**OUTER HOUSE, COURT OF SESSION**

OPINION OF LORD CLARKE

in the cause

PAUL CURRIE (A.P.)

Pursuer;

against

WILLIAM BLACKWOOD CLAMP

Defender:

CO-OPERATIVE INSURANCE SOCIETY LIMITED

Minuters

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**Pursuer: Campbell, Q.C., Spiers; Morison Bishop (for Thomas Purdom & Sons, Solicitors, Hawick)**

**Minuters: Ferguson, Q.C.; Anderson Strathern W.S.**

27 February 2001

[1]In this action the pursuer, who is presently 27 years of age, seeks a declarator that he is due to be paid £100, 000 with interest out of the estate of Charles Henry Clamp (hereinafter referred to as the deceased). This sum, he claims, represents the loss, injury and damage suffered by him as a result of a road accident, which occurred, on the A7 road, between Galashiels and Hawick, in the early hours of 15 December 1995, when he was travelling as a back-seat passenger in an Austin Maestro motor car. The car was being driven by the deceased who died in the accident. He was 25 years of age at the date of his death. There were two other passengers in the car at the time, *viz* Jennifer Bird and Christopher Muir. Christopher Muir was travelling as the front-seat passenger at the time of the accident.

[2]The defender in the present proceedings, who is designed as the next of kin and representative of the deceased, did not enter appearance. The minuters are the Co-operative Insurance Society Limited who were the insurers of the said vehicle at the material time.

[3]The case came before me for proof before answer. At the outset, senior counsel for the minuters explained that it was accepted, on their behalf, that the accident had been caused by the negligence of the deceased in failing to keep control of the vehicle, through being under the influence of alcohol at the time and as a result of which the car had mounted the near-side verge of the A7 road between Galashiels and Hawick, demolishing a section of fencing, striking a tree, going down an embankment, overturning and bursting into flames. The minuters' position was that, nevertheless, the deceased had, at the material time, owed no duty of care to the pursuer because the pursuer was, then, engaged in a criminal offence, namely a contravention of Section 178(1)(b) of the Road Traffic Act 1988, in that he had allowed himself to be carried in the vehicle, knowing that it had been taken, and was being driven, by the deceased, without the consent of the vehicle's owner, or other lawful authority. The parties were agreed as to the amount of damages which the pursuer would be entitled to if the minuters failed in establishing that no duty of care had arisen in the circumstances and but for any element of contributory negligence on the part of the pursuer. That agreement was reflected in the Joint Minute of Admissions No. 29 of process which provides, *inter alia*,

"That in the event of full liability being established the pursuer shall be awarded damages of £60,000 (inclusive of interest to the date of decree) comprising:

(1) £30,000 (inclusive of interest to the date of decree) by way of solatium; and

(2) £30,000 by way of damages for loss of earnings and loss of earning capacity (of which one third represents damages for past loss of earnings, inclusive of interest to the date of decree)".

[4]The proof was concerned with establishing what were the events which preceded and led up to the accident. I found the following facts to be established. The pursuer and the deceased met in a pub known as "The Road House" in Hawick, shortly after 8 pm on 14 December 1995. They drank at that pub. They subsequently went to four other pubs in Hawick that evening, namely "Scrums", "The Waverley", "Robbie's" and lastly, "Clinty's". They drank alcohol at all of these pubs. They were joined at "Clinty's" by Christopher Muir. At "Clinty's" they were also joined, at some stage, by Jennifer Bird. They remained at "Clinty's" until closing time. The deceased attempted to purchase a carryout from the barman, Mr McCutcheon. The barman refused to provide the carryout. The deceased, the pursuer, Christopher Muir and Jennifer Bird thereafter left "Clinty's". By this time the deceased had consumed enough alcohol to be described by the bar manager, Mr McCutcheon, who gave his evidence on commission, as being "well oiled". This witness said that the deceased, at that stage, was slurring his speech and was staggering. All four then travelled to Galashiels in the same vehicle, which was owned by Jennifer Bird's mother, but which was provided to Jennifer Bird for virtually her exclusive use. Jennifer Bird treated the car as if it was her own. The reason for the group deciding to drive to Galashiels was that it was a Thursday evening, and it was known that certain clubs in Galashiels opened late on Thursdays. I am satisfied that, on the evidence, the group must have left Hawick at some time between about 11.30 pm and 12 midnight.

