

Public Authority Liability

A. The Demise of a Scottish Approach

In *AJ Allan v Strathclyde Fire Board* 2016 CSIH 3 the pursuers sought damages on the basis of alleged negligence on the part of the fire brigade after a fire re-ignited. The claim failed and the duty of care on the fire service was restricted: 'the fire service owed a duty of care to the general public, including the pursuers...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.' No breach of the latter duty of care was averred to have occurred.

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.

Burnett v Grampian Fire and Rescue Service 2007 SLT 61

Burnett concerned the duty of care owed by the fire service when responding to an emergency call. In *Burnett* the defenders attended a fire in the flat below the pursuers. They appeared to extinguish it but in fact failed to do so. The following day the fire re-ignited in the pursuer's flat and caused substantial damage. In *Capital and Counties v Hampshire CC* the Court of Appeal denied the existence of a duty in such a situation; it being held that the fire service was only under a duty not to make matters worse.¹ Whilst *Capital* was merely persuasive it may be noted that it was approved by the House of Lords in

¹ [1997] QB 1004.

Gorringe v Calderdale MBC.² Nevertheless *Burnett* held that, having attended a fire, a duty was owed to take all reasonable steps to both extinguish it and to guard against the risk of re-ignition. The duty was owed to those whose lives or property were endangered. *Burnett* is consistent with the stance adopted in the earlier Scottish case of *Duff v Highlands and Islands Fire Board*.³ The key question for Lord MacPhail in *Burnett* was whether the performance of the fire service's statutory functions gave rise to a duty at common law.

In *Burnett* it was argued that the defenders had merely omitted to act and that, therefore, no duty of care arose. It must be doubted whether the failure to extinguish the fire could be viewed as a 'pure' omission: 'it was an omission which occurred after they had gone into action and in the course of their firefighting activities.' More fundamentally, Lord MacPhail took the view that the law of Scotland does not draw a distinction between acts and omissions comparable to that which exists in English law between misfeasance and non-feasance. This is far more open to debate (given the lack of Scottish authority) but, it is submitted, makes perfect sense where a public authority is the defender. Where a private individual is concerned a decision not to impose a duty of care in respect of a 'pure' omission is motivated by a concern to safeguard individual liberty: 'the law does not compel us to be good Samaritans.'⁴ However, such concerns are much less relevant in the context of public authorities since those bodies are established by the legislature to fulfil prescribed aims: 'In some respects the typical statutory framework makes the step to a common law duty to act easier with public authorities than individuals. Unlike an individual, a public authority is not an indifferent onlooker. Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with

² [2004] 2 All ER 326.

³ 1995 SLT 1362.

⁴ J. Thomson, *Delictual Liability*, 3rd edn (2004) 71.

responsibilities, for the public good. The powers are intended to be exercised in a suitable case.⁵ In the case of a public authority the more relevant question is whether the defendant has a statutory responsibility to regulate or supervise etc. the area of activity within which the harm has arisen. Where such statutory responsibility exists the next question should be to determine whether a duty of care should be imposed. In making that determination I would submit that it is inappropriate to isolate so called 'pure' omissions from omissions which are part of an on-going activity. Instead a key factor, in determining whether a duty of care arises, is likely to be whether the public body has taken control of the situation. Thus, in *Gibson v Strathclyde Police* (referred to with approval in *Burnett*), it was held that a duty of care arose once the police had taken control of a hazardous road traffic situation.⁶ By doing so they had put themselves into '... a sufficiently proximate relationship with road users likely to be immediately and directly affected by the hazard as is sufficient for the purposes of the existence of a duty of care to such road users. That duty may extend not only to the manner of the exercise of that control but... to the relinquishment of it.'⁷ In *Burnett*, in a similar vein, it was observed that 'the fire officers were in control of the investigation of the state of the pursuer's flat, and were in a position to discover the hazard if they had exerted themselves to take reasonable care to do so.'

