

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 3
A514/11

Lady Paton
Lady Dorrian
Lord Drummond Young

OPINION OF LADY PATON

in the cause

A J ALLAN (BLAIRNYLE) LIMITED and another

Pursuers and respondents;

against

STRATHCLYDE FIRE BOARD

Defenders and reclaimers:

Pursuers and respondents: Balfour; BLM
Defenders and reclaimers: R Dunlop QC, E Campbell; Clyde & Co

13 January 2016

Whether fire service liable in damages when a fire, apparently extinguished, re-ignited

[1] In this action for damages, it is averred that the first pursuer owned a farmhouse at Gartocharn, Alexandria, Dunbartonshire. The second pursuer, a director of the first pursuer, lived in a caravan but used the farmhouse kitchen. On 31 October 2008, there was a fire involving the Rayburn stove in the kitchen, and a chimney. The second pursuer called the fire brigade. Fire tenders arrived and extinguished the fire. They left at about 3 pm. Subsequently, in the early hours of the following morning (1 November 2008), the fire re-ignited. The pursuers aver that this occurred as a result of smouldering rotten timbers in the roof space. The farmhouse burned down.

[2] The pursuers now seek to recover damages on the basis of alleged negligence on the part of the fire brigade. It is averred *inter alia* that once the fire appeared to be extinguished, the fire fighters should have used a thermal imaging camera to locate any questionable areas. Further it is

averred that the fire fighters should have maintained a regular check on the farmhouse to make sure that the fire was truly extinguished.

[3] In paragraph [28] of his opinion dated 2 September 2014, Lord Brailsford allowed a proof before answer, although the interlocutor of that date repelled the defenders' preliminary pleas. The defenders reclaimed.

Submissions for the defenders

[4] Senior counsel submitted that the action as pled was irrelevant. While the defenders owed a duty of care to the public at large, including the pursuers, the scope of that duty was restricted. It was a duty to take reasonable care not to make things worse, in other words not to inflict a fresh injury (*East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74; *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004). As the fire service were not liable in damages if they failed to attend a fire (*East Suffolk Rivers Catchment Board,* page 88; *Capital & Counties plc* page 1030, subsequently approved in the House of Lords at paragraph 32 of *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057), it would be unprincipled to suggest that a fire service which attended and sought to extinguish a fire could be liable in damages (except of course where they negligently caused fresh injury). An analogy could be drawn with rescuers: there was no general duty to rescue, and if a rescuer made a negligent rescue attempt but did not negligently cause fresh injury, he incurred no liability.

[5] The pursuers' case rested on the concept of assumption of responsibility. However performance of a statutory function did not necessarily equate to an assumption of responsibility (*Rowley* v *Secretary of State for Work and Pensions* [2007] 1 WLR 2861; *X* v *Hounslow London Borough Council* [2009] PTSR 1158). In any event, the existence of a duty of care was not enough: its scope had to be ascertained (cf Lord Hope of Craighead at paragraphs [11], [14], [23], and [26] of *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21). The recent Supreme Court decision in *Michael* v *Chief Constable of South Wales Police* [2015] 2 WLR 343 gave further support to the defenders' position. Previous Scottish decisions had to give way to guidance from the Supreme Court.

[6] In the present case, it was accepted that nothing that the defenders did made matters worse, or inflicted a fresh injury. In law, there were no duties of the scope averred by the pursuers. The action was irrelevant. The reclaiming motion should be allowed and the action dismissed.

Submissions for the pursuers

[7] Counsel for the pursuers emphasised that it was not suggested that there was a common law duty of care parasitic on a statutory duty or a statutory power. The pursuers' case was based on ordinary principles of common law negligence, and was of the type described by Lord Hoffmann in paragraph 38 of *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, namely a case where the fire service had "actually done acts or entered into relationships or undertaken responsibilities which [gave] rise to a common law duty of care" (*Barrett* v *Enfield London Borough Council* [2001] 2 AC 550; *K2 Restaurants Limited* v *Glasgow City Council* [2013] CSIH 49, paragraphs 39 to 42). What was criticised was the manner in which the statutory duty was performed (Lord Browne-Wilkinson's category (b) at page 735F of *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633). As the pursuers' case was not parasitic on a statutory duty, the *dicta* cited from *Rowley* v *Secretary of State for Work and Pensions* [2007] 1 WLR 2861 paragraph 54,

Mitchell v *Glasgow City Council* 2008 SC 351 paragraph 79, and *X* v *Hounslow London Borough Council* [2009] PTSR 1158 paragraph 90, were not in point.

[8] The facts as averred were sufficient to disclose an assumption of responsibility and a relationship of proximity between the pursuers and the fire service such as was described in paragraph 38 of *Gorringe.* The Outer House decision *Burnett* v *Grampian Fire and Rescue Services* 2007 SLT 61 was entirely in point, and was correctly decided. Further support for the pursuers could be found in *Duff* v *Highlands and Islands Fire Board* 1995 SLT 1362. Moreover *Gibson* v *Orr* 1999 SC 420 constituted a major problem for the defenders: if a duty of care was owed by the police in *Gibson*, it was inconceivable that a duty of care was not owed by the fire service in the present case.

[9] While it was accepted that different considerations might apply to the ambulance service (*Kent* v *Griffiths* [2001] QB 36), there could nevertheless be circumstances in which the fire service should be held to owe both broad duties to the public and specific duties to individuals. This was such a case.

[10] On the basis of *Burnett* and *Gibson*, and to a lesser extent *Duff*, the pursuers had pled a relevant case and were entitled to a proof (rather than a proof before answer). The reclaiming motion should be allowed, but only to the extent of allowing a proof rather than a proof before answer. Otherwise the Lord Ordinary's interlocutor should be adhered to and the reclaiming motion refused.

Discussion

[11] The Fire (Scotland) Act 2005 set up fire-fighting authorities. Duties were imposed and powers granted. In particular, sections 9 and 25 of the 2005 Act provide:

> "**9. Fire-fighting**
>
> (1) Each relevant authority shall make provision for the purpose of –
>
> (a) extinguishing fires in its area; and
>
> (b) protecting life and property in the event of fires in its area.
>
> (2) In making provision under subsection (1) a relevant authority shall in particular –
>
> (a) secure the provision of the personnel, services and equipment necessary to meet efficiently all normal requirements;
>
> (b) secure the provision of training for personnel;
>
> (c) make arrangements for –
>
> (i) dealing with calls for help; and
>
> (ii) summoning personnel,
>
> in the event of fire;
>
> (d) make arrangements for obtaining information required or likely to be required for the purpose mentioned in that subsection;
>
> (e) make arrangements for ensuring that reasonable steps are taken to prevent or limit damage to property resulting from action taken for the purpose mentioned in that subsection …
>
> **25. Powers of authorised employees in relation to emergencies**

(1) An employee of a relevant authority who is authorised in writing by the authority for the purposes of this section (an 'authorised employee') and on duty may –

(a) if the employee reasonably believes that a fire has broken out, do anything the employee reasonably believes to be necessary for the purpose of –

(i) extinguishing the fire; or

(ii) protecting life or property;

(b) if the employee reasonably believes that a road traffic accident has occurred, do anything the employee reasonably believes to be necessary for the purpose of –

(i) rescuing people; or

(ii) protecting them from serious harm;

(c) if the employee reasonably believes that an emergency other than a fire or road traffic accident has occurred, do anything the employee reasonably believes to be necessary for the purpose of carrying out any function conferred on the authority in relation to the emergency; and

(d) do anything the employee reasonably believes to be necessary for the purpose of preventing or limiting damage to property resulting from action taken as mentioned in paragraph (a), (b) or (c).

(2) An authorised employee may in particular under subsection (1) –

(a) enter premises or a place (by force if necessary);

(b) move a vehicle without the consent of its owner;

(c) force open and enter a lockfast vehicle;

(d) close a road;

(e) stop and regulate traffic;

(f) restrict the access of persons to premises or a place …"

[12] Thus the defenders are a statutory body with a "general public law duty to make provision for efficient fire-fighting services" (Lord Hoffmann at paragraph 32 of *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057), a duty sometimes referred to as a "target duty" (Lord Rodger of Earlsferry at paragraph 89 of *Gorringe*). The defenders have been given certain statutory powers to enable them to deal with fires, floods, road traffic accidents, and other emergencies. But there is no statutory duty owed to private individuals such as might give rise to a private claim for damages.

[13] In this case it is not disputed that a private common law duty of care does not arise from the general public law duty (cf *dicta* of Lord Hoffmann at paragraph 19 *et seq* of *Gorringe*). However emergency services – including fire, police, and ambulance – have, in certain circumstances, been held liable in damages to private individuals for negligence in the performance of their duties. As Lord Woolf MR explained in *Kent* v *Griffiths* [2001] QB 36 at paragraph 42:

"…The starting point is the fact that even when a statute only establishes a power for a body to act in a particular manner the body can be liable for negligence if there also a common law duty created on the particular facts of the case. As Lord Browne-Wilkinson states in his

significant examination of this subject in *X(Minors) v Bedfordshire County Council* [1995] 2 AC 633, 735:

> 'It is clear that a common law duty of care may arise in the performance of statutory functions. But a broad distinction has to be drawn between: (a) cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion; (b) cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice.'"

See too Stuart Smith LJ in *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004 at page 1031 D-E:

> " … where the rescue/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment the plaintiff can recover."

[14] When ascertaining the current state of the law in this context, it is necessary to bear in mind –

> "… the history of the approach of the courts to the relationship between public failures and private claims in negligence over the last seventy years or more … [as] care needs to be taken chronologically to place any given authority firmly in the judicial context in which it was decided" (Turner J at paragraph 53 of *Furnell v Flaherty* [2013] EWHC 377 (QB))

Significant authorities to date (being decisions of the House of Lords or the Supreme Court unless otherwise indicated, and listed in chronological order) include *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74; *Anns* v *Merton London Borough Council* [1978] AC 728; *Murphy* v *Brentwood District Council* [1991] 1 AC 398; *X(Minors)* v *Bedfordshire County Council* [1995] 2 AC 633; *Duff* v *Highland and Islands Fire Board* 1995 SLT 1362 (Lord Macfadyen, Outer House); *Stovin* v *Wise* [1996] AC 923; *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004 (Court of Appeal); *Gibson* v *Orr* 1999 SC 420 (Lord Hamilton, Outer House); *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 ; *Burnett* v *Grampian Fire and Rescue Service* 2007 SLT 61 (Lord Macphail, Outer House); *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21; *Furnell* v *Flaherty* [2013] EWHC 377 (QB) (Turner J, Queens Bench); *Michael* v *Chief Constable of South Wales Police* [2015] 2 WLR 343; and *Mackay* v *Scottish Fire and Rescue Service* 2015 SLT 342 (Lord McEwan, Outer House).

[15] In my opinion, in a case such as this (concerning the possible liability in delict on the part of a public service body namely the fire brigade), three matters of note arise from the authorities cited above. The first matter is discussed in paragraphs [16] to [21] below; the second in paragraphs [22] to [24]; and the third in paragraph [25].

