SHERIFF APPEAL COURT

[2022] SAC (Civ) 30
STO-A4-13

Sheriff Principal N A Ross
Appeal Sheriff T McCartney
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in appeal by

IAIN SCOTT

Pursuer and Respondent

against

SCOTTISH WATER

Defender and Appellant

Pursuer and Respondent: A. McLean KC; Murchison Law
Defender and Appellant: Di Rollo KC, Tosh; BLM Law

20 October 2022

[1] The respondent, Mr Scott, is a farmer. From at least 2008 he operated Holm Farm and Stoneyfield Farm, Isle of Lewis, as land for grazing and for the provision of winter feed for a herd of beef cattle and a small ancillary flock of sheep. A sewer network vested in the appellant ("SW") runs through land adjacent to Stoneyfield Farm, which land, by means of natural and field drainage, drains into and through the pursuer's land at Stoneyfield Farm. In May 2008 Mr Scott noticed that a calf from his herd at Stoneyfield Farm was sick. The calf later died. The calf was found in the open field drain on the west side of Holm Farm Road.

[2] Mr Scott did not know why the calf had died. He reported to SEPA that he had concerns about the field drain. SEPA operatives attended and inspected the drain and took samples. They found no adverse results. He watched as his herd started to become sick and gaunt to an extreme degree. Several cattle died. He called in veterinary assistance, and the vet was unable to identify the medical cause of the malaise or any environmental cause. Mr Scott's uncle, also a farmer, blamed pollutants in the open field drain. He did not have any empirical evidence for this. Mr Scott did not agree with him.

[3] On 17 July 2009 SW's contractors attended at a sewer manhole which had been seen to be discharging sewage onto the surface of the immediately surrounding land. The manhole was on a large area of common grazing land, which is separated from the boundary of Stoneyfield Farm by Holm Farm Road. They erected a fence to keep livestock away from an area of the surface of the adjacent land. Further discharges of sewage from the sewer onto the land surface continued to occur, and employees of the defender attended to these discharges on 10 January 2010, 17 March 2010 and 4 August 2010. Their operatives further attended blockages in the sewer on 25 and 27 January 2011.

[4] On 25 August 2010 Mr Scott noticed sewage in the field drain where the calf had died in 2008. He could smell and see the sewage. He immediately removed his cattle from the field and pastured them elsewhere. The sewage was flowing from manholes, part of the same sewer network, on the common grazing to the east of Holm Farm Road. This was the first occasion on which sewage was smelled or seen in the field drain. SW sent operatives to clear the drains at Stoneyfield Farm, and carried out further investigation work to the sewers. They repaired defects they found in the sewer. There were no more leakages at the site. Subsequently Mr Scott returned cattle to the same field in Stoneyfield Farm. They did not suffer any further regular sickness.

[5] Mr Scott blamed SW for the condition of his cattle since May 2008, on the basis that there appeared to be a link between sewage leaks and sickness in his cattle. He raised the present action.

The alleged duty of care

[6] Mr Scott's case relied on breach of a duty to take reasonable care. He avers, and SW admits, a duty on SW, in the execution of its statutory duties of inspection, maintenance, repair, cleansing, ventilation and renewal of sewers vested in it under the Sewerage (Scotland) Act 1968 and the Water Industry (Scotland) Act 2002, to take reasonable care to see that their acts and omissions in the course of such execution did not cause harm to the person and property of others. In particular it was said to be SW's duty, having become aware or at least having received notice of the discharge of raw sewage from one of its sewers onto the surface of farm land, to determine the extent to which the resultant pollution might have entered watercourses, to ascertain the uses to which the land served by those watercourses, or through which they ran, was being put and, having done so, to take such steps as were reasonably necessary to prevent or mitigate loss or damage being caused by pollution having entered those watercourses, and to prevent further pollution entering those watercourses as soon and as effectively as was reasonably possible. The proof of breach, therefore, depended on knowledge by SW of discharge of raw sewage, and on a failure to investigate the extent of such discharge and thereafter to provide a remedy.

[7] The underlying law was not in dispute on appeal. It is not enough that the acts or omissions of one party might have led to another party suffering loss. There must be a breach of a duty of care. The foreseeability of harm is not enough by itself for the imposition of a duty of care – there must be something more, such as the assumption of responsibility

(*Mitchell* v *Glasgow City Council* 2009 SC (HL) 21 per Lord Hope of Craighead at paragraph [15]). Although parties at first instance referred to inspection cases such as *Gibson* v *Strathclyde Regional Council* 1993 SLT 1243 and *Nugent* v *Glasgow City Council* 2009 CSOH 88, it is not averred that the overflow of sewers is a predictable event leading to a duty of care to inspect. The duty of care averred is anchored on knowledge, or notice, of actual discharges of sewage. The evidence concentrated on whether SW knew or ought to have known that the sewerage system, for which they were responsible, was leaking harmful materials into the field drain at Stoneyfield Farm and, if so, when they knew.

Submissions on appeal

[8] Senior counsel for SW submitted that the sheriff had failed to address or analyse questions of law and had failed to explain the findings in fact on which he based his conclusion in law. There was no evidence that the sewer leaked on several occasions in 2008, or that there was a recurrent choke problem. There was no evidence of discharge of sewage to the common grazing, next to Stoneyfield Farm, during the relevant period. The sheriff relied on unproven averments of the pursuer. There was no factual basis for his findings on what caused the cattle damage. He had preferred witnesses without properly explaining the basis for so doing. He had double-counted damages. Solatium had been wrongly awarded. Because of these shortcomings, it was necessary for this court to start again, and conduct a detailed consideration of the transcripts of evidence.

