Scotland

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XXIV. Scotland

A. Legislation

There was no Scottish legislation passed in the field of delict in 2020. 1

B. Cases

1. *K v Chief Constable, Police Scotland* (Court of Session, (Inner House) 28 April 2020, [2020] CSIH 18, 2020 Session Cases (SC) 399): Whether Police Force Liable for Psychiatric Harm Suffered by Police Officer Resulting from Decision of another Officer

a) Brief Summary of the Facts

The pursuer joined the police force in 1990 and went on to undertake work as an undercover officer. As a result of treatment for cancer, she was absent from work from July 2003 to November 2005. As a consequence of this illness, she suffered from symptoms of anxiety and developed depression of sufficient severity to require medical intervention and the prescription of appropriate drugs. At the expense of the police force, she periodically met with a psychiatrist on an ongoing basis. In 2007, she was seconded to the Special Operations Unit of the force. After reporting her belief that a colleague had compromised undercover operations, the pursuer was informed in 2011 by a superior officer (a Chief Superintendent) that an investigation was to be carried out into her conduct in relation to the facts of the report and that he had decided that she would temporarily be moved to the witness protection department; she was subsequently informed the move would be permanent. The pursuer was left emotionally distraught by this train of events. She applied for and was granted ill-health retirement from the police force in March 2013. 2

The pursuer subsequently raised an action of damages against the Chief Constable of the police force, alleging that he was in breach of the duty resting on an employer to take reasonable care for an employee's safety, which duty manifested itself on the specific facts of the present case as the breach of a duty to treat the pursuer fairly in relation to the investigation into her conduct and the decision to 3

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move her to another department. The pursuer presented her case as one of the defender's vicarious liability (as employer) for the conduct of his employees.

4 At first instance, the judge held that there had been a breach of duty, that psychiatric injury had been a foreseeable result of such breach, and that the breach had caused her to suffer psychiatric harm. He therefore found in favour of the pursuer. The defender appealed against this first instance judgment.

b) Judgment of the Court

5 The Inner House of the Court of Session unanimously overturned the decision at first instance, holding that: (i) as the alleged liability was vicarious, it was necessary to specify the individual(s) who were said to have been negligent, which the judge at first instance had not done; (ii) the judge at first instance had not specified whom this individual might be; even had he identified the Chief Superintendent as the relevant individual, the judge at first instance had found that officer's concerns to have been legitimately held and it would therefore have been difficult to have characterised his conduct as negligent; (iii) there was no factual basis for holding that the Chief Superintendent ought to have foreseen that his conduct (which imposed no disciplinary process potentially leading to demotion or dismissal) might have caused the pursuer psychiatric injury; (iv) assuming that the duty of fair treatment applied not just to an employer but to a co-employee, which was doubtful, there was no finding that the Chief Superintendent had been aware of any vulnerability in the pursuer; and (v) the operative cause of the harm was the decision to transfer the pursuer to the witness protection unit, but, in the absence of any allegations relating to any duty not to transfer her, the decision was an operational one about which there was no duty of objective evaluation or scrutiny.

c) Commentary

6 There are two interesting features of this litigation which will be addressed: (i) the court's discussion of an employer's duty to treat employees fairly, and (ii) the requirement, in vicarious liability claims, to identify the specific party whose negligence is said to trigger another party's vicarious liability.[1]

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1 There were some inconsistencies in the way in which the pursuer pled her case of vicarious liability, but these procedural issues are not discussed further in this commentary.

The duty of an employer to take reasonable care to avoid causing harm (whether physical or psychiatric) to employees (proximity between the two parties being accepted by virtue of the employment relationship) is well established. But the duty of an employer to treat the employee fairly is a more recent offshoot of the general duty. Unfair treatment is seen as one specific kind of behaviour which is capable of causing harm (including psychiatric harm) to the employee. A leading authority in the field is the decision of the English Court of Appeal in *Yapp v Foreign and Commonwealth Office*,[2] which also concerned psychiatric harm following alleged unfair treatment (and was argued both on a contractual and tortious basis). It was said in this case that, in so far as fair treatment relates to decisions made by an employer, 'the idea that every decision taken by an employer must be attended with due process is unworkable' and that therefore: 'If, for example, in the opinion of an employer, an employee requires to be taken off a particular task and deployed elsewhere, no general right of fair treatment arises. The decision is operational.'[3] **7**

This is an important point: decisions taken by employers may sometimes upset employees, but the employer may nonetheless be acting within its reasonable discretion to take the relevant decision. Employer conduct which upsets an employee does not of itself give rise to liability on the employer's part. However, if treatment of an employee might foreseeably result in psychiatric harm to the employee, the threshold for liability can be met. That was not so in this case, as no such harm could reasonably be foreseen.[4] Importantly, even if such harm might reasonably be foreseen, that does not mean that an employer cannot take the decision in question. As Lord President Carloway notes in his judgment: **8**

> 'an employer may require to institute disciplinary proceedings in a given set of circumstances or to take other action which is needed to protect the interests of others. Provided that the action taken does not amount to a lack of reasonable care, having regard to all the circumstances (and not just those of the affected employee), no fault will arise'.[5]

2 [2014] England & Wales Court of Appeal, Civil Division (EWCA Civ) 1512.

