EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 75
PD2285/11

Lord Brodie
Lord Drummond Young
Lord Glennie

OPINION OF LORD BRODIE

in the reclaiming motion

by

MELVILLE DOW

Pursuer and reclaimer

against

AMEC GROUP LIMITED

Defenders and respondents

Pursuer: Di Rollo QC and Blessing; Thompsons
Defender: Shand QC and McConnell; Morton Fraser LLP

28 November 2017

Introduction

[1] In this action, to which the provisions of Chapter 43 of the Rules of Court apply, the pursuer sues his former employer for damages for personal injury sustained by him and caused by what he characterises as an accident which occurred on 23 March 2009 while the pursuer was working in the course of his employment as a labourer with the defender on a building known as Absorber Unit 3 ("the Absorber") at Longannet Power Station, Alloa. The pursuer's case concerns an alleged failure on the part of the defender to ensure the safety of the pursuer in

respect of harm caused by fire. Although other provisions are pled, what the pursuer now relies on is the breach by the defender of the obligations imposed by two statutory provisions: section 53 of the Fire (Scotland) Act 2005 and regulation 40 of the Construction (Design and Management) Regulations 2007 (the "CDM Regulations").

[2] As at 23 March 2009 the Absorber was still under construction, albeit very close to completion. The defender was the principal contractor for the construction project.

[3] The pursuer avers that at the relevant time he was working on what he describes in his pleadings as "the roof" of the Absorber when he became aware that a fire had broken out, generating thick black smoke. Despite attempting to do so the pursuer was unable to make his way to ground level. He avers (in statement 4 of the statement of claim, reproduced at page 6E of the Reclaiming Print):

> "Prior to the fire there had been exits at a number of sides to the building. At the time of the fire the only way to exit the roof was to use stairs at the east side of the building. It was impossible to use those stairs to exit the roof due to the smoke and fire."

[4] The pursuer became agitated and afraid. He became concerned that the building would explode. He thought that he would die. After a short time in this situation (less than 13 minutes), rescue personnel reached the pursuer. They provided him with breathing apparatus. They offered him the option of following them through the building to ground level or of being taken off on the platform of an extendable mechanical arm (a "cherry picker"). He chose the latter option.

[5] The pursuer did not suffer any physical injury during or as a result of the events of 23 March 2009. However, he avers that as a result of his experience he developed chronic Post Traumatic Stress Disorder ("PTSD") and associated pervasive depressive symptoms.

The Decisions Reclaimed Against

[6] The Lord Ordinary heard proof over eleven days. She heard submissions over a further four days.

[7] The Lord Ordinary's discussion of damages in what is a long and detailed opinion, reflecting what has the appearance of having been a closely contested litigation, is brief (paras [70], [71], [273] to [277]) and consequently lacking any very precise determination of causal relationships; the Lord Ordinary simply explains that she had no hesitation in accepting the pursuer's evidence as to the effect that his experience on the Absorber had on him, the efforts he made to return to work, and the difficulties he faced, both practical and emotional, in doing so at a point in time materially earlier than when he did in fact obtain employment, in May 2015. She assessed damages in respect of *solatium* and patrimonial loss at a total of £223,017.

[8] However, the Lord Ordinary held that the pursuer had failed to prove breach of the obligations imposed by section 53 of the 2005 Act, Regulation 40 of the CDM Regulations or any of the other provisions pled. On 16 December 2016 the Lord Ordinary assoilzied the defender.

[9] Before the Lord Ordinary the defender had argued that, in the event of breach of the consequent obligations, the statutory provisions did not impose any liability in respect of pure psychiatric injury (ie psychiatric injury with no associated physical injury). Although she recorded the written submissions of parties on the question as to whether the scope of the statutory provisions extended to pure psychiatric injury by attaching them as appendices to her opinion, the Lord Ordinary did not make any determination on them beyond setting out some brief observations at paragraph [280] of her Opinion.

[10] The pursuer now reclaims against the Lord Ordinary's decision that on the facts found by her there was not a breach of either section 53 or Regulation 40. The defender cross-appeals on the Lord Ordinary's failure to hold that even had the defender been in breach of either of the

statutory provisions he would not have been entitled to recover damages in respect of psychiatric harm without any physical injury.

[11] Mr Di Rollo QC appeared before this court on behalf of the pursuer, and now reclaimer, as he had at proof. Miss Shand QC appeared on behalf of the defender and respondent, as she had at proof.

The Absorber and the Relevant Events of 23 March 2009

[12] The Lord Ordinary records, at paragraph [6] of her Opinion, that a considerable amount of time was taken up at proof in trying to establish the features of the Absorber and, in particular, the position of fixed and temporary horizontal walkways, scaffolding and points of vertical access on and off the structure; a task made the more difficult by the inability or unwillingness of the parties to provide and agree a readily comprehensible representation of the layout of the Absorber (whether in the form of engineering drawings or other illustrations). Rather less attention was given to these details when the matter came before this court. It is nevertheless convenient, in order to provide context, to summarise the circumstances in which the pursuer came to sustain the injury in respect of which he sues. That requires some description of the Absorber, on which he was working at the relevant time.

[13] Mr Di Rollo confirmed that while he would have something to say about inconsistencies among the findings in fact made by the Lord Ordinary and findings which she had not made which were necessary for the defender to be entitled to succeed, he did not challenge the findings in fact that the Lord Ordinary had made. He highlighted some of the paragraphs of the Lord Ordinary's Opinion as being of particular importance to an understanding of what had happened. Drawing on these paragraphs the following salient facts emerge.

The Absorber

[14] The Absorber was one of three flue gas desulpherisation units being constructed at the Longannet Power Station. Its purpose was to remove or reduce the amount of sulphur in the gas emissions from the station. The process relied on the chemical reaction of combining alkaline seawater with acidic flue gases with the intended result of producing chemically neutral emissions.

[15] For present purposes the Absorber can be regarded as having two constituent elements. The first, known as "the chamber", was in the form of a concrete box within which the chemical reaction whereby the flue gases were neutralised would take place. In operation the chamber would be sealed. It was designed so that the flue gases from the power station could be introduced through an inlet duct at low level. The gases would then rise up and, having interacted with seawater which had been introduced through an inlet duct at high level, would be removed by way of an outlet duct. The gases would then be directed to the chimney, situated to the west of the Absorber. Interaction between the rising gases and the seawater would be facilitated by the spraying of the seawater through a series of pipes with branched arms or splays onto what was described as "packing material" in order to wet it. The packing material consisted of polypropylene, a flammable material. The polypropylene packing material was structured in such a way so as to maximise the surface area which could be wetted with the seawater. The seawater flowing down through the packing material would then be pumped away. Thus, in normal operation, the chamber would be sealed and filled with sea water with no worker requiring to have internal access.

[16] At one point the exterior of the chamber took the form of a gently sloping roof, its gradient leading down from the central part of the chamber to the edge of chamber's sheer western face. The purpose of the slope was to direct the flow of gas within the chamber as it rose

towards the outlet duct. At its highest point where it joined the main part of the chamber the sloping roof was a little below 21 metres above ground level.

[17] The importance of the sloping roof is that, aware of the outbreak of fire and having attempted to get to ground level but being prevented from doing so by the presence of smoke, it was there that the pursuer found himself, and it was from there that he was evacuated by the cherry picker. There was no scaffolding against that portion of the west face of the chamber. The drop to ground level was sheer and only a little less than 21 metres in height from the ground.

[18] The second element of the Absorber was its external structure. This was constituted by a complex array of steelwork and ducting attached to and at points penetrating, the external walls of the chamber. The external structure included a series of fixed horizontal walkways circumnavigating most of the chamber. In addition, on 23 March 2009 there was scaffolding around some, but not all, of the external walls of the chamber.

[19] The external structure included three fixed horizontal walkways, at the heights, respectively, of 21, 23 and 29 metres above ground level. These walkways were fixed along the length (or most of the length) of the west, south and east faces. The part of the walkway designed to be walked on was comprised of thick metal grating of lattice construction which readily allowed air to flow through and around it. There was no clear evidence as to (and no illustrations of) the north face of the Absorber at the point it joined to the power station. The inlet and outlet ducts were situated on this side.

[20] The main vertical access to and egress from ground level to the walkway at the 21 metre level was a permanent metal stair fixed to the south-most part of the external east face of the chamber (the "Southeast Stair").

[21] At all material times, the movements of the pursuer and others were on the external structure and the sloping roof.

The Afternoon of 23 March

[22] By 23 March 2009, the construction of the Absorber was essentially complete, although there were snagging works ongoing such as that on which the pursuer was engaged. Most of the scaffolding which had originally been in place had been taken down. The Absorber was in the process of being prepared for commissioning, which was imminent. On the morning of 23 March 2009, one of the pumps, situated about a kilometre away, had been activated and a very large quantity of seawater pumped into the Absorber chamber.

[23] The pursuer's recollection was that that afternoon, sometime after 2.00 or 2.30pm, he and a fellow employee, John Robinson, a welder, had been working on snagging work from a scaffold just below the 29 metre walkway. Robinson had gone down to ground level to fetch a tool and the pursuer was awaiting his return when he became aware of smoke. Shortly thereafter he heard Robinson shout "there's a fire".

[24] Precise timings were available for these and the immediately following events. Following the fire Scottish Power convened a Panel of Inquiry (the "POI") to investigate its cause. The POI produced a report dated 16 June 2009 of which some limited use was made at the proof. The report contained what the Lord Ordinary held to be a fairly precise timeline of events on the afternoon of 23 March 2009. The first signs of fire or smoke were detected at about 14:57 hours. The station emergency control centre for the site was contacted at 15:01. The station fire team, which was based on site, was mustered to investigate the fire. At 15:07 notification was given to the emergency control room for the site to be evacuated. The evacuation alarm was sounded. At the same time the emergency services, including the fire brigade, were called. The fire brigade's own log recorded this call coming in at 15:02. The fire brigade arrived on site at 15:16.

[25] The pursuer gave evidence of his attempts to escape to ground level. As far as he was aware the only means of doing so was by route of the Southeast Stair. The Lord Ordinary narrates the pursuer's evidence in chief as to his experience at paragraphs [68] to [71] of her Opinion. It is convenient to quote these paragraphs in full:

> "[68] The pursuer said that he then went south along the scaffold that was above the 21 metre walkway to the south-west corner. He said that from the south-west corner he looked east along the south face of the Absorber and saw smoke half-way along the south face of the Absorber and said to himself "I can't go there". The pursuer was asked in chief why he had gone to the south-west corner and looked along and he said "to try and see if I could get access". He said that his intention was to get to the south-east stair. At the south-west corner, looking east, he found that he could not go that way either, due to smoke. At that point, he thought that he was stuck and could not get off the Absorber. So far as he was aware, the route off via the southeast stair was the only route off the Absorber. No other route was designated or signposted in any way. He thought he was in serious trouble at this point. As he explained in cross-examination, he would not consider going through the smoke because he knew that smoke would kill him more quickly than fire would.
>
> [69] The pursuer said that he went back along the scaffold on the west side to the ladder "and it was in smoke". He then went back to the south side again and the smoke "was all along the east". He said that the wind was blowing from west to east so he decided to get onto the sloping roof on the west side of the Absorber away from the smoke. The pursuer said that he climbed over the handrail from the scaffolding onto the sloping roof. (He did not suggest that this was a significant drop.) He wanted to get down to the sloping roof to see if there was any scaffold access down to the ground from that point. He did so by climbing over a scaffold handrail and dropping onto the sloping roof, or possibly, dropping onto the lowest walkway and then onto the sloping roof. Whatever the precise means, this was not a designated route off the Absorber. The sloping roof was at a height of about 21 metres, or possibly a little higher, from ground level. Unfortunately, he found that there was no scaffold access from the sloping roof to the ground.
>
> [70] There was a large flange on part of the sloping roof. The pursuer described smoke coming out through it. The pursuer feared that with excessive pressure it might blow. He was fearful that this would happen and that everything would cave in. He could hear crackling noise. He went to the south-west corner of the sloping roof and shouted down. He briefly contemplated jumping down from there but, given that he was at the height of about 21 metres, he considered that this would be suicide. He stated that he was in fear for his life. He shouted down, or someone else shouted up, to use a nearby cherry picker to rescue him from the roof. He was in, or was told to go to, the south-west corner. Almost immediately steps were taken to move the cherry picker closer to the structure to effect a rescue. The cherry picker soon reached him. At the same time several men from the OPUS rescue team came up to him, wearing breathing apparatus and carrying spare breathing apparatus for the pursuer. He was given the option of coming down with the specialist OPUS team or coming down on the cherry picker. He opted for the latter. He soon reached the ground without

> physical harm. The pursuer estimated that he was up on the structure waiting for between 15 and 25 minutes.
>
> [71] He described being sent home, but being taken for a drink first. He took one sip of his beer and then went outside, up a close and cried for 30 minutes."

