



Compass Chambers

FATAL CLAIMS & RECENT CASES

CALUM WILSON & KATE BENNETT



Compass Chambers

FATAL CLAIMS

HAMILTON v FERGUSON TRANSPORT REVISITED

Calum Wilson, Advocate

Compass Chambers

24 November 2017

HAMILTON V FERGUSON TRANSPORT (SPEAN BRIDGE) LIMITED 2012 S.C. 486

- Damages (Scotland) Act 1976, section 1(4)
- *Hamilton v Ferguson Transport (Spean Bridge) Limited*
- Jury Award £120,000 to 17 year old child for loss of mother age 60.
- *Thomson v Dennis Thomson Builders Limited*
- Jury Award £90,000 to 60 year old father for loss of 26 year old son.



- Both awards held to be excessive - per Lord President Hamilton @ para [73]
- “the test was whether ‘no reasonable jury’ properly directed could have assessed damages at the sum or sums in question” – per Lord President Hamilton @ para [70]



The Problem

- The Court was concerned with the fact that there was “a very striking difference” between the jury awards in the *Nimrod* cases and recent judicial awards for loss of society to parents or children (para [58]) and that this was “an unsatisfactory state of affairs.” (para [45]).
- “If greater regard than hitherto is not had by judges...to jury awards, then the disparity between judicial and jury awards is likely to remain.” (para [63]).



The Solution

- “The objective must now be to seek to narrow that disparity and to eliminate, in so far as practical, that lack of consistency”.
- 3 measures:
 - (1) by judges “having significantly more regard to available jury awards”
 - (2) by juries being given “fuller guidance” than hitherto on the level of damages which might reasonably be awarded.
 - (3) by appellate courts continuing to intervene where necessary



Compass Chambers

Post *Hamilton* Developments

- 12 cases that have been reported.
- 8 judge decisions.
- 4 jury trials.



Judge Decisions (1)

- *McGee v RJK Building Services Ltd.* 2013 S.L.T. 428; 2013 Rep. L.R. 59 : Lord Drummond Young
- *Ryder v The Highland Council* [2013] CSOH 95: Lord Tyre
- *Currie v Esure Services Ltd.* 2014 S.L.T. 631 (OH); 2014 Rep.L.R. 57 (OH); 2015 S.C. 351 (IH); 2015 Rep.L.R. 28 (IH): Lady Wise and the Inner House.

Judge Decisions (2)

- *Gallagher v S C Cheadle Hume Ltd* 2015 Rep.L.R. 33: Lord Uist.
- *Stuart v Reid* 2014 Rep.L.R. 107: Lord Woolman.
- *Young v McVean* 2014 S.L.T. 934 (OH); 2014 Rep.L.R. 113(OH); 2016 S.C 135 (IH); 2015 S.L.T.729 (IH); 2015 Rep.L.R. 110 (IH): Lady Rae and Inner House.

Judge Decisions (3)

- *McCarn v Secretary of State for Business Innovation and Skills* 2014 Rep.L.R. 138: Lord Bannatyne.
- *Manson v Henry Rob Ltd* [2017] CSOH 126: Lord Clarke



Jury Trials

- *Kelly v UCS Ltd (in liquidation)* 2012 Rep. B. 107-6 (Lady Clark and a jury).
- *Scott v Parkes* (Lady Stacey and a jury: 23.05.14).
- *Anderson v Brig Brae Garage Ltd* [H.S. At W. 2015, 21(3),6] (Lady Stacey and a jury: 25 June 2015).
- *Stranger v Flaws and Proctor* 2016 Rep. B. 131-2 (Lord Clark and a jury: 17 June 2016).



Compass Chambers

Guidance to Juries

- Court of Session Practice Note (No. 1 of 2016)
- Procedure
- Not binding.
- Importance of Submissions to Judge.



Stanger v Flaws

- Stanger v Flaws, 17 June 2016, Lord Clark presiding
- Deceased aged 64
- Range of awards to family from trial judge
- Widower aged 72 at trial- £80,000 - £120,000
- Adult sons in their 40s - £30,000 - £70,000
- Teenage granddaughters - £12,000 - £28,000
- Awards :
- Widower – £120,000
- Children - £50,000
- Granddaughters - £15,000 and £20,000



Compass Chambers

Manson v Henry Robb Ltd

- Widow: £75,000
- Adult sons: £30,000
- Key factors – para [29]



Possible standard ranges ?