3 See judgment of Lord Carloway, para 70.

4 The Chief Superintendent had no knowledge of the pursuer's history of psychiatric illness. As Lord Brodie put it in his judgment: 'it is not reasonably foreseeable that a person of ordinary fortitude will suffer psychiatric harm simply because she is not deployed to a particular professional role even in circumstances where her competence and probity may have been doubted and she perceives her change of role as reflecting adversely on her reputation' (see para 96).

5 Para 72.

9 A consequential question presents itself: if an employer can see that a decision it wishes to make in respect of an employee may cause the employee psychiatric harm, and if the employer still wishes to take the decision, what should it do to discharge its duty of care? Assuming it has considered alterative courses of action and rules them out, it might be that supporting the employee through occupational health referrals, through the appointment of someone specific to support the employee through the impact of the change, and perhaps through the funding of psychiatric treatment, might be the kind of steps which might discharge the employer's duty of care.

10 As to the second interesting aspect of this case – the requirement, in vicarious liability claims, to specify the specific party whose negligence is said to trigger another party's vicarious liability – this is an important aspect of pleading which pursuers ought to remember. It is not enough to allege that the general circumstances of the employment, or the conduct of other employees generally, amount to a breach of the employer's duty such as to give rise to vicarious liability. Vicarious liability means liability for someone else's delictual conduct: that someone else must be specified, and the various elements required to substantiate a claim against that person must be established (including that person's negligence or other form of culpable conduct).

11 One curious aspect of the judgment merits a brief mention: Lord Carloway says in his judgment that 'Liability for harm in the employment context is not a discrete area of legal principle. It is part of the general field of quasi-delictual duties …'. What Lord Carloway may have meant by employing the term 'quasi-delict' is unclear: this was a case of alleged negligence, where although the existence of a duty (on the employer) is well established, it is nonetheless a fault-based, common law duty to take care. It is unclear therefore what might merit describing such a duty as 'quasi' delictual or indeed what the 'general field' of such quasi-delictual duties might encompass. The use historically in Scots law of 'quasi-delict' was inconsistent: it was sometimes used to refer to strict (as opposed to fault-based) liability[6] – such usage in this case would have been inappropriate, as the duty under discussion was negligence-based; but the term was also historically employed, in an inconsistent usage, to refer to a delictual obligation deriving from fault rather than intention[7] – while such historic usage would fit with the facts of this case, fault-based duties are now universally considered delictual and not quasi-delictual. As usage of the term 'quasi-delict' is

6 See, for instance, *TB Smith*, Short Commentary on the Law of Scotland (1962) 633–635; *D Walker*, The Law of Delict in Scotland (2nd edn 1981) 284 ff.

7 A usage first adopted by *GJ Bell*, Principles of the Law of Scotland (1829).

avoided in modern Scots law, it seems best to treat its appearance in this case as an aberration and to pass quickly over it.

2. *McCulloch and others v Forth Valley Health Boards* (Court of Session (Outer House) 7 May 2020, [2020] CSOH 40): Whether Doctor's Negligence had Caused or Materially Contributed to Death of Patient

a) Brief Summary of the Facts

The pursuers in this action were the widow and other family members of a man (Mr McCulloch) who had died of a cardiac arrest in April 2012. They alleged that his death had been caused (or materially contributed to) by the negligence of Dr Labinjoh, a consultant cardiologist employed by the defenders, for whose acts and omissions they were responsible as her employer. 12

On 1 April 2012 Mr McCulloch was admitted to hospital with symptoms of severe pleuritic chest pains and vomiting, something for which he had been previously treated the month before. Dr Labinjoh, reviewing the results of an echocardiogram, discounted the likelihood of pericardial constriction and stated that she was 'not certain where to go for a diagnosis from here'. Mr McCulloch thereafter appeared to improve and was discharged, much against the wishes of his concerned wife. The following day Mr McCulloch suffered a cardiac arrest and died. 13

The pursuers claimed that Dr Labinjoh had been negligent in her assessment of Mr McCulloch's state of health before his release, given the evidence she had had presented to her, including through a failure to properly interpret echocardiogram data, through her failure to prescribe any non-steroidal anti-inflammatory drug, to instruct a further echocardiogram, or to provide a management plan for those treating Mr McCulloch who were not experts in cardiology. It was further argued that, adopting the approach taken by the Supreme Court in *Montgomery v Lanarkshire Health Board*,[8] Dr Labinjoh had failed to warn Mr McCulloch of material risks attendant upon her recommended treatment and of any reasonable alternative treatments (including the use of anti-inflammatory drugs). The defenders denied that any breach of a duty of care 14

8 [2015] United Kingdom Supreme Court (UKSC) 11, 2015 Session Cases, United Kingdom Supreme Court (SC (UKSC)) 63, [2015] Appeal Cases (AC) 1430.

had occurred or that any breach had caused or contributed to Mr McCulloch's death.