[26] Cross-examination of the pursuer lasted for a full day but it did not appear to have added anything very material to the account given in chief, which I take the Lord Ordinary to have accepted.

[27] The Lord Ordinary accepted a submission from Miss Shand that the rapidity of spread of the fire and the amount of smoke it generated were "unusual" (Opinion paras [196] and [197]).

[28] Although she found the pursuer to have been mistaken in his belief that he was at or near the 29 metre level when he first became aware of smoke (she considered that he was just above the 21 metre walkway), she held that the essentials of his account to have been established. Thus, having attempted to escape and failed, the pursuer had positioned himself on the sloping roof immediately above the west face which was the only face of the Absorber clear of smoke. At proof parties had proceeded on the basis that for someone at the northwest corner of one of the two lower walkways (in other words adjacent to that part of the sloping roof where the pursuer had found himself) it was possible to access the southeast corner of the Absorber unit (and hence the Southeast Stair) either: (i) by going east along the north face, before turning right (or south) and heading along the east face, or (ii) by going south along the west face, before turning left and heading east along the south face. If one took either of these routes along the fixed walkway at the 21-metre level, one would arrive at the top of the Southeast Stair and, using it, could reach ground level. While from the northwest corner, either of these two ways led to the same place, namely the southeast corner and the Southeast Stair, it appeared to the Lord Ordinary to be common ground that for the purposes of escape this layout constituted two separate routes albeit with a shared end part.

[29] As the Lord Ordinary records at paragraphs [106] to [109] of her Opinion, she heard evidence of the existence of a further means of egress from a point on the west face at the level of the 21 metre walkway, heading north and by a "convoluted" route eventually to ground level. This was described by the Lord Ordinary as the "zig-zag north route". Its existence had been relied on by the defender as providing a route additional to the Southeast Stair. The Lord Ordinary was not satisfied that such a route did in fact provide egress to the ground but, notwithstanding that conclusion and despite an apparent lack of clarity in the evidence, as she explains at paragraph [131] of her Opinion, the Lord Ordinary did find that there was a means of egress additional to the Southeast Stair. It was "to the north" but beyond that the Lord Ordinary would appear not to have been able to specify its location.

[30] However, when considering possible egress routes, in the Lord Ordinary's opinion regard had to be had to the conditions at the relevant time and, in particular, the rapid development and spread of smoke. Unless the pursuer was compelled to go through the smoke he described, neither route (i) nor route (ii) was available to him. As the Lord Ordinary summed it up, in the absence of a route to the ground situated on and accessed from the west face, the pursuer was unable to reach the Southeast Stair. Smoke cut off the pursuer's retreat either by route (i) or route (ii) or any egress to the north.

[31] A result of that, in the Lord Ordinary's opinion, was that even if there was only one means of egress (being the Southeast Stair) and the provision of no more than one means of egress were to amount to a breach of duty, such breach was unlikely to be causative of the pursuer being isolated on the sloping roof and unable to make his own way to the ground (Opinion paragraph [130]).

[32] The pursuer was rescued with the cherry picker before the fire brigade arrived at the site at 15:16. He was therefore rescued within about 13 minutes of the alarm first being raised.

HSG 168

[33] The Lord Ordinary explains in her Opinion (paragraph [180]) that a document produced by the Health and Safety Executive, entitled Health and Safety Guidance 168 ("HSG 168") was the principal guidance on the means of escape from construction sites as at 23 March 2009. It was first published in 1997. Both parties led expert witnesses. Mr McGillvray and Mr Kidd gave evidence for the pursuer. Mr Sylvester-Evans gave evidence for the defender. These witnesses made considerable reference to HSG 168 when discussing the number of fire exits required as well as the appropriate travel distance to a place of safety. According to the Lord Ordinary, whereas neither party sought to link HSG 168 to any of the statutory duties the pursuer founded upon, it was implicit in the manner in which this body of evidence was taken that parties assumed that liability could be determined by reference to whether or not the defender complied with the recommendations of HSG 168 (Opinion paragraphs [168] and [179]).

The Pleadings

[34] At statement 4 of the statement of claim there is a brief account of what the pursuer did and what happened to him on the afternoon of 23 March 2009 between his becoming aware of the fire and his rescue by means of the cherry picker. There is then the passage which I have already quoted at paragraph 4 above. There is then a reference to the POI and its report. Two passages are quoted from the report. They are:

> "Access to and from the absorber is via a single stairway on the east side of the absorber."

and

> "A thorough review of the access/egress arrangements to/from the FGD absorbers is required to be sure that staff have a clear route to ground from any level in the event of an evacuation."

[35] In answer 4 the defender calls on the pursuer to aver why he did not exit the Absorber by "the stairway in the northwest corner or by the scaffold to the north of the building". The defender refers to the fixed walkways at the 21 and 28 metre levels. It then avers that it had carried out a risk assessment of its operations at the site, had prepared a health and safety plan in 2006 and revised that plan approximately once a year, most recently on 18 March 2009. It avers that it took all reasonably practicable steps to prevent fire breaking out and then specifies what these steps were. It avers that the pursuer attended various safety courses. It avers that it organised sufficient emergency access and egress routes, one being at the southeast corner of the Absorber. It avers that it funded a rescue team from OPUS Industrial Services Limited and organised designated employees to act as fire marshals. It avers that the cause of the fire was unknown.

[36] Statement 5 is concerned with damages. In statement 6 it is averred that the claim is based on the defender's breach of statutory duties imposed on them, by, among other provisions no longer relied on, section 53 of the Fire (Scotland) Act 2005 and Regulation 40 of the Construction (Design and Management) Regulations 2007

The Statutory Provisions

[37] Section 53 of the Fire (Scotland) Act 2005 provides as follows:

> "53. Duties of employers to employees
>
> (1) Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace.
>
> (2) Each employer shall–
>
> (a) carry out an assessment of the workplace for the purpose of identifying any risks to the safety of the employer's employees in respect of harm caused by fire in the workplace;

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1).

(3) Where under subsection (2)(a) an employer carries out an assessment, the employer shall–

(a) in accordance with regulations under section 57, review the assessment; and

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1).

(4) Schedule 2 makes provision as to the fire safety measures."

[38] Regulation 40 (1) of the Construction (Design and Management) Regulations 2007 provides as follows:

"(1) Where necessary in the interests of the health and safety of any person on a construction site, a sufficient number of suitable emergency routes and exits shall be provided to enable any person to reach a place of safety quickly in the event of danger".

[39] There are ancillary provisions requiring that an emergency route should "lead as directly as possible to an identified safe area" (Regulation 40(2)); that emergency routes or exits should be kept clear of obstructions (Regulation 40(3)); and that emergency routes and exits should be indicated by suitable signs (Regulation 40(5)). Further, Regulation 40(4) provides that in making provision under Regulation 40(1), account shall be taken of the matters in Regulation 39(2).

[40] The factors in Regulation 39(2) are as follows:

"(a) the type of work for which the construction site is being used;

(b) the characteristics and size of the construction site and the number and location of places of work on that site;

(c) the work equipment being used;

(d) the number of persons likely to be present on the site at any one time; and

(e) the physical and chemical properties of any substances or materials on or likely to be on the site."

The Lord Ordinary's Reasoning

[41] According to Mr Di Rollo, the Lord Ordinary misunderstood the submission made to her on behalf of the pursuer as to the nature of the obligation imposed on an employer by section 53(1) of the 2005 Act. As can be seen from paragraph [224] of her Opinion she understood Mr Di Rollo to have argued that section 53 imposed strict liability. That, Mr Di Rollo explained, was not his position. Rather, he had submitted that section 53 was a provision which mandated a result: ensuring the safety of the employer's employees in respect of harm caused by fire, subject to the defence in the event that safety was not ensured, of reasonable practicability. Thus, in concluding from her consideration of the terms of sub-section (1) but also the terms of sub-sections (2) and (3) of the section, that section 53(1) does not impose an absolute duty, in the sense of imposing liability regardless of the steps taken by a responsible person or without regard to what is reasonably practicable (Opinion paragraph [237]), the Lord Ordinary was somewhat closer to Mr Di Rollo's position as it was explained to us than she appreciated. She accepted, as she understood both parties to accept, that in terms of section 53(1) it was for the defender to show that it was not reasonably practicable to ensure the pursuer's safety from the risk of harm caused by fire. Thus, there was what may be described as a reverse onus on the defender, once the pursuer established a *prima facie* breach of duty.

[42] However, while Mr Di Rollo, resting on the terms of section 53(1), submitted that the relevant duty was to achieve safety in the sense of an absence of the potential for harm, the Lord Ordinary, looking to the sub-sections which followed 53(1), analysed the duty as being to take such fire safety measures (from among those set out in Schedule 2) as are necessary to guard against the risks identified by a competently undertaken risk assessment. The concept of

foreseeability was inherent, whether in assessing risks or in determining what was necessary to enable the employer to comply with the section 53(1) duty. It followed that in order to establish a breach of section 53(1) it must be shown that the employer had failed to take one or more of the particular fire safety measures which were shown to have been necessary by a risk assessment and, further, that the failure to take the fire safety measure in question had caused the claimant harm from the fire that occurred (Opinion paragraphs [233] and [234]). If the employer fails to carry out a risk assessment the knowledge that he would have ascertained had he done so will nonetheless be imputed to him. However, the Lord Ordinary rejected the conclusion that the terms of section 53 meant that in all cases an employer would be liable simply because a fire had occurred; the duty was to ensure the safety of an employee in respect of material and foreseeable harm caused by fire in the workplace. The duty did not extend to ensuring against non-material or unforeseeable risk of harm caused by fire (Opinion paragraph [250]).

[43] The Lord Ordinary then turned to the question as to whether the pursuer required to articulate and prove the manner in which the defenders failed to ensure his safety. Referring to the opinion of Lord Hope in *R* v *Chargot* [2009] 1 WLR 1 at paragraph 22, she observed that while there will be cases where the fact of an accident will speak for itself, in others it may be necessary to identify and prove the respects in which the injured person was liable to be affected by the way that the defender conducted his undertaking. In the opinion of the Lord Ordinary the circumstances of the instant case fell within that latter group of cases. It appeared to her that, at least in a case with no physical injury, it is not necessarily enough for the pursuer to succeed for him simply to prove that a fire had occurred and that he was injured. It was therefore incumbent upon the pursuer to identify and prove the particular failures on the part of the defenders that had the result that the defenders had failed to ensure the pursuer's safety from harm caused by fire. What, in other words, did the defenders fail to do that resulted in his exposure to an

unacceptable level of harm from fire? In terms of the pleadings, the only failure identified was the alleged failure to provide more than one egress from the Absorber. As the Lord Ordinary had found that there were in fact two routes by which the pursuer could have reached the Southeast Stair (and apparently a third route to the north), she held that the pursuer had failed to establish a breach of the duty imposed by section 53.

[44] On the Lord Ordinary's approach the issue of reasonable practicability did not arise. However, as it had been raised on behalf of the defender, she nevertheless addressed it (Opinion paragraphs [253] to [258]).

[45] The Lord Ordinary noted that it had been submitted on behalf of the defender that the outbreak of fire had not been foreseeable and, moreover, that it had not been reasonably foreseeable that, in the event of fire, dense smoke would issue from the very start and would spread to such an extent that persons on the walkway on the west face of the Absorber would not have time to utilise an exit unless that exit was situated on the west face itself and nowhere else. Nor was it reasonably foreseeable, on the hypothesis that the person who was on the west face could not reasonably be expected to go through smoke without breathing apparatus being brought to him (as by the on-site fire team or the fire brigade or OPUS), that even although (i) he would have breathing apparatus brought to him, which would allow him to walk through the smoke and (ii) there was an on-site fire team and OPUS to assist him in doing so that the person who had been on the west face would suffer severe mental illness.

