying his characterisation as an enclosed space because, as I understood it, he took the view that the Absorber chamber would need maintenance from time to time. Alternatively, he said that one should assume the worst case. If he was correct, he would expect there to have been a safe place every 15 or 25 metres.

[206] Toward the end of cross, Miss Shand put to Mr Kidd that HSG 168 was only guidance. He accepted this. Indeed he appeared to go further and to suggest it had a lesser status than "ACOP" or an Approved Code of Practice. However, he did not identify any relevant guidance or code of that character. He accepted the statement in HSG 168, that scaffolding can be a means of escape even if it were not designated as such.

[207] On the basis that the structure was semi-open and that the fire risk was normal then, applying the travel distances in Table 1 of HSG 168, Mr Sylvester-Evans concluded that the appropriate travel distance was 100 metre. Based on his measurements on site, he set out (in a table at para 4.4.4 of his report) what were the estimated travel distances from the 21 and 27 metre levels of the Absorber to ground level and, separately, to a place of safety. The routes he estimated corresponded to routes (i) and (ii), described above (at para [22]). In relation to what constituted a place of safety, this was somewhere that was protected from the initial smoke plume and from where there was a protected route to ground level. In his view, parts of the Absorber structure, in particular the point where route (ii) turned behind the inlet ducting, provided sufficient protection.

[208] Assuming a starting point at either the 21 and 27 metre levels, the travel distances to a place of safety ranged between 45 and 67 metres. The travel distances to ground level ranged between 55 and 122. In particular, the range from the 21 or 27 metre level using route (i) was 55 and 70 metres, respectively. However, the travel distances using route (ii) was between 97 and 107 metres (from the 21 metre level) and between 112 and 122 metres (from the 27 metre level). Notwithstanding that some of these distances exceeded the 100 metres in HSG 168, in his opinion HSG 168 was only guidance and the duty holder would be entitled to modify the distance in accordance with where a safe location might be reached for a particular scenario, rather than to ground.

What constitutes a Place of safety?

[209] A subsidiary issue arose in the context of the travel distance factors, namely what constituted a place of safety? By reason of his unfamiliarity with the Absorber at the time of the fire Mr Kidd was unable to answer the question where was there a place of safety on the structure. He was unable to do so in the abstract. In his view, a place of safety was a place with "an absence of peril". In a series of questions, he was led to express the view that getting to ground level and away from a structure was the safest place to be. Notwithstanding that, his evidence was not that this was the only place of safety. If a place of safety were not at ground level, in his opinion, a place of safety would need to be constructed and insulated.

[210] Mr Sylvester-Evans had suggested that a safe location was somewhere protected from the initial plume of smoke and from where there was a protected route to ground level. On this approach, there were "safe locations" other than at ground level.

Conclusion on characterisation of the structure, on places of safety and on appropriate travel distances

[211] I have no hesitation in accepting the evidence of Mr Sylvester-Evans in relation to the characterisation of the Absorber structure as a semi-open structure and what, as a consequence, was the appropriate travel distance. I also accept his evidence about the use of places of safety other than to ground level and the character of HSG 168 as guidance, subject to modification as he described. Mr Kidd's characterisation of the external features of the Absorber structure as "enclosed" bore no relation to the realities as regards where the pursuer was working on the day in question or as regards the other activities on site and the stage of construction reached. On this aspect, Mr Kidd displayed the same fixity of view I have already described, in relation to his assessment of fire hazard. At no time was the pursuer, or anyone else on the day in question, working inside the Absorber chamber. That is the only feature that could possibly be described as "enclosed". The remainder of the structure was open more or less to the elements, and properly characterised as an open or (in respect of the valley) a semi-open structure.

[212] In relation to safe places, HSG 168 allowed for these as an alternative place to retreat to, other than to ground level. I do not accept Mr Kidd's contention that such a place required to be, in effect, a bespoke enclosed or self-contained structure. This is not what HSG 168 recommends. In any event, as general guidance applicable to a very wide set of circumstances, it cannot, and should not, be read so prescriptively. While HSG 168 clearly envisages the use of enclosed stairwells as a destination place of safety, those assumptions cannot readily be accommodated in all construction contexts, such as a complex industrial structure not intended to be occupied permanently by workers in the course of its operation. I accept Mr Sylvester-Evans' approach as a more measured one, and one more consistent with the status of HSG 168 as guidance. Mr Kidd accepted this characterisation of HSG 168 and indeed expressed a preference for ACOPs. This aspect of Mr Kidd's evidence was consistent with his seeming understanding that his role was to attack Mr Sylvester-Evans' report rather than, as might be expected, to establish a positive case on behalf of the pursuer.

[213] Indeed, the pursuer's expert evidence as a whole was, in my view, unsatisfactory for the following reasons. Mr MacGillivray's views were expressed only at a level of generality. He was not provided with sufficient information to enable him to express any view based on the actual circumstances obtaining at the material time. Moreover, to the extent that he volunteered some industry knowledge of potential relevance, it became clear in the course of his evidence on commission that this was based on the erroneous view that some form of work or machinery was being operated in the chamber of the Absorber on the day of the fire. This is incorrect.

[214] Turning to Mr Kidd's own evidence, insofar as it was relevant, it was unsatisfactory. In the first place it was derivative. To the extent that Mr Kidd's conclusions are based on the incorrectly presumed relevance of Mr MacGillivray's observations, his own report is undermined. In oral evidence, he was selective in the evidence he relied upon to support his views and dismissive of evidence that did not suit his views. He was at times incapable of providing cogent reasons for his conclusions, and inclined to fall back on assertions even if there was no basis in fact to support them. These are not the hallmarks of a responsible expert witness exercising the requisite independence of judgment.

[215] Furthermore, and somewhat surprisingly, there was a paucity of positive expert evidence led by the pursuer and directed to establishing (i) an applicable standard as regards the means of egress or (ii) that the defenders had fallen short of that standard. Mr McGillvray's evidence was expressed at such a level of generality as to be of little assistance. He made no contribution to the evidence about HSG 168, as he never once mentioned it. Mr Kidd 's evidence was principally to criticise Mr Sylvester-Evans' conclusions, not to supply his own reasons as to why HSG 168 was relevant. His reasons for asserting that the fire hazard was high or that the structure fell to be characterised as enclosed were unconvincing or at variance from the known evidence.

[216] On the whole evidence, I find that the defenders' complied with the guidance on travel distances in HSG 168, the standard that the defenders relied on. The pursuer did not seek to prove that any other standard was applicable or breached.

[217] I turn now to consider parties' legal submissions.

Legal Submissions: Introduction

[218] While the evidential phase of the proof was completed in the three weeks allocated to this proof, the legal submissions had to be accommodated at a later diet. In fact, the parties' submissions extended over three further hearings lasting an additional four days, on 22 and 23 March, and on 3 and 16 June 2016. For the pursuer, Mr Di Rollo initially produced:

(1) a written submission (No 65 of process) comprising five pages of submissions and a nine page analysis of the evidence in tabular form; and

(2) proposed findings in fact (No 66 of process).

As will be seen, Mr Di Rollo relied principally on the duty in section 53 of the 2005 Act. His opening submission was completed in a morning. However, after Miss Shand's extended challenge to the recoverability of damages for pure psychiatric injury for breach of the statutory duties founded upon, Mr Di Rollo lodged a further submission, namely;

(3) the pursuer's "response" (No 69 of process) to Miss Shand's historical legal review.

These submissions or findings in fact (as the case may be) are reproduced as Appendices B, C and F, respectively, to this opinion. Mr Di Rollo also produced an additional seven cases relating to the character of a statutory duty to "ensure".

[219] Miss Shand began her submissions with a detailed and lengthy chapter, which she referred to as her historical legal review. This was principally to argue that neither section 53 of the 2005 Act, nor any of the other statutory provisions relied upon by the pursuer, afforded a right of recovery for pure psychiatric injury. To this end, she engaged in a historical legal review in order to trace the evolution of certain domestic statutory regimes, eg starting from the Fire Precautions Act 1971, and also to examine the impact of several EU Directives thereon. On the hypothesis that pure psychiatric injury was not recoverable for breach of statutory duty, Miss Shand sought to reinforce that proposition by undertaking a review of what she said were the controls evolved in common law cases of non-physical or pure psychiatric injury. This was to argue that it was unlikely that the statutory provisions would permit recovery for pure psychiatric injury without also importing the kinds of controls developed by the common law in respect of such claims. Her submissions lasted about four days. In support of these arguments, Miss Shand produced:

(1) A written "skeleton submission" of some 101 pages in length (including the historical legal review) (No 67 of Process);

(2) However, at the resumed hearing on submissions, she lodged another document (comprising 50 pages) to be substituted for the last 50 pages of her first written submission (No 68 of Process); and

(3) Her own response (No 72 of Process) to the pursuer's response (No 71 of process), totalling a further 19 pages.

These are reproduced as Appendices D, E and G, respectively. A substantial part of the written submissions and counter submissions lodged related to this historical legal review. While I will come to deal with those submissions in due course, I propose first to consider the terms of section 53(1) of the 2005 Act, on which Mr Di Rollo principally relied.

Legal submissions on content of duty in section 53(1) of the 2005 Act

Section 53 of the Fire (Scotland) Act 2005 ("the 2005 Act")

[220] Both parties proceeded on the basis that section 53(1) of the 2005 Act applied to the premises in question, the principal dispute between them was as to the proper interpretation of section 53(1). In relation to section 53(1), Mr Di Rollo submitted that by virtue of the word "ensure" there was a duty to achieve a result, namely the safety of employees in respect of harm caused by fire in the workplace. Miss Shand did not particularly contest Mr Di Rollo's interpretation or offer an alternative one, but rather staked her position on the proposition that the 2005 Act did not extend to harm constituting pure psychiatric injury.

[221] Mr Di Rollo's opening submission was short and straightforward. Mr Di Rollo relied principally on section 53(1) of the 2005 Act and, in particular, on the word "ensure". Indeed such was the degree of his reliance on section 53 of the 2005 Act, that he did not refer in his submissions to any of the other statutory provisions (and identified in paragraph [28], above); nor did he endeavour to relate any of the evidence to those other statutory provisions. He did not refer in his opening submissions to any cases or statutory provisions relating to statutory duties expressed in terms similarly to that in section 53 of the 2005 Act.

[222] In relation to the 2005 Act, as I have it noted, Mr Di Rollo referred to the preamble, to sections 53(1), 69(2) and 72(1) as well as to several paragraphs in Schedule 2. He developed his submission only in respect of section 53(1) and, accordingly, it suffices for present purposes simply to summarise the import of these other provisions. So far as relevant to the part of the 2005 Act at issue Part 3, the preamble records that the 2005 Act was in part-implement of several EU Directives (which include the Framework Directive and the Workplace Directive but not the Construction Site Directive) and was also "to make provision in relation to fire safety in certain premises". Section 69(2) creates civil liability of an employer for breach of duty that causes damage to an employee. Section 72 provides for criminal liability for breach of a duty imposed inter alia by section 53 and which puts the relevant person "at risk of death, or serious injury, in the event of fire". Schedule 2 defines, in general terms, what constitutes "fire safety measures".

[223] In full section 53 provides as follows:

"(1) Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace.

(2) Each employer shall—

(a) carry out an assessment of the workplace for the purpose of identifying any risks to the safety of the employer's employees in respect of harm caused by fire in the workplace;

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1).

(3) Where under subsection (2)(a) an employer carries out an assessment, the employer shall—

(a) in accordance with regulations under section 57, review the assessment; and

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1).

(4) Schedule 2 makes provision as to the fire safety measures."

[224] Mr Di Rollo's position was simply put. The pursuer had been injured at work by fire. Section 53(1) imposed a duty to "ensure" his safety. That had not been done. The defenders were liable. While at one point in his submissions Mr Di Rollo had referred to the Framework Directive and the Workplace Direction, he did not relate any part of these Directives to any particular statutory provision on which he relies. He did not invite a purposive or EU-compliant interpretation of the 2005 Act (or any other provision). Mr Di Rollo's submission, in effect, was to treat section 53 as one of strict liability. He said it mandated for a particular result.

[225] After Mr Di Rollo produced his additional seven cases, Miss Shand did, in anticipation of any argument Mr Di Rollo might present, refer to the observations of Lord Hope of Craighead in *R* v *Chargot Ltd* [2009] 1 WLR 1 at paragraphs 21 to 24. *Chargot* was an appeal against conviction for breaches of sections 2(1) and 3(1) of the 1974 Act. The defendants had argued that the prosecution had failed to identify the scope of the duty because it had failed to refer to any particular criticism of how the work had been conducted. The defendants' appeals were dismissed. The passages Miss Shand referred to were Lord Hope's observations of prosecution practice in giving fair notice of the case to be made. By this point in his speech, Lord Hope had rejected the appellants' contention that sections 2(1) and 3(1) of the 1974 Act required the prosecution to identify and prove the acts and omissions by which it was alleged that there was a breach of the duty to achieve or prevent the result they prescribed. Lord Hope had stated that what the prosecution required to prove was that the result prescribed by those sections had not been achieved. Once that was done, he said, the onus shifted to the defendant to make good the defence of reasonable practicability (para 21). Miss Shand placed particular reliance on Lord Hope's observations that while the statute may prescribe the result to be achieved, it was another matter as to how the prosecution proposed to prove this. This would vary from case to case. Lord Hope drew a distinction between a case where an injury had occurred (in which case the facts will "speak for themselves") and a case where the alleged risk had not resulted in an accident (see para 22). In the latter circumstance, it will be necessary to identify and prove the respects in which there was a breach of duty. This, Lord Hope said (at para 22),

"is likely to require more by way of evidence than simply an assertion that that state of affairs existed. The particular risk to which the employees, or the persons referred to in section 3(1) as the case may be, were exposed must be identified. This will require an analysis of the facts in each case. Even where an injury has occurred it may not be enough for the prosecutor simply to assert that the injury demonstrates that there was a risk. Where a prosecution is brought under section 3(1), it may be necessary to identify and prove the respects in which the injured person was liable to be affected by the way the defendant conducted his undertaking."

Miss Shand also referred to the observations in the next two paragraphs of Lord Hope's speech, that the overriding test was one of fair notice.

[226] In Mr Di Rollo's submission in reply in respect of section 53, he referred to the additional cases he had lodged subsequent to his first submission, and said to support his construction of section 53. In particular, he referred to *Brown* v *Watson* 1914 SC(HL) 44 at 51 for the observation that there was no distinction between physical and psychiatric harm. He referred to *Chargot, cit supra*, and in particular to Lord Hope's observations on the word "ensure" where it was used in sections 2(1) and 3(1) of the Health and Safety at Work etc. Act 1974 ("the 1974 Act"). Section 2(1) imposes a duty on an employer "to ensure, so far as reasonably practicable, the health, safety and welfare…of his employees". Section 3(1) imposes a duty on the employer to conduct his undertaking in such a way as "to ensure, so far as reasonably practicable, [that non-employees] are not… exposed to risks to their health and safety". Lord Hope observed:

"[17] The first issue is to determine the scope of the duties imposed on the employer by sections 2(1) and 3(1) . In both subsections the word "ensure" is used. What is [the employer] to ensure? The answer is that he is to ensure the health and safety at work of all of his employees, and that persons not in his employment are not exposed to risks to their health and safety. These duties are expressed in general terms, as the heading to this group of sections indicates. They are designed to achieve the purposes described in section 1(1)(a) and (b) . The description in section 2(2) of the matters to which the duty in section 2(1) extends does not detract from the generality of that duty. They describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words "so far as is reasonably practicable". If that result is not achieved the employer will be in breach of his statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it.

[18] This method of prescribing a statutory duty was not new. As Lord Reid explained in the opening paragraphs of his speech in Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107 , the steps which an employer must take to promote the safety of persons working in factories, mines and other premises are prescribed by a considerable number of statutes and regulations. Sometimes the duty imposed is absolute. In such a case the step that the statutory provision prescribes must be taken, and it is no defence to say that it was impossible to achieve it because there was a latent defect or that its achievement was not reasonably practicable. In others it is qualified so that no offence is committed if it was not reasonably practicable to comply with the duty. Sometimes the form that this qualified duty takes is that the employer shall do certain things: see, for example—and there are many that could be cited— section 48(1) of the Mines and Quarries Act 1954 which provided that the manager of every mine must take such steps by way of controlling the movement of strata within the mine and supporting the roof and sides of the working place as might be necessary for keeping it secure, and regulation 11 of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) which lays down a series of measures that must be taken with regard to dangerous parts of machinery. Sometimes it is that [the employer] shall achieve or prevent a certain result. Section 29(1) of the Factories Act 1961 , which was considered in Nimmo, took that form. So too do sections 2(1) and 3(1) of the 1974 Act. It is the result that these duties prescribe, not any particular means of achieving it".

Mr Di Rollo placed particular reliance on the last sentence of that last paragraph.

[227] Mr Di Rollo also referred to *Cairns* v *Northern Lighthouse Board* 2013 SLT 645, a decision of Lord Drummond Young in the Outer House in a personal injury action. The pursuer in *Cairns* was injured aboard a vessel and made a claim under Regulation 5 of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 as well as at common law. Regulation 5(1) of those regulations provided that an employer "shall ensure the health and safety of workers and other persons so far as reasonably practicable…". Lord Drummond Young considered *Cairns* and the nature of the obligation in Regulation 5. He stated:

"[26] The effect of reg.5 is to impose a strict duty to ensure the health and safety of workers, subject to the defence of reasonable practicability. A great deal of health and safety legislation follows that structure. The construction of such provisions was considered in *R* v *Chargot Ltd*, a case on ss.2 and 3 of the Health and Safety at Work etc. Act 1974 . Those sections imposed a duty on the employer "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of … his employees" and to "conduct his undertaking such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety". The wording thus follows fairly closely that used in reg.5 . The analysis of such a duty is described by Lord Hope at [2009] 1 W.L.R., pp.8—9, para.17: "The first issue is to determine the scope of the duties imposed on the employer … In both subsections the word 'ensure' is used. What is he to ensure? The answer is that he is to ensure the health and safety at work of all his employees, and that persons not in his employment are not exposed to risks to their health and safety. … [The duties] describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words 'so far as is reasonably practicable'. If that result is not achieved the employer will be in breach of his statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it."

In p.9, para.18, after an analysis of remarks of Lord Reid in Nimmo v Alexander Cowan & Sons Ltd, Lord Hope states that 'It is the result that these duties prescribe, not any particular means of achieving it.' "

Mr Di Rollo also relied on the observation of Lord Drummond Young in *Cairns*, to the effect that given the nature of statutory liability there was little utility in making a claim at common law.

[228] Mr Di Rollo also referred to *Hall* v *City of Edinburgh Council* 1999 SLT 744 at page 748, as an illustration of a case where a defender failed to discharge the onus of showing that it was not reasonably practicable to avoid the need for the pursuer in that case to engage in manual handling. Finally, he referred to the observations at paragraph 89 in the judgment of the Supreme Court in *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6 concerning the importance of risk assessments.

Mr Di Rollo's reliance on the fact that a fire broke out

[229] In the course of his submissions, Mr Di Rollo referred to the fact that the cause of the fire was never proved. Notwithstanding this, Mr Di Rollo's position was, in effect, that the mere fact that a fire had broken out was enough to render the defenders liable. On Mr Di Rollo's approach the character of the duty in section 53(1)of the 2005 Act is absolute or, at least, strict, subject to the defence of reasonable practicability.

Discussion of the Proper Interpretation of Section 53 of the 2005 Act

[230] In addressing Mr Di Rollo's submissions, the appropriate starting point is to consider the clear words of the statute, taking into account the context, scheme and purpose of the 2005 Act as a whole. I start with a consideration of section 53(1), which provides as follows:

"(1) Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace."

[231] The first point to note is the presence of the words "reasonably practicable". In my view, that phrase qualifies the word "ensure". It follows that where it was not reasonably practicable to ensure an employee's safety in respect of harm caused by fire in the workplace, there will be no breach of section 53(1). This militates against creation of the nature of the liability contended for by Mr Di Rollo. It also allows for the role of foreseeability in ascertaining what is reasonably practicable.

[232] What about subsections 53(2) or (3), to which Mr Di Rollo made no reference, or the role they play in securing observance of the duty in section 53(1)? Indeed, in Mr Di Rollo's approach, section 53(1) would suffice. Subsections 53(2) and (3) would be otiose. In ascertaining the character of the duty in section 53(1), it is in my view instructive to read subsection 53(1) together with the means set out in the other subsections in section 53 designed to support that duty. Subsection 53(2)(a) imposes a duty to carry out an assessment of the workplace "for the purpose of identifying any risks to the safety of... the employees in respect of harm caused by fire". By subsection 53(2)(b) the employer is obliged to ("shall") take in relation to the workplace "such of the fire safety measures as are necessary" to enable the employer to comply with the duty in section 53(1). Schedule 2 identifies what comprises "fire safety measures". These include measures "to reduce the risk" of fire in relevant premises and measures in relation to "means of escape". Subsection 53(3)(a) imposes a duty to review any assessment and subsection 53(3)(b) imposes like duties (to those in section 53(2)(b)) to take the necessary fire safety duties identified by that review.

[233] The obligations in subsections 53(2) and (3) inform the content of the duty in section 53(1). The 2005 Act does not require an employer to put in place all safety measures (in Schedule 2) in all circumstances. Rather, having carried out an assessment (as required by section 53(2)(a)) or a review of an assessment (as required by section 53(3)(a)), an employer is under an obligation (imposed by section 53(2)(b) or by section 53(3)(b)) to take such fire safety measures (ie from among those set out in Schedule 2) as "are necessary" to enable the employer to comply with the duty in section 53(1). In my view, the concept of foreseeability is inherent in the exercise required by section 53(2)(a) or section 53(3)(a). The risk assessment undertaken or reviewed can only identify the foreseeable risks. Such a risk assessment cannot predict or preclude the unforeseen risks to safety in respect of fire. By the same token, what is a "necessary" safety measure depends on the risk to be guarded against being reasonably foreseeable as a consequence of a competently undertaken risk assessment.

[234] If that is correct, not only is the duty in section 53(1) not of the character Mr Di Rollo contended for, in order to establish a breach of section 53(1), it is not enough for the purposes of an action such as this to show that an employer did not take one or more of the fire safety measures set out in Schedule 2. It must be shown that the employer failed to take one or more particular fire safety measures which was shown to have been necessary by a risk assessment and, further, that the failure to take the fire safety measure in question caused the claimant harm from the fire that occurred.

[235] Approaching matters generally, if a risk assessment is undertaken, this will identify the risks of harm posed by fire and the particular fire safety measures that are necessary for the employer to undertake, in order to enable the employer to discharge the duty under section 53(1). He must take the fire safety measures identified. The imposition of the kind of strict liability Mr Di Rollo contended for, on his reading of "ensure", is not necessary to achieve this result. Furthermore, this interpretation accommodates subsections 53(2) and (3), and which in my view are integral to section 53(1).

[236] The liability the 2005 Act imposes is greater than at common law, in the sense that an employer's lack of actual knowledge of a risk may not relieve him of liability. The duty in section 53(1) is closely linked to the requirement to undertake and review assessments of the risks. The employer must assess the risks (section 53(2)) and must regularly revisit that risk assessment (section 53(3)). The effect of this, if properly carried out, is to increase the employer's actual knowledge of the risks which he should take steps to guard against, so far as it is reasonably practicable to do so. If an employer fails to carry out such an assessment, the knowledge of what he would have ascertained will nonetheless be imputed to him. For these reasons I do not accept that in considering section 53 in terms, that the use of the word "ensure" in section 53(1) imposed a statutory guarantee to achieve a particular result if that is construed to mean that there will never be a fire or that the defenders are liable in all cases simply because a fire has occurred.

[237] I have reached this view based on the language and scope of section 53(1) considered together with subsections 53(2) and (3). Applying this interpretation, liability does not arise simply because a fire occurred. Section 53(1) does not impose an absolute duty, in the sense of imposing liability regardless of the steps taken by a responsible person or without regard to what is reasonably practicable.

Section 53 in the context of the 2005 Act

[238] I next consider section 53(1), and the duty to "ensure", taking into account the context, scheme and purpose of the 2005 Act. Starting with the preamble to the 2005 Act (into which I have inserted roman numerals for ease of reference), it declares that the 2005 Act is:

"[i] to make provision about fire and rescue authorities and joint fire and rescue boards,

[ii] to restate and amend the law in relation to fire services,

[iii] to make provision in relation to the functions of such authorities and boards in connection with certain events and situations other than fires,

[iv] to make provision for implementing in part" six Council Directives (which are there set out);

[v] "to make other provision in relation to fire safety in certain premises; and

[vi] for connected purposes."

These purposes are reflected in the parts of the 2005 Act. In particular, Part 3 of the 2005 Act corresponds to purposes [iv] and [v] of the preamble. This is also borne out by the Explanatory Notes appended to the 2005 Act, and to which reference was made (without objection). The background is set out in paragraphs 3 to 7 of the Explanatory Notes. The "main purpose" of the Act is "to deliver modernised fire and rescue services" (para 1). To that end the 2005 Act repeals and re-enacts many of the provisions of the Fire Services Act 1947 (para 2). (That act was principally concerned with certification of premises.) The 2005 Act gives effect to the majority of the proposals in the Consultation Paper, *The Fire and Rescue Service* published in 2003 (para 5) and which included the reform of fire legislation in Scotland (para 6). There was also reference to an earlier policy paper (*The Scottish Fire Service of the Future*) which itself took into account an earlier paper (*The Future of the Fire Service: reducing risk, saving lives*) (para 7).

[239] The Explanatory Notes next set out an "Overview" of the Act. Part 1 relates to the Fire and Rescue Authorities and Part 2 the Fire and Rescue Services. Part 3, which is headed up "Fire Safety" and contains *inter alia* section 53, "consolidates and rationalises" much of the existing fire legislation in respect of "duties of employers to employees and in relation to premises (sections 53 and 54)". It was also noted that Part 3 of the 2005 Act was in part-implement of six EU Directives on health and safety at work, "in so far as these provisions relate to matters within devolved competence, general fire safety measures to be taken by employers and in so far as more specific legislation does not make appropriate provision". I will return to the potential significance of these parts of the preamble to the 2005 Act a little later in this opinion.

[240] In context, section 53 is the first section in chapter 1 ("Fire Safety Duties") in Part 3 (entitled "Fire Safety") of the 2005 Act. Section 53 is headed up: "Duties of employers to employees." It is instructive to note the terms of section 54, which creates "[d]uties in relation to relevant premises". The focus of section 54 is on the duties arising in relation to control of relevant premises owed by persons who have control "to any extent". Persons having "control" includes owners, those in control for the purpose of carrying on any undertaking, as well as those persons who, by virtue of a contract or tenancy, have obligations of maintenance or repair or safety in respect of harm caused by fire. The duty in section 54(2) is structured in the same way as section 53(2): there is an obligation under section 54(2)(a) to carry out a risk assessment, now of "the relevant premises" (*cf* "workplace" in section 53(2)(a)), and to take in relation to those premises such of the fire safety measures "as are reasonable for a person in his position to take" (*cf* "necessary", in section 53(2)(b)) "to ensure the safety of relevant persons" in respect of harm caused by fire in the relevant premises. Section 54, that section has as its purpose the identification (in section 54(2)(a)) and implementation (in section 54(2)(b)) of steps "to ensure the safety of relevant persons" in respect of harm caused by fire in the relevant premises. Both sections 53 and 54 express the duty in broadly the same way: "to ensure, so far as is reasonably practicable, the safety…" and "to ensure the safety…". There is no obvious reason to give different interpretations to those two cognate phrases.

[241] Section 55 makes provision for the factors to be taken into account for the purpose of implementing the fire safety measures in sections 53 or 54. These factors are set out in subsection 55(3) and the language used is derived directly from Article 6(2) of the Framework Directive. For present purposes, it is sufficient to note the first two factors, which are "(a) avoiding risks" and "(b) evaluating risks which cannot be avoided". Section 70(1) creates an offence for any failure of duty under sections 53, 54 or 55 that puts a relevant person at risk of death or serious injury in the event of fire.

[242] What do these provisions suggest in terms of the character of the duty imposed in section 53? It is notable, in my view, that the duties set out in sections 53 and 54 are to "avoid" risks, not to "prevent" them. It might also be observed that what is to be avoided (or evaluated, if unavoidable) are "risks", not the occurrence

of fire itself. This reading of sections 53 and 54 is fortified by the terms of paragraphs (a) and (b) of subsection 55(3), concerning the avoidance of risks and the risks which cannot be avoided. A guarantee of the result, of having one's safety "ensured", as Mr Di Rollo contends, would carry the implication that no risks were permitted. If that were so, if the mere outbreak of the fire would attract liability (as Mr Di Rollo contended), then the statutory factors in section 55(3)(a) and (b) would be irrelevant or would need to be recast. The considerations would simply be to "avoid fire". It may be useful to test Mr Di Rollo's reading by considering the offences created in section 70. In section 70, the offence is the exposure of a relevant person (not all persons) to "risk of" death or serious injury. However, the fact that a fire has occurred does not itself constitute an offence for the purpose of section 70(1). On Mr Di Rollo's approach, it should.

Consideration of the cases of R v Chargot Limited and Baker v Quantum Clothing Ltd

[243] Both parties confirmed section 53 of the 2005 Act had not previously been considered by a Court. In the course of their submissions, Mr Di Rollo and Miss Shand referred to certain observations from the cases of *R* v *Chargot Ltd*, *cit supra,* and *Baker* v *Quantum Clothing Ltd* [2011] 1 WLR 1003, which I have referred to above. It may be helpful to note a further observation of Lord Hope in *Chargot*. After the passages already referred to, Lord Hope addressed the impact of the reverse onus in sections 2(1) and 3(1) of the 1974 Act and its compatibility with the ECHR. In that context, under the heading of "proportionality", he stated (at para 27):

"27 The question then is whether this approach to the legislation is proportionate. **The first point to be made is that when the legislation refers to risks it is not contemplating risks that are trivial or fanciful**. It is not its purpose to impose burdens on employers that are wholly unreasonable. Its aim is to spell out the basic duty of the employer to create a safe working environment. This is intended to bring about practical benefits, bearing in mind that this is an all-embracing responsibility extending to all workpeople and all working circumstances: Robens report, para 130. The framework which the statute creates is intended to be a constructive one, not excessively burdensome. In *R v Porter* [2008] ICR 1259, the Court of Appeal set aside the conviction of the headmaster of a school where one of his pupils lost his footing on a step which gave access from one playground to another while he was unsupervised, with tragic consequences. It held that there was no evidence that the conduct of the school had exposed the child to a real risk: para 22. The situation was not such as to give rise to a risk of the type that section 3 identifies: para 25. That was an exceptional case, but it makes an important point**. The law does not aim to create an environment that is entirely risk free. It concerns itself with risks that are material. That, in effect, is what the word "risk" which the statute uses means. It is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against."** (emphasis added.)

It respectfully seems to me that these observations are relevant in several respects to the issue under consideration, namely: the nature of the risk to be guarded against, the role of foreseeability in ascertaining that risk and, in some cases, the further elements that must be proved in order to establish the relevant criminal or civil liability. The nature of the risk to be guarded against is one that is material (not "trivial or fanciful") and is foreseeable ("which any reasonable person would appreciate…"). While the duty in section 53(1) is expressed as ensuring "safety…in respect of harm caused by fire in the workplace", this is to be assessed (by virtue of section 53(2)) by reference to the "risks to …safety". In *Chargot* Lord Hope treated the duty "to ensure… health and safety" (in section 2(1)) and the duty to ensure that non-employees were not exposed to risks" as essentially synonymous. Even accepting that statutory wording considered by Lord Hope in *Chargot* is different from that in section 53(1), the rationale discussed by Lord Hope at paragraph 27 is, in my view, equally apposite in the present context.

[244] Lord Hope's observations also invite further consideration of the role of foresight in ascertaining the risks to safety. (This is a distinct question from whether foreseeability is relevant to what is "reasonably practicable", once the reverse onus is brought into play.) *Chargot* was not really a case about foreseeability, but the comments of the Supreme Court in the case of *Baker* v *Quantum Clothing Group Limited, cit supra*, in which *Chargot* was also considered, are relevant.

[245] Unlike *Chargot*, *Baker* was concerned with civil liability. In *Baker* the claimants suffered noise-induced hearing loss as a consequence of exposure in the course of their employment. It was accepted that at the time section 29 of the 1961 Act was enacted, section 29 would not have been intended to cover noise-induced hearing loss. (Such a loss was regarded at the time as an inevitable fact of life.). The question for the Supreme Court was whether the concept of the "safety" (or lack of risk) of a workplace was an absolute and unchanging or a relative one. If the standard of what was "safe" was "absolute" or unvarying, then the employers would be liable for noise-induced loss (even if it was not foreseeable on the then state of knowledge) because the risk was always present. On that approach, foreseeability played no role. Lord Mance, and others in the majority, drew back from that conclusion and considered that the issue of safety was a relative standard and that foreseeability played a role in assessing risk or a lack of safety.

[246] If safety was a relative concept, then, as Lord Mance observed, "foreseeability must play a part in determining whether a place is or was safe": paragraph 68. Lord Mance reviewed (at paras 68 to 76) the differing strands of authority on the role of foresight (see paras 68 to 76), and concluded that what an employer knew or could reasonably foresee informed the understanding of what was "safe". To this extent safety was a relative concept, evolving over time to take into account the advancement of knowledge. Lord Mance then proceeded to consider the concept of reasonable practicability as a qualification on the duty under consideration.

[247] As part of his review of the authorities Lord Mance also considered, by way of comparison, the concept of safety under section 2(1) of the 1974 Act, which imposes a duty "to ensure, so far is reasonable practicable, the health, safety and welfare of his employees" and under section 3(1), which requires an employer "to conduct his undertaking in such a way that other persons were not thereby exposed to risks to their health and safety". He cited with approval the observations of Lord Hope in *Chargot* at paragraph 27 (set out above, at para [243]), that the statutory framework introduced by the 1974 Act was "intended to be a constructive one, not excessively burdensome"; that the law "does not aim to create an environment that is entirely risk free"; and that the word "risk" which the 1974 Act uses "is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against".

[248] In Lord Mance's view the language of the earlier provision, being section 29 of the 1961 Act, was unlikely to be more stringent than the language in sections 2 and 3 of the 1974 Act. Lord Mance also referred to the earlier House of Lords case of *Robb* v *Salamis (M & I) Limited* [2007] ICR 175, and noted the comments by Lord Hope in that case about the relevance of reasonable foreseeability in Article 5(1) of the Framework Directive (described as "imposing on employers a duty to ensure the safety and health of workers in every aspect related to work") and in Article 3(1) of the Work Equipment Directive (described as "requiring employers to take the measures necessary to ensure that the work equipment made available to workers is suitable for the worked carried out"). In *Robb* Lord Hope had said (at para 24) that the obligation was "to anticipate situations which may give rise to accidents": see, *per* Lord Mance at paragraph 72.

[249] Before leaving *Baker*, I should note that in passing the Court criticised the approach which had found favour in the Court of Appeal, namely the acceptance of an "absolute" standard and also acceptance of the premise that simply because a single person had suffered injury due to some feature of the workplace that that had sufficed to show that a workplace was unsafe: see paragraphs 62 to 64, 75 to 76 and especially paragraphs 64 and 76 *per* Lord Mance. Mr Di Rollo's submissions were predicated on the same premise. It was for that reason, on his approach, that the pursuer did not need to identify or prove the defenders' failure in any particular way.

[250] It respectfully seems to me that the import of the *dicta* in *Chargot* and *Baker* is that the risk to be guarded against must be a material risk to safety, and it must be a foreseeable risk. If it were not foreseeable, it is difficult to understand how a risk would be susceptible to assessment such as to enable an employer to take steps (insofar as "reasonably practicable") to guard against the risk identified from an assessment. In my view, the risk to safety must also arise out of the business or undertaking engaged in by the employer. This simply flows from the requirement that there be a causal link between any breach of duty by the employer and any loss or injury sustained by the employee. Adapting this to the language of section 53, the duty is to ensure the safety of an employee in respect of material and foreseeable harm caused by fire in the workplace. The duty does not extend to ensuring against nonmaterial or unforeseeable risk of harm caused by fire in the workplace.

[251] This brings me to a further way that *Chargot* may be relevant to the instant case: namely, whether the pursuer also required to articulate and prove the manner in which the defenders failed to ensure his safety. As Lord Hope said at paragraph 22 in *Chargot*, where there is an accident then in most cases that fact "will speak for itself". In such a case, the prosecution case will be that a certain state of affairs existed and which permitted the accident to occur. The evidential onus then shifts to the defendant to prove that it was not reasonably practicable to avert such risks as arose or to prevent the accident that occurred. Even in cases of injury, Lord Hope nonetheless allowed that in some cases, "it may not be enough for the prosecutor simply to assert that the injury demonstrates that there was a risk": see paragraph 22 of *Chargot*. Lord Hope acknowledged that there were cases where, in the absence of actual injury, more would be required than simply an assertion that a state of affairs existed. In such cases he said "it may be necessary to identify and prove the respects in which the injured person was liable to be affected by the way that the defender conducted his undertaking ". In other words, the particular risks to which the employee was exposed must be identified. It respectfully seems to me that the circumstances of the instant case fall within the scope of these observations. Applying these observations to the present case it appears to me that, at least in a case with no physical injury, it is not necessarily enough for the pursuer to succeed for him simply to prove that a fire occurred and that he was injured (on the hypothesis that the pursuer's psychiatric injury is within the ambit of section 53). It is therefore incumbent upon the pursuer to identify and prove the particular failures on the part of the defenders that had the result that the defenders had failed to ensure the pursuer's safety from harm caused by fire. What, in other words, did the defenders fail to do that resulted in his exposure to an unacceptable level of harm from fire? In terms of the pleadings, the only failure identified was, it was said, the failure to provide more than one egress from the Absorber.

Has there been a breach of section 53(1)?

[252] In the light of my conclusion regarding the nature of the duty in section 53, in a case such as this it is not enough for the pursuer simply to prove the fact of the fire and that he was injured (on the hypothesis that psychiatric injury is a relevant injury). In the light of my finding that there was a second egress to the north of the Absorber, the pursuer has failed to prove the only particularised breach of duty he pled. Miss Shand notes that the pursuer pled no case at proof and made no case for a failure to have a second egress off the Absorber, such as a ladder scaffold, specifically at the west face. Had the pursuer made such a case, she says it is likely that the defenders would have investigated the history of the scaffolding, its configuration and when and why it was taken down. I accept this submission. Accordingly, I find that the pursuer has not established a breach of section 53(1) of the 2005 Act.