[5]As to other material facts and circumstances leading up to the accident, however, matters were much less clear. The first major issue of controversy between the parties, which emerged at the proof, concerned, who it was who drove the vehicle to Galashiels. The pursuer gave evidence to the effect that the deceased had driven the car to Galashiels, having obtained the keys from Jennifer Bird. The pursuer also testified that, before getting into the car, he had asked the deceased if he had a licence to drive, and that the deceased had confirmed that he did have such a licence. The pursuer's pleadings in Article 3 of Condescendence on this aspect of the case are as follows:

"At or about 11 pm the deceased suggested that the four of them go to Galashiels in Jennifer Bird's car. At that point Jennifer Bird voluntarily gave the keys to the deceased. The pursuer believed that the deceased held a driving licence. The pursuer had seen the deceased driving around Hawick. The pursuer was unaware that the deceased had been disqualified from driving. The pursuer did not have a driving licence. The pursuer had been told by the deceased that he had passed his driving test".

Those averments are met by general denial in the minuters' Answer 3. The minuters also aver that "the pursuer knew that the deceased was disqualified from driving and did not have a licence to drive". The minuters, however, make no positive averments about who drove the vehicle to Galashiels. They merely aver "Together they drove from Hawick to Galashiels". At a later point in Answer 3, they aver "In the course of the evening the deceased obtained the car keys. On leaving the night-club the deceased refused to return the car keys to Jennifer Bird".

[6]I heard evidence from Police Constable Gordon McCaa, who had taken statements from the pursuer and Jennifer Bird at Borders General Hospital, where they had been admitted immediately after the accident. These statements were noted in the officer's notebook, 7/4 of process. He interviewed Jennifer Bird first of all. The interview commenced at 13.20 hours on the day of the accident. Constable McCaa was asked what condition Miss Bird was in when she provided the statement. His evidence was that she had a cut to her head, and that she had some broken bones. Otherwise, she was quite lucid and bright and seemed to remember things in fairly good detail. In her statement, as noted in Constable McCaa's notebook, Jennifer Bird said:

"I went into "Clinty's" on my own about 11 o'clock and sat near the stage. I met Paul Currie, a friend of about two years, and we sat down and had a drink. I had one Hooch and Paul had one drink too. A short time later two other guys came in and spoke to us, one called Charlie. I did not know the others. They were friends of Paul Currie. About 11.30 we left "Clinty's", after having another drink. I saw Charlie and his pal have two drinks of vodka and coke. We decided that we would go to Galashiels to Hunters Night-club and Charles drove to Galashiels".

At about 13.45 hours, the police officer interviewed the pursuer, who was in a separate ward from Miss Bird. In his statement, as recorded in the police constable's notebook, the pursuer said:

"When we went into "Clinty's" about 10.45 pm, we met Jennifer Bird and Charles Muir. I had another drink in there, and Chas was at the other end of the place, speaking to his pals. We left "Clinty's" about 11.45 pm, and Jennifer gave Chas her car keys. Chas drove to Galashiels in Jennifer's car, a brown car, a Maestro, and parked near the Bridge Pub in a back street, Roxburgh Street".

Accordingly, while both the pursuer and Miss Bird had clearly been recently through a very major trauma, both were in agreement, when interviewed by the police officer shortly after the accident, that the deceased had driven the car to Galashiels.

[7]The pursuer was examined on 24 November 1999, on behalf of the minuters, by Dr Derek Chiswick, a Consultant Forensic Psychiatrist at the Royal Edinburgh Hospital. Dr Chiswick gave evidence at the proof and referred to notes taken by him at the time he examined the pursuer. These notes recorded that the pursuer told Dr Chiswick that:

"Because the pubs close at 11 pm in Hawick, and open later on Thursday nights in Galashiels, the group discussed going to Galashiels to continue socialising... Mr Currie said that he, Chris Muir and Charles Clamp agreed to go... He said that Jennifer Bird agreed that her car should be used, could be used, and that she handed the keys over to Charles Clamp. ...he denied that they had coerced Jennifer Bird into handing over the keys. Charles Clamp drove the car the twenty miles from Hawick to Galashiels".

