

OUTER HOUSE, COURT OF SESSION

[2016] CSOH 146

A272/11

OPINION OF LORD KINCLAVEN

in the cause

JANET HILL AND NICHOLAS HILL
As Joint Financial and Welfare Guardians of Simon Hill

Pursuers;

against

HIGHLAND HEALTH BOARD

Defenders:

Pursuers: Di Rollo QC, Fitzpatrick; Digby Brown LLP
Defenders: Dunlop QC, Hamilton; NHS Central Legal Office

13 October 2016

Introduction

[1] In this reparation action, the pursuers seek to exclude certain averments (proposed by the defenders by way of Minute of Amendment) on the grounds that the averments concerned are irrelevant *et separatim* lacking in specification. The averments bring into question the extent to which the defenders in a personal injuries action may be held liable for the costs of future care, where the pursuers seek to insist upon private funding, without establishing a Personal Injuries Trust ("PIT"), and where (following upon a joint minute) the extent of agreed liability may be insufficient to sustain such care in the long term.

[2] The pursuers seek damages of £12 million, as the Joint Welfare and Financial Guardians of Simon Hill ("Simon") to whom they owe fiduciary duties by virtue of sheriff court interlocutors. The interlocutor of the sheriff at Dingwall dated 3 May 2013 in terms of Part 6 of the Adults with Incapacity (Scotland) Act 2000 is produced as No. 6/32 of process (and see also No. 6/132 of process). The first pursuer is Simon's mother and the second pursuer is Simon's brother. Simon was born on 20 February 1980. He suffered severe injuries on 6 October 2006, as a result of a fall, and is now an incapable adult in terms of the 2000 Act by reason of those injuries. The pursuers

seek to hold the defenders liable in damages for Simon's injuries, alleging that they were caused by the defenders' fault and negligence.

[3] The contentious averments relate to the quantification of damages. The defenders aver (in Answer 7 of the "Working Print" of the Closed Record, No. 46 of process) that:

> "Simon's accommodation and care at the [*specified*] Centre are received by him at minimal cost to him. That will remain so in the event of any damages awarded in the present claim being paid into a Personal Injury Trust ("PIT")..." ["the first passage"]
>
> "The creation of such a trust would represent reasonable mitigation of Simon's loss. A reasonable person charged with looking after his own affairs and faced with the choice of paying for the care and accommodation at the Centre or arranging a PIT and obtaining such care and accommodation free or at minimal cost would invariably opt for the latter. It would not be reasonable to decline to set up a PIT in such circumstances. The costs related to the creation and maintenance of a PIT are accepted by the defenders as being a legitimate head of claim in the present action..." ["the second passage"]
>
> "Separatim and in ant (*sic*) event the home care package averred as necessary by the pursuers is not one which is feasible or sustainable in the longer term. The present action now proceeds on the basis of damages agreed at 50% of the sum agreed and awarded by the Court. On the pursuers own averments, such a sum will be insufficient to support Simon in the home care regime for which it is contended." ["the third passage"]

[4] There is also a Joint Minute (No. 26 of process), in terms of which the parties have agreed:

> "that the Defenders shall be found liable to make reparation to the Pursuers to the extent of fifty percent (50%) of the loss, injury and damage suffered as a result of the accident to Simon Hill ('the Adult') referred to on Record."

[5] A proof before answer was allowed on 30 May 2012, and split between liability and quantum on 26 February 2014. A proof on liability and contributory negligence was appointed to proceed on 17 June 2014, and thereafter discharged upon receipt of the parties' Joint Minute (*supra*) on 20 June 2014. Following sundry procedure and extensive further adjustment of the Minute of amendment for the defenders (No. 20 of process) and Answers thereto for the pursuers (No. 22 of process) a hearing to debate the outstanding issues of parties was fixed and consideration of the adjusted Minute and Answers was continued to that hearing which proceeded before me.