[9] Senior counsel for Mr Scott submitted that there was sufficient evidence to support the sheriff's findings, and that they were capable in turn of showing a breach of duty of care. In a careful and detailed submission, he sought to demonstrate where witnesses had spoken

to facts which supported the sheriff's findings. There was no double counting or unjustified award of damages.

The sheriff's judgment

[10] Evidence was first heard in December 2015. There were 16 days of evidence, with the last evidence heard on 21 January 2019. The sheriff produced his judgment on 30 December 2021, almost three years after evidence was last heard. Such a delay is unconscionable. He awarded damages of £272,711.28.

[11] The sheriff made findings in fact which include findings that the pursuer's cattle drank water contaminated by pollution from a discharging sewer, and that they thereby ingested pathogens or toxins which caused damage. These crucial findings in fact are only incompletely supported by discussion in the remainder of the judgment. They closely reflect those set out in the written submissions for the pursuer. There is no finding in fact that SW knew or ought to have known of this leakage or damage, or recognising that damage ceased when the cattle were removed from the field in August 2010.

[12] The sheriff heard evidence from 29 witnesses. His judgment rehearsed at length the evidence of 25 of these, without comment or comparison, for 400 paragraphs. He gave no indication which evidence he preferred or accepted, save for a brief discussion of the expert evidence. Four witnesses, namely the defender's witnesses William Morrison, Susan Macpherson, Alan Kellock and Kevin Clifton, received no mention at all, and appear to have been overlooked. Susan Macpherson's evidence might be thought of central relevance, as she is an independent witness who described attending the site in 2008, taking samples, and walking the length of the drain, and finding no signs of pollution. The sheriff took a further 100 paragraphs to set out parties' submissions, without adding comment,

comparison or assessment of merit. Under "Decision", the sheriff started by making statements of fact, but this appears to be a further rehearsal of argument, rather than of his own findings. Only by paragraph [525] did the sheriff start to make any adjudication on the evidence, the witnesses, the duty in law or the merits of the case. A sheriff's duties include, but require much more than, recording the evidence of witnesses and the submissions.

[13] The sheriff appeared to accept the defender's submission that the case was only superficially a simple one. He identified three issues – whether there was a duty of care and whether the pursuer had proved his claim of fault; whether the sewage discharge contributed to illness in the pursuer's herd, and; what losses were a justifiable claim. He started by stating "On any view, the defenders were aware of a continuing choke problem at the common grazing by 16 July 2009". He explained in two paragraphs what evidence led to this conclusion. In a single paragraph, he found that SW knew of the contamination but did not notify Mr Scott of the dangers. The sheriff did not analyse the duty of care on record, namely to determine the extent of damage and investigate the usage of watercourses. He seems to have founded on a failure to warn.

[14] The sheriff proceeded to discuss, and dismiss, a case based on failure to demonstrate what a reasonable water authority would have done. He did so without examining any other duty. He then stated: "The defenders were therefore aware of problems with their sewer in the area since 2008 …", apparently based on evidence of a visit to Holm Farm (a different farm from Stoneyfield Farm, and far from the present locus) about an occasional choke problem. He then described (paragraph [541]) that there were further discharges of sewage on to the surface of the common grazing and into the surrounding drains leading to Stoneyfield Farm on various occasions in 2010. He did not analyse this further, as to volume, flow to Stoneyfield Farm, or harmful content. The sheriff appears, despite his

observations, to have treated this as a simple case which did not need to be explained further.

[15] We are unable to accept, having read the transcripts of 16 days of evidence, the lengthy submissions following proof, and having heard two days of submissions on appeal, that the sheriff has adequately or informatively dealt with the evidence in this case, or that he has explained his findings in fact in a logical or supportable manner. We have not been able to identify, from the sheriff's judgment, whether or not SW has breached any duty of care towards Mr Scott.

Review of evidence

[16] In light of the uninformative nature of the sheriff's written decision, we have required to read the transcripts of the whole evidence in order to assess whether the sheriff's decision is supported by the evidence. The unsatisfactory nature of this requirement is self-evident, as we do so without the benefit of hearing the evidence first-hand.

The basis for the duty of care/What SW knew or ought to have known

[17] This is not an inspection case. It is not a nuisance case. It is case based on SW's alleged fault, having exposed Mr Scott to harm, caused by leakage of sewage from sewers for which they were statutorily responsible. It is admitted that sewage was detected in Mr Scott's field drain in August 2010. It is not disputed, and is clearly proven, that Mr Scott's cattle were damaged in some manner so as to significantly lower their commercial value and in some cases to cause death. The first instance of this was the ailing calf found in the field drain in May 2008. It is not suggested that anyone, whether Mr Scott or SW, knew of the presence of sewage in the field drain prior to May 2008, and therefore no

liability arises for any act or omission prior to that date. The relevant period terminates in August 2010, when sewage was discovered and the cattle removed.

[18] The duty of care is based on SW's deemed or actual knowledge, from May 2008 onwards (but in submission on appeal restricted to July 2009 onwards), of leakage of sewage, from the sewerage system to the open field drain at Stoneyfield Farm, from which Mr Scott's cattle drank. Although the common grazings, from which the sewage leaked, are separated only by a public road from the open field drain, the actual manholes are a considerable distance, estimated at 100 to 200 metres, away. The pursuer required to prove not only that sewage leaked, but that SW knew it had leaked, and thereafter knew or ought to have known, or on the pursuer's averments ought to have investigated and discovered, that the sewage would leak as far as the field drain at Stoneyfield Farm. There is also a question of whether SW ought to have known that the sewage was likely to poison cattle. There are therefore a number of stages of knowledge which require consideration.

