EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 83
PD982/09

Lady Paton

Lord Drummond Young

Lord Wheatley

OPINION OF LADY PATON

in the cause

RUTH MARGARET MACDONALD

Pursuer and reclaimer;

against

ABERDEENSHIRE COUNCIL

Defenders and respondents:

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Pursuer and reclaimer: Ellis QC, J McCall; Lawford Kidd

Defenders and respondents: Milligan QC, Sheldon; Ledingham Chalmers

18 October 2013

Collision at a country crossroads

[1] At about 5.30 pm on 8 May 2006, the pursuer was travelling west from Turriff to Inverness. She was driving along a Class C country road known as C2L. There was a crossroads where the C2L road crossed over the A97 Banff to Aberchirder Road (a Class A road with single carriageways in each direction). As the pursuer drove through the crossroads at about 30 miles per hour, she came into the path of a van travelling north on the A97. A collision occurred. The pursuer was injured, and her passengers were killed. The pursuer subsequently raised an action for damages against the defenders as the roads authority with responsibility for the junction. The defenders challenge the relevancy of the pursuer's pleadings, and seek dismissal of the action.

The Roads (Scotland) Act 1984

[2] Section 1(1) of the Roads (Scotland) Act 1984 provides *inter alia*:

"... a local roads authority shall manage and maintain all such roads in their area ... and for the purposes of such management and maintenance (and without prejudice to this subsection's generality) they shall, subject to the provisions of this Act, have power to reconstruct, alter, widen, improve or renew any such road or to determine the means by which the public right of passage over it, or over any part of it, may be exercised."

The claim against the defenders

[3] The defenders were the local authority with responsibility for the A97 and the C2L. In her summons, the pursuer avers that the defenders had painted white lines along the

centre of the A97, although there was a gap in the lines at the crossroads with C2L. The middle-of-the road white lines indicated to drivers on the A97 that they had priority over side roads. The defenders had also painted double white lines and a white triangle across the C2L at its junction with the A97. They had placed a "Give Way" sign on the C2L, just to the left of the junction.

[4] In Statement 4 of her summons, the pursuer avers:

"There were no signs giving sufficient advance warning of the presence of the junction with the A97 road. There had been road markings, double white lines and a white triangle, marked on the road by the defenders, but they had been 'scrubbed' by traffic passing over them over a period of time. All that remained were lines at the extreme ends of the mouth of the junction. There were no lines in the centre of the road in the path of the pursuer. As a result, the road markings did not give a clear and effective warning of the approaching junction, and the need to give way. There was a Give Way sign erected, but it was offset to the left and at [an] angle, and not obvious to road-users approaching said junction. It was not visible at all until the pursuer was less than 40 metres from the junction. The form of the junction was only apparent for a road-user until about 10 to 15 metres before the junction with the A97 and in any event no feature identified the priority of the junction to the pursuer in contrast with the obvious priority to those driving towards said junction on the said A97 ... a warning of the junction ought to have been given at [at least 60 metres]. The publication 'Well maintained Highways - Code of Practice for Highway Maintenance' published in 2005 and 'Delivering Best Value in Highway Maintenance' published in 2001 supported, endorsed and recommended by the Convention of Scottish Local Authorities are the principal guidance for local authorities. In terms thereof said roads ought to have been inspected monthly. The said Code identifies that road markings that are missing, misleading or badly worn create a serious risk to road-users that should be rectified within 24 hours. Perth and Kinross Council consider worn Stop or Give Way markings are defects which warrant rectification within 24 hours. The defenders inspected road markings monthly but took no steps to renew the road markings. They did not do so within 24 hours."

[5] Further averments at page 11B-E refer to the defenders' inspection of the crossroads in March 2006, as a result of which an open works order had been issued indicating that certain repair works were necessary and instructing that certain road markings be re-lined. A further inspection of the crossroads in April 2006 recorded its condition as satisfactory on the basis that it had previously been identified as requiring repainting. As the pursuer avers at page 12B-C:

"... Given the condition of the markings at said junction as hereinbefore condescended upon, the pursuer believes and avers that the open works order included re-lining of road markings at the said junction ... Within days of the accident, the defenders arranged for road markings at the junction to be re-lined and in about June 2006 erected a Give Way warning sign in advance of the junction. The renewal of said Give Way markings was carried out on 10th May 2006 ... The work cost £150. A Give Way sign and plate which read 'GIVE WAY 70 yards AHEAD' was erected by 15th June 2006 ... This work cost £300. These steps ought to have been taken prior to said accident ..."

[6] The pursuer avers at page 7B that she was not familiar with the roads. Her position was that the form of the junction was only apparent at about 10 to 15 metres before the junction (page 9B-C). She did not have clear and effective warning of the approaching junction or of the need to give way (page 9A-B). She accordingly drove through the junction without slowing down or stopping. The van-driver, for his part, understood from the lines painted in the middle of the A97 that he had right of way. Accordingly he did not slow down at the junction.

[7] In Statement 6 of the summons, the pursuer avers:

"**STAT 6.** The said accident was caused by the fault and negligence of the defenders at common law. The defenders created a danger to road users of said roads. They managed the said roads and had decided and marked them so that drivers on the A97 were given priority at the said junction and they accordingly placed appropriate markings on the road. Drivers on the said roads had a reasonable expectation that junctions on said roads would be marked. The defenders had a duty to devise institute and maintain an effective system of management of the roads for which they were responsible. They had a duty to take reasonable care to devise institute and maintain a reasonable system of installation, inspection and repair of the road signs and markings at said junction. The defenders failed to maintain said road markings for drivers driving on the C2L towards the junction. They failed to repaint said Give Way markings on the road within 24 hours of knowing of their said condition. They had a duty to take reasonable care to act in terms of their policy and take immediate action. They had a duty to take reasonable care to carry out said steps prior to 8th May 2008. It would have been reasonably practicable for them to do so. They failed to adequately warn motorists of the existence of said junction. They failed to erect a Give Way sign 60 metres prior to said junction. It was reasonably foreseeable that if motorists on the C2L did not give way at said junction an accident could occur as in fact happened. The defenders averments in answer are denied except in so far as coinciding herewith."

[8] The defenders sought a debate, which took place before Lord Uist. They argued that the action should be dismissed, as there was no duty of care owed to the pursuer by the defenders. The Lord Ordinary ultimately concluded that:

" ... the defenders were not under the duty of care averred to the pursuer or her mother [one of the passengers] and the action is fundamentally irrelevant."

By interlocutor dated 14 June 2012, he dismissed the action. The pursuer reclaimed. The defenders cross-appealed, submitting that the Lord Ordinary had erred in rejecting their argument that the summons was irrelevant and lacking in specification.

Submissions for the pursuer

[9] Senior counsel for the pursuer submitted that the Lord Ordinary had dismissed the action as fundamentally irrelevant because the duty of care averred by the pursuer did not exist. Two arguments were advanced in reply:

[10] First, in contrast with English law, the common law of Scotland recognised a broad duty resting on roads authorities to take reasonable care to keep roads in their area safe for road-users. That duty covered the present case. As Lord Reed had observed in *Rainford* v *Aberdeenshire Council* 2007 Rep LR 126 at paragraphs [50] and [52], it was not unknown for there to be differences between Scots law and English law.

[11] Secondly, even if the duty of care was narrower, and even if issues of misfeasance or non-feasance were relevant, it could not be said, without inquiry into the facts, that the pursuer would inevitably fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44 at page 50; *Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20, at page 33).

Broad duty of care at common law

[12] The pursuer did not rely upon a duty to remedy the defects within 24 hours (despite an averment to that effect on record). The pursuer's position was that the appropriate road signs should have been put in place at some time prior to the accident. As for the lines painted on the road: the road was inspected monthly; there was a works order dated 1 April 2006 from which one could infer a requisitioning of the re-painting of the lines (page 12B-D of the reclaiming print). The pursuer's case was not based upon her having previously travelled through the junction relying upon the lines and signs (contrast with *Bird* v *Pearce* [1979] RTR 369). Rather she founded upon reliance by the A97 driver on the system of road-marking: so far as he was concerned, his right of way was secured, and he did not have to slow down or take particular care at the junction. Thus the pursuer relied upon the defenders' awareness of a danger against the background of a

general duty of care owed to road-users. *Gibson* v *Orr* 1999 SC 420 (pages 421, 429H, and 432-3) and *Burnett* v *Grampian Fire and Rescue Services* 2007 SLT 61 at paragraphs [33] to [36] concerned different facts and circumstances, but were nevertheless useful illustrations of the duties imposed upon public authorities even where the authorities had not created the danger. There was no need to examine whether what had occurred was an "act" or "omission". But in any event, Scottish courts were more willing than English courts to find liability on the part of local authorities, even where there had been non-feasance.

[13] In support of the broad duty of care owed to road-users by roads authorities in the common law of Scotland, senior counsel referred to *Innes* v *Magistrates of Edinburgh* (1798) Mor 13189 (magistrates liable for a pit dug in the road by university trustees); *McFee* v *Police Commissioners of Broughty Ferry* (1890) 17R 764 (commissioners liable in relation to a low bridge); *McKnight* v *Clydeside Buses Ltd* 1999 SLT 1167 (unnecessary to analyse *Stovin* v *Wise* [1996] AC 923 or *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, as the principle of a duty of care on the part of the roads authority was well-established); *Brierley* v *Midlothian County Council* 1920 SLT 80 (fallen tree); *Cameron* v *Inverness-shire County Council* 1935 SC 493 (snow and ice); *Rush* v *Glasgow Corporation* 1947 SC 580 (manhole cover in disrepair); and *Smith* v *Middleton* 1971 SLT (Notes) 65 (defects in road design and construction). The common touch-stone was the existence of a danger on the road.

[14] *Caparo Industries plc* was a tool to determine whether, in novel circumstances, a duty of care existed: *Caparo* was thus of less relevance if there was a well-established body of law supporting the existence of a duty of care. *Caparo* was not to be used as a tool to cut down duties which had already been found to exist. Thus it was not necessary to have regard to the tripartite test set out by Lord Bridge at page 618C. *Esto* it was relevant to analyse the existing duty in terms of the tripartite test, that test was satisfied in the present case. The necessary "proximity" arose from the relationship between the roads authority and the road-users; and it had long been regarded as "fair, just and reasonable" in Scotland that the roads authority should take reasonable care for the safety of road-users in relation to dangers arising from the state of the roads - although that proposition in those precise terms had perhaps only been clearly articulated in 1990. If a system of priority by lines and signs had been introduced by a roads authority, there was no reason in principle why the roads authority's duty of care should not extend to these lines and signs.

[15] Thus whether properly classified as "omission" or "commission", the pursuer's contention was that the common law imposed a duty of sufficient width to cover the circumstances in the present case.