Counsel for the minuters did not cross-examine the pursuer to the effect that it had not been the deceased who had driven the car to Galashiels, but Miss Bird herself. When Miss Bird, who is now 24 years of age, however, came to give her evidence, she said, that the pursuer had asked her at "Clinty's" bar if she would take himself and the other two men to Galashiels, and that she had agreed to do so. The minuters' counsel then asked, "And who was it that drove the car from Hawick to Galashiels ?". Miss Bird replied, "From Hawick, myself". This response appeared to take senior counsel for the minuters by surprise. He then asked Miss Bird, "Are you quite sure about that", to which Miss Bird replied, "Yes". Nothing daunted, senior counsel for the minuters continued, "Is it not the case that the keys were given to Mr Clamp and Mr Clamp drove...", to which Miss Bird replied, "No, that's not the case, absolutely not". Later on in her evidence, Miss Bird contended that she had not given her keys to the deceased to drive the car to Galashiels because she never allowed anyone else to drive her car. She said her car was very important to her. In cross-examination, in relation to this matter, Miss Bird endeavoured to explain the discrepancies between what she said to the police officer, when interviewed by him in hospital, and her evidence at the proof, on the basis that she was in a poor condition when she was interviewed, having, in particular, sustained a serious head injury. I should also note that at one stage senior counsel for the minuters, in his cross-examination of the pursuer, somewhat faintly attempted to suggest that when the group had arrived in Galashiels, Jennifer Bird took over the driving of the car in order to park it.

[8]In his closing submissions counsel for the minuters initially invited me to hold that Miss Bird's evidence, about who drove to Galashiels, was clearly wrong. He said that the pursuer's evidence was to be preferred on this matter, since Miss Bird had not suggested, in her police statement, that she had driven to Galashiels but, on the contrary, had said that the deceased had done so. After I had indicated what I considered to be the potential significance of that concession, senior counsel for the minuters changed his position and invited me to accept Miss Bird's evidence given at the proof on this matter in preference to that of the pursuer.

[9]I have not found this particular matter entirely easy to resolve. I did not consider that either the pursuer, nor Miss Bird, were entirely satisfactory witnesses. Both clearly, and perhaps understandably, gave their evidence under some stress. Both required short adjournments during the giving of their evidence, the pursuer to enable him to take medication to settle him, and Miss Bird to compose herself after she had broken down. The pursuer was at times somewhat aggressive or evasive in giving his evidence. Both, however, were quite clear and unshaken as to who had driven the car to Galashiels. On other aspects of the case, for the reasons I will explain, I have found that Miss Bird's evidence was unreliable or clearly wrong. There were no other witnesses to speak directly to who drove the car to Galashiels. Ultimately, I have reached the conclusion that the pursuer's evidence on this matter falls to be preferred. I do so primarily because it was consistent with what both he and Miss Bird told the police officer shortly after the accident, and I have no reason at all to suppose that what the police officer noted in his notebook, and spoke to at the proof, was accurate. Indeed, it was never suggested by counsel for the minuters that the note was anything other than an accurate account of what Jennifer Bird had told the police officer. The pursuer's evidence was entirely consistent also with what he told Dr Chiswick when interviewed by him. He was not cross-examined on this point and, as I have indicated above, there are no positive averments by the minuters as to who drove the car to Galashiels.

[10]The fact that the pursuer was not cross-examined on this matter, in my opinion, was significant. I accept that the effect of a failure to cross-examine a witness on a matter does not mean that the evidence, for which no foundation has been laid in cross-examination, but which has been led without objection, falls necessarily to be disregarded. Nevertheless it is for the Court hearing the evidence to pay particular regard to the way in which the evidence emerged in judging of the weight, if any, to be given to it. Considerations of prejudice also arise in such a situation see: *Bryce* v *British Railways Board* 1996 S.L.T. 1378 and *Walker* v *McGruther* 1982 S.L.T. 345.

[11]It seems to me that I should not readily accept the evidence of Miss Bird, on this matter, when the pursuer was not given a chance to contradict it, or even to explain why it could not be true. The principles of fair play, in my judgment, mean that this should have been done and, in this case, the failure to observe fair play by seeing that this was done, can be said to be prejudicial to the pursuer. For all the foregoing reasons, therefore, I have reached the conclusion that it was, indeed, the deceased who drove the car to Galashiels. I should add that in reaching this view I have taken into account the fact that in her statement to the police officer, Miss Bird immediately after saying, "Charles drove to Galashiels" is noted as saying "I parked near 'Car Parks for Us' and then went to Hunters". Neither Counsel was able to provide me with any explanation as to how that last statement was to be reconciled with the clear statement that "Charles drove to Galashiels" and, in any event, I am not satisfied that it is sufficient to make me prefer Miss Bird's evidence, given at the proof, that the deceased did not drive to Galashiels. The significance of my finding on this matter will become apparent later in this opinion.

[12]While it is clear that after the group have arrived in Galashiels, they visited the flat of Jennifer Bird's sister, Rhona Bird, the next area of considerable controversy, in relation to the events of the night in question, related to when exactly, and on how many occasions, the group visited Rhona Bird's flat. There was also some controversy as to what occurred when the party did visit Rhona Bird's flat.