[19] These include knowledge, actual or imputed, that (i) the sewer network, which runs through the neighbouring common grazings, leaked sewage onto the surface; (ii) the sewage, having leaked, would make its way to an open drainage ditch on Stoneyfield Farm, a significant distance away; (iii) the sewage would thereafter cause damage to cattle drinking from the open ditch.

[20] Before the duty of care could be shown to exist and to have been breached, the pursuer required to lead sufficient evidence from which such knowledge could be inferred. The first stage was to assess what the evidence shows. We have required to address this task of new. This task should not be necessary for an appeal court. It was the role of the sheriff to set out clearly what the evidence showed, to analyse the competing evidence, and to make a rational argument about which evidence was to be preferred, and what it proved.

When sewage leaked from SW's system

[21] The sheriff found that "one of the sewers", by which is apparently meant one of a network of sewers running through the common grazing land "blocked and leaked onto the common grazing land between Holm Road and Holm Farm Road on a number of occasions in 2008". That finding in fact (number 5) closely mirrors a finding suggested in the pursuer's submissions and appears to have been accepted without further analysis by the sheriff. The critical allegation is that there were repeated, known leaks in 2008.

[22] SW disputes that this finding is supported by evidence. SW asserts that the only evidence of incidents in 2008 was of two incidents. The first was a burst water pipe, not a sewer, at Holm (a village some distance away) on 12 and 13 March 2008, and the second a burst stopcock at 6 Holm Village on 25 October 2008.

[23] There is very little evidence about this. SW's counsel referred to particular extracts of the evidence of Malcolm Macphail and William Morrison. Mr Scott's counsel referred to extracts of the evidence of Mr Scott, of Malcolm Maclean and certain documents.

[24] Mr Scott's extract evidence is from pages 32 (of 1734) to 53 (of 1734) of the transcript onwards (subsequent page numbers are to the numbers on the transcript of evidence, not the court copies). Mr Scott described the history of the farm and his raising cattle, described the physical layout, and the death of the calf in May 2008. He identified no cause. The remaining calves' condition deteriorated. He asked SEPA to investigate. They took samples from a nearby industrial estate and found nothing. SEPA did not test at Stoneyfield Farm, to his knowledge. He was not aware if they tested the common grazings. He was referred to the pursuer's plan (5/1/75 of process). From that it is evident that the common grazings

incorporate an area of considerable size, an aspect which received no consideration in the judgment, which does not identify from where the leakage took place.

[25] This extract of evidence contains no material which shows knowledge on the part of SW.

[26] Malcolm Maclean's extract evidence is from pages 934 (of 1734) to 977 (of 1734). He is a self-employed project manager who runs CalMax Construction, a firm of contractors. They were engaged by SW for various maintenance works and in about 2008 a new firm, CalMax Civils, was formed to carry out utilities works for SW. He was aware of works carried out at the common grazings. He was referred to 5/1/56 and 57 of process, both dated 8 November 2010. The former related to fencing works at Holm Farm (a farm operated by Mr Scott, to the south of the area in question and not said to be relevant) and the latter to "fencing off drains at Stoneyfield". Both of these invoices post-date the calf incident by two and a half years.

[27] He referred to the "problematic manhole" which was surcharging, but without dates. He said that the manhole that was surcharging had been fenced previously, about a year and a half before (p941), which would date it to about June 2009. The 2010 work involved fencing off field drains, as there was an apparent problem with livestock protection which had not been in place before (p940). He spoke to other invoices (5/1/61 onwards) but these are all dated 3 November 2010 or later, or relate to Holm Farm which is not relevant.

[28] He mentioned additional flows of surface water from the industrial estate, but investigation work was unsuccessful. He again mentioned the "problematic manhole" in the field, but this was in July 2009 when 30 metres of fencing was erected around it. He described this as the "initial protective work". He noted that the 2009 overflow was "a real mess" (p948). He was not asked any questions about the extent of this mess, nor was it

suggested that the mess had not been entirely cleared up. Mr Maclean's further evidence related to post 2010 surcharges.

[29] Mr Maclean was referred to the map at 5/1/53. That map is dated 5 October 2010. It has a hand-written annotation "approximate location of overflowing sewer". The map is scaled 1:2104. It also contains a box, some way to the west, annotated "previous burst/choke (fenced)", which was the 2009 incident, in quite a separate location within the common grazings. The common grazings, on the evidence of other witnesses, is the entire area enclosed by Holm Farm Road (to the west), East Road to the north, and Park End Industrial Estate to the east. Mr Maclean indicated a third manhole, which was to the east of Holm Farm Road, in the top left hand corner of 5/1/53 (p954). He confirmed that the photographs of a surcharging manhole (5/7/5) was the manhole fenced off in 2009 (p958). He accepted that the manhole marked "approximate location …" was the manhole discharging in 2010 (at 970).

[30] Malcolm Macphail, an asset planner for SW, did speak to two incident in 2008. By reference to CalMax invoice 5/1/55 and SW document 6/7, he identified a repair to a burst water pipe (not sewer) on 12 March 2008. By reference to invoice 5/1/67 he identified works at 6 Holm Village on 25 October 2008, a different location and in respect of a burst water pipe (not sewer) (p906 of 1734). He referred to an occasional choke, as distinct from a recurring choke, but this is not by reference to any primary evidence (p999).