Submissions for the pursuers

[6] The pursuers contended that the first and second passages (at page 38D – 39B of the Working Copy Record) seek to assert that, in calculating the amount of future damages, the pursuers should not be awarded a sum to reflect the actual cost of Simon's future care. It was submitted that there is no basis in law or averment of fact for such an assertion. On the contrary, the pursuers are entitled as of right to require the wrongdoer to make reparation rather than rely on funding from the local authority or health authority (*Peters* v *East Midlands Strategic Health Authority* [2010] QB 48, Dyson LJ at paras [33] – [36] and [53] – [56] and *Harman (A child)* v *East Kent*

Hospitals NHS Foundation Trust [2015] PIQR Q4, Turner J at paras [21] – [27]; see, also, *Freeman* v *Lockett* [2006] PIQR P23, Tomlinson J at paras [5] – [7], [29] and [32]; *Fletcher (A Guardian)* v *Lunan* [2008] CSOH 55, Lord Carloway at para [9]; McGregor on Damages, 19th edn (2014) at paras 38-186 – 38-189). The proper assessment of damages requires that a reasonable care package be determined and that the actual cost of that be awarded to the pursuers, subject to the parties' agreement as to liability (*supra*). The assertion by the defenders, as to the minimal costs of current care, is irrelevant. These costs are contributed to partly by the local authority, partly by the health authority, and partly by the pursuers (see Record at pp 25E – 26C and 33D – 34A). The assertion that such a state of affairs will continue is likewise irrelevant *et separatim* lacking in specification. There are no averments by the defenders as to how funding for future care (whether residential or domiciliary) would be provided, by whom and for how long, whether or not a PIT is set up. There are no supporting documents lodged by the defenders and no witnesses to be led relative to these matters.

[7] Further, no account is taken of section 2(4) of the Law Reform (Personal Injuries) Act 1948, which provides that:

> "In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under…the National Health Service (Scotland) Act 1978".

[8] It is for the defenders to make it clear that the future funding (or any part of it) asserted to be available would not involve facilities available under the National Health Service (Scotland) Act 1978. No attempt is made to identify whether any element of the future costs of care would be payable by the defenders and whether such costs would be payable by virtue of the 1978 Act. It is unclear on what statutory basis the costs would be paid by the defenders.

[9] The averments in the second passage are irrelevant *et separatim* lacking in specification. The defenders do not offer to prove that the pursuers as financial guardians with legal responsibility for Simon would be acting unreasonably by failing to set up a PIT. The pursuers' functions and duties as financial guardians are determined by the sheriff and do not include setting up a PIT. It is for the pursuers to decide what care and accommodation may be appropriate for Simon. The averment in respect of the recovery of costs related to the creation and maintenance of a PIT is irrelevant, as the pursuers do not seek any such costs.

[10] The third passage of averments is also irrelevant. The pursuers are entitled to recover half of the loss sustained. The loss sustained has yet to be quantified. Once it is quantified the defenders are liable for half of that loss. The quantification of that loss is not affected by the fact that the pursuers will only recover half of it. The agreement reached in the present case was in respect of contributory negligence. The terms of the Joint Minute make it clear that the pursuers are entitled to fifty per cent of the loss, injury and damage suffered as a result of Simon's accident. Damages are to be reduced having regard only to the claimant's share in the responsibility for the damage (*Sowden* v *Lodge* [2005] 1 WLR 2129, Pill LJ at paras [74] – [86] and Longmore LJ at para [100]; Law Reform (Contributory Negligence) Act 1945 (the "1945 Act"), section 1).

[11] Accordingly, all the specified averments should be excluded from probation.

Submissions for the defenders

[12] The defenders invited me to repel the pursuers' challenge to the relevancy and specification and to allow proof before answer on all the averments in the "Working Print" of the Closed Record (*supra*).

[13] By way of preliminary observation, it was submitted, first, that the cases cited by the pursuers were not binding, being decisions of the English courts, and that the propositions advanced by the pursuers were all untested under Scots law. In the assessment of damages, Scots law tended to shy away from the more rigid rules preferred by English law (*Duke of Portland* v *Wood's Trustees* 1926 SC 640; *Haberstich* v *McCormick & Nicholson* 1975 SC 1). Secondly, the object of any award of damages is to restore the pursuer, so far as is possible by payment of money, to the position that obtained prior to the injury (*Livingstone* v *Rawyards Coal Co* (1880) 7 R (HL) 1). That being so, it would be unprincipled to award damages in compensation of losses, which have not been, and will not be, incurred. Thirdly, the touchstone in any award of damages is the concept of reasonableness. As part of that concept, an injured party must act reasonably so as to mitigate his loss. Failure to do so may result in damages being refused or limited (*Darbishire* v *Warran* [1963] 1 WLR 1067).