- For the loss of spouse/partner - £80,000 - £120,000
- For the loss of a parent - £30,000 - £60,000
- For the loss of a grandparent - £12,000 - £20,000
- What for the loss of a child ?
- Possibly £60,000 - £100,000



Compass Chambers

RECENT CASES

Kate Bennett, Advocate
Compass Chambers

24th November 2017

Recent Cases

Roads Authority

- Bowes & others v The Highland Council [2017] CSOH 53
 - Dewar v Scottish Borders Council [2017] CSOH 53

Public Liability

- Cairns v Dundee City Council [2017] CSOH 86

Low Speed Impact

- Grant Grubb v John Finlay [2017] CSOH 81

ROADS AUTHORITY CASES



ROADS AUTHORITY CASES

Macdonald v Aberdeenshire Council 2014 S.C. 114

Lord Drummond Young

“.[63]...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.....”



ROADS AUTHORITY CASES

*“[64] 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 The second feature means that the hazard must be apparent to a competent roads engineer. ”*

ROADS AUTHORITY CASES

Bowes v The Highland Council

2017 Rep L.R. 52

Lord Mulholland





Bowes v The Highland Council

- Mr Bowes drowned after his vehicle fell from Kyle of Tongue bridge
- Pursuers said Mr B's accident had been caused by defenders' failure at common law to take reasonable care for his safety while crossing the bridge
- Quantum was agreed and the proof restricted to liability



Bowes v The Highland Council

- Mr B travelling alone; poor weather conditions and the road surface covered with snow and slush.
- Unchallenged evidence that he was a careful and slow driver
- No witnesses to accident but could be inferred from evidence that as Mr B's vehicle crossed to the opposite lane, mounted the kerb and collided with the parapet, the railings of which had broken off at the welds and had swung out, and his vehicle had fallen into the water.



Bowes v The Highland Council

- Bridge inspected July 2005 – defects found in major structural elements of bridge, including defects to parapet, categorised as “severe”. Twice yearly monitoring of defects recommended
- 5 inspections between 2006-2008 – found no defects in section of parapet which failed but defects detected were serious and adversely affected the parapet’s containment strength
- Defenders then ceased to monitor parapet
- 2008 – defenders got report from consulting engineers noting the parapet did not comply with current standards for restraint



Bowes v The Highland Council

- PURSUERS' CASE – DEFENDERS OUGHT TO HAVE IMPLEMENTED INTERIM MEASURES E.G. SECONDARY BARRIER, REDUCTION OF SPEED LIMIT, WARNING SIGNS
- *ESTO*, MEASURES NOT REQUIRED IN EXERCISE OF REASONABLE CARE FOR BUDGETARY REASONS, BRIDGE SHOULD HAVE BEEN TEMPORARILY CLOSED
- DEFENDERS DENIED THEY OWED DUTY OF CARE TO MR B
- NO OBLIGATION TO PROVIDE PARAPET OF ANY STRENGTH AND THEREFORE NO REQUIREMENT TO PUT IN PLACE TEMPORARY MEASURES PENDING



Bowes v The Highland Council

HELD:

- “*inescapable inference*” that loss of control due to Mr B’s negligence and not any failure on defenders’ part
- Parapet had not operated as it ought to have in accident
- Had parapet been acting to its design capacity, Mr B’s vehicle would have been contained, would not have left the bridge and, at worst, he would have sustained minor injury
- Critical of defenders decision to cease monitoring parapet
- No Risk Assessment and basic health and safety principles not applied to critical issue of safety



Bowes v The Highland Council

- Defenders knew parapet not compliant with current safety standards, defective, containment capacity compromised to unknown extent and had it been operating as designed, it would have contained Mr B's vehicle
- Parapet an integral part of road for which defenders responsible for managing & maintaining
- Parapet clearly defective, posed a danger to road users and significant risk of accident therefore a "hazard"
- Accident foreseeable
- Urgent requirement to address hazard but had failed to do so



Bowes v The Highland Council

- Temporary measures e.g. reduction in speed, were reasonably practicable and cost modest
- Defenders in breach of duty in failing to deal with hazard by implementing interim measures; had they done so, Mr B's death would have been prevented
- No basis for any finding of contributory negligence on Mr B's part
- *MacDonald v Aberdeenshire Council* applied

NOTE:

Defenders argued that roads authority's duty should be judged according to professional standards