The policy concerns invoked by public bodies in such cases are not groundless. However, as was recognised in the earlier case of *Duff*, these can be adequately taken account of at the stage of standard of care: 'it is no doubt right that in operational matters much must be left to the professional judgement of the fire-fighters, but that can be achieved by applying a test analogous to the

⁵ *Stovin v Wise* [1996] AC 923, 935.

⁶ 1999 SCLR 661.

⁷ *Ibid* at 676.

professional negligence test in determining what amounts to negligence. It is going too far...to suggest that operational judgement should be immune from challenge.⁸ The imposition of a duty of care allows the interests of pursuers and defenders to be taken into account in a more balanced way. It encourages the holders of powers under statute to exercise due care in deciding when and how to make use of them. A highly restrictive approach to recovery against public bodies diminishes not only the deterrent effect of the law of negligence but denies pursuers the benefit of the compensation function.

B. Statute and the Common Law

Gorringe v Calderdale MBC sought to bring about a reconciliation between the law on actions for breach of statutory duty and common law negligence. In short if you could not sue on the statute you could not improve the position by bringing an action at common law:

"If the statute does not create a private right of action, it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care."

Given that actions on the statute are, beyond the realm of health and safety at work, very much the exception this approach possesses the potential to be of considerable benefit to public bodies. Whilst the intellectual incisiveness of the solution is admirable, *Gorringe* is problematic in that it fails to achieve an effective synthesis of all of the relevant case law. A point acknowledged in the case itself by Lord Hoffmann who said that:

"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."

The approach in *Gorringe* seems most persuasive in situations involving acts that, at least traditionally, would not (and often could not) be carried out by a private body: the functions concerned are inherently "public". Resistance to an action in negligence is much more entrenched in these cases. *Gorringe* is very much in line with *X(Minors)* where Lord Browne-Wilkinson expressed concern because the claimants were

"seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect

⁸ *Duff v Highland & Islands Fire Board* 1995 SLT 1362, 1363.

weaker members of society (children) from harm done to them by others. The scheme involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who under the general law are responsible for the child's welfare".

Criticism of *Gorringe* might be thought to be overstated as Lord Hoffmann acknowledges that the exercise of statutory functions will bring into play a number of recognised common law duties. Such duties are owed by public bodies in a variety of situations even though the need to exercise particular statutory responsibilities explains why the public body chose to act. The Scottish case of *K2 Restaurants* provides a good example. There the pursuers' property was damaged when a portion of brickwork forming part of a gable wall and chimney flues adjacent to the pursuers' premises collapsed. The portion of brickwork that collapsed was from an exposed gable left after demolition had been carried out under the Building (Scotland) Act 1959. The pursuers brought an action against the local authority claiming that the defenders knew or ought to have known, on completion of the demolition works, that they had left the former mutual division wall in a condition which presented a foreseeable danger to persons and adjacent property in the event of high winds. The defenders maintained, given the statutory context, that a common law duty of care did not arise. This was rejected:

"I have reached the view that this is a clear case of a common law breach of duty as contended for by Senior Counsel for the Pursuers. The physical proximity of the pursuers' premises to the part of the tenement on which work was being carried out was such as to give rise to a clear and direct duty on the defenders to take reasonable care not to cause injury and damage to that property."

It was noted that:

"In accordance with the categories set out in *X v Bedfordshire*... if the extent of the Pursuers' case was to claim the careless performance by the defenders of a statutory duty then no common law duty of care would arise. On the other hand, if the statutory duty gives rise to a common law duty of care and there is a breach of that duty, liability attaches. In my view it is important to distinguish between the decision made by the Defenders to serve the section 13 notice and their subsequent actions in failing to have regard for the safety of persons and property in the vicinity of the work being carried out. The decision to serve the notice and carry out the work necessarily involves an element of discretion and there is no question of that being challenged here. Once the defenders had made the decision to demolish part of the tenement, a relationship was created between them and

at least the neighbouring proprietors that gave rise to a common law duty of care."