[253] Miss Shand has a fall-back argument which is that, on the hypothesis a *prima facie* breach of section 53(1) was established, it would in any event not have been reasonably practicable for the defenders to have had a means of egress off the west face of the Absorber at the time of the fire. Strictly speaking, in the light of my finding that the pursuer has failed to establish a breach of section 53(1), no issue of reasonable practicability arises. However, I should record my conclusions on this issue.

Reverse onus in respect of reasonable practicability

[254] In common with many provisions under the 1974 Act, section 53(1) imposes a reverse onus on the defender. That is, once a claimant establishes a *prima facie* breach of the duty concerned, then in order to avoid liability the defender must show that it was not reasonably practicable to avoid the breach that has been proved. In terms of section 53(1), the defender must show that it was not reasonably practicable to ensure the pursuer's safety from the risk of harm caused by fire. There appeared to be no dispute between the parties in relation to this reverse onus, and Miss Shand for the defenders led evidence from her own witnesses and which was directed, in part, to discharging this onus.

Was it reasonably practicable to have an egress off the Absorber from the west face at the time of the fire?
[255] Under reference to *Jenkins* v *Allied Ironfounders* 1970 SC(HL) 70 (at pages 41, 42, 44 to 45, 46 to 47 and 51), Miss Shand referred to the observations to the effect that once all of the evidence is out after proof, no question of onus remains in relation to the issue of reasonable practicability. I take this to mean that the issue of reasonable practicability is determined in the light of all of the evidence. Miss Shand also referred to the observations in *Baker* v *Quantum Clothing Group Ltd, cit, supra*, that determining whether something is reasonably practicable involves a degree of foreseeability. I did not understand Mr Di Rollo to dispute this. Miss Shand contended that, consistent with the approach of the common law in determining the circumstances in which a duty of care will be owed in respect of psychiatric injury, pure psychiatric injury had to be reasonably foreseeable.

[256] Miss Shand first considered whether the outbreak of fire was foreseeable. Her position was that it was not. Her next proposition was that it was not reasonably foreseeable that dense smoke would issue from the very start of any fire and would spread to such an extent that persons on the walkway on the west face of the Absorber would not have time to utilise an exit unless that exit was situated on the west face itself and nowhere else. Nor was it reasonably foreseeable, she argued, on the hypothesis that the person who was on the west face could not reasonably be expected to go through smoke without breathing apparatus being brought to him (as by the on-site fire team or the fire brigade or OPUS), that even although (i) he would have breathing apparatus brought to him, which would allow him to walk through the smoke and (ii) there was an on-site fire team and OPUS to assist him, and (iii) the fire services would be called out if necessary to deal with the fire, that the person who had been on the west face would suffer severe mental illness. Miss Shand also renewed her objection to the pursuer making any case based simply on the outbreak of the fire.

[257] In support of her contention that the defenders had taken all reasonably practicable steps to prevent the occurrence of fire, she referred to the following evidence. (This evidence is discussed at para [132]ff, above.) The evidence established that the risk of fire was low. The defenders operated a hot work procedure and that was in place on the day of the fire. Hot work was not a cause of fire. More generally the defenders also had a number of systems to prevent fire. They had a Health and Safety plan. The document behind this plan was No 7/30 of Process, spoken to by Liam Richardson. That plan was more than just a document. In practice it had as parts of its operation a system of SHE inspections. There were daily site inspections by Mr Richardson or by one of his colleagues. Records were kept of any site hazards including fire hazards, and these were actioned. There was an initiative whereby employees on site, not just Amec employees, were encouraged to pick up on any safety issues as they went about their work and to report any hazards. There were weekly meetings between the health and safety personnel of all the contractors on site. There were AMEC audits from higher up the managerial tree than the level of Liam Richardson at regular intervals. The site was designated a No Smoking area, and disciplinary action was taken if anyone breached that rule. There was the hot work permit system. Hot work when done was done with a fire watcher being used to accompany the tradesman, whose job was to look out for any ignition source and to put out sparks using a fire extinguisher and fire blanket. There were fire extinguishers on the absorber. There were regular fire alarm drills, every Friday. Fire extinguishing equipment was maintained.

[258] I have already held that the outbreak of fire was not reasonably foreseeable at the stage the construction had reached. I accept the defenders' evidence, as summarised above, and which was not challenged. Had I found there to have been a *prima facie* breach of section 53(1) of the 2005 Act, I would have nonetheless held that the defenders had discharged the onus of showing that it was not reasonably practicable for them to do more than they did in respect of means of egress.

Legal submissions relating to other statutory grounds founded on by pursuer

[259] While Mr Di Rollo's oral and written submissions were directed to section 53(1) of the 2005 Act, he did indicate that he invited a finding of liability on the other statutory grounds insofar as these were maintained (see para [28]). Applying my ruling upholding the defenders' challenge to certain chapters of evidence on the basis that there was no record (see para [59] above) to these other statutory grounds, I find that there are no relevant

factual averments to support a case based on any of these other grounds other than for the sufficiency of the number of egress routes for the purposes of Regulation 40(1) of the CDM Regulations 2007.

[260] While Regulation 26(1) of the CDM Regulations 2007 also concerns the suitability and sufficiency of means of access and egress from every place of work, in my view that Regulation covers such means other than for emergency purposes. Regulation 26 is headed "safe places of work" and in my view that concerns the means of access and egress used in the normal course by an employee. I accept Miss Shand's submission, under reference to *Evans* v *Sant* [1975] QB 626 at 632F to 636B, that Regulation 26 is not concerned with transitory events such as a fire, but with a "place *qua* place": see Appendix E: 29.

[261] Regulation 40, concerning "emergency routes and exits", is, as it says, concerned with emergency (as opposed to normal) exits. That regulation is properly engaged by the pursuer's pleadings. The factual averments I have identified above (at paras [27] and [58]), as applicable to section 53(1) of the 2005 Act, also afford a factual basis for the legal duties in Regulation 40(1) of the CDM Regulations 2007.

[262] Regulation 40(1) provides as follows:

"(1) Where necessary in the interests of the health and safety of any person on a construction site, a sufficient number of suitable emergency routes and exits shall be provided to enable any person to reach a place of safety quickly in the event of danger".

There are ancillary provisions requiring that an emergency route should "lead as directly as possible to an identified safe area" (Regulation 40(2)); that emergency routes or exits should be kept clear of obstructions (Regulation 40(3)); and that emergency routes and exits should be indicated by suitable signs (Regulation 40(5). Further, Regulation 40(4) provides that in making provision under Regulation 40(1), account shall be taken of the matters in Regulation 39(2).

[263] The factors in Regulation 39(2) are as follows:

"(a) the type of work for which the construction site is being used;

(b) the characteristics and size of the construction site and the number and location of places of work on that site;

(c) the work equipment being used;

(d) the number of persons likely to be present on the site at any one time; and

(f) the physical and chemical properties of any substances or materials on or likely to be on the site."

[264] The only matter relevantly put in issue by the pursuer in his pleadings was the number of means of egress, not their sufficiency. The evidence relevant to Regulation 40(1) and the number of means of egress in an emergency is the same evidence already considered in the context of section 53(1) of the 2005 Act. In respect of Regulation 40(1), Mr Di Rollo invited a finding in fact and law that "the defenders failed to provide a

sufficient number of suitable emergency routes to enable the pursuer to reach a place of safety in the event of danger": see paragraph 13 in Appendix C at unnumbered page 9. He also invited a finding that the defenders failed to have regard to the factors in Regulation 39(2). However, Mr Di Rollo did not develop this submission or identify any evidence to support these proposed findings.

[265] In her submission in relation to Regulation 26(1) of the CDM Regulations, Miss Shand had argued that the pursuer had "no record for any alleged insufficiency of the egress other than the averments which are in essence directed to a complaint about how many there were, ie a complaint about quantity": see Appendix E: page 35. I accept this submission. It also has force in respect of the limited scope of what the pursuer has put in issue for the purposes of Regulation 40(1).

[266] In respect of Regulation 40(1), Miss Shand notes that there is no question of there being a reverse onus on the defenders. In the result, she said, the pursuer has failed to establish a breach of Regulation 40(1). In any event, he has failed show that any breach caused his injury.

[267] She rejected Mr Di Rollo's proposed finding in fact no 47 (see Appendix C: unnumbered page 4) that to comply with HSG 168 there required to be a route to a place of safety in the northwest corner of the Absorber. There was, she argued, no record for this. There was no basis in the evidence to make such a finding. She noted that the common position of Mr Kidd and Mr Sylvester-Evans was that HSG 168 was a guide only and not a Code of Practice. Further, she argued, HSG 168 did not support the proposed finding; it did not prescribe a finding that exits be 180 degrees apart. In any event, the pursuer's own expert, Mr Kidd, had stated that for someone at the northwest point of the Absorber, being broadly where the pursuer was on the afternoon of the fire, the southeast stair provided two egress routes but with the last part in common. Mr Sylvester-Evans had agreed with that analysis. On no view, therefore, was there a breach of HSG 168 or Regulation 40(1).

[268] I accept Miss Shand's submissions. To the extent that Regulation 40 is relevant, ie for which there are supporting averments of fact, it covers the same averments and evidence as that already considered under section 53(1). It is also correct, as Miss Shand argues, that there is no reverse onus of reasonable practicability under the CDM Regulations 2007. However, much of the evidence that was relevant to the discharge of that onus under section 53(1) of the 2005 Act is relevant to the factors in regulation 39(2) of the CDM Regulations 2007, quoted a few paragraphs above. In particular, the evidence I have accepted about the stage reached (being a few days from commissioning), the fact that there were relatively few workmen on the Absorber and that they were engaged essentially in snagging work, and the fact that the stages of construction carrying a higher risk in respect of fire had passed, is relevant to many of the factors in regulation 39(2). On the evidence I have accepted, from the northeast corner where the pursuer was working, he could have proceeded in three directions to escape: by heading east through the valley, before turning south toward the southeast stair; by heading south, along the west face of the Absorber, before turning east and again proceeding to the southeast stair; or by heading north to the means of egress available in that direction. In the light of all of this, I conclude that there was no breach of Regulation 40(1) in respect of the number of means of egress from the Absorber.

[269] What is to be made of the expert evidence? As noted above, there was a substantial body of evidence elicited from the parties' experts but very little reference to it in parties' submissions. The case was presented by both parties on the footing that compliance or otherwise with HSG 168 was the measure of whether there was compliance with, or a breach of, the statutory duties. Given that I have found no breach of HSG 168, it also follows that I found no breach of Regulation 40 on this basis. Mr Di Rollo did not identify any other evidence or basis pointing to a different conclusion.

Conclusion on liability

[270] In the light of my findings on the evidence, my determinations in respect of the legal issues and the application of the evidence I have accepted to the statutory provisions founded upon by the pursuer (insofar as there were relevant averments), the pursuer's case fails.

[271] It is appropriate nonetheless that I record the amount I would have awarded had the pursuer succeeded in establishing liability.

Quantum

Heads of loss

[272] The valuation of the pursuer's claim (No 64 of Process), lodged mid-way through the proof, contains the following heads of loss: (1) pension loss, (2) incidental expenses, (3) past services under section 8 of the Administration of Justice Act 1982, together with interest thereon, (4) past wage loss and interest thereon, and (5) solatium and interest thereon. By Joint Minute (No 63 of Process) ("the Joint Minute") the first three heads of loss were agreed. In relation to (4), parties agreed in the Joint Minute that in the year prior to the fire the pursuer had earned £28,811.04 net; that he had received £9,488.11 in wages from the defenders after the fire and that since the pursuer returned to work on 5 May 2015 he had suffered no further wage loss. There was no reference to *quantum* in the four days of oral submissions and no cases were lodged or referred to that related to *quantum.* The parties' positions are taken from their written submissions and latest statements of valuation.

Past wage loss

[273] In the valuation of the pursuer's claim it is stated that at the agreed rate of £28,811.04 the pursuer would have earned £175,267.16 between the date of the fire in 2009 and his return to work in 2015. After deducting the sum received of £9,488.11, the figure for past wage loss was. However, it was accepted that the pursuer may not have worked continuously in those years. Making a further deduction of one year by way of allowance for periods of unemployment produced a net wage loss of £136,968.01. This would attract interest of £37,870.72.

[274] The pursuer was encouraged by his medical advisers from time to time to look for work. He took steps to do so, including contacting the defenders, who never replied to his queries. Jobs in this line of work were mostly received through word of mouth. The pursuer made enquiries for work in this way. At one point, the pursuer considered taking a training course in England to obtain a new certification or licence, in order to improve his employability, but he did not then have the resources to enable him to afford this. On the evidence, the principal dispute in relation to past wage loss appeared to be the defenders' contention that the pursuer was fit to return to work one year earlier than he did. As is clear from the pursuer's own evidence, and that associated with the several medical reports, the improvement in his mental or emotional state was a slow and gradual one, with setbacks from time to time. One of these setbacks appeared to coincide with the loss of the first diet of proof, in spring 2014, when, on its first day, his then senior counsel moved for discharge in order to secure an expert report. In a case such as this, which is of the utmost importance to the pursuer and is likely to be productive of anxiety as the date for proof approached, it is not surprising that the sudden loss of the proof would have had a profound effect. On all of this, Mr Di Rollo's written submission simply stated (at par 74) that the pursuer's wage loss was £136,968.01: see Appendix D, unnumbered page 7. For the defenders, the entirety of their submission on *quantum* was "that it was not reasonable that the pursuer remained off work after 2014. They contend that the sums brought out in their Statement of Valuation are appropriate in respect of patrimonial loss": see Appendix E, p 45. The defenders contended for a lower sum for solatium, presumably to reflect the contention that the pursuer was able to return to work sooner than he did. In cross of the pursuer, too, there was a tendency at times to seek to minimise the impact of matters on the pursuer.

[275] I have no hesitation in accepting the pursuer's evidence on the effect that his experience on the Absorber had on him, the efforts he made to return to work, and the difficulties he faced both practical and emotional, in doing so at a point in time materially earlier than he did in May 2015. Therefore, the date at which his past wage loss ceased was on 5 May 2015. In relation to the pattern of his past employment, I accept his evidence that he was always well regarded as a worker, but that by reason of the varying or cyclical nature of the industry, that there were also periods of unemployment. I accept Mr Di Rollo's deduction of one year as a reasonable and fair

adjustment to reflect this. Accordingly, had the pursuer established liability, under this head I would have awarded past wage loss of £136,968.01, together with interest thereon.

[276] In respect of solatium, no authorities were placed before me, although Mr Di Rollo referenced JSBG-09 in his statement of valuation. Having regard to the evidence I have accepted about the impact of the pursuer's experiences, I would have awarded the figures contended for by the pursuer, namely of £17,500 (with £15,000 of that attributed to the past), and interested calculated in the usual way on the past element.

[277] In the result, however, the pursuer has failed to establish any relevant breach of duty on the part of the defenders. Accordingly, the defenders are entitled to decree of absolvitor. I shall reserve all question of expenses meantime.

Coda on the Defenders' Legal Historical Review

[278] For the avoidance of doubt, I should record that in holding that the pursuer has failed to establish any breach of duty by the defenders, I have not felt it necessary to resort to the historical legal arguments advanced at some length in submissions or to determine the issue of whether pure psychiatric injury is necessarily irrecoverable for breach of the statutory duties founded upon. Out of deference to effort taken to prepare and present these submissions, it is right that I comment on them. I do so only briefly in the body of this Opinion, after I summarise Miss Shand's historical legal submissions. I set out my comments on these submissions more fully in Appendix H to this Opinion.

Legal Historical Review: Summary

Summary of defenders' Submissions

[279] The principal parts of Miss Shand's historical legal review included the following:

1) Miss Shand argued that none of the fire safety legislative provisions that preceded section 53 of the 2005 Act permitted recovery for pure psychiatric injury. To that end she traced the development of fire safety legislation (including the Fire Precautions Act 1971 ("the 1971 Act"), the Fire Safety and Places of Sport Act 1987 ("the 1987 Act"), the Fire Precautions (Workplace) Regulations 1997 ("the 1997 Regulations") and the Fire Precautions (Workplace) (Amendment) Regulations 1999 ("the 1999 Regulations"), with a view to arguing that none of this permitted recovery for pure psychiatric injury. See Appendix D: pp 1 – 16.

2) In the middle of this review, she also referred to the Framework Directive, the Workplace Directive and *Cross* v *Highlands and Islands Enterprise* 2001 SLT 1060, also to argue that breaches of the 1997 Regulations (which were in implement of the Framework Directive) did no more than transpose the minimum requirements of this Directive. She also contended that the 1997 Regulations did not give rise to civil liability for breach and that (*per* Lord Macfadyen in *Cross*) the Framework Directive was directed toward physical injury from accidents or occupational disease.

3) She also reviewed the development in the common law of certain controls on claims for pure psychiatric injury, from *Bourhill* v *Young* [1943] 1 AC 410 to cases like *Hegarty* v *EE Caledonia* [1997] PNLR*, Frost v Chief Constable of South Yorkshire Police* [1992] 2 AC 455 and *Salter v UB Frozen & Chilled Foods Ltd* 2004 SC 233, dwelling on the case of *Page* v *Smith* and cases subsequent to, and critical of, that case. From these she argued that, at the very least, the common law required foreseeability of pure psychiatric injury, assessed with hindsight and assuming a person of ordinary phlegm. She argued that it would be remarkable if any of the legislative provisions the pursuer founded on were extended to permit recovery for pure psychiatric injury, without also applying like controls as had been created by the common law. So remarkable would this be, that it cannot be something that would be done "tacitly". Further, it would be impermissible "to tack on" common law controls onto the legislation. See: Appendix D: pp 16 to 40.

4) For the purposes of the other statutory provisions founded upon by the pursuer, other than section 53(1) of the 2005 Act, she returned to her historical legal review at a later point in her submission: see Appendix E: 24-29. In particular, she referred to the CDM 2007 Regulations and the CDM Regulations 1994, which they replaced. She also noted that the Construction (Health, Safety and Welfare) Regulations 1996 ("the 1996 Regulations") were the first to implement the Construction Site Directive. None of these provided for damages for pure psychiatric injury. Similarly, she argued that given that the terms of the 1996 Regulations were carried over into the 2007 CDM Regulations, being the ones founded upon by the pursuer, the 2007 CDM Regulations did not and were not intended to permit recovery for pure psychiatric injury. She adopted all that she had already said in relation to her historical and legal review.

Summary of reasons why no reliance placed on the Defenders' historical legal review

[280] In the determination of the issues raised in this case, I have not found it necessary to rely on the historical legal submission advanced by Miss Shand. In any event, I would have been reluctant to do so without a more comprehensive response than that provided by Mr Di Rollo. Having considered the two volumes of materials provided and the submissions, I was also concerned that there might be several shortcomings in Miss Shand's historical legal review, as follows:

1) It is necessary to note the emergence of three distinct legislative regimes in the evolution of fire safety as applied to the workplace: (a) the fire safety regime, (b) how like duties came to be applied to the workplace, and (c) how a more specific regime evolved and was applied to construction sites. It is not entirely correct to assert that there was never any civil liability for breach of general fire precautions (which, *pace* Miss Shand, at Appendix D, p 47 footnote 56, is a defined term in the fire legislation preceding the 2005 Act: see para [17] of Appendix H to this Opinion, where the definition of this from the Fire Precautions (Workplace) Regulations 1997 is set out.). And, insofar as breach of some of the later provisions provided for civil liability to which section 47 of the 1974 Act applied, there is an arguable case that those provisions were habile to permit recovery for pure psychiatric injury.

2) Miss Shand has assumed that the 2005 Act stands solely within, and is the latest fruition of, the statutory regime concerned with fire safety. For that reason, for the purpose of her argument about section 53(1) of the 2005 Act, she did not regard it as necessary to look beyond the evolution of fire safety legislation. (The second part of her historical review was directed to the CDM Regulations: see Appendix E: pp 24 to 27.) While the 2005 Act is principally concerned with fire safety, it is not confined to that. Indeed, the 2005 Act may be seen as a hybrid act representing a convergence of fire safety legislation and also fire safety in relation to workplaces (including construction sites). In part, this follows from its status as an act of the Scottish Parliament (to the extent that fire safety in the workplace is within its devolved legislative capacity) but also as an act implementing, in part, some of the EU Directives. If the 2005 Act is of this hybrid character, the allowance in some predecessor legislation within the workplace and construction regimes for civil liability for breach of fire safety duties (as applied to the workplace or to construction sites), and to which section 47 of the 1974 Act also applied, would be problematic for the submissions she makes.

3) Further, her submission in relation to the EU Directives and to *Cross*, may be of less persuasive force than she contends. *Cross* was concerned with the question of whether the EU instrument there under consideration was of direct effect and created specific enforceable rights in domestic law or (as it was argued) otherwise informed the content of common law duties. In the light of *Cross*, Miss Shand argued that the EU Directives do not expressly permit recovery for pure psychiatric injury. That may be so, but that may be of less significance once it is appreciated that it is in the nature of EU Directives that they are concerned with the effect to be achieved. Subject to the principles of effectiveness and equivalence, the means by which a particular EU Directive is implemented in the domestic legal order is left to the discretion of the Member State. This includes whether a breach of any domestic transposing legislation gives rise to any civil liability. Once that domestic legislation makes express provision for civil liability for breach (as the 2005 Act does), the significance of the EU instrument concerned may be diminished as an interpretative tool.

APPENDIX A: ABBREVIATIONS USED IN THE OPINION

"the CDM Management Regulations 1994" means the Construction (Design and Management) Regulations 1994;

"the CDM Regulations 2007" means the Construction (Design and Management) Regulations 2007;

"the Construction (HSW) Regulations 1996" means the Construction (Health and Safety at Work) Regulations 1996;

"the Construction Sites Directive" means Council Directive 92/57/EEC concerning "minimum safety and health requirements at temporary or mobile construction sites";

"the HSE" means the Health and Safety Executive;

"the Management Regulations 1999" means the Management of Health and Safety at Work Regulations 1999;

"the Scotland Act" means The Scotland Act 1998;

"the 1971 Act" means the Fire Precautions Act 1971;

"the 1974 Act" means the Health and Safety at Work etc. Act 1974;

"the 1987 Act" means the Fire Safety and Places of Sport Act 1987:

"the 1997 Regulations" means the Fire Precautions (Workplace) Regulations 1997;

"the 1999 Regulations" means the Fire Precautions (Workplace) (Amendment) Regulations 1999;

"the 2003 Regulations" means the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003/2457;

"the 2005 Act" means the Fire (Scotland) Act 2005;

"the 2005 Order" means The Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541);

APPENDIX B: Pursuer's first submission

Motion for decree for £167,068 with interest on past solatium (£15,000)[1]and past wage loss (£136,938)[2] at the judicial rate from 23 March 2009 until the date of decree and at 8 per cent per annum on the total sum until payment

Certification of

Mr MacGilvray (expert in relation fire safety) [Report 6/630]

Mr Kidd (expert in relation to fire safety) [Report 6/637]

Dr Rodger (psychiatrist) [Reports 6/1, 6/631, 6/638]

Mr Pollock (actuary) [Reports 6/635, 6/636]

Keith Carter (employment consultant) [Report 6/632 and 6/634]

Objections

(1) Maintain objection to evidence relative to a scaffolding tower to the North (Route 2 in 7/62) – no record for this route

(2) Maintain objection to reliance on drawings and diagrams purporting to demonstrate routes of access and egress in respect of which the original material has not been produced. No witness has spoken to preparing these documents. They have not been proved – 7/17 to 7/22 inclusive. The factual basis upon which RSE expressed his opinions in 7/62 is not established by the evidence.

SUBMISSION

The pursuer suffered a serious post-traumatic stress disorder when he was unable to reach a place of safety during a fire on the No 3 Absorber Unit Longannet Power Station on 23 March 2009. He suffered loss, injury and damage as a result.

In terms of Section 53[3] of the Fire (Scotland) Act 2005 his employer (the defender) has a duty to ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace.

The evidence is clear[4] that the pursuer suffered harm[5] because of the fire

He sustained a serious post-traumatic stress disorder which resulted in his absence from work until May 2015

The pursuer does not have a common law case. He relies upon breaches of statutory duty[6]

The pursuer's case is based on a breach of section 53[7] of the Fire Scotland Act And breaches of other regulations Insist on

Including 53 (1) and (2) and (3) including failure to take the "fire safety measures" outlined in schedule 2

Regulation 3 of the Management of Health and Safety at Work Regulations 1999 (**failure to carry out a risk assessment**);

Regulation 13 (2) (**failure to plan, manage and monitor construction work carried out by him or under his control in a way which ensures that, so far as is reasonably practicable, it is carried out without risks to health and safety**

Regulation 26 (**provision of a safe place and safe means of access and egress to and from work so far as is reasonably practicable)**

Regulation 38 (a) (**suitable and sufficient steps shall be taken to prevent, so far as is reasonably practicable risk of injury during construction work arising from fire**)

Regulation 39 (**Emergency Procedures**)

Regulation 40 (**provision of emergency routes)**

Regulation 41 (**Fire Detection and Fire Fighting**) of the Construction (Design and Management) Regulations 2007

It is important to appreciate that the defender's duty under section 53 involves the failure to secure a state of affairs – that is to say safety in respect of harm caused by fire

The employer must ensure that its employee does not come to harm as a result of fire – if the employee does come to harm then unless it can demonstrate that it took all reasonably practicable steps in the circumstances[8]- it is liable.

HAS the defender demonstrated that it took all reasonably practicable steps to ensure the pursuer's safety in respect of harm from fire.[9]

At its narrowest the pursuer's case is very simple. He was unable to reach a place of safety because the only egress route known to him was blocked. There was no other means of egress. There ought to have been.

There is some evidence that the defender took certain fire precautions but there is no evidence that that it assessed the risk of fire and identified the precautions to be taken during the construction phase of the absorber unit.

The importance of failing to carry out a risk assessment relative to a risk (in this case the fire risk during the construction phase) is highlighted in the case of Kennedy v Cordia[10]

The cause of the fire is unknown. There is no evidence that whatever the cause of the fire may have been all reasonably practicable steps were taken to prevent its outbreak. No attempt has been made to identify what all those steps would have been far less to demonstrate that all were taken. The same applies in relation to preventing the fire from spreading. It also applies in relation to means of escape to a place of safety. There is no evidence that any measures were taken in respect of means of escape. There is no evidence of any steps that were taken to secure that any means of escape could be safely and effectively used. There was no evidence that that any means of escape was signed as such at the time of the fire. The only evidence of access and egress related to the southeast stair. There is no evidence that it was designated as an emergency means of escape. There is no reliable evidence of any other means of access and egress on the absorber unit at the time of the fire. There is no evidence of any designated means of escape from the pursuer's position on the scaffolding. The evidence is clear that the pursuer was unable to escape the fire to a place of safety. He attempted to use the southeast stair but could not reach it due to smoke. Whether he attempted to reach that stair along the north side or by going trying to go along the south side there was smoke. It is clear from photographs that there was little smoke on the west face but there was no means of egress on that side. There is no evidence that there was any means of access on the northwest side and in any event there is no evidence that the pursuer or any other operative knew of any emergency escape route on that side.

EVIDENCE

PURSUER'S WITNESSES		DEFENDERS WITNESSES
PURSUER - pursuer an occasional fire watcher - main job looking after the skips - supported by Richardson in this - no evidence that pursuer was told of any route other than south east stair - said that when he made his way to the sloping roof he thought there had been scaffolding at one point – there was none – if there had been he would have used it - put to him in cross examination but did not accept that there was a scaffold tower that led to the ground level on the north side of the absorber [not suggested there was any other route down and not suggested that he given any specific information in relation to egress in the event of fire]		LIAM RICHARDSON (HEALTH AND SAFETY MANAGER) - unclear as to what his precise role and responsibility was at the time of the incident - unfamiliar with HSG168 - assertion that was a risk assessment was that one would have to be completed to comply with CMD - accepted that a fire risk assessment would require to be carried out - gave details of what it require to include - unable to point to any document containing it - His unspecified "belief" that there was an access on the North side without any foundation - not able to indicate any direct knowledge and unable to point to any documentation to that effect – RSE's diagrams not linked to him in evidence

		- His assertion that not reasonably practicable to install a fire alarm for absorber 3 should not be accepted because unsupported by evidence that it was considered, costed and rejected - Accepted fire alarm should be audible - No consideration given to deluge system
JAMES WILLIAM STEWART (SCAFFOLDING INSPECTOR) - described the scaffolding as a maze - unable to get to the pursuer - clearly distressed by the events - May have been an access on the west side previously but it had been removed		ANDREW FOUBISTER - took drawings 7/18, 7/19,7/20, 7/21 and 7/22 from website - not author of material – - these drawings are not proved
HUGH POLLOCK (INSULATOR) - Taken to southeast stair - No fire alarm		ROD SYLVESTER EVANS (EXPERT) - Given a very restricted remit[11] - Only considers access and egress and signage - does not deal with any of the other measures to ensure safety from harm from fire - his work not based on evidence heard in the proof– made assumptions relative to routes that are not justified on the evidence - his judgement not Amecs – where is Amec's judgement?[12] - Ex post facto justification with regard to the particular fire – not an acceptable basis to justify what was done – this illustrated by reference to "safe area" NOT "place of safety" only context was the fire on 23/03/09 and not any fire - [contrary to his evidence a place of safety was

		ground level away[13] from structure] - measurements (why from SW corner and not where pursuer working?) inadequate and unreliable[14] (based on unproven blown up scale drawings - evidence as to number of routes not spoken to in evidence[15] - did accept in cross that require two routes with 90 degrees separation so if have access on South East stair so an exit on North East (2nd exit in fig 6A of 7/62) corner would be unacceptable - no assessment by defenders as to the level of fire risk - no assessment or identification of place of safety - no assessment of distances - no assessment of number of routes - evidence re documents [6/541 to 6/547] in re-examination – unable to point to risk assessment in respect of fire or any consideration of fire route - in broad terms a deluge system could be fitted - did not say alarm system could not have been fitted - did not speak to other measures - any assertion that pursuer given adequate training not justified by the evidence that has been heard – pursuer not challenged on his evidence that he only given one course at beginning of his employment 2006 (three years or so before the fire) and no specific content put the pursuer - other examples of unjustified factual presumptions – assumption that pursuer would know the routes despite lack of signs see 7/62 at

		paragraph 4.4.16 – no basis in evidence that pursuer knew anything of the sort – pursuer only occasional fire watcher – main task environmental skips - another example is assertion that OPUS was provided for such a circumstance – no evidence for that
STEWART KIDD (EXPERT) [6/637] - No risk assessment relative to fire during the construction phase of the absorber - Clear require two routes - Should be opposite one another - Place of safety at ground level - He clear that the calculations put forward by RSE should not be accepted		
PAT MACALLISTER (SCAFFOLDER) Clear only one "stair" – not challenged [Not realistic to suggest he not referring to scaffolding] Plain that he meant only one access and egress		
ALAN DICKSON (CHAIRMAN OF PANEL OF INQUIRY) [6/538; also lodged as 6/628] - Clear that only one access and egress to and from Absorber		

[In all of the material collected including all of the witness statements no one mentions any other access and egress other than SE stair/or clambering over the scaffolding] - Other than someone going out with a designated climb route the only access was the southeast stairway [Amec involved in production of document – no one seems to contest its finding in this regard]		
COLIN RODGER (PSYCHIATRIST) Reports 6/1; 6/632 and 6/638 Mumford's reports 7/63 and 7/67 Pauline Boyle – a Psychotherapist – see letter dated 16 July 2009 at page 41 of 6/2 of process (the GP records) Made it clear that if there had been an obvious route for the pursuer to escape there would have been no threat. The fact that he was trapped for several minutes or more with the combination of feeling trapped, anxious is enough for PTSD Pursuer continues to suffer intermittent flashbacks and residual chronic mild PTSD but will recover fully		
WILLIAM KEITH MACGILLVRAY (EXPERT ON COMMISSION) Had seen all of the material produced in court - Rapid fire risk known internationally - Deluge system effective means of preventing fire from taking hold		

- Polypropylene and rubber in the installation produces toxic gases - Fire alarm should be audible - No fire risk assessment in respect of the construction phase - Opus and Cherry picker not part of fire procedure plan - Employees should be given specific information as to the escape routes – every time there is a change employee should be told - No information about signage and designation - Would have to be at least two routes		

APPENDIX C: Pursuer's second submission

THE PUSUERS PROPOSED FINDINGS IN FACT

IN THE CAUSE

MD

Against

AMEC GROUP LIMITED

1. On the 23 March 2009 the pursuer was engaged in the course of his employment with the defenders on the construction of absorber number 3 "the absorber" at Longannet Power Station. [ADMITTED]

2. The pursuer was at all material times an employee of the defenders. [ADMITTED]

3. The absorber was a construction site in the course of construction.

4. The defenders were the principal contractors on the construction site and responsible as such under the Construction (Design Management) Regulations 2007.

5. Shortly before 1500 on the 23rd of March 2009 the absorber went on fire (hereinafter referred to as "the fire").

6. The fire burned for the rest of the day and part of the following day, destroying the absorber.

7. The pursuer was working on the absorber at the time of the fire.

8. He was on a scaffold platform working at a height just below the 29m level of the absorber.

9. It was his workplace for the purposes of the Fire (Scotland) Act 2005.[16]

10. Scaffolding surrounded the absorber unit.

11. The pursuer noticed smoke.

12. At or about the same time a co-worker (John Robinson) shouted to the pursuer, “Mel, there is a fire, get down.”

13. Immediately the pursuer attempted to escape.

14. To descend to the 21m level walkway the pursuer required to use three ladders about 8 feet in length.

15. The top two of these ladders were on the west face of the scaffolding surrounding the absorber, the lowest ladder on the north.

16. The pursuer descended the two ladders on the west face of the scaffolding surrounding the absorber.

17. When he reached the final ladder, on the north, there was thick black smoke

18. He was unable to see the bottom of that ladder.

19. The pursuer moved along the scaffold to the south to see if he could find a way down to a place of safety.

20. He was unable to find a way to safety on the south side.

21. The pursuer went back to the ladder on the north and discovered that the smoke was even thicker than before.

22. He was able to scramble a way over the scaffolding to the 21m level.

23. The pursuer again checked for routes off to the north and south, but was blocked by smoke.

24. He went to the south end of the scaffold on the west side of the absorber, but was unable to get down that way.

25. He then went to the north side, but could not see through the smoke.

26. He was agitated and afraid.

27. He considered running through the smoke, but decided against it.

28. He then went to where the roof was at its lowest “referred to as the sloping roof”, about 20 metres in height from the ground at this point.

29. He shouted on an operative at ground level to get a cherry picker to rescue him.

30. The fire seemed to get worse.

31. Whilst waiting on the cherry picker one of his colleagues shouted on him to jump to safety across a gap.

32. The pursuer considered this but decided against it.

33. The pursuer also considered and dismissed descending by a cable hanging from the roof over the west face of the absorber.

34. Whilst waiting on rescue the pursuer noticed that the fire was making a loud roaring noise.

35. He saw flames.

36. The pursuer became concerned that the building would explode.

37. He thought he was going to die.

38. The pursuer was unable to make his way to a place of safety.

39. The defenders did not carry out a risk assessment relative to the risk of fire during the construction phase of the absorber.

40. The defenders did not carry out a risk assessment in relation to the risk of fire relative to the task that the pursuer was performing immediately before the fire

41. There was only one means of access and egress from the absorber.

42. This was by a staircase on the southeast corner.

43. There were no fire escapes designated as such.

44. There was no signage indicating to an operative which way to exit in the event of a fire.

45. The pursuer was unable to reach a place of safety because of the failure of the defenders to provide any alternative means of escape from the fire.

46. The defenders failed to provide a sufficient number of suitable emergency routes and exits to enable the pursuer to reach a place of safety from the fire on 23 March 2009 (contrary to HSG 168 “Fire Safety in construction work” 2007).

47. To comply with HSG 168 “Fire Safety in construction work” 2007 there ought to have been a route to a place of safety in the northwest corner of the absorber opposite to the southeast route.

48. The defenders failed to inform the pursuer of any arrangements (including alternative escape routes) in respect of evacuation from the absorber in the event of fire.

49. The pursuer and all the other operatives working on 23 March 2009 were unaware of any means of access and egress other than by the stair at the southeast corner.

50. Some weeks prior to the fire there had been an access route on the west face of the absorber, but that this had been removed by the time of the fire.

51. After some time rescue personnel from OPUS Industrial Services Limited equipped with breathing apparatus attended at the scene and managed to get to the pursuer.

52. The rescue attempt by OPUS Industrial services was improvised and not part of any fire emergency plan prepared by the defenders.

53. A 15-minute oxygen canister was attached to the pursuer’s face.

54. The OPUS personnel were going to take the pursuer down when a cherry picker arrived and rescued the pursuer.

55. The use of the cherry picker was improvised and not part of any fire emergency plan prepared by the defenders.

56. There was no fire alarm on the absorber.

57. The pursuer did not hear any alarm at any time.

58. The onsite evacuation alarm was sounded several minutes after operatives spotted the fire.

59. There are automatic fire alarm systems that can give warning to operatives seconds after a fire starts.

60. The defenders did not provide an automatic fire alarm system for the construction phase of the absorber.

61. There are measures such as automatic sprinkler or deluge systems that may prevent fire breaking out or spreading.

62. The defenders did not provide an automatic sprinkler or deluge system.

63. As a result of the pursuer becoming unable to reach a place of safety he developed PTSD as outlined in the reports of Dr Colin Rodger 6/1, 6/631 and 6/638 of process.

64. The pursuer was treated for PTSD as outlined in the reports including therapy, medication and admission to hospital.

65. The pursuer is still affected by the accident in respect that he has some anxiety but will make a full recovery.

66. As as a result of developing PTSD the pursuer was unfit for employment.

67. He was unable to return to employment until 5th May 2015.

68. As a result lost earnings and sustained a loss of pension.

69. He also required assistance to look after himself, and was put to certain expenses such as travelling to medical appointments.

70. On the 5th of May 2015 the pursuer returned to work, thus ending the period loss of earnings.

71. But for the harm caused by the fire the pursuer would have worked from the 23rd of March 2009 until the 5th of May 2015 but would have been out of work in any event for a total of twelve months since then.

72. Before the fire the pursuer was earning £28,811.04 (agreed).

73. Since the fire the pursuer received £9,488.11 from the defenders (agreed)

74. The pursuer's loss of earnings since the fire, excluding interest, is £136,968.01.

75. Interest is due on the pursuer's loss of earnings claim at half the judicial rate from the 23rd of March 2009 until the 5th of May 2015, and at the full judicial rate thereafter.

76. The pursuer's pension loss is £7,380 (agreed).

77. The pursuer's claim in terms of section 8 of the Administration of Justice Act 1982 is £5,000 inclusive of interest (agreed).