Esto classification as "omission" or "commission" was relevant
[16] Even if the "omission/commission" classification were relevant, the present case should not be regarded as a simple omission, as the roads authority had introduced a system of priority at the junction. The A97 had been given priority over other roads crossing it. Missing signs or faded lines therefore resulted in a more dangerous situation than would have been the case if no system of priority had been introduced. The facts in the present case were not dissimilar from those in *Bird* v *Pearce*, although what was relied upon in this case was not the pursuer's familiarity with the junction and the priority system introduced by the defenders, but rather the fact that the mid-road lines on the A97 indicated to drivers on that road that they had priority. Thus even if the "omission/commission" classification was relevant, the situation in the present case was not easily classified as pure omission. By *inter alia* introducing a system of priority, the defenders had had an involvement: cf *Gibson* v *Orr,* and *Burnett* v *Grampian Fire and Rescue Services.*

Cases unfavourable to the pursuer
[17] *Murray* v *Nicholls* 1983 SLT 194 formed the basis of the Lord Ordinary's dismissal of the present action. But there were three reasons to ignore that case. First, the decision did not rule out the possibility of liability on the part of the roads authority in cases such as the present. Secondly, there had not been a full citation of authority. Cases such as *Innes* v *Magistrates of Edinburgh* and *McFee* v *Police Commissioners of Broughty Ferry* had not been drawn to the court's attention. Thirdly, *Murray* v *Nicholls* was distinguishable on its facts: there were no averments about reliance by the driver on the main road on signs or indications that he had right of way, or about the defenders' knowledge of the lack of white lines or the existence of any serious

defect. Any "flood-gates" argument was met by control factors such as the foreseeability of harm, and the duty to take "reasonable" care (well-illustrated in cases concerning the scope of the duty when dealing with snow and ice).

[18] *Murray* v *Nicholls* had admittedly been referred to with approval by Lord Rodger of Earlsferry in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at page 1081 *et seq*. But *Murray* had not in fact been cited to Lord Rodger, nor had it been discussed during submissions; the *dicta* were *obiter; Gorringe* concerned the law in England, where there was no background of a long-acknowledged duty of care imposed upon roads authorities; and in any event, the present case was not a pure "omission" in the sense used by Lord Hoffman in *Stovin* v *Wise* [1996] AC 923*,* as the defenders had instituted a system of priority which effected a major change at the cross-roads. The duty of care in the present case arose not simply "because" of the statutory power to paint lines on the road, but rather because of the common law duty on the roads authority to take reasonable care for road-users.

[19] As for cases relating to snow and ice: *Goodes* v *East Sussex County Council* [2000] AC 1356 concerned the true construction of the English statute, the Highways Act 1980, and the court did not go beyond the statute. In *Syme* v *Scottish Borders Council* 2003 SLT 601 there were no relevant averments of a common law case of negligence. In *Macdonald* v *Scottish Ministers* 2004 RepLR 16, the existence of a common law duty of care in Scots law was not questioned.

[20] Finally, senior counsel drew attention to *Morton* v *West Lothian Council* 2006 RepLR 7 where Lord Glennie, in paragraph [64], questioned whether it was correct to concede that a roads authority owed a duty of care at common law to road-users.

The content of the duty of care
[21] In relation to the scope and extent of the duty of care, senior counsel submitted that the present case was very different from cases involving snow and ice. The latter were concerned with transient problems, where clear specification was required to say why snow and ice had to be treated within a particular time. By contrast, the present case did not involve a transient problem. The pursuer relied upon (i) the passage of time between March 2006 and 8 May 2006 (pages 11 and 23B of the reclaiming print); (ii) the Code of Practice for Highway Maintenance Management (page 18D-E of the print), which recommended that the defect be dealt with within 24 hours. An inference of negligence could be drawn from the facts and from the Code of Practice. Senior counsel reiterated that, while reference had been made to the Manual for Perth and Kinross ("rectify obliterated white lines within 24 hours") the pursuer did not base her argument on that Manual, or on rectification within a period of 24 hours.

The cross-appeal: greater specification in the pleadings
[22] This was an action raised under chapter 43 of the Rules of Court. If the defenders required further specification, there was a mechanism in the rules whereby that could be requested, and if necessary the case put out for a by order hearing on that matter. But on the basis of the new approach to abbreviated pleadings, there was enough on record to give rise to an inference of negligence.

Conclusion
[23] The court was invited to recall the Lord Ordinary's interlocutor of 14 June 2012, and to allow a proof under chapter 43.

Submissions for the defenders

[24] Senior counsel invited the court to refuse the reclaiming motion, and to adhere to the interlocutor of the Lord Ordinary. The defenders had six core propositions:

1. The law relating to the distinction between acts and omissions by local authorities in the exercise of their statutory powers and duties was the same in both England and Scotland.

2. In both England and Scotland, there was a duty imposed on roads authorities to maintain the fabric of the road surface. In Scotland, that was a matter of common law. In England, it was a statutory duty in terms of the Highways Acts.

3. In both England and Scotland, there was a common law duty on roads authorities not to create hazards on or near or above the highway. That duty extended to anyone who created a hazard on the highway, and was not limited to roads authorities.

4. In Scotland, there might be a duty to clear the road of snow and ice (although the defenders did not concede that such a duty existed). If there were such a duty in Scotland, that could be justified by the different meteorological conditions north of the border. Otherwise there was no difference between Scots and English law in the context of duties owed by roads authorities.

5. While in the past the courts had been prepared to infer common law duties from the existence of statutory powers given to roads authorities, it was now recognised (in both England and Scotland) that to do so was incorrect.

6. Older cases in which the courts had been prepared to infer such duties (often following a concession by the defenders) could readily be distinguished on the basis that (i) the legal reasoning was flawed; (ii) they related to different statutes which no longer applied; and (iii) the underlying factual matrix had changed.

[25] Senior counsel submitted that the law did not impose a duty of care upon a local authority in respect of a pure omission (*Stovin* v *Wise* at pages 929H to 934D; 943E to 946G; *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21 at paragraphs [39] to [40]). Where the local authority had not actually created the risk (as here), there was in general no duty to remove it or to warn of it. Nor could a duty to use powers be inferred from the statute granting the local authority the powers, although if the powers were used to create a danger, they would be liable for that danger (*Stovin* v *Wise* pages 946 to 958; *Gorringe* v *Calderdale Metropolitan Borough Council,* paragraphs [17] to [36] and [76]). Both in English and Scots law, in the absence of previous reliance by the road-user, or special risk at a junction, there was no duty of care to repaint faded road markings or to place warning signs: *Murray* v *Nichols*; *Gorringe* v *Calderdale Metropolitan Borough Council.* Foreseeability of injury was not enough: there also had to be a sufficient degree of proximity between the parties (*Mitchell* v *Glasgow City Council* paragraphs [15] to [16]); but in the present case the averments did not disclose a sufficient degree of proximity. The defenders had not "actively involved themselves" in the situation at the road junction. They had not undertaken roadworks; created a "trap"; or performed an action such as to assume responsibility for the road junction (contrast with *Gibson* v *Orr* 1999 SC 420). The statutory provisions and guidance documents did not give rise to a duty of care, nor give rise to the necessary degree of proximity. They conferred on the local authority a wide range of discretion. Furthermore, it would not be fair, just and reasonable to impose such a duty on the roads authority (*Caparo Industries plc*; *Mitchell* v *Glasgow City Council* paragraphs [15] and [26]). If the principles articulated in *Caparo* had been applied in *Bird* v *Pearce,* the result would have been different for the reasons given by Lord Rodger in paragraph 93 of *Gorringe.* The imposition of a duty of care in the present case would expose roads authorities to a very broad liability. These authorities would be liable immediately to repaint road markings at every road junction in their jurisdiction, no matter how remote or infrequently used, and regardless of any particular indication that the junction was dangerous (for example, the occurrence of previous accidents at the location). In any event, drivers should proceed on the basis that any road might have hazardous bends, intersections and junctions (*Sandhar* v *Department of Transport* [2005] 1 WLR 1632 at paragraphs 43 and 59): they should not rely on the presence of road signs or markings. Those injured by negligent driving could claim against the negligent driver, who would be covered by an insurer or the Motor Insurers' Bureau. Neither Scottish nor English authority supported the imposition of such a duty on the defenders (*Murray* v *Nicholls,* a case directly in point, supported by Lord Rodger in *Gorringe*). *Bird* v *Pearce* was correctly distinguished by the Lord Ordinary, as the defenders in that case had "actively involved themselves in the situation" and had created a "trap" for motorists. However if the true ratio of *Bird* v *Pearce* was that the defenders had a duty to maintain road markings once they had put such markings in place, the case was

wrongly decided for the reasons given by the Lord Ordinary. In any event, the pursuer in the present case was not familiar with the roads, in contrast with the situation in *Bird* v *Pearce.*

[26] The line of authority beginning with *Innes* and *McFee* (referred to in paragraph [13] above) should be treated with extreme caution. Those cases pre-dated the cases in the House of Lords and the Supreme Court where the powers and duties of local authorities were analysed. They suggested that duties arose from the existence of statutory powers, contrary to the analysis in *Stovin* and *Gorringe.* They could not be taken to vouch the very wide common law duty of care suggested by the pursuer (see Lord Reed in *Rainford* v *Aberdeenshire Council* 2007 Rep LR 126 at paragraphs [50] to [52]; Lord Glennie in *Morton* v *West Lothian Council* at paragraphs [64] to [67]; and Lord Clarke in *Syme* v *Scottish Borders Council* at page 609G-I). Insofar as those cases appeared to establish anything more than the proposition that the local authority is under a duty to repair the fabric of the highway or remove hazards that they have created, they no longer reflected the correct position in law as currently analysed.

[27] *McKnight* v *Clydeside Buses Ltd* 1999 SLT 1167 preceded *Gorringe,* and *Murray* v *Nicholls* appeared not to have been cited. *McKnight* was also distinguishable on its facts, as the roads authority in that case was aware that there had been a series of previous accidents at the locus. If the decision sought to derive a common law duty of care from the existence of a statutory power, it was wrongly decided. If the decision proceeded on the basis that a roads authority had a duty to remedy foreseeable dangers on the highway, it was too widely stated. *Brierley* v *Midlothian County Council* was not helpful to the pursuer: although Lord Anderson stated the duty very widely, he attempted to give it content by reference to "manifest and constant" dangers (page 82, column 1). In any event the decision was overturned by the Inner House (1921 1 SLT 192). *Cameron v Inverness County Council* 1935 SC 493 was framed as a breach of statutory duty (page 495) and although the Inner House considered it in terms of negligence (page 498) there was no analysis such as that set out in *Stovin* or *Gorringe*; also the court recognised the wide discretion afforded to local authorities and imposed only a narrow duty (pages 497 to 498). In *Rush* v *Glasgow Corporation* 1947 SC 580 counsel made a concession that a power implied a duty of reasonable inspection: such a concession would not currently be made. In *Smith* v *Middleton* 1971 SLT (Notes) 65, at page 66, the law of Scotland was recognised as being the same as the law of England, and a wide degree of discretion was attributed to local authorities.

