

Compass Chambers



From the mountain to
Meadows - where next
for scope of duty
arguments?

Kay Springham KC and Kate Bennett, Advocate

What we'll talk about

The Supreme Court decision in Khan Meadows

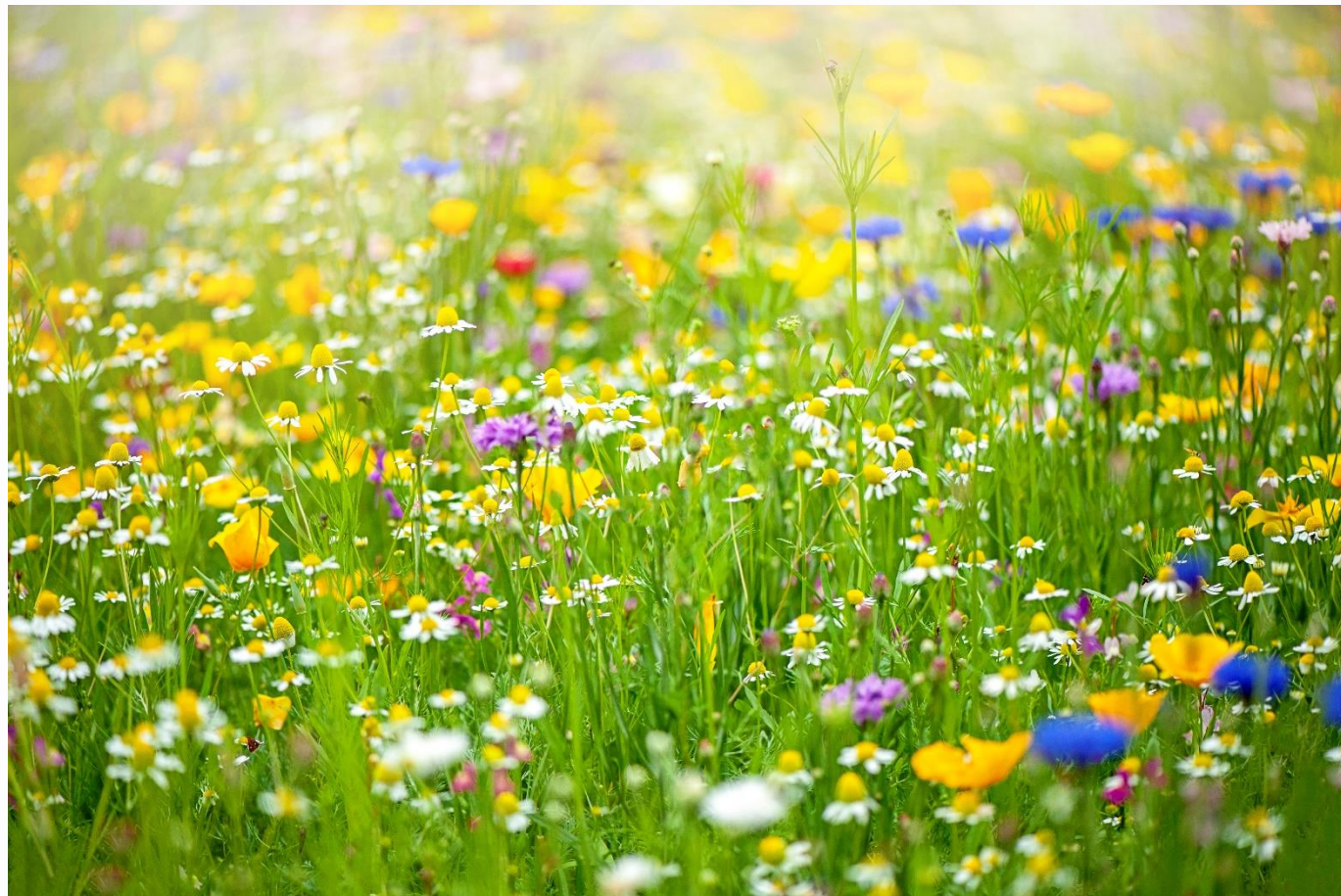
What can be taken from Khan

How has Khan been applied in Scottish courts so far

The practical ramifications of Khan for practitioners



Khan v Meadows [2022] AC 852





The facts – GP asked to advise on whether mother at risk of giving birth to child with haemophilia. GP carrying out wrong test. Mother incorrectly reassured and subsequently giving birth to boy with haemophilia. Child was also born with autism.

What was not in dispute – had mother known of risk of unborn child having haemophilia, would have terminated pregnancy. GP accepted liability for additional costs of bringing up child with haemophilia (agreed at £1.4m)

Issues between the parties – was the GP also liable for additional costs of bringing up child with autism?