78. The pursuer's out of pocket expenses claim is valued at £250 inclusive of interest (agreed).

79. The value of solatium is £17,500, with £15,000 being to the past.

Findings of fact and law

1. The defenders failed to ensure the safety of the pursuer in respect of harm caused by fire in the workplace (section 53 (1) Fire Scotland Act 2005);

2. The defenders failed to make any suitable or sufficient assessment of the risk to the health and safety of the pursuer from fire to which he was exposed while he was at work on the absorber (Fire (Scotland) Act section 53 (2) (a));

3. The defenders also failed to make any suitable or sufficient assessment of the risk to the health and safety of the pursuer from fire to which he was exposed while he was at work on the absorber (Regulation 3 of the Management of Health and Safety at Work Regulations 1999);

4. As a result of failing to assess the risk from fire during the construction phase the defenders failed to take the fire safety measures[17] necessary to comply with the duty owed under section 53 (1) of the Fire Scotland Act 2005;

5. The defenders failed to take all reasonably practical steps to ensure the safety of the pursuer in respect of harm caused by fire in the workplace. (Fire (Scotland) Act 2005 section 53 (1));

6. The defenders failed to plan, manage and monitor the construction work in a way that ensured so far as is reasonably practicable that it was carried out without risk to health and safety (CDM regulation 13);

7. The defenders failed in so far as is reasonably practicable to provide suitable and sufficient safe access to and egress from the pursuer's place of work (CDM regulation 26 (1));

8. The defenders failed in so far as is reasonably practicable to provide the pursuer with a safe place of work (CDM regulation 26 (2));

9. The defenders failed to take suitable and sufficient steps in so far as is reasonably practicable to prevent the risk of injury to the pursuer during the carrying out of construction work arising from fire (CDM regulation 38 (a);

10. An outbreak of fire on absorber no. 3 is a foreseeable emergency within the meaning of (CDM regulation 39);

11. The defenders failed to prepare suitable and sufficient arrangements for dealing with the fire including procedures for the evacuation of the absorber (CDM regulation 39 (1));

12. The defenders failed to take suitable and sufficient steps to ensure that the pursuer was familiar with fire escape arrangements (CDM 39 (3));

13. The defenders failed to provide a sufficient number of suitable emergency routes to enable to the pursuer to reach a place of safety quickly in the event of danger (CDM 40 (1));

14. The defenders failed to provide an emergency route that led directly to an identified safe area (CDM 40 (2));

15. The defenders failed to take into account the matters referred to in regulation 39(2) (CDM 40 (4));

16. The defenders failed to indicate by suitable signs any emergency routes or exits (CDM 40 (5)).

APPENDIX D Defenders' 1st Submission (pp 1 to 50 only)

MD V AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS

The motion for the defenders: The defenders move the court to assoilzie the defenders from the Conclusions of Summons, and to find the pursuer liable in the expenses of process.

SUBMISSIONS IN SUPPORT OF MOTION FOR THE DEFENDERS:

Each statutory case will be considered in turn (No common law case is pled):

(1) Fire Scotland Act 2005, section 53:-

Sub-section (1):-

"Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace."

The defenders submit:

[**FIRST**] that the pursuer suffered no physical injury and this provision does not afford a remedy in respect of psychiatric injury occurring in the absence of physical injury (hereafter referred to as "pure psychiatric injury"), ie pure psychiatric injury is not within the ambit of section 53 on a proper construction of that section;

[SECOND] If the defenders are wrong in their submission that pure psychiatric injury is not within the ambit of section 53, in any event the pursuer has not established a breach of this provision. Nor has he established a causal connection between whatever facts he relies on to establish a breach of this condition and the pursuer's psychiatric injury.

[THIRD] if the defenders are wrong in their submission that pure psychiatric injury is not within the ambit of section 53 and even if (contrary to the submission [Second] above) the pursuer has established a breach of this provision, the pursuer's psychiatric injury is in any event too remote from any such breach for damages to be not recoverable.

Each of these submissions **[FIRST], [SECOND]** and **[THIRD]** are dealt with in turn.

[FIRST]

It is not disputed that the pursuer suffered no physical injuries whatsoever, not even smoke inhalation [6/2 of process, (GP Records) page 10, entry of 24/3/09, also lodged as a another number of process] . The defenders submit that accordingly the pursuer's safety was ensured in respect of harm caused by fire. They submit that section 53 does not allow recovery in respect of pure psychiatric injury where physical injury does not occur.

· The defenders submit that in the first instance common sense dictates that is so having regard to the language of the provision. What the provision seeks to achieve is safety in respect of harm caused by fire. The normal and natural meaning of that phrase is that it relates to physical integrity. That proposition is supported by the use of the word "safety" in the same provision. In **Baker v Quantum Clothing Group Ltd [2011] 1WLR 1003**[18] the Supreme Court had to consider the meaning of section 29(1) of the **Factories Act 1969** which provides as follows:- "*There shall so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there*." It was held that "safety" was a relative concept and that foreseeability plays a part in determining whether a place of work is safe. This case will be considered more fully later in the course of these submissions. In the meantime attention is drawn to what was said by Lord Mance at paragraph 54 where he said "*On the other hand, the scheme of the 1961 Act does indicate that….. it is essentially dealing with safety, rather than health. Safety typically covers accidents. Health covers longer-term and more insidious disease, infirmity or injury to well-being suffered by an employee."*

· The defenders submit that the submission in **[First]** above is obvious simply from the language of section 53(1), ie the use of the term "*safety in respect of harm caused by fire*." Even if that is not obvious from the use of the language in section 53(1) viewed in isolation it can clearly be seen that the proposition is correct when full consideration is given to the purpose of the duty imposed by section 53 and the type of harm that is within its ambit, as deduced from the language of section 53 in the context of (i) the language of the statute as a whole and (ii) the legislative provisions which the statute replaced, and (iii) the historical context of the situation which led to the enactment of [a] these legislative provisions which preceded the 2005 Act and [b] the enactment of the 2005 Act itself.

· It is not only legitimate but necessary to have regard to the type of harm which is within the ambit of a statute.

o In **South Australia Asset Management Corp v York Montague Ltd ("Bank Bruxelles") [1997] AC 191** [19]it was held that a duty of care does not exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. [Page 211 a-b; and G-H]. Quoting Lord Bridge of Harwich in **Caparo Industries v Dickman** Lord Hoffman in **Bank Bruxelles** said this [@ page 212 B-D]:- "*As Lord Bridge of Harwich said, at p. 627: 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.'*

In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.

How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v. Scott (1874) L.R. 9 Ex. 125".

o **Clerk & Lindsell on Torts**, **21st Edition**[20], paragraphs 9-50 to 9-53, in particular 9-53.

o As is stated in **Clerk & Lindsell** @ paragraph 9-53 "*The requirement that the claimant's damage must fall within the scope of the statute is analogous to the rules of remoteness of damage in the tort of negligence*." This was the argument advanced by Mr Rupert Jackson QC, now Lord Justice Jackson, and accepted by the Court of Appeal in the case of **Hegarty v EE Caledonia** which is reported as a conjoined appeal under the name **McFarlane v Wilkinson & Another; Hegarty v EE Caldeonia Ltd [1997] P.N.L.R 578**. –reference is made to pages 595 E-F to 596 A-B. [21]

· In **Donaldson v Hays Distribution Services Ltd 2005 SC 523** [22]the Inner House had to determine whether the pursuer was entitled to recover under the **Workplace (Health Safety and Welfare) Regulations 1992** when she was injured whilst visiting a shopping centre and was crushed against a loading bay by the first defender's lorry which was delivering to premises which she averred were under the control of the second defenders, which failing the third defenders. The question for determination by the court was whether the use of the word "Persons" in the regulation 17 founded upon by the pursuer (regulation 17) applied to visitors to the premises who were not employed by those in control of the premises.

Before the Lord Ordinary it was argued on behalf of the defenders that as the regulations were intended to give effect to the Workplace Directive of 30th November 1989 **(89/654/EEC)** a purposive interpretation must be adopted so as to give effect to the results envisaged in the Directive. It was submitted that using a purposive interpretation of the regulations by reference to the Workplace Directive it was clear that the regulations were intended to provide protection to workers, and there was nothing in the regulations, whether express or by necessary implication, that they should extend to categories beyond persons working.

Before the Lord Ordinary the pursuer argued that the pursuer was entitled to the protection of the 1992 Regulations. He contended that the starting point was to ask what is the natural and ordinary meaning of the words in their context. He accepted that for this purpose the context of the words requires consideration of the regulations as a whole, together with the empowering statute. He contended that the Workplace Directive was not determinative of the meaning of the regulations – all that it sought to provide was minimum requirements. In any event it was not as restrictive as suggested by the defenders.

The Lord Ordinary held that the regulations were not intended to benefit persons such as the pursuer who were not workers. His reasoning included the following factors:-

(a) Whilst the Workplace Directive clearly was concerned only with the health and safety of workers, not of persons passing through the workplace who are not workers, it was open to a domestic legislature to pass laws which are more stringent than the requirements of than the requirements of the directive. However the regulations do not expressly state that they are intended to be more stringent than the Workplace Directive, nor that they are intended to go beyond it in any way.

(b) The change in our domestic law which would be effected by the adoption of the construction contended for by the pursuer would be extremely important. It would have enormous consequences for almost all employers and have a very significant effect on insurers. It would be a surprising way of bringing about such an important and radical change to our laws to do so by means of regulations called the Workplace (Health Safety and Welfare) Regulations which appear to be concerned with the implementation of the Workplace Directive.

The Lord Ordinary held that the appropriate way to construe the regulations was to adopt a purposive interpretation, not a literal interpretation.

In the Inner House the Lord Ordinary's approach was upheld. It was held that regulation 17 should be construed in the legal and historical context in which it was made. In that regard the Court referred with approval [at paragraph 29] to **Craies on Legislation**, eighth edition, at paragraph 18.1.4 [23]where the author quoted from the speech of Lord Bingham of Cornhill in **R (Quintavalle) v Secretary of State for [24]Health [2003] 2 W.L.R 692 H.L** where Lord Bingham said "*The court's task, within the permissible bounds of interpretation, is*

to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole., and the statute as a whole should be read in the historical context of the situation which led to its enactment." The Inner house in **Donaldson** held that whilst it was open to Parliament to extend the protection of the regulations to non-workers, a recognition of the purpose of the European legislation, which was to protect workers, clearly pointed in favour of construing the regulations as being co-extensive in application with the European legislation. It was further held that it was extremely improbable that the legislative intention was to supersede much of the law of occupiers liability tacitly by the mere use of language that might be said to be capable of having that effect. (see head-note).

· The Defenders in the present action submit that section 53 of the **Fire (Scotland) Act 2005** should likewise be construed in the context of the Act as a whole, and in the historical context of the situation which led to its enactment. It is their contention that such an approach should be adopted to statutory interpretation irrespective of whether has been passed to give effect to European legislation, for the reasons given by the Lords in **Quintavalle** and by the author of **Craies** at paragraoh 8.1.7. In any event the 2005 Act was passed in part to give effect to a number of European Directives. (See Preamble to the Act)

· An appropriate place to start a consideration of the historical context in which the Act came into being is with a consideration of the situation in the UK before 2005 as summarized in **Munkman on Employer's Liability**, 14th edition, at 22.61 to 22.69 [25]. From this it will be seen that what happened in England and Wales was that **The Regulatory Reform (Fire Safety Order) 2005 [26]**was made by the Secretary of State pursuant to the powers afforded to him under section 1 of the **Regulatory Reform Act 2001.** It can be seen from article 1 of the **Order** that it came into force on 1st October 2006, the same day as the **Fire (Scotland) Act 2005** [27]came into force in Scotland. It can also be seen from article 1 that the Order does not extend to Scotland.

Schedule 4 of the Order sets out the legislation repealed by the Order. It will be noted that these include:-

(i) The Fire Precautions Act 1971[28]

(ii) **The Health and Safety at Work Act 1974, section 78 and schedule** 8[29]

Schedule 5 of the Order sets out the subsidiary legislation revoked by the Order. These include:-

(i) **The Fire Precautions (Workplace) Regulations 1997**,

(ii) **The Fire Precautions (Workplace) (Amendment) Regulations 1999**, and

(iii) certain provisions of **The Management of Health and Safety at Work Regulations 1999**.

As can be seen from the passages from the excerpt from **Munkman on Employers Liability** at 22.61 to 22.63 until the **2005 Order** repealed them the main pieces of Fire Safety legislation (apart from the various local Acts listed in Schedule 4 of the Order) were the **Fire Precautions Act 1971[30]**, and the **Fire Precautions (Workplace) Regulations 1997[31]**, and the **Fire Precautions (Workplace) (Amendment) Regulations 1999 [32].**

That this is so can also conveniently be seen from the Statement laid before Parliament by the Office of the Deputy Prime Minister at the same time as there was laid before Parliament the draft Order. Tab 46. Reference is made to paragraphs 1, 2, 4, 5, and 14 to 21 of that Statement.

As is stated in paragraph 14 of the Statement of the Deputy Prime Minister both the **Fire Precautions Act 1971** and the **Fire Precautions (Workplace) Regulations 1997** applied to Scotland until their repeal.

· In order to consider the historical context in which the **2005 Act** was enacted it will be necessary to consider what were the provisions of the legislation which it has replaced, ie in order to see whether that previous legislation gave a right to recover damages in a civil action for pure psychiatric injury. In that context the European legislation will also be considered.

If there was no provision in the legislation which has been replaced by the **2005 Act** (and, in England and Wales, the **2005 Order**) allowing recovery for pure psychiatric injury it will be necessary to go on and consider the terms of the **2005 Act** as a whole in order to see whether the intention of the Scottish Parliament was nonetheless to give such a new right.

v **The Fire Precautions Act 1971**[33]:-

o Consideration of the terms of this Act show that its provisions primarily related to the certificating of premises, and to the creation of certain offences in relation to obstructing enforcement officers and in relation to the use and making of false documents and false statements. (See sections19 (6) and 33). It also empowered the Secretary of State to make regulations about fire precautions. (Section 12).

o As originally enacted it made no provision for civil liability.

o In 1987 a new section 27A was inserted by the **Fire Safety and Places of Sport Act 1987**, section 12, providing that the provisions of the Act were not to be construed as conferring any right of action in civil proceedings, other than proceedings for the recovery of a fine. By this stage various amendments to the Act had been made. A new section 9A had been inserted imposing a duty as to means of escape in certain premises exempt from the requirements of a fire certificate. It is plain from the wording of this section 9A that there was no intention to give a right of action in respect of psychiatric injury. Indeed it is plain that none of the provisions of the Act were intended to have that effect. As at the date of repeal of the **1971 Act** it still contained section 27A excluding civil liability.

v **The Fire Precautions (Workplace) Regulations 1997**[34]

o These were enacted to give effect in the UK to article 8(1) and (2) of **Council Directive 89/391/EEC** ("the Framework Directive") and article 6 of, together with paragraphs 4 and 5 of each of the annexes to, **Council Directive 89/654/EEC** concerning minimum safety and health requirements for the workplace. See **Munkman on Employers Liability**, 13th edition[35], at paragraph 17.47; and the Explanatory Note to the Regulations.[36]

o At this point it is appropriate to consider the provisions of the EU Directives which were implemented by the Regulations.

Ø **Council Directive 89/391/EEC ("the Framework Directive")** [37]

§ It is submitted on behalf of the defenders that there is nothing in the Framework Directive indicating that it was intended to address psychiatric injury, in particular psychiatric injury arising from the risk or fear of physical injury that did not materialise. In particular the language of the provisions relating to fire precautions measures in article 8.

§ That view of matters is supported by the reasoning of Lord Macfadyen in **Cross v Highlands and Islands Enterprise 2001 SLT 1060.** [38] (See in particular page 1061 A-D, E-F, J-K; and 1084 L-1086 L). In that case Lord Macfadyen considered the Framework Directive, the 15 individual directives that followed on from it – including 89/654/EEC (hereafter referred to) - and concluded that in the Framework Directive and these individual directives following on from it the Commission intended only to address the incidence of physical injury and occupational diseases of a physical nature.

Ø **Council Directive 89/654/EEC**[39] ("the Workplace Directive", being the first individual directive that followed on the Framework Directive)

§ Article 6 is the General requirements section, and paragraphs 4 and 5 of each of the two Annexes relate to Emergency routes and exits, and Fire Detection and fire fighting respectively.

§ Again it is submitted that there is nothing in the language or provisions of the directive indicating that it was intended to address psychiatric injury, in particular psychiatric injury arising from the risk or fear of physical injury that did not materialise. That view is also supported by the decision in **Cross** as this directive was one of the directives considered by Lord Macfadyen in reaching the view that in using the concept of health and safety at work in the directives the Commission intended only to address the incidence of physical injury and occupational diseases of a physical nature. (**Cross**, page 1086 A-B)

o As far as the Regulations themselves are concerned it can be seen that they do not extend their ambit beyond the minimum requirements of the European directives. Reference is made to regulations 4 and 5. What is more a breach of the regulations did not give rise to civil liability. This result was achieved as follows:-

Regulation 9 of the Regulations provided that for the purposes of sections 16 to 24, 26, 28, 33 to 40, 42, 46 and 47 of the **Health and Safety at Work Act 1974** "*the provisions of the workplace fire precautions legislation shall be deemed (to the extent they would otherwise be so regarded) not to be provisions of health and safety regulations or provisions forming part of the relevant statutory provisions*."

"*Workplace fire precautions legislation*" is defined in the same regulation (regulation 9) as including Part II of the regulations, ie that part which contains regulations 4 and 5 implementing the Workplace Directive.

The provisions of the **Health and Safety at Work Act 1974** which are excluded by virtue of the operation of regulation 9 of the 1997 Regulations include sections 33 and 47, relating to criminal and civil liability respectively.

Section 47 of the **Health and Safety at Work Act 1974** provided "*Breach of a duty imposed by health and safety regulations**[40]** shall so far as it causes damage, be actionable except insofar as the regulations provide otherwise.*" and sub-section (6) of section 47 defines "damage" as follows:- "*In this section "damage" includes the death of or injury to any person including any disease and any impairment of a person's physical or mental condition.*" [41]

Thus the 1997 Regulations specifically exclude this provision.

In regulation 11 the 1997 Regulations made provision for criminal liability in view of the fact that they excluded the operation of section 33 of the 1974 Act. However there was no provision made within the regulations for a breach of the regulations to give rise to civil liability.

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o The **1997 Regulations** were amended by the **Fire Precautions (Workplace) (Amendment) Regulations 1999**.

The effect of the **1999 Regulations** [42] was to widen the premises to which the **1997 Regulations** applied. The Explanatory Notes to the 1999 Regulations state:- to the **1999 Regulations** state:- "*These Regulations amend the Fire Precautions (Workplace) Regulations 1997 ("the principal Regulations"). The Regulations, other than regulation 10, give further effect in Great Britain to article 8(1) and (2) of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ No. L 183, 29.6.89, p. 1) and article 6 of, and paragraphs 4 and 5 of each of the annexes to, Council Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace (OJ No. L 393, 30.12.89, p. 1) in so far as those provisions relate to fire precautions*."

Again it is clear that there was no intention to widen the ambit of the **1997 Regulations** beyond the minimum requirements of the European directives.

That view is reinforced by the fact that (i) there was no amendment by the **1999 Regulations** to introduce civil liability in the event of a breach of the **1997 Regulations**, and (ii) although regulation 11 (relating to criminal liability) was amended by the 1999 Regulations the amended provision still only imposed criminal liability where a breach of the regulations placed employees at risk of death or serious injury.[43]

(It should be noted at this juncture that provision in regulation 11 is replicated in the **Fire (Scotland) Act 2005**, section 72 , which provides that "*If (a) a person fails to carry out a duty to which the person is subject by virtue of – (i) section 53; (ii) section 54: or (iii) section 55; and (b) the failure to carry out the duty in question puts a relevant person at risk of death, or serious injury, in the event of fire, the person shall be guilty of an offence*.")

The defenders submit that the foregoing shows that there was no provision in the legislation which has been replaced by the **2005 Act** (and, in England and Wales, the **2005 Order**) allowing recovery for pure psychiatric injury. It is against that background that it has to be considered whether it was the legislative intention was that the **Fire (Scotland) Act 2005** should introduce a civil right of recovery of damages for pure psychiatric injury in the event of a breach of its provisions.

· **Fire (Scotland) Act 2005**:-

The defenders submit that the 2005 Act did not have as one of its purposes the giving of a statutory remedy for pure psychiatric injury caused by fear or fire or fear of the consequences of fire. They submit that a number of factors point to that being so, as follows:-

(First) In the first instance the Preamble of the Act gives no indication of any such intention.

(Second) None of the Directives which the 2005 Act was intended to implement, insofar as they are not considered by Lord Macfadyen in **Cross** cause any reconsideration of Lord Macfadyen's conclusion that in using the concept of health and safety at work in the directives the Commission intended only to address the incidence of physical injury and occupational diseases of a physical nature.

§ The EU Directives referred to in the Preamble include the Framework Directive and the Workplace Directive already referred to.

§ Directive 91/383/EEC is a directive intended to achieve for workers on fixed-term or temporary contracts the same level of protection, as far as safety and health are concerned, as other workers. [44]

§ Directive 94/383/EEC relates to the protection of young people under 18 years of age at work.[45]

§ Directive 98/24/EC relates to the protection of the health and safety of workers from the risks related to chemical agents at work. [46]It was amongst the Directives considered by Lord Macfadyen in **Cross**.

§ Directive 99/92/EC relates to minimum requirements for improving the health and safety protection of workers potentially at risk from explosive atmospheres.[47]

(Third) – as in **Donaldson v Hayes** – the change in our domestic law that would be effected by the adoption of the construction contended for by the pursuer would be extremely important. It is extremely improbable that the legislative intention was to supersede the common law position relating to recovery for pure psychiatric injury tacitly merely by the use of language that did not expressly state that damages for pure psychiatric injury for a breach of the provisions of the Act were not non-recoverable.

This involves consideration of the common law position in relation to damages for pure psychiatric injury. More particularly it involves consideration of that branch of it which relates to damages for what originally was termed "nervous shock" as opposed to psychiatric illness caused by stress at work.

Common Law before Page v Smith:-

Considering then the issue of "nervous shock", as Lord Keith of Kinkel noted in **Alcock v Chief Constable of South Yorkshire Police** [48]at page 395 A-B the question of liability for "*what is commonly, if inaccurately, described as "nervous shock" has only twice been considered by this House, in Bourhill v Young [1943] AC 92,*

and in McLoughlin v O'Brien [1983] 1 AC 410." In **Bourhill v Young** [49] it was held that whether there was a duty to take care to avoid causing psychiatric injury in the absence of physical injury depended on whether psychiatric injury was reasonably foreseeable. **Bourhill** @ page 98 -99 [Lord Thankerton]; page 101 – 102 [Lord Russell of Killowen]; page 103, and 104-106 [Lord Macmillan]; and pages 107-108, 109-110, and page 111 [Lord Wright]; and pages 113 and 119 [Lord Porter]. Reference is also made to **Cross v Highland and Islands Enterprise** at page 1091, paragraph [127].

The reasons for this requirement of foreseeability of psychiatric injury) follow logically from the neighbour principle stated in **Donoghue v Stevenson**, taken in conjunction with the law's judgement as to the persons who ought according to its standards of value or justice, to have been in contemplation. This is explained concisely by Lord Wilberforce in **McLaughlin v O'Brian [1983] AC 410**[50] @420 D – H.

In determining whether psychiatric injury was reasonably foreseeable after **Bourhill v Young** two requirements had to be met:-

First, in assessing whether psychiatric illness was reasonably foreseeable the defendant, unless he or she had special knowledge to the contrary, was entitled to assume that the claimant was a person of "*customary phlegm*" [**Bourhill,** per Lord Porter @ page 117] and had "*a normal standard of susceptibility*" [**Bourhill**, per Lord Wright @ page 110]. The reason for this is explained in the (dissenting) speech of Lord Jauncey in **Page v Smith [1996] 1AC 155** [51]@ 177 H -178 E, where His Lordship referred to the fact that it is generally recognized that what will induce a psychiatric illness in one person may leave another unaffected. Some people are more robust – or less sensitive – than others. Yet reasonable foreseeability is an objective criterion of duty and a general standard of susceptibility must be postulated.

Second, foreseeability of the psychiatric injury had to be considered *ex post facto* in light of all that had happened. [**Bourhill**, per Lord Wright @ page 110; **McLoughlin v O'Brien** @ 420, per Lord Wilberforce; and 432, per Lord Bridge.] The reason for this is that unless hindsight is used "*the question ceases to be whether it is foreseeable that a reasonably robust person would have suffered psychiatric illness as a result of what actually happens and becomes instead whether it is foreseeable that such a person would have suffered psychiatric illness as a result of what might have happened but did not in fact do so*." [**Page v Smith [1996] 1AC 155**, @ 178 E-F to 179 F, per Lord Jauncey of Tullichettle (dissenting); and Lord Goff of Chievely in **White & Others (Frost) v Chief Constable of South Yorkshire Police [1999] 2 AC 455** @ 477 G-H, quoting from the Journal of Law and Medicine (1995) 3, "*the court has to assess culpability by reference to what has actually happened; if you do not know the outcome of an accident it is impossible to determine whether what occurred should have been foreseen*."]

Page v Smith:-

Until the House of Lords decision in **Page v Smith** it was generally assumed that the test of foreseeability of psychiatric injury applied in all cases where the claimant claimed damages for negligently inflicted psychiatric illness (except where the psychiatric illness was consequent on a physical injury.) The claimant in **Page v Smith** was the driver of a car which was involved in a collision when a car cut across him. The claimant suffered no physical injury. However the impact was severe enough to cause considerable damage to both vehicles, although the plaintiff was able to drive his home. Following this incident he developed a recrudescence of a condition known variously as ME, or Chronic Fatigue Syndrome, or Post Viral Fatigue Syndrome. The claimant contended that the effect was that as a result of the accident his condition became chronic and permanent and that he would never work again. He sued for damages in respect of the effects of the accident on his condition

and his consequential loss of earnings. The trial judge found in his favour and awarded him damages, having found that the shock of the incident exacerbated his condition.[52]The defendant appealed and the Court of Appeal allowed his appeal. The claimant in turn appealed to the House of Lords. The issue for the House was whether the claimant required to show that it was foreseeable that he would suffer psychiatric injury, or whether it was sufficient for him to succeed that he would suffer injury whether that be psychiatric or physical. By a majority of 3:2 (Lords Keith of Kinkell and Lord Jauncey of Tullichettle dissenting) that question was answered in the affirmative in the claimant's favour.

Lord Browne-Wilkinson started by looking at **McLaughlin v O'Brian** and said that since that case "*it has been established that, in certain circumstances, a defendant can be liable for illness or injury, whether psychiatric or physical, produced in a plaintiff by purely psychiatric processes, without any direct physical impact on or injury to, the limbs or organs of the plaintiff. That case also establishes that such a process is, in certain circumstances, to be treated as foreseeable by a defendant*." Having said this, he then identified the issue for the house as follows:- "*The question, therefore, is whether the driver of a car should reasonably foresee that a person involved in an accident may suffer psychiatric injury of some kind (whether or not accompanied by physical injury). I have no doubt that he should. It is not physical injury alone which causes illness or injury: physical or psychiatric illness occurs quite apart from physical injury.*" Lord Browne Wilkinson concluded as follows:- "*I am therefore of the opinion that any driver of a car should reasonably foresee that, if he drives carelessly, he will be liable to cause injury, either physical or psychiatric or both, to other users of the highway who became involved in an accident. Therefore he owes to such persons a duty of care to avoid such injury. In the present case the defendant could not foresee the exact type of psychiatric damage in fact suffered by the plaintiff who, due to his ME, was "an eggshell personality". But that is of no significance since the defendant did owe a duty of care to prevent foreseeable damage, including psychiatric damage. Once such a duty of care is established, the defendant must take his victim as he finds him*."[53]

Lord Lloyd of Berwick held that once it was established that the defendant was under a duty of care to avoid causing personal injury to the plaintiff it mattered not whether the injury in fact sustained was physical or psychiatric or both. Applying that test however is, with respect, to miss the point which was made in **McLoughlin v O'Brian** per Lord Wilberforce at page 420 F-G when he said "*Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred is a formula adopted by English law, not merely for defining but also limiting, the persons to whom that duty may be owed and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such*."

It seems however that in **Page v Smith** there had been an admission by the defendant that the defendant was under a duty of care, ie that the defendant had fallen into the error of admitting the existence of a duty of care when in fact that was the very question to be addressed. Reference is made to page 187 F-G in the speech of Lord Lloyd where he says "*Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a duty of care not to cause foreseeable psychiatric injury*." [54] This may have led to the fundamental part played by foreseeability of psychiatric injury in determining whether there was liability for psychiatric injury being over-looked.

Lord Lloyd in **Page**, having held that held that once it was established that the defendant was under a duty of care to avoid causing personal injury to the plaintiff it mattered not whether the injury in fact sustained was physical or psychiatric or both, went on to say that it was enough in the case before him to ask whether the defendant should reasonably have foreseen that the plaintiff might suffer physical injury as a result of the defendant's negligence, so as to bring him within the defendant's duty of care. As it was not in dispute that the plaintiff might suffer physical injury he was – on Lord Lloyd's approach – entitled to succeed.

Lord Ackner in **Page** simply agreed with Lord Lloyd.

Lord Browne-Wilkinson too in **Page** said that he agreed with Lord Lloyd, but - as I have already noted - he then went on and gave the ratio for his decision as being that that any driver of a car should reasonably foresee that, if he drives carelessly, he will be liable to cause injury, either physical or psychiatric or both, to other users of the highway who became involved in an accident.

Lord Keith and Lord Jauncey dissented. They considered that in accordance with existing authority and principle (a) damages could only be recovered in any case if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it; and (b) that foreseeability had to be judged *ex post facto* and in the light of what would be suffered by a person of normal fortitude.

Criticisms of Page v Smith:

The majority's decision in **Page v Smith** has been very controversial. It has been the subject of a good deal of criticism, both academic and judicial, with the chief judicial critic being Lord Goff of Chievely in **White (Frost) v the Chief Constable of South Yorkshire Police. [55]**

Lord Goff's criticisms and some of those made by academics are set out in **White v Chief Constable** at pages 476 to 487. The criticisms set out there are as follows in summary:-

o The principle that foresight of psychiatric damage is relevant in establishing a duty of care for psychiatric damage had never been doubted before, either in the UK or Canada or Australia and yet in one fell swoop was discarded in the UK, without proper analysis of the authorities or principles which underlay the rule.

o Thus the decision of the majority in **Page** on the one hand potentially widened the circumstances in which persons could claim damages for pure psychiatric injury, but paradoxically the language used by Lord Lloyd in passages in his speech suggested that claims for pure psychiatric injury could also become more difficult for other persons by reason of the necessity to show a foreseeable risk of physical injury.

o The potential widening of the circumstances in which persons may claim for damages for pure psychiatric injury is as a result of the majority of the House in **Page** holding that (i) foreseeability of psychiatric injury was not a pre-requisite of recovery for pure psychiatric injury, but that it was enough that physical injury was foreseeable, in combination with (ii) Lord Lloyd's statement that hindsight had no part to play in cases not involving secondary victims.

o However absent the requirement for foreseeability of psychiatric injury coupled with the doing-away of the rule that foreseeability was to be measured by hindsight, it would be very difficult to know in many cases whether it could be said that physical injury to the claimant – which by definition will not have occurred – was reasonably foreseeable.

o This last point was made by Lord Reed in **Campbell v North Lanarkshire Council and Another 2000 SCLR 373** at page 380 F-G where he said "*Before leaving Page v Smith I should observe that determining the range of foreseeable physical injury may not always be as straightforward as it was in that case (where the plaintiff was the driver of a car involved in a collision), particularly since hindsight has no part to play. The point is illustrated by some examples given by F.A.Trindale in his article "Nervous Shock and Negligent Conduct" (1996) 112 L.Q.R. 22 at p.24.*" [56]

o The language used by Lord Lloyd in **Page** has, on the other hand, caused some to understand that the case laid down – contrary to what was the previous position - that the presence within the range of foreseeable physical injury is a necessary attribute before one can claim damages for pure psychiatric injury. This is explained by Lord Goff in **White and Others (Frost)** at page 478 B –F.

o The paradox arising from what was said by Lord Lloyd was commented on by Lord Reed in **Campbell v North Lanarkshire Council** @ page 379 D-E, and 380 B-F.

Post - Page v Smith

In **Grieves v FT Everard & Sons Ltd (also known as Rothwell v Chemical & Insulating Co Ltd and Another) [2008] 1AC 281** [57]the issue in Mr Grieves' case was whether Mr Grieves' employer could be liable to him for psychiatric injury illness – clinical depression - caused by fear of the development of an asbestos-related disease in circumstances where he learned that he had suffered pleural plaques.

The Supreme Court held that he was not entitled to recover. They held that whether the employers owed him a duty of care in respect of his anxiety in contemplating the risk of future illness depended on whether it was reasonably foreseeable that the creation of a risk of asbestos-related disease would cause psychiatric illness to a person of reasonable fortitude, and, on the facts there was no basis for so finding.

Counsel for Mr Grieves submitted that even if his psychiatric illness was not foreseeable, the decision of the majority of the House in **Page v Smith** made such foreseeability unnecessary. It was enough that his employer ought to have foreseen that exposure to asbestos might cause him physical injury, namely, an asbestos-related disease.

That argument was rejected by the Justices. They held that it was not enough for the purposes of giving rise to a duty of care in respect of psychiatric injury that it was foreseeable that exposure to asbestos might cause Mr Grieves physical injury, namely, an asbestos-related disease. Although it was foreseeable that Mr Grieves might have suffered a psychiatric injury if he had contracted an asbestos disease he had not contracted such a disease and the creation of the risk of disease was not itself actionable; and that psychiatric illness caused by the apprehension of the possibility of an event which had not actually happened was not actionable. [*Lord Hoffmann at paras [23] to [35]; Lord Hope of Craighead at paras [51] to [58]; Lord Scott of Foscote at paras [75] to [77]; Lord Rodger of Earlsferry at paras [92] to [98], and Lord Mance at paras [103] to [104].]*

In so holding the Justices made clear that:

o the right to protection against psychiatric illness is limited [per Lord Hoffman at page 288 C-D]

o the test of foreseeability of psychiatric illness occurring from a particular event was again to be undertaken with hindsight; and that in judging foreseeability in hindsight by reference to the event which actually happened (ie not what might have happened but didn't) the claimant was to be assumed to be a person of "sufficient fortitude" or "customary phlegm". [per Lord Hoffman at page 295, paragraph [30].

o **Page v Smith** should be confined to its own facts.

Lord Hoffmann said that he did not think it right to depart from **Page v Smith** as he did not think it had caused any practical difficulties but it should be confined to what he referred to as "*the kind of situation*" which the majority in that case had in mind. He saw that as being "*a foreseeable event (a collision), which viewed in prospect, was such as might have caused physical injury or psychiatric injury or both*." [para [32]]

Lord Hope said that he considered attractive the defendants' argument that **Page v Smith** should be departed from, but said that he would prefer to leave that argument for another day. It was not necessary to deal with it in order to decide Mr Grieves' case. [para [52]].

Lord Scott and Lord Rodger contended themselves with distinguishing **Page v Smith**.

Lord Mance said that whilst he would leave open the correctness of **Page v Smith** for another day he saw force in the criticisms of it. [para [104]]

Whilst **Grieves (Rothwell)** was decided after the passing of the **Fire (Scotland) Act 2005** it illustrates the controversy that the decision in **Page v Smith** caused. It demonstrates the fact that other than possibly in the narrow set of circumstances identified by Lord Hoffman the law was and always had been that foreseeability of psychiatric injury should be the test for the recovery of damages for psychiatric injury; and that in the application of that test what should have been foreseen was the event which actually happened and what required to be considered was whether it would have caused psychiatric illness to a person of "*sufficient fortitude*" or "*ordinary phlegm*".

To give the **Fire (Scotland) Act**, in particular section 53, the interpretation that the pursuer contends for in the present case (namely, that he can recover for damages for pure psychiatric injury under section 53) would be to turn the common law on its head. It would mean that a pursuer could recover under the Act for any psychiatric injury suffered without the need to meet the common law control mechanism of foreseeability of psychiatric injury (ie assessed in hindsight and taking into account what actually happened, and assuming the pursuer to be a person of sufficient fortitude or ordinary phlegm.) There would be no control mechanism required. All that a pursuer need do would be to show that there had been a breach of the provisions of the Act – in particular section 53 – and that he had suffered psychiatric injury which he would not have suffered but for that breach. There would be no need for physical injury.

Thus, for example if an employer having a duty to risk assess under section 54 failed to do so in breach of the section an employee who had to work in the premises may become so anxious about coming into work each day that he develops a mental illness. The same considerations would apply to section 53 itself, eg if an employer fails to have alarms or fire extinguishers installed in premises and an employee becomes so anxious worrying what may happen in the event of a fire that he or she becomes psychiatrically ill.

Logically, if the pursuer's argument were correct these persons would be entitled to recover damages for their psychiatric illness. Indeed, logically, there would be no need for such a person to show that they had suffered a recognized psychiatric illness rather than distress or anxiety or other mental symptoms falling short of the full criteria for a diagnosis of a condition within the diagnostic classifications for psychiatric disorders, as that is a common law requirement which requires to be met before there can be recovery at common law for non-physical personal injury. It is one of the common law control mechanisms. **White and Others (Frost) v Chief Constable of South Yorkshire** per Lord Goff of Chieveley; at p 1539 per Lord Steyn; and at p 1548 per Lord Hoffmann; **Rorrison v West Lothian College**. 1999 Rep L.R 102, per Lord Reed.

The logic of the pursuer's argument also would be that there would be entitlement to recovery in the event that the employee in question were an unusually anxious person, even if that unusual feature of their personality was not known to the employer. Thus, for example, if a person of susceptible disposition reacts badly to the occurrence of a small fire that would not have happened but for a breach of section 53 and which is quickly put out using a nearby fire extinguisher he or she will be able to claim even if 20 or 30 others present at the same location have no such reaction.

