EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 14
PD53/14

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF LORD BRODIE

in the cause

CRAIG ANDERSON

Pursuer and respondent

against

JOHN IMRIE

First defender

and

ANTOINETTE IMRIE

Second defender and reclaimer

Pursuer and respondent: Milligan QC, Skinner, Drummond Miller LLP
First Defender: Non-participating Party
Second Defender and reclaimer: Springham QC, BTO Solicitors LLP

15 March 2018

Introduction

[1] On 30 June 2003 the pursuer, who was then eight years old, was seriously injured in an accident at Hillhead Farm, Torrance, East Dunbartonshire. A heavy gate fell on the pursuer causing injuries to his skull and brain. In this action, he seeks damages from the

defenders, Mr John Imrie and his wife, Mrs Antoinette Imrie, on the basis that the accident was caused by their failure to take reasonable care for his safety. The defenders lived on the farm at the time of the accident, although it was owned by the first defender's late father, John Imrie senior. The pursuer avers that the defenders were the occupiers of the farm at the material time for the purposes of the Occupiers' Liability (Scotland) Act 1960 ("the 1960 Act"). He claims that they were in breach of the duties they owed to him under the 1960 Act and also at common law.

[2] The pursuer was born on 23 January 1995. The limitation period provided by section 17 of the Prescription and Limitation (Scotland) Act 1973 in respect of personal injury caused by the accident therefore commenced on 23 January 2011. The action was raised shortly before the end of that period, in early 2014.

[3] The action came before the Lord Ordinary for proof on liability and *quantum* of damages on 18 October 2016. Having heard evidence, on 28 October 2016 the Lord Ordinary made avizandum. On 8 December 2016 the Lord Ordinary assoilzied the first defender (Mr John Imrie). He found the second defender (Mrs Antoinette Imrie) liable to make reparation to the pursuer and decerned against her for payment of damages in the sum of £325, 976. That sum reflected a reduction of twenty-five per cent in the damages that otherwise would have been awarded by reason of the pursuer's contributory negligence.

[4] The second defender now reclaims. She presents three grounds of appeal:

1. The Lord Ordinary erred in finding that the second defender failed in her duty to take reasonable care for the pursuer both under the Occupiers' Liability (Scotland) Act 1960 and at common law. The evidence demonstrated that the second defender had exercised reasonable care in supervising the pursuer.

2. The Lord Ordinary erred in concluding that the second defender was an occupier of the farm for the purposes of the Occupiers' Liability (Scotland) Act 1960. The evidence was insufficient to allow him to find that she exercised the necessary control of the premises.

3. The Lord Ordinary erred in holding that the accident occurred due to "the state of the premises" in terms of section 2 (1) of the Occupiers' Liability (Scotland) Act 1960. The gate which injured the pursuer was not a danger due to the state of the premises as is required under that section.

The Facts

Hillhead farm

[5] At the time of the accident Hillhead Farm extended to about one hundred acres. The father of the first defender, John Imrie Senior, owned the farm in addition to certain other farms in the neighbourhood. All the farms were operated as a single business, of which Mr Imrie senior was the sole proprietor. Hillhead was a dairy farm and was also used for breeding cattle and sheep.

The farm courtyard and the location of the accident

[6] At Hillhead various farm buildings were constructed around a central courtyard. The farmhouse was on the south side of the courtyard. A kitchen window looked out on the courtyard. Immediately to the east of the farmhouse there was an iron gate giving access (including vehicular access) to the courtyard from the private road leading to the farm. On the east side of the courtyard there were other buildings, including a barn and a stable. Just in front of the stable (to the west of it) there was a small area used as a race or livestock

crush. On the northern side of the courtyard there was an enclosed area used as a midden. On the courtyard's west side there were other farm outbuildings; they included a second stable.

[7] The Lord Ordinary found there to be no dispute that the pursuer's accident occurred in the race. The purpose of the race was to control the access and egress of livestock between the courtyard and a pen situated to the northeast of the courtyard. It was of the nature of a corridor with a concrete surface. Its east side was formed by a wall of the stable and its west side was constructed from metal panels with a steel crash barrier fixed on top of them. There were gates at both the southern and the northern ends of the race. One could enter the race from the courtyard by means of the southern gate. This was a metal gate with horizontal spars; the type of gate that is frequently found on a farm. It was about two and a half metres in length and around one and a half metres high. It was an awkward gate to open and had to be lifted slightly off the ground to achieve this. The gate at the northern end of the race gave access to the pen. The race was thus an enclosed area. The pen just to the north of the race contained a number of gates and another livestock crush. Beyond the pen there were fields.

The stock gate

[8] The gate which fell on the pursuer was described in evidence as a stock gate. It was of heavy metal construction with eight horizontal spars. It was designed to be used for handling and controlling cattle or sheep. It had originally been used for a bullpen. It weighed about three hundred kilogrammes. The first defender's recollection was that the stock gate had been moved to the race four or five days before the accident because it was intended to make use of it in constructing a new pen. It had been left leaning against the

barrier on the west side of the race. It was secured to the barrier by means of a chain and pin. The chain was wrapped around one of the uprights of the barrier and a link of the chain was then placed over the pin. The gate was chained to the barrier in this way so that it did not fall over and cause injury to persons or livestock.

The circumstances of the accident

[9] At the time of the accident the defenders had five children, the eldest of whom was fourteen. The second defender's recollection was that on 30 June 2003 the three older children had gone to play with friends elsewhere than on the farm. Her mother was helping her look after her son Ben, who was five, and her daughter Tabitha, who was one. The first defender was working on a tractor about a mile from the farmhouse. It was a beautiful day and the second defender was looking forward to going out for a ride on her horse.

[10] The defenders and the pursuer's parents were friends. In circumstances the details of which the Lord Ordinary did not consider that he needed to determine, the second defender and the pursuer's mother agreed that the pursuer should be left at the farm for a period of time in the care of the second defender while the pursuer's mother went elsewhere. The second defender had not looked after the pursuer before as he had not previously visited the farmhouse. However, the Lord Ordinary specifically found that there was no dispute that the second defender was responsible for looking after the pursuer at the time of the accident.

[11] The second defender's evidence, which was accepted by the Lord Ordinary, was that she told Ben and the pursuer that they could play in the farmhouse and in the courtyard, but that they must not go into the race or the nearby midden. These were dirty and unpleasant areas and not suitable for young children to play in. She made sure that the gate leading to

the race from the courtyard was closed. She took some toys out of a shed and put them in the courtyard for the boys to play with. She said that at the relevant time she was going back and forth between the courtyard and the farmhouse to check that her mother was managing with the baby. She had her horse in the courtyard and was dressing it. This required her to go into the stable on the west side of the courtyard for items such as her tack box and brushes. The horse was fidgety so she may have had to put it into the stable at some point. The second defender acknowledged that she had not been constantly watching the boys. Her recollection was that some minutes after she had gone into the stable, Ben came in and told her that she had to come at once. She thought that she might just have been coming out of the stable when Ben approached her. She said that she did not think that she had been away from the courtyard for long enough for anything to have happened. When she had last seen the boys, they had been playing in the courtyard. They had not been particularly close to the gate leading to the race from the courtyard (what is described above as the southern gate). The second defender walked across to the gate and found that the southern gate was shut. She saw the pursuer lying on his back on the ground in the race with a heavy stock gate on top of him. He was moving, but was obviously injured. She managed to lift the stock gate off the pursuer and carried him back to the farmhouse. With the assistance of a man who was working elsewhere on the farm, she drove the pursuer to Stobhill hospital. In cross-examination the second defender said that just before the accident the pursuer had possibly been out of her sight for about 5 minutes. She thought that he must have climbed over the southern gate in order to get from the courtyard into the race. Ben told her that he had said to the pursuer not to go into the race, but the pursuer had insisted on doing so.

[12] Although the pursuer had given a different account in his evidence and there was no other eyewitness, the Lord Ordinary found that the accident probably happened in the following way. The pursuer and Ben were playing together in the courtyard. The second defender was focussed on grooming her horse as the children were playing. She went into the stable on the west side of the courtyard to get something. While she was in the stable, the pursuer managed to climb over the southern gate separating the courtyard from the race. Once he was in the race he climbed onto the stock gate attached to the barrier. He lifted the chain off the pin causing the gate to become detached from the barrier. The gate then over-balanced on top of the pursuer causing him to fall back and strike his head against the concrete surface of the race. He ended up lying on his back on the ground with the stock gate on top of him.

The lord ordinary's reasoning

[13] In his opinion the Lord Ordinary first considers the case alleging breach by the defenders of the duty imposed by section 2(1) of the 1960 Act. In terms of section 1(1) that is a duty imposed on "a person occupying or having control of land or other premises". The first question for consideration was accordingly whether the pursuer had proved that at the material time the defenders were occupiers of the farm (or whether one of them was an occupier). That in turn depended on their ability to exercise control of premises and therefore to be able lawfully to take such steps as are necessary to fulfil the duty of care defined by section 2(1): *Gallagher* v *Kleinwort Benson (Trustees) Ltd and others* 2003 SCLR 384, at paragraph [124]; *Wheat* v *E Lacon & Co Ltd* [1966] AC 552, Lord Denning at 577 to 579. In the present case the undisputed evidence was that the defenders had lived on Hillhead Farm as a family since 1992. There was no doubt that they occupied the farm in the sense that they lived

there, albeit the farm was owned by the first defender's late father, who lived elsewhere. The first defender worked the farm as his father's employee. As the Lord Ordinary understood the first defender's evidence, the first defender's father would decide on matters concerning the running, operation and management of the farm because he was the sole proprietor of the farming business carried out there. Thus, Mr Imrie senior would decide if new equipment should be purchased or if the layout of the farm should be changed. However, in the opinion of the Lord Ordinary, the first defender's status as an employee did not necessarily mean that he could not also have been an occupier of the farm for the purposes of the 1960 Act. There was ample evidence that the defenders had practical and effective control of the entire farm on a day-to-day basis. It was their family home and as such clearly far more than merely a place of work. The Lord Ordinary accepted the evidence of the pursuer's parents that from their experience of visiting on social occasions it appeared to them that the defenders were in charge of what happened at Hillhead and were free to come and go as they pleased anywhere on the farm. The Lord Ordinary's impression from the first defender's evidence was that the first defender had the authority to take any necessary decisions about practical matters affecting the farm, such as where gates should be positioned and where visitors should be allowed to go. The first defender had acknowledged in cross-examination that he had the power to make changes for safety reasons; for example, by filling in holes or dealing with other potential dangers. The second defender accepted that on the day of the accident it was her responsibility to see that all the relevant gates were closed and that the boys were restricted to playing in parts of the farm where it was safe for them to do so. She told them that the race and the midden were out of bounds. She clearly regarded it as her duty to prevent the boys from venturing into any part of the farm that might be dangerous. On the basis of this state of the evidence the Lord Ordinary concluded that both of the defenders were

in a position to take whatever steps were necessary to ensure that the duty of care imposed under section 2(1) of the 1960 Act was fulfilled. Accordingly, he held them both to have been occupiers at the material time for the purposes of the 1960 Act.

[14] The next issue addressed by the Lord Ordinary was whether, on the evidence, the defenders had complied with the duty incumbent on them as occupiers under the 1960 Act. That was a duty to take such care in respect of dangers due to the state of the premises or to anything done or omitted to be done on them, as in all the circumstances of the case was reasonable to see that a person entering on the premises (such as the pursuer) would not suffer injury or damage by reason of any such danger: section 2(1) of the 1960 Act. Reasonableness in this context was to be evaluated in the light of all the circumstances of the case; it must be very largely a question of fact: *McGlone* v *British Railways Board* 1966 SC (HL) 1, Lord Guest at 16.

[15] In considering liability to the pursuer in their capacity as occupiers it seemed to the Lord Ordinary to be necessary to distinguish between the respective positions of the two defenders. So far as the first defender was concerned, he had not been involved in the arrangements whereby the pursuer came to be visiting the farm on the day of the accident. He was working about a mile away from the farmhouse throughout the day and did not return until after the accident had occurred. There was nothing in the evidence to suggest that he even knew that the pursuer had come to play at the farm that day. He had no reason to expect that the pursuer might gain access to the race by climbing over the gate from the courtyard and proceeding to detach the stock gate from the barrier thereby causing it to fall on him. There was no evidence that any similar incident had occurred previously; nothing like this had happened to any of the defenders' children. The Lord Ordinary considered that it was reasonable for the first defender to proceed on the basis that, having secured the

stock gate to the barrier, there was no reason to suppose that it might topple over and injure someone. He had no reason to foresee that anyone might interfere with it. He had no reason to expect that the pursuer would be playing in the race. In the circumstances, the Lord Ordinary concluded that the first defender was not in breach of the duty he owed as an occupier of the farm to the pursuer.