First instance decision – all additional costs allowed (agreed at £9m). Judge applied traditional ‘but for’ test.

Reversed by Court of Appeal

Appeal to Supreme Court dismissed – the scope of the GP’s duty did not extend to the risk of a foreseeable unrelated disability (the autism)

Interest of decision lies in (i) excursus by the majority into the conceptual structure of the law of tort/delict, and (ii) the criticism by the minority of the need to do so.

Majority decision – the six questions

(1) actionability

(2) scope of duty

(3) breach

(4) factual causation

(5) Duty nexus

(6) Legal responsibility

Application to the facts (paras. 67- 68)

(1) Economic costs of caring for disabled child **actionable**? Yes

(2) Service provided by GP concerned a specific risk – giving birth to a child with haemophilia – this was the **scope of GP's duty**

(3) **Breach of duty** – was admitted

Application to the facts (cont'd)

(4) Factual causation established – lost opportunity to terminate pregnancy.

(5) Duty nexus question indicated no duty on GP re unrelated risks which might arise in any pregnancy

(6) Legal responsibility - for foreseeable consequences of birth of a boy with haemophilia.

Scope of duty and duty nexus (Qs 2 and 5)

SAAMCO

– negligent valuers – fall in property market

- Had valuers not been negligent, banks would not have entered into transactions
- ‘but for’ approach indicated banks could recover whole loss

- Focus should be on asking – what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?

Scope of duty and duty nexus (cont'd)

Negligent valuer not responsible for **all** consequences of commercial transaction

How much of the losses fall within the responsibility of the valuer? ('duty nexus')
Answer - responsible only for the consequences of information being wrong

Use of the counter-factual question



The mountaineer's knee



So, what's
all that got
to do with
clinical
negligence?

In many, probably a large majority of cases, scope of duty principle results in loss being within scope of duty Ds' duty

In every case, need to consider 'the nature of the service which the medical practitioner is providing in order to determine what are the risk(s) which the law imposes a duty on (*her*) to exercise reasonable care to avoid.'

Is Khan the new Donoghue?

Excursus setting out conceptual structure of whole tort of negligence is strictly speaking *obiter*

Trenchant disagreement by Lords Burrows and Leggatt (who agreed on the result)

An 'esoteric new roadmap of negligence' with the potential to complicate negligence litigation?



