SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 38
A570/12

Lord Justice Clerk
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the cause

(FIRST) ANNA MARIE BOWES, (SECOND) DAVID EWAN BOWES, (THIRD) JEMMA LOUISE ILLINGWORTH, (FOURTH) ANNE SCOTT, (FIFTH) JUNE BOWES, (SIXTH) BRIAN BOWES, (SEVENTH) DEBORAH BOWES, and (EIGHTH) CHRISTINE GRANT

Pursuers and respondents

against

HIGHLAND COUNCIL

Defenders and reclaimers

First to third and fifth to eighth Pursuers and Respondents: Hanretty QC, Lloyd; Aitken Nairn WS
Fourth Pursuer and Respondent: MacSporran; Balfour & Manson LLP
Defenders and Reclaimers: Milligan QC, Murray; Ledingham Chalmers LLP

5 June 2018

Introduction

[1] This reclaiming motion arises from the death of David Michael Bowes in a road traffic accident, on 2 February 2010, on the A838 Kyle of Tongue bridge. Before the Lord Ordinary, the respondents founded upon the alleged failure at common law of the

reclaimers, as the roads authority for managing and maintaining the bridge and its parapets, to take reasonable care for the deceased's safety whilst crossing the bridge. Specifically, it was alleged that the reclaimers, knowing prior to the accident that the bridge and parapet were in a defective condition, ought in the exercise of reasonable care to have introduced interim safety measures, or alternatively closed the bridge. The Lord Ordinary held that the death would have been prevented had the defenders and reclaimers not "breached [their] duty to deal with the hazard, namely the defective parapets, by implementing interim measures until the parapets were replaced". He found the reclaimers wholly liable, rejecting their case of contributory negligence. The reclaimers challenge that decision, and seek recall of that interlocutor with decree of absolvitor.

Opinion of the Lord Ordinary

The accident

[2] The circumstances of the accident, as found by the Lord Ordinary (para [7]), were that as the deceased crossed the bridge, in a westerly direction,

> "his vehicle crossed from the west bound to the east bound lane, mounted the kerb on the north side of the bridge, collided with the parapet between stanchions 8 and 9 and fell into the water. The 12 west most stanchions (numbers 1 – 12 left hand side) and railings on the north side broke off at the welds over a distance of about 38 metres and swung out from the bridge. Stanchions 13 and 14 fractured but remained attached."

[3] The Lord Ordinary held that there was no non-negligent explanation for the loss of control and manner of driving (*Weatherstone* v *T Graham & Son (Builders) Ltd* [2007] CSOH 94, Lady Dorrian at para 16), and so it was an inescapable inference that the loss of control was due to driver negligence.

[4] The Lord Ordinary found that, at the time of the accident, the weight of the vehicle including the driver and equipment was approximately 2,050kg (para [10]), the speed on impact was in an estimated a range of 20 – 40 mph, and that the angle of impact by the vehicle with the parapet was 15 degrees or less.

[5] It was a matter of agreement between the parties that the parapet was a vehicle pedestrian BACO (British Aluminium Company) parapet designed to contain vehicles weighing up to 1.5 tonnes, travelling at 50 mph, and at an impact angle of 20 degrees. The Lord Ordinary held, upon the unchallenged evidence of the containment capacity of the parapet when acting as designed, that the weight, speed and angle of impact of the vehicle were, at least, well within the original design capacity of the parapet, and that:

> "had the parapet been acting to its design capacity, the Toyota Hilux driven by the deceased would have been contained by the parapet…"

Duty of care

[6] The bridge parapet was an integral part of the road that crossed over the bridge (section 151(1), the Roads (Scotland) Act 1984; Ministry of Transport Technical Memorandum 1967) and could itself constitute a hazard (*GNER Ltd* v *Hart & Ors* [2003] EWHC 2450; *Sargent* v *Secretary of State for Scotland* 2000 Rep LR 118). Indeed, the Lord Ordinary "venture[d] to suggest" (para [25]) that there would be a public outcry and reluctance to use any bridge over water that was built today without a parapet, as a parapet gives comfort to bridge users that there is a safety measure which helps prevent vehicles from leaving the bridge, and a sense of reassurance based on an expectation that parapets work as intended and are not decorative in the sense that they provide a false expectation of safety. Thus (*ibid*): "A parapet gives drivers the reassurance to drive across the bridge in

broadly the same manner as they would drive on a road with no drop into water at either side."

[7] The Lord Ordinary considered (paras [26] – [28]) the "long tract of authority" requiring roads authorities to exercise reasonable care in the management of the roads in Scotland, from *Innes* v *Magistrates of Edinburgh* (1798) Mor 13189 to the most recent Inner House authority, *MacDonald* v *Aberdeenshire Council* 2014 SC 114, which summarised the current state of Scots law. In particular, he observed that the argument presented by the reclaimers in the present case was in broadly similar terms to that rejected by the court in *MacDonald (supra).* On the basis of these authorities, he accepted that the reclaimers owed a duty of care to the deceased.

The design and function of the parapet

[8] The behaviour of the parapet was described by the respondents' expert, Dr John Searle, chartered engineer, as akin to the "unzipping" of the relevant section, which was accepted by the Lord Ordinary as consistent with post-accident photographs showing the section of parapet which had "separated from the bridge deck and swung away" (para [7]). The Lord Ordinary accepted that the airbags in the deceased's vehicle could have been expected to activate if the parapet had been operating as it should, but they had not done so (para [10]).

[9] The functional design, and failure, of the parapet is of some moment in the present reclaiming motion, and is described by the Lord Ordinary (para [16]) in detail:

> "The parapet on the Kyle of Tongue bridge is a BACO type P2(80) parapet consisting of aluminium posts (or stanchions) welded to aluminium base plates. The base plates are anchored to the bridge by four bolts and three horizontal aluminium rails are bolted to the posts… The posts are designed to be frangible, to shear at the welds to enable the rails to deform and contain errant vehicles. As Dr Searle explained, a

> parapet is designed to re-direct the vehicle back into the carriageway. The aluminium rails when struck will operate like elastic whereby the vehicle's energy is absorbed and the vehicle is re-directed using the energy and elasticity in the rails. The rails behave in this way by the shearing off of the stanchions at the point of impact… The unzipping effect of the parapet described by Dr Searle…is not the way in which the parapet is designed to operate."

Since 1967, the requirement for and design of parapets has been subject to Ministry of Transport Technical Memoranda: the parapet in the present case was fitted when the bridge was originally constructed in 1971 (paras [5] and [16]). The bridge was subject to a special investigation in 1988, leading to major repairs to the bridge (although it is not known, at least to this court, whether this included repairs to the parapet) being undertaken the following year.

Inspection and maintenance of the parapet

[10] The reclaimers operated a bridge inspection system comprising three-yearly general (visual) inspections and nine-yearly principal inspections, the latter using specialist access (such as divers and traffic controls). A principal inspection carried out in July 2005 had revealed, *inter alia*, defects to the parapet on the northern side of the bridge, including: defects to the welds between the posts and base plates (nos. 14, 43, 53 and 56, numbering the posts 1 – 58 running from west to east along that side of the bridge); a cracked base casting (no. 13); and a deflection in the rail (between nos. 24 – 36). The Lord Ordinary concluded that:

> "stanchions 1 – 12, and railings, broke off at the welds and swung out… In essence the aluminium parapet had failed due to cracked post based castings and post/base casting welds."