[16] The first matter is the change and development since the 1940s in the courts' approach to the nature and scope of any liability on the part of public authorities to individuals who make private claims in respect of the authorities' alleged negligence in the performance of their public duties. In 1941, a clearly defined and fairly restricted approach could be found in *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74, where a sea wall had been breached and the river catchment board (a statutory authority with certain powers) attempted, not very successfully, to deal with the ensuing flooding. At pages 84, 85 and 87, Viscount Simon LC reasoned as follows:

"[page 84]… The question is whether … the appellants are liable to the respondents in damages to such amount as would represent the net loss to the respondents due to the delay in abating the flood … It is not, of course, disputed that if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages for the consequences of their negligent act [page 85] … But … nothing of this sort happened … the respondents cannot point to any injury inflicted upon them by the appellant Board, unless it be the Board's want of success in endeavouring to stop the flooding at an earlier date.

In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence … In the present case, the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract. Supposing, for example, that after the appellants had made their first unsuccessful attempt they had decided to abandon their efforts altogether, the respondents could have had no legal claim against them for withdrawing, even though the result might have been to leave the respondents' land indefinitely flooded. This shows, I think, how different is the relation between the Catchment Board and individual owners or occupiers like the respondents, and the relation between a contractor employed by the respondents to mend the wall … [page 87] … I agree with du Parcq LJ [who gave the dissenting opinion in the Court of Appeal] that [Lord Blackburn's passage in *Sheppard v Glossop Corporation*] would be misapplied if it were supposed to support the proposition that a public body, which owes no duty to render any service, may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service. On the other hand, if the public body by its unskilful intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby …"

Similarly Lord Romer at page 102 explained:

" … Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which and the time during which the power shall be exercised; and they cannot be made liable, except to the extent that I have just mentioned, for any damage that would have been avoided had they exercised their discretion in a more reasonable way …"

[17] However, subsequent decisions tended to favour the finding of liability on the part of public bodies. A high point was reached in 1977 with the decision in *Anns* v *Merton London*

Borough Council. As Lord Neuberger observed in his address "Reflections on the ICLR Top Fifteen Cases: a talk to commemorate the ICLR's 150th Anniversary" (6 October 2015):

> "37. As often happens, the pendulum then swung too far the other way. Having been too restrictive before *Donoghue* [*v Stevenson* 1932 SC (HL) 31], the scope of duty of care not merely developed as I have just described, but became too expansive. This was principally as a result of the 1977 decision of the House of Lords in *Anns* [*v Merton London Borough Council*], whose effect was to create a risk of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (*Ultramares Corp v Touche* (1931) 174 NE 441) to quote from the great US Judge Cardozo J.
>
> 38. The House of Lords in *Caparo* identified a three-part test which has to be satisfied if a negligence claim is to succeed, namely (a) damage must be reasonably foreseeable as a result of the defendant's conduct, (b) the parties must be in a relationship of proximity or neighbourhood, and (c) it must be fair, just and reasonable to impose liability on the defendant …"

cf paragraphs 106 to 107 in *Michael* v *Chief Constable of South Wales Police*. *Anns* was subsequently overturned in *Murphy* v *Brentwood District Council,* and thereafter there appears to have been a policy-based reversion to a more restrictive approach.

[18] Recently, in *Mitchell* and *Michael*, the House of Lords and the Supreme Court have emphasised the need for a careful approach to the liability of public authorities to private individuals, particularly bearing in mind the possible financial burden which private claims might have upon the restricted resources of public authorities (see, for example, the *dicta* of Lord Toulson JSC at paragraph 122 of *Michael*).

[19] Circumstances in which a public body might currently be found liable to an individual for negligence in the courts in England have been usefully summarised by Turner J in *Furnell* v *Flaherty* [2013] EWHC 377 (QB) as follows:

> "60 There are two broad circumstances of case in which a public body remains vulnerable to an action in negligence notwithstanding the state of the law now governed by *Gorringe*. The first arises where the careless acts of the defendant have left the claimant in a worse position than if it had done nothing at all …
>
> 61 The second category of case in which ordinary private law principles could apply in a relevant way is that in which there has been an assumption or attachment of responsibility. In the context of the *Caparo* approach, this is, at least in part, an aspect of the test of 'proximity' …"

I agree.

[20] Some examples of public service bodies themselves creating an unnecessary danger, or unnecessarily causing damage or injury, include *Knightley v Johns* [1982] 1 WLR 349 (a police officer at the scene of a road traffic accident carelessly creating an unnecessary danger); *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 124 (a police officer attending a break-in and carelessly causing damage to the premises); the first and second cases in *Capital & Counties plc v Hampshire County Council* [1957] QB 1004, at pages 1022B to 1023A, 1031D-H, 1031H to 1032B, and 1034E-G

(fire officers attending a fire in block A and turning off the sprinkler system, resulting in the fire going rapidly out of control and spreading not only in block A but also to other blocks B and C); and also a hypothetical example based on *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 described at page 1034E-G of *Capital & Counties plc v Hampshire County Council*, where Stuart-Smith LJ reasoned as follows:

> "We think that the true analogy between the *Hampshire* case [where the fire officers switched off the sprinkler system, and as a result the fire spread out of control] and the *East Suffolk* case [see paragraph [16] above) would be this. Suppose that after the main sea wall had been breached, the plaintiff had constructed a temporary wall which contained the flood water to a relatively small area, and that the defendants then came upon the land to repair the main wall and negligently destroyed the plaintiff's temporary wall so that the area of the flooding increased before the repairs were completed. In such circumstances the defendants would at least *prima facie* be liable for the extra damage unless they could show – and the burden would be upon them – that the damage would have occurred in any event, even if they had never come upon the scene. If they were unable to discharge that burden, then they would be liable …"

[21] Some examples of relationships giving rise to an assumption of responsibility are described in paragraph 100 of *Michael* v *Chief Constable of South Wales Police.* They include relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient.

[22] The next matter of importance arising from the authorities cited in paragraph [14] above is the fact that the circumstances in the third case in *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004 were very similar to the circumstances in the present case. The circumstances in the third case in *Capital & Counties plc* were described at page 1023 (under the heading "The London Fire Brigade Case") as follows:

> "The second defendants, a company specialising in creating special effects for film and television, caused a deliberate explosion on wasteland near the plaintiffs' industrial premises. Burning debris was scattered over a wide area and small fires broke out. Some of the debris was seen to fall onto the plaintiffs' premises and smoke was observed coming from a corner of the plaintiffs' yard. Members of the public made emergency calls to the fire brigade, who responded by sending to the scene within a short time four fire engines complete with a leading fire fighter and fire crews. The members of the fire brigade attending the scene were employed by the defendant fire authority.
>
> When the fire brigade arrived, the second defendants' staff had already extinguished the fires on the wasteland and there was no visible evidence of any continuing conflagration. The fire brigade's officers took steps to satisfy themselves that all fires had been extinguished and that there was no residual danger, and they left the scene about 20 minutes after the initial explosion without inspecting the plaintiffs' premises, which abutted one side of the wasteland, where combustible material was to be seen. It was likely that there would also have been smouldering debris. No member of the plaintiffs' staff was

present and there was no record of any conversation between the fire crews and the plaintiffs' staff.

Later that evening a fire broke out at the plaintiffs' premises, which were severely damaged. The plaintiffs issued a writ against the fire authority alleging negligence by their servants or agents in failing adequately to inspect the wasteland and the premises, and failing to ensure that all fires and risk of further fires in the area had been eliminated before leaving …"

[23] For the reasons set out in their opinions, the Court of Appeal gave the following guidance in the context of the fire service:

" … the fire brigade [are] not under a common law duty to answer [a] call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way, or run into a tree, they are not liable (page 1030A) … a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation (page 1038E-F) … [if] we had found a sufficient relationship of proximity [in the third case] … we do not think that we would have found the arguments for excluding a duty of care on the ground that it would not be 'just, fair and reasonable' convincing …"

[24] In the result, the Court of Appeal in the third case in *Capital & Counties plc* found the fire brigade not liable in respect of the plaintiffs' loss and damage. Importantly, when *Capital & Counties plc* was discussed in the House of Lords in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, the conclusion reached by the Court of Appeal at page 1030A (quoted *supra*) was specifically approved in paragraph 32. Furthermore when *Capital & Counties plc* was discussed in the Supreme Court in *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 (particularly paragraphs 71 *et seq*), the Appeal Court's approach in respect of the third case was not criticised. The result reached (namely that there was, in the circumstances, no liability on the part of the fire brigade) was not said to be erroneous or unacceptable. That in our view strengthens the arguments for the defenders in the present case.

[25] The third matter arising from the authorities cited in paragraph [14] above is the marked divergence between Scottish and English lines of authority in the context of the potential liability of a fire brigade. The Scottish Outer House decisions of *Duff, Gibson,* and *Burnett* criticised and departed from important aspects of the English authorities, and concluded that certain averments of alleged negligence were (in those cases) relevant for proof in circumstances where an English court, faced with the same averments, would be likely to have struck the cases out as irrelevant.

[26] Against the background of the authorities referred to in paragraph [14] above, and the three matters arising from the caselaw (paragraphs [16] to [25] above) it is my opinion that the carefully developed, policy-based, more restrictive approach currently approved and adopted by the Supreme Court must be followed by the Scottish courts (contrary to the views expressed in the

Outer House in *Duff, Gibson,* and *Burnett*, but in keeping with a recent opinion of Lord McEwan in *Mackay* v *Scottish Fire and Rescue Service* 2015 SLT 342, particularly paragraphs [32], [33], and [37]). I have reached that conclusion for the following reasons.

[27] First, I do not accept that the fire service should be regarded as having undertaken an "assumption of responsibility" in the sense defined in the authorities, for example, by Lord Hamilton in *Gibson* v *Orr* 1999 SC 420 at page 434F:

> "That concept [of assumption of responsibility with reliance] may be traced back to *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* where the concept is of voluntary assumption of responsibility with associated reliance."

The suggestion that the fire service have voluntarily "assumed responsibility" on the basis of answering a 999 call or attending the scene of a fire or taking steps to extinguish a fire or to save lives or property, is, in my opinion, inaccurate. Those actions represent, in my opinion, the fire service carrying out their statutory functions and public duty: cf Viscount Simon LJ at page 87 of *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74; Dyson LJ at paragraph 54 of *Rowley* v *Secretary of State for Work and Pensions* [2007] 1 WLR 2861; Lord Reed at paragraphs 79 and 127 of *Mitchell* v *Glasgow City Council* 2008 SC 351; Lord Hope at paragraph [29], Lord Scott at paragraph [40], and Lord Brown of Eaton-under-Heywood at paragraph [82] of *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21; and Sir Anthony Clarke MR at paragraphs 60-65 and 90 of *X* v *Hounslow London Borough Council* [2009] PTSR 1158. In so doing, the fire service are not, in my opinion, carrying out acts or entering into relationships or undertaking responsibilities "giving rise to a duty of care on an orthodox common law foundation" in the words of Lord Toulson JSC at paragraph 111 of *Michael*, referring to paragraph 38 of *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057.

