Submissions for the Parties

Robert Milligan KC

Agreed facts

- The defender was driving along the Lothian Road in Edinburgh at 11pm on a Saturday night in February
- It was dark and raining heavily
- The pursuer was a pedestrian on Lothian Road
- The pursuer was heavily intoxicated
- The pursuer stumbled out from behind a parked van into the path of the defender's vehicle
- The defender was travelling at 29 mph
- The defender's vehicle struck the pursuer, causing serious head injuries
- Had the defender's vehicle been travelling at 25mph or less, the defender would have been able to avoid the collision

Agreed issues

- Was the Lord Ordinary correct to find that the defender's driving was negligent?
- In deciding this question, does the Inner House have to find that Lord Ordinary was plainly wrong in his decision?
- Alternatively, the facts having been established, is the question of whether those facts infer negligence on the part of the defender one that a court of appeal can consider anew?

Submissions for the Defender and Reclaimer

- This is not a factual appeal
- Question of evaluation of primary facts
- *Anderson v Imrie* 2018 SC 328 per Lord Malcolm
- para [90] "*Despite a number of recent decisions of the UK Supreme Courts there remains room for a discussion as to the scope for an appellate court to interfere with decision such as that in issue in the present case* [the standard of care to be applied]".

Benmax v Austin Motor Company [1955] AC 370

Per Lord Reid at 376:

"*But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.*"

Stephen v Scottish Boatowners Mutual Insurance 1989 SC (HL) 24

per Lord Keith of Kinkel at 61 (emphasis added):

"**The question whether the taking of a particular course of action would have constituted a reasonable endeavour to save the vessel is essentially one for the judgment of the court, to be arrived at upon an evaluation of all the evidence, which where appropriate may include expert evidence**. The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances. Expert evidence is capable of throwing some light on that matter, particularly as indicating the degree of skill and knowledge which such a skipper would normally possess. **The nature of the judgment to be exercised does not render the decision of the judge of first instance particularly sacrosanct**. Counsel for the defenders, in opening the appeal, made reference to Thomas v Thomas 1947 SC (HL) 45 as being in point so as to restrict review of the Lord Ordinary's conclusions. **These conclusions did not, however, depend to any significant extent upon his assessment of the reliability or credibility of witnesses, and no question arises about the correctness of any of his findings of primary fact**. *Thomas v. Thomas* has no bearing on the present case. **The Lord Ordinary's opinion is entitled to respect, but an appellate court, in considering whether the pursuer in this case made all reasonable endeavours to save his vessel, must apply its own judgment to that issue and arrive at its own independent conclusion. The quality of the Lord Ordinary's reasoning must be subjected to examination."**

Barber v Somerset County Council [2004] 1 WLR 1094

- Lord Scott of Foscote para 12 of his speech:
- *"12. After the primary facts have been found and proper directions as to the legal principles to be applied have been given, the decision as to whether a defendant was in breach of the duty of care owed to the claimant has still to be taken and will in every case depend on the standard of care that is thought requisite. This is so in the simplest of cases. Take the case where a pedestrian has stepped off the pavement and been hit by a car. The car was travelling at 25 mph and the motorist could have foreseen the possibility that the pedestrian might step into the road but did not do so. What standard of care is to be required of the motorist? The trial judge may conclude that the speed of 25 mph, in view of the traffic conditions and the likelihood of jaywalkers, was excessive and, accordingly, hold the motorist to be in breach of his duty of care. An appeal court, conducting a review, and accepting all the primary findings of fact, may take the view that the trial judge set too high a standard of care and that the motorist should not have been held to be in breach of his duty of care. It is, I repeat, a legitimate and important function of the Court of Appeal in negligence cases to review the standard of care set by the decisions of the lower courts and to correct the lower courts' rulings if it thinks them to be wrong."*

AW v Greater Glasgow Health Board [2017] CSIH 58

At para 44, after citing Lord Reid in *Benmax*:

"*He noted that the hearing upon appeal is a rehearing, and there was no presumption that the judgment in the court below was right. That is a distinction drawn between questions of primary fact, where the general rule is one of deference to the judge who heard the proof, and inferences, where an appellate court may be more ready to interfere with the judge's findings. We would add two further points: first, in our opinion the reasoning involved in drawing inferences can be reviewed by an appellate court with greater confidence than findings of primary fact; and secondly, the intellectual process involved in drawing an inference of fact is liable to be less influenced by the judge's immediate perceptions of the witnesses.*"

Anderson v Imrie 2018 SC 328

Per Lord Drummnd Young (see generally paras [38]-[51])