b) Judgment of the Court

15 The judge (Lord Tyre) found that (1) applying the standard test for medical negligence laid down in *Hunter v Hanley*[9] and *Bolitho v City and Hackney Health Authority*[10], Dr Labinjoh had not been negligent in relation to the alleged failure to prescribe anti-inflammatory drugs. Conflicting expert medical reports had been presented regarding whether prescription of anti-inflammatory drugs would have been appropriate for a patient with Mr McCulloch's medical history and symptoms. As such, the *Bolitho* test was not met; (2) however, on the facts, it had been negligent for Dr Labinjoh not to instruct a further ECG before Mr McCulloch was discharged; (3) there had been no breach of a duty to warn of risks of the sort imposed in *Montgomery*, as such a duty could only arise in respect of risks associated with a recommended course of treatment – it did not extend to risks associated with courses of treatment that were *not* regarded, in the doctor's exercise of professional judgement, as reasonable alternatives; (4) as to whether causation had been established, there was no basis in the evidence for an assessment of whether, at whatever time it was commenced, and whatever it may have consisted of, competently administered treatment would have been likely to be successful in preventing Mr McCulloch's death. As such, a demonstration of a causal connection using counterfactual analysis had not been made out; (5) the use of 'material contribution' as an alternative to standard counterfactual causation was appropriate only in cases where, because of 'inadequacies in medical science', it was not possible to prove causation using the standard 'but for' test. This was not one of those cases, hence the material contribution approach could not be used. Given these findings, Lord Tyre dismissed the case against the defenders.

c) Commentary

16 This case, although only a first instance decision, is an excellent exemplar of both the standard approach to medical negligence taken by Scottish courts as

9 1955 SC 200.
10 [1998] AC 232.

well as of the application of causal analysis (including the so-called 'material contribution' alternative to the standard *sine qua non* approach).

On the test for medical negligence, the judgment of Lord Tyre exemplifies very well the approach of the Scottish (and English) courts to medical negligence: what is required to demonstrate such negligence is that the doctor took a course of action which no reasonable body of medical opinion supports. As long therefore as the doctor can establish that some other doctors, acting reasonably, would have done as he or she did, liability will not be established. That is so even though there might be other doctors who would have taken a different course of action. In this case, that meant that negligence was not made out in relation to any of the alleged faults, save for the failure to order a final ECG before discharge of Mr McCulloch. The court's view was that no doctor, acting reasonably, would have failed to instruct this further ECG. 17

The further, particularly interesting, aspect of medical negligence in this case relates to the recent decision of the Supreme Court in the *Montgomery* case. That case (discussed in the 2015 Yearbook)[11] concerned the alleged liability of a doctor for failing to disclose risks associated with a recommended treatment. The Supreme Court held that a doctor must disclose 'material' risks associated with such recommended treatment, a specific risk being material when a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should reasonably have been aware that the particular patient would be likely to attach significance to it. Lord Tyre's clear view was that *Montgomery* does not require a doctor to discuss with a patient a potential treatment that the doctor, exercising professional judgement, would not consider appropriate in the circumstances. It is only where a treatment, being in the doctor's professional option a reasonable one, has been discussed by the doctor with the patient that material risks relating to it need be mentioned. In this case, as Dr Labinjoh did not consider the prescription of anti-inflammatory drugs to be reasonable, she had no duty to raise the possibility of prescribing such drugs (and to raise potential risks associated with such drugs). This approach of Lord Tyre is assuredly correct (and consistent with the approach taken in the 2018 judgment of *AH v Greater Glasgow Health Board*).[12] 18

The final interesting point in this case relates to causation and material contribution. On the facts, the judge's conclusion that 'but for' causation was not made out seems correct: it was not possible to conclude, on the balance of 19

11 See *M Hogg*, Scotland, in: E Karner/BC Steininger (eds), European Tort Law 2015 (2016) 519, nos 17–28.

12 2018 Court of Session, Outer House (CSOH) 57, 2018 Scots Law Times (SLT) 535.

probabilities, whether the ordering of a further ECG by Dr Labinjoh would have prevented Mr McCulloch's death. Where 'but for' causation cannot be established, that is often the end of the matter. However, in some cases, courts have allowed a pursuer to succeed where he or she can demonstrate that the defender's conduct materially increased the risk of harm occurring. In effect, doing so is another way of expressing the idea that the defender's conduct deprived the pursuer of a material (ie non-negligible) chance of avoiding the harm. This approach was established in Scottish jurisprudence in the House of Lords' decision in *McGhee v National Coal Board*.[13] The adoption of the material contribution approach is, however, only open to a court where, because of an absence of medical or scientific knowledge in relation to how causation operates in specific circumstances,[14] counterfactual analysis cannot furnish an answer one way or the other in relation to the causal enquiry. The material contribution approach is *not* available in cases where causation might have been able to have been demonstrated were it not for the absence of evidence sufficient to demonstrate it. In this case, Lord Tyre correctly identified that the uncertain cause of Mr McCulloch's heart attack was not because of the current undeveloped state of medical science but rather a lack of available evidence as to the specific cause of the heart attack in this instance. As such, he correctly ruled out the use of the material contribution approach by the pursuers.

3. *McMahon v Grant Thornton UK LLP* (Court of Session (Outer House) 26 May 2020, [2020] CSOH 50, 2020 SLT 908): Whether Accountants Engaged under Contract to Provide Tax Compliance Advice Incurred an Additional Obligation in Delict in Respect of Tax Planning Advice

a) Brief Summary of the Facts

20 The pursuer, Mr McMahon, was the sole shareholder of a company. He instructed the defender, a firm of chartered accountants, to provide him with personal tax compliance services. The pursuer's letter engaging the defender's ser-

13 1973 Session Cases, House of Lords (SC (HL)) 37, 1973 SLT 14, [1973] 1 Weekly Law Reports (WLR) 1.

14 A well established medical example is in relation to the uncertain causation of a mesothelioma of the pleura.

vices contained a provision relating to *ad hoc* advisory services which stipulated that 'whilst we will always seek to inform you of tax planning ideas of which we become aware that may be of assistance to you, we cannot accept a duty to monitor and unilaterally suggest tax planning advice on specific matters.'

