EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2007] CSIH NUMBER 87

PD705/04

OPINION OF THE COURT

delivered by LORD NIMMO SMITH

in

RECLAIMING MOTION

in the cause

(FIRST) JAMES MENZIES CLEGG and (SECOND) LORNA CLEGG

Pursuers;

against

JANE KATHRYN ROGERSON

First Defender and Reclaimer;

and

NETWORK RAIL INFRASTRUCTURE LIMITED

Second Defenders and Respondents:

Lord Nimmo Smith

Lord Wheatley

Lord Brodie

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Act: Maguire, Q.C., Haldane; Digby Brown, SSC (Pursuers)

Alt: McEachran, Q.C., Lamont; Lawford Kidd (First Defender and Reclaimer)

Alt: Peoples, Q.C., Sanders; MacRoberts (Second Defenders and Respondents)

4 December 2007

Introduction

[1] On a sunny evening on 5 May 2001 there was a tragic accident on a level crossing south of Pitlochry in Perthshire. The A9 trunk road, which on that stretch is a dual carriageway, runs close to the main railway line from Perth to Inverness. The railway line lies to the west of the A9. The settlement of Moulinearn lies to the west of the railway line, between it and the River Tummel. Access to Moulinearn is gained by a private road which leaves the northbound carriageway of the A9 and then crosses the level crossing. At that time the railway was operated by Railtrack plc ("Railtrack"), whose successors, Network Rail Infrastructure Limited ("Network Rail") are the second defenders in this action. The car was driven by Jane Rogerson ("Miss Rogerson"), who is the first defender. Her boyfriend, Bruce Thomson ("Mr Thomson"), was in the front passenger seat and a three year old girl, Sarah Clegg, was in the back seat. When the train struck the car Mr

Thomson was killed and Sarah Clegg was seriously injured. Her parents, James Clegg and Lorna Clegg ("Mr and Mrs Clegg"), who are the pursuers, were following in another car, with their son Charlie. In this action Mr and Mrs Clegg have sought damages for the depression and other mental disorders which they suffered in consequence of the accident.

[2] Damages have been agreed between the parties. In the event of either or both of the defenders being found liable to the pursuers, Mr and Mrs Clegg are each to receive £20,000 in respect of solatium with interest from 14 June 2005. Mrs Clegg is also to receive £1,800 in respect of loss of earnings, again with interest from 14 June 2005 and in addition interest on the loss of earnings of £486.

[3] The issue between the parties before the Lord Ordinary was whether and to what extent either or both of the defenders were in breach of their duties of reasonable care to Mr and Mrs Clegg as parents of the injured girl in having caused or materially contributed to the accident. No issue is raised of the scope of the defenders' duty of care to Mr and Mrs Clegg in relation to the injury which they suffered.

[4] The action was originally brought against Miss Rogerson as the sole defender, but she brought Network Rail into the process by third party notice. Thereafter, Mr and Mrs Clegg adopted Miss Rogerson's averments directed against Network Rail, on the hypothesis of fact upon which they proceeded, and made amendments to their pleadings which had the effect of seeking damages from both Miss Rogerson and Network Rail. After hearing proof, the Lord Ordinary (Lord Hodge) awarded the agreed sums of damages against Miss Rogerson, but assoilzied Network Rail. In brief, he held that Miss Rogerson failed to exercise reasonable care in attempting to cross the railway at a time when a train was approaching, and that this was the sole cause of the accident. He also held that Railtrack might be criticised for failing to take one particular precaution, which is discussed below, and that if they had taken it they would have fulfilled their duty of reasonable care, but that this failure did not cause the accident.

[5] Miss Rogerson has now reclaimed against this decision. She does not seek to displace the Lord Ordinary's finding of liability against her. She has lodged an undertaking, which is recorded in the minute of proceedings and was confirmed before us by her senior counsel, that she will not attack the decision of the Lord Ordinary so far as it relates to the finding that she was negligent, as more fully set out in the Lord Ordinary's Opinion dated 19 August 2005. At the start of the hearing before us, when the undertaking was confirmed, senior and junior counsel for Mr and Mrs Clegg sought and were granted leave to withdraw. Network Rail have cross-appealed. The grounds of appeal that were argued before us are set out below.

[6] The issues in this reclaiming motion are, in outline, whether (1) as contended by Miss Rogerson, the Lord Ordinary ought to have found that the accident was caused in part by the fault of Railtrack, and accordingly Network Rail should be found liable to make a contribution to the damages payable to Mr and Mrs Clegg and (2) whether, as contended by Network Rail in a cross appeal, the Lord Ordinary erred in law in holding that Railtrack failed in their duty to take reasonable care.

The Lord Ordinary's findings in fact

[7] To a notable extent, neither party took issue with the Lord Ordinary's primary findings in fact or the conclusions he drew from them. Because of this, and because they appear to us to be clearly expressed, what follows is taken from the Lord Ordinary's Opinion, with minor alterations. We shall indicate at a later stage the points at which the parties took issue with his decision.

The locus of the accident

[8] The accident occurred at the level crossing at Moulinearn, Perthshire, which is situated on the western side of the A9 trunk road between Ballinluig and Pitlochry. The railway runs parallel to the A9 and the crossing is located within about 15 metres of the northbound carriageway of the A9. The road on which the crossing is situated is a private road leading to the hamlet of Moulinearn which comprises about seven

houses and two holiday properties. The road also gives access to agricultural land and to the river Tummel which people can fish on obtaining permits from Atholl Estates.

[9] Until 1997 the crossing was operated by a crossing attendant, Mrs Herbertson, who lived at Moulinearn. The crossing appears to have been operated safely but on occasion a person wishing to cross the railway could be delayed for up to 20 minutes as the signalman would not authorise Mrs Herbertson to open the gates once a train had reached certain points on the railway which were several miles from the crossing. In about 1996 Railtrack decided to dispense with Mrs Herbertson's services and introduce a user worked crossing ("UWC") in place of the gates which she opened and shut. The crossing as constructed in 1997 comprised a barrier which extended across the width of the road. Drivers operated the crossing electronically, pressing a button to raise or lower the barrier. As initially designed in 1996 the proposed UWC would have been operated from either side of the railway by no more than two buttons to raise and lower the barrier which were situated on a pole on the left hand side of the barrier. On the pole there was a klaxon or "yodalarm", which was intended to alert pedestrians to the approach of a train. In addition, in very close proximity to the pole with the buttons and klaxon there was a pole with a sign with a red light and a green light containing short instructions. These lights were smaller than traffic lights on public roads and were known as "miniature stop lights" ("MSLs"). On either side of the red light were the words "Red" and "STOP" and on either side of the green light were the words "Green" and "Clear". Immediately beneath the lights were the words "If no light - phone signalman". Immediately beneath the sign containing the lights there was a further sign containing further instructions. The instructions were as follows:

"INSTRUCTIONS

1. Check that green light shows

2. Fully raise both barriers

3. Check that green light still shows

4. Cross quickly

5. Lower barriers"

The green light would change to red and the klaxon would sound when an approaching train triggered a treadle on the track not less than 40 seconds before the train reached the crossing.

[10] It was intended that a vehicle driver on either side of the crossing would approach the crossing and observe the MSLs and instructions. The driver would stop and would have to get out of his car to operate the buttons. After crossing the railway the driver would again have to get out of the car to close the barriers.

[11] As a result of local representations from, among others, Councillor Eleanor Howie, concerning the problems which disabled and elderly people would face if they had to get out of their cars to operate the barrier controls, Railtrack agreed to install on the right hand side of the road on each side of the crossing a pole with controls which could be operated by a driver from the driver's seat in the car. These poles are referred to hereinafter as "the driver's side poles" and the controls on them as "the driver's side controls". Initially Railtrack proposed that the controls would be operated by a key which would be issued to a few known elderly drivers who used the crossing. But, as a result of further local representations which asserted that that would be discriminatory against disabled drivers, Railtrack installed buttons on the driver's side poles which a driver could operate without having a key. The driver's side poles were located about one car's length from the right hand side of the barriers. The instructions on each of the poles stated:

"Barrier Controls

Ensure Crossing Clear

Before Lowering Barriers

PUSH AND HOLD"

In addition the word "Raise" was located above the green button and the word "Lower" below the red button.

[12] The effect of the introduction of the driver's side controls was that many users of the crossing who were familiar with it did not get out of their cars to operate the controls beside the barrier but stopped their cars on the right hand side of the private road and operated the driver's side controls from within their cars.

[13] There was also on the left hand side of the road as one approached the crossing another pole with control buttons which a passenger could operate to raise the barrier before crossing or which a driver could use from within his car to close the barriers once he had crossed the railway. Those controls had no bearing on the accident. On each side of the crossing there was a telephone linked to the Pitlochry signal box which users could operate if they needed advice in relation to the crossing. There was also an electronic alarm in the Pitlochry signal box which was activated if the barriers remained in a raised position for more than three minutes. This enabled the signalman to warn train drivers to proceed with care.

[14] Most UWCs with barriers in Britain are operated hydraulically by the user who has to get out of his car to do so. Almost all UWCs with electronically operated barriers have the controls beside the MSLs at the barrier, again requiring the user to leave his car. There is in Britain one other UWC with electronically operated barriers which can be controlled by a driver from within his car. That UWC is situated in Sussex and significantly is operated by key and not by push button. Thus the Moulinearn UWC was a unique crossing.