[16] Different factors came into play on considering the position of the second defender. In contrast to her husband, she had assumed responsibility for looking after the pursuer on the day of the accident. She was responsible for him in the absence of his mother and was clearly *in loco parentis*. She had said that she was well aware that the farm could be a dangerous place for children; she accepted that it presented various risks and dangers to children and that it was important to keep a close watch on them to ensure that they did not have an accident. That, the Lord Ordinary concluded, was why she took steps to tell the boys to remain in the courtyard; so that she could keep a watchful eye on them. In her evidence the second defender had accepted that she had gone into the stable and that the boys were, therefore, out of her sight for a period of time. She could not be precise as to the length of this period of time, but thought that it was some minutes; in cross-examination she accepted that it could have been as long as five minutes. From that the Lord Ordinary took it that the boys must indeed have been out of the second defender's sight for a period of at least several minutes. There required to be sufficient time for the pursuer to have approached the gate in the courtyard giving access to the race (the southern gate), to have managed to climb over it into the race, to have clambered up onto the stock gate; to have lifted the chain off the pin and to have succeeded in detaching the gate from the barrier, thereby bringing the gate down on himself. If the second defender had seen the pursuer attempting to take any of these steps the Lord Ordinary considered that she would certainly

have intervened immediately. He concluded that she did not see anything of the sequence of events leading up to the accident. The second defender frankly accepted in evidence that the stock gate might seem to a child of the pursuer's young age to be an alluring item; she agreed that for young boys the prospect of climbing on such a gate might be attractive. She also acknowledged that a child of the pursuer's age might be intrigued by a metal chain and be tempted to interfere with it. It seemed to the Lord Ordinary that the second defender was clearly correct in relation to these points; they were really just matters of common sense that any reasonable adult with some experience of young children would be expected to know. Counsel for the defenders had submitted, under reference to the opinion of Lord Glennie in *Dawson* v *Page* 2012 Rep LR 56 at paragraphs 22, 26 and 27, that the stock gate did not in the circumstances constitute a danger due to the state of the premises since there was no reason to suppose that it was liable to fall and injure anyone. In the Lord Ordinary's opinion, that submission was irreconcilable with the second defender's evidence; her testimony amounted to an acceptance that the gate presented a danger to a child of the pursuer's age if he got into the race. According to the Lord Ordinary the correct analysis was not to ask whether the stock gate constituted a danger in an abstract sense. The real question was whether in the particular circumstances of a young child who might find the prospect of entering the race and playing on the gate to be irresistible, the stock gate presented a foreseeable risk of causing injury. In his opinion it did. Thus, the second defender ought to have foreseen that if the pursuer managed to get into the race he might injure himself by interfering in some way with the stock gate. It followed that she had a duty to take reasonable care as an occupier to see that the pursuer did not get into the race. Like every other reasonable adult, the second defender understood that young boys do not always abide by warnings and instructions. In the Lord Ordinary's opinion the evidence showed

that the second defender did not take sufficient care to ensure that the pursuer was not injured in the race. She had allowed him to be out of her sight and beyond her supervision for an unreasonably long period of time in the circumstances prevailing that day. In his judgment the pursuer must have been out of her sight for at least several minutes. For a child of eight in a potentially perilous environment, such as the farm occupied by the defenders, that was dangerously long. There was, in the Lord Ordinary's view, a foreseeable risk that within such a timeframe the pursuer would suffer an accident in the race. It was not necessary that the precise mechanism of the accident should have been foreseeable: *Hughes* v *Lord Advocate* 1963 SC (HL) 31. There was a foreseeable danger that the pursuer would suffer injury on the farm if he was not sufficiently supervised by an adult. The accident happened because he was not properly supervised. In these circumstances, the Lord Ordinary considered that the second defender had failed in the duty of care she owed to the pursuer under and in terms of section 2(1) of the 1960 Act.

[17] In the Lord Ordinary's opinion, for the reasons applicable to the case in terms of the 1960 Act, the second defender was also negligent at common law because she failed to take reasonable care to supervise the pursuer adequately on the day of the accident. There was no basis for such a case against the first defender. As the Lord Ordinary had found him not to have been in breach of his duties as an occupier he was therefore assoilzied. The second defender alone was found liable for the accident.

Submissions

Second defender and reclaimer

[18] On behalf of the second defender and reclaimer, Ms Springham QC explained that her submissions would fall into two parts: first, a response to the contention in the

respondent's notes of argument that the Lord Ordinary's finding that the reclaimer had failed to exercise reasonable care was of the nature of a finding of fact which could only be interfered with in the event of an error such as was identified by Lord Reed in *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203; and, second, a review of the errors made by the Lord Ordinary in his purported application of the standard of reasonable care to the facts of the case. Ms Springham acknowledged that if the reclaimer failed on ground of appeal 1, the other grounds were academic. She confirmed that she had no challenge to make to the Lord Ordinary's findings of primary fact.

[19] As to the proper approach of an appellate court to a case of this sort, Ms Springham submitted that a finding that there has been breach of a duty of care is not a finding of fact; it is a consequence of the application of the law to the facts and, as such, is amenable to review by an appellate court without any need to demonstrate the sort of error discussed by Lord Reed in *Henderson*: *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at paragraphs 48 to 52. The respondent's reference to *Jolley* v *Sutton London Borough Council* [2000] 1 WLR 1082 at 1088H to 1089D was inapposite. What was being discussed by Lord Steyn in that passage was whether the Court of Appeal had been entitled to reverse the trial judge's assessment of what was reasonably foreseeable. What was in issue in the present case was the Lord Ordinary's application of the duty of reasonable care to the facts. The court was entitled to make its own assessment as to whether he had erred in doing so.

[20] It was Ms Springham's submission that the Lord Ordinary had been in error. In essence, the question for the court had been whether the level of supervision exercised by the second defender was reasonable in the circumstances. The reclaimer submitted that properly considered the evidence did not support a conclusion that the second defender was negligent and that had the Lord Ordinary correctly applied the test of reasonable care the second

defender should have been assoilzied in addition to the first defender. If the reclaimer was correct in her submission that the Lord Ordinary had erred then Ms Springham invited the court to come to its own conclusion on the matter.

[21] The pursuer's case had focused on, first, the time between the second defender last seeing the pursuer and the accident happening and, second, what she had known about the stock gate. As to the first point, it had been unrealistic to ask a witness to make an estimate of this period of time. The Lord Ordinary had been correct not to attempt to go beyond finding that the boys had been out of the second defender's sight for "at least several minutes". To then go on and find that that amounted to a breach of the duty of care was to apply too high a standard. Hindsight should not be applied to find negligent what happens in a busy household: *Surtees* v *Royal Borough of Kingston upon Thames* [1992] PIQR P101 at 111 to 112 and 123 to 124. It was not in the public interest to impose a duty on parents (or those looking after others' children) to keep children under constant surveillance: *Harris* v *Perry* [2009] 1 WLR 19 at paragraph 34, *Surtees* at 123. While the focus had been on the stock gate there were other "dangers" on the farm but this was not a case where these presented the level of risk which might be associated with an unguarded slurry pit, operating machinery or a raging bull. The Lord Ordinary's conclusion had come close to saying that there must have been carelessness simply because the accident happened.

[22] What the Lord Ordinary should have done and what this court should now do was to put itself in the shoes of the second defender with a view to judging the reasonableness of her conduct given the circumstances and what the second defender knew about them. These included: the fact that while the boys were in a farm environment essentially what was involved was two boys playing together; the fact that the second defender had recognised the need to keep the children in the courtyard as far as was possible and to that

end had shut the iron gate closing off vehicle access and had shut the door of the barn where there was livestock; the fact that the stock gate was behind the gate from the courtyard to the race which was difficult to open (albeit that the pursuer had succeeded in climbing over it); the fact that the stock gate was secured to the barrier by a chain; the fact that the stock gate did not lead anywhere; that there was no evidence that the chained stock gate was liable to fall; that precisely how the stock gate came to fall had not been established, although the first defender supposed that the pursuer had pulled the gate over, having got purchase on the barrier with his legs; and that while the second defender was aware of danger in a general sense, she knew the stock gate was within the race, she knew it did not lead anywhere and she understood it to be secured.

[23] Turning to ground of appeal 2, it was Ms Springham's submission that the second defender was not in a position to exercise the control necessary to fulfil an occupier's duties. It followed that she should not have been found to have been an occupier for the purposes of the 1960 Act: *Gallagher* v *Kleinwort Benson (Trustees) Ltd* 2003 SCLR 384 at 416.

[24] As was stated in ground of appeal 3, the stock gate was not properly a danger due to the state of the premises. There was nothing inherently dangerous about it. The stock gate had been chained to prevent it falling on persons or animals passing in the race. There was no basis for finding it to have been improperly secured. It would not be right to ignore a child's choice to indulge in a dangerous activity in every case simply because he was a child: *Keown* v *Coventry Healthcare NHS Trust* [2006] 1 WLR 953 at 958D. The duty under the 1960 Act did not apply: *Dawson* v *Page* at paragraph [22].

Pursuer and respondent

[25] Mr Milligan QC presented his argument under reference to written submissions

which incorporated what was contained in the respondent's previously lodged note of argument and supplementary note of argument. In Mr Milligan's submission the pursuer's case stood or fell on the common law case; what in discussion had been referred to as the childcare case. The Lord Ordinary's findings in fact were unchallenged; the reclaimer had not sought to introduce additional findings. The reclaiming motion had been presented as an appeal on a point of law but that was not correct. This was not a case where any general principle had been advanced; rather the Lord Ordinary had been simply required to make an informed judgment on particular facts. Accordingly, the correct approach for this court to follow was that illustrated in the decision of the House of Lords in *Jolley* v *Sutton London Borough Council*. The critical question for the court was whether the Lord Ordinary had been entitled to come to the decision that he did when applying the law, as to which it was not said that he had made any error, to the unchallenged primary facts which he had found to have been established. In Mr Milligan's submission the Lord Ordinary had been entitled to decide as he had. If he was correct about that then that was an end of the matter; the reclaiming motion must be refused. As was observed in *AW* v *Greater Glasgow Health Board* at paragraph [53], it has been (on a number of occasions) said that an appellate court should be slow to interfere with the decision of a first instance judge in matters of evaluation: *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803 Lord Bridge at 815 to 816; *Re Grayan Building Services Ltd* [1995] Ch 241, Hoffmann LJ at 244 to 245; *Biogen Inc* v *Medeva plc* [1997] RPC 1, Lord Hoffmann at 45. There were good reasons for that. As the judge of first instance, the Lord Ordinary had seen all the witnesses and heard all the evidence. It had been open to him to ask questions in the event that he required clarification or additional information. Moreover, there is value in finality, in other words in not unnecessarily revisiting decisions. A reclaiming motion is not simply a review.

[26] The Lord Ordinary's findings of primary fact provided a proper and adequate basis for his unchallenged finding that there was a risk that an eight year old child would suffer injury if left unsupervised in a potentially perilous environment such as the farm and that the second defender failed in her duty of care to the pursuer. These facts were as follows: the second defender had undertaken responsibility for looking after the pursuer, the second defender had heard that the pursuer (who had not previously visited the farm) was "something of a loose cannon", the second defender was aware that the farm could be a dangerous place for children and that it was important to keep a close watch on them to ensure that they did not have an accident, the stock gate weighed about 300 kilogrammes, the second defender had told the boys to remain in the courtyard so that she could keep a watchful eye on them, the boys must have been out of her sight for at least several minutes, (as was accepted by the second defender) the stock gate and the prospect of climbing it might have been alluring to a child of the pursuer's age; (again as was accepted by the second defender) a child of the pursuer's age might be intrigued by the metal chain on the gate and be tempted to interfere with it, had the second defender seen the pursuer climb over the fence into the race, climb onto the stock gate and lift the chain off the pin which attached it to the barrier she would have intervened immediately. The Lord Ordinary had accordingly been correct to conclude that the stock gate presented a foreseeable risk of causing injury to a young child who might find the prospect of entering the race and playing on the gate to be irresistible.

[27] Grounds of appeal 2 and 3 were largely academic but there was no reason to reverse the Lord Ordinary's findings that the second defender was an occupier and that the stock gate was a danger. For the same reasons as she was in breach of the childcare duty the

second defender was in breach of her duty as occupier. The reclaiming motion should be refused.

Discussion and decision

[28] I consider that Mr Milligan was correct to say, as he did in opening his submissions, that his client's case stands or falls on what came to be referred to in discussion as the childcare case, that is what the Lord Ordinary referred to as the common law case, in contradistinction from the case based on the duties incumbent upon the second defender as an occupier of Hillhead Farm in terms of section 2(1) of the 1960 Act (the statutory case). In my opinion the Lord Ordinary was fully entitled to find that the second defender was an occupier in terms of the 1960 Act but, as is demonstrated by his decision to assoilzie the first defender, he would not have found the second defender in breach of statutory duty had it not been for the fact that she had agreed to look after the pursuer. Accordingly, in my opinion what this reclaiming motion is about is the childcare case, albeit that that case is one where the associated duties fell to be exercised in a particular physical environment. I do not therefore propose to consider the occupier's liability case any further.