[28] Secondly, general policy considerations must be taken into account (cf *Murphy, Stovin, Gorringe, Michael* paragraph 115). As Lord Toulson JSC pointed out at paragraphs 110, 115 and 122 of *Michael:*

> "110 Lord Hoffmann (with whom Lords Goff and Jauncey of Tullichettle agreed [in *Stovin v Wise* [1996] AC 923]) observed that it is one thing for a public authority to provide a service at the public expense, and quite another to require the public to pay compensation when a failure to provide the service has resulted in a loss. Apart from possible cases involving reliance on a representation by the authority, the same loss would have been suffered if the service had not been provided in the first place, and to require payment of compensation would impose an additional burden on public funds. There would, he said, have to be exceptional grounds for a court to hold that the policy of a statute required compensation to be paid because a power was not exercised …
>
> 115 The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun Yeu v Attorney General of Hong Kong*

[1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood District Council* [1991] 1 AC 398 (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (no duty of care owed by a highway authority to take action to prevent accidents from known hazards) …

122 The only consequence of which one can be sure is that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two …"

While Lord Toulson was concerned with the police, his observations are equally applicable to the fire service. Whether one focuses on the existence of a duty of care, or the nature and scope of an accepted duty of care, it is appropriate to take into account such public policy considerations. Also relevant are the *dicta* of Lord Browne-Wilkinson at paragraph [79] of *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21, and the fact that it would be unfortunate if a defensive approach were to be adopted by the fire service as a result of an appreciation that their efforts might be followed by actions for damages (cf the observations of Lord Toulson in *Michael* v *Chief Constable of South Wales Police* at paragraphs 61 and 65).

[29] Thirdly, while analogies may be drawn with the provision of medical services, or with the ambulance service, they are of limited assistance. In relation to medical services, Stuart-Smith LJ explained in *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004, at page 1035A-B and 1036A-B:

"… There is no doubt that once the relationship of doctor and patient or hospital authority and admitted patient exists, the doctor or the hospital owe a duty to take reasonable care to effect a cure, not merely to prevent further harm. The undertaking is to use the special skills which the doctor and hospital authorities have *to treat the patient* …

… [But] we consider that Mr Munby [counsel for the defendants in the first and second cases] is right when he submitted that the fire brigade's duty *is owed to the public at large* to prevent the spread of fire and that this may involve a conflict between the interests of various owners of premises. *It may be necessary to enter and cause damage to A's premises in order to tackle a fire which has started in B's* … [emphasis added]"

As for the ambulance service, as Lord Woolf explained at paragraph 45 of *Kent* v *Griffiths* [2001] QB 36:

"… the arguments based on public policy are much weaker in the case of the ambulance service than they are in the case of the police or the fire service. The police and fire services' primary obligation is to the public at large. In protecting a particular victim of crime, the police are performing their more general role of maintaining public order and reducing crime. In the case of fire, the fire service will normally be concerned not only to protect a particular property where a fire breaks out but also to prevent fire spreading. In the case of

> both services, there is therefore a concern to protect the public generally. The emergency services that can be summoned by a 999 call do, in the majority of situations, broadly carry out a similar function. But in reality they can be very different. The ambulance service is part of the health service. Its care function includes transporting patients to and from hospital when the use of an ambulance for this purpose is desirable. It is therefore appropriate to regard the LAS [London Ambulance Service] as providing services of the category provided by hospitals and not as providing services equivalent to those rendered by the police or the fire service. Situations could arise where there is a conflict between the interests of a particular individual and the public at large. But, in the case of the ambulance service in this particular case, the only member of the public who could be adversely affected was the claimant. It was the claimant alone for whom the ambulance had been called …"

See too *Michael* v *Chief Constable of South Wales Police*, paragraph 112.

[30] Fourthly, as senior counsel for the defenders submitted, there is no general duty to rescue. If a rescuer makes a negligent rescue but does not negligently create a fresh injury, then he incurs no liability in damages (Stuart-Smith LJ at page 1037A-C of *Capital & Counties plc*). The fire service, with their statutory powers and duties, have been held not to be liable if they fail to attend a fire (*East Suffolk Rivers Catchment Board,* Viscount Simon LC at page 88, Lord Romer at page 102; *Capital & Counties plc* v *Hampshire County Council,* Stuart-Smith LJ at page 1030A-B, subsequently approved in the House of Lords at paragraph 32 of *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057). It would therefore seem unprincipled to suggest that a fire service which did attend a fire and sought to extinguish it could be held liable for their actions, other than in circumstances where they negligently inflicted fresh injury (Lord Hoffmann at page 196G-H of *O'Rourke* v *Camden London Borough Council* [1998] AC 188; Lord Reed at paragraph [166] of *Antonucci or McConnell* v *Ayrshire and Arran Health Board,* unreported, Court of Session, 14 February 2001).

[31] Fifthly, the line of English authority relevant to the liability of public bodies including fire services (*East Suffolk Rivers Catchment Board* in 1941 to *Michael* in 2015, see paragraph 75 of *Michael*) is well-established and of considerable authority. It would be unfortunate to adopt a different approach north of the border: cf the observations of Lord Hope of Craighead at paragraph [25] and of Lady Hale JSC at paragraph [78] in *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21.

[32] In conclusion, therefore, I consider that, in the present case, the fire service owed a duty of care to the general public, including the pursuers (cf Stuart-Smith LJ at page 1036A-B of *Capital & Counties plc*), but that duty was to take care not negligently to add to the damage which the pursuers would have suffered if the fire service had done nothing; in other words, not negligently to inflict a fresh injury (cf *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74; *Knightley* v *Johns* [1982] 1 WLR 349; *Rigby* v *Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Capital & Counties plc* v *Hampshire County Council* [1997] QB 1004; *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21; *Michael* v *Chief Constable of South Wales Police* [2015] 2 WLR 343). No breach of that duty of care is averred to have occurred in the present case. Further, as indicated above (paragraph [27]), I do not accept that the averments disclose anything amounting to an "assumption of responsibility"

on the part of the defenders in this case. Accordingly the case as pled is, in my opinion, irrelevant, and should be dismissed.

[33] It follows that this court must disapprove of the Scottish authorities of *Duff*, *Gibson,* and *Burnett*. It is notable that the courts in these cases did not have the benefit of the guidance given by House of Lords and the Supreme Court in *Mitchell* and *Michael*. But some further points may be made, as follows.

[34] In *Duff* v *Highlands and Islands Fire Board* 1995 SLT 1362, the relevant expression of opinion is given in the last paragraph. It is brief and *obiter,* and in my view gives too wide a definition of the scope and content of the duty owed to the public.

[35] As for *Burnett* v *Grampian Fire and Rescue Services* 2007 SLT 61, I am unable to agree with views expressed in paragraph [51] (drawing a parallel with medical services); paragraph [52] (suggesting that the duty owed by the fire service is not owed to the public at large); paragraphs [41] and [64] (a rejection of the parallel with a rescuer and a dismissal of the possibility of operational difficulties arising from a defensively-led fire service); paragraph [65] (concluding that it would be fair, just and reasonable to impose the duties contended for by the pursuer upon the fire service); paragraphs [66] and [72] (views expressed in relation to other emergency services). I note that *Murphy* v *Brentwood District Council* (which overturned *Anns* v *Merton London Borough Council*) appears not to have been cited or discussed in *Burnett*, and the court did not have the benefit of the guidance given by the House of Lords and the Supreme Court in *Mitchell* and *Michael.*

[36] In relation to *Gibson* v *Orr* 1999 SC 420 (commented on by Lord Hope of Craighead at paragraphs 79-81 of *Van Colle* v *Chief Constable of the Hertfordshire Police* [2009] 1 AC 225), I agree with the defenders' senior counsel that it is possible that the result achieved was correct, but the reasoning does not accord with the line of authority from *East Suffolk Rivers Catchment Board* to *Michael*. The court did not, of course, have the benefit of the guidance given in *Gorringe, Mitchell* and *Michael.*

Decision

[37] In this case, there are no averments that the defenders made matters worse or that they inflicted a fresh injury when they arrived at and dealt with the fire at the farmhouse. Nor are there any averments of circumstances which could, in my view, properly be categorised as an assumption of responsibility giving rise to a common law duty to exercise reasonable care. Further it seems to me that it would not be fair, just or reasonable to impose a duty of care of the scope contended for by the pursuers on the fire service. In the result, I am persuaded that the pursuers' case will necessarily fail even if all the pursuers' averments are proved – in other words, that the case as pled is irrelevant (*Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at page 50). I therefore propose that the reclaiming motion should be allowed; the Lord Ordinary's interlocutor of 2 September 2014 recalled; and the action dismissed. I also propose that the question of expenses be continued.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 3
A514/11

Lady Paton
Lady Dorrian
Lord Drummond Young

OPINION OF LADY DORRIAN

in the cause

A J ALLAN (BLAIRNYLE) LIMITED and another

Pursuers and respondents;

against

STRATHCLYDE FIRE BOARD

Defenders and reclaimers;

Pursuers and respondents: Balfour; BLM
Defenders and reclaimers: R Dunlop QC, E Campbell; Clyde & Co

13 January 2016

[38] I agree that the reclaiming motion should be allowed. In advancing his argument that the reclaimers had pled a relevant case, counsel for the respondents accepted that responsibility could not arise directly from any statutory duty incumbent upon the defenders. Furthermore, the duty was not parasitic upon any statutory duty. Nor is the case based on the type of assumption of responsibility, coupled with reliance, under the principles of *Hedley Byrne* v *Heller& Partners Ltd* [1964] AC 465, discussed in *Michael* v *Chief Constable of South Wales Police* [2015] 2 WLR 343 (Lord Toulson paragraph 100) as one of the exceptional circumstances where the law will impose liability for a careless omission. That is not the basis of the present case, rather it was argued as an example of the situation described by Lord Hoffman in *Gorringe* v *Calderdale Metropolitan Borough* Council [2004] 1 WLR 1057 at paragraph 38, where, noting that the issue in that case was confined to

circumstances where an attempt was made to impose a common law duty solely on the existence of a broad public law duty, he went on to say:

> "We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty."

The respondents' case was that the fire service in the present case had indeed done acts, entered into a relationship and undertaken responsibilities such as to bring them within the scope of that paragraph.

[39] The arguments advanced for the reclaimers relied on a line of authority running from *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74 , through *Capital & Counties Plc* v *Hampshire County Council* [1997] QB 1004 and culminating in *Michael.* In so far as Scottish authorities – *Gibson* v *Orr 1999 SC 420, Duff* v *Highlands and Islands Fire Board* 1995 SLT 1362 and *Burnett* v *Grampian Fire and Rescue Services* 2007 SLT 61– were at odds with these cases they were wrongly decided. On the other hand, the respondents argued that these cases were correctly decided, that the *East Suffolk* case was of limited application, and that *Capital & Counties* was wrongly decided, at least in respect of the third of the four cases there decided: it had no application to cases where the fire service attended a fire in response to a call, but was limited to circumstances where they took no action at all.