The construction and approval of the level crossing

[15] The replacement of the manned crossing by a UWC caused controversy locally and there were articles in the *Perthshire Advertiser* inspired by Councillor Howie among others which were critical of the proposed crossing. The Lord Ordinary said that those articles however were of little relevance to the issues in this case as the safety issues which they raised did not give rise to this accident. For example, one of the primary concerns of local residents was that careless users would leave the gates open after crossing the railway. However, Mrs Simpson of the Mid Atholl Strathtay & Grandtully Community Council in a letter dated 4 February 1997 also addressed concerns about the visibility of the warning lights and the audibility of the klaxon in competition with, among other things, heavy traffic on the A9. She suggested that there were too many possibilities of human error, carelessness, forgetfulness and deliberate evasion of the system for the proposed crossing to be safe. Councillor Howie in correspondence also pointed out that the MSLs might be difficult to see in bright sunshine. As the Lord Ordinary was satisfied that the MSLs were visible to a careful driver, the klaxon would have been audible in most circumstances if a driver had listened for it and that Miss Rogerson was not misled by the layout of the crossing, he was not satisfied that the risks which local people raised in correspondence and which were reported in the press contributed to the accident.

[16] The Lord Ordinary said that of more significance were Railtrack's knowledge from the safety assessments which led to the construction of the crossing and Railtrack's failure to follow up reports of three "near misses" between 1997 and 1999. It was necessary to consider these in more detail in order to assess whether they revealed matters which contributed to the accident.

[17] In its Railway Safety Principles and Guidance ("RSPG") HM Railway Inspectorate laid down conditions for the use of UWCs. Those conditions included the requirement that trains should not exceed a certain speed and that the crossings should only be used on private roads. Most UWCs were protected by gates on both sides of the railway. The amount of additional protective equipment that might be provided was related to, among other things, train speeds and daily vehicle usage of the crossing. Thus where, as at Moulinearn (on the higher estimate of user), the daily road vehicle user was more than 50 and less than 100, the RSPG recommended the use of gates or barriers combined with a telephone to a supervising point. Use of MSLs

was recommended where the minimum warning times of trains could not be obtained and the daily road vehicle user exceeded one hundred. Thus the Moulinearn UWC, through the incorporation of MSLs, included protective equipment beyond that suggested in the RSPG. The instruction signs at Moulinearn complied so far as material with the recommendations of the RSPG.

[18] Railtrack initially designed a UWC for Moulinearn which would have required all drivers to get out of their cars to operate the control buttons beside the barriers. They carried out safety assessments on that design in about September 1996. Thereafter in the autumn and winter of 1996 Railtrack corresponded with HM Railway Inspectorate on their risk assessment and the design of the crossing. In accordance with the Level Crossings Act 1983 Railtrack produced a draft Order and consulted Perth and Kinross Council which in turn advertised the application and obtained comments from the public. As a result of public representations and in correspondence with HM Railway Inspectorate on these representations, Railtrack agreed to vary the proposed layout to provide for elderly and disabled access by providing the driver's side controls. The proposal initially was to have control buttons which anyone could operate.

[19] On 6 March 1997 at a meeting attended by representatives of Railtrack, First Engineering and Signalling Control UK those present carried out a Hazard Operability Study ("HAZOP"). First Engineering were Railtrack's main contractors in the construction of the crossing and Signalling Control UK were their sub-contractors. Signalling Control had expressed concerns about the safety of the crossing where drivers could operate the control buttons from the driver's seat without having to leave their vehicles. Among the concerns it raised were whether the signs and MSLs would be visible from the driver's operating point at the control buttons. They also raised the question whether the operating instructions would be visible from a vehicle during darkness. The risks were noted and arrangements were made to check the visibility of the signs and lights at the locus after the equipment was installed. In the initial assessment on the morning of 6 March, in which the parties had examined the proposed layout with the control buttons available to all drivers, the risk of an accident was considered to be remote. Traffic using the crossing was assessed at about 20 vehicles per day. After another meeting in the afternoon Railtrack, acknowledging the continuing concerns of Signalling Control UK that the layout introduced additional risks, revised the layout to enclose the driver's side controls in locked boxes and proposed to issue keys to two known elderly users, thus greatly reducing the usage of those controls. This had the effect of reducing the risk of an accident on the risk assessment methodology which Railtrack adopted from remote to improbable. However no evidence was led as to the detail of the methodology and the Lord Ordinary was not able to form any view as to its reliability. The three risk issues relating to visibility of the instructions and the lights, mentioned above, were assessed as tolerable in the context of the controls being located in a locked box. Mr Allan McCarthy, an employee of Network Rail, gave evidence that from his examination of Railtrack's records he was satisfied that Railtrack officials had carried out a site visit to test the visibility of the signs and MSLs from the operating points at the driver's side poles. Thus Railtrack's assessment of risk was that an accident was a remote risk if the operating controls were open to general use and was improbable if the controls were enclosed in a locked box.

[20] Railtrack brought the new crossing into operation on 23 March 1997, before the draft Order had been finalised and approved. By letter dated 19 March 1997 HM Railway Inspectorate confirmed that Railtrack had power to do so under regulation 4(4)(a) of the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 ("the 1994 Regulations").

[21] At this stage, in order to confine the use of the driver's side controls to elderly or disabled drivers who had been briefed on the operation of the crossing, Railtrack enclosed the control buttons within locked boxes and issued keys to the boxes to the relevant drivers. But, as a result of further representations from Councillor Howie concerning discrimination against the disabled, Railtrack agreed to remove the boxes to give all disabled and elderly persons (and in practice all other drivers) access to the control buttons while sitting in their cars.

[22] On 22 April 1997 a site meeting was held at Moulinearn at which representatives of Railtrack, HM Railway Inspectorate, the Roads Department of Perth and Kinross Council, and the police and also

Councillor Howie, who represented the Moulinearn residents, were present. Councillor Howie raised certain concerns including the visibility of the warning lights from the Moulinearn side in direct sunlight and the risk of a driver failing to shut the barrier after crossing the railway. Another concern which was raised was that foreign drivers might not understand the instructions. Councillor Howie also raised the question of disabled access, and it appeared that at this meeting Railtrack and HM Railway Inspectorate agreed to alter the driver's side controls by removing the locked boxes. At the same meeting PC Gilroy expressed concern that the barrier could be raised when the red MSL was lit on the approach of a train and suggested that there should be an electronic lock which would prevent the barrier being raised when a train was approaching. Both Railtrack and HM Railway Inspectorate rejected that suggestion, taking the position that it was for the users of the crossing to comply with the instructions for its use. In his written report of the meeting and in his evidence PC Gilroy expressed the view that the crossing was safe if drivers operated it in accordance with the instructions displayed on the site but, drawing on his experience as a traffic policeman, that the design had not fully taken account of the human elements of ignorance, stupidity and laziness.

[23] On 6 June 1997 Mr P H Bridge, a Principal Inspector of Railways in HM Railway Inspectorate, wrote to Railtrack referring to the site visit on 22 April which he had attended and expressing general satisfaction with the installed arrangements (including the driver's side controls for operation by drivers from within their cars) and the revisions being proposed. He recommended certain changes to the draft Order to reflect what was being installed on the ground. In a letter to Councillor Howie dated 14 July 1997, Mr Cooksey, a Deputy Chief Inspector of Railways, responded to criticisms of the crossing which Councillor Howie had raised in letters in February and March 1997. He pointed out among other things that the interests of the disabled had been addressed by unlocking the driver-operated control buttons and that the audible warning device was designed to alert pedestrians rather than the drivers of motor vehicles. Finally, by letter dated 19 May 1998, Mr Cooksey referred to Mr Bridge's inspection of the crossing on 6 November 1997 and the subsequent completion of the works on the crossing and granted approval of the crossing on behalf of HM Railway Inspectorate in terms of the 1994 Regulations.

[24] There was evidence of three "near misses" at the Moulinearn UWC in which drivers had crossed the crossing in front of an approaching train on 11 April 1998, 4 October 1999 and 25 November 1999 respectively. The Lord Ordinary held that after the occurrence of the third reported safety incident Railtrack should have carried out a risk assessment of the UWC if they had complied with their own safety standards. They did not do so before the accident with which this action is concerned.

The circumstances of the accident

[25] On 5 May 2001 Mr and Mrs Clegg and their children spent the day in the company of Miss Rogerson and her boyfriend, Mr Thomson. After visiting Huntly, they were travelling in two cars to stay with friends, Branislav Sudjic and Eleanor Howie, at Moulinearn. In one car, Mr Clegg was driving and Mrs Clegg was in the back seat. Their son, Charlie, was in the front passenger seat. In the other car, initially Mr Thomson was the driver, but at some stage in the journey from Huntly Miss Rogerson took over the driving and Mr Thomson sat in the front passenger seat. Mr and Mrs Clegg's three year old daughter, Sarah, was seated in the back seat. Mr and Mrs Clegg, who were following Miss Rogerson's car at a distance, made contact with her or Bruce Thomson by mobile phone when travelling on the A9. As a result, shortly after 7.30 pm they arrived at the junction to Moulinearn together, with Mr and Mrs Clegg's car following Miss Rogerson's car.