[11] The defects to the parapet identified in 2005 were categorised as "severe" (ie top priority), a categorisation referring to those defects currently affecting the integrity of the

structure and essential to repair at an early date, otherwise they could become hazardous with the cost of repair/damage escalating rapidly (*ibid*). Due to safety concerns, it was recommended by Mr Christie, who carried out the inspection (and who is described by the Lord Ordinary as "the engineer responsible for the bridge until 2008" (para [17]) but who has since been described to this court as a "senior technician" (see transcript, p 27)), that repairs should proceed in the next financial year. Interim measures were proposed, namely: a temporary barrier, the introduction of traffic lights, reduction to single lane passage, and a reduction in the speed limit to 30 mph; but these proposals were rejected by Mr Christie's superior, Mr Louttit, a principal chartered engineer, in favour of twice-yearly monitoring (para [18]). According to Mr Louttit, the reduced speed limit would not have been observed (a reason which the Lord Ordinary considered to be invalid: *ibid*), and the temporary measures were not necessary or appropriate standing the light traffic on the bridge, good visibility, straight road, absence of accident history, and the fact that the bridge structure would not have been compromised by a collision with the parapet.

[12] In October 2005, the Highland Council Bridge Maintenance Programme 2005 – 2015 for Sutherland made clear that the bridge parapet was failing and should be replaced on public safety grounds as soon as possible (para [20]). The estimated cost for doing so was £140,000. Subsequent Parapet Defect Monitoring Records in the years up to January 2008 indicated a number of new defects within the parapet. These were visual inspections only, however: it was a matter of agreement that a metallurgical examination of stanchion nos. 9, 10 and 11, carried out after the accident, revealed irregular weld profiles with evidence of lack of root penetration and fusion, porosity in the areas of the welds, and corrosion in the base plates, the general quality of the welds being considered as poor. From 2008, however,

the reclaimers discontinued monitoring, apparently without any rational basis for doing so standing the increasing incidence of defects. The decision to discontinue monitoring was taken by Mr Moncrieff, a principal engineer, "having taken over responsibility for the bridge from [Mr] Christie" (para [20]). His explanation was that "the number of new defects had dropped to zero in percentage terms, the prospectus for repair was due to be issued and at some time in the future, possibly one or more years, major works would be carried out to the bridge" (*ibid*). The Lord Ordinary considered that Mr Moncrieff's description of the decision as a "deferment" was misleading, as it had clearly been a discontinuance, and his attempt to undermine the inspection carried out by Mr Christie in 2005 was defensive. Accordingly, the Lord Ordinary rejected his evidence in this regard.

[13] The reclaimers subsequently commissioned a report on the bridge and parapet from Faber Maunsell, Consultant Engineers (now part of the AECOM group). The report dated 19 September 2008 indicated that the parapet was classified as "low containment" by comparison with prevailing standards. The defects in the parapet further reduced the containment strength. In all the circumstances, the Lord Ordinary considered that Mr Moncrieff's decision to discontinue monitoring had been wrong, made no sense, was against previous advice and meant that the reclaimers were "blind to the state and containment capacity of the parapet from 2008 and [were] not in an informed position to consider what safety and interim measures should be taken in relation to the parapet" (para [22]). Indeed, following the accident, Mr Louttit and the reclaimers' chief structural engineer, Mr Mackenzie, were both unaware of the decision to discontinue monitoring. The Lord Ordinary characterised Mr Mackenzie as "equivocal in his evidence on whether he agreed with the decision but sought *ex post facto* to justify his colleague's decision, broadly

for the same reasons", but Mr Louttit was "surprised when he learned of the decision and would have continued with the monitoring" (para [20]).

[14] It was agreed that the reclaimers did not carry out any road restraint risk assessment, or any risk assessment in relation to the parapet prior to the accident: the Lord Ordinary considered that it was "surprising and alarming that basic health and safety principles of risk assessment were not applied to the critical issue of the safety of the parapet" (*ibid*). A written risk assessment carried out post-accident, in February 2010, suggested that upgrading the parapet was not justified. However, the Lord Ordinary observed (para [23]) that this appeared to be "*ex post facto* justification of the decisions taken pre-accident" and to contain a number of flaws, notably the lack of any reference to the fatal accident or the resulting damage to the parapet, such that no reliance could be placed on its terms. The remnant capacity of the parapet was claimed to be 75% without any logical explanation justifying that assessment. The risk assessment had to be applied and combined with engineering judgement. No engineering judgement had been applied to the results of the risk assessment, although this was recognised to have been necessary by the reclaimers' expert, Mr Day, and was consistent with the ALARP (as low as reasonably practicable) risk assessment tool contained in IAN 97/07 at paragraph 6.7:

> "Parapets with known faults built since 1967 should generally be assessed on the basis of engineering judgement, considering the likely loss of the as-built capacity caused by known faults and defects" (*ibid*).

[15] The Lord Ordinary held (*ibid*) that it was clear on the evidence that:

> "immediately prior to the accident the [reclaimers] knew that (1) the parapet was not compliant with current standards, (2) it was defective, (3) its containment capacity was compromised to an extent which was unknown, (4) it would not operate as intended, and as a result a motorist who lost control of a vehicle and collided with the parapet could go off the bridge into the water below with a risk to life, and (5)

> had the parapet been operating as designed it would have contained the vehicle on the bridge carriageway and the deceased would not have lost his life".

[16] The hazard was not the sea, as the reclaimers had contended: the defective parapet posed a danger to road users and caused a significant risk of an accident, as illustrated by the present case: "A parapet is designed to safeguard road users who come into contact with it to prevent the obvious danger of falling off the bridge being realised" (para [29]; *GNER* v *Hart (supra); Sargent* v *Secretary of State for Scotland (supra)*). A parapet was not designed only for drivers who were at fault: it could equally aid careful road users who were not at fault, such as those who suffered a heart attack and lost consciousness at the wheel, those who had been shunted from the rear, and many more examples. In the present case, the deceased having lost control of his vehicle had been entitled to rely on the parapet to prevent serious injury or loss of life.

Standard of care

[17] The Lord Ordinary held (para [30]) that the test for professional negligence (*Hunter* v *Hanley* 1955 SC 200) was not directed to whether a roads authority had been negligent for failing to deal with a hazard, and that the test set out in *MacDonald (supra)* was to be applied, namely: whether a roads authority using reasonable care would have identified the hazard and taken steps to correct it.

[18] In the circumstances, the hazard had not been dealt with and the risks posed had not been mitigated (para [31]). Had the twice-yearly monitoring inspections continued, the reclaimers would have been in an informed position to consider what steps should be taken in this regard. No risk assessment had been carried out prior to the accident. The interim measures proposed by the reclaimers' Mr Christie, and also contemplated by way of

"obvious control measures" by the co-author of the Faber Maunsell report, Mr Webb, had been rejected. The parapet was eventually replaced in 2011, six years after its replacement had been recommended in the next financial year. The reclaimers' position had been "to hope for the best and leave it to chance" (para [31]).

Temporary safety measures

[19] The Lord Ordinary accepted the expert evidence of Mr Hunt for the respondents, who was "astonished" that nothing had been done to address the condition of the bridge, given the severity of the report in 2005, and reiterated in 2008 (para [32]). On receipt of the principal inspection report in 2005, the implications of the reportedly weak parapet for the safety of the travelling public should have been considered and addressed. On receipt of the Faber Maunsell report in 2008, it should have been clear to the reclaimers that immediate measures were needed to protect the travelling public. Several risk reduction strategies should have been taken, preferably the imposition of a 30 mph speed limit together with signage indicating the reason for it, which would have cost only a few hundred pounds; and erection of temporary barriers in front of the existing parapets, at an estimated cost of £50,000 for 400 metres to be retained as a capital asset. The reclaimers also had a stock of barriers available to them.