Still testing the logic of the pursuer's argument, if it were correct, it would mean that if a employee suffered psychiatric injury as a result of witnessing someone else being injured in a fire due to a breach of section 53, the employee witnessing the employee being injured would be entitled to claim damages for psychiatric injury due to breach of section 53. This would mean that there would be back-door recovery for psychiatric injury for that category of persons categorized by the common law as "secondary victims". At common law there are strict control mechanisms which apply in the case of secondary victims. These are summarized in the speech of Lord Hoffmann in **White and Others (Frost) v the Chief Constable of South Yorkshire Police**, at page 502 F – H, as follows:- (1) the plaintiff must have close ties of love and affection with the victim, (2) the plaintiff must have been present at the accident or its immediate aftermath; and (3) the psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else. To that must be added, as Lord Griffiths said at page 462 H to 463 A, the requirement in the bystander case that the psychiatric injury must have been reasonably foreseeable as a likely consequence of the

accident or its immediate aftermath. "*The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals*." Yet if the pursuer's argument in this case is correct that would mean that all of these control mechanisms would fly off.

There is nothing in the language of the **Fire (Scotland) Act 2005** to point to an intention to do away with the common law control mechanisms which apply in determining whether there can be recovery for pure psychiatric injury, both by "secondary victims" and those whose claims are not based on what they witnessed happen to others (ie so-called "primary victims"). To use the language of the Inner House in **Donaldson v Hayes**, to give the language of the statute, in particular section 53, the interpretation contended for by the pursuer "*would work an enormous change in the law…..It would do so without any express reference to the fact that it was intended to have that effect*." It would greatly widen the ambit of those who could claim damages for psychiatric or psychological injury without physical injury.

It may be argued on behalf of the pursuer that there should be "tacked-on", as it were, to the statutory duties imposed by the **2005 Act** - in particular section 53 - some sort of control mechanism, such as reasonable foreseeability. On an initial reading of the case of **Hegarty v EE Caledonia** [58] it might be thought that the Court of Appeal had proceeded to "tack on" a test of reasonable foreseeability in this way. However the defenders submit that on a proper reading of the case the Court were not in fact transposing the common law control mechanism of reasonable foreseeability to a statutory provision. What they were doing was no more than considering the language of the particular statutory provision before them – which by using the words "*likely to endanger*" necessitated an assessment of foreseeability – in order to determine whether the harm suffered by the pursuer was within its ambit. As was said in **Clerk & Lindsell on Torts, 21st Edition**, at paragraphs 9-50, harm sustained may not be within the ambit of a statute either because the claimant does not come within the particular category of persons contemplated, or because the type of damage was not that which the statute was intended to guard against.

§ The regulation under consideration in **Hegarty v EE Caledonia** was regulation 32(3)(a) of the **Offshore Installations (Operational Safety Health and Welfare) Regulations 1976** which provided that it shall be the duty of every person while on or near an offshore installation: "*….not to do anything likely to endanger the safety or health of himself or other persons on or near the installation or to render unsafe any equipment used on or near it"*.

§ Mr Hegarty was employed as a painter on the Piper Alpha and at night was housed in quarters on board the MV Tharos. On the night of the Piper Alpha disaster this vessel was lying partially anchored about 550 metres south-west of the Piper Alpha. As a result of witnessing what occurred on the Piper Alpha Mr Hegarty suffered psychiatric injury in respect of which a diagnosis of PTSD had been given. He sued the operators of the rig under section 32(3)(a) and at common law, but his claim was dismissed under both heads.

§ The claim based on regulation 32(3)(a) was dismissed by the judge at first instance on the ground that the breach of statutory duty even if proved would not have given rise to liability in the absence of proof that the breach had been such as was likely to endanger his health and safety.

§ He appealed to the Court of Appeal. Before the Court of Appeal Mr Rupert Jackson QC, as he then was, argued that the mere fact that a breach of statutory duty caused the plaintiff's injury on the application of the "but for" test or any similar test was not sufficient. The plaintiff, it was argued, must fall within the class of persons which the statute is intended to protect, and his injury must be of a type and inflicted in a manner which the statute was intended to prevent. This principle, it was submitted, provides a limiting mechanism similar to the requirement of foreseeability in other torts. The Court of Appeal did not disagree with this argument, and indeed referred to it as "persuasive".

§ The Court of Appeal agreed with the argument, and clearly thought that it was following it. [59]

§ The Court held that Mr Hegarty could not succeed on the basis that he would have to satisfy the court that "*a likely and not merely a possible foreseeable outcome of the relevant breach of duty was that the mental health of*

someone on a rescue vessel more than 100 metres away would be impaired. Once one realizes that the risks to which the judge is referring are risks to someone in the plaintiff's position, I cannot fault this part of the case."

§ It is submitted that when one considers the following it is clear that the Court of Appeal were not tagging on a common law control mechanism, but were simply saying that this claim failed at the first branch of the "ambit of the statute" test referred to in **Clerk & Lindsell**:-

Ø The Court accepted that Mr Rupert Jackson QC's argument was correct when he submitted that it was necessary to determine whether in any particular case the harm said to have been suffered was within the ambit of the statute in question;

Ø The Court was not applying a test of reasonable foreseeability but of "likelihood". It was necessary to consider "likelihood" because of the particular wording of the statutory provision under consideration. Thus Lord Justice Brooke, with whom the two other judges agreed, said (at page 596 E-F) "*..in order to succeed, the plaintiff would have to satisfy the court that a likely, and not merely a possible foreseeable outcome of the relevant breach of duty was that the mental health of someone on a rescue vessel more than 100 metres away would be impaired*."

Ø There was no discussion by the Court of the legitimacy of "tacking-on" a common law control mechanism to a statutory provision, and no discussion about how foreseeability was to be judged, ie whether that was to be in accordance with the law as it stood at the time **Page v Smith** was decided, or whether instead it was to be in accordance with some understanding of what it was understood were the changes that **Page v Smith** made to the law as it then stood.

Accordingly it is submitted that there is no authority for 'tacking-on" a test of foreseeability to statutory provisions where the language of the statutory provision itself does not already require an assessment of foreseeability.

Not only is there no authority for "tacking-on" a test of foreseeability to a statutory provision but such could not be justified by reference to principle. The particular harm under consideration in any particular case is either within the ambit or the statutory provision under consideration or it is not. If it is within the ambit of the statute then there is no need to "tack-on" a test of reasonable foreseeability. If it is not within the ambit of the statute as assessed before "tacking-on" or importing a test of reasonable foreseeability then it cannot be made to come within the ambit of the statute by "tacking-on" or importing such a test.

Such an approach would not only be illegitimate but it would give rise to problems. If one were to import the concept of reasonable foreseeability to a statutory provision in order to read it as giving rise to a right to recover for pure psychiatric injury, what would be the content of the test ? Foreseeability of what ? Psychiatric illness ? Or of physical harm, even though no such harm occurred ? How is foreseeability to be assessed ? With hindsight, taking account of what actually happened ? Or without hindsight considering only what might have happened but did not ? As Lord Hoffmann said in **Grieves v F T Everard (Rothwell)** at paragraph [29] "*the answers to a test of foreseeability will vary according to, first, the precise description of what should have been foreseen and, secondly the degree of probability that makes it foreseeable*."

All of these considerations show, as has already been submitted, that if section 53 of the **Fire (Scotland) Act 2005** were to be read as allowing recovery for psychiatric injury without physical injury that would be to work a would work an enormous change in the law, with far-reaching consequences. It would do so without any express reference to the fact that it was intended to have that effect. It is submitted that, as the Inner House held in **Donaldson v Hays**, it was extremely improbable that the legislative intention behind the **Fire (Scotland) Act 2005** would be to supersede the common law in relation to recovery for pure psychiatric injury, and to do so moreover only in relation to fire.

That position is also supported by the fact that the language of section 53 is similar to paragraph 8 of the **Regulatory Reform (Fire Safety) Order 2005** [60] and there is likewise there is nothing in the language of that Order which indicates an intention on the part of the Westminster Parliament to supersede the common law in

England and Wales in relation to recovery for pure psychiatric injury. (Nor is there anything in the Deputy Prime Minister's Statement which preceded the Order to indicate such an intention.[61]). It is submitted that not only is it highly improbable that the Scottish legislature intended to tacitly work this great change to the common law in Scotland but that *a fortiori* it is highly improbable that it would *tacitly* have the law of Scotland differ from that of England and Wales in this matter.

It is significant that a search conducted on behalf of the defenders for any case where breach of a statutory provision has been held to give rise to a right of action for pure psychiatric injury (in cases other than those brought under **The Protection From Harassment Act 1997**) has thrown up only one case. In that case, which was a Court of Appeal case, there was no analysis such as that carried out in **Donaldson v Hayes** of the legislative intention behind the statutory provisions. Further the court simply assumed – again without analysing the position – that it was legitimate to use the tool of foreseeability to determine whether the plaintiff could recover for pure psychiatric injury for a breach of regulation in question. The case is **Young v Charles Church (Southern) Ltd and Another 39 BMLR146**.[62]

§ The facts can be seen from the headnote.

§ The regulation in question was regulation 44(2) of the **Construction (General Provisions) Regulations 1961**, which provided "*Where any electrically charged overhead cable or apparatus is liable to be a source of danger to persons employed during the course of any operations or works to which these regulations apply, whether from the operation of a lifting appliance or otherwise, all practicable precautions shall be taken to prevent such danger either by the provision of adequate and suitably placed barriers or otherwise*."

§ The plaintiff pled his case both in common law negligence and on a breach of the regulation. It was held in the Court of Appeal that he was entitled to succeed at common law as a secondary victim, following **Page v Smith**.

§ The defendant argued that as far as the case based on the regulation was concerned the plaintiff's injury (psychiatric injury without physical injury) was not of a type or inflicted in a manner which the statute was intended to prevent. He cited **Hegary v EE Caledonia** in support of his argument.

§ Lord Hobhouse declined to express a concluded view on the scope of regulation 44, finding it unnecessary to do so as the Court had found the plaintiff entitled to succeed at common law. He merely said that "*In principle there should be parity of reasoning between this claim and the tort claim.*"

It is submitted on behalf of the defenders in the present case that there was no basis for so saying in the area of damages for pure psychiatric injury, where the common law has developed the control mechanisms which apply respectively to (i) secondary victims and (ii) those persons claiming for damages in respect of pure psychiatric injury whose claims are not based on what happened to others (ie so-called "primary victims")

§ The issue of the ambit of regulation 44(2) of the 1961 Regulations was dealt with most fully in the judgment of Lord Justice Evans, but even then it was not dealt with fully. Lord Justice Evans rejected the argument for the defendant, seemingly on the ground that injury was foreseeable, though he does not say whether it was physical injury or mental injury which he considered foreseeable. [page 155, 1st full paragraph].

§ In introducing the common law concept of foreseeability as a tool by which to assess the ambit of a statutory provision Lord Evans has done that which the defenders have submitted is, for the reasons already set out, not permissible and unfounded in principle. [63]

§ Lord Evans set out his reasoning why he held the plaintiff could recover for pure psychiatric injury under the regulation as follows:- "*The statute gives protection to employees from the kinds of injury which can be foreseen as likely to occur when the electrical cable or equipment is allowed, in the words of the regulation, to become a source of danger to them. This certainly includes mental illness caused by the (nervous) shock of seeing his workmate electrocuted so close to him* [emphasis added]*, and in circumstances where he was fortunate to escape electrocution himself*."

The suggestion here that foreseeability of mental illness caused by the shock to the plaintiff of seeing his colleague electrocuted close to him points to the ambit of the regulation being wide enough to permit recovery for pure psychiatric injury betrays what is respectfully submitted is another error in Lord Evans' thinking. He has overlooked or failed to understand that at common law the plaintiff would not have been able to recover for mental illness caused by witnessing distressing events occurring to another without being able to demonstrate the necessary close ties of love and affection. **Alcock v Chief Constable; White and Others (Frost) v Chief Constable.** Accordingly Lord Evans has used the common law concept of foreseeability of mental harm [caused by witnessing injury to another] as a tool or test to hold that the plaintiff could recover under the statute when the very same concept of foreseeability of mental harm [caused by witnessing injury to another] would not have permitted the pursuer to recover as a secondary victim at common law.

§ Further there has been no attempt to ascertain the legislative intention. (Instinctively, it seems highly unlikely that a regulation about electrical equipment promulgated in 1961 was intended to allow recovery for pure psychiatric injury unaccompanied by physical injury at a time when this area of the law was at that stage still fairly novel and even **McLaughlin v O'Brian** had not yet been determined.[64])

§ Lord Hutchison carried out no analysis either of the Regulations in their legal and historical context to ascertain the ambit of the regulation in question. He merely observed that there was nothing in the wording of the regulation to justify a narrow construction. [page 165]

A search of Westlaw discloses [65] that the case of **Young v Church (Southern) Ltd** gave rise to the publication a few articles including one hopefully entitled "*Psychiatric injury – extra routes to recovery* ?" However a search conducted by counsel for the defenders has not uncovered any case in which the court has followed the approach of the Court of appeal in **Young v Church (Southern) Ltd** and has held a defendant liable to a claimant for psychiatric injury unaccompanied by physical injury based on a breach of statutory duty.

It is submitted that if the pursuer's position in the present case is correct, namely that the **Fire (Scotland) Act 2005** allows recovery for pure psychiatric injury unaccompanied by physical injury, there would be a number of other cases where other statutory provisions have likewise been held to permit recovery for pure psychiatric injury. The fact that there are not supports the defenders' position.

[Fourth] The fourth factor which the defenders rely on in submitting that the 2005 Act did not have as one of its purposes the giving of a statutory remedy for pure psychiatric injury caused by fear or fire or fear of the consequences of fire is the language of the Act itself.

o The Preamble has already been referred to.

o Nothing in Parts 1 or 2, which relate to Fire and Rescue Services and Fire and Rescue authorities, indicates an intention to confer rights in respect of psychiatric injury caused by any breaches thereof, and yet there is no change in the language of the Act indicative of a change of intention in that regard when one comes to Part 3, which relates to Fire Safety and includes section 53.

o Section 53: The main duty imposed by section 53 is that imposed in sub-section (1). Sub-sections (2) and (3) are subsidiary thereto. Sub-section (1) reads "*Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace*."

As already observed in the first bullet point on page 2 of this Skeleton the use of the word "safety" is inapposite to include psychiatric harm.

Where it is not permissible to "tack-on" the common law tool of reasonable foreseeability to determine the ambit of this provision how is one to determine whether the section has been breached ? Absent such a tool, on the pursuer's approach – namely that the section allows recovery of damages for pure psychiatric injury – the pursuer's position logically must be that the mere fact that the pursuer suffered psychiatric illness set off by the fire event means that the defenders "*failed to ensure…the safety of [the pursuer] in respect of harm in the workplace*" and thus that the defenders were in breach of this section (subject to the defence of reasonable

practicability). In other words, logically, if the pursuer's approach were correct this must be a case of *res ipsa loquitur*. And that would be despite the fact that no physical injury was sustained. It is submitted that is such a radical position that it simply re-inforces the position that the legislative intent was not to allow recovery by the route of this section of damages for pure psychiatric injury.

o The same considerations apply to section 54.

o Section 59 refers to the fact that the powers to make Regulations under section 58(1) include powers to make provisions for or in connection with the maintenance of premises, facilities or equipment "*with a view to securing the safety of fire-fighters … in relevant premises*." Whilst section 69, relating to civil liability for breach of statutory duty, only gives rise to civil liability vis-à-vis an employer and employee (and thus not between a fireman and the occupier of premises in breach of an obligation imposed under section 58) it seems unlikely that the use of the word "*safety*" in section 58 was intended to cover regulations imposing obligations on owners or occupiers of buildings to prevent fire-fighters suffering pure psychiatric injury. Yet the same word, "*safety*", is used in this provision as is used in section 53.

o Section 72 relates to offences created by the Act. That section provides that *"(1)If a person fails to carry out a duty to which that person is subject by virtue of – (i) section 53….; and the failure to carry out the duty in question puts a relevant person at risk of death, or serious injury, in the event of a fire, the person shall be guilty of an offence…..(3) If –(a) a person fails to comply with a requirement or prohibition to which a person is subject by virtue of regulations made under section 57 or 58; and* the *failure to carry out the duty in question puts a relevant person at risk of death, or serious injury, in the event of a fire, the person shall be guilty of an offence."*

It is clear that provision would not permit prosecution of a person for an offence in respect of having caused psychiatric injury in the absence of physical injury. There would be an inconsistency in the Act if it were to be read as allowing recovery for a breach of its provisions that caused death or serious physical injury but not psychiatric injury. That fact, it is submitted, when taken in conjunction with all of the other factors which the defenders contend point to pure psychiatric injury not being within the ambit of the Act, supports the position that pure psychiatric injury is not within the ambit of the Act.

o Section 69 provides that *"(2) Breach of a duty imposed on an employer by virtue of this Part shall, in so far as it causes damage to an employee, confer a right of action on that employee in civil proceedings*."

It is noteworthy that "*damage*" in this section is not defined in the same way as "*damage*" was defined in the **Health and Safety at Work Act 1974** section 47 before that section was amended by the **Enterprise and Regulatory Reform Act 2013** **[66]**.

- Section 47 of the 1974 Act provided as follows:- "*47…(2) Breach of a duty imposed by health and safety regulations …. shall so far as it causes damage, be actionable except in so far as the regulations provide otherwise……(6) In this section "damage" includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition)* [emphasis added]*."*

- Sec 53 (1) of the **Health and Safety at Work Act 1974** defined "*health and safety regulations*" as follows:- "*health and safety regulations" has the meaning assigned by section 15(1)."*

- Section 15(1) of the 1974 Act provided (and provides still) as follows:- "*15(1) Subject to the provisions of section 50 , the Secretary of State [...] [2] shall have power to make regulations under this section for any of the general purposes of this Part (and regulations so made are in this Part referred to as "health and safety regulations")".*

- As already noted the consequences of the enactment of regulation 9 of the **Fire Precautions (Workplace) Regulations 1997** had been to exclude the operation of section 47 of the 1974 Act (and also the operation of

section 33 of the 1974 Act) so that a breach of the 1997 Regulations did not give rise to civil liability (nor criminal liability insofar as imposed the operation of section 33 of the 1974 Act).

- It was because of this exclusion of the operation of sections 33 and 47 of the 1974 Act from the **Fire Precautions (Workplace) Regulations 1997** that the **Management of Health and Safety at Work Regulations 1999** as originally enacted [67]had to include a specific reference in regulation 3 to the **Fire Precautions (Workplace) Regulations 1997**. Ie as enacted regulation 3 of the **Management of Health and Safety at Work Regulations 1999** [68]provided as follows:- "*Every employer shall make a suitable and sufficient assessment of (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work… for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory* provisions [69]*and by Part II of the Fire Precautions (Workplace) Regulations 1997* [emphasis added]".

- The **Fire (Scotland) Act 2005** did not reverse that exclusion of the operation of sections 33 and 74 of the **Health and Safety at Work Act 1974**. On the contrary it amended the **Management of Health and Safety at Work Regulations 1999** by deleting the reference to Part II of the **Fire Precautions (Workplace) Regulations 1997**, and did not replace these words with anything.[70]

- By section 70 the **Fire Scotland Act 2005** went further and ensured that Part 1 of the 1974 Act and regulations made under it do not apply to devolved fire safety matters except where the enforcing authority is also an enforcing authority under Part 1 of the 1974 Act. [71]The explanation for this is summarized in the Explanatory Notes to the 2005 Act prepared by the Scottish Executive [72] in paragraph 107, as follows:- "*At present, the 1974 Act and the regulations or orders made under it are capable of making provision for certain matters of general fire safety**[73]** that are dealt with in the Act. It is therefore appropriate to disapply the 1974 Act in the context of creating a new devolved fire safety code*." This is consistent with the provisions of paragraph 47 of the 2005 Fire Safety Order applicable in England and Wales [74].

The **2005 Act** did itself make provision for both criminal and civil liability, by enacting sections 33 and 47 respectively. As noted however in so doing it did not define "*damage*" in section 33 as that term was (and is) defined in section 47(6) of the **Health and Safety at Work Act 1974**, with its specific reference to impairment of a person's mental condition.

It is to be presumed that it was a deliberate election on the part of the legislature not to define "*damage*" as it was defined in the **1974 Act.**

The defenders submit that the mere fact of the reference to impairment of a person's mental condition in the definition of "*damage*" in section 47(6) of the **Health and Safety at Work Act 1974** would not be sufficient in any case of an accident arising before October 2013 [75] in which a claimant is relying on a breach of regulations made under the 1974 Act to impose liability for psychiatric illness in the absence of related physical injury. The defenders contend that it would still be necessary to consider the language of the regulation in question. It would also be necessary to consider the context in which the regulation is to be read by considering as a whole the subordinate legislation in which it appears and the legal and historical context in which the subordinate legislation was made to determine the ambit of the regulations. (If the position were otherwise one would expect to see in the law reports cases where persons have sued under the myriad of regulations for psychiatric illness unaccompanied by physical illness said to have been caused by such breaches.) However it is submitted on behalf of the defenders that the fact that the legislature has deliberately declined in relation to fire safety to define "*damage*" in the inclusive terms in what that word was defined in the **Health and Safety at Work Act 1974** reinforces yet further their position that pure psychiatric injury unaccompanied by physical injury is not within the ambit of the **2005 Act**, in particular section 53.

Accordingly for all of the foregoing reasons the defenders submit that psychiatric injury unaccompanied by physical injury is not within the ambit of section 53, and accordingly that provision does not afford him a remedy in respect of psychiatric injury suffered by him as a result of any breach of the provisions of section 53.

[SECOND]

~~If the defenders are wrong in their submission that pure psychiatric injury is not within the ambit of section 53 in any event the defenders submit that the pursuer has not established that the pursuer's safety was not ensured. The pursuer cannot as a matter of law simply point to the fact that he has suffered psychiatric injury and say that establishes that his safety in respect of harm in the workplace was not ensured.~~

~~Yet it is unclear even now, and despite the pursuer having produced proposed Findings in Fact - on what basis the pursuer in the present action contends there has been a breach of section 53. It is not known what facts the pursuer will point to establish that his safety was not ensured~~.

[*See Supplementary Submission for the Defenders (22/3/16)]*

APPENDIX E : Defenders' 2nd submission

MD v Amec:- Supplementary Submissions for the Defenders (22/3/16):

Having heard the submissions by Counsel for the Pursuer the Defenders have revised their submissions from [SECOND] on page 49, as follows:-

[SECOND]

If the defenders are wrong in their submission that pure psychiatric injury is not within the ambit of section 53 in any event the defenders submit that the pursuer has failed in any event to prove a breach of section 53.

The pursuer's argument, as the defenders understand it, is that all that he requires to do is to simply point to the fact that he has suffered psychiatric injury and say that establishes that his safety in respect of harm in the workplace was not ensured.

However what the pursuer overlooks is that the only basis which the pursuer has on Record for proving a breach of this provision is that at the time of the fire there was only one way off the roof and that it was impossible to use that stair due to the smoke and fire. Reference is made to the pursuer's averments at page 6 E- page 7A :- "*Prior to the fire there had been exits at a number of sides to the building. At the time of the fire the only way to exit the roof was to use stairs at the east side of the building. At the time of the fire the only way to exit the roof was to use stairs at the east side of the building. It was impossible to use those stairs to exit the roof due to smoke and fire*." The pursuer could not simply have come to court with an averment that said "*I suffered psychiatric injury at my work due to the fact a fire occurred at my work. That means that you, defenders, failed to ensure my safety, and you are therefore in breach of 53 Regulation.*" It is submitted that these averments would not meet the requirement of fair notice even under the abbreviated pleadings required in terms of Rule of Court 43.2. Litigation is not a guessing game, and the defenders would have been entitled to fair notice of what it was about the occurrence of the fire that led to the pursuer suffering psychiatric injury. As Lady Smith said in **Clifton v Hays PLC,** Unreported Opinion of 7th January 2004, at paragraph [11] *"Whilst the rules contained in [chapter 43] are designed to simplify written pleadings and avoid complexity where possible, I do not understand anything in those rules as detracting from the principle that defenders are entitled, when presented with a summons, to be able to ascertain without undue difficulty the nature of the case against them."* Reference is also made to paragraph [13] in the Opinion of the Court in **McGowan v W & JR Watson 2007 SC 272**, where it stated "*It is clear that in an action of damages for personal injuries to which the provisions of chapter 43 of the Rules of Court apply, it is not necessary for either party to engage in elaborate pleading. There is nonetheless as counsel….recognised, a requirement, which is imposed on defenders s much as on pursuers, to give at least fair notice of a case which it is proposed to make*."

The Pursuer's counsel referred to **R v Chargot Ltd** in support of his contention that all he required to do was to establish that the pursuer has suffered psychiatric injury and that will establish that the defenders did not ensure his safety in respect of harm caused by fire in the workplace. It is instructive however to note, even in the

criminal context, what is said about the need for fair notice of the manner in which sections 2 and 3 of the **Health and Safety at Work Act 1974** were contravened, at paragraphs [22] to [[24].

Mr Di Rollo was critical in his submissions of the limited ambit of Mr Sylvester Evans' report and says that he doesn't know why Mr Sylvester Evans was only asked to address exit routes. That was because that was the only matter put in issue by the pursuer's factual averments both under section 53 of the **Fire (Scotland) Act 2005** and the **CDM Regulations 2007** (regulation 40).

Before this proof commenced the pursuer sought unsuccessfully to amend his pleadings to expand on the very narrow factual case which he had pled. Having failed to do that the pursuer throughout this proof has sought to lead evidence from his own witnesses relating to matters such as:-

(i) the fire alarm system /the absence of a fire alarm actually on the absorber,

(ii) deluge systems,

(iii) information, instruction, training

(iv) fire extinguishers

(v) risk assessments

The defenders insist in all of these objections. The defenders' position is that standing the pursuer's averments the only basis on which the pursuer is entitled to make a case out of a breach of section 53 is that which he pleads at page 6E to page 7A.

The defenders submit that the pursuer has not as a matter of fact proved these averments.

(First) the defenders deny that the pursuer has established that it was as the pursuer avers "*impossible to use the south east stairs to exit the roof due to smoke and fire."*

The defenders remind the court of the following evidence which they submit is relevant to this issue:

· The pursuer gave evidence that on the morning of the day of the fire he and Mr Robinson had been working on scaffolding just below the 29 metre level walkway. He gave evidence that one would get there by going up the south east stair to the 21 metre level and then taking the fixed walkway on that 21 metre level either as it followed the south and then west faces of the absorber to the north west corner, or by going north and taking it on its route under the ducts to the north west corner.

· The pursuer gave evidence that after using the south east stair to get from ground to the 21 metre level walkway and thereafter arriving at the north west corner - either by using either the south-face route of the 21 metre walkway or the north "under the ducts" route of the 21 metre walkway - there would be three scaffold ladders to climb to reach the scaffolding where he and Mr Robinson had been working on the morning of the accident. He said that this level of scaffolding was situated just under the 29 metre fixed walkway.

· The pursuer said that the second (middle) of these three scaffold ladders was situated between the two vertical up-right struts seen in 7/62 photo 1 within which other metal struts or beams form three triangular shapes. He said that it was an 8 foot ladder and that once one got to the top of it one was only feet from the bottom of the third (top) 8 foot ladder. Both these second (middle) and third (top) 8 foot ladders were within the area circumscribed by the two vertical upright struts referred to, seen in photo 1 of 7/62. The pursuer said that the top of the bottom (first) 8 foot ladder was again only feet from the bottom of the second (middle) ladder, but that the bottom of the first (bottom) ladder was more towards the north of the absorber than the second (middle) and third (top) ladders. It was not within the space circumscribed by the said two vertical upright struts seen in photo 1 of 7/62. The pursuer said that it would take him only seconds to get down the three ladders. The 21

metre walkway was made of metal gridwork, an example of which can be seen in photographs 5 and 7 of 7/62. [76]

· The pursuer said that at a time when Mr Robertson had gone to get a grinder the pursuer saw dust above the ducting area above the absorber coming from the north. He walked backwards about haf a dozen steps to see it when he realised that it was smoke. At the same time as he made this realization he heard Mr Robertson shout on him to say there was a fire.

· The pursuer's position was that at this time he was still on the scaffolding on the level below the 29 metre level. (The defenders do not accept that the pursuer was at that level. They contend that at the time the pursuer saw the dust which he then realized was smoke he was in fact already at a height which was not more than one scaffolding ladder above the 21 metre fixed walkway.) The pursuer said that his first thought was "*get down these stairs*" and that he intended to get down the south-east stair. He came down the first two scaffold ladders but when he looked down the third to the area under where the 21 metre level walkway led into the area under the ducts he could see that there was smoke. The pursuer claims that despite the fact that he knew that the base of that third ladder was on the 21 metre level walkway – and thus knew where his foot would be when it reached the bottom of this 8 foot ladder – he wasn't willing to come down the ladder.

· The pursuer said that he went south instead on the scaffold that was above the 21 metre walkway to the south-west corner. He said that he looked east along the south face of the absorber from the south-west corner and had seen smoke half-way along the south face of the absorber and said to himself "*I can't go there*." The pursuer was asked in chief why he had gone to the south-west corner and looked along and he said "*to try and see if I could get access*." He said that his intention was to get to the south east stairway.

· The pursuer said that he went back along the scaffold on the west side to the ladder again "*and it was in smoke*." He then went back to the south side again and the smoke "*was all along the east"*. He said that the wind was blowing from west to east so he decided to get onto the sloping roof away from the smoke.

· The pursuer said that he climbed over the handrail from the scaffolding onto the sloping roof. He described no difficulty in doing that. The 21 metre fixed walkway can be seen relative to where the pursuer was on the sloping roof in photo 7/24/12. It's side face can be seen as the grey metal structure running behind and parallel to the wooden plank behind which the pursuer is standing. It can be seen again jutting out from the sloping roof on the south side of the absorber in 6/15, photograph 51. Mr Sylvester Evans spoke to that being the 21 metre walkway, and his evidence on that was not challenged. This last photograph, 7/15, photograph 51 shows the full length of the 21 metre walkway on the south face of the absorber, and the south-east acess stair can clearly be seen. Mr Sylvester-Evans gave evidence that the distance from the south-west corner to the south-east corner was approximately 20 metres. (see 7/62 at para 4.4.3).

· The pursuer gave no explanation why he would not go through the smoke to use the 21 metre walkway travelling along the south face of the absorber so as to cover the 20 metres to the south-east stair. He said that "*Its common knowledge that smoke kills you before fire does*." The pursuer did not elaborate on what he meant by that, or the manner in which he considered that the smoke could harm him – if indeed he had formed a positive belief at all that the smoke would harm him. The walkway and the smoke were in the open air. The pursuer would not even go through the smoke when the OPUS personnel (2) walked up the south-east stair and offered to give him breathing apparatus and walk along the walkway. The pursuer chose instead to go down in the basket of the cherry picker which had reached him at the same time as the OPUS personnel.

· Although the pursuer claims that at the time the fire broke out he was on the scaffolding level which was just below the 29 metre level the defenders submit that he is wrong about that. The defenders submit that he was already at a level not more than one scaffolding ladder above the 21 metre walkway at that time. The defenders rely on the following evidence in support of their position on that matter:-

Ø The pursuer was working with Mr Robertson on the day of the fire. Mr Robertson submitted a written statement to the POI. This is at 6/539 pages 46 and 47 [also at 6/225]). The submission of this statement by Mr Robertson was spoken to by Liam Richardson (in cross-examination of him) and by Alan Dickson (again in

cross-examination). In that statement Mr Robertson refers to the pursuer and Mr Robertson having worked at the scaffolding just below the 29 metre level earlier that day but having come down from just below the 29 metre level to await scaffolders building an extra bit of scaffolding to enable Mr Robertson to continue welding at the 29 metre level. In his statement he said that he and the pursuer had to wait 1.5 to 2 hours for this scaffolding to be put up and accordingly Mr Robertson decided to do some welding at the 21 metre level. It was in the course of this work that he had to go and get a grinder and when he came back to the 21 metre level became aware of the fire. The pursuer however said in evidence that he had no recollection of the lost 1.5 to 2 hours that Mr Robertson speaks of in his statement. The pursuer has no recollection of working at the 21 metre level.

Ø However Pat McAllister confirmed that he was one of the scaffolders who was working on the west face carrying out work for welders on the west face of the absorber building an extra piece of scaffolding. He said that he was working with other scaffolders. He confirmed (in cross-examination) that they were working on building the extra scaffolding in the area circled in photograph 1 in Mr Sylvester-Evans' report 7/62. And the pursuer confirmed that it had been within that area that he and Mr Robertson started work that day. Although Mr Robertson states in his statement that he doesn't recall any other persons working on the west side of the absorber that afternoon he is not saying categorically that there were none. it is submitted that on a balance of probabilities Mr McAllister and his colleagues were there and working on the additional piece of scaffolding which Mr Robertson himself said was required for himself and [the pursuer] to get back to work above the 21 metre level.

Ø Mr Robertson said that after he started welding on the 21 metre level and then went to get a grinder from the stores. That would logically leave the pursuer on the 21 metre level as there would be no reason for him to go up to where the scaffolders were. And neither the pursuer nor Pat McAllister do say that they were both together at the scaffolding at the level of just below the 29 metre walkway at one and the same time.

Ø Vinny O'Hagan gave a witness statement to the POI. This was spoken to by Liam Richardson who said that he had noted the statement. It is 6/144 of process. In this statement Vinny O'Hagan describes himself as an electrical supervisor. He was an Amec employee. He speaks of hearing a muffled bang or similar and looking up and seeing black smoke billowing out from where the expansion joint would be fitted. He says that within seconds smoke had started pouring out of the south access door underneath the 21 metre level and he could see guys exiting scaffolds on the west side and heading east to the exit staircase. He said that he could see the pursuer trying to exit by the scaffold but "*it seemed to me that he became disorientated by the thick smoke. I shouted to Mel that there was a ladder that he could descend. Mel then climbed down to the 21 metre level. I then told him to climb over the handrail onto the Abs roof and head to the south west corner which he done. So I spoke to Harry Clarke (Amec) to try and keep him (Mel) calm while I organised a cherry picker to the area and started to reach up to the roof.*"

Ø The pursuer said that the fixed walkways, including the 21 metre level, were made of metal gridding. [77]Liam Richardson and James Stewart (the scaffolding inspector, or "tag" man) confirmed that. James Stewart was very confused in his orientation. He spoke of bringing scaffolders down through scaffolding at the back of the absorber, but at one stage, by reference to the isometric diagrams, had this occurring at the north-east. At another stage he said however that when he had brought the scaffolders down he had climbed up again in the same location on the scaffolding and had seen the pursuer's feet on the Kennedy grating. He said that as he was walking away from the absorber he could see the pursuer on the walkway. It seems likely therefore, it is submitted, that Mr McAllister has got his orientation mixed up in the photographs and that he was in the area of the back of the absorber towards its north-west corner, and that it was indeed the pursuer's feet that he saw. That would be consistent with (i) the evidence of Mr Robertson in his written statement that he and the pursuer were doing work at the 21 metre level when he went to get the grinder, (ii) the evidence of Mr McAllister about where he and his colleagues were working, (iii) the fact that Mr Stewart saw the pursuer's feet by looking up from below Kennedy grating, (iv) the evidence that Vinny O'Hagan told the pursuer to come down a ladder to the 21 metre level walkway and over a handrail to the absorber roof, which the pursuer did, and (v) the fact that the pursuer mentioned no difficulty in getting onto the sloping roof by simply stepping over the handrail from the level he was on. Although the pursuer said in cross-examination that he had jumped from the level at which he was positioned (which he claims was at the top of an eight-foot ladder which was standing on the 21 metre

level) to the sloping roof (which is just below the 21 metre level) that would involve a jump of several feet. The pursuer did not give evidence that he jumped any significant distance.

Ø The pursuer claimed that he was the person who shouted for a cherry picker. He said in evidence in chief that he shouted to the electrical foreman "*Get a cherry picker".* In cross-examination he was asked "*When you got to the sloping roof who mentioned a cherry picker*?' and he replied "*I am convinced it was me*." That is inconsistent with Vinny O'Hagan's evidence that it was he, Vinny O'Hagan, who arranged for the cherry picker to come forward. Vinny O'Hagan's evidence on the other hand is consistent with Alan Dickson's evidence that the security video footage showed that it was an Amec employee who arranged for the cherry picker to go to the pursuer.

Ø The defenders submit that the evidence in the foregoing bullet points shows that the pursuer is not a reliable witness. They submit that the pursuer is mistaken as to (a) where he was on the scaffolding at the time of seeing the dust which he quickly realized was smoke; (b) that he is mistaken in his belief that he climbed down two ladders but did not climb down the ladder from which one stepped off onto the 21 metre walkway (referred to above and in evidence as the the "bottom" or "third" ladder), (c) that he is mistaken in his claim that he could not get down this "bottom" or "third" ladder onto the 21 metre walkway due to smoke; and (d) that he is mistaken in his claim that it was he who instigated the use of the cherry picker.

Ø On the hypothesis that the pursuer had, as he claimed, climbed down the first two ladders but had not climbed down the last one onto the 21 metre level because he couldn't see the base of it for smoke, Liam Richardson was asked (by the judge) whether in the event of a fire he would use the ladder if he were in the same position as the pursuer. Liam Richardson said that if he could see the ladder even although he could not see the bottom of it for smoke he would in an emergency descend the ladder.

Ø It is known that there were a number of other men on the absorber including Pat McAllister and the other scaffolders with whom he was working on the west side of the structure. The pursuer also gave evidence that there were DSL laggers on the sloping roof. He said that shortly before he had seen the dust which he quickly realized was smoke he had dropped a cable to these men on the roof so that they could plug it in for him. These men all got off the absorber. Vinny O'Hagan – who was on Absorber to the west of the absorber 3 speaks to seeing the men who had been working on the west of absorber 3 head east to the exit staircase. [78]

No explanation has been given on behalf of the pursuer why everyone else got off the absorber before him, including other men working on the west face. It appeared from the line of questioning (in particular in relation to alarms on the absorber) that it may be suggested that the pursuer was not aware of the evidence when everyone else was. It is submitted that the evidence does not support that. The pursuer saw what he thought was dust blowing overhead. He took only a few steps backwards before he realized that this was smoke. That was at precisely the same time that Mr Robertson, who had accessed the 21 metre level, shouted to him that there was a fire. Mr Dickson said that the security vide footage showed that within a few minutes after the first sighting of smoke an AMEC employee was seen to have started mobilizing the cherry picker to have it travel towards the pursuer.

The defenders submit that no good reason has been put forward why the pursuer did not quickly move to the south-east stairs along with others working on the west side of the absorber. He could have done this using the walkway on the south face of the absorber even if the north route under the ducts was, as he claims, filled with smoke at the very early stage when he first became aware of the fire. He could have done this even if he was three 8 foot ladders up from the 21 metre walkway as he claims[79]. On his own evidence it would take only seconds to come down the ladders.