[45] …**The fundamental issue is the application of legal principles to the facts. In relation to such a matter the question facing an appellate court is not whether the Lord Ordinary acted reasonably in reaching such a decision**. Tests of that nature play a major part in the law of judicial review, but a central feature of that area of law is that the substantive decisions are made not by the courts but by external individuals or bodies exercising a decision-making function, such as a minister, or Scottish Ministers collectively, or a local authority. Consequently the courts are not generally concerned with the substantive merits of a decision (although there are partial exceptions such as the application of proportionality under the law of the European Union and the European Convention on Human Rights) but must rather consider the processes that were used to reach the substantive decision. **In private law, by contrast, the decisions of substance are made by the courts themselves. Consequently it is appropriate that the grounds for review of first instance decisions should extend to matters of substance**. In doing so, the test is not one of entitlement or reasonableness, but whether the judge of first instance was correct. By 'correct', I mean correct on the merits, as a matter of substance.

Woodhouse v Lochs and Glens (Transport) 2020 SLT 1203

[33]. The turns of a witness's eyelid (Lord Shaw (supra)) may, at least in theory, be significant in assessing credibility or reliability. Certainly the advantage, which a court of first instance may have had in having seen and heard the testimony, should not be underestimated (McGraddie v McGraddie , Lord Reed at 2014 S.C. (U.K.S.C.), p.22; 2013 S.L.T., p.1218). An appellate court must have due regard to the limitations of the appeal process, with its narrow focus on particular issues rather than the evidence as a whole (ibid). **However, when the court is not reviewing primary facts but inferences from them (secondary facts), it can more easily reverse a first instance conclusion, especially one which has not involved a finding of credibility or reliability** (Stephen v Scottish Boatowners Mutual Insurance Association , Lord Keith at p.61 (p.287)). This is even more so when what is under review is the application of the law to the facts; whether primary or inferential (SSE Generation Ltd v Hochtief Solutions AG , LP (Carloway) at 2018 S.L.T., p.628, para.282; Anderson v Imrie, Lord Drummond Young at p.347 (p.733) para.44). **In that situation, it may be that the benefits of the larger appellate bench can play a significant part in arriving at the correct decision** (ibid, citing Appellate courts parts 1, 2 and 3 , 2015 S.L.T. (News) 125, 130 and 138 at p.127). When engaging in the intellectual process of applying the law to the facts, or in drawing inferences from primary facts, an appellate court may be more objective in its approach and be less influenced by the Lord Ordinary's perception of, and maybe even sympathy for, the witness (AW v Greater Glasgow Health Board , LJC (Dorrian) at para.44). The unitary nature of the Court of Session as the reviewer of the delegated decisions of the Lords Ordinary is not without significance either in relation to the traditional scope of a division's role (Clippens Oil Co Ltd v Edinburgh and District Water Trs , LP (Dunedin) at (1906) 8 F., p.750; (1906) 13 S.L.T., p.962)

Cameron v Swan [2021] CSIH 30

"[59] *In Woodhouse v Lochs and Glens (Transport) 2020 SLT 1203, the court analysed the scope of a reclaiming motion against a Lord Ordinary's determination on whether a driver had been negligent. That determination is one of law but it is nevertheless heavily dependent upon primary findings of fact.*"

Warner v Scapa Flow Charters [2022] CSIH 25

[5] The Lord Ordinary's opinion is carefully reasoned. **The issue is whether it is correct in law. The principal question concerns the standard of care.** Did the defenders' duty to those on board extend to prescribing, monitoring and controlling the manner in which the divers put on their equipment and made their way from their seated positions to the exit point? A subsidiary question arises on whether it was sufficient that a safe method of walking on deck had been provided by way of handrails and a deckhand, even if it was not strictly enforced by the defenders and not always adopted by the divers.

Submissions for the Pursuer and Respondent

- Reclaimer's case based on a number of dicta – often from dissenting opinions – taken out of context
- Most importantly, the approach suggested offends the principle of finality of litigation
- The proof should be the main event, not a rehearsal

Muir v Glasgow Corporation 1943 SC(HL) 3

Lord Thankerton:

"[8] *Further, this is essentially a jury question, and, in cases such as the present one, it is the duty of the Court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary.*"

Biogen v Medeva plc [1997] RPC 1

Lord Hoffman at page 45:

"*Where the application of a legal standard such as negligence… involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.*"

Jolley v Sutton London Borough Council [2001] 1WLR 1082 per Lord Steyn at 1088H to 1089D