[31] No other evidence is identified by either side. Reading the transcripts yields no other evidence. The appellant refers to a poor system of recording operated by SW, but this does not remedy the problem of incomplete evidence. There is accordingly no evidence that this court can find, or was referred to, that in 2008 SW knew or ought to have known that any of manholes in the common grazings were surcharging and leaking sewage onto the surface.

The earliest evidence of leakage is dated July 2009, according to Mr Maclean's evidence. We cannot find anything in the sheriff's judgment which justifies his finding in fact 5. It is simply not explained or supported. It falls to be deleted.

What occurred between June 2009 and 2010.

[32] SW admits it attended the common grazings on around 17 June 2009 (Record page 9C). SW also admits, in part, paragraphs 8 and 9 of the Notice to Admit, to the effect:

> "8. That on 17 July 2009 contractors instructed by the defender attended at a manhole giving access to the sewer which had been discharging sewage onto the surface of the land around it and erected a fence to keep livestock away from an area of the surface of the adjacent land.
>
> 9. That further discharges of sewage from the sewer onto the land surface continued to occur, and employees of the defender attended to the situation on 10 January, 17 March 2010 and 4 August 2010."

[33] The content of that admission is somewhat vague – the extent of land surface is not identified, the length of time covered by "which had been discharging sewage" is not identified, and the identity of the manhole is not given – Mr Maclean gave evidence about works in relation to at least three manholes in the area, only two of which were on the common grazing. It is the pursuer, however, who has the responsibility for leading sufficient evidence to meet any gaps or ambiguities in the admissions. Further, each of the manholes identified is a significant distance away from Mr Scott's drain, and there is no admission that sewage flowed anywhere near Stoneyfield Farm. These admissions are of limited usefulness.

[34] The incident on 17 July 2009 was one of sewage overflow at one of the manholes. On the plan 5/1/53 there is a hand-drawn box in an area of the common grazings marked "previous burst/choke (fenced)". There is also a line, marked "Drain", which passes

somewhat near to that fenced area, and which links directly to the drain which passes under Holm Farm Road into Stoneyfield Farm, and which is the drain the cattle drank from. SW engaged CalMax to expose the sewer (5/1/66) on 17 July 2009. The evidence of Norman MacLeod, a CalMax labourer who attended the works, was that the marked area was fenced off (p1156 of 1734) because "it was easy to see. It was full of sewage". That was the first time he attended (p1155). He identified a manhole "more or less in the middle of the common grazing" (p1158). He spoke to attending several discharges, but that evidence related to the time he was seconded to SW (p1160) which secondment was in 2010 (p1154) and therefore too late to assist the pursuer's case. He accepted he was not on the job sheet for 17 July 2009 (p1167), and that a subsequent attendance in November 2009 was for a water main. He spoke of digging trenches when they were fencing off (p1164), running in a southerly direction. Unfortunately, the questioning did not clarify if this was the 2009 or subsequent 2010 visits, nor did it explore whether these were for draining sewage or indeed for drainage at all, nor did it explore whether they connected with the relevant field drain or whether anything actually flowed down them. The evidence was not extracted from Mr MacLeod, who attended the site on a number of occasions, particularly post-2010. This evidence is submitted to be a solid platform for Mr Scott's case. It is difficult to agree.

[35] The sheriff stated [para 528] that "on any view" SW were aware of a continuing choke problem at the common grazing by 16 July. He further stated that thus the defenders were aware of the sewer blockages at the common grazings and leading onto Stoneyfield Farm since 2009 [531]. The sheriff does not explain where he finds this evidence, or upon whose evidence he is relying. His description is silent on how sewage got to Stoneyfield Farm in 2009, and how SW must have known about it. There are a number of unbridgeable gaps in his analysis.

[36] One gap is evidence about the identification of sewage on land surrounding the manhole. On attendance in July 2009, Norman MacLeod found it "easy" to identify where the sewage was, and to fence it off. There is no evidence that sewage was found beyond the area he fenced off (shown in 5/1/53 of process), or that it made its way across the common grazings to any extent, far less as far as the Stoneyfield field drain. Although the overflow was "substantial" (Maclean at p1239), no witness spoke to the sewage having travelled any distance. The extent of the leakage was easily identified by Mr MacLeod, and so it is not evident how any further leakage would not also have been easily detectible in the event it went anywhere near Stoneyfield Farm. The evidence of the event in July 2009 seems to be wholly insufficient to demonstrate knowledge by SW that sewage contamination at Stoneyfield Farm, or indeed anywhere outside the perimeter of the fence which was erected, was reasonably foreseeable or was in fact seen.

[37] Another problem is the evidence about distance between the manholes on the common grazing and the field drain at Stoneyfield Farm. At the appeal hearing agents estimated the distance to the manholes (identified by Ross Hall from the plan at 5/1/75 – see p420 of 1734) to be between 100 and 200 metres. Even on rudimentary scaling of that plan, the sewage would require to travel a distance in the region of 150 metres. It is not a justified assumption (and there is no evidence prior to August 2010) that leakage at the manhole (indicated on 5/1/53 of process) must have leaked into Stoneyfield Farm.

[38] There is also very limited evidence about the alleged route travelled by the sewage, a strange omission given that it was at the heart of the case. It appears to be accepted that Stoneyfield Farm is downhill from the common grazings, but little other evidence discusses the physical proximity, gradient or connection between the manholes and Stoneyfield Farm, or the route of any sewage discharge. There was evidence that a stream flowed through the

field drain (p186 of 1734), but no evidence was given about the relationship of any stream to the manholes, or where the stream came from.

