SHERIFFDOM OF LOTHIAN AND BORDERS

A2111/02

JUDGMENT OF

SHERIFF PRINCIPAL IAIN MACPHAIL QC

in the appeal

in the cause

STEVEN HUNTER

Pursuer and Appellant

against

S THOMSON and M PERFECT trading as NATIONAL SPECIALIST STEEPLEJACKS

Defenders and Respondents

_____

Act: Woolman, QC; Corries, Glasgow

Alt: Goodbrand; Simpson & Marwick

EDINBURGH, 31 December 2003

The Sheriff Principal, having resumed consideration of the cause, allows the appeal; recalls the interlocutors of 16 May 2003 and 23 June 2003; repels the second plea-in-law for the defenders; before further answer, allow both parties a proof of their respective averments on a date to be afterwards fixed; finds the defenders and respondents liable to the pursuer and appellant in the expenses of the debate on 15 May 2003, of the hearing on expenses on 23 June 2003 and of the appeal; allows an account thereof to be given in; certifies the debate as suitable for the employment of junior counsel and the appeal as suitable for the employment of senior counsel; remits the cause to the Sheriff to proceed as accords.

NOTE

Introduction

[1]This is an action of damages arising from a road accident in which the pursuer's motor car was damaged in a collision with a vehicle owned by the defenders and driven by one of their employees in the course of his employment with them. The defenders admit liability. The pursuer's car was repaired at a cost of £4,317.38 of which the pursuer paid the first £400 in terms of the 'excess' condition of his insurance policy. There is no dispute about the cost of the repairs, and the pursuer has recovered the sum of £400. The only issue between the parties is whether the pursuer is entitled to recover damages for what he claims to be a diminution in the value of the car as a result of the accident which has not been extinguished by the repairs. The Sheriff has held after debate that his averments in support of that claim are irrelevant, and has dismissed the action. The pursuer now appeals.

The pleadings

[2]The pursuer's averments relative to his claim are in the following terms, in article 5 of the condescendence:

'The pursuer has been advised that the damage sustained to the vehicle by the said accident will affect the resale value of the vehicle. The pursuer seeks the sum of £1,443.75 representing the diminution in value of the vehicle. Engineer's report by Yorkshire Assessors UK will be lodged in any process to follow hereon and will be referred to for its whole terms which are held to be repeated and incorporated herein *brevitatis causa*.'

[3]It appears from the report (no 5/2 of process) that the car was a Renault Mégane Expression Coupé 1.4 which was manufactured in April 2001 and had done an average mileage. The accident took place on 6 February 2002. The material parts of the report are in these terms:

'In this instance we would class the accidental damage as being moderate and as a result we consider that the vehicle's value has been diminished. [. . .]

'Repairs have now been completed and although to a good standard it would be apparent to a qualified person that the vehicle had undergone repairs particularly as follows:-

Nearside front door, nearside and offside front wings, bonnet, bonnet landing panel, front crossmember, nearside rear lamp panel, rear panel assay, nearside quarter panel, boot lid, nearside rear quarter panel inner, rear crossmember.

'It is our opinion that when a vehicle is involved in an accident and subsequently repaired there is no doubt whatsoever that diminution in market value takes place. We take the view that if two identical motor vehicles were being offered in a car showroom one of which had been involved in an accident and the other not, then a prospective purchaser would quite obviously prefer to purchase the vehicle that had not been involved in the accident unless some financial incentive in the form of a discount was offered from the price of the previously damaged vehicle. [. . .]

'We would confirm that the [value of the] vehicle in Feb 2002 would be £9,625.00 and after taking into account all the parameters which must be considered when quantifying the likely loss as a result of diminution, we feel it would not be unreasonable to suggest the diminution to be 15% of the vehicle's value at the time of occurrence.

'We consider that diminution would be evident immediately after the repairs have been completed. Irrespective of the client's previous buying patterns it is likely that the vehicle would be disposed of immediately after repairs, and therefore the amount of diminution should not be discounted.