[20] The Lord Ordinary rejected the evidence of the expert, Mr Day, and others for the reclaimers that it was reasonable to have taken no steps to deal with the defective parapet until it was replaced, having regard to: the absence of an accident history; the low volume of traffic; the configuration of the road; the likely non-observance of a reduced speed limit; the possibility of traffic queues; the risk of overtaking; the *ex post facto* risk assessment, which resulted in monitoring only; and the cost of interim measures and replacement, having

regard to the reclaimers' limited budget. The Lord Ordinary considered that there was a pressing need to address the hazard, and the proposed temporary measures were not unduly onerous. Indeed, there had been no evidence of actual difficulties with implementation of such measures during the remedial works in 2011. The interim measures were reasonably practicable and modest in cost, and would have warned road users of the risk that the hazard presented and would have prevented the death of the deceased (see eg *Sargent* v *Secretary of State for Scotland (supra)*). In all the circumstances, the reclaimers had breached their duty to deal with the hazard by implementing interim measures until the parapets were replaced.

Submissions for the reclaimers

Scope of duty of care (ground one)

[21] In the written note of argument, it was maintained (as had been submitted to the Lord Ordinary) that there was no duty of care, with substantive arguments being advanced in relation to the distinction between a local authority providing a service at public expense and being held liable to pay compensation for a failure in providing that service, and the circumstances in which a common law duty might be created out of a statutory duty or power. The note of argument also contained submissions that any duty did not extend beyond the roadway to the parapet and that in providing a parapet the reclaimers were in a position akin to the emergency services. However, these arguments were not pressed in oral argument, it being accepted that roads authorities owe a duty of care to motorists. However, counsel submitted that the Lord Ordinary erred as to the nature and ambit of that duty. The arguments which were advanced in respect of the individual heads of ground one came to be as follows.

(a) (i) The scope of the duty on local authorities had to be properly circumscribed to prevent effectively unlimited liability and to recognise the financial constraints on a roads authority, whose primary duty was to provide an efficient road system and not to protect drivers from their own carelessness.

(ii) The premise of the Lord Ordinary's opinion was that building the road in the first place had created a hazard. This was fundamentally flawed. The parapet was not the hazard. The sea was the hazard. In *MacDonald,* Lord Drummond Young identified (para 64) the first factor, which must exist for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, as being that "the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user." Here, the parapet was not hazardous to the careful driver. Therefore, the first requirement for liability had not been established. The alleged breach of duty amounted merely to a failure to mitigate the consequences of the deceased driving off the bridge due to his own negligence.

(iii) If the category of careful road users were to include those who suffered a heart attack or were shunted off the road by other road users (see ground of appeal two, *infra*), the necessary precautions would be endless.

(b) In holding that a parapet gave reassurance to drivers, counsel assumed that the Lord Ordinary was making a point about reliance, as referred to in *Bird* v *Pearce* [1979] RTR 369, although the reasoning in that case had been disapproved by the House of Lords (in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057). A road user was not entitled to rely on road markings or street furniture to avoid their

own responsibilities (*Murray* v *Nicholls* 1983 SLT 194). The road user had to take the highway network as he found it (*Stovin* v *Wise* [1996] AC 923 at 958B-E), and had a primary duty to take care for his own safety.

(c) The Lord Ordinary erred in holding that the accident was reasonably foreseeable. In doing so, he referred only to a risk assessment, which had not been relied upon, and omitted to consider the evidence of the two independent engineering experts as to the outcome of a formal risk assessment. A reasonably foreseeable risk of injury required more than just a possibility – it required a natural and probable consequence. On the evidence (Mr Hunt for the respondents, p 101, line 17 – p 106, line 5; Mr Day for the reclaimers, p 20, line 17 – p 39, line 15), any formal risk assessment prior to the accident would have indicated no need for any action, even if the parapet had been missing completely. Accordingly, this court should make a finding in fact that, had a formal risk assessment been carried out before the accident, it would not have disclosed the need for any positive measures to have been taken. The experts agreed that, if a formal risk assessment had been carried out before the accident, it would not have disclosed the need for any positive action, principally because of the extremely low traffic rate on the road. However, the Lord Ordinary (para [33]) had worked back from the occurrence of the accident to ascertain what could have been done to prevent it, rather than look to normal practice at the time the defects in the parapet became apparent. It was not possible to determine whether the decision taken at that time had been reasonable without evidence as to normal practice in such situations, demonstrating that the engineering judgement exercised was one that no ordinarily competent highway engineer exercising

ordinary skill and care would have considered reasonable (see ground of appeal three, *infra*).

A weakening of a minority of parapets on a straight bridge with straight approaches on a road with very low traffic flow did not give rise to a reasonably foreseeable risk of injury, particularly where that risk was not going to last indefinitely due to planned repairs. There was no history of accidents at the location; the bridge was not over a railway line or other motorway; there were no junctions or other features likely to cause conflict with other vehicles; and the weather conditions were irrelevant, the assumption being that the road user would drive accordingly.

(d) In holding that the parapet design standards represented the minimum safety standard for a bridge parapet, the Lord Ordinary failed to explain at what stage it became mandatory for a roads authority to repair or upgrade a parapet. This was something which could not be judged on hindsight. It was necessary to identify the existence, at a given time, of factors leading to the conclusion that the parapet required to be upgraded at that stage, in order to prevent accidents in the future. Modern standards did not apply retrospectively (*McGivney* v *Golderslea Ltd,* Court of Appeal (Civil Division), 6 November 1997, unreported). Many bridges in the UK did not meet the standard referred to. On the evidence, the majority of the bridges under the reclaimers' control did not comply with modern standards.

Accordingly, this court should make findings that: (i) the majority of bridges under the reclaimers' control did not comply with modern standards; and (ii) modern standards do not apply retrospectively.

(e) Thus, the Lord Ordinary failed to take account of the evidence of the budget restrictions imposed on the roads department: again, it was said to be unclear how the roads authority was supposed to determine which bridge parapets required to be upgraded and what protective measures had to be taken in the interim. The Lord Ordinary had also failed to take account of the practical difficulties of implementing the interim measures proposed, given how many bridges were potentially in the same category.

It was implicit in the Lord Ordinary's reasoning (para [29]) that he held the reclaimers liable on the basis that the bridge did not meet modern standards. The fact that the bridge was designed to a certain containment level, which it did not now meet, had been central to his decision.

Counsel proposed that this court should make the following findings in fact, as indicated on the evidence:

(i) the maintenance of bridges in the Caithness and North Sutherland area was covered by the "structures budget", which also included culverts, safety fencing and cattle grids (Moncrieff, pp 3 – 5);

(ii) The structures budget for Caithness and North Sutherland was £129,000 in 2008 (Moncrieff, p 5, line 25); and

(iii) The average daily traffic flow over the bridge was about 400-500 vehicles (Mackenzie, p 50) or so low as to make no difference.

Identification of the relevant hazard (ground two)

[22] In concluding that the parapet was a hazard, the Lord Ordinary erred in failing to appreciate that circumstances could only be described as hazardous if they would be so to

reasonably careful road users. He further erred in law in extending the category of careful road users to include those who suffered a heart attack or were shunted off the road by other road users.