[28] Senior counsel further submitted that decisions such as *Gibson* v *Orr, Burnett* v *Grampian Fire and Rescue Services,* and *Aitken* v *Scottish Ambulance Service* (2011) SLT 822 were not analogous to the present case. The defenders in those cases took actions which brought them into a relationship of proximity with the pursuers. They assumed responsibility for the safety of the pursuers or their property, or at least took actions which brought them within the scope of a duty of care owed to the particular pursuers in those cases.

[29] Finally, it was pointed out that if the duty of care at common law was as wide as the pursuer suggested, it would not be necessary for section 34 of the Roads (Scotland) Act 1984 to provide specifically for a duty to prevent snow and ice "endangering the safe passage of pedestrians and vehicles over public roads" (cf *Goodes* at pages 1370E to 1371A; Lord Reed in *Rainford*).

The cross-appeal: greater specification in the pleadings

[30] There were no averments (i) that the location was known to be particularly dangerous, for example, because of a history of similar accidents; (ii) that the defenders had created a specific danger at the location; (iii) that the pursuer had become reliant upon the presence of road markings at the junction; (iv) that the defenders knew or ought to have known that the "Give Way" sign in its current location was not obvious to road-users. Nor were there any averments as to the content of any duties incumbent on the defenders. There were no averments as to when road markings ought to have been painted, or the "Give Way" sign re-positioned or added to. The references to the practice of Perth and Kinross Council were irrelevant in the absence of averments that Perth and Kinross Council did in fact rectify defects within 24 hours; that their practice was commonly adopted elsewhere in Scotland; and that it would have been reasonably practicable for the defenders to adopt such a practice. There were no averments as to where the "Give Way" sign ought to be positioned, nor when it ought to have been positioned there. Precise averments were required when

attacking the exercise of a local authority's discretion. These averments were necessary even under chapter 43 rules. The action was irrelevant and lacking in specification, and the Lord Ordinary should have dismissed it for that reason also.

Discussion

The reclaiming motion

[31] The defenders have responsibility for the management, maintenance and repair of the roads in question: section 1 of the Roads (Scotland) Act 1984 (quoted in paragraph [2] above). They thus have the right and power to maintain and repair them. In particular they have the right and power to re-paint the lines on the road surface at the junction and to re-position (or add further) roadway signs.

[32] The issues arising in the present case are, in my opinion:

1. Whether in the circumstances the defenders owed the pursuer a common law duty of care to re-paint the lines, re-position and/or add to the road signs, or to indicate in some other or additional way the proximity of a crossroads where the pursuer should give way.

2. If so, the nature and extent of that duty.

3. Whether the course of action adopted by the defenders in the particular circumstances of the case amounted to a breach of that duty.

1. Whether the defenders owed the pursuer a common law duty of care to re-paint the lines, re-position and/or add to the road signs, or to indicate in some other or additional way the proximity of a crossroads where the pursuer should give way

[33] As Lord Stott stated in *Murray* v *Nicholls* 1983 SLT 194 at page 195 (first column):

" ... I am not prepared to hold that the power given to a local authority to mark white lines on the roadway and erect warning signs implies a duty to do so at every crossing in a built-up area where there is a considerable volume of traffic ..."

I agree. Lord Stott was referring to crossroads in built-up areas, but his observations are equally apposite, in my view, to country crossroads such as that formed by the A97 and the C2L. The power conferred does not, in itself, impose any duty upon the defenders. Whether or not a duty is imposed will depend on the facts of each case. As Saville LJ observed in *Marc Riche & Co* v *Bishop Rock Marine Co Ltd* [1994] 1 WLR 1071 at page 1077:

" ... whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course ... these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed ... Again in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. *In the end whether the law does impose a duty in any particular circumstances depends upon those circumstances* ... [emphasis added]"

[34] Lord Steyn, in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 observed at page 1059E:

"No single decision is capable of providing a comprehensive analysis. *It is a subject on which an intense focus on the particular facts and on the particular statutory background seen in the context of our social welfare state is necessary.* On the one hand the courts must not contribute to the creation of a society bent on litigation which is premised on the illusion that for every misfortune there is a remedy. On the other hand there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice ... [emphasis added]"

[35] Clearly a roadway may present a variety of situations ranging from the irritating and inconvenient to the extremely dangerous. Traffic lights may fail; a tree may have fallen onto the road; a road surface may collapse, leaving a deep crater or sink-hole; a lorry may break down and block the carriageway; a bridge may have been constructed with a very low clearance; snow or ice may form on the road surface, making it treacherous. Whether or not a common law duty of care is, in the circumstances, owed to road-users by the roads authority will depend upon statutory provisions (for example, section 34 relating to ice and snow) and/or the particular factual circumstances of the case: cf Lord Browne-Wilkinson in *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633 at page 739C:

" .. the question whether there is such a common law duty, and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done."

I accept that, in Scots law (if not in English law), a consideration of these matters may result in the imposition of a common law duty of care owed to a road-user by the roads authority: cf *McFee* v *Police Commissioners of Broughty Ferry* (1890) 17R 764, *Smith* v *Middleton* 1971 SLT (Notes) 65, *McKnight* v *Clydeside Buses Ltd* 1999 SLT 1167*, Mitchell* v *Glasgow City Council* 2009 SC (HL) 21 at paragraph [25], and *Gibson* v *Orr* 2009 SC 420, Lord Hamilton at page 435C:

" ... The functions ... of roads authorities in respect of the management and maintenance of public roads are laid down, commonly by statute, in similar 'public' terms. However it has never, so far as I am aware, been doubted in Scotland that as regards operational matters, a duty of care is owed by such authorities and their servants to road-users - a duty not directly under the statute but a duty arising out of the relationship between those authorities and road-users created by the control vested by statute in the former over the public roads in their charge ..."

[36] Thus, for example, if a section of a country road were to collapse, leaving a large crater or sink-hole, and if that hazard was drawn to the attention of the roads authority, Scots law would, in my opinion, impose upon the roads authority a common law duty of care owed to users of that country road. That consequence would be in keeping with Scots common law as it has developed (cf the *dicta* of Lord Hamilton in *Gibson* v *Orr* at page 435C, quoted in paragraph [35] above) and would follow from the application of tests such as reasonable foreseeability of harm, proximity of relationship, and what would be fair, just and reasonable.

[37] As for the question of "omission" and "commission" (or misfeasance and non-feasance): as was pointed out by Lord Hamilton at page 435H of *Gibson* v *Orr*:

" ... where a relationship does pre-exist, whether with an individual or with a limited group of persons, the distinction between acts and omissions becomes less important."

[38] Similarly Lord Macphail in *Burnett* v *Grampian Fire and Rescue Services* stated his views on the issue at paragraph [34] as follows:

"In my opinion the law of Scotland does not draw a distinction between acts and omissions comparable to that which appears to exist in the English law of tort between misfeasance and non-feasance."

[39] I agree. In any event, in the present case, the roads authority (the defenders) have chosen to exercise their statutory powers by making the roads at the crossroads available for public use, devising a system of traffic flow priority, installing road signs and painting lines on the road. In such circumstances, even if the English tort law approach were to be applicable, I would not be prepared to accept the submission that the pursuer's case against the defenders must be viewed as one of pure "omission" rather than "commission", resulting in the case being irrelevant for that reason. I remain of the view that the question of the existence of a duty of care depends upon the particular facts of each case, and not upon the sometimes rather artificial categorisation of misfeasance or non-feasance.

[40] In the present case, the defenders are averred to have been aware by, at the latest, April 2006 that the painted lines at the junction of the A97 and the C2L had been worn away by traffic. They are averred to have issued an open works order including the repainting of the lines. Thus there is no question in this case of a lack of knowledge, nor any need to rely upon the concept of constructive knowledge.

[41] As for the nature of the relationship between the parties, it is my view that "drivers using the crossroads" were sufficiently proximate to the defenders to give rise to the imposition of a duty of care owed to them.

[42] However when it comes to the question of reasonable foreseeability of risk of harm, and whether it would be fair, just and reasonable to impose a duty of care on the defenders in the particular circumstances, I consider that the following averments (or lack of averments) have to be taken into account:

- It is averred that the wearing-away of the painted lines was a gradual process, taking place over a period of time [statement 4]. That can be contrasted with *Bird* v *Pearce* [1979] RTR 369, where the local authority destroyed or obliterated painted lines on the road surface which drivers had come to rely on, thus creating what was referred to as "a trap" for the drivers.
- There are no averments that, over the period of wearing-away of the lines, there had been any complaints about the fading of the paint-lines, or indeed about the location of the "Give Way" sign.
- There are no averments that there had been any accidents or near-misses at the cross-roads: on the averments as they stand, drivers appeared to be successfully and safely negotiating the cross-roads, even with the faded lines and the "Give Way" sign in the position it was.
- On the averments, it appears that although the lines painted along the middle of the A97 road indicated to drivers on that road that they had right of way, no such middle-of-the-road lines existed on the C2L: accordingly drivers on the C2L had no reason (arising from lines painted on the road) to believe that they had right of way over any traffic they might meet.

[43] In my view, these averments are sufficient to allow the question of reasonable foreseeability to be dealt with at the stage of debate. As Lord Hope said in *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21:

"...the assumption that is made is that the pursuer will succeed in proving all that he avers. What he can aver will depend on what he believes he can prove. He is given an ample opportunity to set out the case that he seeks to make in his averments. When the court decides to dismiss a case on the ground that the pursuer's case is irrelevant it does so because, having studied those averments, it is satisfied that it is in as good a position to determine the issue of law on which the case depends as it would have been if it had heard all the evidence..."

Bearing in mind the averments and lack of averments listed in paragraph [42] above, and taking into account the guidance in *Jamieson* v *Jamieson* 1952 SC (HL) 44, I am satisfied that the pursuer's averments, even if proved, would not entitle her to the remedy she seeks, because it was not reasonably foreseeable that an accident was likely to occur at the junction. Nor, in my opinion, would it be fair, just and reasonable to impose a common law duty of care on the defenders as was submitted by the pursuer, as the situation at the crossroads did not (prior to the accident) present as a high priority situation with obvious danger demanding prompt attention from the roads authority, burdened as it is with many tasks and duties to perform. In my opinion, in the circumstances of this particular case as averred on record, the only duty owed by the defenders was of a public, general nature, namely to re-paint the lines in the course of their routine rolling

programme of repair and maintenance in the exercise of their statutory powers, and on the basis of a time-table fixed by them (using their judgment and discretion, the guidance given in local authority manuals and codes, and affording certain matters priority over others): cf the *dicta* of Lord Kissen quoted in *Smith* v *Middleton*:

"It seems clear that a highway authority has to balance considerations of finance, the functional efficiency of the road, and safety, when considering questions relating to the construction and maintenance of a road."