'We would assess the diminution value to be £1443.75.'

[4]The defenders state the following preliminary pleas:

'1. The pursuer's averments being irrelevant *et separatim* lacking in specification the action should be dismissed.

2. The pursuer's averments anent quantum being lacking in specification they should not be admitted to probation.'

The judgment of the Sheriff

[5]The Sheriff has sustained the defenders' first plea-in-law and dismissed the action. He has considered certain of the authorities to which I shall refer below and he has concluded that in a case of damage to moveable property the law of Scotland does not admit diminution in value as a head of damages in addition

to the cost of repairs. The pursuer has appealed on the ground that the Sheriff has erred in law and should have allowed inquiry by way of proof or proof before answer.

Submissions on appeal

[6]At the hearing of the appeal senior counsel for the pursuer submitted that in every case the relevant principle was *restitutio in integrum*. All other guidelines were subsidiary to that proposition. In each case it was necessary to examine the facts and determine what sum of money would restore the pursuer to the position he or she was in before the accident. Counsel referred to *Hutchison v Davidson* 1945 SC 395; *Pomphrey v Cuthbertson* 1951 SC 147; and *Di Ciacca v Archibald Sharp & Sons* 1995 SLT 380. As cases bearing directly on the circumstances averred by the present pursuer he cited *Bell v Glasgow Corporation* 1965 SLT 57 and, especially, *Payton v Brooks* [1974] RTR 169, [1974] 1 Lloyd's Rep 241. *Payton* had been accepted in a sheriff court case, *Hewer v Brown* 1990 SCLR 548. Counsel also pointed to a concession in another sheriff court case, *Campbell v Rae (Chief Constable of Strathclyde Police)*, Hamilton Sheriff Court, 31 December 2002, unreported. In *Neill & Co v CDC (Crisps) Ltd*, Outer House, 23 January 1991, Lord Prosser had awarded damages for the diminution in resale value of a car which had resulted from accident damage. Thus Scots law accepted that *restitutio* might include such damages. Counsel then examined the sources of the law relied on by the Sheriff in the present case: a dictum by Lord President Emslie in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 at 173; Walker, *The Law of Damages in Scotland* pages 706-707; Walker, *Delict* (2nd ed) page 749; and 15 *Stair Memorial Encyclopaedia* paragraph 915. Counsel submitted that the Sheriff's interlocutor should be recalled and a proof before answer allowed.

[7]The defenders' solicitor stated that the defenders did not take issue with the general principle of *restitutio*: the question was how it was to be applied in this particular case. The law was as stated in *GUS Property Management Ltd* and by the textbook-writers: where property was damaged, it was a question of circumstances whether the appropriate measure of damages was the diminution in value or the cost of repair. A pursuer had to choose one or other of those alternatives. No allowance would be made for diminution in value unless the vehicle had been repaired and sold at a loss. In the present case, it was important to notice that the car had not been sold. If the pursuer were to sell the car in five or ten years' time, he would not sell it at a loss of £1,443.75, because the car would have continued to diminish in value. He might eventually sell it for scrap. An award of the amount claimed would enrich the pursuer by a windfall benefit. Other cases were distinguishable. In *Pomphrey* the car had been a write-off. *Hutchison* had been concerned with heritable property, as had *Di Ciacca* where an actual loss, not a hypothetical loss, had been sustained. The vehicles in *Bell, Hewer* and *Neill & Co* had been sold. *Campbell* had proceeded on a concession. The defenders' solicitor also referred to *Rolls-Royce (1971) Ltd v Hutchison* 1976 SLT (Notes) 15. He said that there had been no case in Scotland, other than *Campbell*, where such a claim as that now made by the pursuer had come before the courts. Insurance companies had refused to entertain such claims, and claimants had accepted that. The defenders accepted that such claims were entertained in England, but *Payton* was not a satisfactory decision since it did not consider the position if the car was not sold, or was sold without loss, or was sold at a higher figure than its pre-accident value (admittedly an unlikely outcome). Anything other than an award for actual financial loss incurred on a sale would give the pursuer a windfall benefit. The Sheriff had reached the correct conclusion and the appeal should be refused.