[46] The Lord Ordinary summarised the evidence relied on by the defender for the contention that it had taken all reasonably practicable steps to prevent the occurrence of fire in a situation where the risk was low: the defender operated a hot work procedure and that was in place on the day of the fire, a permit was required for hot work and it was supervised by a fire watcher; it had a Health and Safety plan, the relevant document behind this plan being No 7/30 of Process, as

spoken to by the witness Liam Richardson, which was put into operation through a system of SHE inspections ("SHE" stands for Safety, Healthy Environment); there were daily site inspections by Mr Richardson or by one of his colleagues; records were kept of any site hazards including fire hazards, and these were actioned; all employees on site were encouraged to pick up on any safety issues as they went about their work and to report any hazards; there were weekly meetings between the health and safety personnel of all the contractors on site; there were audits by higher management at regular intervals; the site was designated a No Smoking area, and disciplinary action was taken if anyone breached that rule; there were fire extinguishers on the Absorber; there were regular fire alarm drills, every Friday.

[47] The Lord Ordinary confirmed her conclusion that the outbreak of fire was not reasonably foreseeable given the stage the construction had reached. Presumably because she considered these issues superseded by her conclusion on the foreseeability of fire, she did not address the submissions as to the foreseeability of dense smoke at an early stage of a fire or the foreseeability of psychiatric injury in the circumstances which had eventuated consequent on what she held to be an unforeseeable fire. She accepted the evidence as to fire safety measures which had been relied on by counsel for the defender, which evidence she observed had not been challenged. Accordingly, had she found there to have been a *prima facie* breach of section 53(1) of the 2005 Act, the Lord Ordinary would have nonetheless held that the defenders had discharged the onus of showing that it was not reasonably practicable for it to do more than it did.

The Grounds of Appeal

[48] The pursuer's grounds of appeal aver that the Lord Ordinary had erred in fact and law in a number of respects. Shortly stated, they are as follows:

A. The pursuer's case under section 53 of the Fire (Scotland) Act 2005

(i) The Lord Ordinary had erred in her construction of section 53. Contrary to what had been found by the Lord Ordinary, section 53(1) created a duty to ensure the safety of the pursuer in respect of the harm caused by fire subject to a defence of reasonable practicability. Section 53(2) set out in a practical way how compliance might be achieved. It did not qualify the section 53(1) duty.

(ii) Contrary to what was stated by the Lord Ordinary there was no evidence that the defender had assessed the risk of fire during the construction phase or taken all reasonably practicable measures to prevent outbreak and spread of fire, and to secure means of escape when fire broke out. There was no evidence that all reasonably practicable measures had been taken to prevent the outbreak and spread of fire. There was no evidence that any measures whatsoever were taken in relation to means of escape from fire. There was no evidence that any means of escape could be safely and effectively used.

(iii) It could not be held that fire was not foreseeable. The reliance on *Baker* v *Quantum Clothing Ltd* [2011] 1 WLR 1003 was misplaced. The risk of fire and its unpredictability have been known for many years.

(iv) It was incorrect to find, at paragraph [234], that "It must be shown that the employer failed to take one or more particular fire safety measures which was shown to have been necessary by a risk assessment and, further, that the failure to take the fire safety measure in question caused the claimant harm from the fire that occurred." While it was not the pursuer's submission that the defender was liable in all cases simply because a fire had broken out it was nevertheless

incumbent on the defender to show that it was not reasonably practicable to secure the pursuer's safety from harm caused by fire.

(v) The Lord Ordinary erred by limiting her consideration of the reasonable practicability defence to the positive averment of the pursuer regarding exits. In order for the defence to be established the Lord Ordinary required to consider all the measures that might have been taken. The Lord Ordinary had restricted herself to the number of means of egress rather than their safety or effectiveness. Notwithstanding the finding in paragraph [125] of the Lord Ordinary's Opinion that the pursuer had no means of escape that could be safely and effectively used she had found that the defender was not in breach.

(vi) The Lord Ordinary erred in paragraph [168] of her Opinion in stating that the principal issue on liability was whether or not there were sufficient means of egress from the Absorber in the event of fire. All fire safety measures were in issue as was the failure to make a risk assessment. The Lord Ordinary also erred by stating that parties assumed that liability could be determined by reference to whether or not the defender had complied with HSG 168.

(vii) The Lord Ordinary erred when she found that the defender had complied with HSG 168.

(viii) It was unclear what the Lord Ordinary's finding was as to whether there was a fire risk assessment. She should have found that there had been no fire risk assessment.

(ix) The Lord Ordinary erred in upholding the objection to evidence on alternative fire safety measures.

B. The Other Statutory Grounds

There had been a breach of regulation 40 of the CDM Regulations. The duty imposed by this provision was absolute. The evidence did not disclose that the defender had complied with the requirement to provide a sufficient number of suitable emergency routes and exits to enable any person to reach a place of safety quickly in the event of danger. On the contrary, the Lord Ordinary had found in paragraph [125] of her Opinion that the pursuer was unable to reach a place of safety quickly (a breach of Regulation 40(1)). Further there was no evidence that there was any emergency route or exit provided which led to an identified safe area as directly as possible (a breach of Regulation 40(2)).

The Cross Grounds of Appeal

[49] The Cross Grounds of Appeal are as follows:

(i) It was common ground that the pursuer had sustained no physical injury

(ii) The defender and respondent had submitted at proof that even if there had been a breach of the statutory provisions founded on by the pursuer such breach would not entitle the pursuer to recover damages in circumstances where he sustained no physical injury and was seeking damages for psychiatric injury without physical injury.

(iii) The Lord Ordinary failed to adjudicate on the issue of whether, if there had been a breach of the statutory provisions founded on by the pursuer such would have entitled the pursuer to recover damages where he was seeking damages for psychiatric injury without physical injury.

In failing to uphold the submission for the defender that the statutory provisions founded on by the pursuer, had they been breached, would not have entitled the pursuer to recover damages

where he was seeking damages for psychiatric injury without physical injury the Lord Ordinary erred in law.

Submissions of Parties on the Reclaiming Motion

The Pursuer

[50] Having reviewed the pleadings, the relevant statutory provisions (these being section 53, as read with sections 69 and 72 of and schedule 2 to the Fire (Scotland) Act 2005; and Regulation 40 of the CDM Regulations), and the findings in fact which could be identified in certain of the paragraphs of the Lord Ordinary's Opinion (paragraphs 111, 119, 120, 123, 124, 125, 129, 130, 171, 180, 181, 201, and 216), Mr Di Rollo distilled the submissions in support of the reclaiming motion into five propositions. These were intended to bring together the various points raised in the grounds of appeal, other than (ix) which was not insisted upon.

1. The burden of the defence of reasonable practicability to a case of breach of the duties imposed by section 53 of the Fire (Scotland) Act 2005 cannot be discharged without there being shown to have been a suitable and sufficient risk assessment addressing the fire safety measures set out in schedule 2 to the Act
2. A finding in fact that fire was not foreseeable is unwarranted by the pleadings or by the evidence and is contrary to common sense.
3. There is no justification in the evidence for holding that it was not reasonably practicable to have a means of egress on the west side of the Absorber.
4. There was no evidence that the defender had relied on HSG 168 or applied it in any way. Measurement of travel distance does not relate to any route spoken to by any witness.

5. Regulation 40 imposed an absolute duty. On the evidence it was not complied with and non-compliance resulted in injury to the pursuer.

The Defender

[51] Miss Shand submitted that the Lord Ordinary had not erred. The only case pled against the defender was that there had only been one egress route and that had not been enough. The Lord Ordinary had found as a matter of fact that there had been more than one such route. The Lord Ordinary's construction of section 53 of the 2005 Act was correct as was the reasoning which had led her to that construction. Safety is a relative and not an absolute concept: *Baker* v *Quantum Clothing* [2011] 1 WLR 1003, Lord Mance at paragraph 65 *et seq*, Lord Dyson at paragraph 111, *R* v *Chargot Ltd* [2009] 1 WLR 1 at paragraphs 17 to 21, 27, *R* v *Porter* [2008] ICR 1259 at paragraphs 16, 17, 21. But even if the Lord Ordinary's construction had been wrong, she had been right to find that there had been no *prima facie* breach of section 53. The only case made by the pursuer on record related to the contention that there was only one means of egress and that that was insufficient. It was not pled that there should have been a means of egress specifically on the west face of the Absorber. The Lord Ordinary found, as she was entitled to do, that there was more than one means of egress. That was an answer to the pursuer's case on record. It was not part of the pursuer's case that the outbreak of fire was due to any statutory breach on the part of the defender nor that there had been any absence of or deficiency in a risk assessment. Prevention of the spread of fire was not in issue at the proof. Nor was the absence of a "designated escape from fire".

[52] On the assumption that the Lord Ordinary had been wrong in her construction of section 53, Miss Shand addressed the contention that it had not been shown that there had been a risk assessment, as required by section 53(2)(a). Miss Shand accepted that there had been no

express finding of discharge of the section 53(2)(a) duty but she did not accept that there had not been shown to have been a risk assessment. The defender had led evidence about its health and safety regime (which included means of extinguishing fire and providing on-site rescue) which was unchallenged. That evidence is summarised by the Lord Ordinary at paragraphs [132] to [166] of her Opinion. It was to be borne in mind that the fire had occurred almost at the end of a construction operation. Construction was a dynamic process with changes on site on a day-to-day basis. Miss Shand pointed to the evidence of Mr Richardson under reference to the defender's documents, Fire Prevention Safety Healthy Environment 11 of 8 January 2007; and Construction Phase Health and Safety Plan, fourth issue, of 18 March 2009, as recorded by the Lord Ordinary at paragraphs [137] to [143] of her Opinion. The Lord Ordinary found that the defender had discharged the onus of showing that it was not reasonably practicable for it to do more than it did in respect of means of egress. That finding appears at paragraph [258] of her Opinion. Miss Shand accepted that this was the only express finding directed at reasonable practicability, although she reminded the court of the Lord Ordinary's observation, at paragraph [156] of the Opinion, that it had not been suggested to Mr Richardson that any lack of a fire risk assessment relating to the construction phase had resulted in any particular omission of a safety procedure or precaution, much less one that had any causal consequence for the pursuer. Miss Shand also drew attention to the Lord Ordinary's finding, at paragraph [201] of her Opinion, supported by what had been referred to in argument and recorded at paragraphs [196] and [197] that the risk of fire was not reasonably foreseeable. There was no discrepancy in the Lord Ordinary describing the risk of fire as "normal" at paragraph [201] (that being for the purposes of HSG 168), and "low" at paragraph [257]. The Lord Ordinary had been entitled to find that the risk of fire had been low given the evidence that the Absorber was frequently filled with seawater and had been pumped full of seawater on the morning before the fire. Moreover,

the pursuer did not lead evidence of any precaution that was not taken but which he contended that it would have been reasonably foreseeable to take. Nor did he extract evidence in cross-examination of any such precaution.

[53] Miss Shand turned to the case based on breach of the duty imposed by Regulation 40 of the CDM Regulations. The Regulation 40 duty was predicated on it being "necessary" in the interests of the health and safety of any person that emergency routes and exits be provided. As appeared from *Robb* v *Salamis (M&I) Ltd* 2007 SC (HL) 71 at paragraph 23, a step can only realistically be necessary when it can be reasonably foreseen as being necessary. No evidence had been led by the pursuer to support breach of the relevant provision. The Lord Ordinary discusses this at paragraphs [213] to [215] of her Opinion, finding at paragraph [216] that the defender had complied with the guidance on travel distances in HSG 168, the standard relied on by it, no other standard having been relied on by the pursuer (paragraph [179]). She notes at paragraph [264] that the only matter relevantly put in issue by the pursuer in his pleadings was the number of means of egress, not their sufficiency. Mr Di Rollo had proposed that the Lord Ordinary find that the defender had failed to provide a sufficient number of suitable emergency routes but, again as the Lord Ordinary notes at paragraph [264], he did not identify any evidence to support this. It was to be borne in mind that a place of safety as that expression is used in HSG 168 is not necessarily only to be found at ground level (see Opinion paragraphs [209] and [210]). The Lord Ordinary had accepted that a place of safety was somewhere protected from the initial plume of smoke from where there was a protected route to ground level (see paragraphs [210] and [212]). If (contrary to Miss Shand's submissions in support of the cross-appeal) the scope of section 53 of the 2005 Act was wide enough to embrace psychiatric harm in the absence of any physical injury then it was Miss Shand's position that the pursuer needed to be able to point to a particular precaution which, if taken, would have prevented the pursuer suffering that

psychiatric harm. The same applied to Regulation 40 of the CDM Regulations. There was no finding that if Regulation 40 had been complied with in a particular way the pursuer would have avoided psychiatric harm (see Opinion paragraph [171]). Further, as already noted, at paragraph [156] of her Opinion, the Lord Ordinary observes that it had not been suggested to Mr Richardson that any lack of a fire risk assessment relating to the construction phase resulted in any particular omission of a safety procedure or precaution, much less one that had any causal consequence for the pursuer.