[13]The pursuer's account of these matters was as follows. He said that when the party arrived in Galashiels, they first went to a petrol filling station to get cigarettes. They then went, he said, to Jennifer's sister's house. The car was parked outside the building. All four went up to the flat and remained for about ten to fifteen minutes. He said the reason for their going to the flat was simply that Jennifer wanted to see her sister. After ten or fifteen minutes the pursuer said that all four of them left the flat and went to "Hunters" Night-club which is situated in the High Street in Galashiels, leaving Jennifer's car parked outside her sister's flat. The club was about a fifteen minute walk from Rhona Bird's flat. The pursuer thought that they stayed at the club for about an hour. According to the pursuer's evidence, Jennifer Bird came to him at the club and said she wanted to have her car keys returned to her. He said he told her to go and to ask the deceased for the keys. She did this, and came back, and told the pursuer that the deceased had told her that he had left the keys at

her sister's flat. The pursuer said he told Jennifer to go back to the deceased and to ask again if he had the keys and that, having done this, she returned and said again that the deceased had told her that the keys were at her sister's flat. The pursuer's evidence was that from the time the group left Hawick, until the point at which Jennifer said to him in "Hunters" Club that she wanted her car keys back, nothing had been discussed, among the group, about the keys. After Jennifer Bird had been to the deceased on the second occasion to ask for the keys at Hunters Club, and having been told by him that they were back at her sister's flat, the pursuer said that he offered to "chum her along" to her sister's home to get the keys. He said he accompanied Jennifer to Rhona Bird's flat. He waited outside. She was in the flat for about ten to fifteen minutes during which time he smoked a cigarette. When she joined him again, Jennifer Bird said that the keys had not been left at the flat. According to the pursuer he then said that they should go back to the club to collect the deceased and Chris. Just at that, however, the deceased and Christopher Muir appeared on the scene. The pursuer gave his evidence, on this chapter of events, in examination-in-chief, in a clear and coherent fashion.

[14]In cross-examining the pursuer, counsel for the minuters put it to him that the purpose of the group visiting Rhona Bird's flat shortly after their arrival in Galashiels was to enquire if they could stay the night there. The pursuer adamantly denied this. It was also put to him that he and the other two men caused a bit of trouble at the flat, in particular by pestering Rhona Bird's flatmate, Laura Main, who was present in the flat at the time. This was also denied by the pursuer. The

cross-examination of the pursuer, however, did not proceed on the footing that there had been any more than that one visit by the group to Rhona Bird's flat on the night in question.

[15]In her examination-in-chief, Jennifer Bird said that she and the men had visited her sister's flat on their arrival in Galashiels, after she had parked the car outside her sister's flat. She specifically denied that the car was parked in a car park. Having said that all four visited her sister, on their arrival in Galashiels, she was asked "Did you ask your sister if you could stay at her home?". In reply to this question she said:

"After coming back from the night-club in Galashiels, when we were travelling home, before we went home, we came back to the flat, and I asked her if we could stay the night, but she refused".

This she described as occurring on her second visit to her sister's flat. As far as the first visit was concerned, she said that the men had behaved in a loud and boisterous fashion. She said that that visit had lasted for about ten or fifteen minutes. She gave evidence that the group, after leaving her sister's flat on the first occasion, went to two night-clubs, "The Planet" and "Hunters". That evidence was inconsistent with what she told Police Constable McCaa. Counsel for the minuters invited me to hold that the witness was clearly wrong in saying that the group had visited "The Planet" as well as "Hunters". I am satisfied that he was right to do so. The witness, Jennifer Bird, went on to say that after the group left "the two pubs, we went back to my sister's flat before heading back to Hawick". When asked what was her reason for returning to the flat, she said she had no particular reason - "just for a visit". She said that the second visit took place between midnight and half past midnight. She was mistaken about that since the evidence clearly established that the group did not leave Hawick until approaching midnight and that the group spent some significant time at Hunters Night-club in Galashiels before setting off to return to Hawick. Jennifer Bird's evidence was that all four of the group went back to her sister's flat for a second visit after leaving the night-club. She said that, on this occasion, the men behaved inappropriately and, in particular, one of them was following her sister's flatmate round the flat. The witness said that the group planned to return to Hawick and that she was going to drive. She had gone to the toilet in her sister's flat on the second visit and when she returned she could not find her car keys. She said that they had been in the pocket of a jacket or coat which she had taken off in the flat. She said that she left the flat with three men and when they reached the car she had said "Come on, one of you must have the keys". She discovered that the deceased had the keys. In answer to questions put by the Court, the witness said that, on the second visit, to her sister's flat, she had asked if she and the four men could stay the night and that this had been her idea. Her sister had, however, refused that request. She did not appear to consider that, in the situation, the appropriate thing for her to do was to stay alone at her sister's

flat, since she said she had given the impression to her sister that either all of them stayed at the flat, or all of them went.