"*The difficulty facing counsel for the borough was that the Court of Appeal never squarely addressed the question whether the judge's critical finding was open to him on the evidence. For my part the judge's reasons for that finding are convincing in the context of teenage boys attracted by an obviously abandoned boat. And I do not regard what they did as so very different from normal play. The judge's observation that play can take the form of mimicking adult behaviour is a perceptive one. It is true, of course, that one is not dealing with a challenge to an issue of primary fact. The issue whether an accident of the particular type was reasonably foreseeable is* ***technically a secondary fact but perhaps it is more illuminating to call it an informed opinion by the judge in the light of all the circumstances of the case****. In my view it was an opinion which is justified by the particular circumstances of the case. Counsel has not persuaded me that the judge's view was wrong. And I would hold that the Court of Appeal was not entitled to disturb the judge's findings of fact.*"

Barber v Somerset County Council [2004] 1 WLR 1094 (the majority)

- Lord Walker at para [70] "*The judge was entitled to form the view that the school's senior management team were in a position of continuing breach of the employer's duty of care …*"
- Lord Rodger of Earlsferry at para [16], whilst clearly having reservations about the decision at first instance, declined to interfere as there was material "*on which the judge was entitled to take the opposite view*". He applied the same test as for a finding of primary fact, namely whether the judge at first instance had gone "plainly wrong".
- NB Lord Scott, relied on by the Reclaimers, was a dissenting opinion

Housen v Nikolaisen [2002] 2 SCR 235

- Decision of the Supreme Court in Canada
- The majority held that the appropriate test – palpable and overriding error – was the same for primary facts and secondary facts.
- NB Lord Drummond Young in *Anderson v Imrie* relied on the minority judgements

Piglowska v Piglowski 1999 1 WLR 1360

Per Lord Hoffman:

"First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v. Medeva Ltd. [1997] R.P.C. 1:

"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

Second reason

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. The reason why I have taken some time to deal with the Court of Appeal's assertion that the judge did not realise that she was entitled to exercise her own discretion is that I think it illustrates the dangers of this approach. The same is true of the claim that the District Judge "wholly failed" to carry out the statutory exercise of ascertaining the husband's needs.

Third reason

Thirdly, the exercise of the discretion under section 24 in accordance with section 25 requires the court to weigh up a large number of different considerations. The Act does not, as I have said, lay down any hierarchy. It is one of the functions of the Court of Appeal, in appropriate cases, to lay down general guidelines on the relative weights to be given to various factors in different circumstances. . . . But there are many cases which involve value judgments on which there are no such generally held views. The present case is a good example. Which should be given priority? The wife's desire to continue to live in the matrimonial home where she can conveniently carry on her business and accommodate her sons, or the husband's desire to return to England and establish himself here securely with his new family? In answering that question, what weight should be given to the history of the marriage and the respective contributions of the parties to the family assets? ***These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters****. The judgment of Brennan J. in Norbis v. Norbis (1986) 161 C.L.R. 513 contains a valuable discussion of this question.*

Fourth reason

"Fourthly, there is the principal of proportionality between the amount at stake and the legal resources of the parties and the community which it is appropriate to spend on resolving the dispute. In a case such as the present, the legal system provides for the possibility of three successive appeals from the decision at first instance. The first is as of right and the second and third are subject to screening processes which themselves may involve more than one stage. If one includes applications for leave, the facts of this case, by the time it reached the Court of Appeal, had been considered by 5 differently constituted tribunals. This cannot be right. To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness."

The problems with reliance on *Anderson v Imrie*

- The majority view was perfectly orthodox
- Inconsistent with *Biogen* (see para [48], where Lord Drummond Young questions *Biogen*)
- Inconsistent with *Muir* (yet relies on it!)
- Relies on the minority rather than majority in *Housen* (see para [49])
- Based on fallacy that there is a "correct" answer to a question which is by definition a value judgement
- Lord Drummond Young's opinion is all *obiter dicta*, as ultimately the reclaiming motion was refused

The majority view in *Anderson*

- Lord Brodie at para [35]: "…Lord Hoffmann's warning that where the application of a legal standard such as negligence is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation, echoes what Lord Thankerton had said in *Muir v Glasgow* Corporation (p 8) in relation to what was reasonably foreseeable…"
- At para [36]: …this court can only reverse the Lord Ordinary if it is satisfied that he was wrong. For reasons which I have attempted to explain, I have not been so satisfied, let alone satisfied that he was 'plainly and obviously wrong', in the sense of having come to a conclusion which was not reasonably open to him on the primary facts…"

Inconsistent with *Muir*

Lord Drummond Young at para [44]:

"Another example is found in *Muir v Glasgow Corporation* where the House of Lords, reversing the First Division, held that there was nothing intrinsically dangerous in an operation involving the carrying of a tea urn through a passage, with the result that the manageress of the establishment could not reasonably have been expected to see that an accident might occur. In neither of these cases is there any suggestion that an appellate court might not reconsider the decisions of lower courts on the application of general principles of the law of negligence to particular factual situations."

Not correct, as seen in para [8] of *Muir*

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