[23] It was accepted that the first control factor, identified by Lord Drummond Young in *MacDonald*, was that there was a hazard to the careful road user, but if that were to be extended to those with heart attack, or where the accident was caused by the negligence of a third party it would be meaningless. The list of precautions to be taken would be endless. If someone was shunted off the road, the remedy lay with whoever caused that to happen. The local authority's function was to provide a roads system, not to be a source of compensation.

[24] The careful analysis in *MacDonald* came to the conclusion that the roads authority was entitled to design, and maintain, roads on the basis of a careful road user:

> "In the present state of the law, I am of opinion that the critical question is whether there is a hazard, in the sense of something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care." (para 85)

The need for proof of a hazard of this kind was fundamental to the establishment of liability.

Standard of care (ground three)

[25] The Lord Ordinary applied the wrong standard of care. The second control factor identified in *MacDonald* was that the hazard must be apparent to a competent roads engineer exercising professional judgement, in other words the standard set in *Hunter* v *Hanley:*

> "The second feature means that the hazard must be apparent to a competent roads engineer. For example, the branch of the tree in *Brierley* v *Midlothian County Council Suburban District Committee* might not have been a hazard, because the risk that it would fall was not necessarily obvious." (para [64])

The same approach was taken in *GNER* v *Hart (supra)* where (para 49) it was held to be a matter for the professional judgment of highway and bridge designers and engineers to determine what length of approach safety fencing or a barrier should be to prevent a vehicle going through a bridge parapet onto the railway line below.

[26] In *Phelps* v *Hillingdon Borough Council* [2001] 2 AC 619, Lord Bridge, dealing with a floodgates argument, stated (p 672) that:

> "Any fear of a flood of claims may be countered by the consideration that in order to get off the ground the claimant must be able to demonstrate that the standard of care fell short of that set by the *Bolam* test… That is deliberately and properly a high standard in recognition of the difficult nature of some decisions which those to whom the test applies require to make and of the room for genuine differences of view on the propriety of one course of action as against another."

Similar considerations would justify the adoption of the *Hunter* v *Hanley* test in circumstances such as the present.

[27] In *Dewar* v *Scottish Borders Council* [2017] CSOH 68 (decided after the present case), where the pursuer claimed he lost control of his motorcycle due to a dangerous defect in a road, which the defenders had negligently failed to inspect, maintain and repair, the Lord Ordinary had held (para 60) that in carrying out the inspection, the defenders' employee:

> "…had to rely on his experience and make judgements, in the light of his skill and experience, about the condition of the road. There was no other witness with practical experience of carrying out road inspections. In that state of the evidence, there is no basis on which I could make a finding as to what exactly would have constituted a reasonable (ie a non-negligent) inspection in the circumstances. For example, suppose that I found as a fact that the defect was 42mm deep in some places; on what basis could I hold that failure to identify such a defect amounted to negligence, as opposed to an excusable error of judgement? Without evidence as to what would have been acceptable and unacceptable in terms of reasonable practice, it seems to me that the court is not equipped to decide whether the allegedly negligent inspector fell short of a reasonable level of skill and care. This is not, as counsel for the pursuer suggested at one point, a jury question on which the court can reach its own view without recourse to any evidence. In my opinion, the court's assessment as to whether the level of care actually shown fell short of the care that

> would be expected of a reasonably competent roads inspector in the circumstances has to be built upon the secure foundation of evidence explaining what such a hypothetical inspector would have done in the same set of circumstances. The necessary corner stone, comprising evidence as to reasonable and acceptable practice, has not been put in place … there is no evidence as to what would have amounted to the exercise of an ordinary level of skill and care in the circumstances."

Contrary to that approach, the Lord Ordinary in the present case treated the matter as a jury question. There had been no basis for him to have reached a view on the *Hunter* v *Hanley* test, since the pursuer did not lead a highways engineer as an expert witness. The speciality of the expert which they led was that of the construction and design of bridges. There may be some overlap between these two disciplines but, on the question of the professional competence of a highways engineer, evidence from someone expert in that discipline was necessary. Designing bridges to modern standards was completely different to dealing with older bridges which did not conform to such standards. In any event, the case was not presented by the respondents in professional negligence terms.

[28] The reclaimers' employee upon whose evidence the Lord Ordinary seems, in particular, to have relied was a senior technician, not a chartered engineer. His role was to identify defects and report them to his superior, Mr Louttit, who in turn discussed them with the chief engineer to determine what action was appropriate. The issues raised in this case concerned questions of professional engineering judgement and should be decided accordingly.

Contributory negligence (ground 4)

[29] The Lord Ordinary had, for unimpeachable reasons, concluded that the deceased was negligent (para 11). Given the nature of his driving, a finding that his death was not caused to any extent by his own fault was bizarre; that the deceased's negligence was not a

contributory factor defied common sense. The primary cause of the accident was the deceased's negligent loss of control. The Lord Ordinary seemed to be reviving the "last chance doctrine", whereas the primary duty was always on the road user, not the roads authority.

[30] In all the foregoing circumstances, the reclaimers moved this court to allow the reclaiming motion and recall the interlocutor of the Lord Ordinary, primarily because (i) the accident had not been reasonably foreseeable; (ii) the parapet had not been a hazard in the sense defined in *MacDonald*; and (iii) the wrong standard of care had been applied. If the reclaimers were wrong in that regard, nonetheless a finding of 75% contributory negligence should be substituted (see, eg, *Yetkin* v *Mahmood* [2011] QB 827).

Submissions for the pursuers and respondents

[31] Whilst the fourth pursuer and respondent was separately represented, and lodged separate answers and a note of argument in the present reclaiming motion, the position adopted by the respondents was substantially the same on all matters. Indeed, the answers and supplementary note of argument for the fourth respondent were expressly adopted by the other respondents. Accordingly, their combined submissions are set out below, only to the extent necessary to address the arguments as they have come to be advanced by the reclaimers.

Scope of duty of care

[32] The Lord Ordinary had been correct and bound to follow the approach set out in *MacDonald (supra)*, cases of pure omission or rescue being of no relevance where the reclaimers maintained the bridge as part of the road network. The reclaimers (and not

motorists) knew that the parapet was defective, thereby creating a source of danger, and they had special control over that source of danger: it could not be said that they played no active part in the critical events (cf *Robinson, supra).* They were not entitled to stand idly by whilst the parapet lay open to the public in a recognisably dangerous state (*Kane* v *Forest* [2002] 1 WLR 312 (CA) at para [28]). The hazard presented by the existence of the weak parapet was unknown and unknowable to road users.

[33] The Lord Ordinary had been entitled, for the reasons stated and as a matter of common sense and everyday experience of drivers, to find that the parapet gave reassurance to drivers. It was a finding in fact that he was entitled to make on the evidence before him (see transcripts: Mr Hunt at p 39, line 16 – p 41, line 11; Mr Day at p 91, lines 13 – 23). It was inconceivable that drivers would proceed at the applicable speed limit of 60 mph without the benefit of a parapet being in place. The Lord Ordinary had also been entitled to find that the accident was reasonably foreseeable, for the reasons given, and the appellate court should be slow to interfere with his conclusion on the facts, which was essentially a jury question (*Muir* v *Glasgow Corporation (supra)*, Lord Thankerton at 8). The foreseeability of such an accident had been recognised in the available reports of Mr Christie and Faber Maunsell, and in the reclaimers' construction of the bridge with a parapet and subsequent decision to replace the parapets. As such, it was a risk in the contemplation of the reclaimers. It was not said to be foreseeable with the benefit of hindsight: it had been predicted. The reclaimers knew or ought to have known that the parapet may fail to contain a vehicle colliding with it.

