Handout for 4th December 2020

1. **Inferences to be drawn from a vehicle leaving the road**

Woodhouse v Lochs & Glens (Transport) Ltd 2020 S.L.T. 1203

Coach driving northwards on the A83 "Rest and Be Thankful" on a wet and windy day in March. The coach stopped stopped at a layby, then pulled out and accelerated up to 40-45mph before being struck by a gust of wind from the left that pushed it across the road. The driver slowed, corrected her position, and was then struck by another gust from the right that pushed the bus off the road onto the verge. It travelled along the verge before toppling sideways and rolling over, landing up just short of the edge of Loch Restil. A number of passengers were injured, including Mr Woodhouse.

Photograph 5: The coach in its rest position after rolling 360º down the embankment

Damages were agreed and the pursuer moved to have the defenders ordained to lead at proof. Lord Arthurson refused that motion. At first instance, the judge held that although there was an inference of negligence that the defenders had to rebut, and that the weather conditions were not so unforeseeable as to do that, he was satisfied that the driver's conduct had not been negligent.

The Inner House were not impressed:

"[34]. With all these matters firmly in mind, the court has concluded that, despite the care which he has clearly taken in his assessment of the testimony the Lord Ordinary,: (i) misapplied the maxim *res ipsa loquitur* to the facts; (ii) was plainly wrong in holding that the speed of the bus did not make it less easy to handle; (iii) failed to consider relevant evidence; (iv) has misunderstood the driver's testimony on speed; and (v) reached a conclusion which cannot be explained or justified.

[35]. The most problematic flaw is the Lord Ordinary's application of the maxim *res ipsa loquitur* . The use of the maxim in the context of road traffic cases is a familiar one. It was a central feature in *O'Hara v Central SMT Co* . As the Lord President (Normand) pointed out (at p.377 (p.209)), under reference to Lord Shaw's speech in *Ballard v North British Railway Co* (at p.54 (p.227)), *res ipsa loquitur* is not a legal principle. It is a presumption of fact, whose force depends on the circumstances of each case. **When it applies, the defender must demonstrate that the accident occurred without fault on his part. It is not enough to proffer a possible alternative non-negligent explanation. The defender must establish facts from which it is no longer possible to draw the *prima facie* inference** (*Smith v Fordyce*, Toulson LJ at para.61, cited in *David T Morrison & Co Ltd v ICL Plastics Ltd*, Lord Reed at 2014 S.C. (U.K.S.C.), p.232; 2014 S.L.T., p.797, para.37 agreeing with Lord Hodge at p.245 (p.805) para.98).

[36]. The Lord Ordinary correctly determined that the maxim applied. Buses which are driven in a safe and proper manner and at a reasonable speed do not leave carriageways of major trunk roads in winds of the relatively common velocity present at the time of this accident. The defenders thus required to prove, on the balance of probabilities, that the accident had occurred without negligence on the part of their driver. Unfortunately, the Lord Ordinary did not approach the matter in this way. **A different Lord Ordinary had declined to ordain the defenders to lead at the proof. Such an order would perhaps have reflected with greater clarity the correct application of the maxim in the circumstances admitted on record**. Be that as it may, the Lord Ordinary, in his approach to the proof, returned the onus to the pursuer to prove what the Lord Ordinary described (at p.219 (p.10) para.32 of his opinion) as his only suggestion of fault; that being, according to the Lord Ordinary, the actions of the driver, and in particular the speed at which the bus was being driven. That was not the manner in which the pursuer's case was pled or presented. The pursuer did not need to advance any suggestion of fault. A *prima facie* inference of negligence existed by virtue of the facts admitted on record. As the pursuer submitted, the Lord Ordinary effectively required the pursuer to prove negligence twice."

In *Kennedy and ors v MacKenzie* [2017] CSOH 118 a similar motion was also refused – wrongly again, as it turned out.

2. <u>The dangers of varying the timetable</u>
AP v NHS Lanarkshire (Sheriff Holligan, 2/10/20)

A clinical negligence proof was discharged due to lack of court time. The pursuer had some uncontentious productions to lodge and tried to do so by motion. The sheriff clerks insisted that a motion was enrolled to vary the timetable. The pursuer did so and the defenders promptly lodged a number of expert reports.

The pursuer considered that the reports made the claim unlikely to succeed and so abandoned.

The defenders were awarded expenses of process but restricted to 75%.

Lesson – when varying the timetable to lodge productions late, restrict the variation to your productions.