It might be argued that *Gorringe* is not problematic once we acknowledge that orthodox common law duties of care will still be owed; i.e. those duties which arise in the case of private citizens and corporations in the normal course of things. Public bodies are similarly bound unless statute provides a defence. On this approach responsibility often appears to turn on the historical accident of whether there have been prior proceedings against a private body which gave rise to a common law duty. In *Sargent v Secretary of State* the widow of a deceased driver sought damages against the local authority on the basis that there should have been a sign warning of the hazard of buses, a solid barrier and traffic lights.³⁵ Lord Clarke upheld the claim on the basis that a highways authority have a duty to take reasonable care to remove hazards from the road. C19 Scottish authority on liability in negligence was seen as relevant at this juncture; for example, *Fraser v Magistrates*. There the local authority was held to be under a common law obligation to fence a dangerous section of road; a decision unsullied by consideration of the authority's statutory obligations. Viewed through C21 eyes the situation in *Sargent* might be seen as having concerned *Stovin v Wise* in that the pursuer's complaint was that the local authority had failed to exercise its statutory powers. *Stovin* was not seen as relevant to the decision and its complexities did not stand in the way of the claimant.

C. The Police and Employer's Liability

In *Rathband v Chief Constable* [2016] EWHC 181 PC Rathband ` was on duty in a police vehicle...In the early hours of the previous day Raoul Moat, who had recently been released from prison, had shot and injured his former partner and had killed her current partner...Moat made a 999 call in which he outlined his supposed grievances against the police and made threats to kill or injure police officers. He concluded by saying that he was "hunting for officers now". Less than nine minutes later, he shot PC Rathband in the head at close range.' The claimants say that the police owed PC Rathband a duty of care to warn him of the threats made by Moat, that they were negligent in failing to issue an immediate warning, and that if an appropriate warning had been issued, PC

Rathband would not have been (as he was later to describe his position) "a sitting duck". Although their pleaded case ranged more widely, at the trial the claimants' case focused almost entirely on the absence of a warning.

It was held that the Chief Constable's duty of care ` will be excluded, or at least is more likely to be excluded, in cases involving operational decisions concerning the investigation or prevention of crime which are taken under pressure, whether of time or due to other circumstances. That will be a particularly important consideration in circumstances where there is a risk that imposition of a duty would give rise to "defensive policing".' The claim in *Rathband* failed as ` the public interest in the performance of the Chief Constable's duty as a quasi employer is outweighed by the public policy represented by the *Hill* principle and that it would not be fair, just and reasonable for a duty of care to be owed in the circumstances.

The arguments

However, the second way in which such a claim may be put, and the way in which the claimants do put the claim, is that the relationship between a Chief Constable and an officer in his force is a relationship akin to employment, so that a Chief Constable owes the officer a non-delegable duty of care to devise and operate a safe system of work: see in particular *Mullaney v Chief Constable of West Midlands Police* [\[2001\] EWCA Civ 700](#), which is considered further below. This way of putting the case avoids the need to establish a relationship of proximity between individual officers. The relevant relationship is between the Chief Constable and the injured officer, which is itself a relationship of proximity. Accordingly, at least so far as this second way of putting the case is concerned, the requirements of foreseeability and proximity are satisfied.

The Law

(1) The starting point is that a Chief Constable owes to officers within his force a non-delegable duty to take reasonable care for their safety by ensuring both the provision and operation of a safe system of work. That is a different starting point from that which applies in cases by members of the public, where the general rule in the absence of any assumption of responsibility is the exclusion of a duty to protect against harm caused by criminals pursuant to the *Hill* principle.

(2) The duty as a quasi employer may, however, be excluded as a matter of public policy (or because it would not be fair, just and reasonable for such a duty to exist) by reference to the *Hill* principle.