[40] *East Suffolk*, according to the respondents' argument, was limited to cases where the authority was vested with a statutory power, with associated discretion. It had no application in cases where there was a statutory duty laid upon the authority. I accept that the question whether an authority acts under a statutory power or duty may be of some importance, and that in particular, it may be easier to impose liability following the exercise of a statutory duty rather than from the exercise of a discretion conferred by a statutory power. However, in cases such as the present, I consider that the difference is of limited relevance. The duties placed upon the local authority are target duties expressed at a high level of generality, and their execution on the ground is carried out by fire-fighters under the statutory powers conferred on them. The duties under section 9 of the 2005 Act are very similar to the duties which were imposed by section 1 of the Fire Services Act 1947 which was under consideration in *Capital & Counties*, with the powers to fire-fighters provided under section 25 echoing those available under section 30 of the 1947 Act. The statutory duties available in this case, and in *Capital & Counties*, are of such a degree of generality that I see no basis to consider that the reasoning in *East Suffolk* does not apply equally to those duties as to the powers under which the authority acted in that case. This appears to me to be the way in which the matter was approached by the Court of Appeal in *Capital & Counties*, where the duties were categorised as "'target' duties providing in general terms for the organisation and administration of national fire service".

[41] In that case, in which one of the examples was directly analogous to the present one, the final conclusion (page 1038E-F) reached by the court, was firmly in favour of the reclaimers, namely that:

> "In our judgement a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at

the fire ground, and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation."

The Court of Appeal concluded that the duties imposed upon the fire authorities were duties owed to the public at large, and that the statutory provisions conferring control of operations upon the senior officer present were also for the benefit of the public generally, in situations where there may be conflicting interests. The court determined that by taking control the senior officer was not to be seen as undertaking a voluntary assumption of responsibility to the owner of the premises on fire, regardless of whether or not the owner was reliant on it (page 1036 F-G). I see no basis for considering that the court erred in its application of *East Suffolk.*

[42] It is true that in *Capital &Counties* the first question was whether there was a common law duty to answer calls to fires or to take reasonable care to do so. In discussing a passage from *Alexandrou* v *Oxford* [1943] 4 All ER 328, where the decision concentrated on the question whether there was a duty to respond to a call, the court noted that on the facts of the case the police had in fact answered the call and attended the premises, but had inadequately inspected them. They considered that in the fact that the police in fact intervened, albeit inefficiently, would not have been overlooked. It does not seem to me that the court in *Capital & Counties* failed to understand the case of *Alexandrou*. They relied on it in the first place as clear authority for the proposition that the making of an emergency call does not create the necessary proximity. They then proceeded to consider the question which arises in the present case. They were aware of the decision in *Duff*. They accepted that where the Fire Service created the danger which caused the injury, liability would follow. They were clearly well aware that the *East Suffolk* case had involved the exercise of a power rather than a duty. I see no basis for concluding that the court either misunderstood or misapplied any of the cases to which it was referred.

[43] The limitation in *Alexandrou,* later applied in *Kent* v *Griffiths,* was essentially that its application was restricted to the core duties of the police and did not extend to any civil responsibility undertaken, such as helping someone across the road. That is not inconsistent with the approach adopted in *Capital & Counties,* and, as I note below, explains the approach of Lord Hamilton in *Gibson* v *Orr* 1999 SC 420.

[44] In *Michael*, the majority opinion (delivered by Lord Toulson, JSC with whom Lords Neuberger, Mance, Reed and Hodge agreed - any reference to *Michael* is a reference to that opinion) repeated that the core duty of the police was owed to the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private law duty. The duty of a fire service in respect of suppression of fires seems analogous to the duty on the police in relation to preservation of the peace. It is a duty owed to members of the public at large. The context of *Michael* was a failure to answer a call, but there seems no basis for confining the reasoning to such a situation.

[45] As was pointed out in *Michael*, claims against other emergency services – save the ambulance service - have been treated in the same way as claims against the police. Specific consideration was given to the *Capital & Counties* case. It was submitted for the respondents that, in *Michael*, the result in *Capital & Counties* was considered to apply only to cases where there had been a complete failure to engage, but I do not read the observations in *Michael* as being limited in such a way. The *Capital &* Counties case is not restricted to situations where the fire service failed

to attend, or failed to act at all: it extends to cases where they did take action to fight the fire, so long as their intervention did not make the situation worse than it would have been had there been no intervention at all. As has been noted, the third scenario in *Capital & Counties* was identical to the circumstances of the present case, and there is no indication in *Michael* that the UKSC thought that the conclusion reached in that case was other than the correct one. The *ratio* was described as lying in the difference that in the Hampshire case, as opposed to the other three, the fire service aggravated the situation by causing the sprinklers to be turned off, whereas "in the other cases the failures of the fire brigade made things no worse than they were." (*Michael* paragraph 75). It was noted that a comparison had been made with the case of *Rigby* v *Chief Constable of Northamptonshire* [1985] 1 WLR 1242 where liability was established because the actions of the rescue service created additional danger. That accords with the conclusions reached by the UKSC in the case of *Michael* itself, and supports the argument for the reclaimers that the scope of the duty resting upon them is restricted to refraining from making the situation worse, and does not have the reach contended for by the respondents.

[46] The duties which are set out in section 9 are target duties of the widest kind, similar to those which were under consideration in *Gorringe.* In paragraph 32 of that case Lord Hoffman said this:

> "Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide. For example, the majority reasoning in *Stovin v Wise* was applied in *Capital & Counties plc v Hampshire County Council [1997] QB 1004* to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services: see section 1 of the Fire Services Act 1947. The Court of Appeal held, in my view correctly, that this did not create a common law duty."

The fact that he proceeded to quote a passage from *Capital & Counties* dealing with failure to answer a call does not in my view detract from the general approval of the proposition that any common law duty on the fire brigade in such circumstances is restricted in scope to circumstances where their intervention creates a new danger or makes the situation worse than it would have been but for that intervention.

[47] It was argued that the law of Scotland was explained in cases such as *Duff, Burnett* and *Gibson,* rather than *Michael.* However, the principles which underlie the reasoning in *Michael* are the same as those which underlie the law of Scotland in this area. The cases which are elsewhere relied upon for the reasoning in *Michael* (for example in paragraphs 97 and 101) include the two Scottish cases of *Maloco* v *Littlewoods Organisation Ltd* 1987 SC (HL) 77 and *Mitchell Glasgow City Council* 2008 SC 351. It has repeatedly been noted that the law on this matter is the same in both jurisdictions. Moreover, the discussion of *Duff* and *Burnett* at paragraphs 77 and 78 of *Michael* impliedly questions the validity of the reasons given in *Burnett* for declining to follow *Capital &Counties*.

[48] In *Michael* the UKSC said that to impose a duty which could not rationally be confined would be contrary to the ordinary principles of the common law. The difficulty in confining the duty in circumstances such as the present case may not be quite so extreme as those which might be envisaged in circumstances such as *Michael* but they are nevertheless significant. The same point arose in *Capital & Counties.* Noting that the fire service's duty in respect of fire-fighting was

owed to the public at large, the court pointed out the difficulty in limiting the spread of any alleged duty, which would have to extend to bystanders, and to the owners and occupiers of adjoining property, and perhaps those of the property adjoining that, or any property to which the fire might spread, if only by a spark or burning debris. The submission was that the duty might extend to a whole district which was at risk if the fire got out of hand. In other words, in negligently failing to extinguish the fire at Pudding Lane, they would be responsible for the destruction of St Paul's Cathedral.

[49] The respondents placed significant emphasis on the cases of *Gibson, Duff* and *Burnett. Gibson* may be distinguished on several grounds. It was a case in which the police were not acting within the scope of their core duty to prevent and detect crime, but within the scope of their civil function in relation to road traffic operations. That accords with Lord Hope's analysis of the case in *Van Colle* v *Chief Constable of the Herefordshire Police* [2009] 1 AC 225 at paragraphs 79/80. Such a point was also noted in *Kent* v *Griffiths* [2001] QB 36 by Lord Woolf who observed at paragraph 25 that there were a "great variety of situations where the police provide assistance to the public because they decide to do so." As Lord MacPhail was later to do in *Burnett*, Lord Hamilton rejected the suggestion that the duties of the police were owed to the public at large, but of course did so in the context not of considering their core duties, but the civil functions which they were carrying out.

[50] Further, *Gibson* may not unreasonably be analysed as a case where their taking control of and then abandoning a known hazard was at least analogous with a situation where the authority created the damage or made the situation worse, having regard to the reference to the cases of *Knightley* v *Johns* [1982] 1 WLR 349 and *Rigby*. It was a case in which the court was satisfied that there could be identified only a limited class of individuals at particular risk from the hazard. (see page 433 G-I).

[51] As to the case of *Duff* the observations of Lord Macfadyen are *obiter*, and shortly stated. Moreover, the case was decided before the important cases of *Captial & Counties* and *Gorringe,* his Lordship noting that he had been cited no authority which supported the central argument for the defenders. He distinguished *East Suffolk* on the basis that it concerned statutory powers rather than duties, a distinction which, as explained above, I find less than persuasive given the broad nature of the statutory duties involved. The arguments in *Duff,* relating to the equiparation of a fire service and a police service, were subtly different to those advanced before us, being advanced largely on the basis of an argument in favour of immunity, which does not arise in the present case. The rejection of the argument based on Lord Goff's observations in *Smith* v *Littlewoods* was fairly cursory. The case of *Duff* related to section 1 of the 1947 Act, exactly the same provision considered in *Capital & Counties.* The underlying duty upon which his Lordship would have proceeded to reach the conclusion that by attending the fire and fighting it the fire brigade created the conditions necessary for the imposition of liability was the statutory duty "to secure the services of a fire brigade and efficient arrangements for dealing with calls for assistance". This might tend to suggest that he would even have held that there was a duty to answer a 999 call, had he been asked to do so. Not even the respondents' arguments go that far.

[52] Part of the basis upon which the Lord Ordinary in *Burnett* declined to follow *Capital & Counties* was that the law of Scotland did not draw a distinction between acts and omissions

comparable to that drawn in England. The extent to which this is an over-simplification was pointed out by Lord Reed in *Mitchell.*

[53] In *Mitchell,* Lord Reed, whose minority opinion in the Inner House was endorsed by the House of Lords, recognised that in Scots law as well as English law there was a general reluctance to impose affirmative duties to protect others, emphasising (paragraph 88) that, in relation to the distinction between acts and omissions, it was necessary to be able to say on common sense principles of causation that the damage was caused by something which the defender did. He quoted with approval the observations of Brennan J in *Sutherland Shire Council* v *Heyman* [1955-95] PNLR 238:

> "... that the general principle expresses a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to prevent injury being done to another by that other, by a third party, or by circumstances for which nobody is responsible".

Lord Reed's views were endorsed in the House of Lords by Lord Hope (paragraph 34) and the same point is reflected in paragraph 97 of *Michael:*

> "It is one thing to require a person who embarks upon an action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else."

In *Mitchell,* Lord Hope (paragraph 25) observed that: "the law of liability for negligence has developed on common lines both north and south of the border". The point is picked up in *Michael:*

> "78 The *Burnett* case 2007 SLT 61 was cited in *Mitchell v Glasgow City Council* [2009] AC 874, to which I refer below. The *Burnett* case was not mentioned in the judgments, but the distinction between acts or omissions was central to Lord Hope's reasoning, and he observed that the law of liability for negligence has developed on common lines both north and south of the Border: para 25."