Discussion

[8]The question for decision is whether, where moveable property is damaged through the negligence of a defender without being destroyed, and is repaired, and its market value after repair is less than its value before it was damaged, the pursuer is entitled to recover both the cost of repair and an amount representing the diminution in value of the property. In seeking to answer this question I shall begin by setting aside certain of the Scottish decisions discussed at the hearing of the appeal which do not appear to be helpful. I shall then try to identify what seems to be the relevant principle and to apply it to the circumstances averred

by the pursuer. Finally I shall refer to a few examples of the application of that principle to comparable circumstances in other jurisdictions.

Scottish decisions

[9]The Scottish case which requires the most careful consideration is *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 which influenced the Sheriff and was strongly founded on by the defenders at the hearing of the appeal. A building was damaged in the course of building operations on a neighbouring property. The building's owners ('Rest'), a wholly-owned subsidiary of a company, conveyed the property to the pursuers who were another such subsidiary of that company. They later assigned to the pursuers all claims competent to them arising out of the building operations. The pursuers' primary claim was for £350,000, which was said to be the difference between the value of the building before it was damaged and its value thereafter in its damaged state, before repair. Their alternative claim was for £100,000, which was said to be the cost of reinstating the damaged building. Lord President Emslie, delivering the opinion of the First Division, said (at page 173):

'The next question is whether, in light of the averments that the building has been reinstated at a cost of less than £100,000, the so-called primary claim is a relevant one. The answer is a simple negative. *Prima facie* the proper measure of the loss suffered by the owner of property which has suffered partial damage only is the cost of repair. In light of the averments that the damage to the building formerly owned by Rest has been repaired at a cost of £100,000 it is quite irrelevant to plead that, in order to secure *restitutio* for the person with a competent claim to reparation arising from the damage done, the proper measure of damages should be found in the infinitely larger sum said to represent the effect of the structural injuries upon the market price of the building.'

[10]In the House of Lords Lord Keith of Kinkel, in a speech with which the other members of the House agreed, said (at pages 178-179):

'It is undeniable, on the averments, that Rest suffered some loss through the defenders' operations. Its building was seriously damaged. How is the loss to be measured in money terms? One approach is to consider the extent to which the value of the building was depreciated as a result of the damage to it. Another is to assess the cost of repairs necessary to restore the building to the condition it was in before the defenders' operations. Both these approaches involve a process of estimating, an exercise familiar to courts of law. The pursuers make averments as to the extent of the diminution in the value of the building as a result of the defenders' operations. There is nothing in these averments which is in principle irrelevant. They go on to make averments about the costs which they incurred in making good the damage after taking the conveyance of the property. [. . .] The pursuers' averments about their own expenditure on repairs to the building are not open to any objection in so far as they are averments of fact. They have relevance, in my opinion, as indicating the scale of expenditure which it is likely that Rest would have required to incur if they had continued to own the building. The facts averred may thus have evidential value for the purpose of arriving at an estimate of the loss suffered by Rest, which is what the pursuers, as assignees of the claim, are in substance seeking to recover. I am therefore of opinion that the First Division took an unduly strict and narrow view of the pursuers' pleadings, which was not conducive to the aim of doing justice between the parties. It may well be that at the end of the day the proper measure of Rest's loss will turn out to be the estimated cost of making good the damage to the building, rather than the diminution in its market value. It may also be that there will not be found to be any substantial difference between the two measures. But these are considerations which will properly arise after evidence has been led. At this stage it cannot be said that the proper measure is so clearly the cost of making good the damage that the averments about diminution in value are irrelevant.'