[39] A further problem is that the evidence tends to show that sewage leakage is obvious and difficult not to detect. It is easily noticed due to foul odour. It attracts flies. The burst in July 2009 was "a real mess" (Maclean, at p948 of 1734). The leakage in 2010 is graphically described by reference to flies. It is not explained how the sewage ran through the common grazings, on sufficient occasions to cause a chronic medical condition in cattle, without being detected by SW, or Mr Scott, or Mr Scott's uncle Angus, or SW's contractors, or SEPA, or anyone travelling along Holm Farm Road, or anyone else. This is despite both Mr Scott and his uncle being alert to potential problems with their field drain where the calf was found in 2008. Mr Scott spoke about his uncle Angus "giving him the works", and insisting that there was something wrong with the field drain (p185 of 1734), causing Mr Scott to argue that there was nothing wrong with the drain. His uncle told him there is "something far wrong here. There is something in that drain" (p188). The uncle cleaned the drains in Stoneyfield Farm in 2008, to no effect. By 2010 uncle Angus' "drill every morning" was that he would have breakfast and "he was away down the field". He was "forever prodding at the outlets of pipes and tiles with a stick" (p206 of 1734). He eventually detected the sewage in the field drain, but only in August 2010, despite being convinced for two years that there was something harmful in the field drain.

[40] The sewage was easily detected in 2010 as it was "horrendous", with sewage debris present. It was raw sewage with dark-coloured waste (p212 of 1734). It was overflowing from manholes. There was "loads and loads of sewage (p16 of 1734). It was clearly obvious when present.

[41] Further, in 2009 Mr Scott left Hector Low, the vet, to walk the fields alone and see what was wrong. Mr Low could find nothing (p188 of 1734) and said it was beyond him to identify the problem. Mr Scott himself was a hands-on farmer and checked his cattle every day (p317 of 1734). He was adamant there was nothing wrong with the ditch (p185) and argued with his uncle.

[42] In these circumstances, there is no basis for showing that SW knew that their manholes were overflowing sufficient to cause any, far less an ongoing, problem of sewage travelling to Stoneyfield Farm. In the absence of such evidence, only if they had some means of knowing of excessive discharges at their manholes could a case be identified. There was no evidence that SW were aware of any general problem. The evidence shows these were occasional discharges of very limited geographical spread, which they attended and remedied. The evidence was that it is very difficult to ascertain by measurement whether pipes are leaking – attempts are made to ascertain a base-level flow, but this can be influenced by water tables, in other words liquid leaking into the pipes from surrounding ground (per Mr McCreath, a civil engineer with SW, at p745 of 1734).

[43] There is no support for any case that SW did not act responsibly. On the contrary, there was evidence that SW operated a responsible system of appropriate responses, including reporting, logging, investigation and closing-off (Mr McCreath at p746). A discharge of sewage in a water course would mean attendance and clearing up the area (p768). There were different responses according to the significance of the discharge. If the incident was very severe there would be a much more extensive investigation than something that was very localised or seen as not significant (p769). Environmental Pollution incidents are graded EP1 to EP3, and are responded-to accordingly. The response is based on responsible allocation of resources, which are not unlimited (p794). Blockages are not

exceptional events (Mr Macphail at p849 of 1734) and sometimes can recur twice a year. It is important to note that a "blockage" refers to a sewer, where as a "burst" refers to a water main (p906). The sheriff recognised none of this evidence.

[44] It must also be recognised that some evidence was absent. There was no evidence that, except in 2008 with a nil result, the drainage ditch was ever tested for pollutants. No post mortem testing was carried out on the cattle, due apparently to limited veterinary resources. Physical cause and effect is therefore not established, and is left to inference only.

[45] There are accordingly fundamental evidential gaps, unacknowledged by the sheriff, in finding knowledge on the part of SW, either of an ongoing or otherwise significant problem with discharge from manholes on the common grazing, or of polluting (or even the possibility of polluting) the field drain at Stoneyfield Farm.

[46] The submission for Mr Scott founded on SW carrying out fencing of the drains at Stoneyfield in November 2010 explicitly for the purpose of preventing Mr Scott's animals from drinking from the polluted drain. That, however, does not assist Mr Scott, as it post-dates the date of any damage. On the contrary, it tends to indicate that SW acted responsibly with due care when it became aware of leakage affecting cattle.

[47] Mr Scott's case founds on there being a number of instances where sewers were surcharging between 2008 and 2011, thereby purporting to fix SW with knowledge of a special circumstance of blocking of the relevant sewage system, which was interconnected. For the foregoing reasons, these incidents are not proved. There is a further problem with this, namely the absence of correlation between surcharge events and deterioration in the cattle. On appeal, Senior Counsel utilised Annexe J to Mr McNab's report dated 9 December 2015 (5/4/2(10)) of process, p2322 of the appendix) to demonstrate such a correlation. We are unable to accept that Annexe J sets out any evident demonstration of cause and effect. It

proceeds on the expert witness's understanding of the evidence, rather than what was established. It shows no clear link between deaths, or births, or treatment and "reported chokes". We are not persuaded that this meets the point. On the evidence as a whole, a calf became sick in 2008, but close inspection by an independent party, namely SEPA, following the incident showed there was no sewage. If there was any mechanism for toxins or pathogens to arrive at the site without being carried in sewage, or without being easily detectable by sight and smell, there was no evidence or submission on that point.