(3) The duty will be excluded, or at least is more likely to be excluded, in cases involving operational decisions concerning the investigation or prevention of crime which are taken under pressure, whether of time or due to other circumstances. That will be a particularly important consideration in circumstances where there is a risk that imposition of a duty would give rise to "defensive policing". These are the kind of circumstances which have been described as falling within "the core principle of *Hill*" (e.g. *Robinson* at [26]) or which involve the performance of the "core functions" of the police (*Robinson* at [46] and [50]). In such cases the important public policy represented by the *Hill* principle is likely to outweigh the public interest in the performance of the Chief Constable's duty as a quasi employer.

(4) What matters, therefore, is the nature of the decision that falls to be made. Save perhaps in wholly exceptional circumstances which it is unnecessary to consider in the present case, that will be so regardless of whether the circumstances alleged to amount to a breach of any duty are particularly egregious (*Robinson* at [49]).

Many policing decisions involving the performance of the "core functions" of the police will affect the safety of members of the public as well as of police officers. It would be anomalous if, in such cases, a private law duty of care was owed to police officers as a result of their quasi employment relationship with the Chief Constable when it is clear from the *Hill* line of cases that no such duty is owed to members of the public. Application of the principles summarised above will mean that, even if the starting points in the two cases are different, this anomalous result does not arise.

Focussing on the nature of the decision which Superintendent Farrell had to make, as distinct for the moment from whether the decision which she made was right or wrong, the decision fell clearly, in my judgment, within the scope of the core *Hill* principle. It was an operational decision which had to be taken under considerable pressure of time. It involved the weighing of a number of factors, including public safety as well as the safety of police officers. It was directly concerned with the investigation and prevention of crime. To impose a

duty of care owed to police officers in these circumstances would plainly give rise to a risk of defensive policing and would inhibit rapid decision making.

Ormsby v Strathclyde Police 2008 SCLR 783

A police officer (O) sought damages of £837,000 from her former employer (S) in respect of injuries sustained following the development of a riot during a police operation to evict protestors from a council owned building. Police officers, including O, had formed part of a cordon between the building and the protestors to enable council officers to board it up. In being ordered to remain in a cordon and attempting to control the protestors, the officers were subjected to extreme violence and hostility for which they were unequipped and unprepared, and despite a worsening of the situation the senior officer in charge (G) made the decision to continue with the operation.

O submitted that (1) G had failed to respond to the increased level of opposition and violence exposing her to an unnecessary and unreasonable risk of injury for which S were ultimately responsible; (2) due to G's negligence, she was subjected to a physical assault where she was struck on the sternum with a pineapple which caused injury and required her to take time off work, and more significantly, she had suffered psychological injury, developing post traumatic stress disorder with a concomitant major depressive disorder with anxiety and agoraphobia, whereas prior to the operation her health was fine. As a result she became withdrawn and socially isolated and suffered from many phobias, including a fear of people generally and the police. All of this forced her to retire from the police force and her quality of life was severely impaired and would remain so for the foreseeable future.

Held: Decree for £3,000 granted.

(1) The injuries to the officers were foreseeable due to the deterioration of the situation and, based on the particular facts of this case, there was a duty of reasonable care owed to O which had been breached by the decision taken by G as officers continued to be deployed even once the risk of serious injury had become apparent.

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D. The Police: Direct Infliction of Harm

In *Curtis v Commissioner of Police* [2016] EWHC 38 the claimant who was suspected of having a gun was shot by the police. He raised an action in negligence relating to the planning and briefing of firearms officers and the relaying of intelligence in the course of a police operation.

It was held, given the decision in *Hill v Chief Constable* [1989] 1 AC 53, that the police did not owe the Claimant a duty of care. Article 2 of the European Convention on Human Rights was engaged, but it was not violated either by the act of shooting the Claimant, nor in consequence of the planning or conduct of the operation.