21 In 2012, the pursuer was approached by a third party offering to purchase his shares in the company. He instructed the defender to carry out some non-tax related services in relation to the purchase. The defender provided the pursuer with a schedule of information, which estimated the pursuer's capital gains tax (CGT) liability arising from the sale of his shares. The information indicated that entrepreneurs' relief would apply to the first £ 10 million of the capital gain, with the remainder of the sale price being taxable at the standard rate of CGT. A note to the schedule further explained that the pursuer's wife would also be entitled to entrepreneurs' relief provided she held shares for at least a twelve-month period prior to the contemplated sale (as well as meeting some other conditions). The sale of shares occurred in July 2012, without the pursuer's wife having taken any of the shares prior to the sale. The pursuer incurred a substantial capital gains tax liability.

22 The pursuer raised an action for breach of contract and (in delict) for professional negligence. He alleged that the defender should have informed him that, had he transferred some of his shares to his wife, she could have taken the benefit of entrepreneurs' relief when she sold them, thereby substantially reducing his total capital gains tax liability.

b) Judgment of the Court

23 The judge (Lord Doherty) held that: (1) while it was the defender's intention to endeavour to provide ideas of a tax planning nature to supplement the personal tax services, it had not undertaken any contractual obligation to do so; (2) however, by the time that the sale was contemplated, the provision of such advice could be considered 'reasonably incidental' to the express contractual obligations of the defender and thus the defender had been obliged to provide such advice; (3) in terms of any duty arising in delict, the circumstances of this case indicated that any delictual duty was concurrent and co-extensive. Thus, although the defender did not have a delictual duty to raise the idea of CGT mitigation before the sale was proposed, it *did* have a delictual duty to raise the idea in the lead up to the sale; (4) in relation to the defender's contractual and delictual duties, these had not been broken: by including the information relating to the possibility of the pursuer's wife utilising entrepreneurs' relief, the defender had done enough to discharge its obligations to the pursuer; (5) even if

there had been a breach of the defender's duty, Lord Doherty was not persuaded that any such breach could be said to have caused the pursuer loss: utilising his wife's possible entrepreneurs' relief would have necessitated postponing the sale for a year, and he was not persuaded that the pursuer would have been willing to accept the risks and uncertainties associated with such a postponement. Lord Doherty commented that 'he did not think that [the pursuer] would have pursued the idea had it been raised'; and (6) even if there had there been a breach of the defender's duty, what the pursuer lost was the chance of making a tax saving (of £ 733,664). The judge would have valued that chance as a 50% chance.

c) Commentary

24 The judge's consideration of the law relating to the performance by a professional person of duties which are 'reasonably incidental' to the tasks for which the professional is contractually engaged falls outwith the scope of the present consideration of delictual aspects of the judgment and so will not be discussed.

25 The delictual aspects of the case are uncontroversial, except for one (discussed below). In relation to the extent of the (delictual) duties resting on the defender, Lord Doherty rightly observes that professional duties arising in delict are usually co-extensive in nature and scope with contractual ones. However, there are exceptions to that position, and concurrent duties in delict (arising alongside contractual ones) can sometimes permit claims to be made where contractual ones are unavailable, either because one form of liability may have prescribed while the other has not, or because one form of liability may be more extensive than the other. If one species of obligation creates more extensive liability, it is likely to be the contractual, as contractually agreed duties often extend beyond the baseline of the default duties arising in delict. But on occasion, an assumption of liability in delict can exist in circumstances to which a contractual liability does not extend (as happened in the well-known English tort case of *White v Jones*).[15] In this case, the facts appear to support Lord Doherty's view that any duty in delict would be of the same extent as the contractual one.

26 Where, however, it must be suggested that Lord Doherty goes awry is in relation to his analysis of causation (on a 'but for' basis) and loss of a chance.

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15 [1995] 2 AC 207, [1995] 2 WLR 187, [1995] 1 All England Law Reports (All ER) 691.

These two aspects of a delictual claim are mutually exclusive: if counterfactual analysis, using a *sine qua non* approach, furnishes an answer (one way or the other) to the question 'did the defender's breach of duty cause the loss claimed', then application of that analysis is determinative of the outcome, and there is no need (or possibility) of considering a loss of a chance claim. It is only where counterfactual analysis is incapable of answering that question that a pursuer may be permitted to reclassify its claim as one not for actual harm suffered (whether physical or economic) but as the loss of a chance of avoiding an actual harm. Inexplicably, in this case Lord Doherty seems to feel that he requires to analyse the case both as one of a claim for actual harm *and* as a claim for loss of a chance.

It is difficult to make sense of this approach. In answering the judge's own **27**
counterfactual enquiry (posed on the assumption that there *was* a breach of duty) as to whether the pursuer would have been subjected to a £ 733,664 liability in CGT had the defender not breached its duty to him with the answer that he did not think the pursuer would have pursued the idea of utilising his wife's entitlement to entrepreneurs' relief by postponing the sale, Lord Doherty was able to arrive at a clear answer: on the balance of probabilities, the actual loss claimed was *not* caused by any arguable breach of duty by the defender. That should have been the end of the matter. There was therefore no point to his Lordship's considering lost chance recovery, and it is not the case (as Lord Doherty states) that, had the defender breached a duty, the pursuer's loss 'would have been the loss of a chance of making a tax saving of £ 733,664'. Such a statement is at odds with the previous finding of fact that the pursuer would not have utilised his wife's tax relief (and hence that there was never any chance of his avoiding the tax liability). The ability of the court to answer the counterfactual causal question it asked should definitively have excluded any lost chance discussion. Why this point was missed by the court is unclear.