[26] Miss Rogerson waited some time in the right hand lane of the southbound carriageway of the A9 for a gap in the northbound traffic to allow both her and the Cleggs to cross the northbound carriageway into the private road to Moulinearn. Miss Rogerson, on Mr Thomson's suggestion, drew into the right hand side of the private road beside the driver's side pole. Mr Clegg drove their car to the left hand side of the private road and stopped beside and slightly behind Miss Rogerson's car. When the cars were stationary on the private road in front of the barrier and when Miss Rogerson drove across the level crossing the red MSL was on and the klaxon was sounding. Investigations after the accident showed that the warning equipment and the barriers were in working order at the time of the accident.

[27] Miss Rogerson, whom Mr Thomson was instructing on the use of the controls, initially opened the passenger window by mistake before closing it and opening her window. She had some difficulty operating the driver's side controls as she did not keep her hand pressed on the "Raise" button with the result that the barrier started to open then stopped. However when Mr Thomson asked her to keep her hand on the button, the barrier was raised. She then drove over the crossing, looking to see if a train was coming.

[28] When Miss Rogerson's car was almost across the crossing it was struck on the rear nearside by a train travelling in a northerly direction at almost 80 mph. There was nothing that the train driver, who was driving within the speed limit for the track, could have done to prevent the accident. The impact of the train catapulted the rear of the car into the barrier mechanism on the Moulinearn side of the crossing and its front spun into contact with the train. As a result of the accident Mr Thomson died of his injuries in Perth Royal Infirmary and Sarah Clegg suffered brain damage.

Events after the accident

[29] Following the accident Railtrack and other interested parties obtained reports assessing what might have been done to prevent it. The authors of the reports made various suggestions.

[30] Mr Michael Gray, who in 2001 was head of the Ergonomics Section of the Health and Safety Laboratory in Sheffield and who at the time of the proof worked for the Factory Inspectorate, prepared a report in June 2001 at the request of HM Railway Inspectorate and also gave evidence. He suggested, among other things, that an inexperienced user of the UWC would concentrate on operating the buttons at the driver's side pole rather than on the MSLs and that the raising of the electronically controlled barrier could mislead a user into thinking that it was safe to cross. He concluded that the arrangements at Moulinearn were less than ideal and that they could be improved to reduce the likelihood of people making errors. He suggested that habitual users of the UWC would understand how it worked but that people who were unfamiliar or who had a little familiarity were most at risk. His recommendations included improving the visibility of the MSLs, a sounder beside the control buttons and a warning that an open barrier did not mean that it was safe to proceed.

[31] Professor Davies of the Centre of Applied Social Psychology, University of Strathclyde, prepared a report with Dr Alastair Ross in April 2005 and gave evidence. He noted the changes which had been made to the Moulinearn UWC since the accident and identified four "error-promoting conditions" in the UWC at the time of the accident. First, he considered that the location of the controls at the driver's side pole would distract a driver from the MSLs. Secondly, he suggested that the need to press and hold the control buttons would cause a driver to concentrate on operating them rather than directing his or her attention elsewhere. Thirdly, he suggested that the colour coding of the control buttons (green to raise and red to lower) would give the driver a message that the operation of the green button meant that it was safe to proceed. Fourthly, he argued that a driver could be misled by the fact that the barrier rose on pressing the green button, citing the analogy of barriers in car parks, airports and other locations where the correct action on the raising of the barrier is to proceed.

[32] Railtrack commissioned a risk assessment of the Moulinearn UWC from Environmental Resources Management Limited ("ERM") and their report dated October 2001 was discussed in the oral evidence. The purpose of the report was to demonstrate, with particular emphasis on human factors, that the level of risk was as low as reasonably practicable or to identify additional controls that were reasonably practicable. Residents and selected users were interviewed, an ergonomics assessment was made and a HAZOP was carried out to develop a quantified fault tree model of the UWC. The report concluded that the risk to the public merited the introduction of additional controls. It recommended that there should be a partial interlock to prevent the barriers from being raised once a train had struck in, an additional MSL at the driver's side controls and an increased size of lights in the MSLs. Repetition of the instructions at the controls on the driver's side pole was also seen as helpful but it was noted that HM Railway Inspectorate preferred the location of MSLs and instruction signs at both ends of the barrier.

[33] Railtrack carried out a risk assessment shortly after the accident in the context of a formal investigation into the accident. The investigation, led by Mr Allan McCarthy of Railtrack, included representatives of Railtrack, Scotrail and First Engineering. The investigating panel unanimously concluded that the UWC at Moulinearn was appropriate at the time of the accident and met the requirements of the RSPG on level crossings. It acknowledged that there had been a failure to carry out a risk assessment after the three safety incidents and the team commissioned a full risk assessment. The Lord Ordinary said that the risk assessment was patently flawed in its calculation of risk, in that it materially overstated the likelihood of accidents at the UWC. Mr McCarthy admitted as much in evidence. Nevertheless, the panel made certain recommendations to improve the safety of the UWC, recognising that some drivers might be distracted by the positioning of the driver's side controls and might not observe the MSLs and the instructions. Among its recommendations, the panel recommended that the crossing should not be brought back into normal operation until additional signs with instructions had been installed at the driver's side controls, safety instruction sheets had been issued to fishermen when they obtained permits to fish, and residents at Moulinearn had been reminded to inform their guests about the crossing.

[34] Sheriff Principal Dunlop held a fatal accident inquiry in November 2001, but section 6(3) of the Fatal Accident Inquiries Act 1976 precluded the Lord Ordinary from having regard to his determination.

[35] In the event, Railtrack installed a second set of MSLs on the right hand side of the barrier and placed signs containing instructions on the use of the controls (in the same terms as those set out on the second sign referred to in paragraph [9] above) both below those MSLs and at the driver's side controls. The open control buttons on the driver's side poles were replaced with key-operated controls to raise the barriers, in an attempt to confine use of those controls to people who hade been briefed on the UWC when they were issued with keys. Red buttons to lower the barriers were installed and were available to all. The MSLs were replaced with marginally larger lights which were surrounded with square hoods. In addition signs were introduced on the A9 indicating that the road to Moulinearn was a private road**.**

The Lord Ordinary's findings of fault

[36] Before the Lord Ordinary, Mr and Mrs Clegg pleaded a case of fault against Miss Rogerson and submitted that she had failed to exercise reasonable care by crossing the level crossing when the red MSL was on and the klaxon was sounding. Miss Rogerson pleaded a case of sole fault or in any event contributory negligence against Network Rail as successors to Railtrack arising out of what was averred to be an inherently dangerous design of the crossing. After proof senior counsel for Mr and Mrs Clegg submitted that the accident was caused solely by the fault of Miss Rogerson. She adopted Miss Rogerson's case against Network Rail only on the contingency that the Lord Ordinary were to hold that Miss Rogerson was not at fault to any degree.

(a) Miss Rogerson

[37] The Lord Ordinary said that Miss Rogerson as the driver of a car was under a duty to take reasonable care for the safety of, among others, the persons travelling in her car. She was under a duty to keep a proper lookout when driving and she owed her passengers this duty at the UWC as much as she did on the public roads. Her evidence was that she did not see the red MSL nor did she hear the klaxon sounding. From where she was parked the red MSL was located at about 40 degrees to the left in her field of vision and was visible to those who looked for instructions. It was suggested that evening sunlight might have obscured the MSL or the instructions. The Lord Ordinary did not accept that evidence. Railtrack officials tested the visibility of the MSL shortly after the accident in the face of evening sunlight in similar weather conditions. Evening sunlight would not have obscured the MSL. The reason Miss Rogerson did not see the MSL was that she did not look for instructions. The klaxon would probably have been audible to a person in a car with the passenger window down, notwithstanding traffic noise from the A9. Thus Mr Thomson should have heard it when his window was lowered if he had been paying attention. The Lord Ordinary did not accept the assertion that Mr Thomson did not hear the klaxon; at best for Miss Rogerson it appeared that he did not communicate to her

that it was sounding. It is surprising, he said, that Miss Rogerson did not hear the klaxon when the passenger window was lowered. She should have heard it if she were paying attention. Nevertheless, he accepted Miss Rogerson's evidence that she did not hear the klaxon when she raised the barrier and crossed the crossing. He did so for two reasons.

[38] First, Mr and Mrs Clegg in their evidence had no recollection of seeing the red light or hearing the klaxon. This might support the suggestion that the klaxon was competing with traffic noise from the A9. But this was far from conclusive. It appeared that they were concentrating on their children and did not have their car windows open. Mr Clegg told his son that a train was coming and Mrs Clegg was attempting to catch sight of her daughter in the back seat of Miss Rogerson's car but was unable to see her because their car was parked slightly behind her car. They saw Miss Rogerson put her hand out of the driver's window and saw the barrier rise. They did not appreciate that there was danger but they were looking to her to take the lead. As a result Mr Clegg had not applied his mind to the safe operation of the crossing. Concentration on other things combined with the noise of traffic on the A9 might have caused Mr and Mrs Clegg not to hear the klaxon which was clearly audible in the garden of Mr Michie, a local resident, about 60 metres from the crossing on the Moulinearn side.

[39] The Lord Ordinary said that secondly, and more significantly, he did not think that it was likely that Miss Rogerson would have crossed the level crossing if aware of the klaxon warning without taking further precautions. She had her boyfriend and her friends' toddler in the car and would not knowingly have put them at risk. He accepted her evidence that she was not aware of the klaxon sounding or the red MSL being on when she crossed the railway.