Submissions of Parties on the Cross-Appeal

The Defender

[54] Miss Shand submitted that psychiatric injury unaccompanied by physical injury is not within the ambit of section 53 of the 2005 Act and accordingly the provision does not afford the pursuer a remedy in respect of psychiatric injury suffered by reason of what would otherwise be a breach of the obligation imposed by the section.

[55] Miss Shand accordingly further submitted that in circumstances where the pursuer had suffered no physical injury, his safety had been ensured in respect of harm caused by fire. The requirement that a claimant's damage must fall within the scope of the statute is analogous to the rules of remoteness of damage in the tort: Clerk & Lindsell on Torts (21st edit) at paragraph 9-53. The obligation imposed by section 53(1) of the 2005 Act is to ensure "safety". Safety implies physical integrity, as opposed, for example, to health: cf *Baker* v *Quantum Clothing* at paragraph 54. The 2005 Act should be construed purposively: cf *Donaldson* v *Hays Distribution Services Ltd* 2005 SC 523. It does not have as one of its purposes the giving of a statutory remedy for pure psychiatric injury. The thrust of the Act, which is an Act of the Scottish Parliament, is to consolidate and reform fire safety law as opposed to health and safety law, which is a reserved

matter. Its preamble gives no indication of an intention to give a statutory remedy for pure psychiatric injury. Were it to be construed as giving such a remedy that would be extremely important and far reaching. It is improbable that the legislative intention was to supersede the common law, in the absence of more express language.

[56] In support of the proposition that the pursuer's construction of the Act involved a significant innovation upon the common law, the defender's note of argument reviewed the history of the law of negligence in so far as bearing on liability for what was originally termed "nervous shock". Leaving aside *Page* v *Smith*[1996] AC 155, a case which should be restricted to its particular circumstances, the law was and always had been that foreseeability of psychiatric injury should be the test for recovery of damages and that in the application of that test what should have been foreseen was the event which actually happened (as opposed to what might have been apprehended but did not happen) and what required to be considered was whether it would have caused a recognised psychiatric illness to a person of "sufficient fortitude" or "ordinary phlegm": *Rothwell* v *Chemical & Insulating Co Ltd* (otherwise *Grieves* v *FT Everard & Sons Ltd*) [2008] 1 AC 281 at paragraphs 23 to 34, 51 to 58, 75 to 77, 92 to 98 and 103 to 104.

[57] In his written submission to the Lord Ordinary the pursuer had asserted that the common law control mechanisms applicable to the recovery of damages for pure psychiatric injury also applied to recovery of such damages for statutory breach and that, as the pursuer had been within the area of potential physical danger, on an application of these control mechanisms he was entitled to recover damages for nervous shock (and therefore his PTSD). This, Miss Shand submitted, was an attempt to meet the criticism that the pursuer's reading of section 53 would be to effect an extremely important change to the common law with far reaching consequences. The defender did not accept that the pursuer had in fact been within the area of danger of physical injury but even taking him to have been, there was no basis in authority or principle for this

approach (other than by an approximation to the facts in *Page* v *Smith*) and if pure psychiatric injury was indeed within the ambit of section 53 as the pursuer contended, consideration of control measures would be unnecessary. The pursuer asserts that the pursuer's psychiatric injury was foreseeable and therefore within the ambit of the section. Again there is no authority for incorporating this common law control mechanism if the section is to be read as the pursuer contends it should be read. Moreover such an approach cannot be justified by reference to principle. The particular harm under consideration is either within the ambit of the statutory provision or it is not. If it is there is no need to go outwith the statute by importing a requirement of reasonable foreseeability and if it is not, it being reasonably foreseeable cannot alter that.

[58] *Young* v *Charles Church (Southern) Ltd* (1998) 39 BMLR 146 which was relied on by the pursuer, and which would appear to be the only reported decision where there has been a finding of liability for psychiatric injury unaccompanied by physical injury based on breach of statutory duty, had been wrongly decided.

[59] In any event, even if pure psychiatric injury was within the ambit of section 53(1) and the defender had been in breach of duty, the injury suffered by the pursuer was nevertheless too remote to allow recovery of damages. As the pursuer's psychiatric injury was not reasonably foreseeable the damages sued for were too remote.

[60] As far as Regulation 40 of the CDM Regulations was concerned, it was the defender's submission that the pursuer had not established breach but even had he done so he had not established that any such breach had caused the injuries in respect of which he sues. As found by the Lord Ordinary at paragraphs [129] and [130] of her Opinion, the pursuer gave an account of attempting to go in several directions and having encountered thick smoke wherever he had gone. As a consequence, even if there had been additional means of egress from the Absorber on

or via the north face the pursuer would not have been able to avail himself of them and therefore would not have been protected from the injury that he suffered.

[61] In any event a breach of Regulation 40 does not confer a right to recover damages for pure psychiatric injury. It cannot have been Parliament's intention that breach of the many regulatory provisions made under 15(1) of the Health and Safety at Work Act 1974, among which are the CDM Regulations, should result in recovery of damages for pure psychiatric injury.

The Pursuer

[62] Mr Di Rollo adopted the written submission that he had provided to the Lord Ordinary (Appendix F to the Lord Ordinary's Opinion). That submission begins with three propositions which it then goes on to develop. First, the pursuer sustained psychiatric injury within the area of potential danger of physical injury. Second, there was no authority or justification for treating psychiatric injury differently when it is the result of breach of a statutory duty as opposed to breach of a common law duty; the defender's submissions confuse the requirement of foreseeability to create a common law duty of care with the requirement of foreseeability in relation to remoteness of damage. Third, the language of the statutory provisions relied on clearly includes psychiatric injury.

[63] The pursuer sustained PTSD as a result of fear for his own safety in a situation of being unable to escape from a serious fire at his workplace. He was in close proximity to a fire which was producing flame, heat and smoke containing noxious gases. He thought that he was going to die. His fear, Mr Di Rollo submitted, was reasonable. If a pursuer is within the area of potential danger then the defender is liable to make reparation for nervous shock caused by his reasonable fear of bodily harm, even although he may escape physical injury: *Page* v *Smith*.

[64] There are no cases where it has been submitted far less accepted by any court that psychiatric injury is not to be compensated where it has resulted from breach of a statutory duty as opposed to breach of a common law duty (cf *Hunter* v *British Coal Corpn* [1999] QB 140 at 155H and 163D, also *Young* v *Charles Church (Southern) Ltd* (1998) 39 BMLR 146 where no distinction was made between the statutory and common law cases). Rather, it has been submitted, albeit not yet accepted, that where there is a statutory breach, the courts should widen the class of persons entitled to recover for psychiatric injury: *Young* v *Charles Church (Southern) Ltd*, *McFarlane* v *Wilkinson and Hegarty* v *EE Caledonia* [1997] PNLR 578. It was the pursuer's submission that the scope of recovery for psychiatric injury caused by sudden traumatic events resulting from breach of statutory duty was effectively the same as where there was a common law breach, in the absence of express provision to the contrary.

[65] There was no justification for treating psychiatric injury caused by statutory breach differently from that caused by breach of a common law duty: *Brown* v *John Watson* 1914 SC (HL) 44 at 51.

[66] Turning to the meaning of the language used in the relevant provisions, section 69 (2) of the 2005 Act provides that breach of duty shall, in so far as it causes damage to an employee, confer a right of action on that employee in civil proceedings. There is nothing in that language to restrict "damage" to physical injury (even assuming that there is a real distinction to be made between physical and psychiatric injury). There is no reason to suppose that the Scottish Parliament in using the word "damage" did not intend to comprehend impairment of a person's mental condition. There was no need to look beyond the plain meaning of the words used in the legislation. It was unnecessary to look to the terms of the Framework Directive. That "damage" comprehends impairment of a person's mental condition in Regulation 40 of the

CDM Regulations is made plain by section 47(6) of the Health and Safety at Work Act 1974 which is the statute in terms of which the CDM Regulations are made.

Discussion

Pure Psychiatric Injury

[67] The pursuer claims damages for what was referred to in argument as "pure psychiatric injury", that is psychiatric illness which is not associated with any physical injury, which he avers was consequential on the defender's breach of statutory duty. The defender submits that on that basis alone he cannot succeed; his claim is irrelevant. The Lord Ordinary did not find it necessary to deal with that submission and it is raised before this court in the cross-appeal rather than in the reclaiming motion. Nevertheless, I see the question of whether and in what circumstances damages are recoverable in respect of psychiatric injury as providing a useful starting point for a consideration of all the issues which were canvassed before us, both in relation to the reclaiming motion and in relation to the cross-appeal. My focus is on factual situations which are similar to those in the present case, that is on situations where although as matters turned out the pursuer sustained no physical injury he found himself in a position where he might have done and, as a result of the fear provoked by that experience suffered psychiatric injury. I bear in mind that the leading cases are concerned with negligence and therefore with the question as to what is the ambit of the relevant duty of care whereas in the present case the pursuer relies exclusively on statutory provisions and therefore what it is concerned with is the analogous but different question as to what is the scope of the specific statutory duty which is relied upon.

[68] In the course of his submissions, Mr Di Rollo drew attention to what was said by Lord Shaw of Dunfermline in *Brown* v *John Watson Limited* 1914 SC (HL) 44 at 51:

> "On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour—always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice, or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction. Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge."

These observations were *obiter*; the issue in the appeal being whether the death of a miner who had contracted a chill which developed into fatal pneumonia by being exposed to a down draught of cold air while standing in a pit shaft, was due to an "injury" for the purpose of the Workmen's Compensation Act 1906, but they illustrate that there is nothing very novel about the idea of a claim for damages for psychiatric injury in the absence of "physical impact or lesion". Indeed, Lord Shaw refers with approval to the earlier decision (of the English Divisional Court) in *Dulieu* v *White* [1901] 2 KB 669. That was a decision in favour of the plaintiff, the wife of the licensee of a public house in Bethnal Green, who had been standing behind the bar when the defendants' servant negligently drove a horse-drawn van into the premises. She sued for damages claiming that as a result of her experience she had sustained a severe shock, was seriously ill and, some two months later gave birth to a premature child. The defendants took a plea of demurrer, arguing that no action for negligence lay where there was no immediate physical injury resulting to the plaintiff. The plea was rejected, the case being allowed to go forward to trial by jury.

[69] There is a characteristically careful and illuminating review of the development of the law as to damages for psychiatric injury alone subsequent to *Dulieu* in the opinion of Lord Reed

(sitting in the Outer House) in *Campbell* v *North Lanarkshire Council* 2000 SCLR 373. I would respectfully adopt what Lord Reed says there.

[70] Lord Reed notes that the *ratio* of *Dulieu*, with its requirement that the nervous shock must be occasioned by reasonable apprehension of immediate and personal bodily injury, was adopted for Scotland in *Wallace* v *Kennedy* (1908) 16 SLT 485 at 486. While the speeches in *Bourhill* v *Young* 1942 (HL) 78 left for later consideration whether the shock must necessarily have arisen from fear of immediate personal injury, as held by Kennedy J in *Dulieu*, they affirmed that for recovery of damages the nervous shock must, in the particular circumstances of the case, have been reasonably foreseeable.

[71] Pausing there, if it is assumed for the moment that the pursuer coming to be on the sloping roof with thick smoke between him and the means of egress from the Absorber was the result of a breach of a relevant duty owed to the pursuer, as Mr Di Rollo presented the case and characterised the facts, it is one with all the necessary elements for recovery of damages under the law (in relation to common law negligence) as it was stated to be in *Bourhill*. The pursuer was not the subject of any physical impact and he suffered no physical injury. However, he did sustain a "nervous shock" in the sense of developing a recognised psychiatric illness as a direct result of what Mr Di Rollo submitted was his reasonable apprehension of immediate and personal bodily injury (and indeed, death) in circumstances where the development of that psychiatric illness by reason of shock was reasonably foreseeable. He was what Lord Oliver came to describe in *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 410 as a "primary" victim, in other words someone who was directly involved, someone in a position equivalent to the plaintiff in *Dulieu*.