Ms Williams also relied on *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 QBD where a psychopath had occupied a gunsmith's shop. He had spread inflammable powder on the floor and used the guns in the shop to fire at the police. The police had CS gas canisters but, appreciating that these might create a fire risk, initially arranged for fire fighting equipment to be available. However, that equipment was diverted elsewhere and no alternative precautions were in place when the police fired the CS gas at the building which then caught fire. Taylor J found the police to be liable in negligence to the owner of the building in these circumstances.

Ms Williams is entitled to observe that in *Hill* Lord Keith treated *Rigby* as an example of a police officer, like anyone else, being liable to a person who is injured as a direct result of his acts or omissions (see p.59), but, as I have already shown, that simple division between direct and indirectly caused harm was rejected by Lord Steyn in *Brooks*. In *Robinson Hallett and Sullivan* LJJ treated *Rigby* as an example of outrageous negligence where the police would be liable (see [49]). Arnold J. in the same case saw it as an example of assumption of responsibility (see [66]). Whichever of these is the correct way of looking at *Rigby*, it does not help the Claimant. There was no outrageous negligence and there was no assumption of responsibility.

The decision in *Hill v Chief Constable* [1989] AC 53 remains good law. The manner of the subsequent reaffirmation of the approach in the case (*Brooks v Commissioner of Police* [2005] 1 WLR 1495 and *Van Colle v Chief Constable* [2009] AC 225) means that the general principles are unlikely to change but

does allow for the possibility of the emergence of exceptions though there does appear to be very considerable judicial reluctance to develop them. Many of the reported cases deal with complaints by members of the public who allege that the police have failed to protect them from the acts of third parties. *Hill* is also relevant where in the course of the investigation and suppression of crime the police themselves cause the injury to the claimant. In *Robinson v Chief Constable* [2014] PIQR P14 the claimant was an innocent passer-by who was hurt when the police arrested a drugs dealer and he resisted arrest. In rejecting the claim it was noted that the ` *Hill* principle is designed to prevent defensive policing and better protect the public. It would fundamentally undermine that objective to make the police liable for direct acts but not indirect acts. It would encourage the police to avoid positive action for fear of being sued.' It was also noted that ` the line between direct and indirect harm may be a very fine one. This case is a classic example. Miss Widdett claims this is a clear case of direct harm. Mr Skelt insists it is a clear case of indirect harm and the Recorder so found. Whether or not the police should be held liable should not depend on who was responsible for knocking into Mrs Robinson, the officer or the offender. It makes no sense to hold the Chief Constable liable in the former case but not the latter.'

Given the decision in *Robinson* it is not surprising to discover that a claimant who was a criminal suspect and was very badly injured whilst being apprehended also failed to recover in the Australian case of *ACT v Crowley* (2012) 7 ACTLR 142 (It may be noted that the earlier Australian decision in *Zalewski v Turcarolo* [1995] 2 VR 562 took a different approach). In *Crowley* the claimant was shot in the neck in a suburban street by a police officer. At the time of the shooting the claimant was mentally ill. His behaviour was erratic and aggressive and the police had been unable to subdue him or to fend off his attacks. It was held that the principle in *Hill* applied and that no duty of care was owed. It was said that the duties imposed on police officers are ` owed to the public at large. They must be discharged notwithstanding the risk of injury to a person suspected of criminal activity. Otherwise the suspect's rights would prevail over the rights of the whole of the community.' The High Court refused to grant leave to appeal ([2013] HCA Trans 128). It had been said, in the course of maintaining that leave should be granted, that the negligence arose prior to the point where the police were seeking to arrest and related to a failure to follow operational training and therefore was not caught by *Hill*. It was said that the police should have adopted a ` negotiating mode and instead what they did was they abandoned that approach as soon as they arrived and immediately confronted him in a hostile manner which precipitated a violent reaction by him. That involved departure from first of all what...[the superior officer]...had

indicated should be done before they left; secondly, their operational training; thirdly, the various protocols; and, fourthly, their own understanding as to what they were expected to do faced with that sort of risk.'