[14] The pursuers' opening criticism of the defenders' approach (set out in paragraph [6] above) was misconceived. Contrary to the pursuers suggestion, the defenders have offered to prove facts and circumstances from which the court would be invited to conclude or infer that Simon will remain where he presently resides, at no or minimal cost to him. On that basis, the court would be invited to award damages which directly equate to "the actual cost of Simon's future care". The dispute between the parties was therefore not whether the actual cost of Simon's care is recoverable, but rather what the actual cost will be, which was a matter for proof. If the evidence led by the defenders were to be accepted by the court, there would be no basis for awarding damages in respect of amounts which, *ex hypothesi*, would not be spent (*Woodrup* v *Nicol* [1993] PIQR Q104, Russel LJ at Q114). This approach was consistent with statements of high authority on damages in other areas of the law (see, eg, *Ruxley Electronics and Construction Ltd* v *Forsyth* [1996] AC 344; *Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist & Lynn Ltd & Ors* [2009] CSOH 125, Lord Menzies at para 117; *Grove Investments Ltd* v *Cape Building Products Ltd* 2014 Hous LR 35).

[15] The pursuers could not simply assert that exclusively private facilities were going to be used: especially where, at present, they were not; and where, as here, the defenders offered to prove that Simon's best interests would be served by maintenance of the *status quo*. That being so, the pursuers' contention as to entitlement to reparation from the wrongdoer was one that could be made at proof, but only if the pursuers proved that "private facilities" would be used. If, however, the court concluded on the evidence that such facilities would not be used, there would be no basis, in fact or in law, for awarding damages in respect of them.

[16] In any event, the position advanced by the pursuers offended against the requirements of reasonableness. The defenders have offered to prove, and had expert evidence to vouch, that it would be in Simon's best interests to remain in his current care setting. It would not be acting reasonably to move him, even if that resulted in a higher award, where moving him would run counter to his best interests. If the defenders prove their averments it would be unprincipled and manifestly wrong in law for the court to award damages on a wholly different basis.

[17] The pursuers' challenge to the specification of these averments was likewise said to be unfounded. The pursuers themselves averred the current basis for the funding of Simon's care (at p 25E-26A). The defenders merely offered to prove that this would remain the case. Moreover, the pursuers placed reliance (at p 26A – B) on the position after payment of any award of damages, hence the defenders needed to address the matter. It would be inconsistent, unfair and unrealistic to allow the pursuers to make arguments based on the receipt of damages whilst precluding the defenders from countering those arguments by reference to what any reasonable person would do on such receipt.

[18] Nothing in that exercise offended against section 2(4) of the Law Reform (Personal Injuries) Act 1948 (*Eagle* v *Chambers (No 2)* [2004] 1 WLR 3081, Waller LJ at paras [70]- [71]). Contrary to the pursuers' suggestion, the defenders did not aver that the total award of damages should be reduced by reference to available NHS facilities. What was positively averred was the stability and viability of the current and future arrangements for Simon's care in the context of supporting averments (at p 34E-36A) that the reasonable course of action was for Simon to remain in his current care setting with an augmented care package. As previously noted, that was a matter for proof.

[19] With regard to the second passage, the pursuers' attack was also misconceived. It was within judicial knowledge that the setting up of a PIT is commonplace, as a legal device to avoid the loss of benefits from an award of damages. The costs of setting up a PIT have long been recognised as recoverable in a claim such as this (*SRC on behalf of NSEC* v *Mr Ewan Kemp* [2011] CSOH 43). The fact that the pursuers has chosen not to include such a claim could not be decisive of the issue.

[20] The pursuers' complaint as to the lack of averments in respect of the reasonable actings of the pursuers as financial guardians depended upon a selective reading of the defenders' pleadings. The defenders' averments were fit for probation and they formed the basis for the submission, which would be made at proof, that the pursuers were under an obligation to mitigate loss. The averments thereafter specified the basis upon which, in the particular circumstances of this case, the creation of a PIT would satisfy that duty. Notwithstanding the pursuers' position as financial guardians, they were no less subject to the requirement to act reasonably than any other pursuer. The pursuers did not aver that they *could not* set up a PIT, and self-evidently such an averment could not be made, since the setting up of such a device would be entirely lawful.

[21] The pursuers' reliance on *Sowden* v *Lodge (supra)* was also said to be misconceived. *Sowden* concerned the application of the 1945 Act. The present case did not, and so the reasoning in *Sowden* was neither binding nor determinative of the issue. The parties' agreement regarding payment of damages in the present case did not represent an agreed level of contributory negligence, and thus did not turn on the meaning of the 1945 Act. On the contrary, in advance of the earlier proof (on liability only), the defenders had advanced a case that they were not liable *at all*. The parties' agreement was based on litigation risks (including, no doubt, both the sole fault defence and that of contributory negligence). It was not open to the pursuers simply to assert that the agreement was reached in respect of contributory negligence, when that was plainly neither true nor the way in which the Joint Minute was framed.