[11]It is true that Lord Keith of Kinkel indicates that the court might have to choose between two measures of damages: either the cost of making good the damage or the diminution in the market value of the property after the damage was sustained but prior to repair. It is to be observed, however, that the pursuers' primary

claim was not for any diminution in the market value of the property after it had been repaired: thus the question that has to be resolved in the present case did not arise. Further, it is, I think, significant that Lord President Emslie's dictum, '*Prima facie* the proper measure of the loss suffered by the owner of property which has suffered partial damage only is the cost of repair,' is prefaced by the words '*Prima facie*'. It seems clear that his Lordship was not seeking to lay down an absolute rule.

[12]Several of the other Scottish cases cited do not appear to me to be of assistance. In *Bell v Glasgow Corporation* 1965 SLT 57 the pursuer, whose car had been damaged in a collision, averred that after it was repaired he sold it at a lower price than he would have obtained if the accident had not happened. The sheriff-substitute awarded damages of £100 under this head, without any discussion of principle or authority. In the Inner House, where the only issue was whether there had been corroboration of the pursuer's account of the accident, that award was not challenged by counsel of eminence. I do not think it would be prudent to draw any conclusion from that. In the sheriff court case of *Hewer v Brown* 1990 SCLR 548 a similar award was made, upon an acceptance of *Payton v Brooks* [1974] RTR 169, but it is not apparent that the matter was argued. In *Neill & Co v CDC (Crisps) Ltd*, Outer House, 23 January 1991, a further such award was made but without reference to authority and apparently without argument. In *Campbell v Rae (Chief Constable of Strathclyde Police)* Hamilton Sheriff Court, 31 December 2002, unreported, such an award was made upon a concession. The only textbook referred to at the hearing of the appeal which deals with the question in the present case is Walker, *The Law of Damages in Scotland*, which states (at page 707):

'Where repair is properly possible, no allowance will be made for depreciation, unless the vehicle is repaired and then sold at a loss . . .'

The cases cited in the relevant footnote do not vouch that proposition.

Principle

[13]In the absence of Scottish authority on the particular question it is necessary to search for principle. The relevant principles are stated in this way by Lord Patrick in *Pomphrey v Cuthbertson* 1951 SC 147 at page 162:

'Where moveable property has been damaged through the negligence of a defender, the pursuer is entitled to damages which, so far as money can compensate, will give him reparation for the wrongful act and for all the natural and direct consequences of the wrongful act - *Admiralty Commissioners v S S Susquehanna* [1926] AC 655 per Viscount Dunedin at page 661. "The dominant rule of law is the principle of *restitutio in integrum* and subsidiary rules can only be justified if they give effect to that rule": *Liesbosch Dredger v Edison, S S (Owners)* [1933] AC 449 per Lord Wright at page 463. The principle is firmly established. Its application to the infinitely varying circumstances of the owners of damaged articles will vary through a wide range. In the search for a method of restitution whose cost can properly be charged against a wrongdoer another principle must also be applied. The party aggrieved must take all reasonable steps to mitigate the resulting loss. He is not entitled to adopt a method of restoring himself to a position equivalent to that which he occupied before the casualty if there is another and cheaper method of effecting such restoration. The interaction of the two principles will settle the method of restitution appropriate to any particular case, and the cost of that method will measure the damages which can be recovered.'

[14]There are many dicta to the same effect in other jurisdictions where the same principles are observed. In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 Viscount Haldane LC said (at page 689):

'The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.'

That was a case of breach of contract, but the principles are the same: *Admiralty Commissioners v S S Susquehanna* [1926] AC 665 at 661 per Viscount Dunedin. In *Darbishire v Warran* [1963] 1 WLR 1067 Pearson LJ (as he then was) stated the law in this way (at page 1077):

'There should be an element of flexibility in the assessment of damages to achieve a result which is fair and just as between the parties in the particular case. In the *Liesbosch* case [[1933] AC 449 at page 463] Lord Wright quoted Lord Sumner in *Admiralty Commissioners v S S Chekiang (Owners)* [[1926] AC 637 at page 643]: "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject." Lord Wright went on to say: "Lord Sumner also distinguishes 'a rule of thumb' from what is binding law. In these cases the dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can only be justified if they give effect to that rule."'