The defenders submit that the most likely reason why the pursuer did not get off along with the other men working on the absorber was that he simply panicked at an early stage. Even after the OPUS men came up and offered him breathing apparatus the pursuer refused to go the short distance along the walkway on the south side of the absorber and descend using the south east stair.

The walkway was in the open air on the route from the west side along the south face to the south east stair. Insofar as it was not clear of smoke the walkway was in the open air. The pursuer was not facing a situation whereby if he had walked along the walkway on the south of the absorber to the south-east stairs he would be encountering smoke in a confined space. The pursuer has never articulated what precisely his fear was about passing through smoke in the open air. Even by the stage that the photograph 6/15 photo 51 was taken (which was before the pursuer was brought down to ground) it is not accepted that the evidence establishes that there was a good reason why that the pursuer could not have covered the short distance to the south east stair. There is no evidence or in any event no reliable evidence of how the smoke on the south side of the absorber progressed between the pursuer first becoming aware of the fire and the time when the photograph was taken. Mr Hugh Pollock spoke of the fact that he and colleagues had been working on the east walkway when they were told of the fire and that they should get off. He said that they never saw any smoke when they were told to get off. He looked under the duct and saw smoke then, but there was still no smoke affecting the south east stair when he used it to descend.

Although the pursuer said at one stage that he saw flame on the south side he only said that he saw this after he was on the sloping roof and it was in response to a leading question (on Day 1), as follows:-

Q: Could you see fire ?

A: Saw flames on the south side.

Before this the pursuer had not mentioned flame, and at no time did he give it as a reason why he did not go along the south face of the absorber. Thus:

After he said that John Robinson shouted fire and he had come down the first two ladders (as he would have it) and decided against going down the third he went along to the south west corner and looked along towards the east “and it was pitch black with smoke halfway along and I said “I cant go there.”

…….

Q: What were you thinking when you saw the smoke ?

A: That I was stuck

Q: Did you consider going through the smoke ?

A: I went back to the third ladder again and it was in smoke. And I thought about going down and decided against it.

Day 2 (Cross)

Q; Why not evacuate on the walkway that we see in 7/62, photo 5 ?

A: Because it was pitch black with smoke.

The pursuer never gave flame as a reason for not using the walkway.

And the evidence was that the OPUS men walked up, and also that they offered to take the pursuer back down along the walkway and the south east stair. It is submitted that they would be unlikely to do that if there were flames present.

The photographs of the pursuer on the roof, and being assisted into the cherry picker show no flame. [80]

The pursuer was cross-examined about his claims about the denisity of the smoke, and about his claim that he could not get to the south east stair because of smoke. He was questioned about the fact that everyone else got off before him and asked how it was that others got off using the south east stair, including the men who he said had been working on the sloped roof, but he could not explain that.

(Second) the defenders submit that in any event the evidence established that there was at least one another route off using the walkway.

· The photograph number 8 in the report of Mr Sylvester Evans, 7/62, shows where the 21 metre level walkway travelled under the ducts. This photograph was spoken to by Mr Sylvester Evans.

· Mr Sylvester Evans explained that the photograph no 8 was taken from the east looking west; the light area towards the top half of the photograph was daylight from the west side of the absorber; the 21 metre walkway was the middle of the three walkways seen in the photo. There was a 23 metre walkway, accessed from the north-west corner of the 21 metre walkway by using a short set of stairs in the location of the stairs shown in photo 7. It is indicated in red on the left-hand side of the illustrative diagram Figure 6A in his report. Liam Richardson confirmed that this stair was present at the time of the fire leading to the 23 metre level.

· Mr Sylvester-Evans said that one could turn off this 23 metre level walkway into the space between the inlet and outlet ducts (as shown in photo 9). The outlet duct inner face is seen to the right of photo 9. That same outlet duct inner face is seen as the blue-greyish coloured duct facing which has vertical lines running up and down it which can be seen behind the bluish coloured vertical beam coming down just from below roof level on the right-hand side of photo 8 as one looks at the photo. Following the 23 metre walkway off between the ducts would bring one out onto the area coloured yellow in the illustrative plan which is figure 6A in 7/62. Mr Sylvester Evans gave evidence that yellow route shown on the diagram 6A was the same area that could be seen in photo 10 of his report 7/62. He gave evidence that after travelling towards the north on the 23 metre walkway – being the view one has as one looks at photograph 10 of his report – the 23 metre level walkway would turn right and if one continued to follow it one would emerge still on the walkway on the outside of the absorber where that walkway is shown coloured yellow and with the yellow triangle hovering over it in Figure 9 of 7.62.

· Mr Liam Richardson confirmed that this route existed at the time of the fire, and that the scaffold tower shown in the diagram Figure 9 existed at that time and went to ground.

· Mr Alan Dickson in cross-examination said that he learned after the interim POI report was prepared that there was another route off.

· The pursuer said in chief that he knew that the yellow route led to the back of the absorber but didn't know whether it led to a scaffold tower that went to the ground.

· In addition the evidence shows that the absorber was covered with scaffolding. Mr Sylvester Evans said that would afford ways off, although that seems obvious as a matter of common sense.

- The pursuer's counsel seeks a finding in fact that The pursuer further proposes a finding in fact that "*Some weeks prior to the fire there had been an access route on the west face of the absorber but this had been removed by the time of the fire*." (Pursuer's Proposed Finding in Fact 50). It is unclear what evidence the pursuer relies on here. There was evidence that there had previously been scaffolding to some extent on the west face. There was not evidence that it had gone to ground. [81] However the fact that this previous scaffolding is relied on to support the pursuer's case is a recognition that scaffolding can be used as a means of escape in the event of a fire. Both Mr Kidd and Mr Sylvester Evans agreed with the statement to that effect in HSG 168.

Accordingly the defenders submit that the pursuer has not established his only case on Record.

Even if the defenders' objections to the pursuer's attempts to lead evidence about the various matters to which objection has been taken on behalf of the defenders were to be repelled [82]that does not assist the pursuer as he

has not established that any of these things would have avoided the pursuer developing the psychiatric injury which he developed.

Likewise, even if the Court determines that the south east stair was the only way off the absorber and that there should have been more than one way off that would not be enough for the pursuer to succeed in establishing a breach of section 53. The pursuer would have to establish that had there been another way off his safety would have been ensured. But that would only be the case if the hypothetical other route was positioned at a place where the pursuer felt it to be sufficiently clear of smoke that he was willing to use it. Even if it is assumed that a scaffold or structure positioned on the west face which went all the way to ground would have been used by the pursuer (which is not established) it cannot be assumed that if there had been another way off that is where it would have been positioned. The pursuer's case is not that the defenders were in breach of section 53 because they did not have another ladder or scaffold positioned *on the west face specifically*.

Had it been the pursuer's case that the defenders were in breach of section 53 because they did not have another ladder or scaffold positioned on the west face specifically then the case would have been defended differently, Ie there would likely have been investigation into the history of the scaffolding that had been there and its configuration and when and why it was taken down etc.

The defenders submit that it is not permissible to read the record as a record in which the pursuer's case is that defenders were in breach of section 53 because they did not have another ladder or scaffold positioned on the west face specifically. Should that submission be rejected the defenders say that the evidence shows that it was not reasonably practicable to have a means of ascent or descent on the west face specifically.

Not reasonably practicable to have a means of ascent or descent on the west side specifically:-

In **Jenkins v Allied Ironfounders 1970 SC (HL) 70** it was held that once all of the evidence is out after proof no question of onus remains in relation to the question of reasonable practicability. [pages 41, 42, 44 -45, 46-47, 51].

In **Baker v Quantum Clothing Group Ltd** it was held that reasonable practicability involves questions, amongst other things, of reasonable foreseeability. [Para [81] to [85] per Lord Mance; para [123], [128] to [129] per Lord Dyson; para [136] per Lord Saville of Newdigate.] In paragraph [82] Lord Mance said that "*The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other*." In the present case as it is psychiatric injury only that was suffered logically - and consistent with the approach of the common law in determining the circumstances in which a duty of care will be owed in respect of pure psychiatric injury - this will involve considering the issue from the point of view of foreseeability of pure psychiatric injury.

On this point, the defenders submit that outbreak of fire itself was not foreseeable. Further and in any event, *esto* (which is not accepted) the smoke was of such density from the start of the fire that a person of normal fortitude would not have gone through it to get to an exit, even one in the open air (as here) it was not reasonably foreseeable that smoke to such an extent would be generated so quickly that persons on the walkway on the west would not have time to utilise an exit unless that exit was situated on the west face itself and nowhere else. Nor was it reasonably foreseeable, on the hypothesis that the person who was on the west face could not reasonably be expected to go through smoke without breathing apparatus being brought to him (as by the on-site fire team or the fire brigade or OPUS), that even although (i) he would have breathing apparatus brought to him which would allow him to walk through the smoke and (ii) there was an on-site fire team and OPUS to assist him and (iii) the fire services would be called out if necessary to deal with the fire that the person who had been on the west face would suffer severe mental illness

The defenders rely on the following evidence in support of their submission that the outbreak of fire was not reasonably foreseeable:-

o at the time of the fire the work on the absorber was nearly complete. Completion was due to take place three days after the fire. *Alan Dickson, cross-examination on day 5, after 11.36, and with reference to 6/566 page 2.* Construction of the absorber chamber was finished and there were no operatives working in the chamber by the date of the fire. *Liam Richardson cross-examination day 6, after 15.01*

o that morning 100s of cubic metres of water had been pumped through the absorber soaking the polypropylene packing. *Liam Richardson re-examination, day 6 shortly after 14.47 [Q: Do you know of any increased risk of fire in respect of the commissioning of this absorber ? A "the object was to pump quite a lot of water and take samples. I wouldn't say there was an increased risk of fire…. We were about to pump water so I didn't think there would be a risk of fire."]*; *Alan Dickson, cross-examination on day 5 after 11.36.*

o the POI investigation did not find any reason to believe that work being carried out on the absorber was the cause of the fire. A hot work review had been carried out by the POI and there was no hot work ongoing at the time which they considered could account for the fire. *Alan Dickson, day 5, cross-examination after 14.02, and 6/538, para 9.2.* Liam Richardson also spoke to the fact that the defenders operated a system whereby operatives carrying out hot work required to wait at their workstation for 30 minutes after finishing the hot work to ensure that there had ben no ignition of anything. *Liam Richardson, day 6, chief at 11.10.*

o At an earlier stage of the construction various stages of the construction chemical compounds were used to line the absorber internals and flue gas duct work to prevent corrosion. When these chemicals were applied strict controls were in place to ensure that the quantities used were minimal. When the chemicals set the lining material was deemed to be stable. However the higher risk had passed some months previously and no application of lining material had taken place since December 2008. Further tri-party inspections involving Alstom, Amec and Scottish Power had been carried out at regular intervals as part of the Quality Assurance of the construction to ensure that no debris remained within the absorber. *POI report 6/538, para 9.1, and Alan Dickson cross-examination day 5, after 14.02.*

o Alstom had global experience with seawater scrubbing plant (absorbers) but even after charged by the POI with investigating whether any similar incidents had ever occurred and carrying out investigations they drew a blank. *Alan Dickson cross-examination, day 5 after 14.02 and with reference to 6/585 last paragraph on 2nd page, and 6/578 para 2.* Alan Dickson himself also did some research into this but could not find any report of any similar incident. *Re-examination day 5, after 15.50.*

o Although Mr McGillivray in his report had mentioned three fires in the US that he had seen referred to in a US Standard relating to construction of absorbers Mr Sylvester Evans had ascertained from looking into the document that Mr McGillivary had relied on that these were fires in scrubbers which had been taken out of commission and so their packing was dry and the fires moreover occurred as a result of hot work being carried out on ducting. *Mr Sylvester Evans, chief day 10.*

o The defenders and Scottish Power operated a "No Smoking" policy on the absorber. *Liam Richardson, chief day 6, shortly after 10.07 am*. Further the POI, after a battery of tests, ruled out a discarded cigarette as a cause of the fire. *Alan Dickson, cross-examination on day 5 and 6/538 Appendix G penultimate paragraph headed "Discarded cigarette".*

o Mr Sylvester Evans gave evidence that having regard to the nature of the construction and the stage the work had reached the risk of fire was low. There was no hot work going on that could have been responsible for the fire (a fact which the POI were satisfied about). There were no chemicals in use that could cause fire. The absorber was a concrete structure and there would be no-one doing work inside the absorber which could cause ignition. The packing material was of a type that did not easily combust as evidenced by the fact that tests after the fire showed that it would only ignite if a naked flame was held to it for a good number off seconds. The packing material was to be soaked with a huge amount of water that day (and had been so soaked at the time of the fire). Moreover the rapidity of the fire and the amount of smoke it generated was unusual.

The defenders submit that taking into account the following factors it was not reasonably practicable at the time of the fire to have an access from the 21 metre level on the west side of the absorber specifically:-

(i) the fire was not reasonably foreseeable, (ii) if fire did break out it was not reasonably foreseeable that without a means of access on the west side specifically a person situated there would not get down using a walkway /stair even if there were various routes to ground on the other sides of the absorber, (iii) it would not be reasonably practicable to have a scaffold access to ground at every conceivable place where a man may be standing when the fire broke out, (iv) the scaffolding was coming down – not surprisingly – as the structure was 3 days from completion, and (v) Mr Jim Stewart's evidence that the scaffold that had been situated previously on the west side had been removed for pipe-work to go in.

The outbreak of fire:

Counsel for the pursuer submitted that he relied on the fact of the fire breaking out in support of his case based on section 53.

As already submitted he has no averments on Record giving notice that the fact that the basis of the pursuer's claim that the defenders were in breach of section 53 was the fact that fire broke out at all. Moreover counsel for the pursuer gave an undertaking before Lord Brailsford that the pursuer did not seek to make a case against the defenders based on whatever caused the fire to occur.

The defenders insist in their objection to the pursuer being allowed to make out such a case.

In the event of that objection not being upheld, in any event the defenders submit that they took all reasonably practicable steps to prevent the occurrence of fire. The evidence establishes that the risk of fire was low. The defenders operated a hot work procedure and that was in place that day. Hot work was not a cause of fire. The defenders more generally also had a number of systems to prevent fire. They had a Health and Safety plan. The document behind this plan was 7/30, spoken to by Liam Richardson. The plan was more than just a document. In practice it had as parts of its operation a system of SHE inspections. There were daily site inspections by him or one of his colleagues and records were kept of any site hazards including fire hazards, and these were actioned. There was an initiative whereby employees on site, not just Amec employees, were encouraged to pick up on any safety issues as they went about their work and to report any hazards. There were weekly meetings between the health and safety personnel of all the contractors on site. There were AMEC audits from higher up the managerial tree than the level of Liam Richardson and his bosses at regular intervals. The site was designated a No Smoking area, and disciplinary action was taken if anyone breached that rule. There was the Hot Work permit system. Hot Work when done was done with a Fire Watcher being used to accompany the tradesman, whose job was to look out for any ignition source and to put out sparks using a fire extinguisher and fire blanket. There were fire extinguishers on the absorber. There were regular fire alarm drills, every Friday. Fire extinguishing equipment was kept maintained.

It is submitted that the defender were not in breach of section 53 (1).

Section 53(2):

The pursuer has no record that would allow him to lead evidence to establish a breach of section 53(2). The defenders insist in their objection to the pursuer's counsel's line of questioning based on absence of or inadequacy of risk assessments.

In any event both Mr Liam Richardson (in cross) and Mr Kidd (in chief) said that apart from the documents which were put to them in the course of the proof they had seen a risk assessment for the construction of the absorber. Indeed Senior Counsel for the pursuer appeared surprised by Mr Kidd's answer and he asked the

question three times. He got the same answer three times. When Mr Richardson was asked by Senior Counsel for the pursuer where the risk assessment for the construction phase was and said "*I'm not sure. I have not been with Amec for quite a long time*." The pursuer has not proved the terms of that risk assessment nor that it was not suitable and sufficient. [83]

Further it is submitted that the pursuer has not established what a "suitable and sufficient" risk assessment would have consisted of. In any event the alleged breach of section 53(2) adds nothing to his case. The risk assessment is for the purpose only of enabling the employer to comply with the duty imposed in sub-section (1).

(2) Construction Design and Management Regulations 2007

Before considering the individual regulations relied on by the pursuer the defenders submit that none of these regulations give rise to a right of recovery for pure psychiatric injury unaccompanied by physical injury. The defenders submit that the **Construction Design and Management Regulations 2007** ("the 1997 CDM Regulations") were not intended to give a right of recovery for pure psychiatric injury.

In advancing this argument the defenders adopt all that has already been submitted, in relation to the **Fire (Scotland) Act 2005** about the need to have regard to the type of harm that is within the ambit of a statute or subsidiary legislation. For the avoidance of doubt they rely here also on what is said in the **Bank Bruxelles** case, in **Clerk & Lindsell on Torts**, and in **Donaldson v Hayes**, just as they relied in these matters in the context of considering the **Fire (Scotland) Act 2005**. The defenders will submit that the language of the particular regulations relied on by the pursuer in the **2007 CDM Regulations** make it clear that they did not have as their object or purpose protection from psychiatric illness. If the language alone does not make that clear in any event the defenders submit that, as was said in the case of **Donaldson v Hayes,** the provisions under consideration should be construed in the context of the Regulations as a whole, and in the legal and historical context in which the Regulations were made.

It requires to be borne in mind also that the **Fire (Scotland) Act 2005** was a Scottish Act, and the **2007 CDM Regulations** are UK-wide, promulgated by the Westminster government. If the pursuer's argument is correct that both sets of statutory provisions give rise to a right of recovery for psychiatric illness in the absence of related physical injury then the logic of the pursuer's position is that both the Westminster and the Scottish Parliament in two separate pieces of legislation covering different topics intended to allow recovery for pure psychiatric injury and to work an enormous change in the law by sweeping away the common law rules and control mechanisms (but apparently only in relation to the subject matter of these two pieces of legislation) without evidencing a clear intention to do so and doing so only tacitly. It is submitted that is not what has happened, and in fact that neither piece if legislation was intended to nor does have permit recovery for the occurrence of psychiatric illness in the absence of related physical injury.

Conversely, the fact that one of these pieces of legislation was not intended to nor does permit recovery for the occurrence of psychiatric illness in the absence of physical injury strongly supports the position that neither does the other piece of legislation have that effect. There is no discernible difference in the language of either of them indicative of an intention in one of the pieces of legislation to have the effect contended for by the pursuer.

Further a consideration of the historical and legislative background to the **2007 CDM Regulations** will show, it is submitted, that the **2007 CDM Regulations** were not intended to permit recovery for the occurrence of psychiatric illness in the absence of physical injury and properly construed a breach of the provisions thereof do not permit recovery in respect of psychiatric illness in the absence of physical injury.

The **2007 CDM Regulations** replaced the **Construction Design and Management Regulations 1994**. (See Schedule 4, Revocations)

The **Construction Design and Management Regulations 1994** had themselves been promulgated in order to implement **Council Directive 92/57/EEC** on the implementation of minimum health and safety requirements at temporary or mobile construction sites.[84]

Council Directive 92/57/EEC was one of the directives considered by Lord Macfadyen in **Cross v Highlands and Islands Enterprise** [85] in reaching the view (which the defenders submit is correct) that in using the concept of health and safety at work in the directives the Commission intended only to address the incidence of physical injury and occupational diseases of a physical nature. It is one of the individual directives following on the Framework Directive.

The **2007 CDM Regulations** revoked not only the **Construction (Design and Management) Regulations 1994** but also the **Construction (General Provisions) Regulations 1961** ("the 1961 Regulations") and the **Construction (Health, Safety and Welfare) Regulations 1996** ("the 1996 Regulations"). (See Schedule 4).

The bulk of the **1961 Regulations** had already been revoked by the **1996 Regulations**.[86] As can be seen from the Arrangement of SI in Tab 36.1 the object of each provision in the **1961 Regulations** was very specific, and the purpose of Regulations was clearly not to protect from psychiatric illness not brought about by physical harm. In light of the common law position at the time the **1961 Regulations** were implemented, as set out above in these Submissions, it would be extraordinary if the **1961 Regulations** did have protection from psychiatric illness in the absence of physical injury as its object or one of them.

The **1996 Regulations** were the first instrument to give effect to the aforesaid Council directive **92/57/EEC** on the implementation of minimum health and safety requirements at temporary or mobile construction sites, ie before the **2007 CDM Regulations** took over that function.[87] The **1996 Regulations** followed the same structure as the **1961 Regulations**.[88] As with the **1961 Regulations** the object of each provision in the **1966 Regulations** was very specific, and again it is submitted that the purpose of the **1996 Regulations** was clearly not to protect from psychiatric illness not brought about by physical harm. In light of the common law position at the time the **1966 Regulations** were implemented, as set out above in these Submissions, it would be extraordinary if the **1966 Regulations** did have protection from psychiatric illness in the absence of physical injury as its object or one of them. Consistent with that there is no indication in the language of the **1996 Regulations** themselves of any intention to provide protection from psychiatric illness in the absence of physical injury.

Regulation 18 of the **1996 Regulations** was in identical terms to regulation 38 of the **2007 CDM Regulations** ("Prevention of risk from fire etc"), regulation 19 was essentially in identical terms to regulation 40 of the **2007 CDM Regulations** ("Emergency routes and exits"), and regulation 20 was essentially in identical terms to regulation 39 of the **2007 CDM Regulations** ("Emergency procedures"). Regulation 21 of the 1996 Regulations was essentially in identical terms to regulation 41 of the **2007 CDM Regulations** ("Fire detection and fire fighting").

On behalf of the defenders there is repeated herein all that has been said above about the common law relating to recovery for damages for psychiatric harm in the absence of physical injury. On behalf of the defenders it is submitted that there is nothing in the **2007 CDM Regulations** nor the 1996 and 1961 Regulations which preceded it which is indicative of an intention on the part of the legislature to supersede the common law rules and control mechanisms relating to this area of the law. As was said in **Donaldson v Hayes** (in the context in that case of the law relating to occupiers' liability) it is extremely improbable that the legislative intention was to supersede the law in this area tacitly by the mere use of language which might be said to be capable of having that effect. As has already been submitted in relation to the pursuer's case based on section 53 of the **Fire (Scotland) Act 2005** the logic of the pursuer's argument, if it were correct, it would mean that it would not only be the common law relating to so called "primary victims"[89] which would be overturned. If a employee suffered psychiatric injury as a result of witnessing someone else being injured in a fire due to a breach of eg regulation 38 of the **2007 CDM Regulations**, the employee witnessing the employee being injured would be entitled to claim damages for psychiatric injury due to breach of regulation 38. This would mean that there would be back-door recovery for psychiatric injury for that category of persons categorized by the common law as "secondary victims".

Against that background each of the regulations founded on by the pursuer will be addressed in turn. It is submitted in relation to each that (i) they do not give rise to a right of recovery in respect of pure psychiatric injury, (ii) in any event the defenders were not in breach thereof, (iii) in any event the pursuer has not established a causal connection between any breach and his psychiatric condition, and (iv) in any event the pursuer's psychiatric condition is too remote to be recoverable. The regulations which it is understood from the pursuer's sumissions are being founded on are regulations 13 (2), 26(1) and (2), 38(a), 39(1),(2) and (3), and 40(1), (2), (4), and (5), and 41.

Regulation 26:-

It is proposed to deal with this and the other regulations before dealing with regulation 13.

(i) It is submitted that there is nothing in the language of this regulation to undermine the arguments made by the defenders that the **2007 CDN Regulations** do not give rise to a right of recovery in respect of pure psychiatric injury. On a proper interpretation of this section it does not give the pursuer a right of recovery even on the hypothesis that it was breached and the pursuer's psychiatric illness was caused by the breach and was not too remote therefrom.

(ii) it is submitted that sub-paragraphs (1) and (2) of regulation 26 are mutually incompatible. In an accident case a pursuer could not rely on both provisions at one and the same time. An accident (eg due to slipping, or an obstruction) would as a matter of fact either happen at the place of work or the access to /egress from it. **Wilson v Rolls Royce PLC 1998 SLT 247** @ page 252 C-D.[90] Yet the pursuer in the present case in his proposed Findings in Fact and law seeks to argue for a finding of a breach of both sub-paragraphs.

(iii) It is submitted that this fact (ie that the pursuer seeks to rely on both sub-paragraphs) illustrates the fallacy of the pursuer's argument that he is entitled to claim for damages for pure psychiatric injury. He sustained no physical injury but seeks to argue (presumably) that because he might have been physically injured by fire at his place of work if he had stayed there long enough for that to happen and might have been physically have injured if he had used the walkway to get to the south east stair[91] he can rely on both branches of the regulation. It is submitted that this argument for the pursuer is unsound.

(iv) It is submitted also that paragraph 26(1) does not relate to transitory events such as a fire but instead relates to the access and egress qua access /egress. **Evans v Sant [1975] QB 626** @ pages 632 F- 636 B (dealing with the similar wording of regulation 6 of the **Construction Working Places Regulations 1966).** In **Baker v Quantum Clothing Group Ltd** Evans v Sant was considered and not disapproved, and it was held by the Supreme Court that a place of work could be unsafe for the purposes of the similar provision of section 29(1) of the **Factories Act 1961** not only due to its physical structure but also due to the activities constantly and regularly carried on in it. [92]The defenders submit that the fact that there is separate provision made in regulation 40 for emergency routes and exits to enable any person to reach a place of safety quickly in the event of danger supports this view.

(v) Likewise, and based on the same authority, it is submitted that paragraph 26 (2) does not relate to transitory events such as a fire but instead relates to the place *qua* place. The defenders submit that the fact that regulation 38 provides separately that suitable and sufficient steps shall be taken to prevent so far as is reasonably practicable the risk of injury to any person carrying out construction work arising from fire or explosion, flooding, or any substance likely to cause asphyxiation supports this view. There would be no content to regulation 38 if the occurrence of these events were within the ambit of regulation 26(2).

(vi) Before any issue of reasonable practicability would arise in a case based on regulation 26(1) the pursuer would require to establish that there was not suitable and sufficient safe egress from the absorber.

Where a statutory provision imposes a duty subject to a defence of reasonable practicability it is still incumbent on the pursuer in a civil action (and the prosecutor in a criminal one) to establish that if the defender does not prove that it was not reasonably practicable for him to do more than he did there will be a breach of the regulation /statutory provision. Thus, for example:-

v In **Nimmo v Alexander Cowan and Sons Ltd [1968] AC 107** [93] the statutory provision under consideration was section 29 of **Factories Act 1961** which provided that "*There shall so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."*

The pursuer averred that his place of work was not made and kept safe, as required by section 29(1), but he did not aver that it was reasonably practicable to make it safe. [page 107 G; page 114 F-G; page 118 G]. The defenders contended that as the requirement "*so far as is reasonably practicable*" is an ingredient of the offence which would be created by a breach of section 29 its absence rendered the pursuer's pleadings irrelevant. Both the Outer House and Inner House in the Court of Session had held that the pursuer's pleadings were irrelevant as he did not undertake the burden of offering to prove that it would have been reasonably practicable to make the place of work safe. In the House of Lords it was held by the majority that the words "*so far as is reasonably practicable*" was not an inherent part of the duty, which was to make and keep the place of work safe, but was a qualification of the duty to make and keep the place of work safe and the burden of proof in respect of that qualification was on the defenders.

There was never any doubt in **Nimmo** however that the pursuer in a civil action and the prosecutor in a criminal action would first have to establish that the place of work was unsafe before any question arose of the defenders having to establish that it was not reasonably practicable to do more than they did to make and keep the place of work safe. Thus, as noted, the pursuer undertook by his averments to prove that it was not. And Lord Pearson said [at page 131 C-D] "*The appellant concedes, and I think it is clear, that he must aver with sufficient specification and prove in what respects the place of work was unsafe and that its unsafety caused the accident*."

v In **Jenkins v Allied Ironfounders 1970 SC (HL) 37** [94]the pursuer tripped on a piece of metal broken from a casting obscured by sand and was injured. He brought an action against his employers founding on regulation 28 of the Factories Act 1961 which provides as follows:- "*All floors…. shall, so far as is reasonably practicable, be kept free from any obstruction."* Before the Lord Ordinary the pursuer succeeded on establishing a breach of this provision. The defenders reclaimed arguing (a) that the piece of scrap on which the pursuer caught his foot was not an "*obstruction*" within the meaning of the section as it was situated on a part of the factory floor where castings were deposited even although from time to time the pile of castings was reduced as they were moved to the next stage of the manufacturing process, and (b) that the onus of proof was on the pursuer to establish the two precautions which he had averred it would have been reasonably practicable for the defenders to have taken which would have meant that the floor was kept free from obstruction.

The Inner House found in favour of the pursuer that the piece of metal was an "*obstruction*" within the meaning of the section, but held that the pursuer by his averments had accepted the onus of establishing the grounds on which it was reasonably practicable to have avoided the accident and that he failed to discharge that onus.

The House of Lords by a majority (Lord Upjohn dissenting) held likewise that the piece of metal was an obstruction within the meaning of the section. They then held that on the evidence it was not reasonably practicable to remove it from the floor before the accident occurred. (They held that it was unnecessary after proof had been led to deal with the question of onus.)

The point here is that no question of reasonable practicability fell to be considered unless and until the pursuer established that there was an obstruction on the floor. Thus Lord Hodson said [at page 44] "*In order to bring the*

section into operation there must be an obstruction…" , and Viscount Dilhorne said [at page 48] "*Whether the respondents were in breach of the duty imposed by this section depends on whether the gate over which the appellant tripped was an obstruction within the meaning of the section* [emphasis added], *and if it was, on whether or not it was reasonably practicable to keep the floor free of it*."[95] Lord Upjohn did not consider the piece of metal to be an obstruction and accordingly on that ground alone he held that the respondent defenders were not guilty of a breach of section 28 [page 51].

v The **Manual Handling Operations Regulations 1992** provide by regulation 4(1) that each employer shall (a) so far as is reasonably practicable, avoid the need for employees to undertake manual handling operations which involve a risk of their being injured; or (b) where this is not reasonably practicable, take certain steps to reduce the risk of injury. In cases based on this regulation the onus is on the pursuer to establish that he or she were required to undertake a manual handling operation which involved a risk of their being injured before any question arises of the employer having to demonstrate that it was not reasonably practicable to avoid the need for their employee to undertake manual handling operations which involved a risk of them being injured. See eg **Davidson v Lothian and Borders Fire Board 2003 SLT 939**, in the Opinion of Lord Macfadyen at page 943 L to 944 A; **O'Neill v DSG Retail Ltd [2002] EWCA Civ 1139**, @ paras [56] and [60].

v In **Baker v Quantum Clothing Group Ltd [2011] 1 WLR 1003** the claimants had all been employed in the knitting industry. They suffered noise-induced hearing loss. They brought claims against their employers, the defenders, founding *inter alia* on breaches of section 29 (1) of the **Factories Act 1961**.[96] The issue before the court was whether they had established that their place of work was not safe [by reason of the noise levels given off by the work process]. [97]Unless and until it was established that the place of work was not safe within the meaning of section 29(1) no question arose of the employer having to show that it was not reasonably practicable to make and keep the place of work safe. [*Paragraphs [80] and [82] per Lord Mance; paragraphs [127] and [128] per Lord Dyson; paragraph [136] per Lord Saville of Newdigate.]*

The pursuer has not established that there was not suitable and sufficient egress from his place of work. The pursuer has no case based on any alleged unsuitability of the egress other than the fact that it is alleged that the only way to exit from the absorber was from a single stair and he claims that he could not use that due to smoke.

It is submitted that "Suitability" involves an element of foreseeability. Reference is made to paragraph 2.67 of Part 2 of Redgrave's Health and Safety. The pursuer has not established that it was foreseeable that he would not be able to exit using the open air stair due to smoke thereon or on the open-air walkway leading to it. (And, as already submitted it is not accepted that the pursuer was in fact prevented from using the stair due to smoke either at the stair or on the open walkway.) In any event the presence of smoke would be a transitory state of affairs affecting the stair and walkway, and thus would not be relevant to establish a breach of regulation 26(1). **Evans v Sant..**

The pursuer has no record for any alleged insufficiency of the egress other than averments which in essence are directed to a complaint about how many there were, ie a complaint about quantity. Both Mr Kidd and Mr Sylvester Evans agreed that for anyone at the north west or west staying on the 21 metre walkway there were two routes to ground, with the last part in common, ie being the south east stair. [98] Counsel for the pursuer was critical of Mr Sylvester Evans's assessment that the travel distances to a place of safety were adequate and complied with the guidance in HSG 168 but he has no case based on travel distances being longer than recommended in that document. His criticisms take him no-where in any event because HSG168 does not say that there should be more than two routes to a safe place or place of safety.

As far as the egress being safe or not safe is concerned the only fact that the pursuer can point to here is the presence of smoke over the open-air walkway and stair. That, as has been said is a transitory event, and thus does not render the egress not safe for the purposes of regulation 26 (1).

If the defenders are wrong about the fact that a transitory effect such as smoke will not render an egress not safe it was held (by a majority) in **Baker v Quantum Clothing Group Ltd & Ors [2011] 1WLR 1003** that "safety" is a relative and not an absolute concept; and reasonable foreseeability has a part to play not only at the stage of considering what was reasonably practicable but also at the earlier stage of considering whether a working place (or access /egress as the case may be) was safe. [99]The Court overruled a line of cases which had held that reasonable foreseeability had no part to play in determining whether a place of work was safe. These cases had included **Larner v British Steel plc [1993] ICR 551** and **Mains v Uniroyal Englebert Tyres Ltd 1995 SC 518**. **Larner** concerned an undetected crack and caused a structure to fall on the plantiff. In the **Mains** case the injury arose when a piece of machinery made an involuntary and unexpected movement, the cause of which was never ascertained and so trapped the workman's hand; and it was common ground that the circumstances of the accident and its cause were not reasonably foreseeable. In **Baker v Quantum Clothing Group Ltd & Ors** the majority cited with approval the dictum of Lord Diplock in **Taylor v Coalite Oils & Chemicals Ltd (1967) 3 KIR 315** where he said that it was only if a risk was reasonably foreseeable and it would be reasonably foreseeable that an injury would be caused that it becomes necessary to consider whether it was reasonably practicable to aver the risk. [100]

In the present case in order to establish that the workplace was unsafe by reason of the outbreak of fire the pursuer would require to establish that it was reasonably foreseeable not only that the fire which occurred on the absorber would occur but that the pursuer would suffer injury as a result.[101] This raises the question of whether it should be physical or psychiatric injury that the pursuer requires to establish the defenders should reasonably have foreseen. That is not a question that has previously arisen in the context of a statutory case. The reason for that is, of course, the fact that with the exception of **Young v Charles Church Southern** previously referred to no previous case has been identified in which a pursuer been awarded damages for pure psychiatric injury said to have arisen from a breach of statutory duty. The defenders submit that fact simply points again to the fallacy in the pursuer's argument that he is entitled to recover damages for a breach of statutory duty based on the provisions founded on by him.

If however the defenders are wrong in their submission that the pursuer is not entitled to recover damages for pure psychiatric injury said to arise from breach of any of the statutory provisions relied on by him this novel question of whether it is physical or psychiatric injury that ought reasonably to have been foreseen requires to be addressed. Given that the pursuer did not suffer physical injury but rather suffered psychiatric injury it is submitted that it is reasonable foreseeability of psychiatric injury which the pursuer requires to establish. As Lord Steyn pointed out in **White and Others (Frost) v Chief Constable of south Yorkshire Police [1999] 2 AC 455** @ 497 F-G "*It is a non sequitur to say that because an employer is under a duty to an employee not to cause him physical injury, the employer should as a necessary consequence of that duty (of which there is no breach) be under a duty not to cause the employee psychiatric injury*". In **Doughty v Turner Manufacturing Co Ltd 1964 1 QB 518** [102] it was held by the Court of Appeal that even if the inadvertent immersion of the asbestos cement cover into the cauldron was a negligent act the defendants were not liable for the damage resulting from the explosion because it was not damage of such a kind as could reasonably have been foreseen and was altogether different from a foreseeable splash of the liquid in the cauldron. The defenders submit that these cases support the argument that as it is pure psychiatric injury which is claimed for it is psychiatric injury which the pursuer requires to establish ought reasonably to have been foreseen. That is consistent with the common law requirement for the establishment of duty of care for pure psychiatric injury as it stood before **Page v Smith** and there is no justification for extending Page v Smith into this novel area. That is particularly so in the face of the strong judicial criticism of that decision and the clear view of the majority of the Supreme Court in **Grieves v F T Everard** against extending its reach.

It is submitted that the pursuer has not established that it was reasonably foreseeable that at the stage the absorber had reached by the date of the fire a fire would occur thereon, nor that it would cause psychiatric illness to someone through them declining in the initial stages of evacuation to go through smoke on an open-air walkway to descend an open-air stair.

Accordingly it is submitted that the pursuer has not established that there was not suitable and sufficient safe egress from his place of work.

In any event *esto* the pursuer has established that there was not suitable and sufficient safe egress from his place of work the evidence establishes that it was not reasonably practicable to do more to provide suitable and sufficient egress from his place of work. It was not reasonably foreseeable that at the stage the absorber had reached by the date of the fire a fire would occur thereon, nor that it would cause psychiatric illness to someone through them declining in the initial stages of evacuation to go through smoke on an open-air walkway to descend an open-air stair.

Mr McGillivray's evidence on commission is that it was not reasonably practicable to provide covered egress from the absorber. Reference is made to Paper Apart 7 at pages 8 and 9.

In any event if it is the pursuer's position that it was reasonably practicable to do more than was done to achieve suitable and sufficient safe egress from his place of work the pursuer would require to address the court on what that was in order that the court could (i) assess whether the evidence establishes that was something that it would have been reasonably practicable to have done, and (ii) that it would have avoided the pursuer's psychiatric injury. **Jenkins v Allied Ironfounders Ltd** @ page 42; **West Sussex County Council v Fuller** [2015] EWCA Civ 189 @ para 16.[103]

Remoteness: of Damage -

On the hypothesis that, contrary to the defenders' submissions, pure psychiatric injury is within the ambit of regulation 26 on a proper construction of that section and that the defenders were in breach of that section (which is denied) the defenders submit that in any event the pursuer's psychiatric injury is too remote to be recoverable.

The concept of remoteness of damage is separate from the concept of foreseeability as a tool of the common law to determine to whom a duty of care is owed. This distinction is explained by Lord Russell of Killowen in **Bourhill v Young** @ page 101 where he states:- "*In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and the breach are admitted) to the question of remoteness of damage, ie to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, ie to the question of culpability not to compensation.*"

The issue of remoteness was also discussed by Lord Macfadyen in **Cross**, at page 1090 H- 1091 C. It applies to breach of statutory duty as well as to cases where negligence is established at common law. (**Cross**, para [124]). The principle was explained by Lord Macfadyen as follows [at paragraph [127]]:- "*It is, in my view, clear that if the injured party suffers no loss of a reasonably foreseeable type (or to put the matter another way, if the only loss suffered is of a type that is not reasonably foreseeable), damages will not be recoverable. But if reasonably foreseeable injury is caused, the wrongdoer is liable not only for that reasonably foreseeable injury, but for any complication, development or result of that foreseeable injury, even if the complication, development or result is itself unforeseeable.*"

The pursuer's psychiatric injury was not a reasonably foreseeable consequence of any breach of regulation 26 (1) that may be held to be established.