[22] For the reasons outlined above, the court required to assess, on the balance of probabilities, what the future will hold for Simon. The pursuers themselves asked the court, in making that

assessment, to take account of the award of damages that will be made: hence the need to consider whether or not a PIT will be put in place. It would be both unrealistic and unfair to close one's eyes to arguably the most important factor in that assessment: what can, in actuality, be provided affordably? Whether or not the pursuers' arguments prevail should depend on findings-in-fact made by the court, on the assessment of the whole evidence. They could not be determined *ab ante*.

[23] Finally, the defenders queried the utility of the pursuers taking these relevancy points in advance of a proof before answer, which would inevitably be required, before answer. All of the points raised by the pursuers could be argued following, and determined in light of, the evidence – including any evidence allowed subject to competency and relevancy. Given that none of the points raised was dispositive of this litigation, the argument advanced by the pursuers was said to be not only misconceived, but counter-productive. If the defenders succeeded at debate then all that would be occasioned was the addition of expense. If the pursuers succeeded then, standing the effect of the points raised in relation to quantification, the defender would, inevitably, reclaim – as would be their unfettered right (RCS 38.2(4) and (5)) – in which case the arguments before the Inner House would require to proceed on the basis of hypotheticals rather than, as would surely be preferable, the actual evidence.

Discussion

[24] The main objective of an award of damages, in a case such as this, is to place the injured party in a position as close as practically possible to that which he would have occupied had he not been injured in the manner condescended upon. In relation to the costs of future care, the primary focus is on the nature and extent of the proposed care and whether it is reasonably required to place the injured party in his pre-accident position. A further question is whether the costs of such care are reasonable.

[25] In relation to Scottish authority, the pursuers have referred me to the decision of Lord Carloway, then sitting in the Outer House, in the case of *Fletcher* v *Lunan* [2008] CSOH 55. That case concerned a motion for *interim* damages in which the issue for determination was the amount of damages "likely to be recovered". One area of dispute was the claimant's cognitive ability to express a desire as to where she was to live. Lord Carloway observed (*ibid,* para [9]) that:

> "…she [the claimant] has been able to express a preference to be cared for at home. The pursuer has expert advice that she can be cared for at home. Whether the defender has to pay for that care depends upon the application of common law principles of damages. The pursuer is entitled to such damages as will put [the claimant] into the same position, or as near to it as practically possible, as if she had not been injured. If a pursuer proposes a particular care regime, which seeks to achieve that result, then the defender will have to pay for it in damages unless that regime is unreasonable. In that regard, the pursuer is under no obligation to mitigate loss by keeping [the claimant] in a nursing home just because it is funded by central or local government and is regarded as adequate for her needs. If it is reasonable to have her cared for in her own home, where she would have been but for the accident, then the cost of that will be a legitimate head of damage even if it involves additional or exclusive private cost. However, if all that is required to put [the claimant] into that same pre accident position is already, or may be, provided for from a publicly

funded source, it may be unreasonable to instruct a more expensive and unnecessary private scheme. Equally, if a pursuer can secure public funding, in whole or in part, for her care, he might reasonably be expected to apply for it so as to reduce his expenditure. But it is not for the Court to decide what is 'best' for [the claimant] or to stipulate an acceptable minimum level of care. It is for the pursuer to put forward a regime and the defender will require to fund that, unless that regime is an unreasonable or impractical one. *Quantum valeat,* that appears to have been the conclusion reached by the English Court of Appeal in *Sowden* v *Lodge* [2005] 1 WLR 2129 (see also *Crofton* v *NHS Litigation Authority* [2007] 1 WLR 923), to which both parties made reference (see eg Pill LJ at paras [10] – [14], [38] – [41]; *cf* medical expenses in terms of Law Reform (Personal Injuries) Act 1948 (c 41), section 2(4))."

[26] In the present case, there is a fundamental dispute between the parties as to whether Simon ought reasonably to be cared for in his own home, or whether he ought reasonably to remain in his current care centre setting. The pursuers aver, *inter alia,* (at 26C – 27A) that:

> "The pursuers reasonably have determined that Simon's care and welfare interests, including his opportunities to undertake a full programme of social, leisure and cultural activities, are to be achieved by him [*sic*] return to living, with support, in the community. They reasonably seek to secure respect for his privacy and family life through a complex care package for him at his own home… But for his fall, Simon was being prepared by the defenders for living in his own home. He wanted to return to living in the community…"

By contrast, defenders aver, *inter alia,* (at 37A – B) that:

> "In relation to Simon's ongoing and future care, explained and averred that it is in the best interests of Simon to maintain his current accommodation and care… The course of action proposed by the pursuers in removing Simon to a new home is not in his best interests. To remove Simon would, accordingly, not be reasonable in the whole circumstances."