[72] As is explained in Lord Reed's opinion in *Campbell*, the law on recovery of damages for what continues to be described as nervous shock has moved on from the position affirmed in

Bourhill. In *Dulieu* at 675 Kennedy J was very specific in limiting claims to primary victims; "A has ...no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C". Similarly, in *Wallace* v *Kennedy* at 486 Lord Johnston opined: "If the shock is occasioned by apprehension for the safety of another, or is occasioned by horror rather than by terror, that does not justify action." In *Alcock* Lord Oliver described the person whose shock has been occasioned by apprehension for the safety of another, or horror at another's fate, as a "secondary" victim. Departing from *Dulieu*, the Court of Appeal in England had allowed recovery at the instance of a secondary victim (a mother apprehensive for the safety of her children) in *Hambrook* v *Stokes* [1925] 1 KB 141. While in *Bourhill* their Lordships had reserved their opinions on whether a secondary victim might recover, after a number of English and Commonwealth decisions in which such claims were admitted, the House of Lords rejected Kennedy J's more limited principle of liability when it decided *McLoughlin* v *O'Brian* [1983] AC 410 by allowing the appeal of a mother who had suffered severe shock resulting in psychiatric illness on learning of her daughter's death and coming upon other members of her family in an injured condition in hospital immediately following a road traffic accident. The members of the Judicial Committee saw allowing recovery on the facts in *McLoughlin* to be no more than a logical development of the prior English and Commonwealth case-law but explicitly recognised that while reasonable foreseeability of psychiatric injury was a necessary condition for recovery, it was not a sufficient condition; because of the policy considerations discussed by Lord Wilberforce, a line had to be drawn somewhere if the scope of the duty to avoid psychiatric injury was not to expand unacceptably far. As Lord Reed noted in *Campbell*, that was affirmed by the House of Lords in *Alcock* where, as explained by Lord Steyn in *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 496D, the House established certain additional conditions to be satisfied for a successful claim. These "*Alcock* requirements", as Lord Reed referred to them,

were: (i) the plaintiff must have had close ties of love and affection with the physically injured person; (ii) the plaintiff must have been present at the accident or its immediate aftermath; (iii) the psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else. In *White* at 502H Lord Hoffmann described the *Alcock* requirements as "control mechanisms".

[73] The second development from the law as stated in *Bourhill* discussed by Lord Reed resulted from the decision of the majority of the House in *Page* v *Smith* [1996] AC 155 where the leading speech was given by Lord Lloyd of Berwick. Lord Lloyd considered that in principle it was unnecessary in the case of a defendant who was under a duty of care to not cause the plaintiff foreseeable physical injury to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury. Thus, in the case of a primary victim, that is someone exposed to a foreseeable risk of physical injury, that foreseeable risk of physical injury is sufficient to found a claim for any psychiatric injury which the accident caused, even in the absence of such physical injury (see *White*, Lord Hoffmann at 505A).

[74] Lord Lloyd concluded his speech in *Page* with the following resumé of the law:

> "... the following propositions can be supported. 1. In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims. 2. In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim. 3. In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is the primary victim. 4. Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different 'kinds of damage.' 5. A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the

> illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.
>
> These propositions do not, I think, involve any radical departure from the law as it was left by Kennedy J. in *Dulieu* v *White & Sons* and by the Court of Appeal in *Hambrook* v *Stokes*..."

[75] Included in his review in *Campbell* is a consideration of what Lord Reed saw as the clarification of *Page* in *White*. From that Lord Reed notes two points of detail as to the extent of the duty owed to primary victims in respect of psychiatric injury. A claimant falls to be regarded as within the range of foreseeable physical injury, not only in situations in which he is objectively exposed to physical injury but also situations in which he could reasonably believe that he was exposed to danger (see *Campbell* at 381F). However, in either case it is not necessary to prove that the psychiatric injury was caused by the perception of personal danger (see *Campbell* at 381E).

[76] As Ms Shand emphasised, the position taken by the majority in *Page* has been criticised, notably by Lord Goff in his dissent in *White*. However, it was taken to represent the law of Scotland in *Simmons* v *British Steel plc* 2004 SC (HL) 94 and expressly not departed from in *Rothwell*, albeit with the rider added by Lord Hoffmann at 296A:

> "It does not appear to have caused any practical difficulties and is not, I think, likely to do so if confined to the kind of situation which the majority in that case had in mind. That was a foreseeable event (a collision) which, viewed in prospect, was such as might cause physical injury or psychiatric injury or both. Where such an event has in fact happened and caused psychiatric injury, the House decided that it is unnecessary to ask whether it was foreseeable that what actually happened would have that consequence. Either form of injury is recoverable."

Recovery of Damages for Pure Psychiatric Injury due to Breach of Statutory Duty

[77] On behalf of the pursuer Mr Di Rollo submitted that in the context of a claim for damages, there was no justification for treating psychiatric injury caused by breach of statutory duty any differently from psychiatric injury caused by breach of a common law duty. Accordingly, the

class of persons entitled to recover damages should be at least as wide in the case of a statutory breach as it would be in the case of a common law breach. Ms Shand, on the other hand, argued that to give section 53 of the 2005 Act the interpretation contended for by Mr Di Rollo would be to turn the common law on its head. That is not an intention which should be ascribed to the Scottish Parliament.

[78] Both counsel framed their respective arguments by reference to the whole of the law as it relates to recovery of damages for pure psychiatric injury associated with the occurrence or apprehension of harm consequential on an accidental event. As already foreshadowed, I would propose to take a narrower approach. The line of authority considered above distinguishes between primary and secondary victims. It is the latter category which is the more problematic, calling for the application of "control mechanisms" which are unnecessary in the case of primary victims. Primary victims announce themselves by being present at the scene of the accident and at risk of physical injury or, if not objectively at risk, reasonably believing themselves to be at risk. There may be cases where distinguishing between primary and secondary victims is not quite as straightforward as I have suggested, but in the present case I would see no room for doubt, if the pursuer is to be regarded as a victim at all it is because he is a primary victim. It is therefore from the perspective of a primary victim that I propose to consider what, agreeing with Miss Shand, would seem to be the critical questions: was the pursuer's damage within the scope or ambit of section 53?, and was it within the scope or ambit of regulation 40?

[79] Section 53(1) imposes a duty on an employer to ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace. The defender was the relevant employer; the pursuer was its employee. The fire which broke out on the Absorber was a "fire in the workplace". Therefore, subject to it being reasonably practicable, the defender was under a duty to ensure the pursuer's safety in respect of "harm caused by [such

a] fire". In the event of breach of that duty, in terms of section 69(2) of the Act, the pursuer has a right of action in so far as the breach "causes [him] damage". What Miss Shand puts in issue is whether nervous shock and consequent PTSD can ever amount to "harm" as that expression is used in section 53(1) and whether PTSD and its *sequelae* can ever amount to "damage" as that expression is used in section 69(2).

[80] I have to confess that my provisional response to these issues is a perhaps overly simplistic: why not? As a matter of generality there is nothing so very extraordinary about pure psychiatric injury. Its foreseeability in the case of primary victims believing themselves in danger of serious physical harm has been accepted for more than a hundred years. While it is true that the understanding of the mechanisms and the nature of the consequences of what continues to be referred to as nervous shock has evolved and changed over that time, as appears from consideration of, for example, the English Law Commission's Consultation Paper (No 137) on Liability for Psychiatric Illness (1995), on the basis of current medical knowledge there can be no doubt that PTSD is a reasonably foreseeable consequence of experiencing a life-threatening or what appears to be a life-threatening event. Moreover, there is Court of Appeal authority supporting the view that there is no reason in principle why damages for pure psychiatric injury cannot be recovered in respect of breach of statutory duty: *McFarlane* v *Wilkinson and Anor* [1997] PNLR 578 (where the claim failed on the view that psychiatric injury was not foreseeable on the particular facts of the case), and *Young* v *Charles Church (Southern) Ltd* (1998) 39 BMLR 146 (where the claim at the instance of a primary victim succeeded).

[81] I agree with Miss Shand that the pursuer can only succeed with his case based on breach of section 53 if he can bring his damage within the scope of the section; in other words he must show that his damage is of the sort that the section was intended to protect against. It is however clear beyond argument that this section is intended to protect workers against personal injury

and therefore the loss they will suffer in the event of personal injury. Miss Shand did not suggest otherwise. The principle enunciated in *Gorris* v *Scott* (1874) LR 9 Ex 125 may be applicable but this is not a case where a claim is being made under a statute enacted for a different purpose altogether from that of prevention of loss of the sort in respect of which damages are claimed.

[82] Before the Lord Ordinary, Miss Shand presented an argument to the effect that, in the absence of clear indication to the contrary, as there was nothing in either the statutory antecedents of the 2005 Act or the Council Directives which the 2005 Act was intended in part to implement, which would provide a basis for recovery of damages for pure psychiatric injury, it was unlikely that the Scottish Parliament intended to introduce a civil right of recovery in respect of injury of this sort. The argument is set out in Appendix D to the Lord Ordinary's Opinion. It did not find favour with the Lord Ordinary and it was not pressed before this court. I acknowledge Miss Shand's industry, but I am not persuaded by this chapter of submissions. Apart from anything else, where it is not suggested that it was *ultra vires* the Scottish Parliament to enact a provision for the protection of the health and safety of workers, giving that expression the widest interpretation, I see no reason to assume that the Parliament was merely re-enacting what had appeared in previous instruments. As is very familiar, it is always open to a Member State when implementing Directives in domestic legislation to confer more extensive rights than those provided for in the European instruments. The preamble to the 2005 Act includes the following:

> "to make provision for implementing in part Council Directives 89/391/EEC, 89/654/EEC, 91/383/EEC, 94/33/EC, 98/24/EC and 99/92/EC; to make other provision in relation to fire safety in certain premises; and for connected purposes."

That statement of legislative intent is quite wide enough, in my view, to include protection from purely psychiatric harm arising from fire.

[83] The starting point for interpretation of statutory provisions is a consideration of the natural meaning of the words used, read in context. In the written submission contained in Appendix D, Miss Shand contends that the normal and natural meaning of "safety ... in respect of harm caused by fire" relates to physical integrity. I would agree that the conjunction of "safety" with "harm" indicates that what the subsection is concerned with is prevention of or protection against personal injury (as opposed to economic harm, for example) but I see no reason to distinguish between injury to bodily integrity and injury to mental integrity. On that I would follow Lord Shaw in *Brown* v *John Watson Limited*. The harm must of course be "caused by fire in the workplace" but just as harm can be caused by the impact of flame or heat or smoke or noxious gases, I would see it as being capable of being caused by terror arising from a reasonable apprehension of death or serious physical injury by reason of flame, heat, smoke or noxious gas. That fear arising from being in danger of physical injury may produce nervous shock without there having been any physical impact, and that nervous shock may cause recognisable illness has been accepted from at least the time of the decision in *Dulieu*.

[84] As far as "harm" is concerned I would adhere to my provisional impression: it includes assaults on mental integrity as well as assaults on physical integrity. Miss Shand pointed to the definition of "damage" which had been provided by section 47(6) of the Health and Safety at Work Act 1974, before its amendment by the Enterprise and Regulatory Reform Act 2013, as including "any disease and any impairment of a person's physical or mental condition". It was, she submitted, noteworthy that there was no such definition provided in the 2005 Act. While I agree that no definition is provided in the 2005 Act I disagree with Miss Shand that that is of significance for present purposes. It is not always obvious why a particular word or phrase is defined in a statute. I would suppose that the word "damage" appears in very many statutes. It is not always defined. It is not defined in the 2005 Act. It was defined in the 1974 Act. The

definition in the 1974 Act is comprehensive and, as such, an illustration of what the word may mean; it is not an unnatural or extended definition. Critically, simply because a word is defined in one statute does not mean that it must have a different meaning when it appears in another statute where it is not defined. Where a word in a statute is not defined it has its natural meaning, as read in context. Here, I would take it to be quite clear that the development of PTSD amounts to "damage" as that word is used in section 69(2) of the 2005 Act.

[85] I would therefore see pure psychiatric injury, at least if suffered by a primary victim in circumstances such as the present case, and the damage consequential upon that injury to be within the ambit of section 53 of the 2005 Act. The obligation imposed by Regulation 40 of the CDM Regulations applies where it is "necessary in the interests of the health and safety of any person on a construction site". It is not suggested that breach of that obligation does not give rise to liability for an action of damages at the instance of anyone suffering injury in consequence of the breach. I would see "health and safety" as comprehending mental integrity as well as physical integrity but even if the obligation arises from a consideration of what is necessary in the interests of simply physical safety, if it is breached and as a result a person suffers pure psychiatric injury and that psychiatric injury is reasonably foreseeable, I can see no reason why the damage consequential on that injury should not be considered to be within the ambit of the regulation.