[29] The penultimate paragraph (47) of the judgment of the Court of Appeal in *Harris* v *Perry*, handed down by the Chief Justice, as he then was, Lord Phillips of Worth Matravers, contains the following passage:

> "...to a large extent a case of this nature properly turns on first impressions. The factual scenario is a simple one ...The issue is whether a reasonably careful parent could have acted in the same way as the defendant. The case does not turn on expert evidence or special knowledge. Essentially we have had to place ourselves in the shoes of the defendant and consider the adequacy of her conduct from that viewpoint and with the knowledge that she had."

With "second defender" substituted for "defendant" the same might be said about the present case. In paragraph 10 of the judgment in *Harris* it was said: "In a nutshell the accident ...occurred when the defendant's back was turned". With just a little stretching of language, and again substituting "second defender" for "defendant", the same might be said of the present case. In *Harris* the reaction of the members of the court to the factual scenario with which they had been presented was that the defendant could not be held at fault for the way that she acted. Ms Springham urged this court to come to a similar conclusion on the facts of the present case.

[30] I would confess that as a matter of first impression I was sympathetic to Ms Springham's submission that in deciding that the second defender had been negligent the Lord Ordinary had set an overly high standard for what was required by way of the exercise of due care in the circumstances of the case: requiring as it did something close to constant supervision of an eight-year-old child at play in an enclosed environment. However, on a more detailed consideration of the opinion of the Lord Ordinary with the benefit of the analysis provided by both counsel I have come to the conclusion that the Lord Ordinary's decision is not one that can properly be interfered with by this court.

[31] As is very familiar, where what is in issue is physical injury to the person, the parameters of what is required in order to constitute a proper exercise of a duty of reasonable care are determined by what the court considers were the risks of such injury which should have been reasonably foreseeable to the individual upon whom the duty was incumbent. In *Muir* v *Glasgow Corporation* 1943 SC (HL) 3 at 10 Lord Macmillan quoted what he had said about the duty of care in his speech in the then recent case of *Bourhill* v *Young* 1942 SC (HL) 78:

> "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

He then continued:

> "... The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. ...The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable."

Thus, it is for the judge to determine what the reasonable person would have had in contemplation, otherwise what was reasonably foreseeable. The formulation of the duty is to "take *reasonable* care" (*Donoghue* v *Stevenson* 1932 SC (HL) 31, Lord Atkin at 44) but once the risks that the reasonable person would have had in contemplation have been determined, in principle due exercise of a duty of care requires the avoiding of doing or omitting to do anything which may have as its reasonable and probable consequence injury to other persons to whom the duty of care is owed. I say "in principle" because in a given case there may be room for adjustment having regard to the remoteness or otherwise of the foreseeable risk, the extent of the likely harm, the burden of the necessary precautions and any particular considerations of public policy which may come into play. However, fundamentally, taking reasonable care means taking effective precautions against reasonably foreseeable risks of material physical harm. Notwithstanding the way in which the passage begins, I would see what Lord Phillips said, at paragraph 34 of his judgment in *Harris* to be to similar effect in the particular context of a parent looking after children:

> "It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level."

[32] What can be seen in the opinion of the Lord Ordinary, particularly in paragraphs [32] and [33] (from which I quote below), is a detailed consideration of what he considered to be the relevant reasonably foreseeable risks of injury to what appears to have been a high-spirited and perhaps headstrong eight-year-old boy playing in a farmyard. The not very helpful metaphor used in evidence to describe the pursuer at the time of the accident was "loose cannon". What the second defender meant by that appears at page 71 of the transcript (MS 713): "He was always just a fey wee boy …very boyish and free …a little bit determined, and hard, a little bit hard work." I take "fey" in this context to mean "high-spirited" (see eg Chambers's Twentieth Century Dictionary). In large part the Lord Ordinary's analysis of the reasonably foreseeable risks was based on the evidence of the second defender and her acceptance that she was aware that the farm could be a dangerous place for children, presenting as it did various risks, and that it was important for her to keep a close watch on the boys to ensure that they did not have an accident. It is of course true that what is in issue is reasonable foresight, not hindsight, and that once the outcome is known it is not difficult for a cross-examiner to retrace events in such a way as to make the outcome which in fact occurred seem always to have been inevitable. In his speech in *Muir* Lord Thankerton gave the following warning (at 8):

> "The Court must be careful to place itself in the position of the person charged with the duty, and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are

> prone to express regret, *ex post facto*, that they did not take some step, which it is now realized would definitely have prevented the accident."

He continued:

> "In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff … regarded as an admission by Mrs Alexander."

Mrs Alexander was the manageress of tearoom where a number of children were scalded as the result of the overturning of an urn of tea and who was blamed for failing to see that the children were standing clear before the tea urn was carried through a narrow passage. Whatever may have been the case in *Muir*, I do not see this case as one where the Lord Ordinary has made far too much of an isolated expression of regret or *ex post facto* concession or admission of responsibility. It is convenient to quote at length from paragraphs [32] and [33] of the Lord Ordinary's opinion:

> "[32] …In contrast to her husband, Mrs Imrie had assumed responsibility for looking after the pursuer on the day of the accident. She was responsible for him in the absence of his mother and was clearly *in loco parentis*. Mrs Imrie said that she was well aware that the farm could be a dangerous place for children; she accepted that it presented various risks and dangers to children and that it was important to keep a close watch on them to ensure that they did not have an accident. That is no doubt why she took steps to tell the boys to remain in the courtyard; that meant that she could keep a watchful eye on them. Mrs Imrie accepted in her evidence that she had gone into the stable and that the boys were, therefore, out of her sight for a period of time. She could not be precise as to the length of this period of time, but thought that it was some minutes; in cross-examination she accepted that it could have been as long as five minutes. It seems to me that the boys must indeed have been out of Mrs Imrie's sight for a period of at least several minutes. There required to be sufficient time for the pursuer to have approached the gate in the courtyard giving access to the race, to have managed to climb over it into the race, to have clambered up onto the heavy stock gate; to have lifted the chain off the pin and succeeded in detaching the gate from the barrier, thereby bringing the gate down on himself. If Mrs Imrie had seen the pursuer attempting to take any of these steps she would certainly have intervened immediately. I conclude that she did not see anything of the sequence of events leading up to the accident. In her evidence Mrs Imrie frankly accepted that the heavy stock gate might seem to a child of the pursuer's young age to be an alluring item; she agreed that for young boys the prospect of climbing on such a gate might be attractive. She also acknowledged that a child of the pursuer's age might be intrigued by a metal chain and be tempted to interfere with it. It seems to me that Mrs Imrie was clearly correct in relation to these

> points; they are really just matters of common sense that any reasonable adult with some experience of young children would be expected to know. …
>
> [33] In my judgment, it is fair to conclude that Mrs Imrie ought to have foreseen that if the pursuer managed to get into the race he might injure himself by interfering in some way with the heavy stock gate. It follows, as it seems to me, that she had a duty to take reasonable care as an occupier to see that the pursuer did not get into the race. Like every other reasonable adult, Mrs Imrie understood that young boys do not always abide by warnings and instructions. In my opinion, the evidence shows that Mrs Imrie did not take sufficient care to ensure that the pursuer was not injured in the race. I conclude that she allowed him to be out of her sight and beyond her supervision for an unreasonably long period of time in the circumstances prevailing that day. In my judgment he must have been out of her sight for at least several minutes. For a child of eight in a potentially perilous environment, such as the farm occupied by the defenders, that was dangerously long. There was, in my view, a foreseeable risk that within such a timeframe the pursuer would suffer an accident in the race. The precise mechanism of the accident does not, of course, require to have been foreseen (*Hughes* v *Lord Advocate* 1963 SC (HL) 31). There was a foreseeable danger that the pursuer would suffer injury on the farm if he was not sufficiently supervised by an adult. The evidence shows, in my opinion, that the accident happened because he was not properly supervised. In these circumstances, I consider that Mrs Imrie failed in the duty of care she owed to the pursuer …"

What one sees in that passage is the Lord Ordinary taking into account the evidence as to circumstances of the physical environment in which the second defender had undertaken to look after the child and, with the assistance of the evidence of the second defender herself, putting himself in her shoes with a view to making a judgement as to what the reasonable adult would and would not have done if they had been exercising due care for an eight-year-old. In my opinion, there is nothing in the Lord Ordinary's approach that can be faulted.

[33] In the passage quoted above the Lord Ordinary is considering the case against the second defender from the perspective of her being an occupier of the farm, albeit an occupier who has taken on a responsibility for a child who has come onto the farm. His conclusion, which I have omitted from the quotation, is that the second defender was in breach of her duties under and in terms of section 2(1) of the 1960 Act. As I have explained,

I take a slightly different view from the Lord Ordinary as to what is the essence of the case. That does not matter. Both the occupier's liability case and the childcare case depend upon the proposition, which it is for the pursuer to make out, that in all the circumstances the second defender failed to take reasonable care for the pursuer's safety. The Lord Ordinary's analysis of the reasonable foreseeability of the risks arising from the circumstances is as relevant to one case as it is to the other.

[34] Mr Milligan submitted that the question for this court came to be whether the Lord Ordinary came to a conclusion to which he was entitled to come. I do not find "entitlement" to be a very useful criterion by which to determine whether an appellate court can interfere but Mr Milligan's formulation was a reminder that the determination of whether the second defender had or had not exercised due care in the circumstances was a decision for the Lord Ordinary, as the first instance judge, to make. Ms Springham invited the court to reverse the Lord Ordinary's decision. Mr Milligan accepted that the court had the power to do that but he submitted that in the present case it should not exercise that power. I agree with Mr Milligan.

[35] The extent of the power of an appellate court to interfere with decisions at first instance has been recently discussed in the opinion of the court in *AW* v *Greater Glasgow Health Board* at paragraphs [38] to [58]. I did not understand anything which appears there to have been disputed by the parties to this reclaiming motion. What can be seen from the discussion in *AW* is that decisions at first instance can be divided into different categories, categories which provide a framework for analysing what first instance judges do at proof and what an appeal court may do when invited to reverse or interfere with what a first instance judge has done. The categories reflect in what circumstances and how readily an appellate court will be entitled to interfere with the decision under appeal. Because of the

advantages that the judge at first instance enjoys in assessing credibility and reliability, in the absence of some material error on his part an appellate court will not be justified in interfering with a decision on primary fact. Hence, the passage from paragraph 67 of the judgment of Lord Reed in *Henderson* v *Foxworth Investments Ltd* which was relied on by the respondent:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

However, that relatively high threshold does not apply to every category of decision. In particular, it does not apply to the decisions in issue in the present case. On that I agree with Ms Springham. What this reclaiming motion seeks to have reviewed are decisions, not as to what were the primary facts but as to how the law (in the sense of a particular legal norm) should be applied to such primary facts as have been established by the evidence. That is what can be described as a question of mixed fact and law, or a question of evaluation of or adjudication upon primary facts or, to use the formulation employed by Lord Steyn in *Jolley* at 1089B, "an informed opinion by the judge in the light of all the circumstances of the case". Where that is what is in issue, as is explained in *AW*, there is greater scope for an appellate court to interfere than is the case where it is primary facts which are under challenge. At paragraph [44] in *AW* there is a quotation from the speech of Lord Reid in *Benmax* v *Austin Motor Co Ltd* [1955] AC 370 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."

Viscount Simonds had been to similar effect, at 374:

> "In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge."

What had been said in *Benmax* about the function of an appellate court was considered by Lord Hoffmann in his speech, with which all the other members of the Appellate Committee of the House of Lords agreed, in another patent case, *Biogen Inc* v *Medeva Plc* [1997] RPC 1 at 45:

> "The question of whether an invention was obvious had been called "a kind of jury question" (see Jenkins L.J. in *Allmanna Svenska Elektriska A/B* v *The Burntisland Shipbuilding Co. Ltd.* (1952) 69 R.P.C. 63, 70) and should be treated with appropriate respect by an appellate court. It is true that in *Benmax* v *Austin Motor Co Ltd* [1955] AC 370 this House decided that, while the judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, were virtually unassailable, an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness. In drawing this distinction, however, Viscount Simonds went on to observe, at page 374, that it was 'subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge'. The need for appellate caution in reversing the 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 (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness 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."

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*, at 8, in relation to what was reasonably foreseeable:

> "…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."

The reason why an appellate court should be very cautious in differing from the first instance judge's evaluation of primary facts which Lord Hoffmann emphasises in the passage quoted above from *Biogen* is that it is likely that the first instance judge will have gained a much more nuanced and therefore more complete understanding of the facts in the case and their respective importance than it is possible for appeal judges to obtain from the transcript and the documentary productions. In *Muir* Lord Thankerton touched on another reason which I consider to be pertinent in the present case: that what in given circumstances was a reasonably foreseeable risk (and also what was called for in the exercise of reasonable care to obviate that risk) is "a jury question", in other words a judgement to be made on an appraisal of the primary facts from the perspective of the ordinary reasonable person. Now, in theory, a person owing a duty of care has either exercised due care or she has not; there is a bright line to be drawn. However, ordinary reasonable people correctly instructed in the law can draw that line at different points in the spectrum of possible behaviours and accordingly one reasonable person might disagree with another reasonable person over the point at which the other reasonable person has drawn the line and yet hesitate to describe the other reasonable person as having necessarily been wrong. This is explained in the context of judicial decisions at first instance and how they should be approached at appeal by Lord Bridge in another case which is cited in *AW* and which was referred to by Mr Milligan during his submissions, *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd*.