[27] Separately, and as a consequence, the parties differ as to the reasonable costs of Simon's future care.

[28] Having considered the pleadings and the submissions of both parties, I agree with the defenders that the averments in the first and second passages do not seek to exclude the pursuers' entitlement to recover the costs of the future care package proposed by them. The defenders' position on costs is predicated on Simon being cared for in his current care home setting.

[29] The pursuers, on the other hand, do not countenance the possibility of Simon's future care being provided in a care home setting, even if privately funded. On the hypothesis that he ought reasonably to live at home, the pursuers aver, *inter alia,* (at 25D – 26A) that:

> "His current accommodation…is funded jointly by the defenders and by the Highland Council, with contributions required by the Highland Council from the pursuers… The pursuers seek to directly fund the costs of Simon's future care. They do not intend to rely on State provision nor risk that Simon's care requirements and provision should be determined by the defenders or any local authority…"

[30] On a fair reading of the averments, what the defenders seek to do appears to be essentially what is envisaged in *Fletcher* v *Lunan (supra).* They offer to prove that the nature of the care and accommodation regime proposed by the pursuers is unreasonable and impractical in the light of the various practical matters set out on record (at 37A – 38D and 39A - D). Further, they offer to prove that it would be reasonable instead for the *status quo* to be maintained and that it would be unreasonable for the pursuers to choose to pay for the proposed regime unnecessarily. The defenders do not, however, advance the position that the privately funded regime proposed by the pursuers is unreasonable by virtue of the availability of an alternative publicly funded regime. To put it another way, the defenders do not argue that damages ought to be reduced solely on the basis of the availability of a publicly funded alternative regime (cf s 2(4), 1948 Act). The primary dispute between the parties is as to the nature of the care regime itself – that is, whether it is delivered at home or in a care home setting.

The first and second passages

[31] I am not prepared to hold that the first and second passages of the averments the defenders seek to introduce are irrelevant. Whether it is reasonable, in order to place him in his pre-accident position, for Simon to be cared for at home or in a care home setting is essentially a matter for proof before answer. Questions of reasonable mitigation of costs may also arise.

[32] In *Peters* v *East Midlands Strategic Health Authority* [2010] QB 48 (McGregor on Damages (19th edn, 2014), para 38-188) the issue directly before the court was whether

> "even if matters were otherwise equal as between relying on the local authority and recovering from the defendants…the claimant would be fully entitled as a matter of law to choose to pursue the tortfeasors" (para 22, citing Butterfield J at para 75).

In that context, the court observed that the decision in *Sowden* v *Lodge (supra)* "needs to be analysed with some care" (para 42), and did not compel an answer to whether a claimant was entitled as of right to opt for self-funding (para 51), particularly as that issue did not appear to have been argued in that case. It was noted that no authority was cited to the court in *Peters* that was directly in point as to whether, in the context of a claim for care and accommodation costs, the claimant was entitled to recover damages from the wrongdoer as a matter of right, or only if it was reasonable in all the circumstances for him not to enforce his statutory right against the public authority (paras 35 and 36).

[33] In *Peters,* the court concluded (para 53) that:

> "We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be… The only issue is whether the defendant wrongdoers or the council and the [Primary Care Trust] should pay for it in the future…"

[34] The court reasoned that, in principle, the case should be treated in the same way as cases in which a claimant has a right of action against more than one wrongdoer or against a wrongdoer and an innocent party, irrespective of the fact that the claimant's statutory right was to have the loss made good in kind, by the provision of care and accommodation, rather than by payment of compensation (para 54). Thus, "provided that there was no real risk of double recovery…there was no reason in principle why the claimant should give up her right to damages to meet her wish to pay for her care needs herself rather than to become dependent on the state" (para 56).

[35] However, the court went on to observe, by way of a postscript (para 89), that:

> "There is much to be said for the view that it is reasonable for a claimant to prefer self-funding and damages rather than provision at public expense, on the simple ground that he or she believes that the wrongdoer should pay rather than that the taxpayer and/or council tax payer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the state cannot recover damages because he or she has acted unreasonably. In *Freeman's* case [2006] PIQR P340, Tomlinson J came close to embracing this view at para 6. We heard no argument on this approach to the mitigation issue and we express no concluded view about it."