[34] The Lord Ordinary gave proper consideration to the evidence before him, including the *ex post facto* risk assessment, and particularly having regard to the expert evidence of

Mr Hunt and Mr Day (see transcripts: Mr Hunt at pp 74 – 75 and 104; Mr Day at pp 42 – 43, 72 and 79 – 80) that slavish reliance on technical risk assessment calculations would result in the absurd requirement to do no more than monitor even a piece of string as a parapet, or no parapet at all. Even if the initial monitoring policy had been reasonable, it had to contemplate the possibility of other measures being taken, depending upon the results of monitoring, otherwise it would be irrational. It was wrong for the reclaimers to suggest that the weather conditions were irrelevant to the risk of impact: such conditions were likely, from time to time, to cause a vehicle to deviate from its proper course, even in the case of perfect driving.

[35] The Lord Ordinary had been entitled to conclude that the parapet design standards represented a minimum standard for the reasons given, at least insofar as it provided a reference datum in respect of the safety of the bridge judged against the standards to which it had been built. The Ministry of Transport Technical Memorandum set down minimum standards applicable when the bridge was constructed, and the evidence had demonstrated that it was not acceptable to build such a bridge without parapets (see transcripts: Mr Hunt at pp 5 – 6 and 75-76; Mr Day at p 73). A bridge without parapets would, on any view, be a dangerous part of the road, being a road in mid-air: there was an inherent risk of falling off unless parapets were in place. The respondents did not suggest that the parapet should have been upgraded in line with current standards. However, the reclaimers had known since 2005 that the parapet was defective and deteriorating and, by 2008, its containment strength was unknown. It had been accepted, in 2005, that replacement as soon as possible was required on safety grounds. The respondents' case was directed solely to the provision of interim measures in those circumstances, pending repair or replacement.

[36] The Lord Ordinary gave careful consideration to the issue of interim measures, having regard to their cost and the reclaimers' budget, and was entitled to conclude that the interim measures suggested by Mr Christie in 2005, and as put in place during the subsequent repair of the bridge in 2011, were both reasonably practicable and modest in cost, having regard to the alternative 100 mile detour that would have been caused by closure of the bridge. He had been entitled to disagree with the reclaimers' evidence in this regard, to the effect that it had been reasonable not to take the interim measures proposed or that there were budgetary reasons for not doing so.

Identification of the relevant hazard

[37] The Lord Ordinary had correctly identified that the purpose of the parapet was to contain and deflect all errant vehicles up to a certain containment level. He was entitled to conclude that the defective parapet posed a danger to road users and a significant risk of causing an accident, and to reject the reclaimers' submission that the only hazard was the sea. The latter analysis was misconceived, having regard to the fact that the bridge and parapet were part of the road and designed to safeguard road users who come into contact with them from the obvious danger of falling off the bridge. The same analysis would apply to any errant vehicle falling into the sea, whether by reason of a defective parapet or structural collapse of the bridge deck.

[38] The formulation of the relevant test ("the sort of danger that would create a significant risk of an accident to a careful road user": *MacDonald (supra),* Lord Drummond Young at para [64]) was not prescriptive; other formulations existed (see, eg, *McFee* v *Police Commissioners of Broughty Ferry (supra)*, LJC (Macdonald) at 767 and Lord Young at 768; *Fraser* v *Glasgow Corporation* 1972 SC 162; and *Smith* v *Middleton* 1972 SLT (Notes) 63, *per*

Lord Emslie). Moreover, it had been recognised expressly that liability could attach notwithstanding any contributory negligence (*MacDonald* v *Aberdeenshire Council (supra),* Lord Drummond Young at para [65]). Whether a duty exists depends on the facts and circumstances of the individual case. In the present case, the parapet was intended to protect all road users: it was recognised, in Scotland as in England, that not all drivers to whom a duty is owed are model drivers (*Levine* v *Morris* 1970 1 WLR 71, Sachs LJ at 76 – 77; *Rider* v *Rider* [1973] QB 505; *Russell* v *West Sussex CC* 2010 EWCA Civ 71). The actual cause of impact with a parapet by an errant vehicle was immaterial. A seriously defective parapet was a potential hazard and actually dangerous since it was foreseeable that a vehicle may collide with it (*ibid,* Wilson LJ at para [20]), even in the absence of negligence.

Standard of care

[39] The Lord Ordinary's rejection of the proposed test for professional negligence, in favour of a duty of reasonable care, was consistent with well-established authority. In *MacDonald* (*(supra),* Lord Drummond Young at para [64], citing *McFee* v *Police Commissioners of Broughty Ferry (supra)*), the court had not expressly or impliedly elevated the test to one demanding proof that no reasonably competent roads authority would have failed in its duty (see, also, *K2 Restaurants Ltd* v *Glasgow City Council* [2013] CSIH 49). It was sufficient for the hazard to have become apparent, as it had in the present case, for action to be required (*MacDonald (supra),* Lord Drummond Young at para [67]). The Lord Ordinary had been entitled to conclude that the defective parapet had been identified by a competent roads engineer, Mr Christie, but the reclaimers had taken no action, nor applied any engineering judgement. The interim measures proposed by the respondents would have been reasonably practicable and of modest cost, and therefore such as a roads authority of

ordinary competence using reasonable care would have taken. In the circumstances, the reclaimers' inaction had been irrational, for the reasons given by the Lord Ordinary: their actions did not evidence a school of thought (cf *Honisz* v *Lothian Health Board* 2008 SC 235), nor were they capable of withstanding legal analysis (*Michael Hyde & Associates Ltd* v *JD Williams & Co Ltd* 2001 PNLR 8 (CA); *Bolitho* v *City of Hackney HA* [1998] AC 232). Therefore, *esto* the *Hunter* v *Hanley* test applied, the reclaimers' approach amounted to an abdication of responsibility rather than a positive exercise of judgment, and the test was met.

Contributory negligence

[40] The onus was on the reclaimers to establish contributory negligence. Their case on record had been that the deceased had made no attempt to brake or steer his vehicle back onto the road and so it was believed and averred that he had not been paying proper attention. The Lord Ordinary's conclusion in respect of contributory negligence had been correct, and in any event, within the bounds of reasonable disagreement as to the apportionment of responsibility (*Jackson* v *Murray* 2015 SC (UKSC) 105 at para [35]). The relevant apportionment was as to responsibility for the damage, ie the death of the deceased, rather than the accident as such (Law Reform (Contributory Negligence) Act 1945, s 1). The loss of control of the deceased's vehicle, leading to collision with the parapet, was simply a *causa sine qua non:* had the parapet not been defective, the vehicle would have been retained and deflected and the deceased would have suffered, at most, minor injury. The cause of the deceased's death (the damage) was the defective nature of the parapet, which simply "unzipped".

[41] In the event that the court considered any apportionment to be appropriate, however, the causative potency and blameworthiness of the reclaimers' conduct in

managing or failing to manage the bridge was much greater than any unexplained failures on the part of the deceased, and so only a very modest reduction would be appropriate (*Jackson* v *Murray (supra),* para [40]).