[16]In cross-examination, Jennifer Bird said that after she had discovered that her car keys were missing, she went outside her sister's flat to see if she had dropped them in the street. She then went on to say that she went straight back up to her sister's flat and told her sister that the men must have her keys. She then returned to the men and found that the deceased had the keys.

[17]Rhona Bird, Jennifer Bird's sister, gave evidence. She spoke to the group having visited her flat on two occasions on the night in question. She thought the first visit occurred at about nine or ten o'clock but accepted that she could have got the timing wrong. The second visit, she considered took place between half past midnight and 1.30 am. She described the conduct and condition of the men as being "high as kites, absolutely merry, absolutely drunk". She said that on that occasion they behaved arrogantly and inappropriately. They were, she said, slightly more drunk on the second visit than they had been on the first, and that the second visit lasted for about fifteen minutes. She confirmed that her sister had asked if all four of them could stay the night, and that she had refused, saying that he sister knew that she could stay at any time but that, under no circumstances, was she having the other three stay in her flat. She said that her sister came back up to her flat shortly after leaving. She looked round the flat and said, "I don't know what's happened. I can't find the keys". She then left. In this respect, this version of events does not accord with Jennifer Bird's evidence, who said that she had discovered she did not have the keys before leaving the flat at the end of the second visit. In cross-examination Rhona Bird said that she was quite clear that on leaving with the men at the end of the second visit, Jennifer said nothing about not having her car keys. This witness gave evidence that she had telephoned her mother after the group had visited her on the first occasion to say that she was concerned about Jennifer being in the company of these men. She could not recall what her mother had said when being informed of this. She said that she telephoned her mother a second time after the second visit to say that Jennifer had left her flat and was coming home to Hawick. In cross-examination the witness said that on her return to the flat to search for her keys after the second visit, and not having found the keys, Jennifer Bird had said to her sister Rhona that one of the men must have them. This, again, does not correspond with the evidence of Jennifer Bird. In cross-examination, Rhona Bird, was asked if she was sure that there had been two visits by the group on the night in question. She said that she was almost certain that they had visited on two occasions, but then went on to say that maybe they were in her flat just the once, but she was sure that they came twice. She then went on to say that she knew her sister was there on more than one occasion and that on one of those occasions she was on her own, and maybe they, *viz* the three men, were only there just the once. In re-examination, she said that she thought the group had been to the flat twice, but that what she recalled clearly was their behaviour.

[18]Rhona Bird's flatmate, Laura Main, gave evidence and she spoke to the group visiting the flat in the early evening, about 7 or 8 pm. That was clearly wrong, but it is fair to say that this witness said that she could not remember clearly the time at which they came. She said that the men behaved in a boisterous fashion. She spoke of them coming back at some stage when two of the men, including the pursuer, were aggressive and that one of them tried to follow her into her room. She said that they wanted to stay the night, but this request was refused. She gave some evidence to the effect that, on the second occasion, Jennifer Bird initially did not leave with the men and that her sister Rhona had tried to prevent her leaving with them. Again she gave some fairly indefinite evidence that at some stage Jennifer could not find her car keys. Her evidence was also that Jennifer, before leaving the flat on the second occasion, said that she could not find her keys which had been in her coat pocket. In cross-examination, this witness said that her memory of events on the night in question was not entirely clear and was hazy in parts. I did not find this witness's evidence very helpful or persuasive. I furthermore did not find the evidence of Rhona Bird, regarding the events of the night in question, as being entirely reliable or persuasive and there were some important discrepancies between her account and that of her sister. On the matter, therefore, of how many visits the men made to the flat on the night in question, I have come to the conclusion that the pursuer's evidence is to be preferred and that the men visited the flat together with Jennifer on only one occasion. It is, once again, in my judgment, of some considerable significance, that in the statement she gave to Police Constable McCaa, Jennifer Bird did not refer to two

visits to her sister's flat, or that her keys had been taken from her possession on one of these occasions. She merely said, "I remember now, we went to see my sister Rhona Bird 141 High Street Galashiels". Moreover what she told the police officer on that occasion about the car keys was more in accordance with the pursuer's evidence on this matter. She said in her statement to the police constable "We came out of Hunters and Charles would not give me my car keys back" (my emphasis). In his statement to the police officer, the pursuer said more or less the same thing. He was to the effect that after arriving in Galashiels, "We went to Jennifer's sister Rhona's house and then down to Hunters. Chas, Chris and I all had a couple of drinks. Jennifer wanted her car keys back, but Chas would not give her them" (my emphasis). I, accordingly, find as a matter of fact that until shortly before leaving Hunters Club the deceased had been in possession of Jennifer Bird's car keys with her consent, having driven her car to Galashiels.