[36] In the present context, it may also be significant that the court in *Peters* considered that the risk of double recovery could be effectively dealt with by amending the terms of the relevant court order pursuant to which the claimant's affairs were being managed by the Court of Protection (para 63). Thus, an undertaking limiting the authority to act on behalf of the claimant was accepted such that no application for public funding of the claimant's care under the relevant statutory provision could be made without further authority of the court along with a provision for the defendants to be notified of, and given the opportunity to make representations in relation to, any such application.(para 64).

[37] Whether and to what extent the approach in *Peters* ought to be followed in this particular case, and to what precise effect, may well give rise to several issues for this court to address in due course. The decision in *Fletcher* v *Lunan (supra)* provides a starting point for such an analysis. However, for aught yet seen, some questions may not arise in the present case at all, for example, if the pursuers succeed in proving that Simon ought to be cared for at home. In my view, the questions raised during the debate are best addressed after hearing the whole relevant evidence and submissions thereon. To that extent I agree with the defenders' approach. I am not prepared to find against the defenders as a question of relevancy in relation to the first and second passages. Proof before answer is appropriate in relation to those passages.

[38] I also take the view that the pursuers' arguments in respect of lack of specification are unfounded. The defenders' assertion that the costs of Simon's future care will remain minimal in the event of damages being paid into a PIT does no more than assert that Simon's present funding arrangements, as specified by the pursuers, are likely to subsist and would not be adversely affected by receipt of an award of damages in the event of payment into trust. Whether that is ultimately found to be the case, particularly in light of the pursuers' further averments (at 26A – B) in respect of the anticipated intermittent increases to the capital limit under the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2015 and (at 33D) the lack of

certainty as to future charging arrangements in respect of residential care, notwithstanding any commitment by the defenders to currently prevailing guidance, will again be a matter for proof before answer.

[39] On the pursuers' own averment, it is for them to decide what care and accommodation may be appropriate for Simon, and the establishment of a PIT would require the permission of the sheriff. That may well be so, but I accept the defenders' submission that the pursuers as guardians are not necessarily to be viewed any differently with regard to the assessment or reasonable mitigation of a pursuer's losses. Whether a particular course would be reasonable in the circumstances of the present case is essentially a matter for proof before answer.

[40] Accordingly, for the reasons mentioned, the defenders will be allowed a proof before answer in relation to the first and second passages of the averments under challenge.

The third passage

[41] In relation to the third passage under challenge, I agree with the submissions of the pursuers that damages fall to be assessed without reference to the effect of parties' agreement in the Joint Minute (*supra*). Whether the parties' agreement was reached in whole or in part on the basis of contributory negligence, the court is not in a position to decide. Many factors can influence such things. What is clear, however, is that the court requires to give effect to the express terms of that agreement. In the present case, the parties' agreement limits the defenders' liability. It does not, of itself, affect or restrict the assessment of *quantum.* Indeed in the absence of any indication to the contrary (and there is none here), it seems clear that such a limitation falls to be applied to, and after, the assessment of damages on a full liability basis (see, eg, *Neale* v *Queen Mary's Sidcup NHS Trust* [2003] EWHC 1471 (QB), Cox J at paras 77 – 78). The limitation of liability having been fixed by agreement there is really no scope for the application of the 1945 Act, which contemplates findings by the court with regard to fault on the part of the claimant (section 1(1) and 1(2), 1945 Act). No such findings are contemplated in the present case and in any event they would have no bearing on the assessment of damages (*Sowden* v *Lodge (supra),* Pill LJ at para 84).

[42] Accordingly, I agree with the pursuers that the third passage of the defender's averments (specified above) should be excluded from probation. Those averments are irrelevant.

Disposal

[43] For the reasons stated, I will allow the Closed Record to be opened up and amended in terms of the Minute of Amendment for the defenders (No. 20 of Process) and the Answers for the pursuers (No. 21 of Process), both as adjusted, but excepting and excluding therefrom the averments of the defenders contained in the third passage (specified above).

[44] That having been done, I shall of new allow parties a proof before answer (a "PBA") of their respective averments on Record.

[45] In effect the PBA will be relation to the averments now contained in the current Working Print of the Record (*supra*) but under deletion of the words "Separatim and in ant (sic) event … regime for which it is contended." (where they appear on page 39 at letters D-E).

[46] I shall simply reserve all questions relating to the expenses of the debate.