Bowes v The Highland Council

*“30 The next issue is whether the authority is at fault in failing to deal with the hazard which they clearly had knowledge of from 2005, prior to the accident. The defender submitted that the roads authority's duty should be judged according to professional standards. This submission was based on the clinical negligence case of Hunter v Hanley 1955 SC 200 (in support of this submission the defender also cited Honisz v Lothian Health Board 2008 SC 235, which deals with two opposing schools of thought as to the appropriateness of a particular practice). However, **the tripartite test set out in Hunter v Hanley, supra , by Lord President (Clyde) at page 206 is clearly directed at the issue of professional negligence and not whether a roads authority is negligent for failing to deal with a hazard. I will therefore apply the test set out in MacDonald , supra, per Lord Drummond Young at paragraph 64, namely whether a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it.”***

ROADS AUTHORITY CASES

Peter Dewar v Scottish Borders Council
[2017] SCOH 68
LORD PENTLAND





Dewar v Scottish Borders Council

- Motorcyclist seriously injured when lost control of his motorcycle on A701
- His case - wheels of his motorcycle went in to defect, which caused him to lose control
- Defect was a damaged area of road surface along nearside edge of road on approach to right hand bend
- Pursuer sought to prove defect a “hazard” (per *MacDonald*) – presented significant risk of accident
- That as he negotiated the right hand bend, he did so with due skill and care



Dewar v Scottish Borders Council

- Quantum agreed. Proof on liability and contributory negligence
- Pursuer submitted defenders at fault for failing to deal with the hazard – ought to have been “apparent” to a competent roads engineer/inspector, on a reasonable visual inspection which took place 3 weeks before the accident
- No issue in relation to defenders’ policy/system of inspecting road
- Had repairs been effected in accordance with the defenders’ policy, the road would have been repaired before the pursuer’s accident
- Defenders vicariously liable for the acts and omissions of their employees i.e. roads inspector

DEWAR V SCOTTISH BORDERS COUNCIL





Dewar v Scottish Borders Council

- Extended 15-20 metres
- Varied in width between 35-40 cm
- Depth in contention - if 40 mm in depth, then actionable defect in terms of defenders' policy and should have arranged repairs within 7 days
- Pursuer led evidence from 2 police officers who attended accident (not crash investigators) - spoke to defect being 40–50 mm
- Crash investigation officer – did not measure it (no-one did). Said not a “significant” hazard
- Photographs/Video footage

Dewar v Scottish Borders Council

The defenders case

- Pursuer had not proved that the accident was caused by the defect
- Pursuer caused or materially contributed to accident by adopting incorrect road position, by failing to keep lookout and inappropriate speed as he entered the bend
- The hazard did not constitute a defect which required repair in terms of their policy
- Pursuer had failed to lead evidence that the ordinarily competent roads inspector seeing the defect would have acted any differently



Compass Chambers

Dewar v Scottish Borders Council

HELD:

- Absolvitor
- Accepted defect caused Pursuer's motorcycle to leave the road - No evidence that he was driving at excessive speed or that he failed to exercise reasonable care or attention or adopted incorrect road position as he negotiated the bend
- BUT pursuer had failed to prove defect was a "hazard"
- Failed to prove depth of defect such that it fell within category requiring repair within 7 days
- Rejected evidence of the 2 police officers on depth— exaggerated

Dewar v Scottish Borders Council

Further...

- Pursuer would have failed as led no evidence which would have enabled the court to hold that the roads inspector's inspection was negligently performed
- Inspector relied on his skill and experience
- No basis upon which court could make a finding as to what exactly would have constituted a reasonable (non-negligent) inspection
- Rejected Pursuer's submission that this was a jury question on which the court can reach its own view



Compass Chambers

Dewar v Scottish Borders Council

*“...In my opinion, the court’s assessment as to whether the level of care actually shown fell short of the care that would be expected of a reasonably competent roads inspector in the circumstances has to be built upon the secure foundation of evidence explaining what such a hypothetical inspector would have done in the same set of circumstances. **The necessary corner stone, comprising evidence as to reasonable and acceptable practice, has not been put in place in the present case. In short, there is no evidence as to what would have amounted to the exercise of an ordinary level of skill and care in the circumstances** (cf *Hunter v Hanley* 1955 SC 200; *Honisz v Lothian Health Board* 2008 SC 235; and *French; Dempsie v Strathclyde Fire Board* 2013 SLT 247). In the absence of any acceptable evidence that there was a reportable defect in the road and that it amounted to one that any competent roads inspector would have identified, there is no basis on which I could hold that Mr McCudden was negligent in the way that he carried out his inspection on 19 July 2011.”*



Compass Chambers

Dewar v Scottish Borders Council

BUT....