Lord Bridge was considering the application of the test of "fair and reasonable" in the Unfair Contract Terms Act 1977. At 815 he said this:

> "It would not be accurate to describe such a decision as an exercise of discretion. But [such] a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which . . . section 11 of the Act of 1977 direct[s] attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."

[36] The contention of the second defender and reclaimer is that the Lord Ordinary applied "too high a standard of care" and therefore that he erred. Another way of putting that contention is that what the Lord Ordinary considered reasonable was, on a proper evaluation of the facts, unreasonable. It is a criticism of a conclusion arrived at as a matter of judgement. Implicit in such criticism is the proposition that the Lord Ordinary was wrong and indeed in submitting that the Lord Ordinary erred Ms Springham said as much in terms. That had to be her submission; 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. I would therefore move your Lordships to refuse this reclaiming motion.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 14
PD53/14

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF LORD DRUMMOND YOUNG

in the cause

CRAIG ANDERSON

Pursuer and respondent

against

JOHN IMRIE

First defender

and

ANTOINETTE IMRIE

Second defender and reclaimer

Pursuer and respondent: Milligan QC, Skinner, Drummond Miller LLP
First Defender: Non-participating Party
Second Defender and reclaimer: Springham QC, BTO Solicitors LLP

15 March 2018

[37] I agree with your Lordships that the reclaiming motion should be refused. My reasons for concurring in that result are as follows.

The approach of an appellate court

[38] Since the decisions of the UK Supreme Court in *McGraddie* v *McGraddie*, 2014 SC (UKSC) 12, and *Henderson* v *Foxworth Investments Ltd*, 2014 SC (UKSC) 203, it has become

common for appellate proceedings to include lengthy submissions, especially from respondents, about whether or not the court has power to interfere with the decision at first instance. This has created concern about both the time taken up with such submissions and the lack of coherence in many of the views that have been advanced by parties. In *AW* v *Greater Glasgow Health Board*, [2017] CSIH 58, an attempt was made to state principles that would help to clarify the law in this area, with a view to simplifying debate in future cases. It was on the basis of those principles that the main part of the opinion in that case proceeded; that part of the opinion gives general guidance that should be of great importance for future medical negligence cases.

[39] In *AW* the discussion of the powers of an appellate court began with consideration of the categories of decision that may come before such a court following a proof before answer. Four categories were identified. The first comprises decisions as to credibility, reliability and the primary facts: what the persons involved actually did or said. The second consists of inferences of fact drawn from the primary facts. The third comprises the application of the law to the facts, sometimes referred to as questions of mixed law and fact. The fourth is pure questions of law – general rules of law in the abstract. It was pointed out that the four categories are probably not fully comprehensive, and it was expressly stated that they are not mutually exclusive, as in practice the various categories may shade into one another. Nevertheless the categories were put forward as a useful framework for analyzing what first instance judges do at a proof and what an appeal court may do if it is asked to interfere with a first instance decision. (The categories themselves are largely derived from the decision of the Canadian Supreme Court in *Housen* v *Nikolaisen*, [2002] 2 SCR 235; 2002 SCC 33, although the approach adopted in *AW* does not follow the majority of the Canadian

Supreme Court; it is based on prior Scottish authorities, and corresponds broadly to the minority of the Canadian Supreme Court).

[40] The questions that arose in *AW* fell largely, although not exclusively, into the first and second of the four categories. They were concerned in part with primary facts, including the reliability of witnesses, but much of the discussion in the case concerned inferences drawn from the primary facts, especially those embodied in expert reports and expert evidence. The court held, on the authority of such cases as *Benmax* v *Austin Motor Co Ltd*, [1955] AC 370, that where the point in dispute is the proper inference to be drawn from proved facts an appellate court is generally in as good a position to evaluate the evidence as the trial judge, and ought to do so: see paragraph [44]. As to the application of legal principles to the facts of the case, the court held that an appellate court may interfere with the decision of the judge of first instance: paragraph [52]. So far as I can discover, that proposition has never been doubted in cases decided in the United Kingdom.

[41] There are strong reasons to support such an approach. First, the application of legal rules to particular factual situations is the way in which those rules are given practical effect and their boundaries are established. That in itself clearly involves a question of law. Secondly, the development of the common law occurs through the application of legal rules to particular factual situations, and the same is largely true of areas of law that have a basis in statute. The development of the law in this way is a matter that has traditionally been regarded as falling within the purview of an appellate court. Thirdly, an appellate court is made up of three or more judges, who are likely to have different legal backgrounds and may well see different points of importance in the case. They are able to discuss the problems that arise, and in this way they may well be able to provide a better formulation of

the law than a single judge could on his or her own. Thus there are clear practical advantages in having an appellate court review the application of the law to the facts.

[42] So far as the Court of Session is concerned, two further points are in my opinion of importance. First, the Court of Session is a unitary court, and Lords Ordinary sitting in the Outer House exercise a delegated jurisdiction. Decisions of a definitive nature can only be made by the Inner House or the whole Court. Secondly, largely because of the essential structure of the Court, reclaiming motions to the Inner House are technically rehearings. This is why any question of law can be reconsidered, including questions involving the application of the law to particular factual situations. It is also the reason that in appropriate cases factual decisions, especially those relating to inferences rather than primary facts, can be reconsidered by the Inner House. There is no bar to reconsideration as a matter of competency, although there are practical reasons for deferring to the judge of first instance, especially on questions of primary fact. The classic statement of the reasons for doing is found in *Thomas* v *Thomas*, 1947 SC (HL) 45, per Lord Thankerton at 54 and Lord Macmillan at 59. That reasoning has been followed in numerous subsequent cases, including *Thomson* v *Kvaerner Govan Ltd*, 2004 SC (HL) 1, *McGraddie* v *McGraddie* and *Henderson* v *Foxworth Investments Ltd*, and most recently in *AW* v *Greater Glasgow Health Board*.

[43] At this point I should observe that the distinction between the second category, inferences of fact, and the third category, the application of rules of law to the facts of a particular case (questions of mixed fact and law) appears to me to be conceptually very clear, and important. The fundamental distinction between law and fact demands as much. The ultimate decision facing a court will very often involve both elements of fact, including inferences, and elements of law, and these may be interlinked in a complex manner. Nevertheless these elements are conceptually distinct, and a proper analysis of the case will

normally enable the issues facing the court to be broken down into their legal and factual elements. I accept that in some cases the interaction of legal and factual elements may render this difficult, but such cases are the exception. Furthermore, the fact that borderline cases may exist does not preclude the existence of a distinction; almost any legal distinction is capable of giving rise to borderline cases.

[44] In the present case, the critical questions confronting the court relate to the application of legal principles to the facts of the case. The relevant principles are those that govern the standard of care to be observed by persons having the care of children, and the fundamental question is how those principles apply to the particular facts of the case. That falls within the third category, and it is accordingly a question of law that falls squarely within the purview of an appellate court. The application of the law of negligence has repeatedly been treated in that way in the Scottish case law. A clear example is found in *Hughes* v *Lord Advocate*, 1963 SC (HL) 31; 1963 SLT 150, where the House of Lords, reversing both the Lord Ordinary and the First Division, held that in order to establish a coherent chain of causation it was not necessary that the precise details leading to the accident should have been reasonably foreseeable, provided that the accident was of a type which should have been foreseeable by a reasonably careful person: Lord Guest at 1963 SC (HL) 46. That represents an important refinement in the practical application of the general requirement that the causation of an accident should be reasonably foreseeable if liability in negligence is to exist. Another example is found in *Muir* v *Glasgow Corporation*, 1943 SC (HL) 3, 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.

[45] In my opinion exactly the same applies to the present case. 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.

[46] Obviously respect should be given to the decision of the judge of first instance. On questions of primary fact, and to a lesser extent on inferences, the law is clear on this matter. Even in dealing with questions of legal principle in the abstract, and especially in dealing with the application of the law to the facts of a particular case, proper respect should be given to the first instance decision. Substantial assistance can be obtained from that decision and the supporting discussion, even in cases where the decision is reversed. No authority is needed for the foregoing approach; it is a matter of elementary common sense, as well as

judicial courtesy. Nevertheless, the applicable test is one of correctness, as a matter of substance.

[47] Before I consider the merits of the present reclaiming motion, I should comment on two other cases that have on occasion been cited in considering what an appellate court may or should do. The first of these is *Biogen Inc* v *Medeva PLC*, [1997] RPC 1, a case that is discussed with an element of criticism in *AW* v *Greater Glasgow Health Board* at paragraphs [53]-[54]. In that case, in relation to the question of obviousness of an invention in the law of patents, Lord Hoffmann stated (at page 45) that there is a need for appellate caution in reversing a judge's evaluation of the facts. This is said to be because specific findings of fact

> "are inherently an incomplete statement of the impression which was made upon [the judge] by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance".

For that reason Lord Hoffmann thought that an appellate court should exercise great caution in reversing the judge's evaluation of the facts.

[48] I agree that appellate courts should be cautious in reversing a first instance judge's evaluation of the facts. *Biogen* was a case where the issue was evaluation of factual evidence relating to the obviousness of a patent. The reasons for such caution are broadly those stated in *Thomas* v *Thomas* and other analogous cases. The same caution does not, however, apply to the application of the law to a particular factual situation. Furthermore, I have serious reservations about the reason given by Lord Hoffmann for such caution. It is obvious that people are able to communicate complicated and subtle ideas in a manner that is quite comprehensible to others, or at least to others who are versed in the same intellectual discipline. When a judge reaches a decision, whether on law or on fact, he or she is expected

to state the reasons for that decision in a manner that can be properly understood by the parties to the case and, if there is an appeal, by an appellate court. That is in my opinion an essential aspect of the rule of law: adequate and comprehensible reasons must be given for every decision. That requirement underlies the proposition, repeatedly stated both in Scotland and in England and Wales, that reclaiming motions or appeals in ordinary civil cases involve a rehearing, with the result that the appellate court can substitute its own decision for that of the trial judge.

[49] The second case that I should mention is the decision of the Canadian Supreme Court in *Housen* v *Nikolaisen*, *supra*. The primary issue in that case was the application of the standard of care that a municipality must show in relation to rural roads. Questions of causation in relation to a particular accident also arose. Prior to the decision in that case the Canadian courts had decided that, before an appellate court may interfere with the decision of a first instance judge on questions of primary fact, it was necessary that the judge's decision should demonstrate "palpable and overriding error". That test is obviously different from the tests that have been adopted in Scotland and elsewhere in the United Kingdom. In *Housen* the critical question was whether the same test, of palpable and overriding error, should apply not merely to questions of primary fact but also to inferences and, in particular, to the application of the law to the facts. A bare majority of the Supreme Court held that the same test applied in these cases. The minority adopted a similar classification of the questions that might arise, but held that, in relation to the application of the law to the facts, the test should not be palpable and overriding error but simple correctness:

> "Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the

> context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts.… '[I]t is probably correct to say that every new attempt to apply a legal rule to a set of facts involves some measure of interpretation of that rule, and thus more law-making'" (paragraph 106).

[50] For my part, I agree with the approach taken by the minority. The application of the law to particular factual situations involves an exploration of the frontiers of the law. It is the way in which the law develops, and frequently involves setting a standard that will be of importance in future cases. *Housen* concerned the standard of care required of a municipality in relation to rural roads. What an appellate court says about such a matter may give important guidance in future cases. In the context of the present case, the same is true of appellate decisions that discuss the standard of care that should be demonstrated by persons who have children in their care; this is exemplified by two cases that were extensively discussed by counsel in argument, *Surtees* v *Royal Borough of Kingston upon Thames*, [1992] PIQR 101, and *Harris* v *Perry*, [2009] 1 WLR 19. In the present case I found the discussion in those cases to be of considerable assistance, as, it would appear, did the Lord Ordinary.

[51] If the approach of the majority of the Canadian Supreme Court is followed, a decision of an appellate court merely has the status of a first instance decision that has been found to display no "palpable and overriding" error of either fact or law. Furthermore, the reasoning of the appellate court is likely to be structured around that test, and to address questions of judicial process rather than the substantive merits of the underlying legal issue. Such a decision is self evidently of limited assistance as a precedent. The only exception to that occurs where it is decided that the first instance judge was guilty of a "palpable and overriding" error, in which case the appellate court must consider matters *de novo*. That

inevitably limits the availability of precedents, a matter that may have a serious impact on the development of the law. This is especially important in a relatively small jurisdiction where the number of cases coming before the courts in any particular area will be limited. In conclusion, I should note that the test of "palpable and overriding error" as applied by the majority in *Housen* has never been adopted by a Scottish court. Nor, so far as I am aware, has it been adopted in any jurisdiction outside Canada.