The approach in *Crowley* was to be expected given the decision of the High Court of Australia in *Tame v New South Wales* (2002) 211 CLR 317 where it was found that a police officer engaged in completing a traffic accident report did not owe a duty of care to the person whose conduct was the subject of investigation. McHugh J, in particular, was vehemently opposed to such a duty: 'Police officers are frequently obliged to record and use statements from witnesses and informants, statements that frequently damage the reputation of others. It seems preposterous to suggest that an officer has a duty of care in respect of such statements. Gathering and recording intelligence concerning the activities, potential activities and character of members of the criminal class is also central to the efficient functioning of a modern police force. Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering. To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual. It would often - perhaps usually - defeat the whole purpose of intelligence recording if the officer were required to check the accuracy of the material recorded. Often enough, checking the accuracy of the material would require contacting the very person who was the subject of an adverse recording.' It is of course the case that another type of delict may have been committed. In *Hill* Lord Keith said: 'There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence.'

What though if we were to focus in a case like *Crowley* on the element of mental illness? What if the police were called because of concerns over someone's behaviour but there was no suggestion that a crime had been committed? The Scottish case of *Gibson v Orr* (1999) SCLR 661 comes to mind. There the police had been informed that a bridge had collapsed. Two constables had then proceeded to the north side of the bridge and positioned their Land Rover on that side with its blue light flashing and headlights illuminated so as to be visible and give warning to any persons approaching from the south side. They remained with their vehicle so positioned until late afternoon when they withdrew with their vehicle. At the time they did so they had received no information to confirm that any barrier or warning was in place on the south side of the bridge. Within a few minutes of their departure the car in which the

pursuer was travelling made its approach from the south side and fell into the river. In holding that a duty of care was owed the actual practice of policing (and perhaps the expectations induced thereby) was important: the key background factor which pointed towards a finding that proximity existed was that "it is within common experience, at least in Scotland, that police officers, in emergencies and otherwise, take control of traffic or other road safety situations with a view better to safeguarding life and property. Such action is no sense dependent on any crime having been committed or on any crime being apprehended. It is a civil function in respect of which constables have authority, with attendant responsibility." Once the police had taken control of a hazardous road traffic situation they had put themselves into "... a sufficiently proximate relationship with road users likely to be immediately and directly affected by the hazard as is sufficient for the purposes of the existence of a duty of care to such road users. That duty may extend not only to the manner of the exercise of that control but... to the relinquishment of it." What if in a situation like *Crowley* police officers had approached someone who appeared highly disturbed and in some sense taken control of the situation in exercise of their civil functions? What if police officers had persuaded the individual to go into the back of a police car with the intention of taking him to hospital? In such a scenario I would suggest that a duty of care would arise. This argument is supported by *Wilson v Chief Constable* 1989 SLT 97 where a duty was owed to a person who, although not arrested or formally detained, had prior to his release in wintry conditions while in a seriously intoxicated condition been held by police officers. He subsequently died from hypothermia. Lord McCluskey said: "They had a choice: to free him or to hold him. They could not have been unaware that they had that choice. They chose to release him. In deciding how to exercise that choice they had a duty to exercise a reasonable care to have regard to the reasonably foreseeable consequences of his being released." It is of course the case that once a criminal suspect is in custody a duty of care arises (*Reeves v Commissioner of Police* [2000] 1 AC 360).