[15]Thus, in cases where the defender has damaged the pursuer's property without destroying it, the dominant rule is the principle of *restitutio in integrum.* The pursuer is therefore entitled to recover damages to the extent to which the value of his property has been reduced. There is a general rule of practice that the diminution in value is ascertained by reference to the cost of reasonable repairs. That rule is stated in these terms by Greer LJ in *The London Corporation* [1935] P 70 (at page 77):

'*Prima facie*, the damage occasioned to a vessel is the cost of repairs - the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and *prima facie*, the value of a damaged vessel is less by the cost of repairs than the value it would have undamaged.'

Greer LJ's use of the words '*Prima facie*', however, indicates that these are no more than subsidiary rules. The same may be said of Lord President Emslie's dictum in *GUS Property Management Ltd.* The application of such rules cannot be justified if they do not give effect to the dominant rule, the principle of *restitutio in integrum* (*Liesbosch Dredger*, per Lord Wright).

[16]In my opinion that principle, and the principle of mitigation of loss, may be applied in the present case in the following way. I make the assumption, necessary for a decision on relevancy, that the pursuer's averments will be proved. The pursuer's car was damaged by the negligence of the defender's employee. As soon as the accident occurred the car suffered a diminution in value as a result of the damage it sustained in the collision. The pursuer sustained loss as a result of that immediate diminution in the value of his property. He appropriately mitigated that loss by having reasonable repairs made to the car. Nevertheless those repairs did not restore the car to its pre-accident value: thus, there remains a continuing, or residual, diminution in the value of the car which has not been extinguished by the repairs. Despite its having been properly repaired, the car is now less valuable, as a repaired vehicle, than it was before the accident. That continuing diminution in value is a natural and direct consequence of the negligent act of the defenders' employee. The pursuer is therefore entitled to recover damages for the continuing diminution in the value of the car.

[17]The argument for the defenders placed great emphasis on the fact that the car had not been sold. It was maintained that no allowance should be made for any diminution in value unless the car had been sold at a loss. No authority was cited for that proposition, other than the sentence in Walker on *Damages* to which I have referred at the end of paragraph [12] above, and I have been unable to find any authority for it in Scotland or elsewhere. It appears to offend against the principle of *restitutio in integrum*. Notwithstanding the repairs, the car is less valuable than it was before the accident. If an inventory had been made of the pursuer's property after the repairs, the car would have been entered at its post-repair value. If, after the repairs, a wrongdoer had destroyed the car by fire, he would have been liable to pay damages equal to the post-repair value. It appears to me to be undeniable that the difference between the value of the car before the accident and its value after the repairs is a loss to the pursuer. It is for the defenders to make good that loss, and what the pursuer may or may not do with the car after it has been repaired is not the defenders' concern. Whether the pursuer were to sell the car in five years' or ten years' time, or to give it away, or to keep it until

it was saleable only as scrap, the defenders would have no ground for maintaining that they were not bound to pay for the loss they has caused.

Cases in other jurisdictions

[18]That view of the matter appears to be supported by decisions in other jurisdictions where the same principles have been applied to the resolution of the question that is to be decided in this case. An early English case, which I mentioned at the hearing of the appeal, is *The 'Georgiana' v The 'Anglican'* (1872) 21 W R 280. It is cited in Walker on *Damages*, page 707, Street, *Principles of the Law of Damages*, page 211, and McGregor on *Damages* (16th ed) page 871, paragraph 1326, and as far as I have been able to discover it has not attracted adverse comment. After a collision the plaintiff's yacht was repaired but its market value was nevertheless lower than before. He claimed damages on account of its depreciated value and Townsend J made an award under that head of damages although the yacht had not been sold. He said:

'I now come to the last and most important item of the plaintiff's demand, namely Mr Hanson's estimate of the deterioration in value of the yacht. I have to decide that question mainly on principle, because I am not aware of any direct authority, either in the Court of Admiralty of England or in this Court, to guide me to a conclusion. A mere apprehension of depreciation would not justify me in allowing a claim of that kind. But Mr Hanson is positive in stating that the yacht's marketable value has been depreciated by a sum of £300. It is not said that the owner desires to sell her, or that any offer has been made for her, but if there be this positive depreciation of her value in consequence of her having sunk, I think the plaintiff should be allowed, not such sum as would restore her to her former condition, for that is impossible, but such sum as will compensate for the impaired value. In Parsons on Shipping, vol 1, page 539, note 1, some cases are mentioned, which have been decided in the American Courts, in which an allowance was made, to enable the owners of the damaged vessel to put her into as good order as before, and where, says that learned writer, "it was also held that if the vessel received injuries which could not be repaired, damages were to be allowed for the impaired value." I have not been able to consult these authorities, but the principle laid down seems to me to be good sense and reason. It is clearly impossible to do away with the depreciation proved to have been caused by the sinking. [. . .]

'I must therefore allow this £300, not merely because I think I do so on a just principle, but because I have the satisfaction of believing that my view of the matter is sustained by the American authorities referred to in Mr Parsons's valuable work.'

[19]In *Payton v Brooks* [1974] RTR 169 the plaintiff claimed damages of £100 for the reduced value of his car on the ground that although it had been excellently repaired after a collision with the defender's vehicle, its market value had been reduced. He failed to prove any reduction in market value. The Court of Appeal held, *obiter* but *per curiam*, that if he had been able to prove it, he would have been entitled to damages under that head. Edmund Davies LJ (as he then was) said (at page 174):

'I have to say, however, that I find nothing in *Darbishire v Warran* [[1963] 1 WLR 1067] in any way inconsistent with the plaintiff's submission that, if reduced market value can be proved, compensation for the reduction can be awarded to an injured plaintiff. On principle, I fail to see how it could be otherwise where a plaintiff is able to prove that, despite his best efforts to mitigate the damage caused by the defendant's negligence, the value of his property as a saleable asset has been reduced.'

His Lordship referred to American authority and continued:

'I propose to go no further into the law than this. I think it right, however, having regard to the fact that the parties have reached the Court of Appeal, to make it clear that I certainly do not accept the defendant's contention that reduced market value, even if clearly established in such cases as the present, is nevertheless not recoverable. On the contrary, my present view, both on general principle and in the light of the authorities (and there are many more which on another occasion may well have to be dealt with expansively), is that,

had Judge Stockdale found established the reduced market value which the plaintiff asserted, this appeal would have had to be allowed and judgment for the £100 awarded to the plaintiff.'

[20]Buckley LJ said (at pages 174-175):

'I entirely agree with the judgment which Edmund Davies LJ has just delivered and with his observations with regard to the possibility of loss of market value ranking as an item in the damages recoverable by a plaintiff. It seems to me that the question whether loss of market value consequential on damage suffered in an accident, notwithstanding that excellent repairs have been carried out, should rank as part of the damages recoverable by the plaintiff must depend on the particular circumstances of each case.'

[21]Roskill LJ (as he then was) said (at pages 175-176):

'Like Edmund Davies LJ, I have reached the conclusion that, in a case where the evidence justifies the finding, any diminution in value of the damaged goods would be recoverable as a head of damage in addition to the cost of repairs. [. . .]

'There are many cases which arise, whether in the field of contract law or of tort, where the cost of repairs is a prima facie method of ascertaining the diminution in value. It is not, however, the only method of measuring the loss. In a case where the evidence justifies a finding that there has been, on top of the cost of repairs, some diminution in market value - or, to put the point another way, justifies the conclusion that the loss to the plaintiff has not been fully compensated by the receipt of the cost of complete and adequate repairs, because of a resultant diminution in market value - I can see no reason why the plaintiff should be deprived of recovery under that head of damage also.'