Section 53 (1) of the Fire (Scotland) Act 2005: the Issues in the Reclaiming Motion

[86] Section 53(1) imposes a duty on an employer to ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace. The pursuer and reclaimer submits that that duty was owed to him, that it was breached in the circumstances of 23 March 2009, that he suffered harm thereby, and that that harm constitutes

damage in respect of which reparation can be recovered by virtue of section 69(2) of the 2005 Act. For the reasons I have set out above I consider that purely psychiatric injury can amount to "harm" as that expression is used in section 53(1) or "damage" as that expression is used in section 69(2). I therefore turn to consider whether there should be taken to have been a breach of duty as contended by the pursuer. That question can be broken into three issues: first, what is the nature and extent of the section 53(1) duty; second, whether the fact that the pursuer found himself in a position where he could not make his way to the ground unaided and a result suffered from PTSD constituted a *prima facie* breach of the duty; and, third, assuming that there was a *prima facie* breach, did the defender satisfy the onus on it to establish that it had done everything practicable to ensure the pursuer's safety in respect of harm caused by fire. The pursuer does not challenge any finding of primary fact. Accordingly, for him to succeed he must show that on the findings that were made the Lord Ordinary should have concluded that a *prima facie* breach had been made out and, further, that on the basis of the findings that were made and in absence of the findings that were not made, she should have concluded that the defender had failed to discharge the onus of showing that everything that was reasonably practicable to do had been done. All the three issues that I have identified were controversial. What came not be controversial was where the onus of proof lay. It is convenient to say something about that, and how the onus may be discharged, before going further.

Onus of Proof and how it Might be Discharged

[87] The Lord Ordinary records at paragraph [26] of her Opinion that at proof a considerable amount of time was taken up in hearing objections to evidence which the pursuer proposed to lead and for which the defender contended he had no record. The Lord Ordinary discusses these objections and the basis for her decision upholding them at paragraphs [26] to [59] of her Opinion

(an ancillary issue, as to an undertaking, is summarised with an indication as to how it would have been dealt with had it been live at paragraphs [60] to [61]). Ground of appeal (ix), which I have summarised above, includes the proposition that the pursuer was entitled and should have been permitted to lead evidence (in advance of the defender's proof) to answer such a defence. The Lord Ordinary, so the ground avers, should not have excluded or disregarded evidence about the other measures that the defender could have taken to prevent the outbreak and spread of fire and the mitigation of its consequences.

[88] As I have already indicated, Mr Di Rollo did not insist upon Ground (ix). It was superfluous if he was correct in his contention that on the evidence that was led the defender had failed to establish its *probandum*. However, had it been argued, Ground (ix) would have fallen to be refused. In my opinion the way the Lord Ordinary dealt with the matter was a correct application of the decision of the House of Lords in *Gibson* v *British Insulated Callenders Construction Co* 1973 SC (HL) 15 in relation to a provision (such as section 53(1) of the 2005 Act) imposing a duty on a defender to ensure safety so far as is reasonably practicable. The Lord Ordinary accepted that there was an onus on the defender to show that it was not reasonably practicable to ensure the pursuer's safety from the risk of harm caused by fire. In order to do that the defender would have to lead evidence and in order to do that it would have to have pled a case as to what was (or was not) reasonably practicable. It would then be open to a pursuer to cross-examine the defenders' witnesses as to whether some additional step was reasonably practicable, even if his own pleadings were silent on the matter. However, if a pursuer wished to make a positive case by leading evidence that a particular step or precaution was reasonably practicable and one which a defender employer should have taken, then it was incumbent upon a pursuer to plead the particular precaution. Accordingly, as the Lord Ordinary emphasised at paragraph [59] of her Opinion, while it was open to Mr Di Rollo to cross-examine

the defender's witnesses about the reasonable practicability of particular steps, as the only positive case that the pursuer was offering to prove was that there was only one means of egress off the Absorber, that was the only matter on which he was allowed to lead evidence.

[89] The Lord Ordinary cited what had been said in *Gibson* at 35 by Lord Kilbrandon:

> "There is really no mystique about Scottish rules of pleading. If a pursuer wishes to call substantive evidence of practical methods, he must give notice of them, since the defenders must be in a position to have in readiness witnesses who may refute that evidence in the course of their proof of impracticability…My Lords, if I have rightly apprehended the rules of pleading in these cases as they now stand in consequence of the decision of your Lordships' House in [*Nimmo* v *Alexander Cowan & Sons* 1967 SC (HL) 79], they do not seem to be open to serious criticism. Pursuers are for the most part advised by experts, although it is in the nature of things that their facilities are often not as wide as are those available to employers. These experts may advise that a certain safety measure has been neglected. In such a case, the pursuer must specify that neglect as part of his grounds of fault if he wishes to lead evidence about it. But if no such specific ground is alleged, or if, being alleged, it fails of being proved, that does not affect the onus incumbent on the defenders of proving that it was impracticable to make a dangerous place of work reasonably safe, nor is the pursuer's Counsel inhibited from challenging the evidence given by a defender's witness by asking him about the practicability of any method which that witness may expressly, or impliedly by ignoring it, have repudiated."

[90] Lord Reid was to similar effect in his speech when discussing the impact of the reversal of onus on how such a case might be conducted, depending upon what parties had chosen to plead about the practicability or otherwise of specific safety measures:

> "… the defender has to prove a negative—that it was not reasonably practicable to make the place safer. That must, I think, mean that the defender need do no more than aver this in general terms, and lead evidence in equally general terms. His skilled witnesses might say that they had been unable to think of any method of making the place safer and, in the absence of successful cross-examination, that would discharge the onus on the defender. But it would be open to the cross-examiner to ask: 'Have you considered method A, and why is that not reasonably practicable?' If he could get an admission that method A was reasonably practicable and would have prevented the accident, the defender would have failed to discharge the onus and the pursuer would succeed. But if he could not get such an admission, he could not lead positive evidence that method A was reasonably practicable, because he had not made any averment to that effect. … If the pursuer's counsel thinks that he can prove that method A was reasonably practicable, he must either aver that in his condescendence and undertake the onus of proving it or say nothing in his condescendence and rely on his cross-examination. The wiser course may often be to make the averment and lead positive evidence to establish the practicability of method A. But then what happens if he fails to prove that method A was practicable? … In the

> absence of authority I would think that the answer is reasonably clear. Offering to prove method A does not discharge the general onus on the defender. If the pursuer fails to prove the practicability of method A, the defender must still show, at least in general terms, that no other method is reasonably practicable."

[91] Mr Di Rollo had argued that it was misconceived to look at what had been said in *Gibson*. It pre-dated the procedure provided for by Chapter 43 of the Rules of Court and, in particular, the requirement in RCS 43.2 (1) that a summons shall have annexed to it a brief statement containing averments in numbered paragraphs relating only to those facts necessary to establish the claim. The Lord Ordinary rejected this argument. She was right to do so. The principal purpose of pleadings is to give the other party or parties and the court, in concise but sufficient terms, fair notice of what a claim or a defence to a claim is about. If evidence is to be led fair notice requires an indication of what that evidence will be in order that an opposing party can prepare to meet it. This applies in Chapter 43 procedure as it applies elsewhere (cf *McGowan* v *W & J R Watson Ltd* 2007 SC 272 at para 13).

First Issue: What is the Nature and Extent of the Section 53(1) duty?

[92] Differing from the Lord Ordinary, I see no reason not to read section 53(1) as imposing a duty to achieve a result, that result being safety in respect of harm caused by fire, subject only to the defence, or countervailing consideration, which it is for the employer to establish, that it was not reasonably practicable to do so (or, putting it slightly differently, that everything that was practicable to do was done). That is not to render sub-sections (2) and (3) otiose, as the Lord Ordinary suggests at paragraph [232] of her Opinion. First, these sub-sections impose unqualified and specific duties which are additional to the section 53(1) duty: "shall carry out an assessment [and] …take …fire safety measures" and "shall …review …and take … fire safety measures". Second, and on this I can agree with the Lord Ordinary, whether the sub-sections (2)

and (3) duties have been duly performed informs the question as to whether everything that is reasonably practicable has been done to comply with the section 53(1) duty. An employer who can establish that he has carried out a competent risk assessment and reviewed it in accordance with the regulations made under section 57 of the Act and then duly taken the fire safety measures found necessary to enable him to keep his employees safe from harm will be entitled to say that he has complied with section 53(1). However, these are matters which I would see as being for the employer to demonstrate and while the sub-sections (2) and (3) duties point the way by which the more generally stated duty imposed by sub-section (1) can be discharged, that does not detract from its free-standing and over-arching quality.

[93] What then is meant by "safety in respect of harm caused by fire"? As section 53(2)(b) would suggest that taking such fire precautions as are necessary will enable an employer to comply with the section 53(1) duty, an indication of the meaning of safety in respect of harm caused by fire can be got from the list of the various sorts of fire safety measures set out in Schedule 2 to the Act. These are: (a) measures to reduce the risk of the occurrence and spread of fire in relevant premises; (b) measures in relation to the means of escape from relevant premises; (c) measures for securing that the means of escape can be safely and effectively used; (d) measures in relation to the means of fighting fires in relevant premises; (e) measures in relation to detecting and giving warning of fire; and (f) measures in relation to the arrangements for taking action in the event of fire. Section 55(3) of the Act sets out the considerations to be had regard to in implementing fire safety measures. They include the avoiding, evaluating and combating of "risks". Thus, when read with section 55(3), there is in Schedule 2 what looks to be an attempt at a comprehensive categorisation of the things that can be done and therefore should be done with a view to avoiding the risks of harm associated with fire. Therefore, complying with the section 53(1) obligation and thereby achieving "safety" is

about avoiding avoidable risks by taking various sorts of fire safety measures. That, as the Lord Ordinary observes (Opinion paragraph [242]) is different from preventing risks or avoiding fire altogether.

[94] In coming to her conclusion that the duty imposed by section 53(1) was to ensure the safety of an employee in respect of material and foreseeable harm caused by fire in the workplace, the Lord Ordinary drew upon what had been said by Lord Mance and Lord Dyson (with whom Lord Saville agreed) in *Baker* v *Quantum Clothing Group Ltd* [2011] 1 WLR 1003 (Opinion paragraphs [243] to [250]). *Baker* was concerned with what was meant by a safe place of work. The context was a claim for damages for noise-induced deafness relying on alleged breach of the duty imposed by section 29(1) of the Factories Act 1961 that "every … place [at which any person has at any time to work] shall, so far as is reasonably practicable, be made and kept safe for any person working there." An issue in the case was whether "safe" and therefore safety were absolute or relative concepts. The context was the evolving understanding of the damaging properties of certain levels of noise and the acceptance that whereas at the time the damage to hearing was done the relevant noise levels were regarded as acceptable, that was no longer the case by the time the claims came to be litigated. Lord Mance rejected the absolute concept which had found favour with the Court of Appeal. Determining whether a place was safe involves a judgement, one which was objectively assessed, but by reference to the knowledge and standards of the time. Some degree of risk may be acceptable, and what degree can only depend on current standards. The onus is on the employee to show that the workplace was unsafe in this basic sense. Accordingly, the fact that a single person has suffered injury due to some feature of the workplace is not, without more, proof that the workplace was unsafe (*Baker,* Lord Mance at paras 64, 76, 80, 82). Similarly Lord Dyson considered that what is "safe" is an objective question in the

sense that safety must be judged by reference to what might reasonably be foreseen by a reasonable and prudent employer (*Baker*, Lord Dyson at para 111)

[95] *Baker* was concerned with an obligation to make and keep the workplace safe but Lord Mance saw what Lord Hope had said in *R* v *Chargot Ltd* [2009] 1 WLR 1 and *Robb* v *Salamis (M&I) Ltd* 2007 SC (HL) 71 where the relevant obligation was (as is the case with section 53(1) of the 2005 Act) to ensure, as far as was practicable, the safety of employees or workers, as consistent with what he considered to be meant by a safe workplace. *Baker* is therefore clear authority indicating that the obligation to ensure the safety of employees in respect of harm caused by fire has to be understood as an obligation to ensure the safety of employees in respect of reasonably foreseeable harm caused by fire. I do not quarrel with the way it is put by the Lord Ordinary at paragraph [250] of her Opinion:

> "It respectfully seems to me that the import of the *dicta* in *Chargot* and *Baker* is that the risk to be guarded against must be a material risk to safety, and it must be a foreseeable risk… Adapting this to the language of section 53, the duty is to ensure the safety of an employee in respect of material and foreseeable harm caused by fire in the workplace. The duty does not extend to ensuring against nonmaterial or unforeseeable risk of harm caused by fire in the workplace."