[44] I do not therefore accept that, on the basis of the averments, the common law imposed upon the defenders a duty of care owed to the pursuer. In particular I do not accept that the law imposed upon the defenders a duty of care owed to the pursuer to repaint the lines and reposition or add to the road signage either within 24 hours of the issuing of the work line (a position in any event departed from in the debate by senior counsel for the pursuer) or within the period of five weeks prior to the accident.

[45] As soon as the accident occurred, the defenders' duties and prioritisation of tasks might have changed. As often happens in reparation cases, once an accident has occurred, factors such as those referred to in paragraph [42] above may alter. But had the accident not occurred, matters would in my opinion remain as set out in paragraph [43] above.

[46] Thus in the circumstances of this case as averred on record, I respectfully agree with Lord Rodger's approach as set out in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, namely that, in the particular circumstances, no duty of care owed to the pursuer was imposed on the defenders. As he put it:

"87 By deciding to paint the lines at the junction - presumably because of the perceived risk of collisions - [the roads authority] would have come under a duty to do so carefully and not in a way that would aggravate any dangers at the junction. But they had not somehow imposed on themselves, retrospectively, a common law duty to paint the lines or, prospectively, to paint them back if they were obliterated.

88 In exactly the same way, in the present case, the mere fact that the defendants had once painted the 'Slow' sign on the road does not mean that they had been under a common law duty to do so, or that they were under such a duty to repaint the sign when it came to be obliterated. When that happened, the situation returned to what it had been before the defendants decided to exercise their statutory powers by painting it in the first place. They were not under any common law duty to exercise their power to repaint it and are not liable because, for whatever reason, they did not do so. Of course, if they had done so, it might have helped motorists. And after Mrs Gorringe's accident they did indeed repaint the marking and make a number of other changes. But this was something that they decided to do in the exercise of their statutory powers, not something that they were under a common law duty to do."

2. Esto there was a duty of care, it was restricted in its nature and extent

[47] As indicated above, it is my view that , on the averments in this particular case, no common law duty of care was owed to the pursuer by the defenders. *Esto* I am wrong, it is my view that the nature and extent of any common law duty of care imposed upon the defenders was limited to re-painting the lines in the course of the defenders' routine rolling programme of repair and maintenance, on the basis of a time-table set by the defenders (using their judgment and discretion when giving certain matters priority over others). In the words of Lord Reed in *Rainford* v *Aberdeenshire Council* 2007 RepLR 126 at paragraph [51]:

" ... the circumstances in which [the local authority's] resources ought to be used, and the order of priority among different roads and pavements which ought to be adopted, are ordinarily a matter for the discretion of the roads authority, with which the court is not entitled to interfere unless that discretion has been exercised unreasonably."

3. Whether there was a breach of any duty of care

[48] Bearing in mind the nature and extent of any duty of care which (at best for the pursuer) would have

been imposed upon the defenders on the basis of the pursuer's averments (see paragraph [47] above), I consider that the course of action adopted by them did not amount to a breach of that duty.

The cross-appeal
[49] In terms of chapter 43 of the Rules of Court, it is open to a defender to request the court to order further specification in respect that insufficient specification has been given in relation to certain matters. Alternatively a defender may request that the case proceed as an ordinary action, with *inter alia* full (rather than abbreviated) pleadings, pleas-in-law, and periods of adjustment. The defenders in the present case did not avail themselves of either option. However, the fact that these opportunities existed and were not resorted to does not render pleadings immune to criticism. The averments (or lack of averments) listed in paragraph [42] above have the result that the summons fails to set out a sufficiently relevant and specific case against the defenders. Accordingly the summons should, in my opinion, have been dismissed as irrelevant and lacking in specification.

Decision
[50] For the reasons given above, I propose that the reclaiming motion be refused, the cross-appeal allowed, and that the Lord Ordinary's interlocutor of 14 June 2012 be adhered to but with the insertion of the words "and lacking in specification" after the word "irrelevant". Any question of expenses should be reserved meantime.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 83
PD982/09

OPINION OF

LORD DRUMMOND YOUNG

in the cause

RUTH MacDONALD

Pursuer and Reclaimer;

against

ABERDEENSHIRE COUNCIL

Defenders and Respondents:

_____

Lady Paton

Lord Drummond Young

Lord Wheatley

Act: Ellis QC; McCall; Lawford Kidd

Alt: Milligan, QC; Sheldon; Ledingham Chalmers LLP

18 October 2013

[51] This case raises the important question of the liability in negligence of highway authorities. On its particular facts, the case is concerned with the system of signs and markings on roads, but we heard a very

full argument which ranged over more general issues. Following a procedure roll discussion, the Lord Ordinary dismissed the action on the ground that the defenders, the relevant roads authority, did not owe any duty of care to the pursuer as a user of a road under their control. In doing so, he followed the decision of Lord Stott in *Murray* v *Nicholls*, 1983 SLT 194,

as approved by Lord Rodger in *Gorringe* v *Calderdale Metropolitan Borough Council*, [2004] 1 WLR 1057. The pursuer has reclaimed against the Lord Ordinary's decision, submitting that her pleadings disclose a relevant case against the roads authority as a matter of Scots law. In the course of the hearing a large number of authorities, both Scottish and English, were cited. For the most part the Scottish cases indicated an approach that was more favourable to the claims of road users against the highway authority; the English cases, by contrast, appeared to have developed a position that was hostile to such claims. The English cases, however, were generally recent, whereas the Scottish cases were of greater antiquity. It is accordingly necessary to consider the case law in some detail to discover precisely what the current state of Scots law is in this area.

The pursuer's pleadings

[52] The pursuer's pleadings are set out in detail by your Ladyship in the chair. In summary, on 8 May 2006 a car driven by the pursuer was involved in a very serious accident at an intersection between the minor road on which she was driving, numbered C2L, and the A97 Banff to Aberchirder road. As a result of the accident the pursuer's mother and aunt, who were passengers in the car, were both killed. The pursuer avers that she was driving along the minor road at a speed of about 30 mph. She approached the intersection with the A97 road at Mill of Brydock, where there were buildings and yards situated on the east side of the main road, the side from which she was approaching. At the intersection the pursuer's car, a Volkswagen Golf, was involved in a collision with a Ford Transit van which was travelling northwards on the A97. The road markings on the A97 were those found on a major road, with white lines along the middle of the carriageway, indicating the right of way on that road. At the junction there was a give way sign and give way markings on the C2L road, but the pursuer avers that the sign was placed in such a way that it could not be seen by those approaching the junction, and the road markings had been largely obliterated through use. As a result, she avers, she was not aware that she was approaching a junction where she had to give way to traffic on the other road.

[53] The pursuer's averments about the approach to the junction, which appear to me to be important, were as follows. The C2L road along which the pursuer was travelling dropped into a dip, followed by a rising left-hand bend just before the junction. (The photographs suggest that there was a right-hand bend immediately before the left-hand bend.) There was no advance view of the junction, and the pursuer saw the road continuing westwards. She had driven along the road for some miles without coming to a junction. She saw no sign that she was driving on a road where she was expected to give way at a cross roads. She expected that there would be a give way sign if she came to a junction where she was required to give way. She avers that both roads at the *locus* of the accident were "minor rural roads", and that visibility of the junction was poor. I interpose the observation that it seems potentially misleading to describe an A road in those terms, but nothing turns on this. The pursuer further avers that there were insufficient signs and markings on the C2L road to alert drivers to the presence of the junction and that they were to give way to traffic travelling on the other road. In support of that, reference is made to the Traffic Signs Regulations and General Directions 2002, the statutory instrument that sets out the standards for road traffic signs, and to the Traffic Signs Manual issued by the Department of Transport. Further averments relate to the inspection of roads and the rectification of road markings, by reference to certain publications that relate to highway maintenance. At the time of the accident there was an open works order for the road at the instance of the respondents, indicating that certain works, including relining, had to be performed.

[54] I propose to begin by considering the Scottish authorities in this area, with a view to explaining the present state of Scots law. In doing so, I will make reference to the economic arguments that appear relevant

in this area, with particular reference to the use of insurance to bear the risk of liability of accidents. Thereafter I will consider the relevance of English law to Scots law, and the more important English authorities in this area of law. I conclude that English law is different from Scots law, but that Scots law is quite coherent as it stands and has no need to move into line with English law. Many of the differences between Scots and English law are historical in nature, and the statutory background is quite different; consequently there are dangers in adopting the law of one jurisdiction uncritically into the other.

The liability of a roads authority in Scots law

[55] Since 1985 the general powers and duties of local roads authorities have been found in section 1 of the Roads (Scotland) Act 1984. Subsection (1) of that section provides that a local roads authority "shall manage and maintain all such roads in their area as are for the time being entered in a list (in this Act referred to as their 'list of public roads') prepared and kept by them under this section". Extensive powers are conferred to achieve that end. Section 1 does not, however, impose any obligation on a roads authority in relation to persons using the road, and it was not contended for the pursuer that it did so. Consequently any liability of a roads authority to users of the road must be found in the general law of negligence. Historically, the streets in Scottish burghs were held by the magistrates for the public benefit, as part of the common good of the burgh. Roads in landward areas were under the direction of the commissioners of supply and justices of the peace of the county in which they were situated, but during the 17th and 18th centuries Acts of Parliament were passed in respect of almost every county to regulate the management of the roads: see Bell, *Principles*, 10th ed, section 661. Eventually a uniform system was introduced for the election of local road trustees, with elaborate statutory powers: *ibid*. This system of administration was quite distinct from that found in England and Wales, where the cost of maintaining highways fell on the inhabitants of the parish: see paragraph [72] below.

[56] The liability of magistrates and road trustees for negligence was considered in a long series of cases beginning in 1798. Guthrie, the editor of the 10th edition of Bell's *Principles,* summarizes the law as follows (at paragraph 2031):

"Similar difficulties [to those regarding the liability of police commissioners for damages occasioned by their officers] were raised as to the responsibility of road trustees for acts or negligence of workmen employed by them or their surveyors and contractors; and they were held liable in Scotland, while the matter was viewed otherwise in England.... [T]he general rule is now fixed, that statutory trustees and local authorities, unless the statute under which they act provide otherwise, are liable to make good in their corporate capacity and out of their public funds, the damage caused by their own or their servants' fault, in the same way as individuals. The magistrates of a burgh, being charged with the duty of keeping the streets in good order, are liable in damages to persons injured by their being in an unsafe condition".