[52] I now turn to the merits of the present case. As I have indicated, the questions that arise appear to me to involve the application of legal standards to the facts of the case. That is a matter where an appellate court is free to reconsider the Lord Ordinary's decision, and in assessing that decision the criterion that should be applied is whether the decision was correct as a matter of substance.

Merits

[53] The critical issue in the present case is the application of the standard of care that applies to those who have the care of children, whether as parents or, as in this case, as persons acting *in loco parentis*. It was conceded by counsel for the pursuer that the case argued before the Lord Ordinary based on the Occupiers' Liability (Scotland) Act 1960 did not add anything to the common law case based on the liability of those in charge of children. The latter area of law has not been the subject of a great deal of authority. It is, however, potentially a matter of wide general importance. It is also an area where conflicting considerations are important: on the one hand there is a need for proper supervision of children and on the other hand parents and others in charge of children must at a practical level be able to perform other household tasks, including the supervision of other children. Further sources of complexity include the obvious facts that children of

different ages and stages of development require different levels of supervision and that the circumstances in which supervision is exercised vary greatly. In the light of these considerations I think that it is important that the court should give some consideration to the general law in this area.

Decided cases

[54] Several of the cases dealing with liability for injuries to children are not concerned with child care *per se* but rather with the liability of a person who has created a potential hazard to children, or with the failure by a responsible person or authority to deal with such a situation. This applies, for example, to the well-known Scottish decisions in *Hughes* v *Law Advocate*, *supra*, and *Muir* v *Glasgow Corporation*, *supra*. In England and Wales the creation of a hazard to children has been considered in a number of cases; the court was referred to *Jolley* v *Sutton London Borough Council*, [2000] 1 WLR 1082, and *Bourne Leisure Ltd* v *Marsden*, [2009] EWCA Civ 671. The standard of care required to deal with a hazard that has been created by the defender differs, however, from the standard of care that applies to a person who supervises the activities of children under his or her care. The court was referred to two cases falling into the latter category *Surtees* v *Royal Borough of Kingston upon Thames*, [1992] PIQR 101, and *Harris* v *Perry*, [2009] 1 WLR 19.

[55] The first of these cases concerned allegations of negligence against foster carers as a result of burning injuries to a two-year-old whose foot had become immersed in very hot water when she was left alone for a short time. The facts were obviously different from the present case, but certain of the observations by the Court of Appeal are relevant. The critical question was foreseeability of the general type of injury that occurred as a result of leaving the child alone next to a wash hand basin. Stocker LJ stated (at 111-112) that an objective test

must be applied to the question of reasonable foreseeability. The accident had happened in domestic circumstances in a home where there were at least three small children in addition to the plaintiff.

> "I do not doubt there are almost infinite circumstances in which a child if left alone can cause injury to itself. I am also sure that common sense indicates that in such domestic circumstances, though many accidents can in general terms be foreseeable, it was in this context that the test of reasonable foreseeability by [the foster carer] was to be judged…. In my view, it is also relevant to whether the risk of a particular kind of injury is a reasonably foreseeable one. The anticipated length of absence by the parent from the scene of the injury in my view is also a relevant factor".

In all the circumstances it was held that the scalding injury was not reasonably foreseeable and that to impose a duty of care in such circumstances would impose an impossibly high standard on foster carers. Consequently the foster carers were not liable for the injuries. The Vice-Chancellor agreed. He stated (at 123-124)

> "[T]he court should be wary in its approach to holding parents in breach of a duty of care owed to their children.… There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships. Moreover, the responsibilities of a parent (which in contemporary society normally means the mother) looking after one or more children in addition to the myriad other duties which fall on the parent at home far exceed those of other members of society.… The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone, looking after the other children and doing all the other things that the average mother has to cope with simultaneously or in quick succession in the normal household. We should be slow to characterise as negligent the care which ordinary loving and careful mothers are able to give to individual children, given the rough and tumble of home life".

Beldam LJ dissented; he considered the evidence in detail and disagreed with the trial judge on the assessment of that evidence. *Benmax* v *Austin Motor Co Ltd*, [1955] AC 370, was followed.

[56] The facts of *Harris* v *Perry*, *supra*, were closer to the present case. The defendants were at the parents of triplets and hired certain equipment, including a bouncy castle, for the triplets' birthday. Children were allowed to play on the equipment under the supervision of

the defendants. When the mother of the triplets was supervising the use of the equipment, she went to help a child who was in difficulty on a bungee run, and on the bouncy castle a 15-year-old accidentally kicked the forehead of an 11-year-old, causing serious injuries. It was held that the defendants were not liable. Lord Phillips CJ indicated that there is a dearth of precedents dealing with the duty of care owed by parents to their own or other children when they are playing together. (*Surtees* does not appear to have been cited). He pointed out that it was impossible to prevent the risk that one child may injure another, and that minor injuries must be commonplace.

> "It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level" (paragraph 34).

In the case under consideration, the "difficult" task facing the trial judge was to decide what precautions the second defendant, the mother of the triplets, should reasonably have taken to protect against risks to which she knew, or ought to have known, children playing in the castle would be exposed. The difficulty of the task arose from the fact that neither judges or parents were likely to have everyday familiarity with bouncy castles and similar equipment (paragraph 35).

[57] On the facts of the case, the particular issue was what positive steps a reasonable parent would have taken for the safety of a child of the claimant's age playing on a bouncy castle. That would depend on the risks that a reasonable parent ought to have foreseen (paragraph 37). A reasonable parent could foresee that boisterous behaviour by children would create a risk that one child might collide with another causing injury. The court did

not, however, consider that it was reasonably foreseeable that such injury would be likely to be serious, let alone as severe as the injury that had been sustained by the claimant (paragraph 38). On that basis,

> "the standard of care that was called for on the part of the defendant was that appropriate to protect children against a foreseeable risk of physical harm that fell short of serious injury".

At this point I would comment that the formulation of the relevant standard of care is clearly a matter of great importance in cases of this nature. On the facts of the case, the court held that the standard imposed by the trial judge, that the bouncy castle required uninterrupted supervision, as did the bungee run, was unreasonably high. It was reasonable for the defendant to conclude that she could supervise both at the same time (paragraph 40). The issues of somersaulting and the relative size of the two children involved in the accident were then discussed at length, and the Court of Appeal decided that the trial judge had imposed too strict a standard of care in holding that the defendants were in breach of duty in allowing an older child to play with children who were younger and smaller in stature.

Policy

[58] The foregoing cases illustrate the difficulty of determining the standard of reasonable care that is incumbent on parent or person *in loco parentis* in a particular set of circumstances. Inevitably the answer must depend upon the precise facts. Nevertheless, setting the standard of care involves the application of the general duty in the law of negligence, exercising reasonable care, to the particular facts of the case. As I have already indicated, that is a matter that has been repeatedly treated as falling within the province of an appellate court. It is, moreover, a task where a number of policy considerations are relevant. Those

are matters that are peculiarly suitable for consideration by an appellate court. In the present case, the relevant policy considerations are in my opinion as follows.

[59] First, as Lord Phillips CJ indicated in *Harris* v *Perry*, *supra*, the practicalities of child care are of paramount importance. Parents and others looking after children typically require to perform a multitude of domestic tasks at broadly the same time, with the result that constant supervision is impossible. Thus the courts should be careful not to impose an unrealistically strict duty of care on parents and those *in loco parentis* who are looking after children. Secondly, the duty imposed is a duty to take reasonable care, having regard to what is reasonably foreseeable in the circumstances. "Reasonably foreseeable" in my opinion points to the standard of foresight that can be expected, objectively, of a parent exercising ordinary common sense. That is a matter that falls within judicial knowledge. Thirdly, what is objectively reasonable depends on the situation in which the parent or other carer finds himself or herself. This might include the types of circumstances described by the Vice Chancellor in *Surtees* v *Royal Borough of Kingston upon Thames*, *supra*, such as the need to look after a number of different children and to perform other domestic tasks.

[60] Fourthly, notwithstanding the foregoing considerations, "Some circumstances or activities may… involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance": per Lord Phillips CJ in *Harris* v *Perry*, *supra*, at paragraph 34. In some cases a hazard may exist, and in that case there is a duty to do what is necessary to reduce and preferably eliminate the risk presented by the hazard. The range of possible hazards is wide, especially when children play outside. The approach of the courts to what amounts to a hazard and what can be done about it should in my opinion turn on common sense, so that the standard of care that is required in a particular situation is one that can reasonably be expected of an ordinary parent exercising ordinary care for

children. For example, if eight-year-olds are allowed to play in a suburban garden, the degree of risk will typically be low, at least if the garden is properly fenced and the gate is shut. If, however, the garden abuts on a main road, the risk that a child will open the front gate, or climb over it, and thus gain access to the road is likely to be material, with the result that a greater degree of supervision should be expected.

[61] Fifthly, what is a hazard will obviously vary according to the age and stage of development of the child. In this connection, it may be material whether the carer is the parent of a child or a person who is merely looking after the child. Parents get to know their own children, and will be aware of the stage of development of a particular child and whether that child is naturally cautious or reckless. With other children, however, that knowledge may not exist, especially if the carer is looking after a child for the first time. Sixthly, as the discussion of the law in both *Surtees* and *Harris* v *Perry* indicates, the closeness of the supervision that is required, and the ability of the carer to absent himself or herself for a period, must depend on the circumstances. As Stocker LJ pointed out in *Surtees*, at page 112, "The anticipated length of absence by the parent from the scene of the injury… is also a relevant factor".

The facts of the present case

[62] The foregoing are merely policy considerations of a general nature, and the critical question in the present case is how, in the light of those factors, the legal standard of reasonable care should be applied to the particular case. The facts are discussed in detail by the Lord Ordinary. He was faced with a degree of conflict in the evidence between that of the pursuer and that of the defenders, and the version of the evidence that he accepted was as follows (see paragraphs [11]-[15] and [21]-[23]). The pursuer had been brought to the

defenders' farm by his mother with a request that the second defender should look after him because of an emergency that had occurred. The second defender had been planning to go out riding on her horse that day, but stated that she would be willing to look after the pursuer for a couple of hours. The Lord Ordinary noted that he formed the impression that the second defender had been somewhat displeased to find that she unexpectedly had to look after the pursuer. The defenders had five children, the oldest of whom was 14. The three oldest had gone elsewhere to play with friends, and the second defender and her mother were responsible for looking after Ben, the second youngest, who was five years old and Tabitha, the youngest, who was one year old. The first defender, their father, was working elsewhere.

[63] The second defender's evidence, which was accepted by the Lord Ordinary, was that she had told Ben and the pursuer that they could play in the farmhouse and in the courtyard outside it, but they must not go into the race where the accident occurred or the midden, which was adjacent to the race. She made sure that the gate leading to the race from the courtyard was closed, and she took some toys from a shed and put them in the courtyard so that the boys could play with them. She stated that she was going back and forwards between the farmhouse at the courtyard to check that her mother was managing with the baby. Her horse was in the courtyard and she was dressing it there. This required her to go into the stable on the west side of the courtyard to obtain the necessary items. She thought that she might have had to put the horse into the stable at some point. She acknowledged that she had not been constantly watching the two boys. Her recollection was that some minutes after she had gone into the stable Ben came in and told her to come at once. She then went across to the gate leading to the race from the courtyard and found that it was shut, but she saw the pursuer lying on his back on the ground in the race. A heavy stock

gate lay on top of him. He was moving but obviously injured. She lifted the gate and carried the pursuer to the farmhouse. With assistance, she then drove him to the nearest hospital.

[64] The heavy stock gate that fell on the pursuer had been secured to a barrier in the race situated between the farmyard and the livestock pens that lay to the north. The gate had been placed against the barrier on the left hand side of the race some days previously, and was secured to the barrier by means of a chain and pin. The chain was wrapped around one of the uprights of the barrier and a link of the chain was then placed over the pin. The reason for doing this was to ensure that the gate did not fall over and cause injury to persons or livestock. The second defender thought that the pursuer must have stood on one of the lower spars of the gate and untied the chain. She presumed that this caused the gate to fall over on top of him. She gave evidence that the pursuer had possibly been out of her sight for about five minutes, and she thought that the pursuer must have climbed over the gate to get into the race. Ben had told her that he had said to the pursuer not to go into the race, but the pursuer had insisted on doing so.

[65] The Lord Ordinary concluded that pursuer and Ben had been playing together in the courtyard. The second defender was focussed on dressing her horse as the two boys played. She went into the stable situated on the west side of the courtyard to get something. While she was in the stable, the pursuer managed to climb over the gate leading to the race, and once he was in the race he climbed on to the stock gate. He then lifted the chain off the pin, which caused the gate to become detached from the barrier. The gate then over-balanced on top of the pursuer, causing him to fall back and strike his head against the concrete surface of the race. The pursuer ended up lying on his back on the ground with the gate on top of him.