Second Issue: Was There a Prima Facie Breach?

[96] In *Baker* in relation to section 29(1) of the Factories Act 1961 Lord Mance held that the onus was on the employee to demonstrate that the workplace was unsafe. By parity of reasoning in the present case it is for the pursuer to demonstrate that his safety was not ensured in respect of harm caused by fire, in other words that the result described in section 53(1) was not achieved (cf *R* v *Chargot* at para 21). Once that is demonstrated it can be said that the pursuer has established a *prima facie* breach of duty. Mr Di Rollo submits that the pursuer has discharged the onus upon him to establish *prima facie* breach. The Lord Ordinary had accepted that he had suffered harm caused by fire in the form of PTSD and depression in reaction to his fear that he would die on

finding himself isolated on the sloping roof with no effective or sufficient means of escape in the face of thick smoke blocking any means of egress. She should therefore have found that, *prima facie,* there had been a breach of section 53(1). This was a case such as those referred to by Lord Hope in *Chargot* at paragraph 22 where the facts speak for themselves.

[97] The Lord Ordinary rejected the argument that it was sufficient for the pursuer to prove that a fire had occurred and that he had been injured (Opinion paras [251] to [253]). In her view it was necessary for the pursuer to identify and prove the particular failures on the part of the defender that had the result that the defender had failed to ensure the pursuer's safety from harm. As he had failed to prove the only failure identified by him (not providing more than one means of egress), the pursuer had not established even a *prima facie* breach of section 53(1). No issue of reasonable practicability arose.

[98] Addressing Mr Di Rollo's argument head on involves accepting, as I would accept, a necessary component in the pursuer's case and that is that "harm" in the section 53(1) sense includes pure psychiatric injury. It also involves accepting that this pursuer did indeed suffer harm "caused by fire in the workplace". As I have already observed, there is essentially nothing in the Lord Ordinary's Opinion by way of detailed discussion of the causation of the pursuer's medical condition. The pursuer's experience is narrated in very brief terms and there is little or nothing about the supporting medical evidence. Be that as it may, the Lord Ordinary accepted that the pursuer suffered from a recognised psychiatric illness in the form of PTSD and depression and she accepted that this was "the effect that his experience on the Absorber had on him" (Opinion paragraph [275]). While it is not spelled out, I would take it that it was accepted by the Lord Ordinary (and perhaps also by the defender) that the pursuer's PSTD was a direct consequence of his being in fear for his life, as is recorded at paragraph [70] of the Lord Ordinary's Opinion. As I would construe section 53(1), in order to amount to "harm" as that word is to be

understood in the context of "safety …in respect of harm", the relevant psychiatric injury would have to be reasonably foreseeable. Now, it is the case that the Lord Ordinary concluded (at paragraph [201] of her Opinion) that the risk of fire at the stage of construction reached was not foreseeable to the defender. I shall have to return to that. However, there is no finding that, given his experience on the Absorber, it was not reasonably foreseeable that the pursuer would in consequence go on to develop PTSD. Indeed, I would see it as implicit in the Lord Ordinary's findings that she accepted that the pursuer's PTSD was a reasonably foreseeable (and therefore direct) consequence of his becoming isolated on the sloping roof by smoke from the fire.

[99] As Miss Shand pointed out under reference to para 30 of the speech of Lord Hoffmann in *Rothwell*, the reasonable foreseeability of psychiatric illness is to be judged by reference to the test of whether it was reasonably foreseeable that the event which actually happened would cause psychiatric illness to a person of reasonable fortitude. What actually happened in the present case was that the pursuer was able to make his way to the sloping roof, that thick smoke cut off his egress from that roof, but that, having been able to shout to workmates, he was taken off the sloping roof by a cherry picker having previously been offered the option of accompanying the OPUS team wearing breathing apparatus, all this having occurred within less than 13 minutes of the pursuer becoming aware of the fire. Clearly, there are elements in that account: its relative brevity, the fact that the pursuer was in the open air and able to communicate with workmates, the fact that he apparently knew about the availability of a cherry picker, which might be thought to have ameliorated the experience and therefore made an adverse reaction less likely (as noted at paragraph [45] above, this point was advanced rather more strongly by Miss Shand in the course of submissions) but, on the other hand, the Lord Ordinary accepted that the pursuer thought he was going to die due to the development of the fire. She does not find this to have been unreasonable. That is despite the rapid arrival of the OPUS team and the availability of the

cherry picker. Thus, even if I am wrong in reading the Lord Ordinary's Opinion as including an acceptance that the pursuer's PTSD was a reasonably foreseeable consequence of his experience, on the admittedly limited information available I would nevertheless see it as appropriate to approach the case on the basis that the pursuer suffered harm (in the form of reasonably foreseeable psychiatric injury) and that this was "caused by fire in the workplace" because it was smoke from an undoubted fire which prevented the pursuer from making an unassisted escape and it was his resulting fear that gave rise to his PTSD and depression.

[100] That may be said to step over the Lord Ordinary's finding at paragraph [201] of her Opinion that the risk of fire at the stage of construction was not foreseeable to the defender. As to that I would uphold Ground (iii) of the pursuer's grounds of appeal. The pursuer avers that the risk of fire and its unpredictability have been known for many years. That no doubt is true, although the risk of fire will vary depending upon circumstances and for the reasons set out at paragraphs [196] and [197] of her Opinion the Lord Ordinary was entitled to find that the risk of a fire on the Absorber on 23 March 2009 was very low indeed. That is very relevant when it comes to consider whether it would have been reasonably practicable for the defender to have done more by way of the taking of fire safety measures, but as I would construe section 53(1) the existence of some risk of fire must be taken as a given. In other words the duty is to ensure the safety of employees in the event of fire. The level of risk will determine the nature of the fire safety measures that must be taken in order to enable the employer to comply with his section 53(1) duty but in any consideration of whether that duty has been complied with it is to be presumed that fire may occur. The possibility of fire is enough.

[101] In my opinion the pursuer accordingly has established a *prima facie* breach of the section 53(1) duty.

Third Issue: Did the Defender Satisfy the Onus as to Reasonable Practicability?

[102] While the onus is on the defender to show that everything that was reasonably practicable to do was done, I would expect a pursuer who contends that that onus has not been discharged to be able to point to the fire safety measures which were not taken and which, had they been taken, would have prevented the pursuer from suffering harm. When pressed on this Mr Di Rollo listed three respects in which measures had not been taken: (1) secure and effective means of escape; (2) a warning of the fire; (3) the prevention of spread of fire. However, so Mr Di Rollo submitted, making a proper risk assessment and then reviewing it was the key, as had been pointed out by Lord Reed and Hodge, with whom the other Justices of the Supreme Court had agreed, in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at paragraph 89. It was Mr Di Rollo's submission that it had not been established that the defender had carried out and then reviewed a suitable risk assessment as it was required to do by section 53(2)(a) and (3)(b).

[103] I turn first to the matter of risk assessment. In *Kennedy* the Supreme Court agreed with the proposition which had originally been stated by Smith LJ in *Allison* v *London Underground Ltd* [2008] ICR 719 at para 59, that a risk assessment was meant to be a blueprint for action and that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. I must accept that and I would further accept that that approach is reflected in the structure of section 53(2) and (3): the imposition of an obligation to make an assessment of risks with a further obligation to take fire safety measures to ensure the safety of employees in respect of these risks; and the imposition of an obligation to keep the initial assessment of risks under review with an obligation to take fire safety measures to ensure the safety of employees in respect of anything emerging on that review. There is therefore no question as to the applicability of an approach to the analysis of the relevant substantive duties to reduce risks which is by reference to a risk

assessment that is designed to identify these risks. However, the point made by Smith LJ and noticed by the opinion of the Supreme Court remains: the failure to carry out a sufficient and suitable risk assessment and therefore the failure to discharge a statutory obligation to carry out such a risk assessment is never the direct cause of an injury. What, in the context of section 53 of the 2005 Act, may be the direct cause of an injury is a failure to take a particular fire safety measure; hence Mr Di Rollo being pressed to identify such a fire safety measure.

[104] In the present case, given the uncontroverted evidence about the defender's health and safety regime (which included means of extinguishing fire and providing on-site rescue) as summarised by the Lord Ordinary at paragraphs [132] to [166] of her Opinion, it would appear that it might have been held that the defender had duly carried out and then reviewed an assessment of the workplace for the purpose of identifying any risks to the safety of the employer's employees in respect of harm caused by fire. However, it would appear that no document specific to a fire risk assessment at the construction phase had been produced to the court and, as Miss Shand confirmed, there was no express finding by the Lord Ordinary that section 53(2)(a) and (3)(a) duties had been discharged. I take them therefore not to have been discharged, in other words, breached. However, at paragraph [156] of her Opinion the Lord Ordinary points to there having been no cross-examination of the relevant witness led by the defender (Mr Richardson) to the effect that, notwithstanding the totality of the documentation produced by the defender to which he had spoken, there was some specific deficiency as regards the defenders' safety procedures on site. It was not put to him that the lack of a fire risk assessment relating to the construction phase resulted in any particular omission of a safety procedure or precaution, much less one that had any causal consequence for the pursuer. It was not put to him that the number or location of the means of escape was inadequate or insufficient. The Lord Ordinary returns to the issue of causation at paragraph [171] of her Opinion where she

states "given my findings on the extreme rapidity of the development and spread of the smoke, it is unlikely that any breach of duties in relation to ...the preparation of a specific fire risk assessment for the construction phase ...would have had any causal significance". That finding puts matters beyond doubt: while, on the evidence, the defender may have been in breach of its duties under section 53(2)(a) and (3)(a) to carry out and then review a risk assessment, that was not a cause of the pursuer's injury, either directly or indirectly.

[105] I return then to the three matters in respect of which Mr Di Rollo submitted that there were reasonably practicable measures which could have been taken but which were not. The first is an alleged failure to provide secure and effective means of escape. At least if Mr Di Rollo had presented his submissions in the same way before the Lord Ordinary as he did before this court, I would have taken this complaint to have been decisively determined against the pursuer by the Lord Ordinary's finding at paragraph [258] of her Opinion, albeit upon what was for her a hypothesis (but which I take to have been the case) that a *prima facie* breach had been established, that the defender had discharged the onus of showing that it was not reasonably practicable for it to do more than it did in respect of means of egress. However, whereas before the Lord Ordinary the case for the pursuer had focussed on the number of means of egress, before this court the complaint was not about the number of means of egress but rather their inadequacy as means of escape in a fire. As Mr Di Rollo put it: there was no finding that there were secure and effective means of escape, there was no finding about fire escape signs, there was no findings about any designated fire escape.

[106] Listening to Mr Di Rollo, I understood what he meant by a secure and effective means of escape was a route which was in some way protected from or at least free from smoke. I was not clear just how he envisaged this being achieved because he did not explain. Absent any explanation of what it is contended should have been done the court is not in a position to

identify a reasonably practicable fire safety measure which the defender had failed to take and the pursuer must therefore fail on "secure and effective means of escape" but there is also the point that in fact the pursuer was provided with a secure and effective means of escape, indeed two such means escape in the forms of the arrival of the OPUS team with breathing apparatus and the cherry picker. To that it might be objected that the means of escape may have arrived in time to prevent physical harm to the pursuer but they did not arrive in time to prevent psychiatric harm. While that may be so, the obligation in section 53(1) is to ensure safety in respect of harm as far as is reasonably practicable. The concepts of safety and reasonable practicability involve consideration of what is foreseeable, given knowledge of particular circumstances. While psychiatric harm may be reasonably foreseeable as a matter of generality if someone is in fear for his life, I would not see it to be reasonably foreseeable that someone who, *ex hypothesi*, would not suffer psychiatric harm if able to make his own way from a burning building, would suffer psychiatric harm if his only means of escape required the assistance of others.

[107] As far as the complaint about lack of signage and failure to designate a fire escape are concerned, particularly when one has regard to the Lord Ordinary's finding at paragraph [171] of her Opinion that it was unlikely that any breach of duties in relation to signage, training and instruction would have had any causal significance, I do not understand how it can be said that the presence of signs or the designation of a route as a fire escape would have made any difference to the outcome.