That principle is vouched by a substantial number of cases.

[57] The earliest of these is *Innes* v *Magistrates of Edinburgh*, 1798, Mor. 13189. During the construction of Old College it was necessary for the purpose of constructing some arched passages to dig a pit about 15 feet deep in the lane of the north side of the building (where Chambers Street is now situated). The pit was secured in various ways: initially by a sentinel, and subsequently by a rail with a gate which, at the time of the pursuer's accident, consisted of two fixed posts and three cross-bars. On the night of the accident it seemed clear that some or all of the crossbars were missing, either because they had not been put in place by the workmen or because they had been removed by "mischievous people". The pursuer was proceeding along the lane on the way to his lodgings in Bristo Street, situated nearby, and he fell into the pit and broke his thigh bone, being rendered incurably lame as a result. The accident occurred at 8 pm on a very dark evening. It was noted that there was strong evidence that the pursuer was not intoxicated. An action for damages was brought against the Magistrates as the persons responsible for the streets in the city. After the hearing of a proof the Trustees for the College were also sisted as defenders. The pursuer's case was stated as follows:

"The Magistrates, as guardians of the police, were bound to see, that in every operation carried on within the burgh, sufficient precautions were taken for the safety of passengers, D. lib 43. t. 8. l. 2. s.24.; lib.9. t. 2. l. 29. s. 7; that of consequence any failure in this duty must subject them in damages; and that, if there had not, in this case, been some degree of negligence on their part, the accident could not have happened."

The Court was divided as to the liability of the Trustees,

"but they were unanimous in thinking the action well founded against the Magistrates. One of their most important duties (it was observed) is to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers. They are liable for the smallest neglect of this duty, and in this case, without some degree of *culpa* on their part, the pursuer could not have met with the misfortune".

The Court subsequently assoilzied the Trustees, but adhered to the decision that the Magistrates should be liable in damages, reserving a claim for relief from the representatives of the architect, Robert Adam. The two passages quoted from the Digest are instructive. The first (43.8.2.24), a quotation from Book 68 of Ulpian's *Ad Edictum*, states that an interdict of the praetor forbidding acts on the highway does not apply to urban streets because these are under the care of the magistrates (Hoc interdictum tantum ad vias rusticas pertinet, ad urbicas vero non: harum enim cura pertinet ad magistratus). The second (9.2.29.7), a quotation from Book 18 of *Ad Edictum*, occurs in a section dealing with the lex aquilia, the source of delictual liability in Roman law. It is there stated that the municipal magistrates, if they cause wrongful damage, can be held liable under the lex aquilia (Magistratus municipales, si damnum injuria dederint, posse aquilia teneri). These passages appear to have been accepted unanimously by the court as establishing first, that the streets of a burgh are under the control of the magistrates and secondly, that the magistrates are responsible for negligently inflicted injury resulting from dangers in the streets, under ordinary principles of delictual responsibility. The court clearly considered that a principle akin to *res ipsa loquitur* applied to the circumstances of the pursuer's accident. It should be noted that the hazard in question, the pit, had been created by the Trustees for the University and not by the Magistrates. Thus the liability of the Magistrates was clearly as the public authority responsible for the streets of the city and not as the person who had created a dangerous situation.

[58] During the 19th century a similar approach was taken in a considerable number of analogous cases; these are collected in Bell's Principles, 10th ed, at paragraph 2031. For example, in *McFee* v *Police Commissioners of Broughty-Ferry*, 1890, 17R 764, police commissioners had taken over a private road passing under a railway line as a public street. The road passed through a bridge seven feet in height, not sufficient to allow a cab to pass. A person who drove a cab along the street at night was killed by coming into contact with the railway bridge. His widow and children brought an action against the police commissioners and the railway company for damages. It was held that it was the duty of the police commissioners to take effective measures to prevent the public from using the street for purposes for which it was not safe, and that the accident was caused by their neglect of that duty. Consequently they were liable in damages to the driver's widow and children. In argument there was an elaborate discussion about the respective liabilities of the police commissioners and the railway company, and in particular about the commissioners' statutory powers of control over buildings that adjoin streets. The Court's decision, however, was that the commissioners were primarily liable at common law. The Lord Justice-Clerk stated (at 767) that the road was under the commissioners' sole control, and continued:

"Their duty is, in my opinion, to see that there shall be no dangerous obstruction on the roads of which they have the control. If anything occurs to create a danger on these roads, it is their duty to guard against it. It is their business not to allow traffic to pass along the road until they have either put the road into a proper state, or (if they desire to maintain that another person or body is liable to do so) until they have caused that person or body to perform the duty.... They are bound as guardians of the public safety to take means to prevent the manifest danger which exists".

Lord Young stated (at 768):

"The pursuers' case against the Commissioners of Police is that it is their duty to the public to see that the road of which they have the custody and guardianship is in a safe condition for public use. If it is not, it is for them, if they cannot put it into such a state, or compel those whom they allege to be the right persons to make it safe to do so, to stop that traffic upon it which cannot be conducted without danger. Their failure in that duty is the ground of liability".

In argument before us, counsel for the respondents submitted that the decision proceeded upon the statutory powers of the commissioners, their duty being spelled out of those powers; a body such as the commissioners had no duties at common law. In my opinion this is not a correct reading of the decision. It seems clear to me that the court proceeded upon a common law duty of the commissioners to ensure that the roads under their control were free of danger. There is a reference to statute in the pursuer's argument, but the section in question refers to buildings or holes "near" any public or private street; it was thus relevant to the commissioners' powers against the railway as the owners of the bridge. The opinions of the Second Division make it clear that they founded on a more general duty. There are cases where liability to road users proceeded on a construction of statutory powers, for example *Stephen* v *Thurso Police Commissioners*, 1876, 3 R35, but this is not one of them.

[59] In *Strachan* v *Aberdeen District Committee*, 1894, 21 R 915, it was held that a claim in damages was competent against the county council for injuries arising from their failure to keep a road sufficiently fenced. The pursuer's horse and van had fallen into a burn as a result of the lack of fencing beside the road. The sheriff, founding largely on English authority, decided that no liability existed. The Lord President (at 919) quoted a statement in a Canadian case before the Privy Council, *Municipality of Pictou* v *Geldert*, [1893] AC 524, to the effect that a roads authority, although liable in a public law remedy for breach of its duty to keep a road or bridge in repair, was not liable for damages at the suit of a person who had suffered injury from their failure to do that. He continued:

"Now, against that, so far as Scotland is concerned, we have the fact that there is a whole series of cases in which public bodies of road trustees... have not questioned their liability to answer in damages where negligence is proved, and have been found liable in damages for failure to keep roads in repair".

Lord Adam delivered an opinion to similar effect. Lord McLaren stated (at 920):

"According to the law of Scotland as hitherto understood and administered, Parliamentary trustees and Local Authorities... are responsible for negligence in the same manner as railway companies or other corporations who carry on public undertakings for profit".

He went on to contrast the Scottish rule with the position of roads authorities in English law. The English decisions, he thought, had no relation to the Scots law of reparation but rather depended upon peculiarities of the English system.

[60] The same principle has been affirmed in subsequent cases. In *Brierley* v *The Suburban District Committee of the County Council of Midlothian*, 1920 2 SLT 80 (Outer House); 1921 1 SLT 192 (Inner House), a large branch of a tree overhanging the road fell on the pursuer's car, injuring him and wrecking the car. Lord Anderson reviewed previous decisions, including *Innes* and *McFee*, which he regarded as based on the common law. He nevertheless held that the common law obligation only related to dangers which were manifest and constant; in the present case the danger, though potential, was latent and discoverable only by skilled inspection, with the result that the pursuer's case was held irrelevant. This was reversed by the Second Division, however and proof before answer was allowed. In *Smith* v *Middleton*, 1971 SLT (Notes) 65, Lord Emslie accepted that a highway authority had a duty to road users to take reasonable care in all the circumstances, although those circumstances might include balancing considerations of finance and functional efficiency of the road as well as safety. Against that background, it was held that fault had not been established against the Secretary of State, who was responsible for the road in question. In *McKnight* v *Clydeside Buses Ltd*, 1999 SLT 1167, a child had been killed when the bus in which she was travelling ran into a railway bridge. Her parents sought damages from the bus operators, who in turn sought relief from the

roads authority and the owners of the railway bridge. On the liability of the roads authority, Lady Cosgrove held (at 1172) that the duty of a roads authority towards road users is to take reasonable care in all the circumstances; this encompassed an obligation to remedy a dangerous situation of the type which the bus operators offered to prove; *McFee* was cited as authority. Lady Cosgrove further rejected an argument that any duty on the roads authority was restricted to taking care of the actual road surface; a similar duty of care extended to road signs, at least in cases where an obvious hazard was known to exist.

[61] I should note two further cases that were cited to us in support of a principle analogous to that applying to roads authorities. *Gibson* v *Orr*, 1999 SC 420, concerned the liability of Strathclyde Police for failing to warn motorists about the collapse of a bridge carrying a public road. Heavy rainfall had caused the collapse of the bridge. On being advised of this, police officers set cones on the north side of the river and positioned a police vehicle with a flashing blue light and illuminated headlights so as to be visible to and to give warning to any person approaching the bridge from the south side. The police later left the *locus* without having received confirmation that any barrier or warning had been put in place on the south side. Shortly thereafter a car was driven on to the bridge and fell into the river, killing all of its occupants apart from the pursuer. The pursuer sought reparation from the chief constable of Strathclyde Police in consequence of the actings and omissions of the police officers. For the defender it was contended that no duty of care existed. It was held that a duty of care did exist in the circumstances. Lord Hamilton held (at 429-431) that the tripartite test adopted in *Caparo PLC* v *Dickman*, [1990] 2 AC 605 (see paragraph [74] below), should be followed. Applying that test, he held (at 432-433) that there existed between the constables on duty at the bridge and the pursuer a relationship of sufficient proximity to found a duty of care. That had to be established at the time when the constables left the bridge. At that point, they had taken charge of the situation there. It was a situation that presented "a grave and immediate risk of death or serious injury to road users likely to be affected by the particular hazard" (page 433); that seemed sufficient to satisfy the requirement of proximity. Finally, it was held (at 435) that it was wrong to treat the duties of police officers and the like to "the public at large" as if they were wholly discrete from and irrelevant to any duty of care owed by such persons to particular individuals. Such an approach was said not to square readily with the principles and practice of Scots law. An analogy was drawn with roads authorities, on which it was said (again at page 435):

"The functions, for example, of roads authorities in respect of the management and maintenance of public roads are laid down, commonly by statute, in similar 'public' terms. However, it has never, so far as I am aware, been doubted in Scotland that as regards operational matters a duty of care is owed by such authorities and their servants to road users - a duty not directly under the statute but a duty arising out of the relationship between those authorities and road users created by the control vested by statute in the former over the public roads in their charge".