From Meadows to the Grampians

D v Grampian Health Board

Lady Wise, 7 September 2022

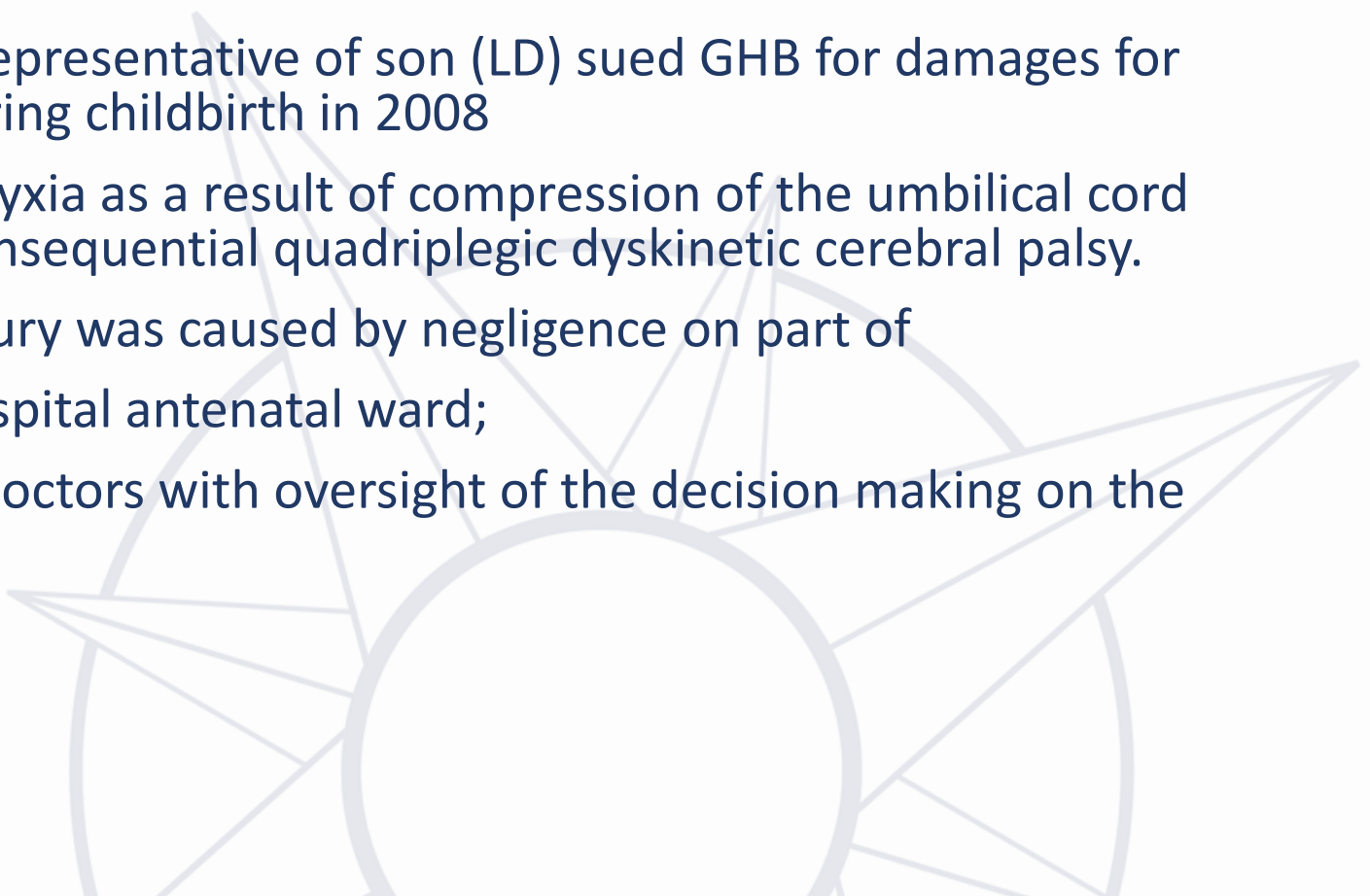
[2022] CSOH 63

2022 GWD 30-445



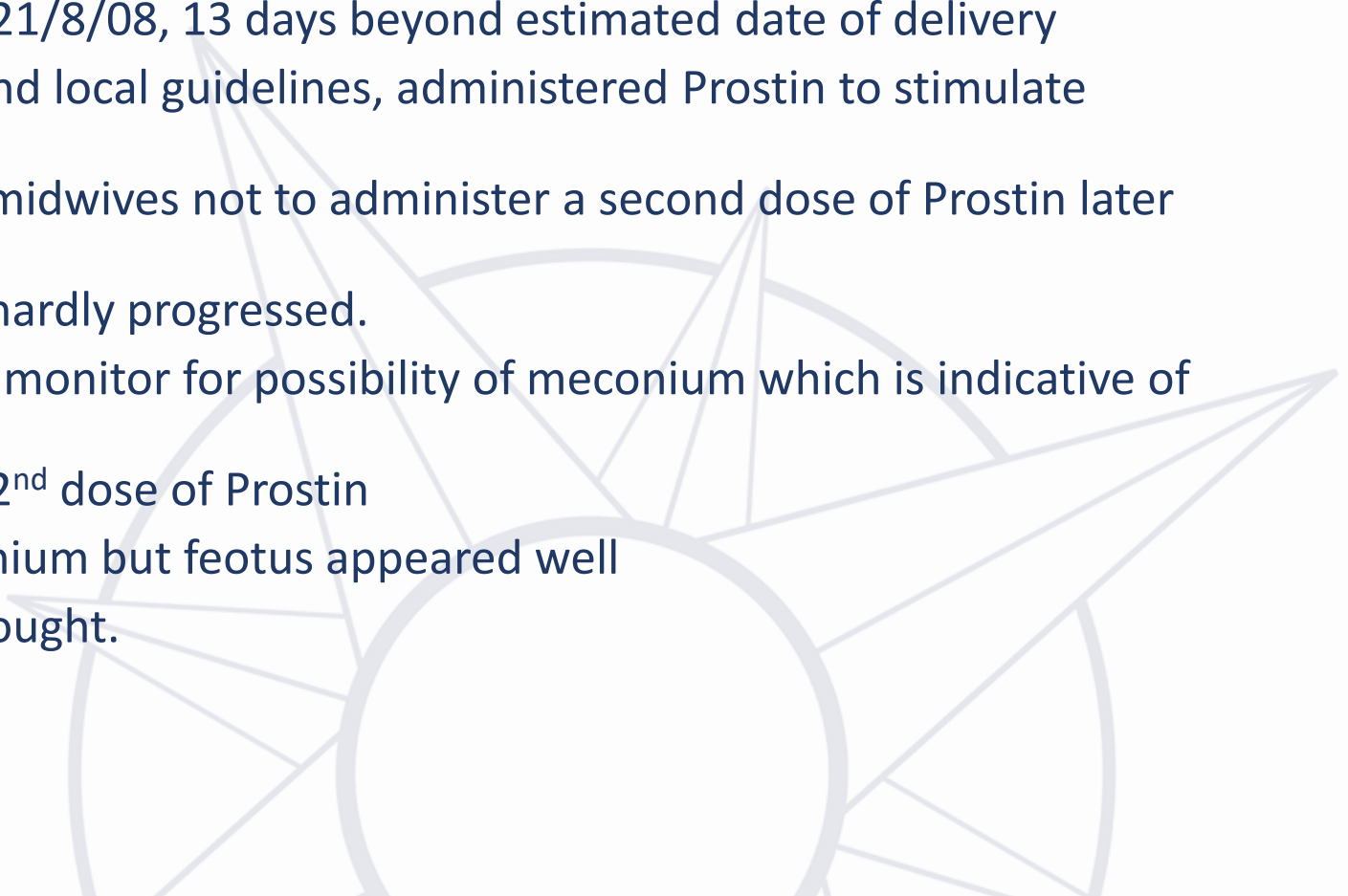


The Claim

- Pursuer - mother as legal representative of son (LD) sued GHB for damages for injury sustained by him during childbirth in 2008
 - Suffered severe acute asphyxia as a result of compression of the