4. *Campbell v Dugdale* (Court of Session (Inner House) 27 May 2020, [2020] CSIH 27, 2020 SLT 587): Liability of Politician for Defamation in Relation to Comments made by Political Commentator

a) Brief Summary of the Facts

The pursuer, Mr Campbell, was a political commentator. In March 2017 he pub- **28**
lished a tweet, referencing two politicians (who were father and son), in which

he stated: 'Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner'. Oliver Mundell's father was gay. The defender, the then leader of the Scottish Labour Party, wrote a newspaper column a few days later in which she referred to the pursuer's 'homophobic tweets' and stating that the pursuer had 'spouted hatred and homophobia towards others'.

29 The pursuer raised an action for defamation against the defender in respect of these statements in her newspaper column. At first instance, the judge held that the defender's statements – in alleging that the pursuer was homophobic – were defamatory, but that she had available to her the defence of 'fair comment'. He therefore dismissed the claim. The pursuer appealed to the Inner House of the Court of Session, arguing that: (i) the published remarks were fact and not comment (and thus not protected by the fair comment defence); (ii) even if the statements were comment, they were not based upon a sufficient and accurate foundation of facts, with the reasons for them not being clearly stated; and (iii) the comment was not fair.

b) Judgment of the Court

30 The Inner House of the Court of Session held that: (1) a 'comment' is that which would strike a reasonable reader as something which is or could reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, or similar. In making such an inference, it was important to look at both the visual and textual context in which an article appeared. On this approach, the court concluded that the remarks were comment and not fact; (2) there was a sufficient factual basis upon which the comment was based: the terms of the article, coupled with the material in the public domain, were sufficient to draw the reader's attention to the existence of tweets as the basis upon which the defender's comment was based; (3) on whether the comment was fair, the question of whether homophobia and abuse was a fair inference from the true facts was to be decided as a matter of common sense. Taking that approach, the court agreed with the sheriff's conclusion that the remarks were indeed fair comment. The Inner House therefore rejected the appeal.

c) Commentary

31 Social media are often the loci of abrasive or controversial remarks. Such remarks give rise to threats of legal action from time to time. In this case, it was

not social media posts themselves which gave rise to a claim for defamation, but a party political leader's views on those social media posts expressed in a newspaper column. The court was faced with the challenge of policing the extent to which, where a social media post is deemed to be offensive, that can be publicly condemned in strongly critical terms.

32 The law of defamation in Scotland is largely untouched by statute, instead being governed by the common law. That may change in the near future, given a proposal by the Scottish Law Commission for a Defamation Act, but this case was decided under the existing common law. That common law holds a statement to be *prima facie* defamatory if it 'tends to lower [the pursuer] in the estimation of right thinking members of society generally'.[16] To be actionable, such a statement must be false. Where the statement made is not in the nature of stating a fact but rather of expressing an opinion, the defender can (as happened in this case) plead as a defence that the making of the statement was a 'fair comment'. To qualify as a fair comment, the opinion must be a comment on some fact(s), the underlying facts must be true, and the facts must relate to a matter of public interest. Where these criteria are met, it does not matter if the opinion expressed is in colourful or polemical language:

> 'The expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language.'[17]

33 In this case, the matter (comments by a prominent blogger on two politicians) was plainly one of public interest. The court identified the underlying, true fact as being:

> 'that the pursuer had tweeted that the nature of Oliver Mundell's public speaking was such that it would have been better if his father had declared his homosexuality earlier whereby, it is said, his son would not have been born'.[18]

34 Finally, the court had to consider whether the remarks were presented as comment rather than fact, and took into account that it appeared not in the news reporting section of the publication but in a separate section in which the defender published her personal views on a range of issues. Those views referenced the clearly identifiable and separate matter of fact commented upon. The court's conclusion that the defender had thus made 'comments' seems evidently

16 *Sim v Stretch* [1936] 2 All ER 1237.
17 *Archer v John Ritchie & Co* 1891 18 Rettie (R) 719.
18 Opinion of the Court, para [35].

correct. As to their fairness, the court makes the observation that this is not just a question of whether the views expressed were genuinely held by the defender: the court adds that there is the additional 'objective element of whether a reasonable person could reach that … view'. The court's conclusion that the comment was fair (in this sense) seems a justifiable assessment of the issue.

5. *Advocate General for Scotland v Adiukwu* (Court of Session (Inner House) 14 August 2020, [2020] CSIH 47, 2020 SLT 861): Breach of Alleged Duty of Care owed by Government Minister to Issue Letter Confirming Immigrant's Leave to Remain in the Country

a) Brief Summary of the Facts

35 The respondent (and original pursuer), Ms Adiukwu, was a non-EU national who sought leave to remain in the United Kingdom on the basis of her right to respect to private and family life (under Art 8 of the European Convention on Human Rights). That application was refused at first instance, before the respondent successfully appealed against that decision. A further appeal by the Government (the original defender) in March 2015 was refused. However, no leave to remain letter was issued to the respondent until November 2016.