[54] This reluctance to impose liability for failing to prevent harm caused by someone, or something, else, is consistent with a conclusion that the duties incumbent upon the fire service in the present circumstances are restricted in scope, and that liability is limited to the situation where the intervention has created a new danger or made the situation worse. Lord MacPhail's observations relating to the importance to be attached to the control exercised by the reclaimers over the fire site (paragraph 69) did not take account of the important observations in *Capital & Counties* (p1036 F-G) that the reason for conferral of such control was "... for the benefit of the public generally where there may be conflicting interests." I am thus unable to agree with the conclusion reached by Lord MacPhail in *Burnett.*

[55] The view that it was arguable that in fighting fire the fire brigade owed a duty not to the public at large but to a limited class of those whose lives and property are endangered (paragraph 52), is inconsistent with a weight of authority beyond the *Capital & Counties* case. (For example, *Kent* v *London Ambulance Service (No 2)* [1999] PIQR 192 at p199*; Kent* v *Griffiths*,*supra*, (Lord Woolf, paragraphs 24 and 45; *Watson* v *British Boxing Board of Control Ltd* [2001] QB 1134 paragraph 77; *Gorringe* paragraph 32*)*

[56] The ambulance cases do not assist the respondents. The role of the ambulance service has repeatedly been distinguished from that of the police and the fire service. As was noted in *Kent* v *London Ambulance* (p199), once a call has been accepted by an ambulance, the service undertakes to deal with, indeed to treat if necessary, a named individual at a specific address. The relationship which is thus created has been described as "highly personal". The duty becomes one owed not to the public at large but one specifically aimed at one individual. The same does not apply to the fire service. The duty prayed in aid here remains to the public at large, even if the primary beneficiary may be an individual householder. In *Kent* v *Griffiths* the distinction was maintained, the court noting (Lord Woolf MR paragraph 45) that:

> "The police and fire services' primary obligation is to the public at large. In protecting a particular victim of crime, the police are performing their more general role of maintaining public order and reducing crime. In the case of fire the fire service will normally be concerned not only to protect a particular property where a fire breaks out but also to prevent the fire spreading. In the case of both services, there is therefore a concern to protect the public generally."

[57] For the reasons given above, I am of the opinion that the reclaiming motion should be allowed and the action should be dismissed.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 3
A514/11

Lady Paton
Lady Dorrian
Lord Drummond Young

OPINION OF LORD DRUMMOND YOUNG

in the cause

A J ALLAN (BLAIRNYLE) LIMITED and another

Pursuers and Respondents;

against

STRATHCLYDE FIRE BOARD

Pursuers and Respondents: Balfour; BLM
Defenders and Reclaimers: R Dunlop QC, E Campbell; Clyde & Co

13 January 2016

[58] I agree that this reclaiming motion should be allowed. The question in issue is the extent to which a fire authority comes under a duty of care when it attempts to tackle a fire. I should note at the outset that the dispute between the parties relates to the scope of the fire service's duty of care, not its existence. The fire board accept that in fighting a fire they may be liable for negligence if they create fresh damage beyond the fire that they are tackling, or if they make matters worse than would have occurred had they done nothing. In the present case, however, they contend that they did not make matters worse, and that contention is not challenged.

[59] The pursuers argue that the fire board were under a duty to take reasonable care to extinguish all traces of fire in the premises, and that if they failed to do so there is liability in negligence. That proposition was accepted by the Lord Ordinary. In my opinion the duty of care incumbent on a fire authority does not extend so far. I reach this view for two reasons. First, if the pursuers were correct, a fire authority would be liable for what is generally referred to as a "pure" omission, and for sound policy reasons the law has set itself against such a position, at least in respect of damage to property. Secondly, a number of other policy reasons, related to the nature of a fire authority and the circumstances under which it operates, support the view that the liability in negligence of such an authority should be restricted. I will consider these in turn. In doing so, however, I should emphasize that the present case is concerned with damage to property, not injury to the person. What I say should be read in that context.

Pure omissions

[60] An important feature of the work of the fire service is that normally it attempts to control and extinguish sources or threats of danger or damage that have been caused by others or by the forces of nature. A similar point can be made about the police: at least in fulfilling their function of preventing and detecting crime, the police deal with the wrongdoing of third parties or threats of wrongdoing caused by third parties. Other rescue services such as the coastguard and lifeboat services also seek to resolve problems created by others or by the forces of nature. Thus a failure by such an authority will not amount to a positive act but merely to an omission to deal with a situation created by others or by natural forces. It has been repeatedly held that there is no general duty to prevent a third party or natural forces from causing harm. The leading statement of Scots law is that of Lord Goff in *Maloco* v *Littlewoods Organization Ltd*, 1987 SC (HL) 37, at 75-76:

> "[A] problem arises when the pursuer is seeking to hold the defender responsible for having failed to *prevent* a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognized that there is no *general* duty of care to prevent third parties from causing such damage. … The fundamental reason is that the common law does not impose liability for what are called pure omissions".

An analogy was drawn with the parable of the good Samaritan, where the priest and the Levite who passed by on the other side of the road would not have incurred any civil liability under the legal systems of the United Kingdom. The point is taken up by Lord Toulson in *Michael* v *Chief Constable of South Wales Police*, [2015] 2 WLR 343, at paragraph 97:

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else".

[61] It follows that an omission in the course of active conduct, as by a driver who omits to keep a proper lookout or apply his brakes, or by a surgeon who omits to follow proper procedures, may be actionable, but without such active conduct there is generally no liability. Otherwise, it has been pointed out, a person who sees another person about to walk over a cliff with his head in the air and does not shout a warning would be liable for negligence*: Mitchell* v *Glasgow City Council*, 2009 SC (HL) 21, at paragraph [15]. Thus in general there is no duty to act to save others from harm caused by a third party or natural forces or the victim's own acts. It follows that there is no liability in such circumstances for the consequences of mere inaction. Moreover, if there is no liability for inaction, it follows logically that there can be no liability for acting negligently, provided that the ultimate result is no worse than would have occurred without intervention. On the latter point, there is no direct British authority, but the proposition was accepted in Canada in *The Ogopogo* [1970] 1 Lloyd's Rep 257; [1971] 2 Lloyd's Rep 410, in a passage which was referred to with approval by the Court of Appeal in *Capital & Counties PLC* v *Hampshire County Council*, [1997] QB 1004 (see paragraph [14] below). All of the foregoing assumes that the defender played no part in creating the hazard to the pursuer; if, on the contrary, the defender did play such a part, there may be a duty to intervene and liability if the intervention is negligent, but that obviously does not apply to the emergency services.

[62] Nevertheless, as Lord Toulson indicates in *Michael*, the rule that there is no liability for pure omissions is not absolute. It seems that four categories of case exist where the rule has been held not to apply.

1. If there is no duty to act there can be no liability for the consequences of mere inaction. If, however, the defender does act and makes matters worse than they would have been if he had done nothing, there may be liability. This applies both to an exacerbation of the damage caused and to the creation of a new danger.
2. Where the defender is in control of the wrongdoer; he may be under a duty to control the wrongdoer's actions; this is exemplified by *Dorset Yacht Co Ltd* v *Home Office*, [1970] AC 1004. The same may be true where the defender is in control of a situation that presents a danger to others; in such a case the fact of control carries responsibility to take reasonable steps to avoid the danger of harm. An example of this can be found, I think, in *Gibson* v *Orr*, 1999 SC 420. In that case heavy rainfall caused the collapse of a bridge carrying a public road. On being advised of this, police placed warning cones in position on the north side of the bridge but failed to do anything on the south side. A car approaching from the south then fell into the river, killing all but one of its occupants. It was held that liability existed. The police constables who attended the locus had taken charge of the situation, which presented "a grave and immediate risk of death or serious injury to road users likely to be affected by the

particular hazard" (page 433). Lord Hamilton remarked (at pages 434-435) that the case could be regarded as one where the necessary proximity was brought into existence through an assumption of responsibility. The same approach might well be taken where the police undertake the direction of traffic; once again there is an assumption of control of a situation which may present a hazard. The notion of control also underlies the liability of roads authorities in Scots law to take reasonable care to remove hazards, as exemplified by the numerous cases discussed in *Macdonald* v *Aberdeenshire Council*, 2014 SC 114.

3. Liability for a failure to act may also be imposed where there has been an undertaking of responsibility on the part of the defender to safeguard the pursuer. This is essentially an application of the well-known principle established in *Hedley Byrne* v *Heller & Partners Ltd*, [1964] AC 465. A fiduciary relationship may give rise to this sort of liability: see *Michael* v *Chief Constable of South Wales Police*, *supra*, at paragraph 100. The same is true of contractual relationships, where it is possible to infer a duty to take care of the pursuer's property, a matter discussed in *Maloco* at 1987 SC (HL) 77, although in the case of both fiduciary relationships and contractual relationships the liability may be said to originate in an express or implied contractual term to use reasonable care in the performance of a task. Under the law of contract, obviously, a duty to act and liability for failure to do so can be regarded as the norm.
4. In some cases where acts of a third party harm the pursuer, liability for failing to act may be imposed on the defender because of the relationship between the defender and the pursuer. Such relationships include parent and child, school and pupil and employer and employee.

It is the first and second of these categories, and to some extent the third, that are potentially relevant to the present case. I should observe that, although the first category is discrete, the second and third are not clearly differentiated from each other. Taking charge of a situation might in some circumstances be regarded as involving an undertaking of responsibility, and giving an undertaking of responsibility can involve taking charge. The difference between these situations is thus one of emphasis: in one case the defender acts to deal with a situation and the law draws the inference that there is responsibility, whereas in the other the defender's actings involve some sort of undertaking of responsibility.

[63] The first category, the principle that liability attaches to a person who is under no duty to intervene but does so and makes matters worse, is discussed in *East Suffolk Rivers Catchment Board* v *Kent*, [1941] AC 74, a case which involved the liability of a statutory drainage board for the inefficient repair of a breach in a sea wall. It was held that the board were under no statutory duty to repair the breach. The original breach and the consequential flooding were caused by acts of nature, and the board's want of skill did not cause such damage. If, however, the board had not shown want of skill in trying to repair the wall, the gap would have been closed sooner and the flooding of the plaintiffs' land would have been more promptly abated. Viscount Simon LC stated (at 84-85):

> "It is not, of course, disputed that if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages for the consequences of their negligent act. If, for example, the appellants, by their unskilful proceedings had caused a further area of the respondents'

land to be flooded, or had prolonged the period of flooding beyond what it would have been if they had never interfered, they would be liable.…
In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence.… In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract".