- ROAD INSPECTOR'S EVIDENCE WAS THAT HE WOULD EXPECT TO IDENTIFY SOMETHING IN THE RANGE OF 30 – 40MM; WOULD ERR ON THE SIDE OF CAUTION; IF HE SAW SOMETHING BETWEEN 30-40MM IN DEPTH HE WOULD ACTION IT
- DEFENDERS' EXPERT ACCEPTED THAT, IF THE DEFECT EXCEEDED 40MM IN DEPTH, IT SHOULD HAVE BEEN IDENTIFIED BY EXPERIENCED INSPECTOR EXERCISING REASONABLE CARE



Bowes v Dewar?

- What does this mean for the future?
- Conflicting opinions (Bowes v Dewar)
- Standard of care on roads inspector (roads authority) to be judged against a higher standard approaching a standard of professional negligence?
- OR NOT?
- BOWES WILL BE GOING FURTHER

PUBLIC LIABILITY

Cairns v Dundee City Council

[2017] CSOH 86

Lord Woolman





Compass Chambers

Cairns v Dundee City Council

- Pursuer slipped on sheet ice in car park
- Defenders' system for dealing with the city's car parks separate from the winter maintenance programme
- System - car parks were gritted by the maintenance assistants
- Began their day by collecting money from the meters
- Would grit as necessary
- They did not work Saturdays!
- Pursuer went to shops on Saturday morning (around 11.30)



Compass Chambers

Cairns v Dundee City Council

HELD:

- The decision not to have maintenance men working on a Saturday was a matter of application of resources
- That was not a matter for the Court
- Since the pursuer sought to prove that the car park should have been gritted by 10am which was earlier than might be achieved on other days
- He must fail

LOW SPEED IMPACT

Grant Grubb v John Finlay

[2017] CSOH 81

Lord Kinclaven





Compass Chambers

Grant Grubb v John Findlay

CHAPTER 1

- A CASE OF FUNDAMENTAL DISHONESTY?
- OR
- JUST “*LESS THAN CONVINCING*”?



Grant Grubb v John Findlay

- Collision between 2 cars in garage forecourt – recorded on CCTV
- Liability admitted
- Low speed impact – 4 mph
- Damage “significant” (?) (£2,200) and injury to pursuer & passenger
- Dispute as to extent of pursuer’s injuries
- Defender averred the pursuer was exaggerating his claim for financial gain
- Sought to have the action dismissed *in limine* based on fundamental dishonesty of pursuer
- REFUSED!



Grant Grubb v John Findlay

- Credibility and reliability of pursuer challenged
- *“Issues of credibility and reliability lie at the centre of this case.”*
- Pursuer said had not driven since accident BUT had several post accident driving convictions!
- Pursuer said had not worked BUT had been working on a market stall amongst other things when “off sick” resulting in his dismissal
- Pursuer’s explanation for termination of his employment *“less than convincing”*
- Pursuer’s evidence re advice given to him *“less than convincing”*
- Pursuer accepted that he had lied about his father being in jail
- “[22] *Such failings and shortcomings can have serious consequences for any pursuer in relation to credibility, reliability, causation, and quantum of damages – and properly so.”*



Grant Grubb v John Findlay

HELD:

- That the pursuer was not entirely credible/reliable on all things but did not accept defender's contention that his claim was fundamentally dishonest

- Accepted facts of accident

- Accepted effects of accident lasted around 12 months and some symptoms beyond that but later symptoms not caused by accident

"[45] Contrary to the defender's protestations of fundamental dishonesty, I found the pursuer's account to be acceptable in essentials in relation to that limited period."



Grant Grubb v John Findlay

CHAPTER 2

- Hearing on expenses (15th September 2017 – unreported)
- Tender not beaten

“[14] Having regard to the whole circumstances, I have stopped short of making a finding of “fundamental dishonesty”, or contempt of court, or referral to the criminal authorities. However, the court can and should mark its disapproval of a claim presented with such a lack of candour on the part of the pursuer. That disapproval can be reflected in a finding on expenses.”



Compass Chambers

Compass Chambers

Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Calum Wilson, Advocate

Mobile: 07739 639328

Calum.wilson@compasschambers.com

Kate Bennett, Advocate

kate.bennett@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com