Regulation 26(2):

No separate breach is established of this sub-paragraph by the evidence.

In any event the defenders adopt all that the have said in relation to regulation 26(1) as regards "safe", the failure to establish that the place of work was not "safe" having regard to the absence of reasonable foreseeability, reasonable practicability, and remoteness.

Regulation 38:

It is submitted that the use of the word "injury" in this regulation re-inforces the argument already made that the regulations are concerned with physical injury and do not give rise to liability for psychiatric injury in the absence of physical injury. In any event it is submitted that is the case as far as this regulation is concerned.

If the regulation does relate to pure psychiatric illness, then as with regulation 26 the pursuer requires to establish that suitable and sufficient steps were not taken to prevent the risk of injury to him before any question arises whether it was reasonably practicable to do more to prevent the risk of injury.

The pursuer's case under this regulation as with all the other regulations pled is predicated on his averments at page 6 E to 7A of the Record.

The defenders adopt all that they have already said about these averments not having been established.

In any event they contend, as they have done already, that it was not reasonably practicable to do more to take suitable and sufficient steps to prevent the risk of injury to the pursuer arising from fire. They rely on their submissions already made in relation to that matter, in particular at pages 17 to 22 above.

In any event if there was more that could reasonably practicably have been done the pursuer has not identified what that was and thus the court cannot assess (i) whether the evidence establishes that was something that it would have been reasonably practicable to have done, and (ii) that it would have avoided the pursuer's psychiatric injury. Causation between the pursuer's injury and any alleged breach of this provision is not established.

Regulation 39:

There was never, even before proof, any question of "reverse onus" of any part of the case based on this regulation and the pursuer has not led evidence which establishes a breach of the duty imposed by this regulation. Nor could he as his only factual averments are those at pages 6E to 7A of the Record.

Esto the pursuer has established a breach of the duty imposed by regulation 39 (which is denied) he has not established that it caused the injury in respect of which he sues.

Regulation 40:

As with regulation 39 there was never, even before proof, any question of "reverse onus" of any part of the case based on this regulation and the pursuer has not led evidence which establishes a breach of the duty imposed by this regulation. Nor could he as his only factual averments are those at pages 6E to 7A of the Record.

Further the pursuer has not led evidence to establish that any breach of the duty imposed by regulation 40 caused the injury in respect of which he sues.

It is noted that the pursuer proposes that there should be a finding in fact as follows:-

"*To comply with HSG 168 "Fire Safety in Construction Work" 2007 there ought to have been a route to a place of safety in the northwest corner of the absorber opposite to the southeast route*." (Pursuer's Proposed Finding in Fact 47). The pursuer does not have Record for such a case.

In any event is denied that there was evidence which would allow the proposed Finding in Fact to be made. (This is without prejudice to the fact that the very great majority of the rest of pursuer's Proposed Findings in Fact and Proposed Findings in Fact and Law are not accepted either.)

The evidence of both Mr Kidd and Mr Sylvester Evans was that HSG 168 was a guide only, and not a Code of Practice. Further HSG168 (6/638) does not say what the pursuer proposes be said in Proposed Finding in Fact 47. In Table 1 (on page 17) it says "*Alternative escape routes should where possible proceed in substantially opposite directions. The principle is that they are sufficiently apart that any fire should not immediately affect both routes. As such they should not be less than 45 degrees apart*."

Senior Counsel for the pursuer read out the notes in Table 1 of 6/638 to Mr McGillivary on day 4 and then asked him the following question: - "*If there was an escape route in the south-east corner – I'm not saying there was – if there had been another one opposite that would that be the north west corner* ?" Mr Kidd replied (not surprisingly) "*That would be logical*."

At this point the judge pointed that would have the two routes hypothestical routes 180 degrees apart. Mr Kidd replied that it would and that the "*standard maxim*" was that alternative escape routes should be 45 degrees apart to ensure proper separation between exits.

A finding of fact in the terms proposed would not establish a breach of regulation 40.

Regulation 41:

As with regulations 39 and 40 there was never, even before proof, any question of "reverse onus" of any part of the case based on this regulation and the pursuer has not led evidence which establishes a breach of the duty imposed by this regulation. Nor could he as his only factual averments are those at pages 6E to 7A of the Record.

Further the pursuer has not led evidence to establish that any breach of the duty imposed by regulation 40 caused the injury in respect of which he sues.

Regulation 13 (2)

The pursuer does not have record to establish the facts to succeed in a case under regulation 13 (2). The evidence does not establish a breach of regulation 13 (2).

Management of Health and Safety at Work Regulations regulation 3:-

The pursuer has failed to establish that there was a breach of this regulation. In any event he has failed to establish that but for any such breach as he may have established his injury would not have occurred.

Objections:

The defenders' present insist in all of their objections based on absence of Record and breach of the undertaking given in Lord Brailsford's court.

Summary:

The defenders submit that legislative provisions relied on by the pursuer do not permit recovery for pure psychiatric injury. Further and in any event the pursuer has failed to establish that the defenders were in breach of the legislative provisions relied on by him or that his psychiatric injury was caused thereby, and in any event was not too remote.

On quantum the defenders contend that it was not reasonable that the pursuer remained off work after 2014. They contend that the sums brought out in their Statement of Valuation are appropriate in respect of patrimonial loss.

APPENDIX F: Pursuer's 3rd submision

RESPONSE TO THE SUBMISSION THAT A BREACH OF STATUTORY DUTY DOES NOT GIVE RISE TO LIABILITY FOR THE DAMAGE SUSTAINED BY THE PURSUER

SUBMISSION

1. The pursuer sustained psychiatric injury within the area of potential danger of physical injury;

2. There is (i) **no authority** or **(ii) justification** for the proposition that psychiatric injury should be treated differently where there is a breach of statutory duty as opposed to a breach of common law duty[104]. It is submitted that the defenders' submissions in support of the proposition confuse a requirement of foreseeability to create a duty of care (often unnecessary where there is a statutory duty) with a requirement of foreseeability in relation to the remoteness of damage (necessary for both common law duty and statutory duty). Wherever a duty is owed whether at common law or under statute the damage must not be too remote to be recoverable[105];

3. The **language** of the statutory provisions[106] relied upon clearly includes psychiatric injury.

These three propositions are expanded upon below, followed by a brief discussion of the cases relied upon by the defenders and argument in support of their position.

1. THE PURSUER SUSTAINED PSYCHIATRIC INJURY[107] WITHIN THE AREA OF POTENTIAL DANGER OF PHYSICAL INJURY.

The old fashioned but somewhat expressive term "nervous shock" might be used to describe the pursuer's injury. A medically accurate term is post-traumatic stress disorder[108]. In the pursuer's case it was a long

lasting debilitating psychiatric injury. The pursuer sustained this injury as a result of being unable to escape from a serious fire at his workplace. The evidence is clear that he was plainly at risk of physical injury (within the area of potential danger). He was trapped at height on a burning building. He was within the class of persons the statutory provisions were intended to protect. Fear for his own personal safety caused him to sustain the injury. It is submitted that in any event the psychiatric injury he sustained was reasonably foreseeable. He attempted to escape from the fire but was unable to do so until an improvised rescue took place.

It is not clear whether or not the defenders accept that the pursuer was within the area of potential danger. It is submitted that on the evidence the pursuer was at risk of injury to his person. He was in close proximity to a fire producing flame and heat and in danger of inhaling smoke containing noxious gases. The pursuer thought he was going to die. Others were very concerned for his safety. The pursuer considered jumping at great personal risk. He also considered climbing down a cable again at great risk. He was reached by persons wearing breathing apparatus. It is entirely understandable that he was "terrified by the experience" or to put it another way "he suffered an acute emotional trauma" because his personal safety was at real risk. If a pursuer is within the area of potential danger then the defender is liable to make reparation for nervous shock caused by his reasonable fear of bodily harm although he may escape physical injury[109]. The pursuer's fear was entirely reasonable[110]

2. (i) NO AUTHORITY.

There are no cases where it has been submitted far less accepted by any court anywhere that psychiatric injury is not to be compensated where there is a breach of statutory duty as distinct from breach of common law duty. On the other hand it has been submitted in at least two cases (but not yet accepted) that where there is a breach of statutory duty the courts should widen the scope of persons entitled to recover for psychiatric illness [111]. It is submitted on behalf of the pursuer that the scope of recovery for psychiatric injury caused by sudden traumatic events as a result of breach of statutory duty is practically identical to the common law in the absence of specific and express provision in the statute to the contrary. The pursuer must establish that the statutory duty relied upon is owed to him and that he has sustained damage that the law recognises as recoverable.

Much has been made of the fact that there are few examples of a pursuer or plaintiff recovering for psychiatric injury absent any other physical injury relying only on breach of statutory duty. This is easily explained by the fact that cases involving a psychiatric injury and nothing else are relatively rare and practitioners traditionally tend to plead the common law first and foremost[112]. Be that as it may there is at least one clear example of breach of statutory duty giving rise damages for psychiatric injury in the English Court of Appeal - Young v Charles Church (Southern) Ltd and another 39 BMLR 146 (Tab13). That case would have to be rejected as wrongly decided for the defenders' submission to be accepted in this case. On the contrary the decision is sound and should be followed. Another case where there is no hint of any distinction to be drawn on the basis of breach of statutory duty is Hunter v British Coal Corporation and Another [1999} QB 140. In that case the plaintiff's statutory case failed because he was not within any of the recognised categories (he was not actually at the scene, he was not at physical risk or not involved as an unwilling participant). The decision in Young v Charles Church (Southern) Ltd and another was approved[113].

The Scottish Law Commission[114] refer to Hunter and to Young. There is no suggestion whatsoever in the discussion paper that these cases were wrongly decided or would not be followed. The Herald of Free Enterprise and Piper Alpha disasters produced many cases where psychiatric injury was compensated in the absence of any other physical injury. These cases were dealt with at arbitration[115]. Many of the claimants would have had statutory cases and could have proceeded on the basis of these to the exclusion of the common law if liability had not been conceded. The pleural plaques litigation in Rothwell is also instructive. Industrial disease cases usually involve breaches of statutory duty – these claims were rejected not because the statutes did

not allow for recovery of psychiatric injury but because the nature of the damage was such that (in the opinion of the court subsequently overturned by the legislatures in both Scotland and Northern Ireland) a recoverable injury had not been sustained. In the case of Grieves v FT Everard[116] the psychiatric injury was not caused by the injury struck at (an asbestos related disease) but by the apprehension of the possibility of an unfavourable event that had not actually happened.

2. (ii) NO JUSTIFICATION.

To adopt the language of Lord Shaw of Dunfermline in Brown v John Watson 1914 SC (HL) 44 at page 51

"If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice, or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction. **Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge** (emphasis added)**."**

One hundred or so years later given the advances in modern understanding of psychiatric injury there is even less justification for making any distinction[117].

3. **THE LANGUAGE OF THE STATUTORY PROVISIONS.**

The defenders have, so far, made submissions concerning the recoverability of damages for 'pure' psychiatric damage under section 53 of the Fire (Scotland) Act 2005. From their written submission however it is clear that the submission of the defenders goes beyond section 53 of Fire (Scotland) Act 2005 – it also applies to the other statutory duties relied upon by the pursuer[118]. It is convenient at this point to consider the terms of these statutory duties. The Construction Design and Management Regulations 2007 and the Management of the Health and Safety at Work Regulations 1999 are made under the Health and Safety at Work Act 1974. Section 47 (2) of the 1974 Act states that breach of health and safety regulations shall be actionable in civil claims insofar as it [the breach] causes damage. Section 47 (6) provides that "damage" includes impairment of a person's mental condition. With that definition how can it be maintained that psychiatric injury unaccompanied by any other physical injury cannot be recovered in a civil claim for damages for breach of these regulations? Attention is drawn to S.11 of the Interpretation Act 1978 which states, "*Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act*."[119]

It is submitted that the language of the statutory provisions relied upon includes psychiatric injury

In the context of the Fire (Scotland) Act the key words are "**safety… in respect of harm caused by fire**" in section 53 and in section 69 (2) the words "Breach of duty shall, **in so far as it causes damage** to an employee, confer a right of action on that employee in civil proceedings"

There is nothing in the language of these provisions that restricts "damage" to physical injury (assuming that there is any useful dichotomy between physical injury on the one hand and psychiatric injury on the other)

In ordinary language the words "safety" and "harm" [120] do not connote only physical injury but include mental impairment such as psychiatric illness.

As already noted the word “damage” in the context of section 47 (6) of the Health and Safety at Work Act 1974 includes any disease and any impairment of a person’s physical or mental condition. There is no reason to think that Parliament when it enacted the Fire (Scotland) Act and used the word “damage” did not intend “damage” also to include impairment of a person’s mental condition[121].

The words and phrases used in the legislation do not provide any justification for the assertion that the impairment of a person’s mental condition is not within its scope. These provisions are designed to promote health and safety at work without restriction.

If the defenders submission is correct why should there be any compensation for any psychiatric injury in any circumstances where there is breach of statutory duty? In other words if the defenders submission is correct “damage” should be restricted to the non- psychiatric consequences of the breach. But it is plainly accepted by the defenders that where physical damage also occurs then damage does include psychiatric consequences. There are many examples of breaches of statutory duty giving rise to liability where psychiatric injury has occurred[122].

There is no need to look beyond the plain meaning of the words used in the legislation. It is unnecessary to look to the antecedent legislation. It is also unnecessary to look to the terms of the Framework Directive.

In order to recover damages in a civil claim the court must hold that a duty is owed to the pursuer, the duty was breached and that **recoverable** damage has been suffered as a result of the breach.

DISCUSSION.

(1) The cases relied upon by the defenders

DONALDSON[123]

The case of Donaldson is not helpful to the question as to whether the damage sustained by the pursuer in this case is recoverable where there has been a breach of statutory duty. Donaldson is concerned with whether the framework directive in relation to work places is intended to protect non-workers such as members of the public visiting the premises. That is an entirely different question to the question whether the type of damage suffered by the pursuer is recoverable.

CROSS

There is nothing in the history of the legislation[124] or of the Framework Directive to suggest that the type of damage sustained by the pursuer here is not included. The obiter comments of Lord MacFadyen in Cross[125] are concerned with “stress at work” (a mental illness that develops over time as a result of stress due to working conditions[126] as opposed to “nervous shock” that is to say injuries sustained as a result of a sudden and traumatic event). Stress at work usually involves an employee carrying out “normal” working activity and the question whether an employer is alerted over time to particular vulnerabilities of an individual employee. Lord Macfadyen was rejecting the contention put forward by counsel for the pursuer that the failure of the precursor[127] to the 1999 regulations[128] to provide for civil liability meant that the UK had not implemented the Directive relative to “stress at work”. At paragraph [102] of his opinion (at page 1086 H –J] Lord MacFadyen observed that the Directive is not concerned with “stress at work”. He did not say and should not be taken as meaning that the Directive is not concerned with mental impairment caused by failure to protect against sudden and traumatic events. It is noteworthy that counsel for the defenders in Cross submitted that there is a distinction between “stress at work” and cases involving “nervous shock” (see paragraphs [57] and [58] at 1073H to 1074E and paragraph [100] at 1085 F to 1086E). It is plain that the submission on the Directive maintained that it was concerned with the prevention of accidents and disease as opposed to the

effects of stress on mental health. Another case decided at the same time discusses the distinction between "nervous shock" and "stress at work" cases (see Fraser v State Hospitals Board for Scotland 2001 SLT 1051[129]).

What CROSS and FRASER make clear is that at common law liability for psychiatric injury can arise for stress at work as well as for nervous shock. They have nothing to offer in support of the proposition being contended for by the defenders

(2) Argument made relative to consequences of allowing psychiatric injury to be recovered

The defenders' argument at pages 29 to 31 of their written submission contending that under statute there would be no control mechanism is misconceived. The example given of a breach of duty to prepare a risk assessment or provide alarm systems omits to mention that the pursuer must be harmed by fire for the statutory provision to have any application. The suggestion that there would be no need to show a psychiatric illness takes no account of the requirement to establish that "damage" has been sustained. The law does not recognise as "damage" distress or anxiety in this context. In this context there is no distinction between damage caused by breach of duty at common law and damage caused by breach of statutory duty – the breach of statutory duty gives rise to a right to damages for the same loss as can be recovered where there is negligence (or culpa to use the Scots term). The example of the unusually anxious person reacting to a small fire quickly put out (which bears no relation to the circumstances of the case before the court) is unhelpful as there is no reason to think that the individual could recover because there was no threat from the fire. Finally the position relative to a bystander or witnesses is different because such a person is unlikely to be within the ambit of the duty to the employee under the provision. The statutory duty is to ensure safety from harm from fire not to prevent injury where someone else is harmed by fire. So just as Hegarty was unable to bring himself within the ambit of the terms of section 32(3)(a) of the Offshore Installations (Operational Safety Health and Welfare) Regulations 1976 so a person witnessing a fire (such as Mr Stewart the scaffolder) would be unable to bring himself within the ambit of the Fire Scotland Act – assuming of course he had suffered a psychiatric illness.

APPENDIX G The Defenders' 3rd Submission

Response by the Defenders in DM v Amec Group Limited to the document for the Pursuer titled "Response To The Submission That A Breach of Statutory Duty Does Not Give Rise To Liability For The Damage Sustained By The Pursuer"

Nothing said on behalf of the pursuer in the pursuer's Response document causes the defenders to depart from the Submissions they have made. Without prejudice to that generality and for the assistance of the Court the defenders would respond to certain specific points made on behalf of the pursuer in the pursuer's Response document as follows:-

1. Paragraph 2 of the pursuer's Submission summary (on page 1 of the Pursuer's Response document):-

o The defenders are not confusing a requirement of foreseeability to create a duty of care (at common law) with a requirement of foreseeability in relation to the remoteness of damage. The defenders have clearly dealt with the issue of remoteness of damage as a separate issue from liability . See pages 39 to 40 of document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS".

o The defenders agree that where a person is within the class of persons to whom a particular statutory duty is owed *and the statutory duty in question is one which is owed in respect of the kind of loss he has suffered* the requirement of foreseeability is not usually relevant to liability nor necessary therefor. (An exception is the Provision and Use of Work Equipment Regulations.) [130] The defenders' position, as is made clear in their written submissions, is that (i) the statutory provisions relied on by the pursuer do not afford a remedy in respect of pure psychiatric injury, ie that psychiatric injury without physical harm is not within the ambit of the statutory provisions relied on by the pursuer, and (ii) that it would not be legitimate to "tag on" or import a test of foreseeability to the terms of the statutory provisions relied on by the pursuer in order to try and extend the ambit of these statutory provisions so as to afford him a remedy in respect of pure psychiatric injury, and (iii) that if the defenders are wrong in their submission that the statutory provisions relied on do not afford a remedy in respect of psychiatric injury without physical harm then, as a fall-back, the defenders contend that ***even if (which is denied) they were in breach of any of the statutory duties founded on and causation was established between that breach and the pursuer's injury,*** the pursuer's injury is too remote to be recoverable.

2. Footnote 4 on page 1 of the pursuer's Response (referring to Simpson v ICI):-

o The defenders have argued, in testing the pursuer's argument that he is entitled to recover for pure psychiatric injury, that logically if the pursuer's argument were correct then there would be no need for a person to show that they had suffered a recognized psychiatric illness rather than distress or anxiety or other mental symptoms. That is because the requirement for a recognized psychiatric illness is one of the control mechanisms which the common law requires before there can be recovery for psychiatric symptoms without physical injury. Reference is made to page 30 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS".

o the case of Simpson v ICI referred to by the pursuer does not detract from that argument made on behalf of the defender. Simpson v ICI was a case in which liability was admitted. The only ground of fault mentioned in the report as having been pled by the pursuers was common law fault, being "*the negligence of other employees of the defenders for whom the defenders were vicariously liable*." (1st paragraph in the Opinion of the Lord Justice Clerk). The issue of whether it would be necessary in a case of breach of statutory duty where no physical injury had been suffered to show that the claimant had suffered a recognized psychiatric injury (as opposed to distress and upset and normal human emotions falling short of a recognized psychiatric illness) has never been discussed as there has been no case identified in which the question has arisen. This is because – with the exception of the case of Young v Charles Church (Southern) already referred to by the defenders [131]- there has been no case discovered by counsel in which a pursuer has been held entitled to recover damages for psychiatric injury or illness without physical injury in an action for breach of a statutory provision intended to protect from physical harm. In certain types of reparation claims damages are awarded for mental suffering and distress not amounting to a recognized psychiatric illness. Reference is made to McEwan and Paton on Damages for Personal Injuries in Scotland at paragraph 9-03. Accordingly it cannot be assumed, as the pursuer's Response document appears to assume, that if it were to be held that the Fire (Scotland) Act and/or the Construction Design and Management Regulations on which the pursuer founds give rise to a right of recovery for psychiatric harm without physical injury the class of claimants who could claim damages and the types of injury for which they could claim would be constrained by the requirement that they have to show that they suffered a recognized psychiatric illness or condition.

3. Section 1 of the pursuer's Response document headed "The Pursuer Sustained Psychiatric Injury Within the area of Potential Danger of Physical Injury:-

o It is notable that in this section the pursuer deals in generalisations and his submissions are more appropriately directed to a case of common law negligence than to the question of whether pure psychiatric illness or injury unaccompanied by physical injury is within the ambit of the particular statutory provisions relied on by him. The defenders did not submit that as a matter of principle it could *never* be the case that a statutory provision or a regulation could give rise to a right of recovery in respect of psychiatric illness or injury unaccompanied by physical injury. That is clearly not the case. The Protection From Harassment Act 1997 for

example provides that every individual has a right to be free from harassment and accordingly that where a person pursues a course of conduct that amounts to harassment of another that other may bring a civil claim and in that claim he or she can recover damages including damages for any anxiety caused by the harassment. The defenders' position is that the type of injury sustained by the pursuer – ie psychiatric illness or injury unaccompanied by physical injury - does not fall within the ambit of the statutory provisions founded on by him reading these provisions in their respective statutory contexts (ie the context of the Fire (Scotland) Act 2005 and of the Construction Design and Management Regulations respectively) and reading that Act and these Regulations in the historical context of the situation which led to their respective enactments. In making that argument in respect of each of (i) the Fire (Scotland) Act 2005 and (ii) the CDM Regulations the defenders contend that the change in the common law relating to recovery for pure psychiatric injury that would be effected by the construction contended for by the pursuer would be so important that it is extremely improbable that the legislative intention was to supersede the common law position relating to the recovery for pure psychiatric injury tacitly merely by use of language that did not expressly state that damages for pure psychiatric injury for a breach of the provisions of the Act and Regulations were not non-recoverable.

o This section of the pursuer's Response document considers whether the pursuer was "within the area of potential danger of physical injury", whatever precisely that may mean. [132] If pure psychiatric injury unaccompanied by physical injury was – as the pursuer must be contending - within the ambit of the statutory provisions upon which the pursuer founds it would not be necessary to consider whether the pursuer was "within the area of potential danger of physical injury". Conversely if pure psychiatric injury unaccompanied by physical injury is *not* within the ambit of the statutory provisions on which the pursuer founds that position cannot be changed by importing a common law test [133] of whether or not a pursuer was "within the area of potential danger of physical injury". (Reference is made to pages 35 to 36 in particular of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS".)

o It is stated on behalf of the pursuer in the first paragraph of page 2 of the pursuer's Response document that "*It is submitted that in any event the psychiatric injury he suffered was reasonably foreseeable*." Here again, by falling back on the common law test of foreseeability, the pursuer falls into the very trap of which he accuses the defenders in paragraph 2 on page 1 of his Response document. [134]

o Although the defenders contend that the following statements made on behalf of the pursuer on page 2 of his Response document are irrelevant to the question of whether the statutory provisions on which the pursuer founds give rise to a right of recovery for pure psychiatric injury they would comment thereon as follows:-

(i) "*The evidence is clear that he was plainly at risk of physical injury (within the area of potential danger).*" – This is not accepted. As Lord Reed said in Campbell v North Lanarkshire Council 2000 SCLR 373 [135], determining the range of foreseeable physical injury in a case where physical injury does not occur will not always be as straightforward as was the case in Page v Smith [136]particularly if foreseeability were not to be judged ex post facto by reference to what actually occurred. Reference is made to page 26 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" where that case is referred to. Examples of this difficulty are given in the article by F A Trindade published in the Law Quarterly Review referred to by Lord Reed in that case. [137] Thus FA Trindade states on page 24 of Vol 112 "*It is implicit in the judgments of the majority in Page v Smith that those who fall into the category of primary victimswill be easy to identify; but will that always be the case ? In Page v Smith it was not difficult to conclude that the plaintiff was within the area of physical impact and that there was therefore a foreseeable risk of bodily injury to the plaintiff. But cases will not always be as simple as that. What of the passengers sitting on a bus with which a negligent motorist collides ? Is it only the passengers who are in close proximity to the part of the bus where the impact occurs, or every passenger on the bus who could be said to be within the range of foreseeable physical injury ? What of a passenger train which is derailed by the negligence of the engine driver ? Is it only the passengers sitting in the derailed carriage or all the passengers on the train who are within the range of foreseeable physical injury ? And what of the situation of a disabled aircraft which flies over a city and then crashes into a residential building (as in the recent air crash in Amsterdam) or a runaway lorry as in Hambrookes v Stokes [1925] 1 KB 141 ? Would there not be many people within the range of foreseeable physical injury ? In the case of a runaway lorry would it matter that the plaintiff would have had ample time to step aside into a shop into a position of safety ? Would that prevent the plaintiff claiming to be a primary victim*

? And what of the example given by Lord Ackner in Alcock [1992] 1 AC 310 at 403 of a petrol tank careering out of control into a school in session and bursting into flames ? Who would be within the range of foreseeable physical injury ? The children and teachers in the classrooms, those in the playground, parents or friends waiting to collect children, passers-by who fear that the petrol tanker might explode as a result of the collision ?"

Once a fire has broken out in a building or on a structure it does not mean that everyone in the building or on the structure is "*within the area of potential physical danger*" for the purpose of determining whether they would be entitled to damages at common law for pure psychiatric injury in the event of psychiatric injury occurring as a result of their experience. Mr Kidd the Loss Prevention expert called on behalf of the pursuer, gave evidence on day 7 at the end of evidence in chief that it is not reasonably practicable for exit routes in a building to remain free from smoke for a long time. But, he said, that was not required. Exit routes in a building only required to remain smoke free for a short time, to allow people to get out of the building. In other words the mere fact that a person is present within a building on fire does not automatically mean that "*they are within the area of potential physical danger*" for the purpose of determining whether they would be entitled to damages at common law for pure psychiatric injury for psychiatric injury occurring as a result of their experience. In cross-examination on that same day Mr Kidd was asked about Mr Sylvester-Evans' position (at page 29 of Mr Sylvester Evans' report 7/62) that half-way down the stair would be a safe location for determining the end point by which the calculate the distance of an escape route. Mr Kidd said that it was "*safe in the sense of being in the open air so that the probability of smoke inhalation is fairly low*." This again simply illustrates the obvious point that merely because a fire has broken out in a building or on a semi-open structure does not mean that everyone in the building or on the structure is "*within the area of potential physical danger."*

(ii) "*He was trapped at height on a burning building."* It is disputed that the evidence establishes that the pursuer was trapped. Without prejudice to the generality of the proposition that the pursuer has not proved that he was trapped. Reference is made to pages 3 to 16 of the document Supplementary Submissions for the Defenders.

(iii) "*He was in close proximity to a fire producing flame*." – It is not accepted that this has been proved. Reference is made to pages 12 to 14 of the document Supplementary Submissions for the Defenders. The pursuer said in cross-examination that the flame, referred to on page 12 of the document Supplementary Submissions for the Defenders was at a height above the level of the 21metre walkway. He denied (in Chief) that he saw any other flame. Referred to 6/2 page 37, where he is recorded as having told psychologist Pauline Boyle that flames were billowing, he said that it was not correct that flames were billowing.

(iv) "*He was in close proximity to a fire producing…. heat*." – Fires by definition produce heat. There is no evidence that by the stage at which the pursuer was taken off the absorber he had felt heat. The phrase "close proximity" is entirely inspecific and subjective. There is no evidence that by the stage at which the pursuer was brought down from the absorber, within 13 minutes from the first signs of smoke, he had been at any risk from heat.

(v) "*He was in danger of inhaling smoke containing noxious gases."* – There is no evidence that by the stage at which the pursuer was taken off the absorber he was in danger of inhaling noxious gases. (Nor is there any evidence that any of the men who utilized the means of egress which the pursuer for whatever reason did not utilise inhaled smoke or noxious gases.)

(vi) "*Others were very concerned for his safety*."- It is not clear who is being referred to here as "others". As the defenders have stated on page 11 of the document "Supplementary Submissions for the Defenders (22/3/16) the evidence of Alan Dickson is that within a minute or so of the fire breaking out an Amec employee had started mobilizing the cherry picker to have it travel towards the pursuer. That is precisely the concern for the pursuer's safety that would be expected. It does not however determine the question of whether the pursuer would be within the range of physical injury if one was adopting a test of foreseeability of physical injury as a test of recovery of damages for pure psychiatric injury at common law in a hypothetical case of negligence.

[138] It may be that it is the evidence of Mr James Stewart that the pursuer is referring to here. Mr Stewart did not actually articulate any concern for the pursuer's safety as such, although he was upset that the pursuer was walking about on the grating above his head and he couldn't get to him. Mr Stewart said he'd tried to get to the pursuer from a level below him on what appears to be the north side. He was close enough to the pursuer to be able to see his feet on the grating above Mr Stewart's head. Yet Mr Stewart did not say that he, Mr Stewart, felt he was in an unsafe place. Further Mr Stewart, on his own evidence, had come away from the absorber and was walking to the muster point when he saw the pursuer still on the absorber. It is known from the evidence of Alan Dickson that the pursuer was on the ground within 13 minutes of the fire breaking out. So Mr Stewart has last seen the pursuer on the absorber as he, Mr Stewart, walked away from the absorber less than 13 minutes after the fire broke out. If it is Mr Stewart's evidence that the pursuer is referring to here when he states that "*Others were concerned for his safety*" the fact that Mr Stewart felt concerned would not determine the question of whether the pursuer would be within the range of physical injury if one was considering a test of foreseeability of physical injury as a test of recovery of damages for pure psychiatric injury at common law in a hypothetical case of negligence.

4. Section 2 of the Pursuer's Response Document -Young v Charles Church (Southern) Ltd:

o The pursuer apparently relies on the case of Young v Charles Church (Southern) Ltd [139]in support of his position that pure psychiatric injury is within the ambit of the particular statutory provisions which he relies on. It is stated on page 4 of the pursuer's Response document that case would have to be rejected as wrongly decided for the defenders' submission to be accepted in this case. The defenders submit that it would not follow that simply because a court held that regulation 44 (2) of the Construction (General Provisions) Regulations was held to afford the plaintiff a right of recovery for pure psychiatric injury that the same result would follow in relation to the statutory provisions relied on by the pursuer in the present case.[140]

o In any event the defenders dispute that this is "*a clear example of breach of statutory duty giving rise to damages for psychiatric injury*." As the defenders have stated in discussing the case of Young v Charles Church on page 38 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" Lord Hobhouse declined to express a concluded view on the scope of regulation 44 of the Construction (General Provisions) Regulations. Moreover a decision on the ambit of regulation 44 was not necessary for the plaintiff to succeed as the court had already held that the plaintiff was entitled to succeed at common law.

o Criticisms of the reasoning of the members of the Court of Appeal in this case are set out on pages 37 to 41 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" and the court in the present case is referred back to these pages and to these criticisms.

o Since the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" was prepared counsel for the defenders has noted that it is incorrectly stated in the first bullet point on page 38 of that document that the Court of Appeal in that case held that the plaintiff was entitled to succeed at common law as a secondary victim following Page v Smith. In fact the court was split as to whether the plaintiff was a secondary or a primary victim.

v Evans LJ held that the pursuer was entitled to succeed as a primary victim even although unlike the plaintiff in Page v Smith the plaintiff's injury was caused not by fear for his own safety but by the impact on him of the injuries and death of his colleague.

v Hutchison LJ agreed that the plaintiff was a primary victim.

v Thus both Evans and Hobhouse found the plaintiff to be a primary victim *even although he suffered no physical injury and did not fear that he would do so*.

v Hobhouse in contrast considered that the plaintiff was a secondary victim. This was on the basis that his psychiatric injury was brought about by the infliction of physical injury upon the person of the plaintiff's colleague. However it was, it is submitted, clearly wrong to hold that Mr Young was a secondary victim in circumstances where – as was accepted by the Court - there did not exist between the plaintiff and his colleague those close ties of affection or blood relationship which are necessary before one can be held to be a secondary victim.

o It is submitted that the case is therefore one in which the bench evidenced confused thought processes.

o It is submitted that the case was wrongly decided at common law. It departed from the law as it stood before Page v Smith and insofar as it purported to follow Page v Smith that case was not authority for the proposition that at common law a claimant can succeed in recovering damages for pure psychiatric injury even although he or she suffered no physical injury and did not fear that they would suffer physical injury.

o Insofar as Young v Charles Church (Southern) Ltd can be said to have decided that the plaintiff was entitled to recover under the 1961 Regulations damages for pure psychiatric injury it is submitted that aspect of the case too was wrongly decided.

o The pursuer claims that Young v Charles Church (Southern) Ltd was approved in Hunter v British Coal Corporation, another Court of Appeal decision.[141] In Hunter the plaintiff suffered psychiatric injury through wrongly believing himself to be responsible for a colleague's death. The case was brought at both common law and under statute. It was held that the claim failed as the plaintiff was neither a primary nor a secondary victim. Young v Charles Church (Southern) Ltd was considered briefly, and essentially in the discussion of the common law case in Hunter. There was no separate consideration of the position under statute in Hunter and no discussion at all of the issue of what was the ambit of the statutory duty which was engaged in Hunter.

o As already noted in the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" (at page 41) the case of Young v Charles Church (Southern) Ltd gave rise to a flurry of articles but no case has been found since Young v Charles Church (Southern) Ltd in which the claimant has been found entitled to damages for pure psychiatric injury on the basis of breach of statute. There is no case since Young v Charles Church (Southern) Ltd in which the issue of recoverability of damages for pure psychiatric injury for breach of statute has even been discussed. This is despite the researches of counsel for both parties.

o In the Northern Ireland Queen's Bench case of Gregg v Ashbrae [2005] NIQB 37 [142]the plaintiff worked on a building site where he had driven a digger alongside a wall. Shortly after the wall collapsed and crushed his colleague who later died. The plaintiff, who had witnessed the collapse of the wall, found his colleague's body, which had suffered serious head injuries. Due to his deteriorating mental state the plaintiff gave up work a few weeks after the accident. Although he did not consider that he was to blame for the accident he later became aware that others blamed him. The plaintiff claimed that he suffered post traumatic stress disorder as a result of witnessing the collapse of the wall on to his colleague. At trial the judge found that the plaintiff had witnessed the event and was involved in it and his psychiatric illness resulted from what he saw and was reasonably foreseeable. [143] Young v Charles Church (Southern) Ltd was referred to in this context (in paragraph [26]). Following that decision the article referred to at page 41 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" "*Psychiatric injury – extra routes to recovery ?*" was published in the Journal of Personal Injury Law. [144] In that article it was argued by its author, Mr Nigel Tomkins, that on the basis of the decision of the Court of Appeal in Young v Charles Church (Southern) Ltd Mr Gregg would have had a much more direct route to recovery under regulation 10 of the Construction (Health, Safety and Welfare) Regulations (Northern Ireland) 1996 which match the Construction (Health, Safety and Welfare) Regulations 1996 which were engaged in Young v Charles Church (Southern) Ltd.

It is submitted on behalf of the defenders in the present case that it is telling that the argument which Mr Tompkins considered was available to Mr Gregg was not advanced on Mr Gregg's behalf despite the fact that the case of Young v Charles Church (Southern) Ltd was relied on by Mr Gregg in support of his common law

case. It is submitted that the decision not to argue the point which Mr Tompkins consider should have been argued on Mr Gregg's behalf can be seen as a lack of confidence in the Court of Appeal's view in Young v Charles Church (Southern) Ltd that there was no reason to interpret the regulations as to exclude the plaintiff because he was not physically injured.

o What is more the decision in Gregg v Ashbrae was subsequently appealed to the Court of Appeal of Northern Ireland. The Court overturned the decision of the judge at first instance. [145]It is notable that there was no mention in its decision by the Court of Appeal of Northern Ireland to the case of Young v Charles Church (Southern) Ltd. In a Case Comment published in 2007 Journal of Personal Injury Law commenting on the case the author concluded his commentary by stating "*Somewhat strangely (since it was the key to the first instance decision), the case of Young v Charles Church (Southern) Ltd was not mentioned at all*." [146] The defenders in the present case would submit that the decision by the Court of Appeal of Northern Ireland not to mention Young v Charles Church (Southern) Ltd can be seen as supportive of the proposition that it is not a sound decision and its reasoning is flawed.

o The pursuer in his Response document states that the Scottish Law Commission refer to Hunter and Young. These cases are referred to by the Commission only in a Discussion Paper. Further they are referred to only in the context of considering the common law relating to recovery of damages for pure psychiatric injury (and there is no discussion whether either case was correctly decided or not).