[64] The issue can thus be treated as one of causation. If loss is caused by the acts of third parties or the forces of nature, a public authority such as the board cannot be said to have caused the loss. Where the authority's actings create further damage, however, causation can be said to exist, and with it liability. The analysis in terms of causation is apparent in the distinction drawn (at page 86) from *Geddis* v *Proprietors of Bann Reservoir*, (1878) 3 App Cas 430. Nevertheless, analysis in terms of causation will only go so far. If there is negligence on the part of the authority it can be said that two distinct matters are causally significant: the underlying flooding or fire, caused by the forces of nature or third parties, and the negligence of the authority. The main reason for the exception is one of policy: if the authority makes matters worse through its negligence, it is reasonable that it should be liable for the damage caused by its actions.
[65] Viscount Simon further observed that the relationship between an authority such as the board and the individual owners or occupiers of property was quite different from the relationship between those owners and occupiers and a contractor employed by them to mend the wall. In the latter case a contractual remedy in damages would exist for negligent performance of the work, if damage resulted. The board was different, however; it had responsibilities over the whole of its area to consider, and in its judgment it might find it necessary to use skilled staff in mending other breaches, or the outlay involved in making a good job of one particular repair might be more than its limited finances would permit (pages 85-86). That indicates the need to consider the overall position of a public authority in assessing the scope of its liability; I return to this point subsequently. Lord Romer expressed views that were similar in their result (at pages 102-103). His reasoning is somewhat different, however, in that he laid particular stress on the fact that the board was a statutory authority entrusted with a mere power, rather than a duty, to make good the damage. In my opinion this factor cannot now be decisive in assessing the delictual liability of public authorities; it is now clear that liability for negligence can exist even though the authority is acting under statutory powers and duties, and even though the relevant statute may confer a statutory discretion on the authority: *Gorringe* v *Calderdale Metropolitan Borough Council*, [2004] 1 WLR 1057, at paragraph 3 per Lord Steyn, paragraph 38 per Lord Hoffmann and paragraph 71 per Lord Scott.
[66] *East Suffolk Rivers Catchment Board* v *Kent* has been followed in a number of cases, including in relation to the fire service *Capital & Counties PLC* v *Hampshire County Council*, *supra*, the case that contains the most detailed discussion of the delictual liability of a fire authority. In that case four distinct claims were considered. The first two were taken together; they were claims made by the lessees and underlessees of premises which were destroyed by fire where the fire brigade had attended but an officer turned off the sprinkler system in the building; at the time that was the

only effective means of fighting the fire. It was held that that was negligent and that it resulted in a total rather than a partial loss of the building. The third claim related to premises destroyed by fire following a fire at adjacent premises which was attended by the fire brigade. The fire brigade satisfied themselves that that fire had been extinguished and left without checking the plaintiffs' premises or adjoining waste land. A fire subsequently broke out in the plaintiffs' premises, which were severely damaged. This claim presents an obvious analogy with the facts of the present case. The fourth claim related to a fire in a chapel. A fire had been seen in a classroom attached to the chapel, and the fire brigade attended, but they were unable to fight the fire effectively owing to the absence of a proper supply of water. It was held that the fire brigade owed a duty of care in respect of the first two claims, but not in respect of the third and fourth.

[67] The Court of Appeal's analysis began by considering whether there was a common law duty on the fire brigade to answer calls to fires or to take reasonable care to do so (page 1026). They concluded (page 1030):

> "In our judgment the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable".

In reaching that conclusion, the court considered the principle of general reliance which had been developed in Australian case law; the essence of this principle is that in some areas the public rely on a public authority's performing its function with due care, with the result that there is a right of action if due care is not taken. It was observed that that principle had received little if any support in English law, and in two cases, *Marc Rich & Co AG* v *Bishop Rock Marine Company Ltd*, [1996] AC 211, and *Philcox v Civil Aviation Authority*, The Times, 8 June 1995, it had not been applied. The former case related to a marine classification society, and the latter to the inspection of aircraft for airworthiness by the defendant authority. Furthermore, in *Stovin* v *Wise*, [1996] AC 923, Lord Hoffmann (at 954-955) had expressed some scepticism about the doctrine, and suggested that it was not obvious that there should be a right to compensation from a negligent fire authority which would ordinarily enure by right of subrogation to an insurance company.

[68] The court then considered the decision of the Court of Appeal in *Alexandrou* v *Oxford*, [1993] 4 All ER 328, dealing with the duty of the police to respond to an emergency call. In the latter case it was said that if the police were under a duty to respond to a single emergency call they would be under a similar duty to respond to any such call relating to suspected crime. On that basis it could not be said that there was any special relationship between the person making the call and the police; the duty was too wide. Furthermore, in *Alexandrou* the court had held that as a matter of policy it was not fair, just or reasonable to impose a duty of care on the police in these circumstances; that would expose them to potential actions for negligence by every disappointed or dissatisfied maker of a 999 call. That case was followed in *Capital & Counties*, and consequently it was held that there could not be a duty of care simply on the basis that an emergency call had been sent (pages 1028-1030).

[69] The next issue in *Capital & Counties* was whether the fire brigade owed a duty of care to the owner of property on fire, or owners of neighbouring properties, once they had arrived at the fire ground and started to fight the fire. Two possible bases for liability had been suggested: first, that

such cases involved the direct infliction of foreseeable physical damage, which was an established category of case where a duty of care existed; and secondly, that sufficient proximity would arise where someone possessed of a special skill undertook, quite irrespective of contract, to apply that skill for the assistance of another person who relied upon such skill. In relation to the first of these contentions, it was held (at page 1031) that

> "The peculiarity of fire brigades, together with other rescue services, such as ambulance or coastal rescue and protective services such as the police, is that they do not as a rule create the danger which causes injury to the plaintiff or loss to his property. For the most part they act in the context of a danger already created and damage already caused, whether by the forces of nature, or the acts of some third party or even of the plaintiff himself, and whether those acts are criminal, negligent or non-culpable. But where the rescue/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment the plaintiff can recover".

The critical point was that a new or different danger should have been created. In the first and second claims under consideration by the Court of Appeal, switching off the sprinkler system created a fresh danger, and this resulted in the fire's rapidly going out of control and spreading to other blocks that had been deprived of their own sprinkler protection. This is accordingly a straightforward application of the first of the qualifications at paragraph [62] above on the general proposition that there is no liability for pure omissions: there is liability if the fire service, police or other rescue service makes matters worse.

[70] The second way in which a fire brigade might come under a duty of care to the owner of property was where there was an assumption of responsibility and reliance by the owner (the third of the categories discussed above). The Court of Appeal (at pages 1034-1035) accepted that as a general rule a sufficient relationship of proximity will exist when someone possessed of a special skill undertook to apply it for the assistance of another person, who relied on such skill; *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*, *supra*, and *Henderson* v *Merrett Syndicates Ltd*, [1995] 2 AC 145, were cited in support. An analogy had been drawn with the relationship of doctors or health authorities and patients. Nevertheless this line of argument was rejected. A fire brigade did not grant any undertaking or assume responsibility to deal with fires. Moreover, the fire brigade's duty was owed to the public at large to prevent the spread of fire, and that might involve a conflict between the interests of various owners of premises; the analogy given was that during the great fire of London the Duke of York required to blow up a number of houses not yet affected by fire to make a fire break. Consequently, in asserting any such duty as a result of an undertaking, it was in practice impossible to identify to whom any duty might be owed. The owner of the building on fire would not be sufficient, because the owners and occupiers of neighbouring premises could also be affected by a fire. Ultimately the duty would have to extend, potentially at least, to an entire town or district on the basis that that was the extent of the potential risk. That was too wide a responsibility to give rise to a sufficient relationship of proximity.

[71] It can I think be said that the arguments rejected in this way by the Court of Appeal amounted to a reworking of the doctrine of general reliance, which has generally been rejected by courts in the United Kingdom. The Court went on to hold that by simply attending a fire and conducting fire-fighting operations the fire brigade did not, save in exceptional circumstances such

as the first two claims in *Capital & Counties*, create or increase the danger. On that basis, unless there were an increase in the danger, there could be no liability. An analogy was drawn with a rescuer (at page 1037):

> "It is not clear why a rescuer who is not under an obligation to attempt a rescue should assume a duty to be careful in effecting the rescue merely by undertaking the attempt. It would be strange if such a person were liable to the dependants of a drowning man who but for his carelessness he would have saved, but without the attempt would have drowned anyway. In Canada it has been held that he is not: *The Ogopogo* [*supra*]. This is consistent with the *East Suffolk* case. It is also, as we have pointed out, the effect of *Alexandrou* v *Oxford* because the ineffective intervention by the police in incompetently inspecting the plaintiff's premises did not create a relationship of proximity".

The analogy with a rescuer is in my opinion a logical extension of the principle that there is no liability for pure omissions unless matters are made worse. The important point is perhaps that a rescuer should not be taken to undertake responsibility to use due skill and care merely by the fact of attempting the rescue. The Court of Appeal then referred to a number of cases where it had been held that a special relationship had been established between the police and a particular member of the public. These were described as cases where the court has considered on the special facts of the case that there was a sufficiently close relationship of proximity to give rise to a duty of care (page 1038). But they did not come anywhere near the circumstances that arose in the appeals that were under consideration. The court concluded:

> "In our judgment, a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation".

On this basis, in the third and fourth of the claims under consideration in *Capital & Counties*, the plaintiff failed owing to lack of sufficient proximity. As I have already observed, the third claim appears to me to be indistinguishable from the present case.

[72] The Court of Appeal then went on to consider the question of whether it was just, fair and reasonable to impose a duty of care, as a matter of policy. Because of their decision on proximity, it was unnecessary to reach a definite decision on the matter, but it was indicated (at page 1044) that the arguments for excluding a duty of care on the ground that it would not be just, fair or reasonable did not seem convincing. The analogy with the police exercising their functions of investigating and suppressing crime was not close, and many of the arguments would apply to public services, such as the National Health Service, which is potentially liable for negligence. I return to this issue below at paragraph [82].

[73] The fundamental ground of decision in *Capital & Counties* is accordingly that there is no duty on a fire authority to take reasonable care to answer an emergency call and, if it does, any liability can only arise under one of the exceptions to the general rule that there is no liability for pure omissions. In Scotland a different view has been advanced in two cases, *Duff* v *Highland and Islands Fire Board*, 1995 SLT 1362, and *Burnett* v *Grampian Fire and Rescue Services*, 2007 SLT 61. I consider these cases further at paragraph [85]-[91] below. *Capital & Counties* was followed in the

High Court in England, in *OLL Ltd* v *Secretary of State for Transport*, [1997] 3 All ER 897, and was referred to with no hint of disapproval by Lord Toulson in *Michael* v *Chief Constable of South Wales Police*, [2015] 2 WLR 343, at paragraphs 71-75. In *Michael*, *Duff* and *Burnett* were also cited (paragraphs 76-78). Lord Toulson observed that a key feature of the reasoning in *Burnett* was the claim that no distinction is drawn in Scots law between acts and omissions. That distinction had, however, been central to the reasoning of the House of Lords in *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21. That is a clear criticism of the decision in *Burnett*.

[74] In *Michael* the issue was the liability of a police force on receipt of a 999 call. The general propositions of law that applied were set out first at paragraphs 97 *et seq*, where it is pointed out that English law did not as a general rule impose liability on a defendant for injury or damage to the person or property of a claimant caused by the conduct of a third party; *Maloco* v *Littlewoods Organization Ltd* (*sub nom Smith* v *Littlewoods Organization Ltd*), *supra*, was cited in support.

> "The fundamental reason, [as explained in the latter case], is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else".