36 The respondent raised an action for damages claiming for losses she incurred as a result of the delay of the issuing of the leave to remain letter, these losses relating to her inability to obtain employment or to access welfare benefits without the letter. At first instance, the judge granted the respondent's request for a proof (a trial of the facts). The appellant appealed against that decision.

b) Judgment of the Court

37 The Inner House of the Court of Session found that: (1) it was likely that the government had been under a public duty to grant the leave to remain letter, though a definitive decision on that point was not necessary for the purposes of determining the common law claim in delict for damages; (2) the common law would not impose a duty of care to run alongside a public law duty, unless there were very good reasons for doing so; (3) the relevant principles to be applied in the field were that: (i) public authorities may owe a duty of care in circum-

stances where private individuals would owe such a duty, unless that duty is inconsistent with or excluded by the terms of any legislation imposing or regulating the duty; (ii) neither private individuals nor public bodies generally owe a duty of care to confer benefits on others; (iii) the first step is to ascertain whether the relevant legislation under which the public body is acting itself creates a private right of action; and (iv) except in a case where the relevant statute expressly or by implication itself creates a private right of action to run alongside the statutory duties incumbent on the public body, the mere existence of a statutory duty is not sufficient to give rise to a common law duty of care. There must be something more; and (4) applied to the facts of this case, the government minister had done nothing in the performance of her statutory obligations to indicate that she has assumed responsibility to the respondent to take reasonable care to issue to her a leave to remain letter, and therefore there had been no breach of any duty of care owed to the respondent. The court therefore allowed the appeal and overturned the judgment at first instance.

c) Commentary

38 This case is the latest in a line of cases from across the United Kingdom denying private individuals the right to sue in delict (or tort) for the breach of an alleged duty of care arising out of a failure by a public body to fulfil a statutory duty or exercise a statutory power. Courts have taken a narrow approach to the possibility of common law delictual liability arising in such cases, holding that the existence of duties or powers in public law does not normally create a private law duty in respect of the failure to exercise the power or duty. The result of such an approach is that members of the public who are adversely affected by such failures often have no recourse against the public body in respect of losses they have suffered. That was the outcome in this case in respect of the failure to issue the leave to remain letter, which the court assumed (for the purposes of disposing of the claim in delict) to constitute a breach of a public law duty to issue the letter once the government had exhausted any further right to appeal against the decision to grant Ms Adiukwu leave to remain in the United Kingdom.

39 The appeal bench considered the relevant authorities in the field in some depth, including the seminal authority of *Stovin v Wise* (concerning an authority's failure to remove a traffic obstruction),[19] the later case of *Gorringe v Calderdale Metropolitan Borough Council* (concerning a council's failure to erect a

19 [1996] AC 923.

warning sign on a road),[20] and the recent Supreme Court decision in *N v Poole Borough Council* (concerning failure by a council to prevent a mother and her children, housed by the council, from being abused and harassed by anti-social neighbours).[21] While in none of those cases was the defendant found to have owed a common law duty of care to the injured party, in *N* (a case whose facts were made more complex in that the harm had been caused by a third party) the Supreme Court held that, as long as it would not be inconsistent with the applicable statutory regime, a public authority might 'assume responsibility' in tort to another party in respect of its failure to protect that party from harm. However, on the facts in *N* it had been held that the local authority had done nothing to indicate that it had assumed any such responsibility in tort for its failure to rehouse the family for over five years. The appeal bench in *Adiukwu* reached a similar conclusion in respect of the government's failure to protect Ms Adiukwu from the various economic harms she had suffered.

6. *Woodhouse v Lochs and Glens (Transport) Ltd* (Court of Session (Inner House) 30 October 2020, [2020] CSIH 67, 2021 Reparation Law Reports (Rep LR) 2): Whether a Finding of Prima Facie Negligence had been Warranted on the Facts of a Road Accident

a) Brief Summary of the Facts

40 The pursuer was one of several passengers on a tour bus driven by an employee of the defenders. The bus was heading northwards on a popular tourist route when it left the road and rolled over. The pursuer, who was injured in the accident, raised an action for damages against the defenders, alleging that the bus driver's negligence had been the cause of his injuries and that, as the driver's employer, the defenders were vicariously liable for her fault. The pursuer, relying on the legal maxim *res ipsa loquitur*,[22] argued that the mere fact that the

20 [2004] United Kingdom House of Lords (UKHL) 15, [2004] 1 WLR 1057.

21 [2019] UKSC 25, [2020] AC 780.

22 This legal maxim (literally translated as 'the thing speaks for itself') applies in cases where the facts of a harmful outcome can only be explained by the fault of the defender, so that such fault is therefore presumed. In such a case, the onus is on the defender to demonstrate that it was *not* at fault (a reversal of the ordinary burden of proof).

coach came off the road at the place where it did gave rise to a *prima facie* inference of negligence on the part of the driver.