[22]It is important to notice that the Court considered that the material question on the facts was whether there remained any diminution in market value after the repairs were completed. They held that it was irrelevant to calculate what loss the plaintiff might suffer if he were to sell the car in the future. The point was that he had been *entitled* to sell the car as soon as the repairs had been completed. The judge of first instance had appeared to address his mind only to the question whether, when the plaintiff, in accordance with his general practice, changed his car in four years' time, there would at *that* date be any reduced market value. Edmund Davies LJ said (at page 171):

'Despite the plaintiff's general practice of retaining a car for four years, however, circumstances could well arise when he (or others interested in his assets) would want to sell it almost as soon as he acquired it. When the appeal was first before us, we indicated that we thought that the judge was in error in omitting to have in mind this very real possibility. We considered that he had accordingly failed to make any finding on the evidence before him as to whether, supposing the plaintiff had wanted to sell the car on the day when the admirable repairs had been completed, he would get a lower price in the market than if it had never been involved in an accident at all.'

[24]Finally I refer to a decision of the Court of Appeal of New Zealand, *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, which is cited in Fleming on *Torts* (8th ed), page 250. This case was not mentioned at the hearing but I have considered it unnecessary to invite argument upon it because it does not raise any new point and does not modify the conclusion I have already reached. The purchaser of a flat sued the builder for negligence which had caused subsidence. He claimed damages for the cost of remedial work, depreciation or diminution in value and loss of rental while the repairs were carried out. He was held to be entitled to recover damages under each head. As to the second, Richmond P said (at page 441):

'Apart from the actual cost of the alterations, there is a sum of $2,000 claimed as depreciation or diminution in value. This sum represents the difference between the market value of the property after all repairs were done and the market value had there been no subsidence. This claim, in my opinion, should be allowed. In one sense it can be described as an economic loss, but it is economic loss directly and immediately connected with the structural damage to the building and as such is properly recoverable.'

The other members of the Court agreed with the President on this point: Woodhouse J at page 422, and Cooke J (as he then was) at page 428.

Result

[24]Upon this view of the law the Sheriff at inquiry in the present case could find that there remained after the repairs a diminution in the value of the car which merited compensation. I therefore consider that the defenders' general plea to relevancy should not have been sustained and that the appropriate course is to allow a proof before answer. I have accordingly recalled the Sheriff's interlocutors. I have repelled the defenders' second plea-in-law since I have decided that all the pursuer's averments relating to loss and damage should be remitted to probation.

[25]It should be noted that since this is a decision on a question of relevancy it has been necessary to assume that the facts averred by the pursuer will be proved. The facts remain to be ascertained, however, and the assessment of the damages will be ultimately a matter of fact. I adopt the words of Roskill LJ in *Payton v Brooks* at page 176:

'I would only add one word of caution. This conclusion is not a charter under which infuriated plaintiffs, who have the misfortune to have their cars damaged by careless drivers, acquire an unfettered right to recover diminution in value in every case in addition to the cost of repairs. It is essential in such a case, in my judgment, for appropriate evidence to be called to prove diminution in value. I do not think that in the ordinary case the burden of proof which rests on the plaintiff would be discharged merely by calling an individual to prove his idiosyncratic view of the particular loss in a particular case. The diminution in market value must be proved by appropriate evidence of the kind usually called when diminution in market value is sought to be proved as a head of damage. Subject to that qualification, it seems to me that this head of damage is recoverable.'

My judgment therefore offers no encouragement that the head of loss which I have held to be in principle capable of recovery will on the evidence at inquiry be established.

[26]The parties were agreed that expenses should follow success, and I have given effect to that agreement. While I have allowed an account of expenses to be given in, I have not ordered a remit to the Auditor at this stage. It will be for the Sheriff to remit the account to the Auditor along with the account of expenses allowed to be given in at the conclusion of the litigation (Macphail, *Sheriff Court Practice* (2nd ed), vol 1, pages 604-605, paragraph 18.87). The pursuer's motion to certify the appeal as suitable for the employment of senior counsel was not opposed and in view of the importance of the issues discussed I have had no hesitation in granting it.