Application of the standard of care

[66] The Lord Ordinary considered the potential liability of the first defender as occupier of the farm, and concluded that he was not in breach of the duty owed as occupier. That part of his decision is not challenged on appeal. The Lord Ordinary then examined the position of the second defender (paragraphs [32]-[33]). She had assumed responsibility for looking after the pursuer on the day of the accident and was accordingly *in loco parentis*. She was well aware that the farm could be a dangerous place for children; that it presented various risks and dangers to children and that it was important to keep a close watch on them to ensure that they did not have an accident. That explained why she told the boys to remain in the courtyard, so that she could keep a watchful eye on them. The second defender had accepted that she had gone into the stable and that the boys were accordingly out of her sight for a period. The Lord Ordinary thought that that period must have been at least several minutes. There required to be sufficient time for the pursuer to approach the gate between the courtyard and the race, to climb over that gate, to climb on to the heavy stock gate, to lift the chain off the pin, and thereby to detach the gate from the barrier. The second defender had accepted that if she had seen the pursuer attempting any of these steps she would have intervened immediately. The Lord Ordinary therefore inferred that the second defender had seen nothing of the sequence of events leading to the accident.

[67] The Lord Ordinary further concluded that a child of the pursuer's age might be intrigued by a metal chain and might be tempted to interfere with it; in her evidence the second defender had conceded that, and in the Lord Ordinary's view that was a matter of common sense which any reasonable adult with some experience of young children would be expected to know. The gate presented a danger to a child of the pursuer's age if he got

into the race; the second defender had agreed with that in her evidence. The correct analysis, the Lord Ordinary suggested, was not to ask whether the heavy metal stock gate constituted a danger in an abstract sense. The real question was whether in the particular circumstances of a young child who might find the prospect of entering the race and playing on the gate to be irresistible, the gate presented a foreseeable risk of causing injury. In his opinion it did present such a risk.

[68] Consequently the Lord Ordinary concluded that the second defender ought to have foreseen that if the pursuer managed to get into the race he might injure himself by interfering in some way with the heavy stock gate. She accordingly had a duty to take reasonable care to ensure that the pursuer did not get into the race. She understood that young boys do not always abide by warnings and instructions. On the evidence, therefore, she had not taken sufficient care to ensure that the pursuer was not injured in the race. She allowed him to be out of her sight and beyond her supervision for an unreasonably long period of time in the circumstances that prevailed that day. The Lord Ordinary considered that he must have been out of her sight for at least several minutes. For a child of eight in a potentially perilous environment such as the farm, that was dangerously long. Thus there was a foreseeable risk within such a timeframe the pursuer would suffer an accident in the race. The precise mechanism did not require to have been foreseen, a proposition vouched by *Hughes Lord Advocate*, *supra*. On the evidence, the accident happened because the pursuer had not been properly supervised.

[69] For the purposes of the reclaiming motion the important aspect of the Lord Ordinary's opinion is his analysis of the second defender's duty of care at common law, that is to say, her duty as a person acting *in loco parentis* to take reasonable care for the pursuer's safety. He accepted the statements in *Surtees* v *Royal Borough of Kingston upon Thames* and

Harris v *Perry* to the effect that courts should not be unduly critical of parents and persons *in loco parentis* in relation to responsibility towards children in their care. He indicated that it was impossible to preclude all risk that children will injure themselves or each other when playing together. In some circumstances, however, as Lord Phillips CJ pointed out in *Harris*, circumstances or activities may involve an unacceptable risk to children unless they are subject to supervision or surveillance, and in such a case the adult's responsibility is to ensure that children are subject to such supervision or surveillance as is necessary to restrict the risk to an acceptable level. In the circumstances of the present case, the Lord Ordinary concluded that the second defender failed to ensure that the pursuer was subject to such supervision as she knew was necessary to restrict the risk of injury to an acceptable level. She failed to take reasonable care to see that he did not get into the race and injure himself. On that basis the second defender was liable for breach of her duty of care.

Assessment of the Lord Ordinary's reasoning

[70] In my opinion the Lord Ordinary's decision on the foregoing matters is correct. In particular, I consider that he correctly stated the principles that relate to the duty and standard of care incumbent on those who have charge of children, whether as parents or as persons acting *in loco parentis*, and that he correctly applied those principles to the facts of the case. Consequently I would uphold his decision. The defenders did not challenge the facts found by the Lord Ordinary; consequently, as I have already indicated, the case is concerned entirely with the application of legal principles to the facts, which is a matter of law that lies within the purview of an appellate court.

[71] The Lord Ordinary's analysis of the application of the standard of care began with the recognition that, although in general courts should not be unduly critical of parents and

those *in loco parentis* in regard to the exercise of their responsibilities towards children in their care, in some circumstances an unacceptable risk may arise unless the children are subject to supervision or surveillance. In that event an appropriate level of supervision or surveillance is called for, to reduce the risk. The Lord Ordinary then stated that a farm can be a dangerous place for children. In my opinion that proposition is a matter of common sense; various hazards may be presented, arising from buildings and other structures or from machinery or from animals. An adult is likely to identify a hazard and to approach it with due caution. An eight-year-old child, however, is less likely to appreciate the dangerous nature of a particular building or structure, and is less likely to treat it with proper caution. That is why proper supervision or surveillance is required; once again that is a matter of common sense. This is precisely how the Lord Ordinary analyzed the case. He pointed out that the second defender had stated in evidence that she was aware that a farm could be a dangerous place for children and that it was important to keep a close watch on them.

[72] The Lord Ordinary then considered the period when the second defender had, by her own admission, gone into the stable and had the two boys out of her sight. He concluded that the pursuer must have been out of her sight for at least several minutes. In my opinion that must be correct. For the pursuer to get through the gate into the race, in all probability by climbing it, and then to climb and loosen the stock gate in the race must have taken several minutes, especially as the pursuer was in what were clearly unfamiliar surroundings. The second defender accepted that the stock gate would be a danger to an eight-year-old child if he were able to enter the race, and it is accordingly probable that, if she had seen the pursuer trying to enter the race, she would have stopped him. She must have been inside the stable during the whole of the period when the pursuer made his way

into the race and loosened the stock gate. In my opinion that must have taken several minutes. I further agree with the Lord Ordinary that, for a child of eight in a potentially perilous environment such as the defenders' farm, that was dangerously long; it gave rise to a foreseeable risk that the pursuer would get into the race and suffer an accident there.

[73] The Lord Ordinary concluded that the stock gate was an allurement to boys of the pursuer's age; the second defender had agreed with that view. She also accepted that a child of that age might be intrigued by the metal chain and might be tempted to interfere with it, a view with which the Lord Ordinary agreed. As he stated, these are essentially matters of common sense that any reasonable adult with experience of young children would be expected to know. In my view that is correct. In these circumstances I agree with the Lord Ordinary that the gate presented a foreseeable risk of causing injury. That inevitably meant that the second defender had a duty to take reasonable care to ensure that the pursuer did not get into the race and injure himself. The precise mechanism of the accident need not be foreseeable: *Hughes* v *Lord Advocate*, *supra*; consequently it was enough that the stock gate was a potential danger, capable of causing significant injury, and that the pursuer remained unsupervised for long enough to enable him to reach the race and the gate and to climb the gate.

Criticism by the second defender of the Lord Ordinary's reasoning

[74] Counsel for the defenders made a number of specific criticisms of the Lord Ordinary's reasoning. She emphasized that the second defender had two of her own children under her charge that day, Ben and a very young child, Tabitha, who was in the house with her mother. The second defender had taken steps to control where the pursuer and Ben played: she told them to play either in the house or in the courtyard. She

specifically told them not to go out of the courtyard into the midden or other dirty areas. She shut gates giving access from the courtyard to other parts of the farm and to the access road. She further gave the two boys toys to play with in the courtyard. She spent time dressing her horse, in part to permit her to keep an eye on what the boys were doing. From time to time, however, she required to go into the stable to obtain items from her tack box. She also required to go in to the house from time to time to check on Tabitha or to obtain drinks for the boys. Counsel stressed the difficulty of estimating how long the second defender was away from the boys, especially more than a decade after the accident. In evidence the second defender had expressed the view that there could not have been enough time when she was in the house or in the stable for the accident to have occurred. On the foregoing basis, it was submitted that the Lord Ordinary had applied too high a standard of care in holding that negligence was established when the boys were out of the second defender's sight for several minutes.

[75] The Lord Ordinary accepted that there were a number of competing demands on the second defender's time. It was in the light of that fact that he gave consideration to the precise requirements of the standard of reasonable care in the situation in which the second defender found herself. He had regard to the fact that a farm inevitably presents hazards to young children; the gate that fell on the pursuer was merely one example of possible hazards. It was because of the existence of those hazards that particularly close supervision was required in order to fulfil the standard of reasonable care. While the second defender had told the boys to remain in the courtyard, it is obvious, as the Lord Ordinary observed, that young boys do not always obey instructions that they are given. The Lord Ordinary further had regard to the allurements presented around the farm courtyard, specifically the stock gate in the race. The race itself, and other areas separated from the courtyard by gates,

would themselves constitute allurements, enticing young boys to explore them; once again this is a matter of common sense. The risk of such exploration would be particularly important for a boy such as the pursuer, who was not familiar with the farm. The existence of allurements of this nature constitutes a major reason for holding, as the Lord Ordinary did, that the farm itself presented hazards to young boys. Overall, I do not think that the Lord Ordinary's assessment of the dangers presented by the farm is open to criticism.

[76] The same applies to the danger presented by the stock fence. This was held up by a chain and pin. Furthermore it was a gate that a young boy might easily be tempted to climb. In my opinion the Lord Ordinary was correct to hold that the gate and the chain and pin could present allurements to young boys, to climb the gate and to unfasten the chain. Nevertheless, the gate and its fastening were merely one example of the hazards that exist on any farm, and was merely one of the reasons for close supervision of young boys. Detailed knowledge of the gate and its fixing was not a fundamental part of the Lord Ordinary's reasoning; it was enough that the gate was one of a range of hazards, and that the second defender was aware that such hazards existed on the farm. In my opinion that is the correct approach.

[77] Once it is accepted that the farm in general and the gate in particular presented hazards, the critical question becomes whether the supervision that the second defender exercised over the pursuer, in particular, met the requisite standard of reasonable care. In this connection it is I think significant that the race which contained the stock gate, and other hazardous areas such as the midden, were readily accessible from the courtyard by climbing or opening various gates. That suggests that supervision should be close. Counsel for the second defender criticised the Lord Ordinary for applying too high a standard of care; he had in effect required the second defender to exercise near constant supervision and

surveillance of the pursuer, whereas the risks to which the pursuer was exposed did not call for that. This was not a case where a child was left playing next to an inherently dangerous object or in an inherently dangerous situation.

[78] In my opinion this criticism of the Lord Ordinary is misplaced. The fundamental point in the Lord Ordinary's reasoning is that the farm itself presented a range of hazards, which required a relatively high level of supervision. As to the time during which the pursuer was not supervised, the Lord Ordinary was careful in his assessment of the period involved. He rejected a figure of five minutes that had been spoken to in evidence, and was clearly conscious that estimating the precise time was impossible, given the considerable number of years that had passed since the date of the accident. He accordingly adopted a pragmatic approach to determining how long the pursuer was out of the second defender's sight. There must have been sufficient time for the pursuer to have approached the gate in the courtyard that gave access to the race, to climb that gate into the race, to climb onto the stock gate, and to lift the chain off the pin and detach the gate from the barrier. The second defender had accepted that she would have intervened immediately if she had seen any of those events. Consequently the period of non-supervision must have been sufficient to allow the pursuer to perform all of those acts. The Lord Ordinary concluded that this must be a period of several minutes. I agree with that assessment. Given the range of hazards that may exist on a farm, I agree with the Lord Ordinary that the period of non-supervision must have been sufficiently long to amount to a breach of the relevant standard of care.

[79] For the foregoing reasons I am of opinion that the Lord Ordinary's determination of the appropriate standard of care and his application of that standard of care to the facts of the case were correct. In view of his findings of primary fact, which appear in any event to

be firmly based on the evidence led, I do not think that a contrary conclusion could have been reached. I accordingly agree that the reclaiming motion should be refused.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 14
PD53/14

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF LORD MALCOLM

in the cause

CRAIG ANDERSON

Pursuer and respondent

against

JOHN IMRIE

First defender

and

ANTOINETTE IMRIE

Second defender and reclaimer

Pursuer and respondent: Milligan QC, Skinner, Drummond Miller LLP
First Defender: Non-participating Party
Second Defender and reclaimer: Springham QC, BTO Solicitors LLP

15 March 2018

[80] I begin by agreeing with your Lordship in the Chair that this case is not truly one under the Occupiers Liability (Scotland) Act 1960. The statute is aimed at protection against risks caused by unsafe premises. The premises have not been shown to be unsafe, except in the extended sense that any farm will present dangers to an unsupervised child. It is well known that children are adept at finding ways of doing mischief to themselves, even in

premises which, on any reasonable view, cannot properly be described as being in a dangerous condition. If there is liability in the present case, it is because, while unsupervised, the respondent wandered off, climbed on the stock gate, and then unclipped the chain; not because of any inherent risks caused by the gate and chain.