[40] Nonetheless, the Lord Ordinary considered that the accident was caused by Miss Rogerson's failure to exercise reasonable care. It appeared that she did not apply her mind to ascertain the safe way to cross the railway and did not read the visible instructions but rather followed the guidance of her boyfriend, Mr Thomson. This was clear from the evidence of Mr Calum McLean, a catering officer with Scotrail, who got off the train and spoke to Miss Rogerson immediately after the accident. He gave evidence that she explained to him that Mr Thomson had told her to raise the barrier and that she had done as he had told her. Miss Rogerson in her evidence accepted that she had followed Mr Thomson's instructions but asserted that she had not done so slavishly. The Lord Ordinary held that it was likely that Mr Thomson heard the klaxon when the passenger window of the car was opened and was in a good position to observe the red MSL but it was not clear why he advised Miss Rogerson to lift the barrier. Miss Rogerson gave evidence that Eleanor Howie had told her and Mr Thomson that the crossing had been broken on three or four occasions. The Lord Ordinary said that this might have influenced Mr Thomson but he do not consider that there was sufficient evidence to reach a view on why he advised Miss Rogerson to raise the barrier.

[41] Mr Thomson was familiar with the crossing as he had visited his friends at Moulinearn on many occasions. Miss Rogerson was less familiar with the crossing but she had been across it (in one or other direction) on between four and six occasions as a passenger. She accepted that she was aware of the klaxon and also that she was aware of lights, at least on the Moulinearn side of the crossing, but she explained that she thought that the red and green lights were to warn drivers of oncoming traffic as the road rose sharply from Moulinearn to the crossing and had a blind spot on the brow at the crossing.

[42] The Lord Ordinary said that, significantly, Miss Rogerson accepted that she and Mr Thomson had waited at the A9 side of the crossing in the dark for over half an hour in December 2000 because the klaxon was sounding. Eventually a driver from the Moulinearn side of the crossing opened the barrier and crossed the railway. He explained to them that the safety mechanism was broken and that the red MSL and klaxon remained on even when no train was approaching. He also explained that the system had broken down before and that one had just to keep a good lookout when crossing. Miss Rogerson claimed that on that occasion she did not see the red MSL but only the small red lights on the barrier. She also claimed that she did not see the instruction sign beneath the red MSL. The Lord Ordinary was unable to accept that evidence. While she may have forgotten that she had seen the MSL, and while she, as a passenger in the car, may not have paid much

attention at the time, he considered that it was highly unlikely that she did not see it when she spent between 30 and 40 minutes in a car in front of the barrier. There was persuasive evidence from PC Gilroy that the MSLs at this UWC were prominent at night. He also gave evidence, which the Lord Ordinary accepted, that the sign containing the instructions, which was located beneath the MSLs, would have been visible in the headlights of a parked car. In addition, if Miss Rogerson had applied her mind to the working of the crossing she would have realised from her experience in December 2000 that the barrier might be raised when the warning system was on. Senior counsel for Miss Rogerson submitted that all she could reasonably have taken from observing the other driver open the barrier was that the barrier could be raised when the warning system was broken. The Lord Ordinary was not persuaded that that was the case. At the very least her experience ought to have alerted her to the presence of the warning system and to the possibility that barriers could be raised when the warning system was in operation.

[43] The Lord Ordinary went on to say that it was clear from the evidence that Miss Rogerson acted promptly in drawing up at the driver's side pole and opening the barriers. Her estimate was that the manoeuvre to cross the northbound carriageway of the A9, open the barrier and cross the railway took between 20 and 30 seconds. While this might have been an underestimate, she certainly acted quickly. Mr Clegg suggested that the cars were stationary at the barrier for about 30 seconds before the barrier lifted. Of that time, some time would have passed when Miss Rogerson obtained Mr Thomson's advice, opened the passenger window of her car in error and then opened the driver's window. Thereafter, over ten seconds were spent in pressing the control button to raise the barrier. The collision occurred about seven seconds after the barrier was raised. Miss Rogerson did not read the instructions beside the driver's side controls but relied on Mr Thomson to explain that she required to keep her hand on the raise button for the barrier to continue to rise. In these circumstances the Lord Ordinary was satisfied that Miss Rogerson did not look around for instructions on whether to cross the railway or to operate the controls or for any red or green light. She was content to act on Mr Thomson's prompting to raise the barrier and attempt to cross the railway. In so acting she failed to keep a proper lookout and to have regard to the red MSL and instructions and thus failed in her duty of care.

[44] Senior counsel for Miss Rogerson submitted that she was misled by the layout of the crossing and was entitled to conclude from her experience of automatic crossings on public roads that when the barrier rose it was safe to cross. While the Lord Ordinary recognised that there might be people who could be misled by the fact that the barrier rose, he did not accept that a reasonably careful driver would ignore the important difference between an automatic crossing on a public road and a UWC, namely that the barriers in the former were operated without any action by a driver while the barriers in the latter were normally in a closed position and open only if the driver took steps to open them. The fact that the driver had to take the initiative ought to cause the careful driver to instruct himself or herself on the operation of the crossing. He did not accept that a reasonably careful driver who had some familiarity with the crossing would have been exercising reasonable care if he or she failed to observe the red MSL and instructions, raised the barrier and assumed that it was safe to cross. If a driver exercised such care, he or she would have looked for instructions on a safe means of crossing the railway. A careful driver looking for instructions at Moulinearn would not have had difficulty in finding them.

[45] The Lord Ordinary was also referred to the Highway Code, which in the section on railway level crossings at paragraph 269 discusses user operated gates and barriers. It states:

"Some crossings have 'Stop' signs and small red and green lights. You MUST NOT cross when the red light is showing, only cross if the green light is on. If crossing with a vehicle, you should

· Open the gate or barriers on both sides of the crossing

· Check that the green light is still on and cross quickly

· Close the gates or barriers when you are clear of the crossing."

Section 38(7) of the Road Traffic Act 1988 provides that a failure of a person to observe a provision of the Highway Code may be relied on in civil proceedings as tending to establish liability. Miss Rogerson 's failure to observe the Highway Code confirms the Lord Ordinary's opinion, derived from the evidence of the locus and the circumstances of the accident, that the accident was caused by her fault.

[46] The Lord Ordinary said that it was appropriate that he comment on the credibility and reliability of Miss Rogerson as counsel for the other parties both made submissions on that issue. He did not accept that she was incredible in the sense that she was knowingly telling untruths when giving evidence. Nonetheless, he found her evidence to be unreliable in several respects. He did not accept that she did not see the red MSL and the instructions during her prolonged wait at the crossing in December 2000. He was not prepared to accept that she relied on the fact that the barrier rose to conclude that it was safe to cross on the evening of the accident. In December 2000 she had seen a driver raise the barriers when the red MSL was on and the klaxon was sounding. She was aware from discussions with Eleanor Howie of the importance of closing the barrier after crossing and thus that the barriers did not close on the approach of a train. There was no reason therefore for her to assume that the approach of a train would prevent the barrier being raised and the Lord Ordinary was not persuaded that she made such an assumption. He did not accept Miss Rogerson 's evidence that, if there had been MSLs and a sign with instructions on the right hand side of the barrier and instructions at the driver's side pole, she would probably have taken heed of them and desisted from crossing. It was possible that she would have observed them and obeyed them, but he did not think that it was more likely than not that she would have done so. Rather her acts, of which she and others spoke, were consistent with a failure to apply her mind to the issue of safety and an undue reliance on Mr Thomson's instruction to raise the barrier and cross the railway. Her account of slipping in and out of consciousness and of screaming at Perth Royal Infirmary when she gave a statement to the police was contradicted by others who were present. The Lord Ordinary did not accept that account but he did not attach any weight to the answers which she then gave in response to questions from the police as it appeared that she may have been sedated at the time. In general he formed the view that in her evidence of how the accident had occurred she had persuaded herself that she must have done or thought certain things which in fact she had not done or thought. In the light of the tragedy this was understandable.

(b) Network Rail

[47] Miss Rogerson pleaded that the accident was caused by Railtrack's fault in having designed and constructed an inherently dangerous crossing. Network Rail denied any such liability and pleaded that the layout of the crossing and its construction had been authorised in compliance with an order made by the Secretary of State for Transport under section 1 of the Level Crossings Act 1983 and had been approved by HM Railway Inspectorate.

[48] The Lord Ordinary said that in his opinion the duty of care owed by Railtrack was as stated in *Smith* v *LMS Railway Co* 1948 SC 125, *per* Lord President Cooper at page136: they were under a duty at every level crossing where there was reason to expect members of the public to be to take all reasonable precautions to reduce the danger to the public to a minimum. The fact that they went through the statutory procedure to obtain the approval of HM Railway Inspectorate and obtained that approval for the level crossing did not exclude liability for negligence but was nevertheless relevant in considering whether or not Railtrack were negligent: *Voli* v *Inglewood Shire Council* [1962-1963] 110 CLR 74, 88 *per* Windeyer J. Railtrack carried out a risk assessment of the proposed layout, including the layout with the unlocked control buttons on the driver's side pole, before the UWC was constructed. But the Lord Ordinary did not have any significant information on that assessment or the cost/benefit balance which resulted. He therefore discounted any argument that the low level of usage would necessarily have justified less protection of users than would otherwise be the case. The fact that Railtrack's pre-installation HAZOP indicated a tolerable risk was not of itself an answer to the claim. This was a unique crossing. The uniqueness of the crossing required Railtrack to consider its layout carefully.