E. The Position of the Ambulance Service

Where the emergency services are concerned the absence of an action on the statute is not an absolute bar to a duty in negligence arising. This line of case law is of interest as the primary and fundamental obligation of the emergency

services is to rescue and analogies with the responsibilities of private citizens break down. Should an emergency call be dealt with incompetently by, for instance, the ambulance service it might be said that no duty of care arises because in general there is no duty to rescue. At the same time there might be an absence of an action on the statute because the relevant provisions might be insufficiently detailed to embrace the situation that has arisen: in *Aitken v Scottish Ambulance Service* it was noted that the "provisions of the 1978 Act and the 1999 Order, do not place any statutory duty on the first defenders to uplift within a particular timeframe, those who require to be taken to hospital. In such circumstances, there is no question of the pursuer being able to found her claim for damages on the basis of a breach of statutory duty on the part of the first defenders".

Nevertheless, in *Aitken* an action against the ambulance service was allowed to go to proof. The claim related to the period commencing with the making of a 999 call and ending with the arrival of one of the defenders' ambulances. It was said that a duty of care arose with respect to the manner in which the 999 call was responded to and an ambulance despatched. Lord Mackay refused to hold that the action was irrelevant despite the fact that the pursuer sought to found on negligence which occurred in the course of the defenders carrying out their statutory duties. The decision is consistent with that of the Court of Appeal in *Kent v Griffiths*. Not surprisingly, counsel for the defenders in *Aitken* drew attention to the general delictual position with respect to rescue: there is "in general, no common law duty on one individual to rescue another. Any duty to intervene, in circumstances where a rescue may be required, is a moral as opposed to a legal one. Thus an ambulance man or a doctor passing the scene of an accident is under no duty to stop, even if he is waved down and in a position to do so. In such circumstances, a failure to rescue is no more than a pure omission which will not, in general, be actionable".¹⁹ In any event, the "public" nature of the function should have negated any mooted duty on the basis of *Gorringe*. However, enforcement of the defender's obligations to safeguard life was at the front of the court's mind and the defender's arguments were not seen as insuperable

Gorringe: ` is subject to exception where 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. A hospital trust provides medical treatment pursuant to the public law duty in the 1977 Act, but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice.' Deciding when the exception arises is not without difficulty. by this argument and indeed it is difficult to see why a line should be drawn between the way in which the defenders respond to an emergency call and the manner in which they act should they actually attend an emergency. The decision in *Aitken* is problematic as in every case where a public authority, in exercising statutory functions, performs a service could it not be said that a relationship has arisen with the recipient of those services? It should be stressed that the provisions of the 1978 Act and the 1999 Order, do not place any statutory duty on the first defenders to uplift within a particular time-frame, those who require to be taken to hospital. In such circumstances, there is no question of the pursuer being able to found her claim for damages on the basis of a breach of statutory duty on the part of the first defenders. What the pursuer seeks to do to found on negligence on the part of a employee of the first defenders, which occurred in the course of the first defenders carrying out their statutory duties under the 1978 Act and the 1999 Order.'

F. Roads

MacDonald v Aberdeenshire Council 2014 SC 114

Held that: (1) although there was a duty of care on the defenders, the pursuer's averments did not make out reasonable foreseeability of an accident being likely to occur and therefore the common law did not impose a duty of care in the circumstances (per Lady Paton, paras 41-44, Lord Wheatley, para 89); (2) for a roads authority to be liable an injury must be caused by a hazard that would create a significant risk of an accident to a careful road user and the authority must be at fault in dealing with the hazard; the pursuer had no averments directed to that issue and the case therefore irrelevant (per Lord Drummond Young, paras 64, 67, Lord Wheatley, para 89);

Drummond Young: `the current state of the law is in my opinion as follows. A roads authority is liable in negligence at common law for any failure to deal with a hazard that exists on the roads under its control. A "hazard" for this purpose is something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care. Such a formulation is in my view supported by the considerable line of authority that exists in Scots law...This means that, for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, two features must exist. First, the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user. Secondly, the authority must be at fault in failing to deal with the hazard. This means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it, whether by altering the road, or by placing

suitable signs, or in an extreme case by closing the road (as in *McFee* and *Gibson*, if the latter case had involved the actings of the roads authority).