5. Section 3 of the pursuer's Response:-

o The pursuer contends that as the Construction Design and Management Regulations 2007 were made under the Health and Safety at Work Act 1974 section 47 (2) of the 1974 Act applies. That is to overlook the effect of sections 70 and 78 of the Fire (Scotland) Act 2005 in combination with section 61(9)(za) and (c) [147]of that Act and regulation 46 of the Construction Design and Management Regulations 2007. The effect of these provisions is that section 47 of the Health & Safety at Work Act 1974 does not apply to regulations 39 to 41 of the Construction Design and Management Regulations as the construction site where the pursuer was working formed part of premises occupied by persons other than those carrying out construction work, namely Scottish Power. (Reference is made to pages 46 to 47 of the document "MD v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS" and footnote 54 in particular on page 47). [148] Doubtless it is for that reason that the Construction Design and Management Regulations make provision within the body of the Regulations themselves (at regulation 46) for civil liability.

o In any event it is not accepted that because "damage" is defined as it is in section 47 of the 1974 Act it would follow that in the case of regulations made under the 1974 Act in respect of which section 47 was not dis-applied a breach of any provision of the regulations would give rise to a right of recovery in respect of psychiatric illness or injury unaccompanied by physical injury. The 1974 Act was an enabling Act only. That is to say that with the exception of the general duties in sections 2 to 9 the Act itself did not specify precautions to be taken in any particular premises or industries or activities or provisions to be made for these premises, industries, or activities. That was to be the function of the Regulations which regulation 15 empowered the Secretary of State to make for the purpose of Part 1 of the Act. Whether pure psychiatric injury is within the scope of any particular regulation will depend on what was the purpose of the particular regulation under consideration and whether that type of harm – pure psychiatric injury unaccompanied by physical injury – is within the ambit of the regulation in question. If the pursuer's argument were correct it would mean that a breach of any of the provisions of the very many Regulations which have been made under section 15 of the 1974 Act since it came into force would give rise to a right of recovery for pure psychiatric harm without physical injury. It would be astonishing in these circumstances that Young v Charles Church (Southern) Ltd is the only case that can be found by Counsel in which the court has expressed the view that the plaintiff should be able to recover for pure psychiatric injury.

o It is submitted that it is unlikely in any event that in defining "damage" as it did in section 47 the 1974 Act Parliament had in mind the concept of pure psychiatric injury (or "nervous shock") occurring without physical

injury. As is stated in McEwan & Paton on Damages for Personal Injuries in Scotland at paragraph 9.01 "*Post traumatic stress disorder (PTSD), reactive depression, depressive illness, personality change, pathological grief, anxiety neurosis, phobias, and vulnerability to future psychiatric problems are some of the conditions currently attracting awards. Judicial recognition of such disorders has been relatively recent. While claims began to emerge in the late nineteenth century it was some time before the courts acknowledged their validity*."[149] McLoughlin v O'Brian which is referred to in that passage in support of what is said therein was itself only decided in 1983. As late as 1970 in Malcolm v Broadbent [1970] 3 All ER 508[150] the Court felt it necessary to refer to authority for the proposition, now regarded as trite, that there is no difference between an egg-shell and an egg-shell personality. In that case the judge was concerned with the psychological consequences of physical injuries which the plaintiff had suffered, as well as the effect on her of injuries which her husband had suffered. The Judge referred to the "nervous shock" cases as a separate category of case having "*somewhat special rules*." It is submitted by the defenders in the present case that there would have to be clear language in the 1974 Act of an intention to sweep away those special rules before section 47 could be held to have that effect, and that it is highly improbable that the intention behind section 47 was to tacitly sweep away the special rules.

o The pursuer states on page 3 of his Response document that there is no reason to think that Parliament when it enacted the Fire (Scotland) Act and used the word "damage" did not intend "damage" also to include impairment of a person's mental condition. The defenders submit that on the contrary it is significant that the Scottish Parliament, having provided that section 47 of the 1974 Act should not apply to fire safety provisions where the HSE are not the enforcing authority, made alternative provision for civil liability in the 2005 Act [151] and elected not to define "damage" as it is defined in the 1974 Act. If the Scottish Parliament had intended "damage" in the 2005 Act to be defined as in section 47 of the 1974 Act it would have said so. "Damage" in statutory provisions giving rise to a right of recovery in respect of injury to the person (as opposed to damage to property) does not automatically fall to be defined as it is defined in section 47 of the 1974 Act. Thus the Consumer Protection Act 1987 section 41 provides that "*in this section "damage" includes personal injury and death*"[152].

6. Page 10 of the pursuer's Response document:

o The pursuer states on page 10 that "*Finally the position relative to a bystander or witnesses is different because such a person is unlikely to be within the ambit of the duty to the employee under the provision. The statutory duty is to ensure safety from harm from fire not to prevent injury where someone else is harmed by fire.*" In this passage the pursuer is attempting to argue that the control mechanisms which currently exist in the common law to control who may recover damages for pure psychiatric injury would not all be overcome if he were to succeed in his argument that he is entitled to recover under the statutory provisions upon which he relies. However if the pursuer were correct that the statutory provisions on which he relies afford a remedy for pure psychiatric injury (which is denied) there would be no logical or principled basis when considering claims under the statutory provisions for distinguishing between what are currently referred to in the common law in this area as "primary" and "secondary" victims. The pursuer's argument on page 10 is based on the fallacy that selected parts of the common law in relation to recovery for pure psychiatric injury would somehow operate to place a limit on who could recover under statute.

APPENDIX H: Comment on the Defenders' historical legal submissions

[1] The thrust of Miss Shand's historical legal review was to argue that recovery for damages for pure psychiatric injury was never allowed under any antecedent fire safety legislation and, in the absence of express provision for this, the 2005 Act should not be construed as a departure, as it were, from this feature of the legislation preceding it.

The potential relevance of the 2005 Act as an Act of the Scottish Parliament and as in part-implement of EU Directives

[2] No argument was advanced that to legislate for health and safety matters would be outwith the devolved competence of the Scottish Parliament. (Miss Shand's argument was that it was simply unlikely that there would be so momentous a change, as she would have it, that would be enacted simply by implication.) Nonetheless, it may be helpful to consider the potential relevance of the 2005 Act as an act of the Scottish Parliament. As a generality, health and safety is a reserved matter. However, subject to a few narrow exceptions (none of which is here relevant), fire safety is not: see Section 29 of the Scotland Act 1998 ("The Scotland Act"), defining the legislative competence of the Scottish Parliament, and paragraph H2 ("Health and Safety") of Part II of Schedule 5 to the Scotland Act, setting out the reserved matters in respect of health and safety. Accordingly, subject to the reservation of this subject-matter (and two other reserved areas, which are of no relevance), "fire safety" is a devolved matter: see sub-paragraphs (b)(i) to (iii) of H2. The consolidation of the fire safety legislation being undertaken in England (in the Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541) ("the 2005 Order")) was mirrored in the terms of, and effected in Scotland by, the 2005 Act. Accordingly, while fire safety measures might broadly be characterised as falling within the scope of health and safety, it is nonetheless within the competence of the Scottish Parliament to legislate in respect of fire safety measures, including the application of such measures to the workplace. This reflects the UK-wide reforming intent to consolidate fire safety legislation.

[3] And indeed, the thrust of the 2005 Act is to consolidate and reform fire safety law, as the preamble and Explanatory Notes make clear. For the reasons explained by Lord Hope of Craighead in paragraph 11 of *Martin (Sean)* v *HMA* 2010 SC (UKSC) 40, on occasion there will be some degree of "overlap" between reserved and devolved matters. The law of health and safety encompasses fire safety issues. The Scottish Parliament may legislate in respect of the latter (as within its devolved competence), even if that same subject matter might also be characterised as forming part of the law of health and safety. Having regard to this demarcation of legislative competence, the "pith and substance" of the 2005 Act is in respect of fire safety.

[4] There is, however, a further borderline that must be noted. The 2005 Act bears to be in part-implement of six EU Directives, all of which are concerned with improving health and safety for employees. To the extent that the 2005 Act is in part-implement of these Directives, it might be considered problematic, given that health and safety is a reserved subject-matter. However, if the "pith and substance" of the 2005 Act is fire safety (even if that might otherwise be seen as a facet of health and safety), then there is scope for implementation of the EU Directives to the extent that their subject matter coincides with the area of "overlap" already referred to. This legislative context, placed within the broader constitutional role of the Scottish Parliament, is reflected in the terms of the Explanatory Notes, where it stated the 2005 Act was in part-implement six EU Directives on health and safety at work, "in so far as these provisions relate to matters within the devolved competence, general fire and safety measures to be taken by employers and in so far as more specific legislation does not make appropriate provision". It is the "general fire safety measures taken by employers" in Part 3 of the 2005 Act that is in part-implement of the EU Directives and which is also within the devolved competence of the Scottish Parliament. In respect of the last qualification recorded in the Explanatory Notes, "and in so far as more specific legislation does not make appropriate provision", there was no argument presented that one or more of the provisions founded on from the other statutory regimes constituted "more specific legislation". I therefore proceed on the basis that there is no other "more specific legislation".

[5] On a proper analysis, the 2005 Act is of a hybrid character. Its principal focus is fire safety but those measures are extended into the workplace, to the extent that it is within its devolved competence to do so, and it is in part-implement of inter alia the Framework and Workplace Directives. Accordingly, the 2005 Act represents a convergence of the different legislative regimes identified in the next paragraph. This means that in determining the 2005 Act's legislative antecedents, as it were, it is not enough to look only at features of the predecessor fire safety legislation about the availability or otherwise of civil liability for breach or the kind of damage recoverable for such breaches.

[6] Miss Shand's historical legal submission does not appear fully to address the existence of, or the relationship between, these several regimes and their application to workplaces, and how that has evolved over time. In particular, her submission did not take full account of the demarcation that occurred in the evolution of

(i) fire protection legislation of general application,

(ii) the duties imposed under the health and safety regime, and

(iii) the separate, or more specific, regime applied to construction sites.

If one is going to rely on features said to be derived from an historical legal analysis, it is necessary to review all of the relevant strands that preceded the act in question. Even in relation to the strand of fire safety legislation examined in Miss Shand's historical review, she did not appear to take into account a later amendment, made in 2003, which had the effect of extending civil liability for breach of fire precautions, or more properly "workplace fire precautions regulations", as they had become. Her proposition that there was no civil liability for breach of such provisions may be too broadly stated. It is necessary, therefore, to trace the emergence of the different statutory regimes. I begin with the fire protection legislation she referred to.

The Fire Protection Legislation: The 1971 Act

[7] Miss Shand argued that breach of any provision of the general fire precaution regime did not attract civil liability. If that were correct, a fortiori breach would not allow recovery for pure psychiatric injury flowing from any such breach. What was the position under the fire safety legislation? At the time it was enacted, the 1971 Act was silent on the question of whether any breach gave rise to civil liability. As it predated the 1974 Act, it was of course not made under it and could not be regarded as "health and safety regulations" to which section 47 of the 1974 Act might be applied.

[8] Having regard to the premises or uses of premises for which a fire certificate was required by the 1971 Act (under section 1) and those premises exempted from a fire certificate (under section 2(2)), the scheme of the 1971 Act did not intend to cover places of work (using that in a collective but non-technical sense), whether they be offices or shops (section 2(a)), a factory (section 2(b)) or a mine or quarry (section 2(c)). Accordingly, while it is correct that no civil action was available for breach of the provisions of the 1971 Act, that is relatively uninformative as to the availability (or otherwise) of a civil action for breach of like obligations owed in respect of types of premises or uses outwith the scope of the 1971 Act, such as places of work.

[9] Miss Shand relied on the fact that section 9A of the 1971 Act introduced a duty to provide a means of escape from fire and a means for fighting fire in respect of exempt premises, but that still did not attract civil liability. That may be so, but once the Fire Precautions (Workplace) Regulations 1997 ("the 1997 Regulations") came into force, section 9A of the 1971 Act did not apply to premises to which Part II of the 1997 Regulations applied. Again, the absence of liability for breach in a non-work place is of little relevance to the different context of a workplace. As will shortly be seen, Part II of the 1997 Regulations concerned fire precautions in the workplace.

[10] While the 1971 Act had been silent on the question of whether any breach gave rise to civil liability, this was put beyond doubt in 1987, by the insertion of a new section 27A into the 1971 Act by the Fire Safety and Safety of Places of Sport Act 1987. In its original form, section 27A provided as follows:

> "Except in so far as this Act otherwise expressly provides, and subject to section 18 of the Interpretation Act 1978 (offences under two or more laws), the provisions of this Act shall not be construed as—
>
> (a) conferring a right of action in any civil proceedings (other than proceedings for the recovery of a fine) in respect of any contravention of a provision of this Act, of any regulations thereunder or

of any fire certificate or notice issued or served thereunder by the fire authority; or

(b) affecting any requirement or restriction imposed by or under any other enactment whether contained in a public general Act or in a local or private Act; or

(c) derogating from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than under this Act."

Miss Shand founds on section 27A(a). It is important to note, however, that section 27A(a) was, in effect, without prejudice to any right of action arising otherwise than under the 1971 Act. (None of the differences among the five versions of section 27A that applied from time to time affected this feature of it.) On the issue of the availability or exclusion of civil liability, therefore, it is important to have regard to the demarcation reflected in the legislation between matters coming within the meaning of "workplace fire precaution legislation" and matters which were "health and safety regulations". Section 47 of the 1974 Act applied to the latter; it did not apply to the former.

[11] This demarcation is consistent with the non-application of the 1971 Act to places of work. Indeed, properly understood, the 1997 Regulations are not the successor to the 1971 Act in respect of like premises. Rather, the 1997 Regulations had the distinct purpose of transposing into the UK certain EU Directives whose common purpose was the protection of workers - a category of use (or person) outwith the scope of the 1971 Act.

Fire Safety in the workplace: The 1997 Regulations

[12] What then of the 1997 Regulations? The first point to note is that these regulations were not made under section 15(1) of the 1974 Act. Accordingly, they were not "health and safety regulations" for the purposes of that Act. The purpose of enacting the 1997 Regulations was to give effect to certain articles of, or paragraphs of annexes to, the Framework Directive and the Workplace Directive: see the Explanatory Note to the 1997 Regulations.

[13] In broad terms, this was done by extending the regime under the 1971 Act to "workplaces" (defined in Regulation 2(1)), and by deeming that the requirements of the "workplace fire precautions legislation" (defined in Regulation 9(2)) were requirements made under section 12 of the 1971 Act: see Regulation 17 of the 1997 Regulations. In other words, like duties as subsisted under a 1974 Act regime were applied to the distinct regime of fire safety. However, this fire safety regime was not applied to "excepted workplaces": Regulation 17(1)(b)(i).

[14] The terminology of "excepted", as opposed to "exempted", used in the 1997 Regulations is significant. "Excepted" workplaces were not exempt. They had another, parallel, regime applied to them. For present purposes it is sufficient to note that the definition of "excepted workplace" in Regulation 3(5) of the 1997 Regulations included any place that was a "construction site" within the meaning of Regulation 2(1) of the Construction (Health and Safety at Work) Regulations 1996 ("the Construction (HSW) Regulations 1996"): Regulation 3(5)(d). Accordingly, the exclusion of civil liability for breach of obligations under the 1971 Act or regulations made thereunder did not extend to, or affect, like obligations imposed in respect of other types of premises (eg excepted construction sites) outwith the scope of the fire precaution legislation.

[15] Regulation 9 of the 1997 Regulations was amended by the Fire Precautions (Workplace) (Amendment) Regulations 1999 ("the 1999 Regulations"), but in both its original and amended form it provided that for *inter alia* sections 33 and 47 of the 1974 Act, the provisions of the "workplace fire precautions legislation" (which is defined, and includes the Part II of the 1997 Regulations) were deemed not to be "health and safety regulations": Regulation 9(1). By Regulation 9(3) (as amended) the definition of "health and safety regulations" in the 1974 Act was incorporated into the 1997 Regulations but, essentially, to reinforce the

demarcation (already noted) between the health and safety regime and that applicable to fire safety in certain workplaces. As a consequence, Regulation 9 of the 1997 Regulations made it clear that the civil liability otherwise provided for by section 47 of the 1974 Act for breach of "health and safety regulations" did not apply to the workplace fire precaution duties created by Part II of the 1997 Regulations. (While the effect of the amendment made by the 1999 Regulations to the 1997 Regulations was to extend the fire precautions regime to certain workplaces, the exclusion of civil liability for breach as provided for under section 27A of the 1971 Act was likewise extended to and applied in respect of the workplaces to which the scheme of the 1971 Act had just been extended (by virtue of the 1999 amendments to the 1997 Regulations.))

[16] What does all of this mean? First, that at this point in time, it remained the case that there was no civil liability for breach of the core fire precaution duties in Part II of the 1997 Regulations (as amended). But it must be borne in mind that the workplace fire precautions regulations did not extend to workplaces that were "construction sites". As a consequence, whether or not breach of any equivalent to any workplace fire precaution duty as might be applied to a construction site gives rise to civil liability, is not a question that can be answered having regard to the workplace fire precautions regime. Instead, one must have regard to the separate regime that applied to constructions sites.

The demarcation in the application of workplace fire safety duties to different types of premises or uses

[17] Part II of the 1997 Regulations created core fire precautions to be taken in the workplace. They did so in implement of the Framework Directive and the Workplace Directive. The duties created under Part II of the 1997 Regulations form the core of what is defined as "workplace fire precautions legislation" in Regulation 9(2). While the 1997 Regulations did not apply to "excepted premises", this was because there were other more specific provisions applicable to such premises. But the 1997 Regulations also governed the relationship between fire precautions duties created in Part II of the 1997 Regulations and imposed on "workplaces", and the existing duties, including those of a similar character, under the Management of Health and Safety at Work Regulations 1992 ("the Management Regulations 1992") then in force (and which regulations were the predecessor of the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations 1999")). It achieved this by including certain provisions of the 1992 Management Regulations in the definition of "workplace fire precautions legislation", but only insofar as they imposed requirements concerning "general fire precautions" to be taken or observed by an employer in a workplace (other than an excepted workplace): see Regulation 9(2). ("[G]eneral fire precautions" is defined as "measures… to be taken or observed in relation to the risk to the safety of employees in case of fire in a workplace, other than any special precautions in connection with the carrying on of any manufacturing process".) It was incumbent upon every fire authority to enforce the workplace fire precautions legislation in their area. It should be noted that the defined terms of "health and safety regulations" and "workplace fire precautions legislation" are used to denote the substantive content of the duties, whereas the phrase "the relevant provisions" is used when identifying the authority responsible for enforcing the substantive duties concerned in the "relevant premises".

[18] The effect of the 1997 Regulations was not to repeal or supersede the duties in the 1992 Management Regulations. Rather, the 1997 Regulations had to set out the demarcation between the separate enforcement regimes. It did so by providing for mutually exclusive definitions of "health and safety regulations" and "workplace fire precautions legislation". Consistent with that, Regulation 9(1) of the 1997 Regulations provided that, for the purposes of certain provisions of the 1974 Act, it deemed that the provisions of the workplace fire precautions legislation were not provisions of the "health and safety regulations" (ie the phrase relevant to the substantive content of these duties (in terms of the 1974 Act)) and were deemed not to be part of "the relevant statutory provisions" (ie the phrase relevant to the enforcement of those duties by the enforcing authority under the 1974 Act) - as both of those phrases were defined in the 1974 Act. Accordingly, while in practical terms the content of the duties under the two regimes was the same, Regulation 9(1) of the 1997 Regulations had the effect of dis-applying the enforcement regime under the 1974 Act to duties created by the workplace fire precautions legislation. Where those duties applied in a "workplace" (as defined), they were governed by the fire precautions legislation regime and were enforced by the fire authorities. Where those duties did not have that character, or were not in respect of a "workplace", then they continued to operate as

prescribed under the 1992 Management Regulations and, in that context, remained part of the health and safety regime.

No provision for civil liability for breach of workplace fire precautions duties

[19] As enacted, the 1997 Regulations made no express provision for any civil liability for breach of any duty imposed by the workplace fire precautions legislation. It will be recalled that the provision in section 47 of the 1974 Act for civil liability was in respect of breaches of duty imposed by the "health and safety regulations". Regulation 9(1) of the 1997 Regulations simply disapplied certain provisions, including section 47, in respect of workplace fire precautions legislation. Whatever the consequences of a breach of duty under the workplace fire precautions legislation, such a breach did not fall within the meaning of "health and safety regulations". In terms, section 47 of the 1974 Act had no application to matters that were not breaches of any duty imposed by "health and safety regulations". This reflects the demarcation between the health and safety regime and that of workplace fire precautions legislation brought into existence by the 1997 Regulations. Strictly speaking, the 1997 Regulations were silent as to the consequences of a breach of duty arising under the workplace fire precautions legislation. That is quite different from an express exclusion of liability for breach.

[20] While it is correct, therefore, as Miss Shand notes, that Regulation 9 of the 1997 Regulations disapplied sections 33 and 47 of the 1974 Act in respect of workplace fire precautions legislation, that disapplication was in relation to fire precautions legislation (as defined in Regulation 9 of the 1997 Regulations) and the premises to which such legislation applied. It did so as part of the demarcation between the health and safety and workplace fire precautions legislation regimes. In any event, it had no effect in respect of whatever obligations subsisted in respect of "excepted workplaces" such as a construction site.

The divergence of safety regimes applicable to different types of premises or uses: construction sites

[21] Accordingly, at the point where fire precaution duties created in the 1971 Act were extended to places of work, by virtue of the 1997 Regulations, a distinction was nonetheless drawn between that general extension to places of work and some places of work (eg such as construction sites) carved out from that extension, and for which other, more specific, provision was made.

[22] In passing it should be noted that Part II of the 1997 Regulations had (by virtue of an amendment introduced by the 1999 Regulations to Regulation 9(2)(a)(i) and (ii)) been disapplied to certain premises (ships under construction and repair, and special premises) to which a different set of premises applied. However, civil liability for breach of the Part II duties was extended to those premises: see Regulation 9(2A) of the 1997 Regulations. This was done by providing that the Part II provisions in their application to such premises were deemed to be "health and safety regulations" for the purposes inter alia of sections 33 and 47 of the 1974 Act. While this is only in relation to very particular classes of premises, it is an example of civil liability for breach of what was, in effect, a fire precaution duty. This calls into question Miss Shand's broad assertion that fire precaution duties did not attract civil liability, much less liability for damage that was pure psychiatric injury.

[23] I return to consider one of the propositions on which Miss Shand's historical legal review is premised: namely, the absence of civil liability for breach of fire precautions duties. For reasons that are not clear, Miss Shand did not take note of the further amendment to the 1997 Regulations made in 2003 and which had the effect of providing for civil liability for breach of the workplace fire precautions regulations. I turn to the 2003 amendments to the 1997 Regulations.

The 2003 Regulations: The creation of civil liability for breaches of the fire precautions legislation

[24] The 1997 Regulations were further amended in 2003 by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003/2457 ("the 2003 Regulations"). As the somewhat cumbersome title to those regulations indicates, they amended both the 1997 Regulations (being part

of the workplace fire precautions legislation regime) and a set of regulations comprising part of the health and safety regime (being the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations 1999")), and which had by then replaced the Management Regulations 1992.

[25] In particular, the 2003 Regulations provided for civil liability for breach by an employer of the duties under the Management Regulations 1999: see Regulation 6 of the 2003 Regulations, amending Regulation 22 of the Management Regulations 1999. The 2003 Regulations also provided for civil liability for breach by an employer of the duties under the 1997 Regulations: Regulation 11 of the 2003 Regulations, inserting Regulation 9A into the 1997 Regulations concerning "civil liability for breach of statutory duty". (The civil liability did not extend to breach of duty to third parties: Regulation 9A(2)). It will be recalled that Part II of the 1997 Regulations created the core fire precaution duties in the workplace. Two further amendments to the 1997 Regulations put beyond doubt that one of the purposes of the 2003 amendments to the 1997 Regulation was to create civil liability for breach of the workplace fire precautions legislation duties owed by employers to employees. In order to effect this, the exclusion of civil liability had to be removed and the scope of civil liability also had to be defined.

[26] First, the issue of the exclusion of civil liability by section 27A of the 1971 Act for breach of any regulations "made under" the 1971 Act had to be addressed, otherwise there would be a conflict between Regulation 22 of the 1999 Regulations (as inserted by the 2003 Regulations) providing for civil liability, and section 27A of the 1971 Act precluding it. This conflict was addressed by amending Regulation 27 of the 1997 Regulations, so as to disapply section 27A(a) of the 1971 Act to the Part II duties (under the 1997 Regulations) made under the 1971 Act. (As noted above, Section 27A(a) of the 1971 Act, inserted by the 1987 Act, had expressly excluded civil liability.)

[27] The 2003 Regulations amended Regulation 9 of the 1997 Regulations by amending the definition of " workplace fire precautions legislation" (in Regulation 9(2) and by inserting 9(2A)) and also by providing (in a new Regulation 9A) for civil liability of an employer in respect of breach of any duty imposed under the workplace fire precautions legislation, "so far as it causes damage": see Regulations 11 and 12 of the 2003 Regulations (which are both contained in that part of the 2003 Regulations headed up "Amendment to the Fire Precautions (Workplace) Regulations 1997").

[28] The terms of the new Regulation 9A, inserted by the 2003 Regulations, are complex. (For the purposes of demarcation, Regulation 9A distinguishes between the content of workplace fire precautions (breach of which now gives rise to civil liability) and their enforcement ("[n]otwithstanding that the provisions of Part II of [the 1997] Regulations are not provisions forming part of the relevant statutory provisions"). It suffices for present purposes to note that the core workplace fire precautions legislation created in Part II of the 1997 Regulations are "deemed to be health and safety regulations for the purposes of" inter alia of section "47 of the 1974 Act". (From this point in time, the original heading to this Regulation in the 1997 Regulations – "disapplication of the 1974 Act"—has the potential to mislead.) One has to unpick the double negative in regulation 9A(2) of the 1997 Regulations to understand that civil liability was extended to breach of the workplace fire precautions duties owed by employers to their employees.

[29] The next question is, civil liability for what? As just noted, one of the effects of the 2003 amendments was that the provisions in Part II of the 1997 Regulations were now deemed to be "health and safety regulations" for the purposes of section 47 of the 1974 Act. In other words, not only was there express provision for civil liability for breach, but the extended definition in section 47 of the 1974 Act (including "mental impairment") applied. At the very least it is arguable that this was habile to cover claims for pure psychiatric injury (assuming, of course, that there was proof of a causal connection between the breach and the kind of damage claimed). Miss Shand's historical legal review would therefore appear to be incomplete even in respect of the fire precautions strand she sought to trace. In any event, the 2003 amendments to the 1997 Regulations would suggest that Miss Shand's proposition (derived from her historical legal review) is too baldly stated and does not take into account the extension of civil liability for breach of certain provisions of the workplace fire precautions legislation in certain contexts and for which, arguably, the damages recoverable may include non-physical injury.

[30] What then of the distinct regime applicable to construction sites?

The Construction (Health, Safety and Welfare) Regulations 1996

[31] The Construction (Health, Safety and Welfare) Regulations 1996 ("the Construction (HSW) Regulations 1996") were made under section 15(1) of the 1974 Act and they were enacted to give effect in the UK to Council Directive 92/57/EEC concerning "minimum safety and health requirements at temporary or mobile construction sites" ("the Construction Sites Directive").

[32] In terms of their scope, subject to certain exceptions, the Construction (HSW) Regulations 1996 applied in relation to "construction work" on a "construction site", being a place where "construction work" (as defined) was carried out by a person at work.

[33] In terms of their application, the Construction (Health and Safety at Work) Regulations 1996 ("the Construction (HSW) Regulations 1996") extended to "construction sites" (as defined in Regulation 2(1)). Regulations 19, 20 and 21 collectively dealt with emergency routes and exits (Regulation 19), emergency procedures (Regulation 20), and fire detection and fire-fighting (Regulation 21), although these regulations applied "only to and in relation to construction work carried out by a person at work at a construction site": Regulation 3(3). In terms of enforcement, consistent with health and safety legislation generally, this fell within the purview of the Health and Safety Executive ("the HSE"). However, for the purposes of Regulations 19 and 20 (to the extent they related to fire) and Regulation 20, in respect of a construction site which is "contained within, or forms part of, premises which are occupied by persons other than those carrying out the construction work or any activity arising from such work" (which for convenience I will refer to as "part-construction site"), the enforcing authority was the fire authority (as defined within the meaning of section 43(1) of the 1971 Act) in respect of those regulations: Regulation 33. The effect of Regulation 33 appears to be that, while the content of the duties imposed by regulations 19 to 21 did not change for a part construction site (as just defined), the enforcing authority was different. This same form of words, and distinction, is carried over into the 2005 Act (as amended).

[34] Notwithstanding the nature of the enforcing authority (the fire authority), or the character of the duties in question (being fire precautions), the Construction (HSW) Regulations 1996 did not expressly preclude civil liability for breach of any duty under the those Regulations. Accordingly, section 47 of that Act applied, meaning that there was civil liability for breach of statutory duty, unless the Construction (HSW) Regulations 1996 made express provision to the contrary. They did not do so.

[35] The Construction (HSW) Regulations 1996, and the Management Regulations 1999, referred to above, were both repealed and replaced by the Construction (Design and Management) Regulations 2007 ("the CDM Regulations 2007"), one of the Regulations founded on by the pursuer.

[36] Having regard to the demarcation identified above, and separately, to the 1997 Regulations (as amended by the 2003 Regulations) and the terms of the Construction (HSW) Regulations 1996 just noted, I find that the submission that there was no prior provision affording a civil action for breach of a provision such as those found in the 2005 Act is not correct. Whether that liability excludes pure psychiatric injury will depend on the interpretation of section 47.

The CDM Regulations 2007

[37] The CDM Regulations 2007 repealed inter alia the Construction (HSW) Regulations 1996 and the Management Regulations 1999. They were intended to implement in the UK the obligations in the Construction Sites Directive for the purposes of Article 16(1) of the Framework Directive: see paragraph 1 of the Explanatory Note to the CDM Regulations and see also the list of national measures appended to the copy of the Construction Directive (OJ L 245, 26/08/1992 page 6). The CDM Regulations 2007 were also, as noted in the preamble, made under the requisite provisions of the 1974 Act so as to fall within the definition of "health and

safety regulations". For completeness, I note that the CDM Regulations 2007 were not made under or intending to transpose either the Framework Directive or the Workplace Directive.

[38] Apart from Regulation 3 of the Management Regulations 1999, the other regulations founded upon by the pursuer are all contained in Part 4 of the CDM Regulations 2007 concerning "Duties relating to health and safety on construction sites". While the CDM Regulations 2007 were in force, the duties they imposed subsisted alongside those in the 2005 Act. This raises the prospect, at least, that these were precisely the kind of "other provisions" to which the more general provisions in the 2005 Act might give way, as envisaged in the Explanatory Notes referred to in para [239] of the Opinion. (The fact that as, originally enacted, the 2005 Act excluded construction sites from relevant premises and was then amended to include them, as explained in para [60] below, may affect such an argument.) I express no view on these matters.

[39] In respect of certain duties arising in relation to premises to which Part 3 of the 2005 Act applies, the enforcing authority was that under section 61 of the 2005 Act. In short, this meant the fire service. This was, in effect, a carve out of the enforcement of these duties from the responsibility of the HSE, who were the default enforcers. This is achieved by Regulation 46 of the CDM Regulations 2007. In particular, by Regulation 46(1) the enforcing authority is that under section 69 of the 2005 Act in respect of

> (i) any part-construction site (as I have termed it, although there is no longer reference to Part II of the 1997 Regulations (because these have been repealed)), and
>
> (ii) in respect of Regulations 39 and 40 in so far as they relate to fire, and Regulation 40.

If the circumstances or site are not a part-construction site, then the enforcer is the HSE. In either case, however, the content of the duties is the same.

[40] What next falls to be considered is the question of civil liability for breach of the statutory duties in the CDM Regulations 2007. There is express provision in Regulation 45 of the CDM Regulations 2007 for civil liability. At the material time, Regulation 45 provided as follows:

"**45.** Breach of a duty imposed by the preceding provisions of these Regulations, other than those imposed by regulations 9(1)(b), 13(6) and (7), 16, 22(1)(c) and (l), 25(1), (2) and (4), 26 to 44 and Schedule 2, shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a person who is not an employee of the person on whom the duty is placed.

If one unpicks the double negative, the effect of this is twofold:

> (i) in respect of the other regulations (apart from those specified), Regulation 45 imposed civil liability on employers only in respect of their employees; but
>
> (ii) in respect of Regulations 9(1)(b), 13(6) and (7), 16, 22(1)(c) and(1), 25(1), (2) and (4), 26 to 44 and Schedule 2, the imposition of civil liability was not qualified or restricted as being owed only to employees.

[41] There is no dispute that the pursuer was an employee of the defenders in a relevant sense and, accordingly, the defenders were potentially exposed to civil liability for any breach of the regulations under the CDM Regulations 2007 relied upon by the pursuer.

[42] Regulation 47 also provides an example of the demarcation between respective enforcing authorities, but where the duties to be enforced are the same.

[43] The next question though is, civil liability for what? In common with the Construction (HSW) Regulations 1996 and the 1997 Regulations (as amended by the 2003 Regulations), just referred to, and the

CDM Regulations 2007, section 47 of the 1974 Act was applied to all of these provisions. This section of the CDM Regulations 2007 contains an extended definition of "damage", which includes "mental impairment".

[44] In relation to section 47, in its application to the CDM Regulations 2007, Miss Shand argued in her third written submission that:

> "it is not accepted that because 'damage' is defined as it is in section 47 of the 1974 Act [,] it would follow that in the case of regulations made under the 1974 Act in respect of which section 47 was not dis-applied[,] [that] a breach of any provision of the regulations would give rise to a right of recovery in respect of psychiatric illness or injury unaccompanied by physical injury": see Appendix G at p 16.

She observed that the 1974 Act was an enabling act only and that it was still necessary to consider whether recovery for pure psychiatric injury was within the scope of any particular regulation. While she did not put it this way, the logic of this argument is that even if the definition of "damage" as set out in section 47 of the 1974 is incorporated into a particular set of regulations, its meaning may differ from one set of regulations to another. As it is not necessary for the determination of the issues before me, and in the absence of fuller argument or reference to any authority for that, perhaps surprising, submission, I reserve my opinion on this issue. The possible arguments concerning this issue, however, calls into question the correctness of the proposition Miss Shand sought to derive from her historical legal review and which she stated in such absolute terms.

Discussion of the EU argument

[45] As part of her historical legal review Miss Shand also referred to the case of Cross and to several of the EU Directives, including the Framework Directive and the Workplace Directives. It is important to understand the context, and the potential limits, of the observations of Lord Macfadyen in Cross. In that case, the domestic regulations applicable expressly excluded civil liability for breach. For that reason, the pursuer in that case sought to argue that the duties in the Framework Directive were directly effective or, so it was argued, ought to inform the content of any common law duty. Lord Macfadyen did not accept those arguments. Having been provided with a detailed review of the policy and legislative materials, including various Programmes and proposals of the European Commission, and which appeared to extend well beyond the usual *travaux preparatoires*, he concluded (at para 102) that Framework Directive was addressed to the incidence of physical injury caused by accidents and occupation diseases of a physical nature.

[46] It is trite that it is in the nature of an EU Directive that the manner of giving it effect within the domestic order (the choice of "form and methods") is left to the discretion of the Member State. (For the purposes of the present discussion, I ignore the position where the time limit for transposing the EU instrument has passed.) This form of instrument may be contrasted, for example, with an EU Regulation. It is unsurprising, therefore, that the Directives under consideration are silent as to the issue of civil liability or, indeed, other form of sanction or consequence for breach of the duties they created. Indeed, this is borne out by the case of *Commission* v *UK* (Case C-127/05), decided after Cross. In *Commission* v *UK* the Luxembourg Court rejected the Commission's argument that the inclusion of the qualification "so far as reasonably practicable" where it appeared in section 2(1) of the 1974 Act was inconsistent with Article 5(1) of the Framework Directive. In doing so, it observed that Article 5(1) simply embodied the general duty of safety to which an employer was subject, but without specifying any form of liability: see paragraphs 39 to 44 of the judgment. The case of *Kolbeinsson* v *The Icelandic State* (Case E-2/10), a decision of the EFTA Court, arose under the Construction Sites Directive. Mr Kolbeinsson had been injured in the course of his employment on a construction site. While the administrative occupational authorities found that the employer had omitted certain measures, the Icelandic court found that by reason of Mr Kolbeinsson's own conduct, he was wholly to blame and, accordingly, the employers were not at fault. Mr Kolbeinsson challenged this domestic rule of contributory negligence as contrary to the Directives in question. It was in this context that the EFTA court discussed the question of effectiveness of EU law in the domestic order. In particular, the EFTA Court said:

> "47 the ECJ has repeatedly held that while the choice of penalties remains within the discretion of the Member States, they must ensure that infringements of European law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effect, proportionate and dissuasive, see Joined Cases C-58/95, C-75-95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallottie and Others* [1996] ECR I-4345, paragraph 14, and the case law cited therein. These considerations are equally valid in the context of the EEA Agreement. Provisions establishing a duty would be reduced to mere declarations of intent if they were imposed without any form of liability in the event of the duty being breached, see to this effect the Opinion of Advocate General Megozzi in *Commission* v *United Kingdom*, cited above, paragraph 76".

[47] These comments are, in my view, equally apposite to the question of civil liability, where the Member State elects to impose that as a feature of the transposition of these duties into the domestic legal order. The creation of civil liability is likely to be consonant with the principles of effectiveness and equivalence discussed by the EFTA court in *Kolbeinsson*.

[48] However, once the UK has transposed these obligations, unless it is argued that there has been a failure in transposition, the principal issue is the interpretation and application of the transposing legislation. Here, the 2005 Act bears to be in part-implement of several EU Directives, including the Workplace and Framework Directives. Accordingly, it is appropriate to construe section 53 in the light of the wording and purpose of the Directive (see: *Marleasing SA* v *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135) to the extent that section 53 effects that implementation. Subject to the principles of effectiveness and equivalence, if the transposing legislation was silent on the question of the form of damages recoverable, then resort to the purpose of the particular EU instrument transposed may assist in the interpretation of the transposing legislation. However, there is nothing to preclude the Member State from imposing more extensive duties, or permitting recovery of a wider range of damages than presumed by the EU instrument – if it chooses to. In those circumstances, resort to the EU instrument may not be of particular assistance. What I have found of more persuasive force is the non-incorporation into the 2005 Act of the definition of "damage" as set out in the 1974 Act, notwithstanding the incorporation into the 2005 Act of a number of other definitions from the 1974 Act.

[49] From the foregoing, it will be seen that I have determined the principal matters in dispute between the parties without recourse to Miss Shand's historical legal submission. Further, I have not had the benefit of a full submission in reply to all of the points Miss Shand makes. In any event, I have certain concerns about the completeness or correctness of the propositions that Miss Shand sought to extract from her historical legal review. . For these reasons, it is not necessary to consider the cases Mr Di Rollo identified as bearing to be inconsistent with Miss Shand's historical legal review, being *Young* v *Charles Church (Southern) Limited* (1998) 39 BMLR 146 or *Hunter* v *British Coal Crop* [1999] QB 140 , or to decide if they are well-decided decided and destructive of Miss Shand's proposition, or anomalous.