[19]The next chapter of the case concerns what happened immediately before the group drove off from Galashiels towards Hawick. On this matter the evidence of the pursuer, and Jennifer Bird in many respects, was materially the same. In relation to this part of the night's events, Jennifer Bird, in her statement to the police constable, was to the following effect:

"We came out of Hunters and Charles would not give me my car keys back. He was argumentative and acting drunk. Chas sat in the driver's seat and the other guy sat in the front passenger seat. I sat behind the driver and Paul sat behind the passenger in the back".

The pursuer is noted by Police Constable McCaa as saying the following:

"We went to Jennifer's sister's, Rhona's house, and then down to Hunters. Chas, Chris and I all had a couple of drinks. Jennifer wanted her car keys back, but Chas would not give her them. Chas insisted on driving. Chas was driving and Chris sat in the front passenger seat and I sat behind Chris and Jenny sat behind Chas".

In his evidence, at the proof, the pursuer said that once he and Jennifer Bird were joined by the deceased, after Jennifer had been to her sister's flat to look for her car keys, she asked the deceased where the keys were and he just laughed. The pursuer said that he told the deceased to give Jennifer her car keys back. In cross-examination the pursuer said that the deceased had suggested to Jennifer Bird that the pursuer and Mr Muir had the keys. The deceased, however, opened the car door with the keys. The pursuer was also having an argument with the deceased at this time about who should sit in the front passenger seat. He continued to tell the deceased to give the car keys back to Jennifer Bird. The deceased jumped into the driver's seat and Jennifer Bird and the others got into the car. The pursuer said Jennifer did nothing to prevent the deceased from driving. She got into the car "of her own accord". He accepted, however, that the deceased should have given the car keys back to Jennifer Bird because she wanted to have them returned to her. He said that when he, the deceased and Jennifer Bird were in "Clinty's" bar earlier in the evening, Jennifer had said that the car was hers and that had been his understanding throughout. He did not know that it belonged to her mother. Jennifer Bird, in evidence, said that she pleaded with the deceased to have her car keys given back to her. She said that she felt herself threatened and intimidated by the three men, although as I understood it, this was simply because of the fact that they were men and outnumbered her, rather than any actual threats being uttered to her. She said she got into the car because she was frightened that they were going to steal her car, and, accordingly, she thought that the best thing, in all the circumstances, to do was to get into the car. She said that she was not at that time feeling particularly well mentally, because she had been suffering for some time from a sort of depression. In cross-examination Jennifer Bird said that the deceased simply ignored her request that he should hand back the keys. She said that she asked him for the keys more than once. She had placed herself at the driver's door, but when the deceased opened the driver's door with the keys she moved away from it and she got into the back passenger seat. She said she did that simply because it was either that or the men went away with her car. In re-examination Jennifer Bird said that she would have been happy to drive the three men back to Hawick.

I have reached the conclusion that on the evidence, the position was that Jennifer Bird, immediately before getting into the car, made it clear to the deceased that she wished to have her car keys back and that the

pursuer had sought to persuade the deceased to hand the keys back to Jennifer. The deceased refused to do so, got into the driver's seat of the car and Jennifer Bird, not wishing to be left behind, and not wishing to see the men go off with her car, got into the back of the car with the pursuer, the other man Chris Muir having got into the front passenger seat. I am satisfied that both the pursuer and the deceased knew that Jennifer Bird did not want the deceased to drive her car back to Hawick, but, however, she had been willing to drive all four of them back. She, went along, ultimately, with the deceased driving the car, understandably enough, because otherwise she believed that they would simply drive off without her. The keys had got into the possession of the deceased, initially, with her consent, by reason of her allowing him to drive the car to Galashiels.