Decision

[42] There are two important points, which must be borne in mind at the outset. In the first place, at the time of the deceased's accident, the reclaimers had accepted that the bridge and parapet required extensive repair and replacement work, which was scheduled as part of a planned programme of repairs and was eventually carried out in 2011. The need to do so was identified as part of a rolling programme of maintenance from October 2005, and was further confirmed in the Faber Maunsell report in 2008. At various stages in his submissions, senior counsel for the reclaimers complained that the Lord Ordinary had failed to state at what point the bridge had reached the stage where action was required. Given that it was already very clear to the reclaimers, by 2008 at the latest, that action was required, and that they had resolved to take such action, all of which (and the reasons therefor) had been set out in detail in the Lord Ordinary's opinion, we see no need for the Lord Ordinary to have made any findings of the kind referred to by counsel.

[43] The second factor to bear in mind is that the respondents' case was not that the reclaimers had a duty to carry out this repair work at any given time; or that they had a duty to close the road pending such repair. The respondents' case was that, given the state of knowledge about the defects in the parapet, the reclaimers had a duty to continue to monitor the parapet, in order to keep them informed about its condition, pending repair or replacement, and to put in place various *interim* measures, such as secondary barriers, a single lane passage controlled by traffic lights, and a reduction in the speed limit to 30mph.

The Lord Ordinary found that the want of reasonable care lay in not introducing these measures.

[44] As noted above, those grounds which related to the distinction between acts and pure omissions, or the question of the creation of a common law duty out of a statutory duty or power, as raised in several of the English cases referred to in the reclaimers' note of argument, were not pressed in the oral submissions. Nor were arguments that the parapet was not part of the road, or that the reclaimers, in providing and maintaining the parapet, should be viewed as a "rescuer" in the same way as the emergency services (cf *AJ Allan (Blairnyle) Ltd* v *Strathclyde Fire Board* 2016 SC 304). Rather, senior counsel recognised that there was a duty of care on the reclaimers, and that the respondents' claim rested on a long line of Scottish authority stretching back to *Innes* v *Magistrates of Edinburgh* (1798) Mor 13189, all as analysed in detail by Lord Drummond Young in *MacDonald* v *Aberdeenshire Council* 2014 SC 114.

[45] For the avoidance of doubt, we are quite satisfied that, whatever the law may be elsewhere, roads authorities in Scotland have a duty of care towards road users at common law, as set out in *MacDonald*. In this regard, the reclaimers appeared to suggest that budgetary constraints should, by themselves, be used as a mechanism to control and limit the scope of a roads authority's duty of care to road users. We consider that submission to be wrong. Where there is a duty of care, the scope of that duty must be assessed in the same way, whether the defender is a local authority or a private entity. That is not to say that budgetary considerations have no relevance, but they do not serve to operate as a general limitation of liability. The cost of taking preventive steps, in the context of the nature and

consequences of the risk, and of the financial circumstances of the defender, will always be a relevant consideration, but no more than that.

[46] In any event, it is incorrect to suggest that the Lord Ordinary failed to take account of budgetary constraints, where relevant to any issue before him. He referred to budgetary issues and costs (paras [17] and [32]), and noted that closing the road, an important community lifeline, would have entailed a 100 mile detour. On the other hand, he considered (para [33]) that the proposed *interim* measures were both reasonably practicable and of modest cost. Whilst counsel for the reclaimers prayed in aid the limited "structures budget", and sought to have this court make findings in fact in this regard, its relevance as a possible budgetary constraint was not entirely clear. It was not suggested, for example, that the structures budget represented the sole source of available funding from which the cost of the interim measures under consideration would have to have been met. Nor was the court given any detailed information as to any competing demands on that budget or that it was otherwise allocated in 2008, or in 2005 or any other year during which the reclaimers might have been expected to implement such measures in light of their knowledge of the defective state of the parapet. If anything, the reclaimers' position tended to suggest that they would not necessarily have known the state of repair of the bridges and other structures under their control, or, presumably, the consequential works to which the structures budget might have been allocated at any given time. In any event, the court sees no utility in making the limited findings in fact proposed by the reclaimers in this regard.

[47] Against that background, and having regard to the narrow scope of the respondents' case, we are satisfied that the Lord Ordinary was correct to reject the reclaimers' submissions that this was a case in which the test for the standard of care required to be

assessed according to the test for professional negligence as set out in *Hunter* v *Hanley*, and instead to apply the ordinary standard of reasonable care. It was not suggested that the bridge or parapet should have been repaired or replaced at any time earlier than was actually done. Rather, the case concerned the issue of managing the road at that locus pending such repair or replacement. In the particular circumstances of the present case, this was not an issue based on technical matters of professional judgement. The reclaimers had already identified the existence of the hazard: the existence of the constituent parapet defects was not, of itself, in dispute in terms of the outcomes of formal reporting and monitoring carried out between 2005 and 2008, notwithstanding that the relevance of those defects as a hazard remained contentious. No doubt the inspection and monitoring processes, of themselves, involved the exercise of professional engineering judgement, whether by a suitably qualified civil engineer or an adequately supervised engineering technician, on behalf of the reclaimers. Those aspects having been dealt with, questions of monitoring and/or interim protective measures that may be required as a consequence might in some cases involve the related exercise of professional engineering judgement. It is conceivably a matter of such judgement, for example, to determine the appropriate monitoring intervals and inspection methodology based upon the nature of the subject structure and materials and their uses. Likewise, the identification of a suitable temporary barrier system, having regard to its constituent materials and containment capacity, may require the exercise of specialist knowledge. In the present case, however, whatever professional engineering judgement may have been applied to the decision to commence monitoring in the first place, and the identification of proposed interim protective measures, having regard to the conclusions of the reclaimers' principal inspection report in 2005, the subsequent decisions

to discontinue monitoring and not to implement the proposed interim measures, which are the present focus, have not been presented to this court by any party as dependent upon the application of any particular aspects of engineering knowledge or expertise or any exercise of professional judgement in respect of such matters. Where such technical aspects have been superseded or are otherwise absent, then matters of risk assessment are properly open to assessment by the court as predominantly requiring the application of common sense. Of course, the courts are eminently familiar with similar risk-based assessments, primarily arising from the routine operation of health and safety legislation, often in non-technical contexts. Again, whilst it may assist the court to hear expert or skilled witnesses on health and safety related matters, that fact does not alter the underlying duty of care or necessarily elevate the matters under consideration to questions of professional judgement (see, eg, *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59), paras 67 – 69). In the present case, this court is entitled to assess the reasonableness of the reclaimers' decisions, where those decisions have not been taken in the exercise of professional judgement.

[48] It is convenient to note at this stage that we consider the reclaimers' submissions in this regard to suggest an over simplistic approach with regard to the nature and identification of the hazard. What constitutes a hazard will depend on many factors. The Lord Ordinary did not consider that building the road in the first place constituted the hazard. The hazard was considered to arise from a combination of factors (para [29]):

> "the parapet is clearly defective to the extent that the containment capacity, if any, is unknown. The parapet is there to provide a safety barrier for vehicles to prevent them from falling off the bridge into the water below. The defective parapet poses a danger to road users and there is a significant risk of an accident caused by the defective parapet."

In other words, the hazard was the fact that the parapet of a bridge over the sea, built for containment, was in such a weakened state that its containment factor, if any, was unknown. As it was put for the respondents, the parapet presented a hazard to safe passage over the bridge.