umbilical cord shortly before birth and consequential quadriplegic dyskinetic cerebral palsy.
 - It was claimed that LD's injury was caused by negligence on part of
 - (i) midwives in the hospital antenatal ward;
 - (ii) certain unnamed doctors with oversight of the decision making on the ward; and
 - (iii) the registrar.
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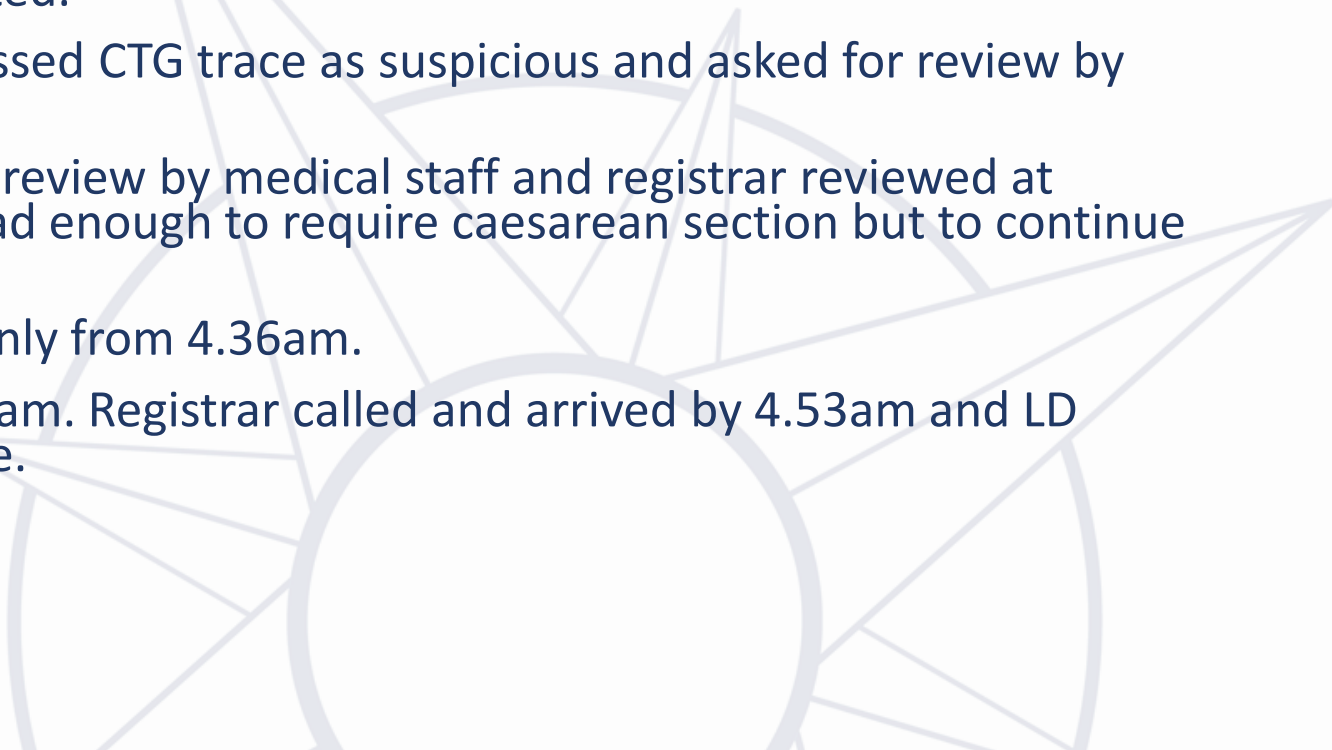