[20]The foregoing state of affairs, is, in my judgment, a far cry from the situation where someone allows himself to be driven in a car which he knows to have been stolen, for example, or where it has been taken on a joyriding expedition, without the consent or knowledge, of the owner. I am satisfied that the pursuer was entitled to assume that the car belonged to Jennifer Bird. While she did, in my judgment, make it clear that she did not want the deceased to drive her car back from Galashiels, the fact of the matter is that she got into the car, for what I have already accepted were perfectly understandable reasons, and travelled along with the pursuer as a passenger in the car being driven by the deceased. From the point at which the car began to be driven by the deceased back to Hawick, I consider that it is, perhaps, somewhat straining language to hold that the pursuer was allowing himself to be carried in a vehicle which he knew had been both taken and was being driven without the consent of its owner for the purposes of Section 178(1)(b) of The Road Traffic Act 1988. Even if, technically speaking, there was a breach of the statutory provision, it could not, in my view, be considered as in any respect a serious breach. Had I reached the view that the deceased had never had the keys of the car with the consent of Jennifer Bird on the night in question, and that this was known to the pursuer, I may have taken a different view of matters. But I have already held that she did allow the deceased to have the keys to drive the car to Galashiels.

[21]The law in relation to when an injured person will be disqualified from suing for injuries which have been caused by the failure of another to take care because at the time he was engaged in a criminal activity, was discussed in the case of *Weir* v *Wyper* 1992 S.L.T. 579. In that case the Lord Ordinary held that the Scots authorities did not support the contention that Scots Law had adopted a firm rule that participation in any type of criminal conduct, however minor, disabled an injured party from recovering damages, and that, on the contrary, the question depended on the particular facts and circumstances. His Lordship, in particular, referred to an *obiter* dictum of Lord Hunter, in the case of *Winnick* v *Dick* 1984 S.C. 48 where his Lordship said:

"It is clear, from the authorities cited to us, that the question whether two parties were participating in a joint criminal activity with the effect that one might in the circumstances be disabled from claiming reparation from the other, is, in a case like the present, likely to be a question of fact or degree. Moreover, in such a case, the matter of fact and degree may, as the authorities show, be relatively narrow". (at P. 189)

The position in English law was the subject of discussion by the Court of Appeal in the case of *Pitts* v *Hunt* (1991) 1 QB 24. That was a case which was relatively extreme on its facts. The plaintiff and a friend had spent the evening drinking at a disco before setting off on the friend's motorcycle. The plaintiff was aware that the motorcyclist was neither licensed to ride a motorcycle nor insured. It was found that, moreover, on the journey, the plaintiff had encouraged the cyclist to ride in a fast, reckless and hazardous manner, with the purpose of frightening members of the public. This conduct eventually led to a collision with an oncoming car in which the plaintiff was severely injured. It was held that in the circumstances the plaintiff could not recover. As Lord Coulsfield in the *Weir* v *Wyper* case observed, however, the judgments of the Court of Appeal do not support the contention that in English law there is a strict or absolute rule that any participation in a criminal activity will necessarily bar a plaintiff from recovering damages for injuries sustained as a consequence of being engaged in that activity. In his judgment, in that case, Beldam LJ, after a full examination of the earlier authorities, including *Winnick* v *Dick supra* and certain Australian authorities, said at page 46, that:

"On the facts found by the Judge in this case the plaintiff was playing a full and active part in encouraging the young rider to commit offences which, if a death other than that of the young rider himself had occurred, would have amounted to manslaughter. And not just manslaughter by gross negligence, on the Judge's findings. It would have been manslaughter by the commission of a dangerous act either done with the intention of frightening other road users or when both the plaintiff and the young rider were aware, or but for a self-induced intoxication would have been aware, that it was likely to do so, and nevertheless they went on and did the act regardless of the consequences."

His Lordship continued:

"Thus on the findings made by the Judge in this case I would hold that the plaintiff is precluded on grounds of public policy from recovering compensation for the injuries which he sustained in the course of the very serious offences in which he was participating. On a question on which, as Bingham LJ said in *Saunders* v *Edwards* (1987) 1 WLR 1116, 1134, the Courts have tended to adopt a pragmatic approach, I do not believe that it is desirable to go further in an attempt to categorise the degree of seriousness involved in offences which will preclude recovery of compensation".

The policy of the law in adopting such a pragmatic approach is, as Beldam LJ said at page 45, one of

"Seeking where possible to see that genuine wrongs were righted so long as the Court did not thereby promote or countenance a nefarious object or bargain which it was bound to condemn"

As described by Balcombe LJ in *Pitts* v *Hunt* at page 49, this pragmatic approach involves considering

"What would have been the cause of action had there been no joint illegal enterprise - that is, the tort of negligence based on the breach of the duty of care owed by the deceased to the plaintiff - and then to consider whether the circumstances of the particular case are such as to preclude the existence of that cause of action".