[49] A relevant hazard is one which represents "the sort of danger that would create a significant risk of an accident to a careful road user" (*MacDonald,* para [64]), but the application of that test must be sufficiently flexible to recognise that a particular hazard is likely to arise as a result of the combined effect of a number of factors. In the present case, the defective parapet cannot be viewed in isolation, and assessed as constituting a hazard or otherwise on that basis. If the defective parapet were merely to have separated the carriageway from a flat expanse of grassland or similar run-off area, such that breaching the parapet rather than merely colliding with it would have no particular adverse consequences, no doubt the defective parapet would not, of itself, be viewed as a hazard. However, breach of the same parapet, separating the carriageway from a drop into the sea, is properly to be viewed as a hazard on the basis that breach of the parapet rather than a mere collision with it would be likely to lead to adverse consequences of an entirely different character and severity, namely the vehicle falling from height into the sea. In the present case, therefore, the defective parapet did not create a significant risk of an accident in the sense of causing the deceased's initial loss of control and collision with the parapet, but it did create a significant risk of an accident in the sense of causing the deceased's collision with the parapet to lead to his vehicle falling from the bridge into the sea. In other words, the defective parapet caused a significant risk of an accident *of a type and severity that would not otherwise have arisen* to a careful road user. Put another way, adopting the consistent

approach and language of *McFee* v *Police Commissioners of Broughty Ferry ((supra),* LJC (Macdonald) at 767), the significant risk of falling from the bridge into the sea, rather than merely colliding with the parapet, was a manifest danger against which the reclaimers were bound to take preventative measures. Whilst it is no doubt correct to say that no parapet will contain all vehicles, the significance of the hazard or risk to safety in the present case had been identified by the reclaimers themselves, and deemed sufficient to justify repair or replacement of the parapet in early course. We cannot see any reason to consider that the Lord Ordinary was not correct in reaching the conclusion that he did.

[50] The statement that "A parapet gives drivers the reassurance to drive across the bridge in broadly the same manner as they would drive on a road with no drop into water at either side." occurs in the context of a discussion of the circumstances in which a parapet might be considered a hazard. The Lord Ordinary was doing no more than stating the obvious. It is clear, in the context of the rest of the paragraph in which that sentence appears, that the Lord Ordinary was not suggesting that the deceased was entitled to rely on the bridge rather than to take care for his own safety.

[51] Similarly, the argument that the Lord Ordinary erred in extending the category of careful road users to include those who suffered a heart attack or were shunted off the road by other road users is surprising, considering the submission made to him, recorded at para 29:

> "It was also argued by the defender that a parapet is not designed for careful road users, rather it is designed for drivers who are at fault."

The Lord Ordinary's reference to other road users was made in that context. He disagreed with the reclaimers' proposition, saying that:

> "A parapet may indeed come to the aid of drivers at fault but equally it could aid drivers who are not at fault who, for example, have had a heart attack at the wheel and lost consciousness, or who have been shunted from the rear into the parapet. There are many more such examples. A parapet is designed to safeguard road users who come into contact with it to prevent the obvious danger of falling off the bridge being realised"

The Lord Ordinary was not suggesting that the roads authority required to design or maintain roads on an assumption that drivers would not take reasonable care; rather he was pointing out the simple fact that the parapet was erected for the benefit of all drivers who might, for whatever reason, stray from the carriageway.

[52] The question then arising is whether there was any fault in failing to identify the hazard or in taking steps to correct or address it. No question arises as to the hazard being an obvious danger to which careful road users could have regard and drive accordingly. The defective nature of the parapet in the present case was entirely latent, so far as road users were concerned, and obvious only to the roads authority itself. That fact, of itself, removes much of the difficulty that might otherwise be encountered in establishing that a roads authority of ordinary competence exercising reasonable care would have identified the hazard and would have taken steps to correct it. Only the latter aspect is in issue: the hazard was apparent to the reclaimers, and so the relevance of the ordinarily competent roads authority using reasonable care is restricted to the steps that would be expected to have been taken by such an authority to correct or address the hazard.

[53] The defective parapet having been properly identified as a hazard to all such drivers, *interim* measures were suggested, and the basis for failing to install them does not appear to have been based on any particular professional judgement. For example, the reason for rejecting the suggested 30 mph speed limit was that it "was pointless as a reduced speed limit would not be observed". Indeed, there appears to have been no logical or rational

basis for the rejection of those proposals. The twice-yearly monitoring, instated after Mr Christie's report, was discontinued in 2008 on the decision of a single employee who had consulted neither the respondents Chief Structural Engineer, nor their Principal Engineer. Whilst this was a case where expert evidence might assist the judge in reaching a conclusion, such evidence was not critical to the relatively simple balancing exercise which lay at the heart of the case. The Lord Ordinary was faced with the respondents' criticism of a decision which was not dependent upon the exercise of professional engineering judgement, but upon the sound application of general risk assessment principles, in the context of the reclaimers' wider duties as the roads authority responsible for the maintenance of this and many other bridges. There were no competing views as to the requirement for repair or replacement of the bridge and parapet or when that could reasonably be achieved. The only issue in dispute related to the appropriate management of the hazard which resulted from allowing the bridge and parapet to continue in operation pending such repair or replacement. As we have already noted, the fact that expert evidence may be of assistance does not elevate the case to one where the standard of care requires to be assessed on the same basis as a case of professional negligence. In that regard, the Lord Ordinary rejected Mr Moncrieff's reasoning in support of his decision to discontinue monitoring, and the evidence of Mr Mackenzie to the extent that he sought to support the decision for the same reasons, due to the lack of any logical basis for it. Moreover, the Lord Ordinary had the benefit of the evidence of the respondents' expert, Mr Day, to the effect that monitoring and interim measures were required. Whilst the Lord Ordinary placed no reliance upon it, for the detailed reasons given, it is also notable that the reclaimers' own *ex post facto* risk assessment concluded, at least, that continued monitoring was required.

[54] We do not accept that the Lord Ordinary erred on the issue of foreseeability. Specifically, we do not accept that the Lord Ordinary erred in the way suggested in respect of the assessment of evidence of "risk assessments". The "risk assessments" referred to in the grounds of appeal relate to post-accident evaluations which the Lord Ordinary considered, for reasons which he gave in detail, to be flawed. The evidence of the reclaimers' expert, Mr. Day, is given careful consideration (at paras [23] and [32]) and rejected by him for rational and justifiable reasons. The issue of foreseeability is not one which is to be assessed in the narrow way suggested for the reclaimers. The passage (at para [33]) quoted by the reclaimers is preceded by discussion of both the Christie and Faber Maunsell reports bringing home to the reclaimers the defects in the parapet. The Lord Ordinary had already referred (at paras [23] and [29]) to the purpose of the parapet, and to the potentially fatal consequences were the parapet to be breached. He did not ignore factors such as the straight road layout, lack of prior accidents or low traffic volume. All these passages need to be read together. When that is done, there is in our view no error by the Lord Ordinary on the question of foreseeability.

[55] The Lord Ordinary's actual findings on this point (at para [25]) were:

> "The bridge was completed in 1971 and the parapet was part of the bridge as built. The erection of parapets as an integral part of a bridge is consistent with Ministry of Transport Technical Memorandum from 1967 which laid out minimum standards (6/59 of the inventory of productions, JM 1 paragraph 6.3)."

At no point in his opinion does the Lord Ordinary say that the bridge or its parapet required to meet certain minimum standards, or to be maintained to such standards as they changed over the years. In particular, he did not suggest that a bridge built in 1971, or the parapets thereto, required to be maintained in such a way that it met current standards for building such structures. Nor had the respondents suggested that this was required. The Lord

Ordinary did not in any way seek to lay down a minimum safety standard for a bridge parapet.