At first instance, the judge accepted that the maxim *res ipsa loquitur* applied 41
to the circumstances of the accident. Despite this, he dismissed the case against the defenders on the basis that negligence on the part of the driver had not been established. The pursuer appealed, arguing that the judge had erred in the approach he had taken.

b) Judgment of the Court

The Inner House of the Court of Session allowed the appeal, holding that: (1) the 42
judge at first instance had misapplied the *res ipsa loquitur* maxim to the facts of the case. It was not a principle but a presumption of fact, and, were it properly applied, it required the defenders to demonstrate that the harm had occurred without fault on its part. As the judge at first instance had continued to insist that the pursuer demonstrate fault, he had thus erred in his approach; (2) in reviewing the speed of the bus at the time of the evidence, the judge at first instance had been wrong to conclude that its speed did not make it less easy to control: it was self-evident that a lower speed made a vehicle easier to handle, and evidence to that effect at the trial had been wrongly ignored by the judge; (3) reviewing the evidence as to the bus driver's negligence, it supported the conclusion that she had been negligent. In so holding, the appeal court found the defenders liable to pay the pursuer damages amounting to £ 15,000 (the amount agreed by the parties as being due should the defenders be found liable).

c) Commentary

This appeal court judgment is somewhat unusual as it involves the review by an 43
appeal bench of a matter that would normally be conclusively decided at first instance, specifically the issue of whether a defender has been negligent. The additional feature of interest is that the appeal bench considers that the judge at first instance failed to appreciate that, on these facts, it was (unusually) for the defenders to prove that they had not been negligent rather than for the pursuer to establish the presence of negligence.

The reversal of the ordinary balance of proof arose because this was one of 44
those cases where the court considered it appropriate to apply the *res ipsa loquitur* legal maxim. Unfortunately, the appeal bench considered that one of the

ways in which the judge at first instance had erred was in applying this maxim. That does indeed seem to have been the case, as when the maxim applies (and road traffic accidents are a common type of case in which the maxim often applies) the defenders must lead evidence to demonstrate that they were *not* negligent; whereas, the judge at first instance had returned the burden of proof to the pursuer, holding that it had not discharged that burden. The appeal bench noted:

> '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.'[23]

45 This error was compounded, in the view of the appeal bench, by the judge at first instance's failure to consider relevant evidence and plainly incorrect findings as to the evidence which he did consider.

46 The effect of the combined legal error and errors regarding assessment of the factual evidence meant that the court felt able to take the rarely exercised step of revisiting the assessment of the evidence presented as to the alleged negligence of the bus driver. In so doing, it concluded that the bus driver had been negligent and made an appropriate monetary award (of the agreed amount).

47 The approach taken by the appeal bench seems appropriate given their conclusion as to the errors made at first instance. The only quibble which one might make with the appeal bench's judgment is in its assertion that *res ipsa loquitur* 'is not a legal principle' but a 'presumption of fact'. It is not quite clear why a rule which gives rise to a presumption of fact cannot itself be described as a 'principle'. Indeed, there is evidence that courts in a number of jurisdictions have referred to *res ipsa loquitur* as a legal principle. This, however, is a minor semantic quibble with a judgment which in general looks to have corrected errors made in the first instance judgment.

7. Personal Injury

48 The volume of cases reported in 2020 in Scotland was, as elsewhere in the world, reduced on account of court closures during the first wave of the Corona virus pandemic. In due course, there may well be some delictual cases arising from facts related to the pandemic. However, in 2020 the majority of personal injury cases remained, as in other years, a mixture of mostly road traffic inju-

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23 Opinion of the Court, para [36].

ries, workplace accidents, and medical negligence claims. Four cases have been selected for a brief, specific mention, to give a flavour of the reported claims.

49 The first instance decision of *Cameron v Swan*[24] is notable for two reasons. First, the injuries sustained by the pursuer in this claim occurred 'in Wellmeadow Street, Paisley … to the west of its junction with Lady Lane'.[25] That description places the occurrence of the harm in the immediate vicinity of the former Wellmeadow Café, which as many delict and tort lawyers will know, was the location of the most famous delict case, *Donoghue v Stevenson*[26] (which was cited to the court in this case). In this case, the injury sustained was not caused through the consumption of a contaminated bottle of ginger beer but instead through a combination of the unfortunate decision of the drunken pursuer to lie down on the roadway and a passing delivery van driver, who, failing to notice the pursuer, drove over him at just before 5 am. The judge, examining the facts of the case, concluded that the driver had not broken the duty of care which he owed to the pursuer. The judge added that, even had the defender broken his duty of care through being insufficiently attentive while driving, he would have held the pursuer to have significantly contributed to his own injuries by having decided to lie on the roadway while in a drunken state. It seems that, almost a century after *Donoghue v Stevenson*, Wellmeadow Street remains a locus of accidents.

50 The second judgment worthy of a brief mention is *Wildcat Haven Enterprises CIC v Wightman*.[27] This case is of interest in being the second 2020 instance of a defamation action relating to comments on social media.[28] Like the other reported case, the facts of this case also led to the defence of fair comment being pled (again, successfully). The judgment of Lord Clark includes discussion of the point that '[f]or the defence of fair comment to be available, it is not necessary that every fact founded upon is true',[29] which aided the defender in this case given that not all the facts upon which the comments rested were in fact true.

51 *McManus v Scott Wilson Scotland Ltd* [2020] CSOH 47 was the lead action in a group of forty-four cases raised by people who claim to have suffered personal injury as a result of inhaling harmful substances alleged to have been present in land upon which a housing development had been constructed. The defender

24 2020 [CSOH] 20.

25 Para [4] of Lord Brailsford's judgment.

26 1932 SC(HL) 31.

27 2020 [CSOH] 30, 2020 SLT 473.