[81] The occupation and control of premises does not, in itself, render one liable for an injury arising purely from activities carried out on the subjects. Any liability for such activities would arise under the common law principles applicable to the law of negligence. Sometimes a distinction is drawn between "occupancy duties" and "activity duties". Here we are in the realms of the latter. However, nothing of importance turns upon this. Having expressed his conclusions on the occupier's liability case, the Lord Ordinary explained that the same considerations applied to the allegation of common law negligence. It can be observed that, had this been a matter truly concerning occupier's liability, the first defender's absence on the morning of the accident would have been of no moment.

Negligence

[82] The Lord Ordinary required to address the following issues. Would it have been apparent to an ordinary reasonable person in the position of the reclaimer that a reasonable and probable consequence of non-supervision of the pursuer would be harm to him? If the answer is yes, the precise way in which the harm occurred need not have been foreseeable, so long as it was caused by the kind of occurrence which could be anticipated: *Hughes* v *Lord Advocate* 1963 SC (HL) 31; *Jolley* v *Sutton London Borough Council* [2000] 3 All ER 409 (HL).

[83] The next question was whether the reclaimer's conduct amounted to *culpa*; in other words, did she meet the standard of care required of her? What would a reasonable person

have done or not done? If her conduct fell within the scope of a reasonable standard of care, there is no liability. Thus, for example, it might be reasonable to leave a child alone for a short period, but not for an extended length of time. Much depends upon the whole circumstances. Sometimes reference is made to a "calculus of risk", which might include the seriousness of any injury within contemplation.

[84] At paragraph 23 of his opinion the Lord Ordinary described how the accident happened. While the respondent and her son Ben were playing in the courtyard the reclaimer was "focussed" on grooming her horse. She went into the stable to get something. While she was in the stable the respondent climbed over the gate separating the courtyard from the race. He then climbed onto the stock gate and lifted the chain off the pin, thus detaching the gate from the barrier. The gate over-balanced on top of him. He fell back striking his head against the concrete surface of the race. The gate ended up on top of him. Earlier the Lord Ordinary recounted the reclaimer's evidence that she told the boys to play in the courtyard and that they must not go into the race or the nearby midden. She made sure that the gate to the race was closed. Her recollection was that some minutes after she had gone into the stable, Ben came and told her to come at once. In cross-examination she said that the boys had possibly been out of her sight for about five minutes. She was aware that the farm could be a dangerous place for children, and she had heard that the respondent had a reputation for being something of a "loose cannon."

[85] The Lord Ordinary set out his views at paragraphs 32 and 33 of his opinion. The farm was a dangerous place. The reclaimer was in *loco parentis*, and she thought it right to keep "a watchful eye" on the respondent. She was aware that he had a reputation of being something of a "loose cannon". She went into the stable. The boys "must have been" out of her sight for a period of at least several minutes given the time needed for the respondent to

leave the courtyard and for the accident to happen. The reclaimer had acknowledged that the heavy stock gate would be "an alluring item" to the respondent. Climbing upon it would be an attractive idea, as would interfering with the metal chain. The stock gate presented a foreseeable risk of causing injury to a young child.

[86] As to his Lordship's overall conclusions, although expressed in the context of occupier's liability, the same considerations apply in respect of the common law case. In effect the Lord Ordinary held that the reclaimer owed a duty of reasonable care towards the respondent and that she ought to have foreseen that if he entered the race he might injure himself by interfering with the heavy stock gate; it can be assumed in the sense of it being a reasonable and probable consequence of the alleged failure on her part. She fell below the standard of care expected of her. She "did not take sufficient care". She knew that children do not always obey instructions. The boys were out of her sight for at least several minutes, which was "an unreasonably long period of time in the circumstances." For a child of eight in a potentially perilous environment such as the farm, "that was dangerously long". There was a foreseeable risk that while she was in the stable the respondent would have an accident and come to harm in the race. The accident happened because of a negligent lack of proper supervision.

[87] The risk of exercising hindsight is ever present in cases of this kind. That would be as apparent to the Lord Ordinary as it is to this court. At a number of stages the foresight of and/or the conduct of a reasonable person had to be determined. Only the court can do this, and it requires a full and proper appreciation of all the relevant circumstances. On issues of this kind there may be no obviously right or wrong answer. Different judges, while acting reasonably and without error, might have different views.

[88] The critical issue in the present case was whether the dangers within contemplation were such that to leave the children unsupervised for the period of time when the reclaimer was in the stable amounted to a wrongful act such as would make her responsible in law for what happened. Accidents for which no one should be held responsible in law can and do happen. There are obvious concerns about imposing unreasonable burdens and expectations on parents and other guardians. The correct judgement on issues of this kind will always be a matter of fact and degree, with much dependent upon the full circumstances of the case.

[89] There is no challenge to any of the Lord Ordinary's findings in fact; however the court is invited to substitute a different decision in respect of the allegation of negligence on the part of the reclaimer. In order to address this submission it is once again necessary for the court to consider and direct itself as to when it can and should interfere with a decision of this kind.

The role of an appellate court

[90] Despite a number of recent decisions of the UK Supreme Court, there remains room for discussion as to the scope for an appellate court to interfere with decisions such as that in issue in the present case – see for example the articles entitled "Appellate courts" commencing at 2015 SLT (News) 125. For the respondent, it was submitted that considerable deference should be shown to the Lord Ordinary's conclusion on negligence. Reliance was placed upon the well-known passage in the speech of Lord Thankerton in *Thomas* v *Thomas* 1947 SC (HL) 45 at 54, and on a trilogy of recent Supreme Court decisions in Scottish cases. For the reclaimer it was submitted that, if it differs, the court can and

should substitute its own view on the merits given that there is no challenge to the primary facts.

[91] This appeal presents a classic example of the kind of dispute which has prompted discussion and disagreement involving judges in several jurisdictions. In *Muir* v *Glasgow Corporation* 1943 SC (HL) 3 at 8, Lord Thankerton described the question whether a particular accident could reasonably have been anticipated as "essentially a jury question" in respect of which "a court of appeal should be slow to interfere with the conclusions of the Lord Ordinary." However, in *Benmax* v *Austin Motor Co Ltd* [1955] AC 370 Viscount Simonds drew a distinction between a judge's identification (or "perception") of the facts and his evaluation of the facts. A finding of negligence is an example of the latter, which his Lordship also described as a judge drawing a "proper inference" from the facts. The view was that in an appeal against the outcome of such an exercise "an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge" (374). Lord Reid said (376) that "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." Lord Somervell of Harrow spoke of "the impossibility … of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial."

[92] Recently there has been a revival of the more restrictive language used by Lord Thankerton. In *Royal Bank of Scotland Plc* v *Carlyle* 2015 SC (UKSC) 93 the issue was whether the evidence supported the contention that the bank had made a binding commitment to advance a large sum of money. The Lord Ordinary held that it did; the

Inner House that it did not. After an appeal to the UK Supreme Court, Lord Hodge observed that, had he been the Lord Ordinary, he might have agreed with the Inner House, but it was not the task of an appellate court to approach matters as if it was a court of first instance. It was open to the Lord Ordinary to decide the case either way. There was a "reasonable basis" for his view, and there was no legal error in his reasoning. It followed that the Lord Ordinary's decision should be restored.

In re B (a Child)

[93] The tension between the two schools of thought was demonstrated in another recent decision of the UK Supreme Court, namely *In Re B (a Child) (FC)* [2013] UKSC 33. The context was the making of a care order with a view to a child's adoption. Lord Neuberger said (paragraph 58) that if an appeal court is asked to overturn a trial judge's evaluation of an issue, then:

> "depending on the precise basis on which the appeal is mounted, the reasons for giving primacy to the trial judge's conclusion (good sense, policy, cost, delay and practicality) will either apply in the same way as, or will apply with somewhat less force than, they do in relation to findings of primary fact."

At paragraph 60 his Lordship said:

> "when it comes to an evaluation, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation…"

[94] On the issue of proportionality of the care order in terms of article 8, Lord Neuberger disagreed with Lady Hale's view that the appellate court required to assess the question for itself if that meant a *de novo* exercise. Otherwise litigants would be able to force (or be obliged to undergo) two separate sequential judicial assessments of proportionality. The appeal court

should not interfere if the judge "approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach" (paragraph 88). It would be different if there was a significant error of principle or a decision which he should not have reached. Only then will the appeal court reconsider the issue for itself if it can properly do so. If the appeal court cannot be sure whether the trial judge was right or wrong without hearing the evidence and seeing the witnesses, "it would either have to reach a decision knowing that it was less satisfactorily based than that of the judge, or it would have to hear the evidence and see the witnesses for itself" (paragraph 90). If the appeal court has doubts, but on balance considers that the judge's decision was wrong, it "should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case" (paragraph 94). The last remark is reminiscent of the final sentence in Lord Thankerton's celebrated observations in *Thomas*: "It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

Discussion

[95] I have quoted extensively from Lord Neuberger's judgment because, in my respectful opinion, it contains insights which are of value to the proper resolution of the present appeal, not least in respect of the observation to the effect that the significance of the advantages enjoyed by a trial judge will vary from case to case. In some instances the significance will be clear. For example, on a pure question of law, such as the proper meaning of a statutory provision, lesser weight will attach to the trial judge's opinion than is appropriate in the context of an appeal challenging findings of primary fact. However, in between these two examples there is a wide spectrum of first instance decisions, which, in my opinion, are not

susceptible to the kind of classification of different types of appeals which from time to time has been attempted by judges and academics.

[96] When an appeal court is pondering whether it can and should interfere, I suggest that the core question is this – when regard is had to the particular point at issue in the appeal, how important are the advantages enjoyed by the trial judge? Where the point at issue concerns the inference which should be drawn or evaluation made from the evidence as a whole, such as, for example, did the defender exercise reasonable care, or was the invention obvious, there will be cases where there is no clearly correct answer, and in respect of which the trial judge is in an advantageous position when compared to the appeal judges. In that event an appellate court will be wise to think long and hard before reaching a confident view that the judge came to the wrong decision – as opposed to one which is merely different to the outcome which commends itself to the appeal court. I reiterate, it is not a matter of allocating a place in a classification of types of appeal: the key question for the appellate court is - do the advantages enjoyed by the trial judge in respect of the question at issue place him in such a superior position that the court ought not to conclude that he reached the wrong decision?

[97] The superior position of the trier of fact goes beyond that which follows from the ability to observe and listen to the witnesses. In *Housen* v *Nikolaisen* [2002] 2 RCS 235 the majority opinion of the Supreme Court of Canada quotes (paragraph 14) R D Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 Advocates' Q 445 at 446:

> "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

The majority opinion continued as follows:

> "The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole."

The majority opinion returns to these sentiments at paragraph 25:

> "Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. … It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact…"

[98] Similar observations can be found in the speech of Lord Hoffmann in *Biogen Inc* v *Medeva Plc* [1997] RPC 1 at page 45 (all in the context of the question of whether an invention was obvious):

> "The need for appellate caution in reversing the 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. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness 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."

Thus, even in cases where the challenge concerns only the judge's evaluation of the facts (sometimes called "a mixed question of law and fact"), the advantages enjoyed by the trial judge will often justify considerable deference to his opinion. Later in his speech (page 50) Lord Hoffmann said "… I think that your Lordships learned enough of the detailed facts to

form the view that the judge's decision was one which was open to him upon the evidence and should not have been disturbed". If this approach is adopted in the present appeal, the question becomes – was the decision taken by the Lord Ordinary one which was open to him on the evidence? It will be appreciated that this is a different question from - does the appeal court think that it would have reached the same decision?

Henderson* v *Foxworth Investments

[99] There will be cases where it is obvious that a judge has come to the wrong conclusion. If a judge decided that it was not a failure to take reasonable care for a driver to speed through a built up area at 75mph simply to impress his girlfriend, an appeal court would have little difficulty in upholding an appeal. However, often there will be no hard and fast right or wrong answer to the question posed. In *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 the Lord Ordinary concluded that a sale was made for adequate consideration and thus was not a gratuitous alienation. The Inner House disagreed and set out its reasons. The UK Supreme Court was unpersuaded by the reasoning of the Inner House and restored the decision of the Lord Ordinary. Lord Reed added some general observations (paragraphs 58-69). Various judicial statements were cited which explain that an appeal court should interfere only in limited circumstances, for example if satisfied that the judge was "plainly wrong", or that no conclusion was possible except that he was wrong. Lord Reed summarised the position at paragraph 67:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

Echoing comments of the First Division in *HS* v *FS* 2015 SC 513 at paragraph 22, I do not interpret this passage as importing a judicial review type immunity from a challenge to the merits of a decision. It is clear that it was not intended to add to or extend the traditional restraints. As I understand it, Lord Reed was interpreting earlier decisions to the following general effect: if a judge avoids error, applies the correct legal principles, and comes to a decision which was open to him, it cannot be categorised as a wrong decision. So, if an appeal court can say no more than that it favoured a different decision, in itself that is not enough to justify interference. The court would have to say that the decision was not open to the judge: in other words, that it was plainly wrong. Failing that, the advantages enjoyed by the trial judge put him in a better position to decide on the correct outcome, and provide a good and sufficient reason to decline to disturb it.