[56] Finally, we turn to the assessment of contributory negligence, in which regard we are satisfied that the Lord Ordinary erred. The Lord Ordinary made the following finding as to the deceased's fault (para [11]):

> "It is an inescapable inference that the loss of control was due to the negligence of the driver. Drivers must drive for the conditions and even careful drivers, such as the deceased, make mistakes. I therefore hold that the loss of control was due to the fault of the deceased and not due to any failure on the part of the defender, which in any event was not a case pled by the pursuers."

The assessment of contributory negligence requires to be made on a broad basis, weighing up the blameworthiness and causative effect of the acts of each party. As counsel for the reclaimer put it, "The deceased drove out of the lane in which he was driving, across the opposing lane, onto the kerb and into the bridge, on a straight line road and with no other vehicles around." We cannot accept the Lord Ordinary's conclusion that these acts must be taken as having no causative effect.

[57] The proper construction of section 1(1) of the Law Reform (Contributory Negligence) Act 1945 has recently been the subject of consideration by the UK Supreme Court in *Jackson* v *Murray* 2015 SC (UKSC) 105. In light of the full survey of authorities undertaken in that case, it is not necessary to look beyond the comprehensive guidance set out there. The court observed, in the context of a road traffic accident involving a car and a child pedestrian, the relevant distinction between the apportionment of "responsibility for the damage (not, it is to be noted, responsibility for the accident)" (Lord Reed, para [20]). Moreover, the contemplated "fault" encompasses both the defenders' breach of duty and the deceased's corresponding lack of regard for his own interests (*ibid*, para [27]). A "just and equitable"

outcome allows for reasonable disagreement amongst different judges (*ibid,* para [28]). Ultimately, the question for this court is whether the Lord Ordinary "went wrong" (*ibid,* para [35]):

> "In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as to the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the apportionment made by the court below was not one which was reasonably open to it."

[58] In the present case, it may be said that there is an identifiable error, insofar as the Lord Ordinary failed to take account of the deceased's negligence. That, of itself, is sufficient to justify interference by this court (*ibid*, para [36]). Equally, however, it may be said that the Lord Ordinary's apportionment was not one which was reasonably open to him, insofar as he failed to make any apportionment at all, or at least absolved the deceased of responsibility entirely, notwithstanding the deceased's negligence, such that the question of apportionment is a matter at large for this court (*ibid*, paras [37] and [38]).

[59] The Lord Ordinary's approach necessarily, if not expressly, follows that advanced by the respondents before this court, namely to focus on the deceased's death, as the relevant damage, rather than the accident. Such an analysis is, however, misleading and incomplete. Of course, on the Lord Ordinary's findings, had the parapet not been defective, the deceased would not have left the road and died. Equally, however, according to the same findings, had the deceased not driven negligently in the first place, thereby impacting the parapet, he would not have left the road and died. The reality, therefore, is that both elements had causative effect in the circumstances of the present case and one cannot be isolated from the other in arriving at a just and equitable outcome. The court must do so "having regard to

the claimant's share in the responsibility for the damage" (section 1(1), 1945 Act), which in the present case was caused by the tragic coincidence of factors, namely the negligence on the part of both the deceased and the respondents.

[60] Whilst it is correct that the proper focus is the deceased's death, as the relevant damage, the deceased must share in the responsibility for that damage where the accident leading to his death would not have occurred in the absence of his negligent driving. The Lord Ordinary is, of course, quite correct that the deceased "did not contribute in any way to the defective parapet" but it does not follow that the deceased's negligent driving did not contribute in any significant way to causing the harm (para [34]). Plainly the cause of the harm was not solely the defective parapet, which would have presented no danger to the deceased had his negligent driving not led him to collide with it. Had the collision been caused by a non-negligent event, then a different analysis would follow and the question of contribution would not arise. However, to treat the present case in the same way as one in which there was a non-negligent explanation for the impact, thereby ignoring the fact of negligence, would not amount to properly having regard to the claimant's share in the responsibility for the damage. On any reasonable view, the deceased's negligent driving in the present case properly forms the basis for a finding of contributory negligence. The more difficult question is the proper extent of that responsibility.

[61] In the application of section 1(1) of the 1945 Act, it is necessary to take account of both the blameworthiness of the parties and the causative potency of their acts (*Jackson,* para [40]). It may be said in the present case, as in *Jackson (ibid),* that "the causation of the injury depended upon a combination of" the deceased's negligent driving and the reclaimers' breach of duty. If the deceased had not driven negligently, albeit in a manner

not precisely identified, he would not have collided with the parapet. Equally, if the parapet had not been defective, albeit to an extent not precisely known, it would have contained the colliding vehicle. The blameworthiness of the parties is, in these circumstances, difficult to assess.

[62] The negligent explanation for the deceased's loss of control of his vehicle is simply not known, therefore any assessment of the level of blame that ought to be attributed to his conduct is rather speculative. According to the Lord Ordinary's findings, the deceased was not speeding, and was generally a careful driver. The most that might be said is that he made a mistake (para [11]), which could encompass all manner of gross errors of judgment, uncharacteristic lack of care, or mere instinctive reactions, rather than conscious driver input, in response to some stimulus such as a sudden lack of traction on the apparently icy road surface. By whatever means, however, it may be assumed that the mistake was not so significant that it would have caused the deceased's vehicle to overcome the containment capacity of the non-defective parapet. To that extent, it may be said that the deceased was driving to the road conditions at least to the extent that (all else being equal) he would have been entitled to assume that such a mistake would be sufficiently mitigated by the parapet as to avoid his serious injury. The risk of the severe consequences that ultimately transpired could not reasonably have been contemplated by him, the defective state of the parapet being known only to the reclaimers.

[63] By contrast, upon the Lord Ordinary's findings, the reclaimers had been put on notice as to the potentially severe consequences of the unsafe condition of the parapet: in the report of Mr Christie's principal inspection in July 2005; the Bridge Maintenance programme for Sutherland 2005 – 2015 of October 2005; in the Parapet Defect Monitoring Records of

2006, 2007 and 2008; and in the Faber Maunsell report of 2008. Moreover, they were bound to assume that not all drivers could be expected to be model drivers: mistakes had to be catered for to a reasonable extent. As the Lord Ordinary found, there was no rational explanation for the reclaimers' failure and delay in taking the steps desiderated by them to continue monitoring, implement appropriate interim safeguarding measures, and thereafter rectify the defective condition of the bridge.

[64] Whilst it may be difficult to determine the relative causative potency of the parties' actions, the combined effect of which was to cause the accident, and the death of the deceased, the blameworthiness of the reclaimers' is demonstrably far greater than that attributable to the deceased upon the known facts. That disparity in blameworthiness is sufficient to justify the reclaimers bearing substantial responsibility for the deceased's death. Nonetheless, we consider that a contribution of 30% is appropriate in recognition of the deceased's conceded negligence.

[65] Therefore, the reclaimers' fourth ground of appeal falls to be allowed, albeit accepting the *esto* position of the fourth respondent, as adopted by the first to third and fifth to eighth respondents, that only a modest reduction falls to be made. However, since there are some administrative matters to be addressed, arising from the Joint Minute and the terms of the Lord Ordinary's interlocutor, we should appoint the case to be heard by order to determine the form which our final interlocutor should take.