[49] In the Lord Ordinary's opinion, in weighing up the probability and seriousness of a risk, Railtrack (and HM Inspectorate) should have been able to foresee the careless driver as well as the careful driver. The location of the driver's side control buttons on the right hand side of the road might distract an uninformed and inattentive driver from looking at the MSLs and the instructions on the left hand side of the barrier. When concentrating on pressing those controls a driver was likely to look at the controls and, when he did so, the MSLs would not be clearly visible. In that limited respect Moulinearn UWC did not meet the guidance of the RSPG during the time when a driver was operating the driver's side controls. But the MSLs would be clearly visible as the driver approached the crossing and before he or she turned to look at the driver's side controls. Further, a driver who was wholly unfamiliar with the crossing would be unlikely to draw up at the right hand side of the road but would be more likely to stop on the left hand side with the MSLs and instructions immediately in front of him or her. Thus the risk of the unfamiliar driver failing to notice the MSLs and instructions was likely to be low.

[50] It also appeared that people were capable of being misled by their ability to raise the barrier on operating the control button into the belief that it was safe to cross. Mr Hammond, a consulting engineer and a friend of Eleanor Howie and Mr Sudjic, gave evidence that he had crossed the Moulinearn UWC between three and four times per year and that until the accident he had assumed that it was safe to cross when the barrier rose. While it was surprising that a person of his professional background would make such an assumption and would repeatedly fail to observe the instructions and the MSLs, the Lord Ordinary accepted that there were members of the public who would not take sufficient care and who would make that assumption.

[51] Railtrack were aware of the concerns of the safety of the layout when the crossing was being constructed, including those which Signalling Control UK and PC Gilroy articulated. The former were specifically concerned about the unlocked driver's side controls. The latter was concerned that the barrier should have an interlock to prevent it opening when a train approached. Railtrack required to address those concerns. However it was not legitimate to use hindsight to impose on a defender obligations which would not arise in the exercise of reasonable care without the benefit of that hindsight. It might be easy after the event to think of things that could have been done to prevent a particular accident. But that did not mean that a failure to do one or more of those things amounted to a failure to exercise reasonable care in the circumstances as they existed before the accident. Similarly, the fact that Railtrack introduced additional safety measures after the accident was not of itself evidence that they were negligent in constructing the UWC without those measures. It was easy to be wise after the event: *Philpott* v *British Railways Board* [1968] 2 LLR 495, *per* Thesiger J at page 502.

[52] In the Lord Ordinary's opinion, Railtrack might be criticised for introducing the driver's side controls which were available to all drivers without repeating the instructions on the second sign mentioned above on a pole beside the controls. This would have served to direct the attention of the driver, who was concentrating on the driver's side controls, to the MSLs as the principal safety device. He was not persuaded that without the benefit of hindsight Railtrack could be criticised for a failure to introduce the other measures which were introduced after the accident. Their duty was to take reasonable care. As in *Titchener* v *British Railways Board* 1984 SC (HL) 34, people approaching the railway would be aware of the potential danger when they crossed it. If Railtrack had repeated the instructions beside the driver's side controls, they would have fulfilled their duty of reasonable care. Even if Railtrack had carried out a risk assessment in response to the three safety incidents between 1997 and 1999, it was not likely that it would have introduced other measures desiderated by senior counsel for Miss Rogerson.

[53] Network Rail founded on the fact that the UWC was approved by HM Railway Inspectorate. The Lord Ordinary said that it was clear from the legislation that the Inspectorate could withhold approval of the crossing if not satisfied that it was safe and it was clear from correspondence passing between Railtrack and the Inspectorate that the latter required the former to prepare a draft order under the 1983 Act. From the evidence of Mr Tilly it appeared that the Inspectorate supported standardisation, taking the view that consistency as between crossings of a certain type was more important to a user's safety than additional measures at a particular crossing. The Inspectorate's approval of the UWC was relevant in two respects. First,

while Railtrack remained responsible for the safety of the crossing, the approval tends to show that, without the benefit of hindsight, they did not overlook an obvious danger. Secondly, insofar as there were precautions which might have been taken, such steps would need the Inspectorate's approval. If that approval was not likely to be forthcoming, the Lord Ordinary could not conclude that Railtrack were negligent in failing to introduce those precautions.

[54] In relation to the first of these, the Lord Ordinary considered that insufficient attention was given by both Railtrack and the Inspectorate to the possibility that an unfamiliar driver might see the driver's side control buttons and fail to notice the MSLs and the instructions. There was a real possibility that the driver's side controls could mislead a person who was not familiar with the crossing and distract them from the MSLs and the instructions located at the left hand side of the barrier. While the risk of this occurring might be small, the potential for a fatal accident if the risk eventuated was considerable. There was a need therefore for the instructions to be repeated beside the driver's side pole.

[55] It was also apparent that had the driver's side controls been enclosed in a locked box or had they been only key operated, steps could have been taken to brief those who were given keys on the safe operation of the crossing. This would have minimised the risk that uninformed persons would use the driver's side controls. However, the Lord Ordinary did not consider that Railtrack, without the benefit of hindsight and in particular the research which followed the fatal accident, would have been open to criticism for installing open driver's side controls if they had also repeated the instructions near the driver's side pole.

[56] The second respect in which the attitude of the Inspectorate was relevant to this action was in relation to senior counsel's suggestion that there should have been a partial interlock and also wig-wags. In the Lord Ordinary's opinion Railtrack were not careless in failing to introduce these protective measures, which existed in no other UWC in Britain. In any event he was satisfied, for the detailed reasons discussed by him, that the Inspectorate would not have sanctioned their introduction.

[57] In the Lord Ordinary's opinion the critical question in this case was whether any failure by Railtrack caused or materially contributed to the accident. While he had criticised Railtrack for not introducing instructions at the driver's side controls, he was not persuaded that the absence of those instructions caused the accident. Having regard to the speed with which and manner in which Miss Rogerson raised the barriers and the fact that she was carrying out Mr Thomson's instructions, he did not accept that she would have read the instructions any more than she did the instructions on the driver's side pole to push and hold the control button to raise the barrier. He was also not persuaded that if there had been MSLs and instructions on the right hand side of the barrier it was more likely than not that the accident would have been avoided. Miss Rogerson was not looking for external guidance but was carrying out Mr Thomson's instructions. While MSLs on the right hand side of the barrier would have been slightly easier to see from a position close to the driver's side controls than those on the left hand side of the barrier, the Lord Ordinary was not able to conclude on balance of probability that Miss Rogerson would have observed them or acted on their warning. What would have prevented the accident was a partial interlock. For the detailed reasons given by him, Railtrack were not negligent in not introducing such an interlock.

The grounds of appeal

Grounds of appeal for Miss Rogerson

[58] The grounds of appeal for Miss Rogerson which were argued before us (omitting ground 1.2, which was not argued) were, so far as material, as follows:

"1 The Lord Ordinary erred in law in his assessment of the evidence in concluding ... that the failure of [Railtrack] did not materially contribute to the accident. In particular:

1.1 The Lord Ordinary was wrong to conclude that Mr Thomson heard the klaxon before the accident ...

1.1.1 Mr Thomson is dead and there is no direct evidence of knowledge prior to the accident.

1.1.2 The klaxon was intended to warn pedestrians and not motorists or people in cars.

1.1.3 None of the other occupants of the two cars heard the klaxon, viz. ... Jane Rogerson and Mr and Mrs Clegg.

1.1.4 The surrounding circumstances make it most unlikely and improbable that he heard the klaxon. If he had heard the klaxon he surely would have warned [Miss Rogerson] to protect her, himself and the child in the back of the car. ...

1.3 In assessing the probabilities of [Miss Rogerson] reacting to warning instructions on the pole beside the driver's side controls, the Lord Ordinary has overlooked the evidence that between 1997 (when the warning sign should have been put up) and the accident, [Miss Rogerson] would have passed over the crossing 4-6 times and Mr Thomson on many occasions ... As the purpose of such a warning sign would have been to warn occasional visitors in cars such as [Miss Rogerson] and Mr Thomson, it is likely that they would have seen and taken note of the instructions and in particular the need to check that the warning light was not at red. They are likely to have acquired knowledge of the proper and safe method of crossing in 1997 and in any event well before the date of the accident. Accordingly it is likely that on the day of the accident they would have approached the level crossing, having checked to see if the warning light was at red or green; and only proceeded if the light was at green. This is particularly so when they had a child in the back seat."

Ground of appeal for Network Rail

[59] The sole ground of the cross-appeal for Network Rail is in the following terms:

"The Lord Ordinary erred in law in holding that [Railtrack] failed in their duty to take reasonable care having regard, in particular, to the following considerations: (firstly) that [Railtrack] designed and constructed the crossing in accordance with a statutory procedure under which the layout was independently assessed by HM Railway Inspectorate acting on behalf of the Secretary of State and authorised by an Order made under the Level Crossings Act 1983; (secondly) the crossing, as at the date of the accident, complied in all material respects with the terms of the Order; and (thirdly) if [Railtrack] had not complied with the requirements of the Order, they were liable to face prosecution."