The Facts

- Pursuer admitted to hospital 21/8/08, 13 days beyond estimated date of delivery
 - In line with normal practice and local guidelines, administered Prostin to stimulate contractions.
 - Decision taken by one of the midwives not to administer a second dose of Prostin later that evening.
 - Over following 2 days labour hardly progressed.
 - On 23/8 midwives decided to monitor for possibility of meconium which is indicative of foetal distress
 - Decision taken to administer 2nd dose of Prostin
 - Continued suspicion of meconium but feotus appeared well
 - No specific medical reviews sought.
- 



The Facts

- No progress in labour - on evening of 23/8 midwife called for medical review.
 - Obstetric registrar reviewed. Decided to transfer pursuer to labour ward.
 - CTG commenced. Meconium noted.
 - At 3.45am on 24/8 midwife assessed CTG trace as suspicious and asked for review by senior midwife.
 - At 3.50 senior midwife asked for review by medical staff and registrar reviewed at 4.10am. Decided that CTG not bad enough to require caesarean section but to continue monitoring.
 - Foetal heart rate dropped suddenly from 4.36am.
 - Foetal bradycardia noted at 4.45am. Registrar called and arrived by 4.53am and LD delivered as soon as was possible.
- 



Evidence

- Mechanism of injury agreed - caused by sudden descent of LD's head causing cord occlusion, very shortly before delivery (just before 4.43am). Also agreed that had LD been born by 4.50am he would probably not have suffered any brain injury.
- Pursuer led evidence from a midwifery expert and consultant in obstetrics and foetal medicine - opined that had it not been for the midwives' failures to give Prostin and to refer to the medical staff and/or to respond appropriately to the finding of possible meconium staining, LD would have been delivered well in advance of 4.50am on 24/8; and the registrar ought to have proceeded to perform a caesarean section at 4.10am
- Defenders led evidence from a professor of clinical nursing and midwifery and a professor in obstetrics - each gave evidence that they would have acted as the midwives and/or the registrar had on the available information.



The Decision on Breach of Duty

- Decree of Absolvitor
- Parties agreed that appropriate guidance on breach of duty and correct approach to competing expert evidence provided by Lord Hodge in ***Honisz v Lothian Health Board*** 2008 SC 235
- Reaffirms ***Hunter v Hanley*** 1955 SC 200
- And guidance on application of ***Bolitho v City and Hackney Health Authority*** [1998] AC 232
- Lady Wise in fact preferred the defenders' skilled witnesses



Obiter – Scope of Duty and Causation

- Ref paras [168] – [175]
- Pursuer's contention – but for the midwives' breach of duty, LD would have been born before 4.50am, and so would have been born uninjured.
- Defenders argued - pursuer had failed to prove that LD would have been born uninjured. Even if she had, this overlooked the issue of "scope of duty", as distinct from traditional "but for" causation approach.
- Relied on ***Khan v Meadows***
- **Para 63** *"...it is necessary in every case to consider the nature of the service which the medical practitioner is providing in order to determine what are the risk or risks which the law imposes a duty on the medical practitioner to exercise reasonable care to avoid. That is the scope of duty question."*