Nevertheless, the rule is not absolute. Apart from statutory exceptions, two well-recognized types of situation existed in which the common law might impose liability for a careless omission. The first of these was where the defendant was in a position of control over the third party and should have foreseen the likelihood that the third party might cause damage to someone else in close proximity if care were not taken in controlling them; *Dorset Yacht Co Ltd* v *Home Office*, *supra*, was an example of this. The second general exception was where the defendant assumed a positive responsibility to safeguard the claimant. This could include cases of contract, fiduciary relationships, employer and employee, school and pupil and health professional and patient. In substance these are the second and third qualifications on the general rule regarding pure omissions that have been described previously. Furthermore, the rule and its qualifications were applicable both to private litigants and to public bodies.

[75] Lord Toulson then examined decided cases relating to the liability of a range of different public authorities, and observed (paragraphs 114-115):

> "It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.
>
> The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public".

Furthermore, if the police when they intervened owed a duty of care to victims or potential victims of crime, there were difficulties about the range of the responsibility involved (paragraphs 117 *et seq*). Potentially the duty was owed to almost anyone who claimed to be a victim. This difficulty underlined the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of closer special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care. Furthermore, the imposition of liability on the police to compensate victims of violence on the ground that the police should have prevented it would have potentially significant financial implications (paragraph 122). Thus the reasoning in *Michael* in relation to the police can be said to parallel to a significant extent the reasoning in *Capital & Counties* in relation to the fire service.

Negligence and the emergency services

[76] In *Michael* Lord Toulson addressed certain general issues of public policy in relation to the imposition of liability in negligence on public authorities, in particular the danger of a virtually unlimited duty and the possible financial implications. In *Capital & Counties*, by contrast, the Court of Appeal based its decision on the absence of proximity, and was generally unpersuaded by considerations of public policy. This distinction may well reflect the state of development of the law in 1997 as against 2015. In *Capital & Counties* the court approached the scope of the duty of care of the fire service on the basis of the well-known tripartite analysis of negligence found in the speech of Lord Bridge in *Caparo Industries PLC* v *Dickman*, [1990] 2 AC 605, at 617-618. For a duty of care to exist, three elements were necessary: foreseeability, proximity (or neighbourhood), and whether it was fair just and reasonable that the law should impose a duty of a given scope. Of these three requirements, the first, the foreseeability of damage, can be seen as a necessary but not a sufficient condition. Later developments have focused on the second and third requirements. These are reflected in *Michael*, where Lord Toulson expressed the view (at paragraphs 131 *et seq*) that proximity was not a sufficient criterion for the existence of a duty of care; the concept was circular, and left the question of closeness or proximity open-ended. A contrary view was put forward by Lord Kerr (at paragraphs 144 *et seq*) with specific reference to the facts of that case.

[77] For present purposes it is unnecessary to enter into the details of this controversy. The important point is that it has come to be recognized that proximity together with foreseeability cannot, by themselves, provide a universal solution to every question involving the existence and scope of a duty of care. Instead policy must also be taken into account. It is this, I think, that is meant by the expression "fair, just and reasonable" in Lord Bridge's formulation in *Caparo*. Proximity points to the closeness in fact of the relationship, and also to the question, which underlies the decision in *Capital & Counties*, of whether the relationship of the defender is with a small group of persons or the public generally. But policy introduces wider considerations. Moreover, it has in my view come to be recognized that proximity and policy cannot be looked at separately: they form parts of a single evaluative exercise which is designed to determine whether a duty of care exists and, if so, what its scope is. To the extent that *Capital & Counties* proceeds on the basis of proximity alone, without regard to questions of policy, I consider that it reflects the state of the law in 1997, when the tripartite test in *Caparo* was treated as providing a general scheme for the analysis of duties of care. Assuming foreseeability, the next question was whether proximity existed. If it did, the third question was whether there were policy considerations that

tended to negative or limit the scope of such a duty of care. Today, however, it has come to be seen that proximity and policy are interdependent; except in established cases it is impossible to say that proximity exists without evaluating the relevant policy considerations. In a sense a finding that there is proximity is a statement of a result. The notion of proximity does not, except at a very general level, give much guidance as to how that result is reached; that is where policy is important.

[78] Relevant policy considerations can take many different forms, and will inevitably vary from case to case. For present purposes it is the considerations relevant to the liability of public authorities that are important. At a very general level, one consideration is the need to avoid what was described, in Cardozo CJ's celebrated formulation in *Ultramares Corporation* v *Touche*, (1931) 174 NE 441, as "liability in an indeterminate amount for an indeterminate time to an indeterminate class". While the requirement of proximity will tend to avoid such a result, the need to keep delictual liability under reasonable control should still be kept in mind. That is a factor that in my opinion is of considerable importance in considering the liability of a public authority that operates for the benefit of the entire public.

[79] More specifically, a public authority will generally act for the benefit of the public as a whole. This is particularly true of the emergency services, where the functions of the fire service and police, in particular, are very obviously public in nature. In the case of the fire service, their public duty is owed to any member of the public whose property is affected by fire, including the owners of neighbouring properties which are threatened by a fire. In some cases the interests of members of the public may conflict. For example, a fire may break out in one property and threaten to spread along a row of properties. To prevent this, the fire service may consider that it is necessary to demolish the property adjacent to the fire to save the properties further along the row. Consequently the potential liability of the fire service is extremely wide and may involve sharp conflicts, where one member of the public is preferred over another. In such circumstances the warning in *Ultramares Corporation* v *Touche*, *supra*, is relevant; care must be taken to avoid indeterminate liability.

[80] When a public authority is said to be liable for negligence as a result of the performance of its functions, statutory or otherwise, any liability to pay compensation will fall on the public purse. While that may in some cases be an appropriate means of bearing such a cost, there is a danger that potential liability for negligence may inhibit the authority's performance of its public functions, which will result in further hidden costs to the public. For these reasons it will frequently be appropriate for courts to restrict the private law liability of authorities. Perhaps a more important consideration is that it is generally economically desirable that the costs of any particular activity should fall on the participants; if it is a commercial activity they will obviously be passed on to customers, and if the activity is the ownership of property, they will form part of the general costs of owning that type of property. Those costs may be covered by insurance (although obviously the premiums for the insurance are a cost of the activity or property ownership in question). If, however, a public authority is liable for the costs of an incident, they will fall on the general public rather than the participants. That may be a reason for curtailing the liability of public authorities. The general rule that there is no liability for pure omissions, when applied to public services, tends to achieve this result.

[81] When a claim is made against one of the emergency services, including the fire service, two further factors may be relevant. The first of these is the complexity of the operational demands that are typically made on such services, particularly the police but also the fire service. More than one emergency may arise at the same time, and difficult decisions will have to be made as to the allocation of resources among them. It can be said that it is inherently undesirable that decisions of this nature should be the subject of negligence claims. Frequently such decisions are made on the basis of incomplete information about what is happening, and the controlling officers may well be placed in acute dilemmas as to whether one incident rather than another should receive a response and as to precisely what that response should be in each individual case. This is a factor that was considered at length in *Michael* v *Chief Constable of South Wales Police*, *supra*, in relation to the police at paragraphs 29 *et seq*, and in relation to other emergency services at paragraphs 71 *et seq*. The second relevant factor is the difficulty faced by an emergency service in dealing with a particular incident. If the incident is truly an emergency, rapid action is required, on the basis of what will usually be incomplete information. Judgments have to be made quickly in conditions that are both dangerous and uncertain. Any potential liability must reflect this. Of course it applies to emergency services when they are performing their essential function: fighting fires, combating crime and the like. It is less obviously relevant when, for example, the police are directing or warning traffic, in a situation that is known and understood and where the resources are adequate to the task in hand. More generally, the peculiar difficulties that confront the emergency services are less relevant in cases where they can be said to have taken charge of a situation, at least where adequate resources are available.

[82] The fire service and the police have, in *Capital & Counties* and *Michael*, been held to be subject to relatively restricted duties of care. This approach has not been extended to the ambulance service, however, which has been held subject to ordinary duties of care: *Kent* v *Griffiths*, [2001] QB 36. Two reasons are advanced for the distinction. First, the ambulance service functions as part of the health service, and thus provides services equivalent to those provided by doctors and nurses; this distinguished it from the police and fire service: *ibid* at paragraph 45. Secondly, the ambulance service normally deals with patients on an individual basis, just as a doctor does, and the risk of conflict among commitments is therefore less. The police and fire services, by contrast, owe their primary duties to the public at large; in the case of the police to achieve the prevention of crime and the detection of the perpetrators and in the case of the fire service to deal with outbreaks of fire wherever they occur. For these reasons the liability of the ambulance service cannot in my opinion provide a good guide to the liabilities of the fire service.

[83] I am accordingly of opinion that good reasons exist for restricting the duty of care incumbent on the emergency services. The solution that has been adopted is based on the fact that the emergency services generally act to deal with situations that are not of their own making. Consequently the common law limitation on liability for pure omissions applies, subject to the various qualifications on that principle. Where the emergency service makes matters worse than would have been the case had it not intervened, liability exists; that is clear from the first two claims were considered in *Capital & Counties*, and in my opinion that is a fair result, which is in any event conceded by the fire board in the present case.

[84] The other qualifications may present somewhat greater difficulties in individual cases. Thus where the fire service arrives at a fire and begins to fight it, it might be argued that it has

"taken control" of the situation, or has assumed some form of responsibility to the owners of the property or affected neighbouring properties. It is at this point in my opinion that the policy considerations discussed above are important. When it fights a fire, the fire service's primary duty remains to the public as a whole. Even in the vicinity of the fire, the duty may be owed to a number of proprietors whose interests are in conflict. Perhaps more importantly, the fire service is almost invariably dealing with a hazard created by others or by the forces of nature, in an emergency situation and with incomplete information. In that situation it cannot in my opinion be said that the fire service is in a situation of "control", on any sensible meaning of that word. The notion of control may become relevant where, for example, the police are performing functions such as directing or warning traffic, when the situation is known and understood and the police are able to take charge of matters. It does not, however, apply to matters such as the fighting of a fire and the consequences of that task; fighting a fire is usually an attempt to achieve control. It follows in my opinion that the argument that the fire service is in control of the situation when it fights a fire should normally be rejected. That must I think apply to the present case.

Scottish authority

[85] We were referred by counsel to four Scottish cases dealing with the liability of public authorities, and I should say something about each of these. The first case was *Duff* v *Highland and Islands Fire Board*, *supra*, where Lord Macfadyen held, *obiter*, that *East Suffolk* was distinguished on the ground that in that case the authority was exercising a mere power whereas in *Duff* they were acting under a statutory duty. That argument cannot I think be supported, on the authority of *Gorringe* v *Calderdale Metropolitan Borough Council*, [2004] 1 WLR 1057, at paragraph 3 per Lord Steyn, paragraph 38 per Lord Hoffmann and paragraph 71 per Lord Scott, where it was held that the existence of statutory powers and duties was irrelevant to common law negligence. Lord Macfadyen further held, again obiter, that if the destruction of the pursuers' house had been caused by the fire authority's negligent failure to extinguish a chimney fire completely, he would have regarded the causal connection between the negligence and the loss as clear, and that the authority, by attending the chimney fire and fighting it, placed themselves under a duty to the owners of the property and neighbours to exercise reasonable care to extinguish the fire. That is contrary to the decision in *Capital & Counties*.