[48] There is also the separate issue of SW's evidence being apparently left out of account by the sheriff. The witnesses William Morrison, Susan Macpherson, Alan Kellock and Kevin Clifton receive no mention, despite detailed discussion of every other witness. We can only infer that the sheriff overlooked this evidence. Ms Macpherson (formerly Cowie) was a SEPA employee. She spoke to walking the length of the field drain in 2008 from the road up to the industrial estate, detecting nothing untoward. She was looking for pollution, and would have noticed sewage. She took samples and found nothing harmful. These were taken at various points. She took one sample near the culvert. Alan Kellock is a trade effluent advisor. He stated that there were no businesses in the area which used arsenic, which requires consent. He could not comment on whether the arsenic levels found at the central pumping station were trace or not – it would depend on the timescale and sampling. This evidence was apparently disregarded. It serves to undermine any case (mentioned below) founding on the finding of arsenic at the central pumping station

[49] Accordingly, the evidence about knowledge of leakage in July 2009 appears to be limited to (i) a manhole which had been surcharging at most since June 2009, one month earlier; (ii) whose discharge was limited to an area immediately around the manhole, the boundaries of which discharge were "easy" to identify; (iii) which was promptly fenced off

to stop animals coming into contact with the sewage, which was; (iv) promptly cleaned up by CalMax, specially hired for the task by SW. There is no evidence for anything else. Any inference that sewage was conducted, or leaked, towards Stoneyfield Farm requires (i) an unjustified interpretation of Mr MacLeod's evidence about digging trenches southwards, including that he was in fact referring to July 2009 and not some later date; (ii) a dismissal of the considerable distance involved, estimated by Mr Scott's agents during the appeal as between 100 and 200 metres, and crudely measurable at about 150 metres from the plan 5/1/53; (iii) a complete lack of explanation how sewage, with its inherent smell and flies problem, could make its way across the common grazings while entirely undetected, particularly in light of the intense efforts at detection by Mr Scott's uncle, and Mr Scott himself; and (iv) SEPA sampling in 2008 which did not find any harmful residue in the drainage ditch, despite the death of a calf. In relation to (i) above, we have already referred to evidence about contractors digging ditches to drain sewage away from a manhole towards Stoneyfield Farm. A brief look at the evidence here shows it to be short, vague, unconnected to sewage and not followed up by detailed questioning (in Mr MacLeod's evidence at page 1164 of 1734).

[50] Mr Scott's case also referred to the greening of grass as an indication of the presence of sewage, and that green grass was found at the field drain. There was evidence that such greening would occur relatively quickly, within a few weeks of leakage (p451 of 1734, Mr Hall), and there was no evidence that SW was or must have been aware of the greening, or that it necessarily implied a leak of sewage.

[51] We are obliged, in the absence of coherent explanation by the sheriff, to reach a conclusion on the evidence as discussed at appeal. On the balance of probabilities, we are unable to find that any leakage of sewage occurred other than between June 2009 and

approximately July 2009; or that this limited leakage was sufficient in volume to reach Stoneyfield Farm; or that SW knew or ought to have known that it was likely to reach Stoneyfield Farm; or that SW had any knowledge at any time that sewage had leaked, or would reasonably foreseeably leak, into the field drain at Stoneyfield Farm. Knowledge that sewers blocked from time to time was not enough – indeed, SW operated a system for promptly remedying such events. There is no evidence to show this was an unreasonable system, and there is no logical reason to describe SW's system as inadequate or unreasonable.

[52] Accordingly, Mr Scott is unable to demonstrate liability in relation to any act or omission of SW during 2009.

Acts or omissions in 2010

[53] SW admits discharges from the sewer network onto the land surface, requiring attendances on 10 January, 17 March and 4 August 2010 (see Notice to Admit procedure, para 9, set out above). As discussed, bare knowledge of occasional spills is not sufficient by itself to establish liability.

[54] Mr Scott's case is that these are merely further examples of what SW must have known, or did know, was a continuing problem of leakage onto his land. For the reasons set out above, the evidence does not support that case.

[55] The next significant event occurred in August 2010. Mr Scott found sewage in his field drain. He forthwith notified SEPA of the discharge. He forthwith removed his cattle. SW acted quickly to instruct contractors, CalMax, to attend at Stoneyfield Farm to remedy the sewage mess, which was considerable. The contractors duly did so. SW also took steps to remedy the sewer malfunction, including rodding and surveying the sewers to identify

faults and then taking remedial action, including fencing off the ditch to prevent Mr Scott's cattle drinking the contaminated water. Unfortunately for Mr Scott's case, SW acted with due care in relation to him and his cattle. It is accepted that there is no claim for acts and omissions after August 2010.

[56] Accordingly, there is no separate case of negligence in relation to events in 2010.

[57] SW admit a duty of care in connection with the administration of the sewerage network in the area. For the foregoing reasons, we cannot agree with the sheriff that there was evidence to support his conclusion that this duty of care was breached. Mr Scott failed to demonstrate the breach by SW of any duty of care which they owed to him. It follows that SW's appeal must succeed, and SW be assoilzied from the craves of the initial writ.

The particular duty of care

[58] For completeness, the alleged duty of care requires comment. The terms of the particular duty of care are set out above at paragraph 7 above. There is no dispute on the legal principles which apply, as discussed above. The case is built on the alleged knowledge of SW of sewage leaks.