The scope for review of the Lord Ordinary's decision

[60] It was agreed between the parties that the leading authority which provides guidance to this court is *Thomas* v *Thomas* 1947 S.C. (H.L.) 45, in which observations were made about the duty of an appellate court when reviewing a decision on fact of the judge who heard the evidence, where the credibility of witnesses is involved, and upon the circumstances in which the court is justified in disregarding his conclusions. In a well-known passage at p.54, Lord Thankerton said:

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle employed therein is a simple one, and may be stated thus:-

(1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

(2) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his

having seen and heard the witnesses, and the matter will then become at large for the appellate Court."

Counsel for Miss Rogerson also relied on a passage in the Opinion of Lord Hamilton in *Hamilton* v *Allied Domecq plc* 2006 S.C. 221, at paragraphs [84] to [85]. In paragraph [84] Lord Hamilton referred to the constraints to which an appellate court was subject on matters of fact. This did not, however, absolve the Inner House of the Court of Session from its obligation as a Court of Appeal on matters of fact to reconsider the evidence led before the Lord Ordinary and determine upon such reconsideration whether critical findings of fact, both primary and secondary, made by the Lord Ordinary were justified. The appellate court had to bear in mind the advantages which a judge of first instance enjoyed and which an appellate court did not, including the opportunity to form an impression, from the manner in which a witness gave evidence, as to the reliability or otherwise of that witness's evidence. The way in which the case was conducted by legal representatives in the court of first instance might also legitimately affect the approach adopted by the court to the assessment of evidence. The paragraph concluded:

"Moreover, in so far as concerns the evaluative exercise of drawing, or declining to draw, factual inferences from primary facts, an appellate Court should exercise due caution before reversing such an evaluation."

In paragraph [85] his Lordship said:

"On the other hand, when, on examination by the appellate Court of the printed evidence, it is plain that it could not constitute a proper basis for some primary finding of fact made by the Judge of first instance, the appellate Court has a power and a duty to reverse that finding. If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate Court to reverse the decision made at first instance."

Counsel for Miss Rogerson also referred to a unreported decision of the Court of Appeal in England, *Heffer and Another* v *Tiffin Green*, UBENF 97/1050/1, 17 December 1998, particularly in the judgment of Lord Justice Henry, who said at para.6.4:

"The appellants here ask us to allow the appeal, and give judgment for the defendant, effectively reversing the judge's finding on credibility. I am not prepared to go that far. But I am persuaded that the decision appealed is shown by the judgment delivered to have been arrived at without sufficient regard being paid to the building blocks of the reasoned judicial process, where the evidence on each issue is marshalled, the weight of the evidence analysed, all tested against the probabilities based on the evidence as a whole, with clear findings of fact and all reasons given."

The cross-appeal

[61] We propose to consider this first, since, if it is well-founded, and Railtrack were not at fault, the question whether any failure on their part caused or materially contributed to the accident does not arise. Before us it was common ground that the Lord Ordinary correctly proceeded on the basis that the duty of care owed by Railtrack was as stated in the passage referred to in *Smith* v *LMS Railway Co*: they were under a duty at every level crossing where there was reason to expect members of the public to be to take all reasonable precautions to reduce the danger to the public to a minimum, the nature of the precautions which were required and the question whether the duty was fulfilled depending upon the circumstances of each case.

[62] In considering whether the Lord Ordinary correctly held that Railtrack were in breach of this duty, we bear in mind a number of important points. Prior to the proof, the parties lodged a Joint Minute, in which various matters of fact were agreed. The manner of construction and operation of the level crossing were agreed in paragraphs 8 to 19, the terms of which are reflected in the Lord Ordinary's findings in fact. Paragraphs 18 and 19 were in the following terms:

"18. That provided the instructions for operating the crossing were seen, understood and obeyed by users, the level crossing could be used with safety.

19. That in respect of the crossing at Moulinearn the position of the low level buttons resulted in car drivers if using said buttons requiring to position their vehicles in a position remote from the signs containing the instructions for use and the miniature stop lights."

As has been seen, at paragraph [52] above, the Lord Ordinary held that Railtrack might be criticised for introducing the driver's side controls which were available to all drivers without repeating the instructions on the second sign on a pole beside the controls. This, he held, would have served to direct the attention of the driver, who was concentrating on the driver's side controls, to the MSLs as the principal safety device. If they had repeated the instructions beside the driver's side controls, they would have fulfilled their duty of reasonable care. As can be seen from the terms of the ground of appeal for Network Rail, it is not argued that the Lord Ordinary erred in holding the failure to repeat the instructions to be a ground of criticism. The argument is that the Lord Ordinary erred in holding that it was a ground of criticism *of Railtrack*, having regard to the statutory procedure under which the level crossing was designed and constructed. It is therefore necessary to start with an examination of the statutory context.

[63] Section 1 of the Level Crossings Act 1983, as amended by the Level Crossings Regulations 1997 (SI 1997/487), Regulation 4, provides, so far as material for present purposes:

"(1) Subject to the following provisions of this section, the Secretary of State may, in relation to any place where a railway crosses a road on a level (in this section referred to as a 'level crossing'), by order provide for the protection of those using the level crossing.

(1A) Subsection (1) above applies whether or not the crossing is in use when the order is made; and if it is not in use when the order is made the order shall be made so as to come into force when it is in use.

(2) An order under this section may make such provision as the Secretary of State considers necessary or expedient for the safety or convenience of those using the crossing; and, in particular -

(a) may require any such barriers or other protective equipment as may be

specified in the order to be provided at or near the crossing, and to be maintained and operated, in accordance with the order; and

(b) may impose requirements as to the operation of the railway at or near

that crossing.

...

(6) The Secretary of State may make an order under this section in respect of a level crossing on being requested to do so by the operator of the crossing or without any such request, but he shall not make such an order without any such request unless he has sent to the operator and to each local authority in whose area the level crossing is situated a copy of a draft of the order he proposes to make and a notice specifying the period (not being less than two months) within which the operator or local authority may make representations to him in respect of his proposal to make the order.

(6A) Where the Health and Safety Executive gives written notice to an operator of a crossing that in its opinion a request should be made to the Secretary of State to make an order under this section in respect of that crossing and the notice states the reasons for that opinion, the operator shall be under a duty to make such a request."

In subsection (11), the expression "operator", in relation to a crossing, is defined as meaning the person for the time being operating the railway at the crossing. This of course was Railtrack at the material time. The expression "road" is defined as meaning any highway or other road to which the public has access. It was not

in dispute that, although the road leading to Moulinearn was a private road, it was a "road" within the definition, as it was a road to which the public had access.

[64] The original section 1(3)(a) of the 1983 Act was repealed by Regulation 3 of the 1997 Regulations, which provided instead:

"(1) While an order is in force under section 1 of the Level Crossings Act 1983 in relation to a level crossing, whether or not that order was made before the coming into force of this Regulation, the operator of the crossing shall ensure that the order is complied with."

Contravention of paragraph (1) by the operator of the crossing constitutes an offence, subject to the defence provided by paragraph (2), which is not relevant for present purposes. By Regulation 1, the 1997 Regulations (with the exception of Regulation 2(3)) came into force on 1 April 1997.

[65] The Railtrack Moulinearn Level Crossing Order 1997 ("the 1997 Order") was made by the Secretary of State for Transport at the request of Railtrack and in exercise of his powers under section 1 of the 1983 Act. It was dated 21 July 1997 and came into force on 31 July 1997. The procedure which preceded the making of the order was as summarised by the Lord Ordinary (see paragraphs [15] to [23] above). Paragraph 3 of the Order provided that certain provisions, being provisions which in the opinion of the Secretary of State were necessary or expedient for the safety or convenience of those using the crossing, should apply in respect of the crossing. These included:

"(a) the operator shall provide, operate and maintain so long as this Order

continues in force the barriers and other protective equipment which are specified in Part I of Schedule 2 to this Order ... ".

Part I of Schedule 2 contained detailed provisions, of which the following paragraphs are of particular relevance:

"10. The barriers shall be raised or lowered simultaneously by the operation of push-button control switches situated on each side of each road approach and adjacent to the traffic sign mentioned in Paragraph 12 below. The control switches, labelled 'raise' and 'lower' together with instruction label 'push and hold' shall be located so that barriers can be raised or lowered from each side of the crossing. The push switch shall require to be held until either raising or lowering is complete. ... "

Paragraph 12 provided that a traffic sign of the size, colour and type shown in a specified diagram should be provided on each side of the crossing between the carriageway and wicket gates and should face outwards from the crossing. Paragraph 14 provided that immediately below this traffic sign there should be a traffic sign of the size, colour and type shown in another specified diagram. The crossing was constructed in accordance with this specification, the push-button control switches and traffic signs being as described above at paragraph [38]. The 1997 Order was varied by the Railtrack Moulinearn Level Crossing (Variation) Order 1998, made on 23 February 1998 and coming into force on 1 March 1998. This provided for the substitution of paragraphs 16 and 18 of the 1997 Order with fresh provisions relating to signs to be provided on the nearside of the road at each exit from the crossing, and a sign to be provided on the A9 northbound carriageway approach to the crossing. These paragraphs, as so varied, are not relevant for present purposes. Although an alternative interpretation of the 1997 Order was (somewhat faintly) suggested to us by counsel for Miss Rogerson, it is clear that only one set of the two signs specified in paragraphs 12 and 14 of the 1997 Order was authorised to be provided on each side of the crossing, and accordingly that the crossing as constructed was in conformity with the Order.