That approach is entirely in keeping with earlier authorities stretching back as far as *Innes*, and emphasizes that the existence of a hazard may give rise to duties of care to a range of persons.

[62] Secondly, in *Burnett* v *Grampian Fire and Rescue Services*, 2007 SLT 61, firefighters had been called out to deal with the fire in a flat underneath the pursuer's flat. They forced entry into the pursuer's flat to check that the fire had not spread upwards, but it was said that they had failed to make a thorough search for traces of fire or possible causes of re-ignition. The fire had continued to smoulder, and it re-ignited the following day causing substantial damage to the pursuer's flat. It was held by Lord Macphail that the pursuer had stated a relevant case against the defenders based on negligence at common law. The *Caparo* approach was applied, and an analogy was drawn with cases such as *Gibson*. On that basis, the defenders owed to the pursuer a common law duty of care not only to take all reasonable steps to extinguish the fire but also to take all reasonable steps to establish whether circumstances existed which, if not eliminated, constituted a risk of re-ignition or extension of the fire. Those duties arose from the fact that it was reasonably foreseeable that the pursuer's flat would be exposed to the "immediate and direct hazard" of the spread of the fire; and from the proximity of relationship between the pursuer and the firefighters who had forced entry to his flat to check that there was no danger. In these circumstances the imposition of liability was considered fair, just and reasonable (paragraph [73]). The case is also notable for Lord Macphail's statement (at paragraph [34])

that Scots law does not draw a distinction between acts and omissions comparable to that which appears to exist in the English law of tort between misfeasance and non-feasance. He explained that, where no pre-existing relationship existed, a failure to act might not amount to a breach of the duty of care, whereas a positive act might well do so. Where, however, a relationship did pre-exist, the distinction between acts and omissions was less important.

The current state of Scots law

[63] In the light of the foregoing history, the current state of the law is in my opinion as follows. A roads authority is liable in negligence at common law for any failure to deal with a hazard that exists on the roads under its control. A "hazard" for this purpose is something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care. Such a formulation is in my view supported by the considerable line of authority that exists in Scots law. In *Innes* the court referred to the magistrates' duty to protect the public from "danger". (The expression "to prevent the slightest danger" is, however, clearly an overstatement of the modern position.) It is also noted that the pursuer was not intoxicated, which indicates that they expected him to take reasonable care for his own safety, according to objective standards. In *McFee* the Lord Justice-Clerk stated that the defenders were under a duty "to see that there shall be no dangerous obstruction on the roads of which they have the control". Lord Young referred to a duty to see that the road "is in a safe condition for public use". In *McKnight* Lady Cosgrove referred to remedying a "dangerous" situation.

[64] This means that, for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, two features must exist. First, the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user. Secondly, the authority must be at fault in failing to deal with the hazard. This means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it, whether by altering the road, or by placing suitable signs, or in an extreme case by closing the road (as in *McFee* and *Gibson*, if the latter case had involved the actings of the roads authority). Those two requirements are in my opinion of great importance. The first means that roads authorities are entitled to act on the assumption that drivers and others who use the roads proceed with reasonable skill and care. That means that it can be assumed that drivers will have regard to any obvious dangers on the road and drive accordingly. There is no obligation on a roads authority to protect drivers from anything that is obvious. Obvious dangers would include bends, blind summits, visible road junctions, and the fact that the driver's view is restricted, whether by buildings, vegetation or features of the land and the configuration of the road. In all such cases, a careful driver should slow down and look carefully ahead. If he does not do so, the accident is his own fault. I return to this matter below at paragraphs [66] and [67] in relation to the facts of *Murray* v *Nicholls*, 1983 SLT 194, and at paragraphs [68]-[70] in relation to snow and ice. The second feature means that the hazard must be apparent to a competent roads engineer. For example, the branch of the tree in *Brierley* might not have been a hazard, because the risk that it would fall was not necessarily obvious.

[65] In my opinion this state of the law strikes a fair and reasonable balance between the interests of drivers and their passengers on one hand and the interests of the roads authority on the other hand. Roads authorities are under a public law duty to maintain the roads under their care, and it seems fair that they should be held to minimum standards not just in public law but as a matter of delictual liability in civil law. Eliminating hazards, in the sense discussed above, is the minimum that can be expected of them. The fundamental fairness of such a duty is supported by consideration of the insurance implications of an accident. Third party motor insurance is of course compulsory, and if an accident is caused by a driver's fault those who are injured, including his passengers, may expect to obtain recovery from his insurer. If the driver is not at fault, however, there can be no recovery, from the insurer or the driver. If an accident occurs because of a hazard, in the sense discussed above, the critical point is that there is no fault on the part of the driver; it is the road that is dangerous rather than the driver. In such a case, therefore, passengers will only recover anything if the roads authority is liable. (Of course in some cases the principles of joint fault and contributory negligence may come into play, but those can be dealt with according to well-established rules of law.) Furthermore, for

a roads authority that deals conscientiously with its responsibilities, the cost of eliminating hazards will be part of its normal running expenses. In such a case, therefore, the duty of care imposed by Scots law should not add to the costs of the authority. To the extent that claims do occur, the cost can obviously be absorbed by insurance by the roads authority. The critical point is that the costs of such liability should not impose a serious burden on a roads authority, and will be almost non-existent for an authority that takes proper steps to eliminate hazards.

Murray v *Nicholls*

[66] The Lord Ordinary founded on the decision of Lord Stott in *Murray* v *Nicholls*, *supra*. In that case a car was driven out of a minor road into a major road, where it collided with a car proceeding along the major road. The driver of the car that had emerged from the minor road was killed and his passengers were injured. They raised actions against him and against the roads authority. The case against the roads authority was that there were no markings to show that drivers on the minor road should give way to traffic on the major road. White lines had been painted previously, but these had been all but obliterated in consequence of road works some months before the accident and had not been repainted. That was said to amount to a breach of the roads authority's duty to take reasonable care to maintain the roads in their area in such a condition that persons using them could do so in safety. Lord Stott stated (at 1983 SLT 195):

"No case was cited to me in which a road authority has been held to be at fault merely by reason of failure to mark white lines on the roadway or erect a warning sign at a road junction in a built-up area".

After distinguishing the English case of *Bird* v *Pearce*, (1979) 77 LGR 53 (see paragraph [76] below) he continued:

"What is said is that because of houses and walls adjacent to the road, those driving northwards towards the junction would have no visibility to the east until they actually reached it, but that is no more than the normal state of affairs in a built-up area. The fact that white lines had been put there before while relevant to the question of foreseeability has no bearing otherwise on the existence of a duty. If the pursuers' contention were accepted it would open up a wide field for actions against road authorities".

Thus an injured pedestrian might claim that a pedestrian crossing should be put in place. Any such change in the law should be effected by Parliament. The pursuers had an alternative case based on a failure of the roads authority to take account of several police reports of accidents. In relation to that case, counsel for the roads authority conceded that:

"if there was evidence of a dangerous situation existing at a particular locus over a period of time the road authority would have to do something about it and the precautions desiderated by the pursuers might well be shown to be appropriate."

It was nevertheless held that this part of the pursuers' case was fatally lacking in specification; the defenders had denied having received complaints about the condition of the white lines, and they were entitled to sufficient notice to enable them to investigate the allegations of accidents and reports.

[67] The decision in *Murray* is in my opinion entirely consistent with the view of the law set out at paragraphs [63] and [64] above. In relation to the primary case presented by the pursuers in that action, any junction in an urban area is a potential hazard, and if no white lines are marked on the roadway a driver exercising ordinary skill and care will clearly anticipate the risk that traffic may be proceeding along the other road. The existence of houses and walls adjacent to the road is commonplace, and the resulting danger is obvious and should always be recognized by a careful driver. Thus there was simply no hazard, in the sense that I have suggested, and accordingly there could be no duty on the roads authority to do anything. The fact that white lines had existed previously is, I think, of very limited relevance; if there was no requirement to paint white lines in the first place the fact that they are obliterated should not make any difference. In relation to the pursuers' alternative case in *Murray*, it is noteworthy that the roads authority

conceded that if a dangerous situation had been shown to exist they would have had to take action. In other words, if a hazard, in the sense described above, becomes apparent, action must be taken.

Snow and ice

[68] In the argument before us counsel made reference to a number of cases dealing with snow and ice. The earliest of these was *Cameron* v *Inverness-shire County Council*, 1935 SC 493, where a sheep farmer brought an action against the roads authority for failing to clear snow for periods of between four and seven days; as a result he was unable to access fields and in consequence many of his sheep died. The action failed, on the ground that the county council was under no statutory duty to clear snow in the manner asserted by the pursuer and consequently could not be liable without fault or negligence. No attempt had been made to aver such fault. Thus the case is not of relevance to the issues that arise in the present action. We were further referred to a number of recent cases in which it was said that Scottish local authorities had been in the habit of accepting liability in certain cases for failure to clear snow and ice, but the basis for their doing so had been doubted. In the first of these cases, *Syme* v *Scottish Borders Council*, 2003 SLT 601, Lord Clarke rejected a case based on negligence at common law, on the basis that the roads authority were only subject to a duty of care and it was therefore necessary to set out what had to be done in pursuance of such a duty; it was not enough to state what might have been done. He further held that there was no statutory duty to clear snow; section 34 of the Roads (Scotland) Act 1984, which deals with snow and ice, was only intended to make clear which authority was to be responsible for carrying out common law duties, and as a matter of public law left the carrying out of those duties to the discretion of the authority. Thus the case is similar to *Cameron*. In *Macdonald* v *Scottish Ministers*, 2004 Rep LR 16, a car skidded on black ice, and the driver sued the roads authority on the ground of common law negligence. The pursuer's averments were held irrelevant by Lord Clarke on the basis that she had failed to specify why the fact that the roads authority did not treat the locus before the accident amounted to a failure on their part to take reasonable care. Lord Clarke indicated that the need for such precision in averments of fault was important, because it was plainly impossible for a roads authority, especially in a large geographical regions such as the Highlands, to ensure that every patch of black ice which appeared on roads within the area was treated simultaneously and continuously to prevent vehicles from skidding. In both of these cases it was accepted that in Scotland a roads authority "owed a common law duty of care to road users in respect of hazards on the roads arising from snow and ice": *MacDonald* at paragraph [6], where it was pointed out that that did not appear to be legal position in England.