[100] In any particular case, matters of law will intrude to a greater or lesser extent; and similarly in respect of issues of fact. The more the ultimate decision turns on the law as opposed to the facts, the greater the scope for an appeal court to exercise its own judgement. On such matters the advantages enjoyed by the trial judge are likely to be of lesser significance, and vice versa when issues of fact or evaluation of fact play a more prominent role. This may be why, even in cases where judges are taking a more liberal approach, one finds phrases such as "weight" being given to the opinion of the judge below, for example see *Benmax* at page 374. In *Muir* v *Glasgow Corporation* Lord Macmillan said that when it comes to what a reasonable man would have in contemplation, "there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable." The sense is that there are certain questions which admit of no certainty as to the correct answer (perhaps a reasonable

definition of "a jury question"), hence deference will be given to the trial judge since he is in a better position to form a judgement. If however the case raises an issue of principle, it is likely that the appeal court will consider that it is in as good a position, perhaps a better position, to resolve it.

Housen* v *Nikolaisen

[101] I would not endorse all of the reasoning in the majority opinion of the Supreme Court of Canada in *Housen* v *Nikolaisen*, but this is in respect of relatively unimportant matters when set against the following propositions which can, I think, be taken from it, and with which I respectfully agree:

1. An appeal court should not re-try a case. The essential question is whether the trial judge has reached the wrong result. It is not a matter of an appellate court simply reviewing the evidence, forming its own view on a balance of probabilities, and, if it differs from the judge below, concluding that he erred.
2. The trial judge has been exposed to the entire case and has "total familiarity" with the evidence. He is likely to have a "far deeper" insight than that of the court of appeal. He will have had an "extensive exposure to the entire factual nexus of a case."
3. Generally it will be wrong for an appellate court to set aside a judgment where the only point at issue is the interpretation of the evidence as a whole. The appeal court will assume that the judge's decision is better than its opinion on such matters. Unless it is clear that an error has been made, deference will be due to his evidentiary conclusions, which will be linked to

> the weight to be attached to the evidence. The court would need to be satisfied that no jury could properly reach the decision.

When regard is had to the minority opinion in *Housen*, it becomes clear that the key disagreement was as to whether the trial judge had erred in law. It can be noted that the majority opinion is consistent with the approach adopted by the United States Supreme Court in *Anderson* v *Bessemer City* [1985] USSC 57, a decision which covered not just credibility determinations, but also "inferences from other facts" (paragraph 19).

Hughes* v *The Lord Advocate

[102] In the passage in the speech of Lord Hoffman in *Biogen* quoted earlier, mention was made of an exception for cases involving a question of principle. I do not detect anything of that kind in the present case. It has been said that the decision in *Hughes* v *The Lord Advocate* 1963 SC (HL) 31 demonstrates that Scottish judges are willing to open up a trial judge's decision on issues of fact. However it, no doubt along with many others, raised an issue of principle, or, as it might otherwise be put, an important question of law which did not depend to any material extent upon the trial judge's findings on, or his overall impression of, the facts of the case.

[103] The point can be illustrated by reference to their Lordships' discussion in *Hughes*. Initially there were three lines of defence on the merits: (1) the children were trespassers; (2) their arrival could not be foreseen; and (3) the mechanism of the injury (explosion as opposed to burning by fire) could not have been anticipated. The first line of defence was not pursued in the House of Lords. As to the second, this was based upon the manhole being in a quiet road with no dwelling house fronting it, and on the evidence of the Post Office employees to the effect that they had never been bothered by children. This defence

found favour with the Lord President in the Inner House. However, Lord Guest noted that it had been rejected by the Lord Ordinary, "who was in a better position than we are to judge of its validity." After a brief mention of some of the relevant considerations, his Lordship said: "The Lord Ordinary, in my view, was well entitled to reach the conclusion which he did." This would seem to be a good example of the kind of inference from or evaluation of facts which is better left to the decision of the trial judge.

[104] The appeal in *Hughes* was upheld because of their Lordships' decision that in respect of a known source of danger it was no defence if the accident occurred in a way that could not have been foreseen. This was in reality a question of law in respect of which little, if anything, turned on any superior position of the trial judge. *Hughes* was a classic example of an authoritative appeal court developing the law, and moving it forwards from that which had been understood from cases such as *Muir* v *Glasgow Corporation*. In contrast, the second line of defence, namely was it foreseeable that children would be allured to the manhole, attracted a considerable degree of deference to the decision of the trial judge. It was the kind of issue in respect of which he was better placed. It was not a matter of law, but turned on the overall impression left from the relevant evidence in the case. One can ask: should the same apply in respect of the question of whether the reclaimer acted with reasonable care when looking after the respondent?

[105] *R & J Dempster* v *Motherwell Bridge and Engineering Co* 1964 SC 308 has also been mentioned as an example of an appeal court exercising an expansive approach to its entitlement to interfere with the decision of the trier of fact. However, again it can be seen as closer to a question of law than an issue of evaluation or proper inference from the facts. The question was, in the proven circumstances, did the letters constitute a concluded contract? In the specific context, there was little if any reason to defer to the opinion of the

Lord Ordinary. There was no reason to speak of a "penumbra of imprecision", to quote Lord Hoffmann in *Biogen*.

[106] *Hughes* and *Dempster* are cases where it is clear that the appellate court judges were in as good a position as the trial judge when it came to a view on the point at issue. Illustrations of this kind of case could be multiplied. For example, the discussion and decision in *Macfarlane* v *Tayside Health Board* 2000 SC (HL) 1 took place after a procedure roll debate, but it would have made no difference if they had occurred after a proof where a Lord Ordinary had made findings in fact. In contrast, as I understand the reasoning, in *RBS* v *Carlyle* the UK Supreme Court considered that it fell within the spectrum of the type of decision where weight should be placed on the "greater familiarity" with the evidence and the "deeper insight" enjoyed by the trial judge, as opposed to the narrower, perhaps "distorted" perceptions of the appeal court (Lord Hodge at paragraph 22). The question in the present appeal is - should a similar approach be taken?

[107] The point at issue in *Carlyle* was whether the evidence supported the contention that the bank had made a binding commitment to advance large sums of money. Lord Hodge said that the evidence could support either an affirmative or a negative answer – see paragraph 25. (This can be contrasted with *Hughes*, where, if the law was as explained by the House of Lords, it could not sensibly be argued that nonetheless the defenders should escape liability.) The availability on the evidence of a decision either way was the context for Lord Hodge speaking of "a good reasonable basis" for the Lord Ordinary's decision that, in a telephone call, the bank made a legally binding promise to fund the development of the subjects. This is not importing something akin to a judicial review type test. It is reflective of a wholly different issue, namely, was it the kind of case where an appellate court can say

with confidence that the decision is wrong, as opposed to one which it might not have reached?

AW* v *Greater Glasgow Health Board

[108] Recently this area of the law was considered by the Second Division in *AW* v *Greater Glasgow Health Board* [2017] CSIH 58. Consistently with Lord Thankerton in *Thomas* and with the above discussion, the court stated:

> "An appellate court should not come to a different conclusion from the trial judge on the basis of the printed evidence unless it is satisfied that any advantage enjoyed by the trial judge through having seen and heard the witnesses could not be sufficient to explain or justify his conclusion" (paragraph 48).

The court completed the reference to Lord Thankerton's observations by adding that matters may be at large if the reasons given by the trial judge are unsatisfactory, or because it unmistakably appears from the evidence that he had not taken proper advantage of having seen and heard the witnesses.

[109] In the following paragraph the court indicated that there should be a greater readiness to interfere where the challenge is not to the primary facts, but as to the proper inference or inferences to be drawn from them, quoting Lord Reid in *Benmax* at 376. This prompts a question as to the extent to which, if at all, this was intended to qualify the observations in paragraph 48. There are passages in the opinion which appear to restrict the effect of the recent UKSC decisions to appeals where the challenge is to the findings of primary fact, as opposed to matters of evaluation or inference – see, for example, paragraph 51. It will be apparent from the above discussion that I do not interpret the recent guidance from the Supreme Court as being so restricted. As more fully explained earlier, and echoing those parts of the opinion in *AW* which call for a flexible, pragmatic, and

undogmatic approach, each case should be approached on its own merits, with the appeal court asking itself whether, having regard to the specific point or points at issue, the trial judge was better placed to form a correct opinion. Just because the case covers matters of evaluation, it does not necessarily follow that an appellate judge is in as good a position as the trial judge.

[110] In *AW*, reference was made to *Flower* v *Ebbw Vale Steel, Iron and Coal Co Ltd* [1936] AC 206; however there the question ultimately turned on sufficiency of evidence, an issue in respect of which it is readily understandable that an appeal court will see little reason to defer to the court below. *AW* was primarily concerned with a review of expert evidence, in respect of which particular considerations can arise, especially if the trial judge is choosing between competing opinions bearing directly upon the ultimate question which the court requires to answer. Reference can be made to the discussion at paragraphs 56/58 and 62. A further distinguishing feature is that, in so far as the court criticised the Lord Ordinary for giving inadequate reasons (paragraph 66), this factor does not arise in the present case.

Decision

[111] The above discussion can be summarised as follows. Where there has been no apparent error, and a decision reached which was available on the evidence to a judge acting properly and reasonably, then, everything else being equal, an appellate court should not attempt to form its own view, but should defer to the various advantages of the trial judge, and recognise that he was in a better position to decide upon the correct outcome. This is not the same as saying that the court has no power to review the merits of the decision under appeal; but, in cases such as the present, it is a jurisdiction which should only be

exercised when the court can be confident that, despite that superior position, it is clear that the decision in the court below cannot stand.

[112] The Lord Ordinary's decision depended upon an overall impression as to where the evidence pointed. It is far from clear that he was wrong. We are told that the reclaimer was "somewhat displeased to find that she unexpectedly had the (respondent) on her hands that day." She had five children, three of whom were away from the farm with friends. She had been planning to go out for a ride on her horse, and had collected her mother to look after Ben and her youngest child – see paragraph 11 of the opinion. The horse was in the courtyard and she was dressing it while "going back and forth between the farmhouse and the courtyard to check that her mother was managing with the baby" (paragraph 12). The horse was fidgety so she may have had to put it into the stable at some point. The Lord Ordinary painted a picture to the general effect that the reclaimer's attention was not on, or at least not sufficiently on the respondent. The same could be said of her supervision of Ben; but Ben was her child and she could draw on her knowledge of his temperament and how he would respond to her instruction to stay in the courtyard.

[113] At paragraph 23 the Lord Ordinary said that, as the boys played, the reclaimer was "focused on grooming her horse". She went into the stable and the children were out of her sight for some minutes. The Lord Ordinary was better placed than this court to judge the dangers which this created for the respondent, and the extent to which they could and should have been foreseen by the reclaimer. He held that she was aware that the heavy stock gate would be an alluring item to the respondent. Earlier she had determined to keep a watchful eye upon him. The stock gate presented a foreseeable risk of injury to the boy. Again the Lord Ordinary was better placed than this court to reach a view on whether the children were out of the reclaimer's sight for an unreasonably long time. Built into this

would be a judgement as to how long it must have taken for the respondent to climb into the race; clamber onto the gate; unclip the chain and fall to the ground sustaining the head injury; and for Ben to realise what had happened and alert his mother to the accident.

[114] Given the passage of many years since the events of that day, there was never any possibility of anyone providing an accurate account of timings; however, the Lord Ordinary felt able to conclude that the children were out of sight for an unreasonable and dangerously long period of time in what was a potentially perilous environment. He will have based that upon all of the relevant evidence, including his impression as to the extent to which the reclaimer was, to use the Lord Ordinary's word, "focusing" on grooming the horse rather than keeping an eye on the respondent. As mentioned earlier, there is an obvious concern about the courts placing unreasonable and inappropriate burdens on those caring for children. Nonetheless, every case, including this one, depends upon its own particular facts and circumstances, and it is clear that the Lord Ordinary considered all the evidence and approached his task with great care.

[115] The key issue which the Lord Ordinary required to decide was whether the reclaimer is liable in negligence for the injury to the respondent. It has already been explained that it is of no moment that he set out his reasoning in terms of the Occupiers Liability Act. Exactly the same issues arise under common law negligence. The questions which required to be addressed and resolved were set out earlier in this opinion. They are classic jury questions which raise no issue of principle or law. The Lord Ordinary gave clear and coherent reasons, and his decision was available on the evidence. There were no errors of the kind mentioned by Lord Reed at paragraph 67 of *Henderson* v *Foxworth Investments*. The observations of Lord Hoffman in *Biogen Inc* at page 45 and of Lord Neuberger in *In re B (a Child)* at paragraphs 90 and 94 (all quoted earlier) are apposite. It is not for this court to

attempt to form its own view, but rather to ask whether it can conclude that the Lord Ordinary reached a wrong conclusion. As with your Lordship in the chair, I am not so persuaded, thus I agree that the reclaiming motion should be refused.