[66] Counsel for Network Rail submitted that it would be contrary to the Order for Railtrack to erect any other sign. Their discretion was fettered, because they had as a matter of law no choice but to comply with the Order. While the statutory scheme did not relieve Railtrack of their duty at common law, on a legal

analysis, whatever options they had before the making of the Order, they ended with the Order. Once the Order was made, one should look to the party who made it, i.e. the Secretary of State, whose responsibility it ultimately was.

[67] Counsel sought to derive support for this approach from a number of authorities. In *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619, Lord Clyde said at page 673, under reference to the position of education authorities under the Education Acts:

"The question arises whether the common law duty can or cannot stand in the face of the statutory context. But while no common law can stand in contradiction of some statutory provision, and it may be hard to impose a duty of care in the exercise of a statutory power ..., the existence of a statutory background against which the professionals are exercising their particular skills should not inhibit the existence of a common law duty of care."

In *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633 Lord Browne-Wilkinson said at page 739:

"[I]n my judgment a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties."

At page 765 he also said:

"Although, as I have said, it is impossible to impose a common law duty of care which is inconsistent with, or fetters, a statutory duty, I can see no legal or common sense principle which requires one to deny a common law duty of care which would otherwise exist just because there is a statutory scheme which addresses the same problem."

The case of *Great Central Railway Company* v *Hewlett*[1916] 2 AC 511 related to a structure erected by the railway company in the public highway, in exercise of powers conferred by a special Act. The action was brought by the driver of a vehicle which was damaged in a collision with the structure at night. Lord Parker of Waddington said, at page 519:

"My Lords, it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered. To bring this principle into play in the present case the company must be shown to have been exercising a statutory power the exercise of which was likely to occasion and did occasion the collision. ... Is the principle relied on really applicable under these circumstances? In my opinion it is not. It seems to me that for its application the company must be doing something involving risk to others without taking reasonable precautions to obviate such risk. Here the risk arises, not from what the company is doing, but from the existence of the gateposts legalized by the Act coupled with the diminution of light necessitated by the exigencies of the war."

Lord Sumner said at page 524:

"Here the authority is specific and precise: the thing authorized is not an activity at all; the section [of the special Act] leaves the railway company no selection or choice."

[68] Counsel for Miss Rogerson founded in particular on the Australian case of *Voli* v *Inglewood Shire Council* [1963] ALR 657 (summarised in *Jackson and Powell on Professional Liability*, 6th edition (2007), para. 9-201). Architects designed a stage which collapsed because the joists supporting it were insufficiently strong. The High Court of Australia held that it was no defence for the architects to point to the fact that their design had been passed by the Public Works Department. Windeyer J. said, at paragraph 16:

"The facts of the present case really do not admit of the conclusion that the architect was freed of liability to persons in the position of the appellant when his plans were approved by the Public Works Department. No doubt the fact that his plans were approved by a public authority may, in some cases, be relevant in considering whether or not an architect was in fact negligent; but that is a very different thing from saying that by obtaining approval in this case the architect shed all liability for negligence. The approval of the Public Works Department was required ... But that does not mean that the officers who examined the plans undertook to correct the architect's errors."

[69] In considering these submissions, we take as our starting point that there was no dispute between the parties that the test was as stated in *Smith* v *LMS Railway Co.*, that is to say that Railtrack had a duty to take all reasonable precautions to reduce the danger to members of the public who might have occasion to use the level crossing. The approach in *Voli* v *Inglewood Shire Council* appears to us to be of assistance, and to be consistent with the authorities relied upon by counsel for Network Rail. No doubt the court cannot impose a duty that flies in the face of a statutory requirement, but among the particular circumstances to which regard requires to be had is the question how the statutory requirement came into existence. Railtrack were no doubt under a statutory duty to comply with the 1997 Order, but that is to put the matter too simply. The Order was made at the request of Railtrack, in accordance with the statutory procedure, as operators of the crossing, and they were closely involved at every stage prior to its making. It cannot be suggested that at these stages they were not subject to the above duty of care. Others were of course involved also, and their involvement, in particular their assessment of the safety aspects of the layout of the crossing, is of relevance to the question whether Railtrack were in breach of this duty. But if, as the Lord Ordinary held, the failure to repeat the instructions beside the driver's side controls constituted a ground of criticism, it is a ground of criticism for which Railtrack must at least share responsibility. They cannot be heard to say that the making of the Order relieved them of all liability for negligence in the devising of the layout. Moreover, although what we have said so far is enough to justify the Lord Ordinary's view of this matter, Railtrack's responsibility did not cease with the making of the Order. Their duty of care was continuous, and if in the light of experience of its operation any change in the layout of the crossing seemed appropriate, it was Railtrack's resposibility, in discharge of that duty, to request a variation of the 1997 Order. This was indeed done in 1998, albeit in respects not otherwise relevant for present purposes. The Lord Ordinary's findings about the three "near misses" between 1997 and 1999, referred to in particular at paragraph [23] above, are of particular relevance in this context, although in the absence of more detailed findings it is not possible to reach a conclusion as to what steps might have been taken had Railtrack complied with their own safety standards.

[70] There was thus scope for Railtrack, in discharge of their duty of reasonable care, to request, at all material times, a requirement that the instructions be repeated beside the driver's side controls. This is the main respect in which the present case falls to be distinguished from that of *Great Central Railway Company* v *Hewlett* (see paragraph [67] above). The principle to be derived from that case is that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, this constitutes negligence, and the person thus injured will be entitled to reparation therefor. This principle is applicable in the present case. It was also held in *Great Central Railway Company* v *Hewlett* that for the application of this principle the company must have been doing something involving risk to others without taking reasonable precautions to obviate such risk. In that case, the risk did not arise from what the company was doing, so that there was no failure to exercise reasonable care and hence no negligence on its part. In the present case, by contrast, the risk arose from Railtrack's operation of a level crossing, that is to say from what Railtrack were doing, an operation which gave rise to inherent risks. It lay in their power, in the exercise of reasonable care, to do more to minimise these risks than they in fact did. In our judgment, therefore, for these reasons, the cross-appeal for Network Rail is not made out. In reaching this decision, however, we recognise also the specific reason why the Lord Ordinary held that Railtrack might be criticised for not repeating the instructions beside the driver's side poles. This was because they would have served to direct the attention of the driver *who was concentrating on the driver's side controls* to the MSLs as the principal safety device. This is of major significance in our consideration of issues of causation.

The reclaiming motion

[71] We turn now to the reclaiming motion for Miss Rogerson. In so doing, we bear in mind three important considerations. In the first place, as noted at paragraph [5] above, Miss Rogerson has lodged an undertaking that she will not attack the decision of the Lord Ordinary so far as it relates to the finding that she was negligent, as more fully set out in the Lord Ordinary's Opinion. It follows from this that Miss Rogerson does not seek to displace the Lord Ordinary's findings, set out at paragraph [40] above, that she did not apply her mind to ascertain the safe way to cross the railway and did not read the visible instructions but rather followed the guidance of Mr Thomson. She also does not seek to displace the finding, set forth at paragraph [42] above, that at the very least her experience of waiting with Mr Thomson at the A9 side of the crossing in the dark for over half an hour in December 2000 because the klaxon was sounding ought to have alerted her to the presence of the warning system and the possibility that barriers could be raised when the warning system was in operation. Moreover, she does not seek to displace the finding, set forth at paragraph [43] above, that on the day of the accident she did not look around for instructions on whether to cross the railway or to operate the controls or for any red or green light, but was content to act on Mr Thomson's prompting to raise the barrier and attempt to cross the railway; and that in so acting she failed to keep a proper look out and to have regard to the red MSL and instructions and thus failed in her duty of care. Secondly, she does not invite us to reverse the Lord Ordinary's adverse findings about her reliability, set forth at paragraph [46] above. Thirdly, it is apparent from the grounds of appeal for Miss Rogerson, quoted at paragraph [58] above, and as was also clear from her counsel's submissions to us, that she does not seek to bring under the review of this court the Lord Ordinary's primary findings in fact, or his assessment of the evidence upon which he based those findings. Rather, the challenge is to the inferences which the Lord Ordinary drew from those findings in fact.

[72] It is with these considerations in mind that we now turn to consider the grounds of appeal for Miss Rogerson. In doing so we record that during the hearing before us extensive reference was made to the Notes of Evidence. We have of course carefully considered the passages referred to, but we see no need to repeat them here. We are satisfied that the Lord Ordinary has given a full and accurate account of the evidence which appeared to him, and appears to us, to be relevant to his decision. We therefore propose to concentrate for the most part on his process of reasoning.