28 For substantive discussion of the other case, see the earlier analysis of *Campbell v Dugdale* at no 28 above.

29 Para [70].

was a civil engineering company which had provided surveys of the site prior to the construction of the development. The judge thought that the defender had owed a duty of care to those persons who would reside on the contemplated development, stating:

> 'where a person is involved in an activity which, if he does not exercise reasonable care, will create a foreseeable risk of personal injury to others, the person owes a duty of care to those others to act reasonably having regard to the existence of that risk'.[30]

52 The crucial point here is that the risk was of causing personal injury to people and not simply of causing pure economic loss (had it been the latter, no duty would likely have been owed). In the circumstances, however, it was held that there had been no breach of the duty owed.

53 The final case is *MacBean v Scottish Water*.[31] This was an action for interdict and damages in respect of an ongoing alleged nuisance said to be constituted by the emission of noxious fumes from a sewage treatment plant owned and operated by the defender. Prior to the action being raised, the defender had sought to meet the pursuer's concerns by carrying out remedial works at the plant. However, the defender was unsatisfied that the problem had been resolved. Reviewing the evidence, the court concluded that the pursuer had not established a continuing actionable nuisance: any remaining odours were irregular, faint, transient, and only occasionally reaching the pursuer's property. Any disturbance caused by the odours did not thus meet the minimum threshold required for an actionable nuisance, which is that the alleged nuisance be constituted by a harmful effect which is more than reasonably tolerable.

C. Literature

1. *Elspeth Reid*, Liability for Wrongful Deprivation of Liberty: Malice and Police Privilege (2020) 24(2) Edinburgh Law Review 175–201

54 In this article, the author reviews the Scottish law relating to delictual redress for wrongful deprivation of liberty. The article is a timely one, as a lot of public

30 Para [53].

31 [2020] CSOH 55, 2020 SLT 707.

attention has recently been drawn to the circumstances surrounding the detention of two administrators of Glasgow Rangers Football Club. Delictual claims relating to the detention of one of the administrators were discussed in a previous Yearbook.[32] Professor Reid examines this case and other authorities in the field.

The argument advanced is that there are only two categories of case: **55** (1) those in which a pursuer avers that he or she has been deprived of liberty unlawfully, and (2) those in which a pursuer concedes that a police constable had the power to arrest or detain but that the exercise of that power on the particular occasion was unwarranted. She further argues that there is insufficient authority in the Scottish sources to support an intermediate category of conduct by police officers which is at once unlawful and yet broadly within their 'competence', and which is privileged on that ground; and that there ought not to be any role for a requirement to establish 'malice' in motive in claims arising in this area.

As the Lord Advocate has apologised publicly to the two administrators for **56** prosecutions which it is now accepted ought not have happened, and as substantial damages are to be paid to each, it is likely that this area of the law, and what it requires pursuers to demonstrate, will be the subject of continuing scrutiny by lawyers and law reformers.

2. *James Ford*, Poole Borough Council v GN, and the Piecemeal Dismantling of Local Authorities' Immunity (2020) 24(2) Edinburgh Law Review 256–262

In this case note, the author reviews the decision of the UK Supreme Court in **57** the English appeal of *Poole Borough Council v GN* and another[33] (a decision referred to in passing earlier, in the discussion of *Advocate General for Scotland v Adiukwu*[34] at no 35 above). As alluded to earlier, in *Poole* the Supreme Court refused a tort claim by a mother against the local authority which had housed her and her children in respect of the abuse which they had suffered at the hands of third parties (neighbours).

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32 See discussion of *Whitehouse v Chief Constable, Police Scotland* [2019] CSIH 52, 2019 SLT 1269.

33 [2019] UKSC 25.

34 [2020] CSIH 47, 2020 SLT 861.

3. *Eleanor Russell*, The duty of the reference giver, 2020 Scots Law Times (News) 175–181

58 The author examines the law regarding whether a reference giver owes a duty of care to *a third party* who is neither the subject nor recipient of the reference, an issue which had not previously received judicial attention until it was raised in the recent judgment in *Glasgow City Council v First Glasgow (No 1) Ltd*.[35] The existence of a duty of care in such circumstances is not analogous to any of the existing circumstances in which a duty has been imposed in respect of the giving of a reference, and such a duty was found in the judgment not to arise. In her analysis, the author signals her approval of the decision.

4. *Douglas Brodie*, Vicarious Liability and Bifurcation: Reflections on WM Morrison Supermarkets v Various Claimants (2020) 24(3) Edinburgh Law Review 389–394

59 The author reflects on the developments in the law concerning employers' vicarious liability for the delicts of employees, specifically in the light of the decision of the UK Supreme Court in *WM Morrison Supermarkets plc v Various Claimants*[36] (which judgment had denied liability in a case concerning the unauthorised release of a supermarket company's payroll data on the internet by one of its employees).

60 The author argues that denying liability on the basis that the employee was engaged on a personal vendetta is difficult to reconcile with the outcome in earlier cases, and that concern that expansion of the law has gone too far may have led the Supreme Court to edge towards the view that the 'close connection' test of vicarious liability should be reserved for child abuse cases and denied in other sorts of case. The author suspects that, if such bifurcation in approach is indeed emerging, some very tricky demarcation issues will arise. He ends by noting: 'By way of conclusion, it can be said that it has never been more apparent that this is an area of law where policy concerns dominate; regrettably they also fail to furnish a coherent framework.'[37]

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35 [2019] CSOH 101, 2020 SLT 75.

36 [2020] UKSC 12, [2020] AC 989.

37 At 394.