Scope of Duty and Causation

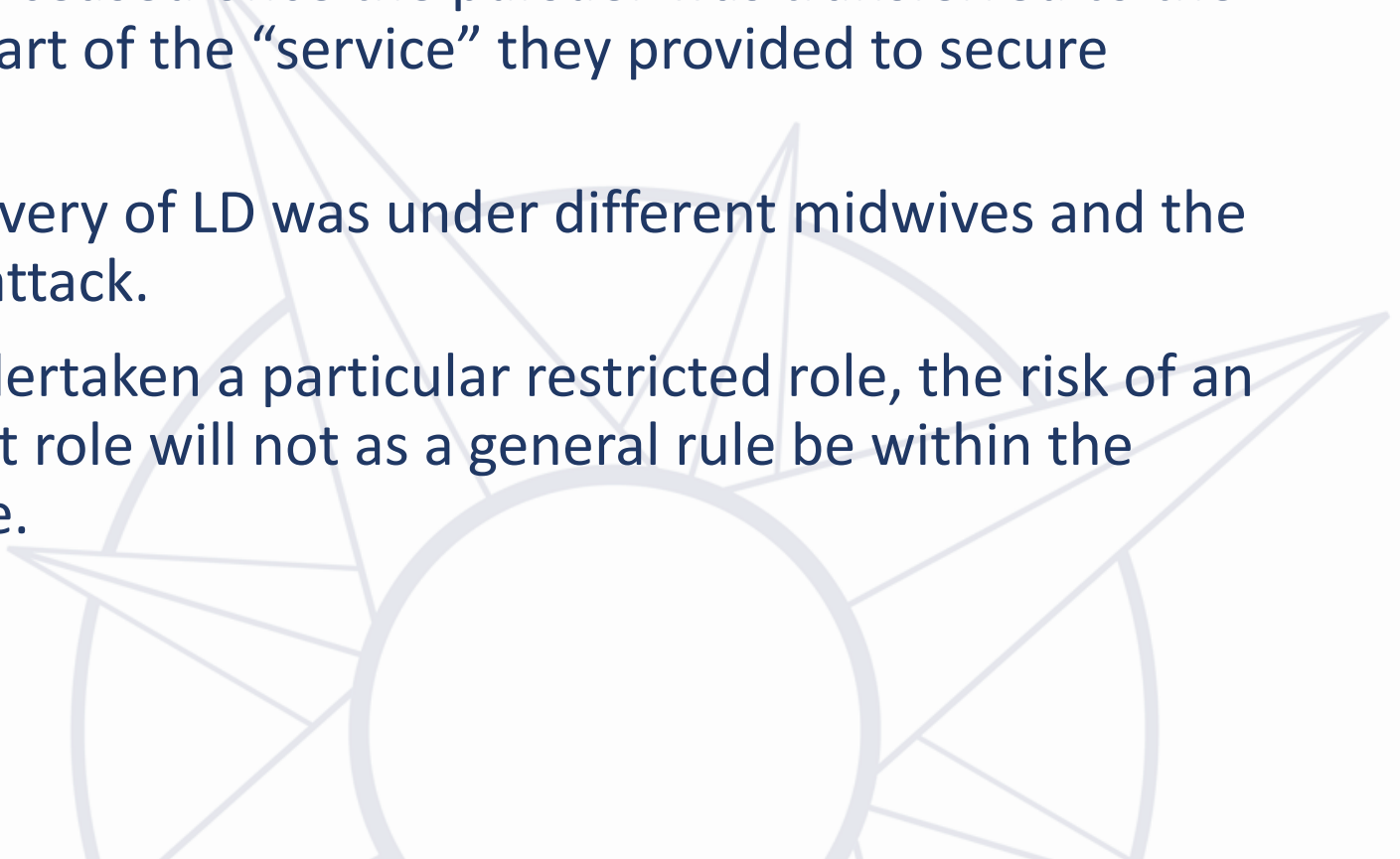
Defenders' argument

- Cause of LD's injury was unforeseen. Up to around 4.40am, LD was not injured.
- Midwives had seen pursuer over the previous 2 days on the antenatal ward.
- The issue was whether the alleged breaches of duty on the part of the midwives could result in liability for all the injuries suffered by LD prior to the birth regardless of the cause.
- Defenders applied the 6 sequential questions identified in *Khan*
- In doing so contended it was evident there was not sufficient nexus between the harm for which damages were sought and the subject matter of the midwives' duty of care: the cause of the damage was unrelated to any breach of duty by the midwives on the antenatal ward.



Scope of Duty and Causation

Defenders' argument

- The midwives' obligations ceased once the pursuer was transferred to the labour ward. It was not part of the “service” they provided to secure delivery of the baby.
 - The care provided for delivery of LD was under different midwives and the registrar who was under attack.
 - Where a midwife had undertaken a particular restricted role, the risk of an outcome unrelated to that role will not as a general rule be within the scope of their duty of care.
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Scope of Duty and Causation

Pursuer's argument

- *Khan* not in point.
- There was a link between the risk of cord compression and prolonged pregnancy; the evidence on that was unchallenged.
- The breaches of duty on part of midwives took place against the background of the known risks of such a prolonged pregnancy.
- By delaying induction, the midwives exposed the pursuer and LD to the specific harm that prompt induction would have avoided.
- Cannot distinguish induction of labour from labour itself – the harm was caused by the various delays and so naturally flowed from the breaches of duty.
- Direct link between breaches of duty and the damage to LD so scope of duty argument did not arise.