[86] In *Burnett*, Lord Macphail held that a fire authority whose officers had been called to a fire might be liable in negligence for failure to extinguish it properly, with the result that it reignited, causing significant damage. Proof before answer was accordingly allowed. Lord Macphail's opinion is careful and thorough, and provides a helpful analysis of the authorities in this area. It was of course followed by the Lord Ordinary. Nevertheless it proceeds, I think, on a misunderstanding of the notion of pure omission (paragraphs [33]-[36]). Lord Macphail expresses the opinion that "the law of Scotland does not draw a distinction between acts and omissions comparable to that which appears to exist in the English law of tort between misfeasance and non-feasance". Even if some distinction were recognized between acts and omissions along the lines of English law, when firefighters attended at the scene of the fire they could not be said to be "doing nothing"; they were taking active steps to fight the fire. Consequently what was involved was not a pure omission as understood in English law.

[87] The problem with that analysis is that it does not recognize the underlying feature of the work of the fire service, namely that it deals with situations created by others or by the forces of nature. That is why any failure to act by the fire service is considered a pure omission; there is in general no duty to act to prevent damage caused by third parties or by the forces of nature. It also explains why, if a member of the emergency services or other rescuer intervenes and does so negligently, there will be no liability unless the result is worse than would have occurred without intervention: compare *The Ogopogo*, *supra*, referred to at paragraph [61] above. Furthermore, I am of opinion that the foregoing propositions, that a failure to act by the fire service is properly characterized as a pure omission, that there is in general no duty to act, and that if there is intervention there is no liability in negligence unless the result is worse than would have occurred without intervention, all follow from the nature of the task confronted by the fire service: dealing with a hazard created by another person or by the forces of nature. That is an inevitable feature of the task, and it does not depend in any way on specialties of Scots or English law. For that reason I must respectfully disagree with this part of Lord Macphail's analysis.

[88] Lord Macphail then considered the statutory framework within which the fire service operated, and indicated that the pursuer's case was not founded on breach of statutory duty but on common law negligence. The argument had been that in carrying out their statutory functions the fire service had brought about a relationship between themselves and the pursuer sufficient to give rise to a duty of care at common law. The negligence founded on was said to have occurred in the course of a routine operation, the containment and extinction of a fire, and the existence of a common law duty was entirely consistent with the fire service's due performance of their statutory duties. Nor was such a duty liable to discourage such performance (paragraph [41]). It is correct that a common law duty of care is consistent with statutory duties. Nevertheless, for such a duty to arise, I am of opinion that one of the four exceptions to the general rule of non-liability for pure omissions, as set out in paragraph [] above, must exist. That follows from the characterization of inaction by the fire service as a pure omission, as explained above.

[89] The question of proximity was considered at some length (paragraphs [46] *et seq*). Lord Macphail was critical of the reasoning in *Capital & Counties*, observing that he did not understand the role of proximity in that case. In particular, it had been said that there was insufficient proximity for the creation of a general duty of care to the property owner but nevertheless sufficient proximity to give rise to a duty not make matters worse. I consider that there is some force in this criticism; the reasoning in *Capital & Counties* proceeds almost entirely on the basis of proximity, whereas it has, I think, now been accepted that policy must play a part as well as proximity, and that is certainly how I would prefer to analyze the position of the fire service and other emergency services. As a matter of policy, I would prefer to say that a duty is owed by the fire service but, for reasons of policy, the scope of that duty is confined to cases where matters are made worse by intervention. Lord Macphail then referred to the *East Suffolk* case, and observed that it did not appear to have been followed in Scotland so far as it restricted liability to making matters worse. That may well be correct, but the absence of Scottish authority does not mean that the underlying principle is unsound; that principle is based on the fundamental fact that the damage tackled by an emergency service is normally caused by someone else or by the forces of nature.

[90] Thereafter Lord Macphail observed that it was arguable that, when a fire brigade was fighting a fire, it owed a duty not to the public at large but to the limited class of those whose lives or property were endangered, including neighbouring proprietors (paragraph [52]). For reasons already discussed I consider that that would be dependent on holding that the fire brigade had taken control of the situation or had in some way undertaken responsibility, but that normally such a conclusion should be resisted because there is no "control" in any proper sense: see paragraph [84] above. This is founded on policy considerations that apply to the emergency services, and in particular the fire service when it is fighting a fire. Finally, at paragraphs [57] and [58] Lord Macphail indicated that it was inappropriate to proceed on the basis of assumption of responsibility because the elements of a *Hedley Byrne* relationship did not exist. It was also inappropriate to proceed on the basis of general reliance (the Australian doctrine) because it had been disapproved in *Stovin* v *Wise*. It might be better, he thought, to say that the pursuer was dependent on the fire service for the protection of his property against damage or destruction by fire. Whether property was vulnerable to fire depended entirely on the skills of the firefighters. Consequently they should have sought possible causes of reignition, acting as firefighters of ordinary competence exercising reasonable skill and care. The problem with this analysis in my opinion is once again that it assumes that there was a duty to act to deal with a hazard that had been caused by the actings of a third party or the forces of nature.

[91] Although I have expressed disagreement with part of the reasoning in *Burnett,* I should pay tribute to a carefully reasoned opinion which casts considerable light on the problems that arise in this area of law. A further Scottish case dealing with the liability of the emergency services is *Gibson* v *Orr*, *supra*, which dealt with the liability of the police for failing to give any warning of a serious hazard on the road. I have already commented on this case at paragraph [62] above; it appears to me that it is a case where the police took control of a situation in such a way that a duty of care was assumed. In my opinion that analysis is one that may frequently apply to work performed by the police in controlling traffic or dealing with hazards on the roads. It would not, however, normally apply to work performed in the prevention of crime and the detection of the perpetrators of crime.

[92] Finally, I should mention the last Scottish case, *Mitchell* v *Glasgow City Council*, *supra*. This case involved a claim by the widow and daughter of a tenant of the local authority who had died of wounds following an assault by another tenant. The other tenant had previously threatened to kill the deceased, and the local authority was aware of a long history of threatening and aggressive behaviour by the other tenant towards the deceased. It was claimed that the authority were, in consequence of their common law duty of care, under an obligation to evict the assailant and to warn the deceased about the threats. That argument was rejected, essentially on the ground that the law does not impose a positive duty to protect others against harm inflicted by a third party. The decision is accordingly entirely consistent with the approach taken in *Capital & Counties* and *Michael*. The general approach adopted by Lord Hope, who delivered the leading opinion, was the tripartite test propounded by Lord Bridge in *Caparo*, although it was emphasized (paragraph [26]) that that test should be directed not merely to whether a duty of care existed but to the scope of any duty of care. It was the scope of the duty that was in issue in *Mitchell*; it was accepted that the local authority owed duties to their tenant and his family in relation to matters such as the state of

the property leased and the common parts. Nevertheless that duty did not extend so far as protecting him from harm threatened by a third party.

[93] Although the tripartite test was followed, it is clear from the opinions that policy considerations were taken into account. Lord Hope (at paragraph [15]) emphasized the reasons for the principle that there is no liability for mere inaction where the defender has played no part in the harm that has occurred. At paragraphs [21] *et seq* he emphasized that something more than foreseeability was required for liability, together with the inability of any single general principle to provide a practical test that could be applied in every case. Consequently the whole circumstances of the case must be examined in determining whether a duty of care should exist, and if so what its scope should be. At paragraph [29] he suggested that public policy should govern the scope of any duty of care. I respectfully agree with such an approach; it seems to me that for reasons already discussed public policy must be an essential ingredient in assessing whether there exists a duty of care of a given scope. Lord Brown (at paragraphs [79]-[80]) emphasized the general significance of the decision and the question of whether it was appropriate, as a matter of policy, that any landlord who knows about a dispute involving one of its tenants should owe a common law duty of care to protect the tenant's safety. Thus the case can be seen as supporting the view that policy is of vital importance in determining the scope of a duty of care, and that policy must be applied on an essentially casuistic basis.

Conclusion

[94] For the foregoing reasons I am of opinion that the reclaiming motion should be allowed, and the action dismissed. I would add two final observations.

[95] First, the issue in this case relates to damage to property, not injury to the person, and the foregoing discussion of the law proceeds on that basis. In a number of English cases it has been said that no distinction can be drawn between injury to the person and damage to property. Logically that is no doubt correct; the principle that there is generally no liability for a pure omission, if used literally and without modification, must apply to any form of injury or damage caused by a third party or the forces of nature. Nevertheless this result troubles me. In my opinion a distinction might properly be drawn between injury to the person and damage to property. In part this reflects the fact that the latter is usually covered by insurance whereas the former is not. More important, however, is the fact that the life, health and safety of the individual possess a greater moral significance than the security and integrity of any property; a normal person will attach greater importance to his safety than to his property. The parable of the good Samaritan would lose nearly all of its force if the man who went down from Jerusalem to Jericho had merely dropped his purse, which the Samaritan saw and returned to him.

[96] Consequently I hope that in an appropriate case the law might develop in such a way that, at least in clear cases where action can be taken without danger to the rescuer, the officers of a public service such as the fire service or police are obliged to take action to rescue persons in danger. I realize that this must require a further exception to the general rule that there is no liability for a pure omission. I think, however, that policy considerations can be made to prevail over a mechanical application of the rule. I note that such a result has been achieved in French law by article 223-6 al 2 of the Code pénale, which makes it an offence deliberately to fail to help a person in peril where there is no risk to oneself or to others in doing so. While this provision of

itself imposes criminal liability, breach of the duty gives rise to civil liability. German law is similar; section 323c of the Strafgesetzbuch (the German criminal code) provides that a person who fails to provide help in cases of disaster or imminent danger or distress, although such help is necessary and reasonable under the circumstances and does not involve substantial danger for the rescuer, is guilty of an offence. As in France, breach of the criminal provision gives rise to civil liability in delict. If our law of delict were to develop in that direction, there would obviously have to be an imminent danger to a person and rescue would have to be possible without serious risk to the rescuer, but a rule could be developed around those limitations. Justice in my opinion requires nothing less.

[97] Any such development would mean that policy considerations prevailed over the literal and mechanical application of established law. This leads on to the second observation that I would like to make: the importance of policy in this area. The main development in the law of negligence over the last 25 years or so has perhaps been a recognition that the notion of proximity is limited in its usefulness, and that the question of whether there is sufficient to give rise to a duty of care of a given scope must depend ultimately on policy considerations. Thus an evaluative exercise is required, which takes account both of proximity, in the narrower sense of physical or causal connection, and policy considerations that are specific to the type of case under consideration. The result is that, as Lord Bridge stated in *Caparo* (at page 618), "the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognizable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes". Those varying situations, perhaps many in number, will determine the policy considerations that should govern the existence and scope of any particular duty of care. Such development may be incremental and by analogy with established categories, as suggested by Brennan J in *Sutherland Shire Council* v *Heyman* (1985) 60 ALR 1, at 43-44. Thus the past may guide the future. The critical point is that rules derived from existing case law should not be applied mechanically to new situations: instead it should be asked whether, as a matter of policy directed to the specific situation under consideration, a new analysis is required. The result would be a law of negligence that was less unified than in the past but which dealt more fairly with individual cases. That would in my opinion be a desirable development.