I might observe that this pragmatic approach appears to me to be entirely compatible with developments in the case of negligence, which define the question of whether, in any particular case, a duty of care arises, as being whether or not it would be "just, fair and reasonable" to impose such a duty. Applying a pragmatic approach to the facts I have found in the present case, I consider that the deceased owed the pursuer a duty of care and, that, accordingly, that the pursuer is not disqualified from recovering damages for the injuries caused to him by breach of that duty of care, because either the pursuer was not engaged in any criminal activity, or alternatively, at the worst for him, his conduct involved a very minor breach of the relevant statutory provision.

[22]That leaves for decision the question of contributory negligence which arises because of the fact that the pursuer knew, or ought to have known, that the deceased was unfit to drive, because of his consumption of alcohol on the night in question. There was confusion in the evidence as to exactly how many drinks the deceased had consumed in the course of the evening and, indeed, what kind of drinks he did consume. The fact of the matter, however, is that the deceased was clearly drinking steadily from early in the evening and frequented no fewer that five pubs where he drank alcohol. He then drank more alcohol while at "Hunters" Night-club in Galashiels where he remained for at least an hour. Blood and urine samples taken during the post-mortem examination of the deceased revealed 188 milligrams of alcohol in 100 millilitres of blood and 257 milligrams of alcohol per 100 millilitres of urine. The description of the deceased's behaviour and appearance given by the manager of the pub "Clinty's" in evidence, which was taken on commission, as previously noted by me, was that he was "well oiled", staggering and slurring his speech by the time he left for Galashiels. I have no doubt that by the time he drove to Hawick the deceased was heavily intoxicated. As the pursuer had been one of the deceased's companions throughout the night, I am satisfied that the pursuer knew, or ought to have known, that the deceased was clearly unfit to drive and that given his condition there was a serious risk of his being unable to keep the car under proper control. Both counsel referred me to various authorities as to the level of contributory negligence which should be found in this case. These

authorities were, *Winnick* v *Dick supra* and, at first instance, 1981 S.L.T. (Sh.Ct.) 23, *Sloan* v *Triplett* 1985 S.L.T 294, *Owen* v *Brimmell* (1971) 1 QB 859 and *Hill* v *Chivers* 1987 S.L.T. 323. Each case, however, must be decided on its own facts. I am of the view that, in the circumstances of this case, on the facts as I have found them, the pursuer should be held to be contributorily negligent to the extent of one third. This means that the pursuer, in terms of the joint minute, is entitled to two thirds of £60,000 in damages and interest, that is £40,000. It was agreed that of the total sum of £60,000, £10,000 should be regarded as damages for past loss of earnings, inclusive of interest to the date of decree. That figure falls to be reduced to £6,666.66 which is the sum available for deduction of benefits in terms of Section 15(2) of the Social Security (Recruitment of Benefits) Act 1997. The parties were agreed, in terms of their joint minute, that the following persons should be certified as skill witnesses in terms of Rule of Court 42.13:

(1) Mr John Philips, Consultant Orthopaedic Surgeon;

(2) Mr C. A. Neville, BDS;

(3) Dr Cliff Sharpe, Consultant Psychiatrist;

(4) Dr C. P. Freeman, Consultant Psychiatrist;

(5) Mr Peter Davies, Employment and Vocational Rehabilitation Consultant;

(6) Mr James Christie, Consultant Orthopaedic Surgeon;

(7) Dr Derek Chiswick, Consultant Forensic Psychiatrist;

(8) Dr Basil N. Purdue, Pathologist, and I so certify them.

[23]Having regard to the form of conclusion and the nature of the pleas-in-law in this case, it did appear to me that further consideration required to be given as to precisely what form the interlocutor in this case should take to reflect my findings. I, accordingly, had the case put out for a hearing; By Order. At the By Order hearing it was explained to me that the minuters were prepared to pay to the pursuer any sum which was found to be due as against the deceased's 'state in fulfilment of their obligations under Section 151 of the Road Traffic Act 1988. It was, accordingly, suggested by counsel for both parties that the case should be continued for a further six weeks to enable the minuters to make payment to the pursuer of the sum which I have found him entitled to, together with the expenses of the action (and subject to the minuters considering the possibility of marking a reclaiming motion against my findings). I was prepared to accede to that proposed course of action and so I will continue the cause for a further six weeks.