Scope of Duty and Causation Decision

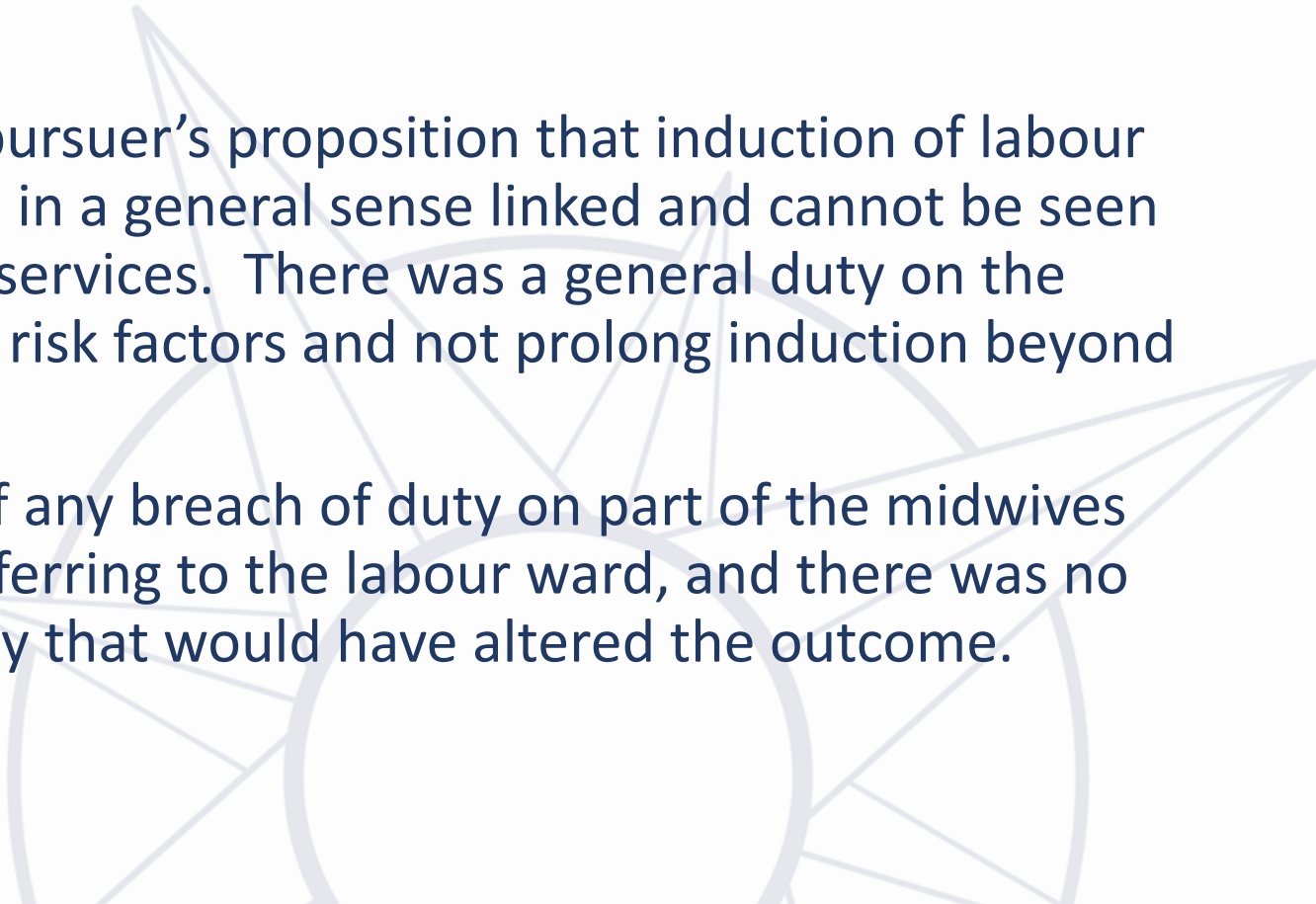
Lady Wise concluded:

- On basis of unchallenged evidence about how harm to LD occurred, that harm was too remote from his time on the antenatal ward for there to be necessary sufficient nexus between any breaches of duty on part of the midwives and the adverse outcome.
- No scope of duty issue arose for obstetric case; registrar's decision to monitor pursuer resulted in no attempt to deliver LD by the time bradycardia caused by cord occlusion occurred.
- Link between the registrar's decision to delay and harm caused was a direct one and causation on a traditional "but for" basis flowed naturally from that



Scope of Duty and Causation Decision

Reasoning of Lady Wise:

- Accepted up to a point the pursuer's proposition that induction of labour and subsequent delivery are in a general sense linked and cannot be seen as two completely separate services. There was a general duty on the midwives to take account of risk factors and not prolong induction beyond an acceptable time frame.
 - But the only consequence of any breach of duty on part of the midwives was a delay in pursuer transferring to the labour ward, and there was no evidence about how and why that would have altered the outcome.
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Scope of Duty and Causation Discussion

Did Lady Wise get it right?