The Lord Ordinary's finding that Mr Thomson heard the klaxon

[73] As is obvious, and is recognised in paragraph 1.1.1 of the grounds of appeal, Mr Thomson is dead and there is no direct evidence that he heard the klaxon sounding prior to the accident. It is therefore necessarily a matter of inference whether he did hear it. It is not in dispute that, as stated in paragraph 1.1.2, the klaxon was intended (at least primarily) to warn pedestrians and not motorists or people in cars. Equally, however, if a person in a car, whether driver or passenger, did in fact hear the klaxon, it would serve as a warning of the approach of a train. It is not in dispute that, as the Lord Ordinary held, Miss Rogerson and Mr and Mrs Clegg did not hear the klaxon. But, as was accepted at the hearing before us, of the four adults in the two cars, Mr Thomson was the best placed to hear the klaxon. He was in the front passenger seat of the foremost of the two cars and was thus nearest the klaxon. His window was opened and then closed by Miss Rogerson. It was suggested to us that traffic noise on the adjacent A9 might have affected the audibility of the klaxon to someone in Mr Thomson's position. But this possibility, speculative as it is, needs to be weighed against the fact that the klaxon was heard by Mr Michie in his garden, about 60 metres from the crossing on the Moulinearn side (see paragraph [38] above). Mr Michie also gave evidence that when he used the crossing he could hear the klaxon from inside his car, especially if the window was open. Another witness, Mr Herbertson, husband of the Mrs Herbertson referred to at paragraph [9] above, a retired railway signalman who lived with his wife in a house near the crossing, gave evidence to a similar effect. One approach to testing the matter would be by reference to the conclusions that might be drawn by an independent bystander at the scene of the accident. On the basis of the primary evidence before the Lord Ordinary, and accepted by him, we see no reason why such an independent bystander should not have concluded, before the car moved

off, that Mr Thomson had heard the klaxon. In our opinion, there was ample evidence, only some of which is referred to above, to justify the Lord Ordinary's conclusion that he did.

[74] Of course, the most eloquent fact which might serve to militate against such a conclusion is, as is reflected in ground of appeal 1.1.4, that Miss Rogerson did start to drive the car across the crossing. The argument on her behalf is that if Mr Thomson had heard the klaxon he would have warned her, for the protection of all three occupants of the car. There are, however, as it appears to us, insuperable difficulties in concluding what did and what did not pass between Mr Thomson and Miss Rogerson in the moments before the accident, and the Lord Ordinary did not attempt to do so, beyond his findings summarised above. Given that Mr Thomson is dead, and given the Lord Ordinary's finding, which she did not seek to challenge before us, that Miss Rogerson's evidence was unreliable in several respects (see paragraph [46] above), there is no evidential basis upon which it would be open to us to reach a view contrary to that of the Lord Ordinary, that is to conclude that Mr Thomson did not hear the klaxon, even if we were persuaded, as we are not, that there is scope for interference with the Lord Ordinary's conclusion that Mr Thomson did hear it. In the passage in his Opinion, reflected at paragraph [46] above, in which he assessed Miss Rogerson's reliability, the Lord Ordinary said that

"her acts ... were consistent with a failure to apply her mind to the issue of safety and an undue reliance on Mr Thomson's instruction to raise the barrier and cross the railway."

Given these findings, it is a matter of speculation, and no more than that, why, if he heard the klaxon, Mr Thomson did not impart that information to Miss Rogerson. The Lord Ordinary did not engage in such speculation, and it would be entirely inappropriate for us to do so. Rather, we are satisfied, on the basis of the evidence as a whole, that the Lord Ordinary's reasoning which led him to the conclusion that Mr Thomson did hear the klaxon cannot be faulted. Counsel for Miss Rogerson submitted that the Lord Ordinary had not looked at the totality of the evidence. If he had properly weighed up the evidence and had looked at the probabilities he would inevitably have come to a different view. His approach, it was submitted, led to an absurdity. For the reasons we have given, we are unable to accept these submissions. In any event, even if we were to decide that it was open to us to interfere with this conclusion, there is no evidential basis upon which we would feel able to reach a contrary conclusion, and at best for Miss Rogerson the matter would have to be left undecided. In our judgment, the finding that Mr Thomson heard the klaxon should stand.

The Lord Ordinary's finding that, if Railtrack had repeated the instructions beside the driver's side controls, Miss Rogerson would probably not have taken heed of them

[75] So far, we have discussed the Lord Ordinary's finding that Mr Thomson heard the klaxon without reference to the relevance of this finding to the question whether a causal connection was established between Railtrack's failure to repeat the instructions beside the driver's side controls and the circumstances of the accident which was, at least partly, caused by the fault of Miss Rogerson. In considering this question, it is necessary to repeat the respects in which the Lord Ordinary found Miss Rogerson to have been at fault, which she does not seek to challenge in this reclaiming motion. He found that she did not apply her mind to ascertain the safe way to cross the railway and did not read the visible instructions but rather followed the guidance of Mr Thomson. He did not accept her evidence that, if there had been instructions at the driver's side controls, she would probably have taken heed of them and desisted from crossing. On the contrary, she failed to apply her mind to the issue of safety and relied unduly on Mr Thomson's instruction to raise the barrier and cross the railway. In their submissions to us, counsel for Miss Rogerson accepted that she was acting under the guidance and on the instructions of Mr Thomson, at the point that the decision was taken to cross the railway; and in any event to argue the contrary would have been inconsistent with her undertaking not to attack the decision of the Lord Ordinary so far as it relates to the finding that she was negligent.

[76] It is no doubt because of this that counsel sought to develop a submission that had the warning sign been repeated at the driver's side, Mr Thomson would have known to look for the red light on the MSL. This is a submission which, in our opinion, it is not open to Miss Rogerson to advance in this reclaiming motion and,

in any event, it appears to us to be unsound. Miss Rogerson's case of fault against Railtrack on record is directed to the risk that a driver might operate the controls, raise the barriers and proceed onto the crossing, in circumstances where a train was approaching, without noticing the MSLs. Her pleadings include the sentence: "There was a risk that such drivers would drive into the path of an oncoming train, as did in fact occur." This was the case which the Lord Ordinary had to consider, and this is the context in which he made the finding that if the instructions had been repeated beside the driver's side controls, this would have served to direct the attention of the driver, who was concentrating on these controls, to the MSLs as the principal safety device. There was no basis in Miss Rogerson's pleadings for the Lord Ordinary to make a finding as to whether a causal connection was established between Railtrack's fault and Mr Thomson's state of knowledge, and indeed the Lord Ordinary was not asked by counsel to make any finding in this respect.

[77] In any event, in the circumstances of this case, the state of Mr Thomson's knowledge about the safe operation of the level crossing does not appear to us to be of relevance to the question whether there was a causal connection between Railtrack's fault, to the limited extent that the Lord Ordinary held that they were at fault, and the circumstances of the accident. Railtrack were at fault because, but only because, they failed to repeat the instructions beside the driver's side controls and thus failed to exercise reasonable care to direct the attention of the driver, who was concentrating on these controls, to the MSLs as the principal safety device. There is no case directed against them that in addition they failed to exercise reasonable care to direct the attention of a passenger in a car to the MSLs as the principal safety device. Such a case would have involved enquiry into the question whether it was reasonably foreseeable that a driver, instead of applying his or her mind to the available information about the safe use of the crossing, would instead rely upon guidance by and instructions from a passenger. This of course is the very respect in which the Lord Ordinary found Miss Rogerson to be at fault: instead of looking around for instructions, she was content to act on Mr Thomson's prompting, and in so acting she failed to keep a proper look out and have regard to the red MSL and instructions and thus failed in her duty of care. It is because of this finding, above all, which Miss Rogerson does not seek to displace, that we do not consider that the state of Mr Thomson's knowledge has any relevance to the question whether the failure of Railtrack materially contributed to the accident.

[78] We have reached the conclusion that there are insuperable obstacles to Miss Rogerson's attempt to secure a contribution from Network Rail. The Lord Ordinary has held that she did not apply her mind to ascertain the safe way to cross the railway and did not read the visible instructions but rather followed the guidance of Mr Thomson, and she does not seek to displace this finding. Likewise she does not seek to displace the finding that she was content to act on Mr Thomson's prompting to raise the barrier and attempt to cross the railway, and in so acting failed to keep a proper look out and to have regard to the red MSL and instructions and thus failed in her duty of care. The Lord Ordinary found her evidence to be unreliable in several respects, and did not accept her evidence that, if there had been MSLs and a sign with the instructions of the right hand side of the barrier and instructions at the driver's side pole, she would probably have taken heed of them and desisted from crossing. He found that her acts were consistent with a failure to apply her mind to the issue of safety and an undue reliance on Mr Thomson's instruction to raise the barrier and cross the railway. Moreover, the Lord Ordinary attached significance to the incident in December 2000 when Miss Rogerson and Mr Thomson waited at the A9 side of the crossing in the dark for over half an hour in December 2000 because the klaxon was sounding. He held that it was highly unlikely that she did not see the red MSL when she spent between 30 and 40 minutes in a car in front of the barrier. In addition he held that she would have realised from her experience of this incident that the barrier might be raised when the warning system was on. Given the state of the evidence, the Lord Ordinary's assessment of Miss Rogerson's reliability, and above all his specific findings of fault on her part, there appears to us to be no room for displacing the Lord Ordinary's decision on what he rightly characterised as "the critical question in this case", in deciding that he was not persuaded that the absence of instructions at the driver's side controls had any part to play in the causation of the accident.

[79] For these reasons it is clear to us that Miss Rogerson has not satisfied the tests provided by *Thomas* v *Thomas*, *Hamilton* v *Allied Domecq plc* and *Heffer and Another* v *Tiffin Green*, quotations from which are set out at paragraph [60] above. Both his primary findings in fact and the inferences which he derived from

them, so far as under attack in this reclaiming motion, appear to us to be supported by the evidence which he was entitled to accept, and his decision appears to us to have been arrived at with sufficient regard to "the building blocks of the reasoned judicial process".

Decision

[80] For these reasons we have decided to refuse the reclaiming motion and the cross-appeal and to adhere to the Lord Ordinary's interlocutor of 19 August 2005.