[59] On averment, SW are said to have breached a duty, knowing of sewage leaks, to determine the extent to which the resultant pollution might have entered watercourses, to ascertain the uses to which the land served by those watercourses, or through which they ran, was being put, and, having done so, to take such steps as were reasonably necessary to prevent or mitigate loss and prevent further pollution. Senior counsel for Mr Scott did not advance authority for a duty of care of the extent set out. As presented, the duty would potentially require SW to carry out investigations where they had no reason to know that any damage had occurred. It is not easy to see what limits could be placed on such a duty –

for example, whether it extended to every property downhill from every sewer leak, however small the leak. Such a duty might encompass requiring investigation of the water table, or soil composition, in a way which may prove extremely burdensome and out of proportion to actual risk. We would not be prepared to identify such a duty in these circumstances. This is particularly because the manhole (whichever one was involved) is a significant distance from Stoneyfield Farm, and there was no evidence that sewage can spread without being obvious and easily detected. In any event, the actions of SW, in reacting promptly and comprehensively to each leak, point away from the breach of any such duty. Their actions, in identifying and carrying out effective repairs, were prompted by the first significant incident that could be identified, namely the ingress of sewage to Stoneyfield Farm in August 2010. Prior to this date, there is no evidence of harm caused by any surcharging sewer in the area. Even if such a duty of care were established, the evidence does not support any conclusion that it was breached.

[60] For completeness, we do not accept the submission on behalf of SW that there was a requirement to set out what a reasonable authority would do. This is not an inspection case, such cases being based on known harms and the requirement to detect them. This is a straightforward case alleging harm knowingly caused and failure to remedy. The failure-to-inspect case on record was not related to the existence of harm, but its extent. The defence was that there was no known harm. Unlike inspection cases, there was no reason to assume that harm would occur. Once harm was identified, namely the leakage of sewage to Stoneyfield Farm, SW acted to mitigate damage.

Causation of damage

[61] The question of what harmed the cattle occupied a considerable amount of evidence. There was competing expert opinion from veterinary practitioners, together with evidence about the likely content of the sewage discharged from the manholes in the common grazings.

[62] There are significant gaps in the evidence. No samples were taken from the open field drain in which the sewage was found in August 2010. While samples were taken by SEPA in 2008, following the report by Mr Scott, these samples were not taken from the field drain itself, and the samples from the common grazings showed little other than road salt. The cattle themselves were never tested, largely because of pressure on veterinary resources in Lewis.

[63] There is therefore no definitive cause of damage or death. Mr McNab, the treating vet and whose evidence the sheriff preferred, opined that the cause was chronic arsenic poisoning. This was a differential diagnosis, which most closely matched the observed symptoms in the cattle. We note that Mr McNab's evidence was to some extent based on incomplete information, as he accepted (p629 of 1734). He recognised that a definitive diagnosis may never be established.

[64] There was evidence about the presence of arsenic in the overall sewerage system. No samples were taken from the nearby sewage system.

[65] The sheriff made a finding in fact (15) that a sample taken in August 2010 contained very high concentrations of ammonia, biochemical oxygen demand and orthophosphate. Finding in fact 24 identified that cattle ingested "pathogens or toxins". The sheriff found that levels of arsenic in the treatment plant at Stornoway showed 6.3kg of arsenic in 2008, 5.4kg in 2009 and 6kg in 2011, the reporting threshold being 5kg. In finding in fact 27 he

found that the symptoms suffered by the cattle were consistent with chronic arsenic poisoning. He did not make any finding linking these facts, or explaining amounts or locations of arsenic. It is left to inference that arsenic was the cause. There are significant gaps in the chain of reasoning.

[66] These gaps are important. While a level of, for example, 6.3kg of arsenic found at a sewage treatment plant would seem to be a significant level, the reportable limit imposed by SEPA was 5kg. It is not self-evident that, if levels below 5kg were not reportable, that 6.3kg detected over a year represented a significant danger to cattle. As referred to above, Mr McCreath's evidence was that it was not possible to say if 6.3kg was a significant amount, far less that arsenic was actually present in this very small section of the overall sewerage system for Stornoway.

[67] The evidence showed that only 2.83% of the total amount of sewage in Stornoway came from this sewerage system, which serves the Park End Industrial Estate and common grazings. There is no attempt to show that the arsenic did not come from the other 97.17% of sewerage in Stornoway. There are no known industrial processes in Stornoway which require the use of arsenic. The sheriff did not explain how he related the evidence about arsenic to the actual analysis of sewage in 2010, which did not identify the presence of arsenic. It is not self-evident that these cattle were exposed to arsenic from the sewerage system or anywhere else.

[68] However, in our view there was a sufficiency of evidence that sewage is foreseeably a harmful substance. The presence of arsenic need not be established in order to fix SW with knowledge that sewage is an inherently risky substance, and is foreseeably likely to cause harm to animals which drink sewage-tainted water. We accept the evidence that sewage and sewage products, such as slurry, are well-known as being substances which require care

due to risk of medical harm. The sheriff accepted evidence that the cattle condition was caused by chronic arsenic poisoning. The presence of arsenic in the sewerage system (at least in general) can be demonstrated. The absence of other proven or even likely sources of arsenic, other than the sewerage system, gives some support to the proposition. The fact that it was a chronic condition means that two samples, taken two years apart, does not exclude the presence of arsenic at other times. Despite the deficiencies in the sheriff's explanation, we would be prepared to accept that there was a bare sufficiency of evidence for the sheriff to find that the cattle were harmed by "pathogens or toxins", which may or may not have included chronic arsenic poisoning, which were present in the open field drain from which they drank. There is significant evidential value in Mr Scott's evidence that, after the sewer was fixed, the cattle were returned to the field and there were no further problems (p254 of 1734), and that the remainder of his cattle, grazing elsewhere on the other farms in the area, were not affected. We would be prepared to accept that, were there evidence of sewage being discharged from the defender's sewers and polluting Ms Scott's drain, together with evidence of negligence on the part of SW, then a duty of care would arise, irrespective of whether the presence of arsenic was proved or not. The evidence, however, does not support those facts. In the event, when SW became aware of just such an event (being the only proven event of leakage into Stoneyfield Farm, in 2010) they acted swiftly to remedy the problem. Separately, although there was evidence of possible alternative causes for the cattle illness, such as BVD, this was not pressed in the appeal and we do not find convincing evidence of any competing cause.