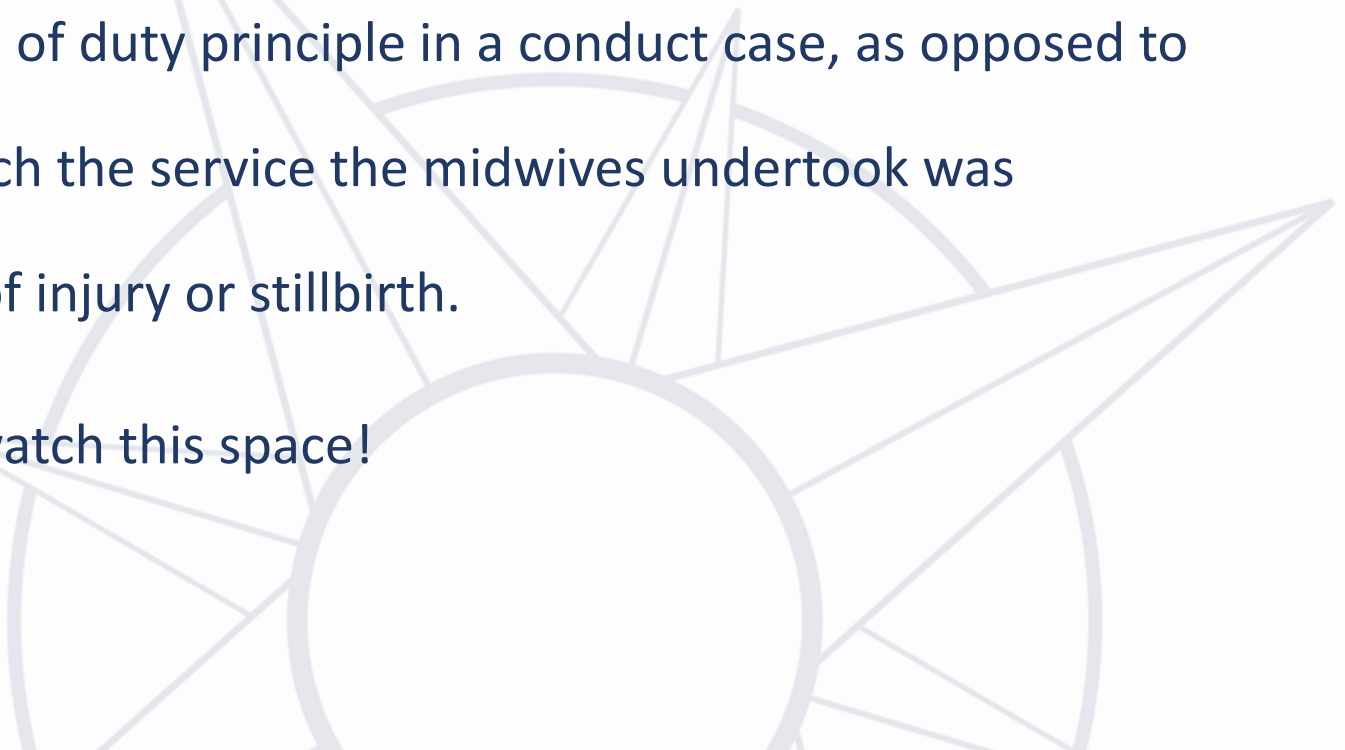


Scope of Duty and Causation Discussion

- The scope of duty principle is that a defender is not liable in damages in respect of losses of a kind which fall outside the scope of their duty of care.
- The majority in *Khan* appear to have accepted the argument that the scope of duty principle applies in all personal injury cases, even road traffic accidents where apportionment of risk is a banal exercise.
- They were also clear that there was no principled basis for excluding clinical negligence from the ambit of the scope of duty principle.



Scope of Duty and Causation Discussion

- *Khan* concerned the provision of negligent information/advice.
 - The midwives were not providing information or advice. Should their duty have been limited as it was in this case?
 - Is it appropriate to apply scope of duty principle in a conduct case, as opposed to an information/advice case?
 - Question - what is the risk which the service the midwives undertook was intended to address?
 - Answer (?) – to avoid the risk of injury or stillbirth.
 - Reclaiming motion marked – watch this space!
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From the Grampians to
.....drinks!



Compass Chambers



Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Kay Springham KC

Mobile:

kay.springham@compasschambers.com

Kate Bennett, Advocate

Mobile: 07870574318

kate.bennett@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com