[69] *Morton* v *West Lothian Council*, 2006 Rep LR 7, concerned an accident when a car skidded on a patch of black ice. The driver sought damages from the local authority for failing to treat it. Lord Glennie (at paragraph [64]) recorded that it was agreed between the parties that roads authorities owed a common law duty of care to road users, and that in that respect the law of Scotland appeared to differ from the law of England and Wales. He remarked that why the law should be different was unclear to him, as there did not appear to be obvious differences in social circumstances or policy such as to explain the different development of the common law in the two jurisdictions. He held that the pursuer had failed to establish any lack of reasonable care on the part of the roads authority, and the action failed. Finally, in *Rainford* v *Aberdeenshire Council*, 2007 Rep LR 126, the driver of a van sued the roads authority after he skidded on ice on a road maintained by them. It was held that the action failed on the basis that nothing in the evidence indicated that there had been any breach of a duty of care in failing to grit the road on which the pursuer was travelling by the time of his accident. Lord Reed referred to Lord Glennie's remarks in *Morton* and expressed agreement with them. He indicated that in this area of law, dealing as it did with the liability in negligence of public authorities for the exercise or non-exercise of statutory powers, the arguments that figured prominently in modern English cases did not appear to have been considered.

[70] In relation to snow and ice, I do not think that it is necessary to consider the details of the English case law. On the traditional Scottish approach, any action against the roads authority at common law will almost inevitably fail, for two reasons. First, in nearly all such cases there is no hazard, in the sense described above. Snow is obvious, and any driver exercising reasonable skill and care will modify his or her driving

accordingly. So far as ice is concerned, a careful driver will obviously be aware of low temperatures and will in consequence drive in such a way as to minimize the risk of skidding on black ice. Secondly, it will almost invariably be impossible to state that the roads authority ought to have treated the particular *locus* of the pursuer's accident. As Lord Clarke indicated in *Macdonald*, it is impossible for an authority to treat all the snow and ice in its area at once. The authority has limited resources, and must be free to deploy these as it thinks fit. That means that inevitably some areas will be treated ahead of others, sometimes as a matter of policy and sometimes because of random factors, such as the way in which the gritting trucks happened to operate on that day. Thus any claim based on the failure to clear snow and ice will usually fail to surmount the two important hurdles in Scots law: the existence of a hazard and negligence on the part of the roads authority.

The relevance of English law

[71] Counsel for the respondents contended that a roads authority should not be under any duty of care to road users. He submitted that the Scottish case law that holds that roads authorities are under such a duty should not be followed, and that instead the court should follow English case law which holds that no such duty exists at common law. Following Lord Glennie in *Morton*, he stated that there were no obvious differences in social circumstances or the development of policy in the two countries to explain the difference. The only possible difference was one of climate, which might explain the different treatment of snow and ice in Scotland. Nevertheless, the basic point was that Scots law should follow English law in this area, and ignore its own traditions. This is in effect a *Bartonshill* argument: *Bartonshill Coal Co* v *Reid*, (1858) 3 Macq 266, where LC Cranworth notoriously stated "But if such be the law of England on what ground can it be argued not to be the law of Scotland?"

[72] In fact the law relating to roads authorities in Scotland has been developed through a substantial number of cases extending over more than 200 years. It is possible, in view of the references to the Digest in *Innes*, that its origins lie in Roman law, where the magistrates appear to have been liable under the lex aquilia for wrongful loss occasioned by municipal property. The magistrates in Scottish burghs and the commissioners who were responsible for roads and streets were held subject to a similar duty. It appears that English law was always different; the cost of maintaining English highways fell on the inhabitants of the parish, and it was thought unjust to impose on them the additional burden of paying compensation to users of the highway who suffered injury because the highway surveyor had failed to repair it; only a public law remedy was available to enforce the duty to repair: *Stovin* v *Wise*, [1996] AC 923, at 952; *Gorringe* v *Calderdale MBC*, [2004] 1 WLR 1057, at paragraphs 11-14, per Lord Hoffmann in both cases. (It appears that as a result of statutory innovation beginning with the Highways Act 1959 English law now permits recovery for damage caused by lack of repair of the highway itself: see *Gorringe*, per Lord Scott at paragraphs 48-52). The difference in history may explain why the two systems have proceeded quite separately from each other.

[73] There is nothing intrinsically undesirable about such a difference; legal systems may quite rationally take distinct approaches to a problem and formulate different rules. Each system must be considered on its own merits. Regardless of its different origins, this area of Scots law can in my opinion be seen to operate rationally. Much of the discussion in the English case law is based on the assumption that roads authorities must either be liable in all cases where loss is caused by defects in a road or in none of those cases. Scots law, however, takes an intermediate position: roads authorities are liable for negligence, but only in respect of hazards, in the sense of defects that are unlikely to be noticed by road users who exercise reasonable care and skill. This provides redress in cases that are not covered by the compulsory system of motor insurance; thus there is an economic justification for the Scottish position. Furthermore, the cost of eliminating hazards should not be a significant burden for a roads authority that takes its responsibilities seriously. Most of the cases where doubts have been raised about the stance taken by Scots law have related to snow and ice, but these can readily be eliminated by considering the true rule of Scots law, which denies a remedy in nearly all such cases. Consequently I can see no reason for Scots law to follow English cases in this area. In the English cases, however, certain general points are made about the law of negligence, and it is appropriate to

examine them in order to discover whether Scots law reflects the policy considerations that have underlain the English decisions. This must be understood against developments in the law of negligence since 1964.

The liability of roads authorities in English law

[74] The law of negligence developed significantly following the decision of the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*, [1964] AC 465. The high water mark of such development was reached in cases such as *Anns* v *Merton London Borough Council*, [1978] AC 728, and *Junior Books Ltd* v *Veitchi Co Ltd*, 1982 SC (HL) 244. Subsequently a reaction set in, and the criteria for establishing a duty of care were curtailed to a marked extent. Perhaps the leading case indicating the new attitude was *Caparo PLC* v *Dickman*, [1990] 2 AC 605. In that case Lord Bridge, after referring to a number of cases decided between 1985 and 1989, continued (at 617-618):

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But... the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope. Whilst recognizing, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognizable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

That was the approach first suggested in the well-known Australian case of *Sutherland Shire Council* v *Heyman*, (1985) 157 CLR 424.

[75] The approach taken in *Caparo* has been adopted into Scots law: *Mitchell* v *Glasgow City Council*, 2009 SC (HL) 21, per Lord Hope at paragraphs [21]-[25]. It is accordingly necessary to consider whether the Scottish rule that a roads authority may be liable to road users in negligence is fair and reasonable. Clearly that must be considered in context, a context which includes the system of motor insurance. In my opinion the Scottish approach can be considered fair and reasonable, perhaps to a greater extent than the current English approach. The roads authority is responsible in public law for the maintenance of the roads in its area, and it does not seem unfair or unreasonable that it should take proper steps to eliminate hazards that could not reasonably be foreseen by a careful driver, with civil liability if it fails to fulfil such a duty. This should not be especially onerous; an authority that takes its public responsibilities seriously should deal with such hazards as a matter of course. To the extent that a risk of civil liability remains, it can readily be covered by insurance. Moreover, in a case where a passenger is injured as a result of such a hazard, he or she will be denied redress if there is no liability on the part of the roads authority, but may well obtain redress under the existing rules of Scots law. Consequently the *Caparo* approach does not appear to demand any change in Scots law.

[76] In *Bird* v *Pearce*, *supra*, a highway authority was found liable in negligence for an accident that occurred at a junction where the road markings on the minor road had been obliterated by roadworks. The major road had markings that indicated that traffic there had priority, and it was a driver on the major road who was injured. The rationale of the decision appears to have been that, through having priority markings on the major road but not the minor road, the authority had created a dangerous situation, for which they were liable. Not unnaturally the present reclaimer founded on that decision. I am nevertheless of opinion that it is of little help in the present case. First, it deals with English law, while there is a distinct Scottish line of authority in this area. Secondly, it was decided towards the height of the expansion in the categories of

negligence that followed *Hedley Byrne*. Thirdly, in recent cases a degree of doubt has been cast on the decision, at least if it is regarded as turning on more than its special facts: see, for example, *Gorringe* v *Calderdale MBC*, [2004] 1 WLR 1057, at paragraphs 42-43 per Lord Hoffmann.

[77] In *Stovin* v *Wise*, [1996] AC 923, it was held that a highway authority was not liable either for negligence or breach of statutory duty as a result of failing to remove a bank that obscured visibility at a junction. Had similar facts occurred in Scotland, the result would in my view have turned on whether the bank was a hazard, in the sense discussed above. Against that, it might be said that the restricted visibility was obvious and that a careful driver would therefore approach the junction with great caution, edging out slowly until a proper view could be obtained. On the other hand, the bank might have been so placed that even a careful driver would be in a dangerous position once he had a clear view of the major road; in that event, a Scottish roads authority would be liable for its failure to take steps to deal with the hazard. The operative part of the reasoning of the majority is found in the speech of Lord Hoffmann at pages 951-955 and 956-958. The local authority had a statutory power to maintain roads, but it was held that this did not give rise to a duty to do so as a matter of civil liability. First, it had not been demonstrated that it was unreasonable or irrational for the highways authority not to have removed the objectionable bank. Secondly, there were no grounds upon which it could be said that the public law duty should give rise to an obligation to pay compensation to persons who suffered loss because it was not performed. There was no question of reliance on the highways authority's having improved the junction. It was accepted, in part on the authority of Australian and Canadian authorities, that if it could be shown that the public relied specifically on a public authority to carry out its functions, there might be a duty on the authority to exercise the power, and civil liability if it failed to do so. Examples of such liability included a lighthouse authority, which would be subject to civil liability if it failed to maintain its lights in an efficient state, air traffic control, the safety inspection of aircraft and the fighting of fires by a fire authority: these examples are based on the opinion of Mason J in *Sutherland Shire Council* v *Heyman*, (1985) 157 CLR 424, at 464. Lord Hoffmann concluded (at 958) by stating that the duty of care could not be used as a deterrent against low standards in improving the road layout; the road network largely antedated the highway authorities, and consequently the courts were not in a position to decide what an appropriate standard of improvement might be; that was a matter for the discretion of the authority. Consequently drivers must take the highway network as they found it and drive accordingly.