[69] That does not cure the gap in evidence referred to above, and Mr Scott's failure to show that (i) there was an ongoing leakage of sewage between 2008 and 2010 which reached as far as the open drainage ditch at Stoneyfield Farm, and: (ii) crucially, that SW knew or

ought to have known about such leakage and did not take effective steps to prevent it entering the drainage ditch.

Damages

[70] For completeness, we deal with the submissions on damages as follows:

[71] The sheriff found SW liable to Mr Scott in the sum of £272,711.88 under various heads of claim, several of which the defender challenges. Specifically SW submits that the sheriff erred in awarding damages in respect of both the diminution in value of Mr Scott's herd and the cost of replacing it, selecting a figure of £60,000 as an appropriate award for loss of profit and failing to take into account the effect of depreciation in the calculation of loss of profit

[72] SW submitted that the award of £115,000 for replacement of the herd amounted to double counting as awards of damages separately based upon decrease in value and the cost of replacement measure the same loss by different methods. On behalf of Mr Scott it was submitted that if the capital assets of a business (in this case, a herd of cattle) are unavailable over a period of time then profits are likely to be lost as a result. The special nature of the assets of the business, being a herd of cattle, which in normal course is self-regenerating, means that the replacement cost of the herd is a separate and additional loss. The sheriff included in his assessment of damages the sum of £60,432 in respect of cattle that died or were sold at a loss (as a result of their physical decline or at dispersal sales). He also awarded damages of £115,000 for the cost of restocking Mr Scott's herd.

[73] We consider that SW's submission that this constitutes double counting is well-founded. A number of Mr Scott's cattle died and he sold the remainder at reduced prices. An award of damages was made in respect of the loss arising based upon the value of the

cattle that died and the full difference between the actual sale proceeds of the diminished cattle and their value in good health. Mr Scott would thus receive the sale proceeds plus compensation for that diminution in value in respect of dead and diminished cattle.

[74] In addition the sheriff awarded damages for loss of profits for the years 2011 to 2018 inclusive. Taken together, the awards for diminution in value and loss of profits, along with retention of the sale proceeds, would place Mr Scott in the same position that he would otherwise have been and there is no additional loss identifiable based upon the nature of the asset being a self-regenerating herd. We therefore would have found, had it been necessary, that the sheriff erred in making a separate award of £115,000 for re-stocking the herd and any award of damages would fall to be reduced by that amount.

[75] The sheriff made an award of damages of £60,000 in respect of loss of profit calculated on the basis of £7,500 per annum for eight years. In his findings in fact the sheriff found that the average reduction in profits in the four years 2011 to 2014 was £3,531 per annum. It was conceded for Mr Scott at the appeal hearing that no basis for the figure of £7,500 could be identified in the sheriff's judgment and there was no basis for a figure of annual loss beyond the sum of £3,531 per annum. The calculation of loss of profits for eight years should have been based upon the figure for average annual reduction in profits which was found in fact to be £3,531 giving a total loss for eight years of £28,248. Therefore any award of damages would have been reduced by a further £31,752.

[76] It was submitted for SW that the sheriff ignored or failed to take into account the effect of depreciation in the calculation of loss of profit. It was submitted that historically depreciation had been reflected in Mr Scott's accounts and there was no reason not to take that into account in assessing any loss of profit. For Mr Scott it was submitted that the sheriff did not err in relation to issues of depreciation. The claim related to actual lost

income and an accounting practice in valuing a business in a balance sheet was not applicable to calculation of actual loss of income.

[77] The sheriff provides no analysis of his approach to the issue of depreciation in the judgment. We would have accepted the submission on behalf of Mr Scott that the issue of depreciation is an accounting exercise relating principally to capital assets such as plant and machinery, and thus the sheriff cannot be said to have erred in failing to make any provision for depreciation in the calculation of loss of profit.

[78] The effect of the foregoing is that, had the appeal been otherwise unsuccessful, the award of damages would have been reduced to £125,959.88.

[79] In terms of a supplementary ground of appeal, lodged late in the day, it was submitted for SW that the sheriff erred in law in making an award of solatium in the sum of £5,000, on the basis that the sheriff did not find that Mr Scott sustained any recognised psychiatric injury and, in any event, psychiatric harm was not a reasonably foreseeable consequence of any breach of duty by SW.

[80] We note, however, that SW made no such submission at first instance, and indeed nothing appears to have been said specifically about this head of damages. In the circumstances we see no useful exercise in addressing this point of new, and we will not consider further this ground of appeal.

Disposal

[81] For the foregoing reasons, this appeal must succeed. We will therefore sustain the appeal, recall the interlocutor of the sheriff dated 30 December 2021, assoilzie the defender and appellant from the craves of the initial writ, and continue the cause for a hearing on expenses. Parties should attempt to agree the disposal of expenses, and the issue of sanction

for senior counsel. They should contact the clerk, and the matter can either be dealt with administratively, or in the event of dispute on expenses a hearing can be fixed.