Subsidiary argument based on section 70 of the 2005 Act

[50] Finally, parties engaged in a late subsidiary argument as to the effect of section 70 of the 2005 Act, especially of section 70(2), and whether or not it excluded the extended definition of "damage" in section 47 of the 1974 Act.

[51] Section 69 of the 2005 Act provides for civil liability for breach of the duties created in Part 3 of the 2005 Act. The question at issue in this case is, civil liability for what type of damage? Miss Shand referred to section 70 , essentially for the purpose of arguing that section 70 excluded the definition of "damage" in section 47 of the Health and Safety at Work Act 1974 ("the 1974 Act") from the 2005 Act and, as a consequence, a narrower definition of "damage" applied in that context. Reference was also made to

paragraphs 3 to 8 and 77 to 79 of the Explanatory Notes to the 2005 Act. As part of this submission, Miss Shand also referred to section 61(9)(za)(iv), as modified by the CDM Regulations 2007.

[52] Miss Shand relies on section 70(1) in support of the proposition that the definition of harm in section 47 of the 1974 Act, and which includes "mental impairment", does not extend to Scotland. (Or, perhaps, to put the matter more precisely: for the purposes of Part 3 of the 2005 Act, Part 1 of the 1974 Act is disapplied in respect of fire safety concerning relevant premises.) The consequence, she said, was that the definition of damage in section 47 of the 1974 Act, which extended to "mental impairment", was excluded. If the Scottish Parliament had intended to apply the extended definition in section 47 of the 1974 Act, it could have. It did not. From that Miss Shand infers that a narrower definition of "damages" applies.

[53] Section 70 is headed "Consequential restriction of application of part 1 of [the 1974 Act]" and it provides as follows:

> "(1) Except as respects its application in relation to the aspects of fire safety set out in paragraph (b) of the sentence on interpretation in Section H2 of Part II of Schedule 5 to the Scotland Act 1998 (c. 46) (reserved matters), Part I of the Health and Safety at Work etc. Act 1974 (c. 37) ("the 1974 Act") and any regulations and orders made under it shall not apply in relation to fire safety."

[54] Subject to one exception, section 70(1) disapplies Part I of the 1974 Act (and any regulations or orders made under that) to "fire safety". The one exception concerns "process fire precautions", which is a reserved matter in terms of paragraph (b) of the sentence on interpretation in section H2 of Part I of Schedule 5 to the Scotland Act 1998. It is a matter of agreement that the activities on site on the day of the fire did not relate to process fire precautions. It follows that, so far as section 70(1) of the 2005 Act is concerned, Part II of the 1974 Act (including the definition in section 47) is disapplied to fire safety. This much was common ground between the parties.

[55] Parties were at issue as to the meaning and effect of section 70(2). It provides as follows:

> (2) Nothing in subsection (1) affects the operation of Part 1 of the 1974 Act or any such regulations or orders where an enforcing authority is also, for the purposes of that Part or, as the case may be, the regulations or order, an enforcing authority (as defined in section 18(7)(a) of the 1974 Act).

Miss Shand contended that, because the enforcers here were different, then section 70(2) reinforced her position. Mr Di Rollo resisted this, but did not particularly offer an alternative interpretation of section 70(2). It appeared to be his position either that the enforcers were the same or that section 70(20) did not have the effect that Miss Shand contended for.

[56] Having considered the parties' arguments, I am not persuaded that section 70(2) has the significance attributed to it. In my view, section 70(2) is doing no more than operating as a "savings" provision, in the sense that the 2005 Act is without prejudice to the responsibilities of the HSE (or other enforcing authority) operating under any health and safety regime. It is ensuring an appropriate demarcation between the regime created by the 2005 Act and the existing health and safety ones. It is a similar exercise of demarcation, if less involved, to that required when the 2003 Regulations amended the 1997 Regulations, described at paragraphs [17] to [28], and especially at paragraphs [28], of this Appendix.

[57] Are the enforcing authorities different as Miss Shand contends?

Enforcing authorities under the 1974 and 2005 Acts

[58] Section 18 of the 1974 Act makes provision for the authorities responsible for enforcement of the

relevant statutory provisions, the position being that in addition to the HSE a number of other bodies have responsibility for enforcing statutory duties under certain regimes introduced under the 1974 Act. Section 18(7)(a) of the 1974 Act provided the definition of enforcing authorities for the purposes of "the relevant statutory provisions" under the 1974 Act. The enforcing authority could be the HSE or any other authority made responsible for enforcement of duties under a specific regime.

[59] Turning to the 2005 Act, the definition of "enforcing authority" is, by virtue of section 79(1) of the 2005 Act, that set out in section 69(9). It is the responsibility of enforcing authorities to enforce the Chapter 1 duties in Part 3 of the 2005 Act: section 69(1). The definition of "enforcing authority" in section 61(9) has been amended from time to time. The ordering principle in section 61(9) is to define the enforcing authority by reference to the character of the "relevant premises" or by reference to the nature of the activities carried on. The position in relation to construction sites is a little involved. At the material time, the HSE were the enforcing authority in respect of "relevant premises…which are a workplace which is, or is on, a construction site (as defined in Regulation 2(1) of the [CDM Regulations] 2007]) and to which those Regulations apply (other than a construction site to which Regulation 46(1) of those Regulations apply)": section 61(9)(za)(iv) of the 2005 Act. This definition reinforces the conclusion that construction sites are, generally, within the meaning of "relevant premises" in section 78 of the 2005 Act in force at the material time.

"Relevant Premises" includes Construction Sites

[60] The definition of "relevant premises" in section 78(1) is an all-embracing one, covering "any premises" other than those excepted in section 78(2). (Parenthetically, I note, that in the 2005 Act as originally enacted, a "construction sites" was one of the type of premises excepted from the definition of "relevant premises". This may explain the omission of reference to the Construction Site Directive in the preamble to the 2005 Act. However, that part of section 78(2)(b) excluding "construction sites" was deleted by the time of the pursuer's accident.) Accordingly, by the time of the fire on the Absorber, the construction site such as that at which the pursuer was employed constituted "relevant premises" for the purposes of section 78 of the 2005 Act. The definition of the HSE as the "enforcing authority" in respect of certain types of constructions sites on relevant premises, just noted, reinforces that conclusion.

[61] The only exception from the scope of "construction sites", and in respect of which the HSE is not the enforcing authority, are construction sites to which Regulation 46(1) of the CDM Regulations 2007 applies.

[62] What is the scope of the exception from "construction sites" in section 61(9)(za)(iv) of the 2005 Act made under reference to Regulation 46(1) of the CDM Regulations 2007? Regulation 46(1) of those Regulations provides that in Scotland the enforcing authority within the meaning of section 61 of the 2005 Act shall be the enforcing authority in respect of:

> "a construction site which is contained within, or forms part of, premises which are occupied by persons other than those carrying work or any activity arising from such work as regards Regulation 39 and 40, insofar as those Regulations relate to fire, and Regulation 41".

The reference to "premises which are occupied by persons other than those carrying work …" means areas occupied by persons doing things other than construction work. In short, it means non-construction areas. So, Regulation 46(1) is directed to those situations in which there is construction work on or within part of a site, but where that work does not encompass the whole of the premises or site. In other words, the "part-construction sites" as I have termed them. This definition only applies in respect of premises to which Part 3 of the 2005 Act applies.

[63] In summary, other than for part-construction sites, the HSE are the enforcing authority for the Chapter 1 duties (in Part 3 of the 2005 Act) in respect of relevant premises which are a workplace which is, or is on, a "construction site" within the meaning of regulation 2(12) of the CDM Regulations 2007. Reading these

provisions together, the HSE is the enforcing authority in respect of "relevant premises" in Scotland that are a workplace (as defined) on or forming part of a construction site, except where the construction site is a "part-construction site", (ie one that is "contained within, or forms part of, premises which are occupied by persons other than those carrying work or any activity arising from such work"). To the extent that relevant premises are a part-construction site (within the scope of Regulation 46(1) of the CDM Regulations 2007), then the enforcing authority is not the HSE. In that case, the matter is governed by the residual category in section 61(9)(c), and the enforcing authority is the "relevant authority" in whose area the premises are situated. In short, other than for part-construction sites, the HSE are the enforcing authority for the Chapter 1 duties in part 3 of the 2005 Act in respect of relevant premises which are a workplace which is or is on a construction site within the meaning of Regulation 2(12) of the CDM 2007.

[64] This invites the question, was the Absorber a part-construction site? There was little evidence of how the construction work on Absorber 3 related to other work at, or other occupiers of, the Power Station. So far as there was evidence, it was not suggestive that the site was only a part-construction site within Regulation 46(1) of the CDM Regulations 2007. (This is borne out by the site plan, no 7/16/1 of process, showing the area under the control of the defenders.) Accordingly, I proceed on the basis that the Absorber unit was a construction site for which the HSE were the enforcing authority, and that it was not a part-construction site (for which the local fire authority would be the enforcing authority).

[65] What then of Miss Shand's contention that in the present context the enforcing authorities are different? I do not accept that this is correct. Other than for part-construction sites, the HSE are the enforcing authority of the Chapter 1 duties in Part 3 of the 2005 Act in respect of relevant premises. More importantly, in my view, it matters not whether the enforcing authority is the same; they are enforcing the separate duties arising under the respective regimes. In other words, even if the HSE is the enforcing authority under the 2005 Act in respect of construction sites, that itself does not have the effect of bringing into play, in context of the 2005 Act duties, section 47 or Part II of the 1974 Act.

[66] This is because section 47 of the 1974 Act governs the kind of damage recoverable for civil liability for breach of statutory duty of health and safety regulations. It does not govern the question of what damages are recoverable for civil liability for breach of statutory duty outwith that type of regime. In my view, therefore, section 47 itself is uninformative about the scope of civil liability for breach of statutory duties arising under other, that is non-health and safety, regimes such as that for fire safety introduced under the 2005 Act. Nor is it sufficient to identify who is the enforcing authority.

[67] The 2005 Act is the restatement and imposition of fire safety duties, as applied to "relevant premises", enacted for Scotland by the Scottish Parliament. In doing so, the 2005 Act must respect the devolution settlement and it should be construed consistent with the devolved competence. But the 2005 Act must also take account of the demarcations created in the predecessor legislation between the different regimes concerning fire safety, health and safety in the workplace and health and safety for construction sites, and which is distinct from the question of legislative competence and the character of the 2005 Act as a an act of the Scottish Parliament. That, in my view, is all that section 70 seeks to do; it is simply confirming that the 2005 Act regime is without prejudice to the operation of the distinct regimes constituting " health and safety" ones under the 1974 Act. It did not incorporate section 47 into the scheme created by the 2005 Act.

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[1] This is at 4% per annum until the date of decree

[2] This is 4 % per annum from the date of the accident until 5 May 2015 and 8% thereafter

[3] The pursuer also relies on breaches of regulation 3 of the Management of Health and Safety at Work Regulations 1999; regulation 13 (2), regulation 26, regulation 38 (a), regulation 39, regulation 40 and regulation 41 of the Construction (Design and Management) Regulations 2007

[4] See 6/1 and 6/631 and 7/63 and 7/67 – a graphic account of the incident was given by the pursuer to Pauline Boyle – a Psychotherapist – see letter dated 16 July 2009 at page 41 of 6/2 of process (the GP records)

[5] There is no distinction between psychiatric harm and physical harm see Brown v John Watson 1914 SC (HL) 44

[6] See Lord Drummond Young at paragraph [43] Rosemary Cairns v Northern Lighthouse Board and Another 2013 SLT 645

[7] Including 53 (1) and (2) and (3) including failure to take the "fire safety measures" outlined in schedule 2 and regulation 3 of the Management of Health and Safety at Work Regulations 1999 (**failure to carry out a risk assessment**); regulation 13 (2) (**failure to plan, manage and monitor construction work carried out by him or under his control in a way which ensures that, so far as is reasonably practicable, it is carried out without risks to health and safety** regulation 26 (**provision of a safe place and safe means of access and egress to and from work sofar as is reasonably practicable)** , regulation 38 (a) (**suitable and sufficient steps shall be taken to prevent, so far as is reasonably practicable risk of injury during construction work arising from fire**), regulation 39 (**Emergency Procedures**), regulation 40 (**provision of emergency routes}** and regulation 41 (**Fire Detection and Fire Fighting**) of the Construction (Design and Management) Regulations 2007

[8] R v Chargot Ltd [2009] 1 WLR AT PARAS 17 AND 18 "**The first issue is to determine the scope of the duties imposed on the employer by sections 2(1) and 3(1) . In both subsections the word "ensure" is used. What is he to ensure? The answer is that he is to ensure the health and safety at work of all his employees, and that persons not in his employment are not exposed to risks to their health and safety. These duties are expressed in general terms, as the heading to this group of sections indicates. They are designed to achieve the purposes described in section 1(1)(a) and (b) . *9 The description in section 2(2) of the matters to which the duty in section 2(1) extends does not detract from the generality of that duty. They describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words "so far as is reasonably practicable". If that result is not achieved the employer will be in breach of his statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it.**

18 This method of prescribing a statutory duty was not new. As Lord Reid explained in the opening paragraphs of his speech in *Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107* , the steps which an employer must take to promote the safety of persons working in factories, mines and other premises are prescribed by a considerable number of statutes and regulations. Sometimes the duty imposed is absolute. In such a case the step that the statutory provision prescribes must be taken, and it is no defence to say that it was impossible to achieve it because there was a latent defect or that its achievement was not reasonably practicable. In others it is qualified so that no offence is committed if it was not reasonably practicable to comply with the duty. Sometimes the form that this qualified duty takes is that the employer shall do certain things: see, for example—and there are many that could be cited— section 48(1) of the Mines and Quarries Act 1954 which provided that the manager of every mine must take such steps by way of controlling the movement of strata within the mine and supporting the roof and sides of the working place as might be necessary for keeping it secure, and regulation 11 of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) which lays down a series of measures that must be taken with regard to dangerous parts of machinery. Sometimes it is that he shall achieve or prevent a certain result. Section 29(1) of the Factories Act 1961 , which was considered in Nimmo , took that form. So too do sections 2(1) and 3(1) of the 1974 Act. It is the result that these duties prescribe, not any particular means of achieving it."

[9] See the approach of Lord MacFadyen in Hall v City of Edinburgh Council 1999SLT 744 at 748 J –L "In the result I am not satisfied that the defenders have discharged the onus incumbent on them of showing that it was not reasonably practicable to avoid the need for the pursuer to undertake a manual handling operation which involved a risk of injury. It may well be that there would have been economic or practical objections to equipping every pickup truck with an onboard hoist. It may well be that in organisational terms there would be

very great difficulty in making a forklift truck available whenever a bag of cement required to be loaded onto a pickup. There may have been difficulties in manoeuvring the conveyor into the shed where the bags were kept. Some of the methods suggested might not have eliminated manual handling completely. **None of the defenders' witnesses, however, appeared to have applied his mind in a comprehensive way to the question of how the manual handling operation on which the pursuer was engaged might have been avoided. In the absence of proper consideration having been given to the matter, and in the absence of any evidence expressed in terms of the absence of any reasonably practicable alternative, I am not prepared to hold that the random objections to individual proposals expressed in the evidence properly support the conclusion that the avoidance of the need for the pursuer to undertake the operation in question was not reasonably practicable**. I would be slow to conclude that human ingenuity could not devise a relatively simple and reasonably practicable mechanical aid to lift the bag from the pallet and convey it to the platform of the truck. The evidence led does not lead me to that conclusion."

[10] [2016] 1 WLR 597 at paragraph 89**"The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in the case of Allison v London Underground Ltd [2008] EWCA Civ 71; [2008] ICR 719. Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree."**

[11] It is important to note that by following the terms of his instruction this report [7/62] is not, and never could have been, an answer to the question, 'did the defenders do everything reasonably practicable to prevent harm to the pursuer caused by fire".

[12] No basis upon which to test whether the assessment was correct – see HSG 168 at paragraph 14 ""Ask the question "if somebody asked us to justify what we've done, could we really do it or would we just be guessing?" See also Kennedy v Cordia at paragraph 89 quoted in footnote 10 above.

[13] See photographs 31 and 37 of 6/15 of process – plainly halfway down the stairs not a safe area – these photographs taken twenty minutes of the fire starting

[14] For example the stop and alleged turn right of the 21m walkway, as seen in photo 8 of 7/62 is not represented in either figure 6 or figure 6A.

[15] No one gave any positive reliable evidence of any route other than the SE stair.. The basis for the other routes mentioned in 7/62 is unclear. When RSE attended in October 2013 there was a permanent stair on the NE side. Richardson expressed a "belief" that there was a scaffold tower on the NE side though he was not on the absorber after the fire and worked from "drawings". No one remember this route – RSE stated it not sufficient anyhow as not opposite SE. No record for it. The purported exit on NW side not put to anyone and seems not to be relied upon

[16] See section 79 of the 2005 Act which defines it as **-*"workplace"*, in relation to an employer and the employer's employees, means any relevant premises which are used for the purposes of an undertaking carried on by the employer and made available to an employee of the employer as a place of work; and includes–**

(a) any part of those premises to which an employee of the employer has access while at work;(b) any relevant premises (other than a public road)–

(i) which are a means of access to or egress from the place of work; or

(ii) where facilities are provided for use in connection with the place of work.

[17] These are measures to **reduce the risk of fire**, and the **risk of spread of fire** and measures in relation **to the means of escape,** measures for securing **that the means of escape from relevant premises can be safely and effectively used**, measures in relation to **the means of detecting fires in relevant premises and giving warning in the event of fire** and measures in relation to **the arrangements for action to be taken in the event of fire in relevant premises including the instruction and training of employees**

[18] Tab 21

[19] Tab 1

[20] Tab 48

[21] Tab 2

[22] Tab 3

[23] Tab 47

[24] That was a case concerned with the Human Fertilisation and Embryology Act 1990, not with European legislation.

[25] Tab 49.2

[26] Tab 33

[27] Tab 34.1

[28] Tab 26.1

[29] Section 78 of the **1974 Act** amended the **Fire Precautions Act 1971** and Schedule 8 related to Fire Certificates.

[30] Tab 26.1

[31] Tab 29

[32] Tab 31

[33] Tab 26.1 (as originally enacted)

[34] Tab 29 (as enacted)

[35] Tab 49.1

[36] The Preamble to the Regulations refers not only to section 2(2) of the **European Communities Act 1972** but also to sections 35, 40(8), and 43(1)(3) of the **Fire Precautions Act 1971**. Section 35 of the **1971 Act** relates to a power bestowed on the Secretary of State to apply any of the provisions of the Act to vessels and moveable structures; section 40(8) relates to the Crown; section 43(1)(3) relates to the Interpretation section of the Act.

[37] Tab 38

[38] Tab 10.

[39] Tab 39

[40] Section 15 provides that the Secretary of State shall "*have the power to make regulations under this section for any of the general purposes of this Part (and regulations so made are in this Part referred to as "health and safety regulations")*.

[41] Tab 27.2

[42] Tab 31

[43] By reason of the operation of regulation 9 of the **1999 Regulations** regulation 11 of the **1997 Regulations** read as follows:- *11. A person shall be guilty of an offence if (a) being under a requirement to do so, he fails to comply with any provision of the workplace fire precautions legislation; and (b) that failure places one or more employees at risk of death or serious injury in case of fire*."

[44] Tab 40. See in particular Preamble and articles 1 and 2.

[45] Tab 43.

[46] Tab [ ].

[47] Tab 44. "Explosive atmosphere" is defined in Article 2.

[48] [1992] 1 AC 310. Tab 7

[49] Tab 5

[50] Tab 5.1

[51] Tab 8.1

[52] Page 181 E-F.

[53] As Lord Goff of Chievely stated later in **White & Ors (Frost) v Chief Constable of South Yorkshire Police [1999] 2AC 455** @ 476 A-D this appears to be to misunderstand the egg-shell skull rule, which only applies where liability is established ("you must take your victim as you find him") and is not a principle relevant to the question of liability. That same point was made by Lord Jauncey when dissenting in **Page v Smith**, at page 176 G-H.

[54] The report of the case at first instance (Tab 8.2)shows that the parties had agreed on a series of questions which the judge was to address. The judge was not however asked whether the defendant was under a duty of care not to cause the plaintiff psychiatric injury (or indeed physical injury). The questions the judge was called upon to address were as follows:-

1. Is there a condition or disease or illness called ME, CFS or PVFS?
2. What are the principal or typical symptoms or characteristics of this condition?
3. What causes it?
4. Did the plaintiff suffer from the condition before the accident? If so, to what extent?
5. Did the road traffic accident cause or materially contribute to the condition that has prevailed since the accident?
6. If so, if he had it before, to what extent would he have suffered if there had been no accident?
7. The extent, if any, to which the plaintiff has suffered damage as a result of the accident?

(8) If his present condition is attributable to the accident, the level of compensation to which he is entitled after allowance is made for his pre-accident condition and the probable future that he would have enjoyed had there been no accident.

Even the question of foreseeability of injury was not raised by those questions. The issue of foreseeability was however canvassed before the trial judge in the following way, as can be seen from the Judgment of the trial judge:- " *Mr. Julian Priest, leading counsel for the defendants, submitted in a forceful and attractive argument that the plaintiff suffered no physical injury and therefore if the subsequent relapse was triggered by shock alone he could only recover damages if the defendant could have foreseen the consequences. Here the plaintiff should fail because it was not reasonably foreseeable that the accident of such a trivial nature would have had such a devastating effect….. I must respectfully reject that submission. First, on the issue of fact, this was not a trivial accident. Secondly, it is well established that the defendant must take the plaintiff as he finds him*." Thus (i) the trial judge misunderstood the relevance of "taking one's victim as one finds him", perceiving it to form a part of the exercise of determining liability rather than as a rule for determining the extent of the damages for which one should be found liable in the event of liability being established; and (ii) what was done was the very thing which Lord Wilberforce cautioned in **McLaughlin v O'Brian** @ page 420 G-H should not be done when he said *"[Foreseeability] is not merely an issue of fact to be left to be found as such."*

[55] See also the observations of Lord Neuberger (with which Lord Mance agreed) in **Corr v IBC Vehicles [2008] UKHL 13**, at para [54] where he said:- " *The first point concerns the somewhat controversial decision of this House in Page v Smith [1996] AC 155. As Lord Bingham has explained, neither party has criticised that decision, let alone invited the House to review it. At least for my part, I understood that was the position of the employer because, even if we had been persuaded that Page was wrongly decided, that would not have ensured the success of this appeal. I agree. Accordingly, not least in the light of the trenchant observations of Lord Goff of Chieveley in Frost v Chief Constable of South Yorkshire Police [1999] 2 AC 455 at 473D to 480F, I would not want to appear to prejudge any decision as to the correctness of the majority view in Page, if it comes to be challenged before your Lordship's House on another occasion*."

[56] Tab 4

[57] Tab 11

[58] Tab 2

[59] see page 595 F-G, and 596 C-D

[60] Tab 33 (and see paragraph 4)

[61] Tab 46. See paragraphs 47 to 51.

[62] Tab 13.1

[63] ie as submitted above the particular harm under consideration in any particular case is either within the ambit or the statutory provision under consideration or it is not. If it is within the ambit of the statute then there

is no need to "tack-on" a test of reasonable foreseeability. If it is not within the ambit of the statute as assessed before "tacking-on" or importing a test of reasonable foreseeability then it cannot be made to come within the ambit of the statute by "tacking-on" or importing such a test.

[64] See the reference in the speech of Lord Wilberforce in **McLoughlin v O'Brian** at page 421 B-H to 422 A the fact that mental injury had become more familiar and less a deterrent to recovery since the passage from Prosser on Torts, 4th edition (1971) which Lord Wilberfoce cited was written.

[65] see Tab 13.2 for Westlaw Case Analysis

[66] when civil liability for a breach of any of regulations made under the 1974 Act was excluded.

[67] Tab 32

[68] Relied on by the pursuer in these proceedings.

[69] Defined in section 53 of the **Health and Safety at Work Act 1974** as *"(a) the provisions of this Part and of any health and safety regulations….and (b) the existing statutory provisions*." "*The existing statutory provisions*" are in turn defined in section 53, and relate to Acts and regulations which preceded the passing of the 1974 Act.

[70] Thus, since the coming into force of the **Fire (Scotland) Act 2005,** regulation 3 of the **Management of Health and Safety at Work Regulations 1999** now only apply to "*the relevant statutory provisions*".

[71] Section H2 of Part II of Schedule 5 to the **Scotland Act 1998** referred to in section 70 of the 2005 Act is contained within Tab 30. The enforcing authority under Part 1 of the Health and Safety at Work Act 1974 is the Health and Safety Executive. The Health and Safety Executive are not the enforcing authority in respect of fire safety in workplaces except where the workplace forms part of a construction site which does not form part of premises occupied by persons other than those carrying out construction work. (Section 61(9)(za) and (c) and section 70 of the Fire (Scotland) Act 2005, in conjunction with section 18(7)(a) of the Health and Safety at Work Act 1974, and section 46 of the Construction Design and Management Regulations 2007.

[72] Tab 34.1

[73] "*General fire safety*" is not a term which appears in the 2005 Act but "*general fire precautions*" are defined in the **Regulatory Reform (Fire Safety) Order 2005** applicable to England and Wales in paragraph 4, where they are contrasted with fire precautions required to be taken in connection with manufacturing processes.

[74] Which is headed "Disapplication of the Health and Safety at Work Act etc 1974 in relation to general fire precautions" and provides:- *"(1) Subject to paragraph (2), the Health and Safety at Work etc. Act 1974 and any regulations made under that Act shall not apply to premises to which this Order applies, in so far as that Act or any regulations made under it relate to any matter in relation to which requirements are or could be imposed by or under this Order.*

(2) Paragraph (1) does not apply—

(a) where the enforcing authority is also the enforcing authority within the meaning of the Health and Safety at Work etc Act 1974;

(b) in relation to the Control of Major Accident Hazards Regulations 1999 [now 2015]"

[75] At which time civil liability for a breach of Regulations made under the Act was abolished.

[76] This was spoken to by the pursuer and James Stewart and Liam Richardson.

[77] known as Kennedy grating.

[78] The men who had been working at the back of the absorber on the scaffolding on the north side of the absorber who James Stewart spoke of leading down through the scaffolding would not have had ready access to the fixed walkways. The 21 metre walkway would have been under the ducts on the north and thus the north face of the absorber would have been between these scaffolders and the walkway running under the ducts. Further both the 21 metre walkway and the the 29 metre walkway – which the pursuer said was also 360 degrees – would have been above the height at which these scaffolders had been working. James Stewart's evidence was that he located these men on the north-face scaffolding at a level below the 21 metre level. The pursuer spoke of the 27 metre walkway extending only one half of the circumference of the absorber.

[79] the defenders not accepting that he was as high up as he claimed.

[80] The first time any flame is seen is in the photographs in 6/15, and Mr Di Rollo frankly admitted that he did not know when they were taken, ie how long after the pursuer was down. Mr Dickson thought that they were taken at least 20 minutes after the pursuer was brought down but was not certain.

[81] Mr James Stewart said that if it had been there he didn't know if it would have allowed him to get to ground, merely that it may have given the pursuer "another option".

[82] With the exception of the objection about deluge systems which has already been sustained

[83] Doubtless this has is because the pursuer never came to court to establish a deficiency of risk assessment. He has no pleadings that would allow him to do so, and for the avoidance of doubt the defenders insist in their objection to the pursuer being allowed to make out a case based on risk assessment.

[84] Tab 41;and see excerpt from **Munkman on Employers' Liability** at Tab 49.1.

[85] Tab 37.1

[86] See Arrangement of SI and Overview Document in relation to the 1961 Regulations in Tab 36

[87] Reference is made to paragraph 3 of the Explanatory Note to the 2007 CDM Regulations.

[88] See Arrangement of SI and Overview Document in relation to the 1996 Regulations and the 1996 Regulations themselves in Tab 37.

[89] ie persons whose claims are not based on the fact or fear of injury to another person.

[90] Tab 22.

[91] the defenders do not accept that he would have been injured if he had used the walkway to get off.

[92] at paragraphs [45] to [51] in particular paragraph [51], per Lord Mance; paragraph [107] per Lord Dyson; paragraph [136] per Lord Saville of Newdigate. Attention is also drawn to paragraph [54] in the speech of Lord Mance where he states "*On the other hand the scheme of the 1961 Act does indicate that, even though section 29(1) is to be read as indicated in Evans v Sant, it is essentially dealing with safety, rather than health. Safety typically covers accidents. Health covers longer-term and more insidious disease, infirmity or injury to well-being suffered by an employee*."

[93] Tab 16

[94] Tab 17,

[95] See also Lord Reid at page 41, "*The first question is whether this gate was an "obstruction"....*"; and Lord Guest at page 45, "*The first question is whether the piece of scrap on which the appellant caught his foot was an "obstruction" within the meaning of section 28(1)*."

[96] ie the same provision as was relied on in **Nimmo**, *supra*

[97] That issue in turn raised issues about (a) whether a workplace could be unsafe for the purposes of section 29(1) by reason not only of its physical structure but also due to the activities carried on therein; and (b) whether safety for the purposes of section 29(1) was a relative concept which had to be judged according to the general knowledge and standards of the time and by reference to what might reasonably have been foreseen by a reasonable and prudent employer.

[98] Mr Kidd (on Day 4) was asked by Counsel for the pursuer to consider the position of a fire escape going all the way round a walkway. from which someone on the north west could gain access to "a fire escape" on the south east corner by either going south and east or north and east. Mr Kidd said that was "*two routes but with the last part in common*". He re-affirmed that was his position in cross-examination (in the last question asked in cross-examination on day 7, at 14.39). Mr Sylvester Evans agreed that was a situation where there were two routes with the last part in common and that was the situation on the absorber.

[99] paragraphs [62] to [80] per Lord Mance; [108] to [125] per Lord Dyson; paragraph [136] per Lord Saville of Newdigate.

[100] para [71] per Lord Mance; para [121] per Lord Dyson; para [136] per Lord Saville of Newdigate.

[101] Lord Dyson in **Taylor v Coalite Oils and Chemicals Ltd**, approved in **Baker v Quantum Clothing Group.**

[102] Tab 6.1.

[103] Tab 23

[104] Quite the contrary see Brown v John Watson 1914 SC (HL) 44 at page 51

[105] For example see McKew v Holland & Hannen & Cubitts (Scotland) Ltd 1968 SLT 12 OH and Simmons v British Steel PLC 2004 SC (HL) 94 – cases brought at common law and breach of regulations

[106] The Fire Scotland Act 2005, The Management of Health and Safety at Work Regulations 1992 and the Construction (Design) Management regulations 2007

[107] Mere distress or anxiety or a fright is never enough see Simpson v ICI 1983 SLT 601 IH

[108] The pursuer experienced an event that involved a threat to him and his response involved intense fear, helplessness or horror - see Dr. Rodger's report at Page 8 of 6/1 of process. Dr. Mumford's report for the defender 7/63 at page 18 paragraph 7 also confirms that the pursuer's description of events satisfies the entry requirements as a psychologically traumatic event within the definition of PTSD DSM-IV 309.81

[109] See Page v Smith [1996] A.C. 155 (Tab 8) Even the dissenting Lords of Appeal would have held in the circumstances in this case that it was foreseeable that the pursuer (who was in fear of his life) would suffer a psychiatric injury see Lord Janucey at 179E -180F and Lord Keith 169F -170B. The majority decision in Page v Smith was approved by Lord Hoffman in Rothwell (Tab 11) at paragraph 32 of his speech – applying his reasoning to this case then a foreseeable event such as a fire and an inability to escape is such that might cause physical injury or psychiatric injury or both. Where such an event in fact happened and caused psychiatric injury it is unnecessary to ask whether it was foreseeable that what actually happened would have that consequence. Either form of injury is recoverable. It is submitted that it is irrelevant that the ground of action is statutory

[110] As distinct from the plaintiff in Hegarty who in order to bring himself within the terms of the statute had to show that it was likely that he would be injured by the explosion. On the evidence and under reference to the specific terms of the statutory provision it was held in Hegarty that it was not likely that the plaintiff's health and safety was in any danger in the circumstances.

[111] See Young v Charles Church (Southern) Ltd (Tab13); See also the consolidated appeals McFarlane v Wilkinson and Hegarty v EE Caledonia [1997] PNLR 578 (Tab2). In the latter case breach of statutory duty was treated in exactly the same way as breach of common law duty – at common law the plaintiff had to show that the breach gave rise to a foreseeable risk of injury **to him -** in the case of breach of statutory duty the plaintiff had to show that the statutory duty was in respect of **his** safety – not someone else (see at 596 B –F).

[112] c.f. Lord Drummond Young in Cairns v Northern Lighthouse Board at paragraph 43 "Nevertheless, it seems to be standard practice to plead a common law case. "In part, this may reflect the fact that traditional legal thought in this country tends to focus on negligence as the basis of delictual liability, and thus assumes that employers' liability should be based on some kind of fault. That is not, however, a proper analysis of legislation based on strict liability." This point is reinforced by consideration of McFarlane v EE Caledonia Ltd [1994] 2 ALL ER 1 where the statutory duty was not pled by experienced and able counsel. A case was brought against them in professional negligence for not pleading a statutory duty. Counsel was exonerated inter alia because the result of the case would have been the same with or without the statutory duty

[113] See at 155H – 156B and 163D

[114] See Scottish Law Commission Discussion Paper No 120 "Discussion Paper on Damages for Psychiatric Injury - at paragraph 3.21

[115] Reports of the quantum awards ate to be found in McEwan & Paton on Damages for Personal Injuries in Scotland (2nd Edition 1989) at paragraphs CN28A-01 to CN28A-23 at pages 584/1 to 584/5

[116] See Lord Hoffman in Rothwell (Tab 11) at paragraph 33.

[117] See Page v Smith [1996] AC 155 – Lord Browne-Wilkinson at 182H – 183C and Lord Lloyd of Berwick at 187G – 188F

[118] Regulation 3 of the Management of Health and Safety at Work Regulations 1999 and Construction (Design and Management) Regulations 2007 Regulations 13(2) 26; 38 (a); 39; 40 and 41

[119] The Interpretation Act section 11 can be found at Volume 1 of the Parliament House Book Division B page 122/2

[120] The OED (second edition) (1989) defines "safety" as *"The state of being safe; exemption from hurt or injury; freedom from danger"* and 'harm" as "1. a. Evil (physical **or otherwise** (emphasis added) as done to or suffered by some person or thing ; hurt, injury, damage, mischief. – 2. Grief, sorrow, pain, trouble, distress, affliction"

[121] See Bennion on Statutory Interpretation (Sixth Edition) (2013) at page 522 "*Abandonment of a definition* Sometimes a term is given a definition which is omitted in later legislation within the same field. Here it is assumed, unless the contrary intention appears, that the definition is intended to continue to apply"

[122] For example Simmons v British Steel PLC 2004 SC (HL) 94 see paragraph 32 of the speech of Lord Rodger of Earlsferry at page 103. Simmons' case was at common law and under breach of regulations.

[123] Donaldson v Hays Distribution Services Ltd 2005 SC 523 Tab 3

[124] The Fire Scotland Act 2005 and its antecedents or the 1999 or 2007 regulations or their antecedents

[125] Cross v Highland and Islands Enterprise 2001 SLT 1060 (tab 10)

[126] See Hatton v Sutherland [2002] ICR 613

[127] The Management of Health and Safety at Work Regulations 1992

[128] The Management of Health and Safety at Work Regulations 1999 (civil liability does **now**

[129] In this context Lord Carloway said at paragraph [122] "There is, in short, no reason why the general principle relative to the avoidance of the risk of injury should become restricted to physical injury. In that regard I do not find it at all surprising that successive and eminent counsel for defenders in three jurisdictions have not attempted to pursue any argument to the contrary. The absence of such an argument in those cases cannot be viewed as a strong point from which the principles accepted in these cases can be criticised. Rather it is illustrative of the general understanding of the law by members of the legal profession."

[130] Regulation 4 of the Provision and Use of Work Equipment Regulations provides that every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided, and sub-paragraph (4) provides that "suitable" in this context means "suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person".

[131] At pages 37 to 41 of document "DOW v AMEC – WRITTEN SKELETON SUBMISSIONS FOR THE DEFENDERS". (Copy of case is in Tab 13)

[132] All things are possible or "potential". The phrase "within the area of potential danger of physical injury has no recognized or universal meaning in law.

[133] Being the test, or a variation of it, introduced for the first time by the controversial case of Page v Smith. Before that case the only test for recovery of pure psychiatric injury was foreseeability of psychiatric injury, not physical injury, and moreover foreseeability was to be judged ex post facto in light of all that had happened.

[134] For the avoidance of doubt the defenders dispute that the pursuer has established that the psychiatric injury he sustained was a reasonably foreseeable consequence of the events upon which he founds. Reference is

made to pages 3 to 16 and 34 to 41 in particular of the document "Supplementary Submissions for the Defenders (22/3/16).

[135] Tab 4

[136] Tab 8

[137] The article by Trindade is at Tab 50.

[138] "Hypothetical" because the pursuer has no pleadings for case of negligence.

[139] Tab 13

[140] Regulation 44 (2) of the Construction (General Provisions) Regulations was the regulation in issue in Young v Charles Church (Southern) Ltd.

[141] Tab 1 of Defenders' Supplementary List of Authorities folder.

[142] Tab 2 of Defenders' Supplementary List of Authorities folder.

[143] The reference to his being involved "mediately" was taken from the speech of Lord Oliver of Aylmerton in Alcock v Chief Constable where Lord Oliver divided cases of liability for what was then called "nervous shock" into, broadly, two categories.." that is to say, those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others." As Lord Goff of Chievely pointed out in White and Others (Frost) v Chief Constable at [1999] 2 AC 455 page 472, F-G it requires to be stressed that although he referred – for the first time – to victims in the first category as "primary" victims he did not attempt any definition of this category.

[144] Copy Article to be inserted in Tab 8 of Defenders' Supplementary List of Authorities folder.

[145] [2006] NICA 17. Tab 3 in Defenders' Supplementary List of Authorities for the Defenders folder.

[146] "Damages – personal injury – employers liability", J.P.I. Law 2007, 1, C57-59. Tab 4 in Defenders' Supplementary List of Authorities for the Defenders folder.

[147] Section 61 as it stood before amendment by the Police and Fire Reform (Scotland) Act 2012 is contained within Tab 34, where it is numbered 34.3.

[148] A plan of the site in 6/538 at Appendix A was spoken to by Mr Hugh Pollock.

[149] Tab 5 of the Defenders' Supplementary List of Authorities folder.

[150] Tab 6 of the Defenders' Supplementary List of Authorities folder.

[151] by section 69

[152] "Personal injury" in turn is defined in section 45 of the Consumer Protection Act 1987 as including "any disease and any other impairment of a person's physical or mental condition"