[78] So far as Scotland is concerned, it is not suggested that the civil liability of a roads authority arises by implication from its statutory powers; it is rather a common law liability that was imposed, possibly on the basis of Roman law, well before the modern statutory system of roads legislation came into being. The Scottish liability has always been recognized as a private law delictual liability; it is not suggested that it should be spelled out of any statutory power. In relation to Lord Hoffmann's concluding remarks, I do not know whether the existence of civil liability in Scots law has acted, or may in future act, as a deterrent against low standards. What it does, however, is to provide compensation for a limited category of accidents that are not caused by any fault of the drivers concerned. Lord Hoffmann states that drivers should drive in accordance with the state of the highway network. If I may respectfully say so, I agree entirely with that. It appears to me to be a proposition that is well recognized in the existing state of Scots law. Finally, the concept of "special" reliance, as developed in Australia in particular, is of significance; in my view it can reasonably be said that members of public rely on roads authorities to eliminate hazards, in the sense described above, even when they are driving carefully.

[79] *Goodes* v *East Sussex County Council*, [2000] 1 WLR 1356, concerned a driver who was seriously injured when his car skidded on black ice. It was held that the highway authority's duty under the English legislation, the Highways Act 1980, to maintain the highway was an absolute duty to keep the fabric of the highway in such good repair as to make it safe for ordinary traffic, but did not include a duty to prevent the formation of ice or remove the accumulation of snow on the road. Consequently the claim failed. Lord Clyde (at 1370) commented on the position in Scotland. He stated that the duty in section 1 of the Roads (Scotland) Act 1984 to maintain the roads did not include a duty to clear snow and ice, but he did not comment further on the common law.

[80] Finally, *Gorringe* v *Calderdale Metropolitan Borough Council*, [2004] 1 WLR 1057, involved a claim brought by the driver of a car on a country road who, travelling at about 50 mph, drove head-on into a bus. The bus had been hidden behind a sharp crest on the road until just before the plaintiff reached the top of the hill, and a curve in the road might have given her an impression that it was on her own side. It was pointed out that on the face of matters the accident was the plaintiff's own fault and was certainly not the fault of the bus driver, who was driving with proper care. The plaintiff claimed, however, that it was the fault of the highways authority, which failed to give proper warning of the danger involved in driving fast when it was impossible to see what was coming. It was claimed that the authority should have painted the word "slow" on the road surface at some point before the crest. That had been done in the past, but the marking had disappeared. It was held that there was no liability on the part of the highways authority. A case based on the statutory duty to "maintain" the highway under section 41 of the Highways Act 1980 failed, on the ground that maintenance did not include the provision of signs. As to common law negligence, Lord Hoffmann stated (at paragraph 32):

"I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."

I would respectfully agree with that observation, although the word "simply" may be of some significance. The Scottish duty of care arises at common law, however, and does not find its source in any statutory provision. Lord Hoffmann went on (at paragraphs 35-36) to state that as a matter of policy there was no need for highways authorities to be liable for accidents, and that compulsory third-party insurance was intended to ensure that compensation could be paid to those injured by careless driving. I respectfully agree with that as a general proposition. The system of insurance does not, however, deal with cases where an accident is caused by a hazard that a careful driver would not see. It is in those circumstances that the Scottish common law duty comes into operation, and in my opinion it fulfils a useful, if limited, function in the system of accident compensation. It may also be that a focused duty, to eliminate hazards, may encourage improvements in road safety more effectively than a general liability of the sort that appeared to be under consideration in the English cases.

[81] Lord Scott adopted a generally similar approach to Lord Hoffmann. He summed up his conclusions at paragraph 76, including the following observations:

"[A] highway authority may be liable at common law for damage attributable to dangers that it has introduced, or, in the case of dangers introduced by some third party, that it has unreasonably failed to abate. Members of the public who drive cars on the highways of this country are entitled to expect that the highways will be kept properly in repair. They are entitled to complain if damage is caused by some obstruction or condition of the road or its surroundings that constitutes a public nuisance."

That is in my opinion fairly close to the Scottish position at common law; Lord Scott appears to have in mind dangers of the sort found in cases such as *Innes* (a pit) or *Gibson* v *Orr* (a bridge that had collapsed). Lord Rodger made reference to *Murray* v *Nicholls*, *supra*, although the case had not been cited. He accepted that Scots common law was somewhat more generous to those injured due to the failure to maintain the roads than was English common law (paragraph 84). I have already commented on this case, which appears to me to be fully in line with the Scottish common law, although it contains little reference to the previous authorities.

[82] Lord Brown agreed generally with the other judges, reiterating that the question at issue in that case was whether a common law power could be spelled out of the statutory powers and duties of highways authorities (paragraph 103). He observed, however, that most cases arose in the context of road accidents involving negligence of at least one road user (paragraph 102). That was because it was difficult to contemplate

"a case in which a road accident could occur without such negligence unless either (a) it results from the physical state of the road (in which case, as already explained, liability will in any event rest upon the

highway authority), or (b) the highway authority will, irrespective of any particular statutory power or duty, be liable in a conventional common law negligence action for having enticed the motorist to his fate by some positive act".

Examples of the latter were a failure to place a "No Entry" sign at one end of a one-way street, or where road markings indicated that it was safe to overtake when it clearly was not. Once again, I am of opinion that this is close to the Scottish position; both of these examples would be hazards in the Scottish sense.

[83] Consequently I am of opinion that much of what is said in *Gorringe* supports the general approach of the Scottish common law. As to the facts of *Gorringe*, it is impossible to say what the result would have been without a good deal more information than is available in the reports of the case. Photographs are always of the greatest of assistance in reaching a conclusion as to whether a hazard existed on the road in question. At a general level, it seems to me that the plaintiff in that case might well have been approaching an obviously dangerous section of road. She was approaching the top of a hill on a country road, a situation that obviously calls for some care, and perhaps a lessening of speed. The road appears to have been an ordinary road with sufficient room for traffic in both directions, and it is noteworthy that she turned into the path of the bus rather than to the side of the road, which would be the normal way to avoid a vehicle coming in the other direction. In these circumstances it is possible that the result would have been the same as that reached in the House of Lords.

The pursuer's pleadings

[84] I have summarized the essential features of the pursuer's pleadings in paragraphs [52] and [53] above. The following features appear to me important. The pursuer avers that, at the crossroads where the accident took place, there were buildings and yards situated on the east side of the A97 road, on either side of the C2L road on which she was travelling. Furthermore, the C2L road dropped into a dip and then entered a rising left-hand bend just before the junction, giving no advance view of the junction. It is no doubt true that there was no advance view of the junction, but the configuration means that there was no advance view of the road at all; the combination of the crest of the hill and buildings on either side, together with the bend, is bound to have obscured the view ahead. In these circumstances the risk of something unseen might be thought to be obvious, and in that event it would be appropriate to slow down: see paragraph [64] above. Furthermore, even if there had been "give way" markings on the road, these would not have been fully visible until the pursuer reached the top of the hill, at which point the existence of a junction was apparent. In these circumstances there is *prima facie* a danger that should be apparent to any road user proceeding with ordinary skill and care.

[85] In the present state of the law, I am of opinion that the critical question is whether there is a hazard, in the sense of something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care. In my opinion the pursuer's pleadings do not address that question adequately. There are references to the configuration of the road, including an upward gradient, a bend and buildings on either side of the road, but these are suggestive of an obvious danger rather than a true "hazard". Otherwise, there is reference to the fact that there had been markings on the road previously, but in my view this cannot assist the pursuer; the critical question is whether the absence of markings constituted a hazard, and previous practice only indicates what the roads authority chose to do previously. It is averred that as a result of the lack of clear lines on the road the road markings "did not give a clear and effective warning of the approaching junction, and the need to give way"; nevertheless, to a driver approaching the junction at a reasonable speed it should have been clear that there was a junction, with no evident priority, and therefore a need to approach carefully.

[86] The references to the Traffic Signs Regulations and General Directions 2002 and the Traffic Signs Manual obviously give an indication of good practice for roads authorities, but junctions vary almost infinitely in their configuration and in my opinion it cannot be inferred from a failure to comply with the strict wording of either the Directions or the Manual that there has been carelessness on the part of the roads

authority. The references to inspection of roads and the rectification of road markings are in essentially the same position as the averment that the defenders had previously painted markings at the junction; the critical question is whether there is a hazard, with the result that in the absence of such markings there will be fault on the part of the roads authority. Finally, the reference to the existence of the respondents' open works order merely indicates that the defenders thought it desirable to repaint the road; it does not demonstrate that any hazard existed.

[87] The fundamental problem with the pursuer's pleadings is that they do not address the fundamental test of whether a hazard, in the sense described above, existed at the junction. They describe the junction, but in a manner that if anything indicates that the risks should have been obvious to a driver approaching along the C2L road in the same direction as the pursuer, provided that the driver used reasonable care and skill. Averments are made regarding the distance at which the junction would be visible and the distance at which the form of the junction would be apparent to a road user (40 m and 10 to 15 m respectively). Nevertheless, if the approach to the junction looks as if it is potentially dangerous because of the hill and the buildings, it can be expected that a driver exercising reasonable care would approach it fairly slowly, keeping a careful look out, and in that event the distances mentioned may mean little or nothing; on reaching the crest of the hill the driver would see that there was a junction and, not knowing the system of priority, would slow further and look for traffic on the other road. The pleadings refer to statutory provisions governing traffic signs and to the Traffic Signs Manual, but the action is founded on common law negligence, and not on any statutory provision. It is not averred that a failure to observe the recommendations of the Manual would amount to fault or be otherwise actionable. Exactly the same is true of the references made to local authority guidance. Further averments relate to the inspection of roads and the time within which road markings should be replaced, and also to the existence of an open works order. None of these, however, is directed towards the fundamental issue: whether there was a "hazard" at the junction. There are no averments of complaints about the junction or of any history of accidents there. It may be that some of the more recent cases have not stated the law with particular clarity, but in my opinion it is essential that there should be averments from which such an inference can be drawn. That is so despite the fact that the action proceeds under chapter 43 of the Rules of Court; the need for averments from which the existence of a hazard can be inferred is fundamental, and in the absence of any such averments in pursuer's case must be irrelevant. For this reason I am in agreement that the pursuer's present averments are irrelevant.

[88] I agree with your Ladyship in the chair on the issue raised in the cross-appeal, that the pursuer's pleadings may be challenged on the ground of lack of specification. I accordingly agree that the pursuer's case on record is irrelevant and lacking in specification, and that the reclaiming motion should be refused.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lady Paton

Lord Drummond Young

Lord Wheatley

[2013] CSIH 83
PD982/09

OPINION OF LORD WHEATLEY

in the cause

by

RUTH MacDONALD

Pursuer and Reclaimer;

against

ABERDEENSHIRE COUNCIL

Defenders and Respondents:

_____

Act: Ellis QC; McCall; Lawford Kidd

Alt: Milligan, QC; Sheldon; Ledingham Chalmers LLP

18 October 2013

[89] I agree with the judgements of Lady Paton and Lord Drummond Young.