[108] The second respect in which Mr Di Rollo said that measures had not been taken was that there had been no warning of a fire. That assertion would seem to be contradicted by the acceptance by the Lord Ordinary of what appeared in the report of the POI, that the first signs of fire and smoke were detected at about 14:57 hours and that the evacuation alarm was sounded at

15:07. The pursuer may have become aware of smoke before that. His fellow employee, John Robinson, shouted to him that there was a fire. If Mr Di Rollo meant to suggest that an earlier warning could or should have been given, there are no findings which would allow the court to come to a view on that. A further difficulty for the pursuer is again the finding of the Lord Ordinary which is recorded at paragraph [171] of her Opinion. That includes her conclusion that it is unlikely that any breach of duty in relation to alarms would have made any difference.

[109] The third respect in which Mr Di Rollo said that measures had not been taken was the prevention of spread of fire. As with the other matters to which he referred, Mr Di Rollo did not develop what he contended should have been done which had not been done or explain what effect it would have had in preventing the pursuer's injury. Moreover, as Mr Di Rollo accepted, it is not known where (or how) the fire started. Accordingly it is simply impossible to come to any conclusion as to what effect (entirely unspecified) measures for the prevention of the spread of fire would have had on the circumstances in which the pursuer found himself.

[110] The defender pled a case that it had done what was reasonably practicable to do in discharge of its section 53(1) duty. It led evidence in support of that case which was accepted by the Lord Ordinary, as is discussed by her in her Opinion at paragraphs [132] to [166]. In my opinion the pursuer has failed to identify any fire safety measure which was not in place and which, had it been in place, would have prevented the pursuer suffering the harm in respect of which he sues. Moreover, at the time of what the pursuer describes as his accident, the Lord Ordinary's (perhaps surprising) assessment was that the risk of fire was not foreseeable to the defender. Accordingly, the defender has discharged the onus upon it to show that it did what was reasonably practicable. The pursuer's case of breach of section 53(1) fails.

Breach of the Section 53(2) and (3) Duties

[111] While it cannot be said that the point emerges very clearly from the pursuer's pleadings, once it is accepted, as I have accepted, that subsections (2) and (3) of section 53 of the 2005 Act impose duties which are additional to and independent of what I have described as the over-arching duty imposed by subsection (1), then, on the basis of his averment at statement 6 that "said claim is based on the defenders' breach of statutory duties imposed upon them by section 53 of the Fire (Scotland) Act 2005", even if he fails on section 53(1) it is open to the pursuer to argue that he can succeed on section 53(2) and(3). There is, however, an overlap in the evidence which bears on the section 53(1) case and such cases as can be made under reference to section 53(2) and (3). That evidence is to the effect that if it be assumed that there was a breach of the obligation to compile section 53(2)(a) and (3)(a) compliant risk assessments then this was not of causal significance. The pursuer has failed to identify any fire safety measure which was not in place and which, had it been in place, would have enabled the defender to comply with its section 53(1) duty. The section 53(2) and (3) case fails.

The Regulation 40 Case

[112] The duty imposed by regulation 40 of the (now repealed) CDM Regulations is not subject to considerations of reasonable foreseeability. It relates to routes and exits and therefore the availability of a cherry picker and the OPUS team is irrelevant to the question of whether it has been breached. However, the obligation is to provide a "sufficient" number of such emergency routes and exits which are "suitable". In assessing suitability regard must be had to Regulation 40(2) which requires that they lead as directly as possible to an identified safe area (assumed in the present case to be synonymous with ground level) but the determination of what is suitable, as with the determination of what is sufficient, implies the exercise of foresight,

in other words an assessment of what is reasonably likely to be required, in the light of the stage which has been reached in the development of the construction site. In the course of submissions Mr Di Rollo appeared to challenge that reading of the regulation by suggesting that if in circumstances of emergency (however unlikely) which actually arose the number and nature of routes and exits did not prove sufficient and suitable, then that would amount to a breach of the regulation. I do not accept Mr Di Rollo's approach. I see it as contrary to the language used and it would deprive the regulation of what I would see as its rational purpose as one provision in Part 4 of the Regulations, the whole of which is intended to ensure that construction sites are planned and then operated in a way which safeguards the health and safety of employees.

[113] There is no reverse onus imposed by Regulation 40. It is therefore for the pursuer to plead and prove what it was about the routes and exits from the Absorber which was not sufficient or not suitable. The only case pled related to the sufficiency of the number of exit routes, although, as appears from the Lord Ordinary's Opinion, evidence was led under reference to HSG 168 (as to which, at paragraph [267], she found no breach). The pursuer's contention (and only contention) was that there was only one exit and one exit was not sufficient. As explained at paragraphs [260] to [268] of her Opinion, having considered the pursuer's case based on Regulation 40 the Lord Ordinary rejected it, the short point being that she found on the evidence that three routes were provided, rather than one. Having found that its factual basis had not been established, the Lord Ordinary was bound to reject the Regulation 40 case, as would I.

[114] I would move your Lordships to refuse both the reclaiming motion and the cross-appeal.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 75
PD2285/11

Lord Brodie
Lord Drummond Young
Lord Glennie

OPINION OF LORD DRUMMOND YOUNG

in the cause

by

MELVILLE DOW

Pursuer and Reclaimer

against

AMEC GROUP LIMITED

Defenders & Respondents

Pursuer and Reclaimer: Di Rollo QC, Blessing; Thompsons
Defenders and Respondents: Shand QC, McConnell; Morton Fraser LLP

28 November 2017

[115] This case concerns the nature and extent of an employer's liability under section 53 of the Fire (Scotland) Act 2005 and regulation 40 of the Construction (Design and Management) Regulations 2007 (2007 No 320). The construction of the former section, in particular, is a matter of general importance because the section is structured in a manner that is typical of modern health and safety legislation. Furthermore, that structure is different in important respects from common law negligence and also from the older United Kingdom health and safety legislation found in, for example, the Factories Act 1961. For that reason neither the

common law nor the earlier health and safety legislation can be considered a reliable guide to the application of section 53 and other analogous provisions.

[116] The facts of the case have been fully set up by your Lordships. I agree with the conclusions reached, but in view of the importance of the type of legislation that is under consideration I think it appropriate to set out my own reasoning. What I have to say is largely prefigured in the English case of *R* v *Chargot*, [2008] UKHL 73; [2009] 1 WLR 1; consequently my comments can be fairly brief.

Section 53(1) of the Fire (Scotland) Act 2005

[117] Section 53 is headed "Duties of employers to employees". Subsection (1), which is the most important provision for present purposes, is in the following terms:

> "Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace".

That subsection has two components: a duty to ensure the safety of employees in respect of harm caused by fire, and a defence of reasonable practicability. The primary duty is in my opinion a strict duty, in the sense that it is a duty to achieve a specified result; if that result is not achieved there is a prima facie breach of the duty. The strict nature of the duty follows from the use of the word "ensure". In *R* v *Chargot*, sections 2 and 3 of the Health and Safety at Work etc Act 1974 were considered. Section 2(1) of that Act provided that it should be the duty of every employer "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". Section 3(1) provided that it should be the duty of every employer "to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety". In both cases, the duty was expressed as a duty to

"ensure" a particular result, subject to a defence of reasonable practicability. The import of such a duty was described by Lord Hope at paragraph 17:

> "These duties are expressed in general terms…. They describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words 'so far as is reasonably practicable'. If that result is not achieved the employer will be in breach of a statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it".

It is important to notice that statutory schemes of this nature are not dependent on common law negligence. Such schemes are based on a strict duty to achieve a specified result qualified by an express defence, and it is immaterial whether or not there has been a want of reasonable care on the part of the employer.

[118] An injured employee obviously requires to establish that the specified result, in the case of section 53(1) safety from fire, has not been achieved. Once that has been done, however, the onus of establishing the defence, that effective precautions were not reasonably practicable, falls on the employer. This proposition was not in dispute in the present case, and it is well established in the authorities: see, for example, *Nimmo* v *Alexander Cowan & Sons Ltd*, 1967 SC (HL) 79, *Jenkins* v *Allied Ironfounders Ltd*, 1970 SC (HL) 37, *Gibson* v *BICC & Co Ltd*, 1973 SC (HL) 15, and *Chargot* itself at paragraphs 19-21. In the last of these cases section 40 of the relevant statute, the Health and Safety at Work Act 1974, expressly provided that when a duty was imposed to do something so far as reasonably practicable, it was for the accused, or employer in civil proceedings, to prove that it was not reasonably practicable to do more than was in fact done. The earlier cases, however, concern legislation that said nothing about the burden of proving the defence. This conclusion is supported by practical considerations. The information required to determine whether it is or is not reasonably practicable to take precautions for the safety of employees should be readily available to the employer. The employer is enjoined to carry out risk assessments; in the case of section 53 of the 2005 Act

subsection (2)(a) requires each employer to carry out an assessment of the workplace for the purpose of identifying any risks to the safety of employees in respect of harm caused by fire. The risk assessment should address the risks to employees that may foreseeably arise, and also the question of what is reasonably practicable. Moreover, information about such matters as the structure of buildings, the availability of fire escapes and the existence of equipment to prevent or control fires should be within the records of the employer. These are all matters that are relevant to the defence that effective precautions were not reasonably practicable.

[119] It is also, I think, significant that section 53 of the 2005 Act, like much modern health and safety legislation, is based on European Union legislation in this field, in particular the Council Directive 89/391/EEC of 12 June 1989 (commonly known as the Framework Directive). Article 5.1 of the Directive provides that an employer "shall have a duty to ensure the safety and health of workers in every aspect related to the work". Article 6.1 provides that an employer "shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks". Article 6.2 sets out a number of general principles of prevention, which include the avoidance of risks, the evaluation of risks which cannot be avoided, and combating risks at source. To the extent that an employee is injured through a breach of legislation based on the Directive, it is implicit in the legislation that liability should be strict, and that the available defences should be limited. Many of the Member States of the European Union already had damages regimes based on strict liability, and the same applies to the EU-derived legislation that followed the 1989 Directive. In the United Kingdom strict liability was the norm, as found in the Health and Safety at Work etc Act 1974 and as explained in earlier decisions of the courts dating back to the leading cases of *Groves* v *Lord Wimborne*, [1898] 2 QB 402, and *Black* v *Fife Coal Co Ltd*, 1912 SC (HL) 33.

[120] That approach is supported by important economic considerations. The underlying economic theory is that the cost of workplace accidents is part of the cost of production of a good or service, and the most efficient way of absorbing that cost is by passing it to the ultimate consumer as part of the price of the product. The employer is obliged to obtain insurance in respect of liability to employees, and the premiums payable for that insurance are ultimately reflected in the price charged by the employer to customers. This is obviously more efficient than, for example, expecting employees to insure against the possible cost of injury through an accident at work. Furthermore, strict liability has an advantage over fault-based liability in that it acts as an incentive to reduce the incidence of hazardous activities; the employer knows that if the risk of injury comes to pass he will be liable, and thus he is encouraged to take steps to reduce the frequency with which the risk is incurred. The ultimate result is that the cost of workplace accidents in the course of a particular activity is met through the price paid by those who consume the good or service that is produced.

[121] The Lord Ordinary placed considerable reliance on the decision of the UK Supreme Court in *Baker* v *Quantum Clothing Group Ltd*, [2011] 1 WLR 1003. That case involved a number of claimants who had been employed in the knitting industry prior to 1990 and claimed to have suffered hearing loss as a result of exposure to excessive noise during that employment. The claim was based on common law employer's liability and on section 29(1) of the Factories Act 1961. Common law liability is obviously based on fault, which in turn is based on the concept of reasonable foreseeability. Section 53(1) of the 2005 Act, by contrast, is based on strict liability. For this reason alone I consider that cases on common law liability are of little or no assistance in dealing with liability under modern health and safety legislation, including the 2005 Act.

[122] I am further of opinion that the discussion in *Baker* of section 29(1) of the Factories Act 1961 is of little relevance to the present case. First, section 29(1) is differently worded and differently structured from section 53(1) of the 2005 Act. In particular, section 29(1) does not prescribe that a result (the safety of employees) must be ensured; it rather prescribes that every place of work shall, so far as is reasonably practicable, be made and kept safe for persons working there. That difference is in my view significant. If a failure to ensure the safety of an individual is to be established, all that is required is to demonstrate that the individual has been injured while at work. In order to establish that a place of work has been kept safe, however, it is necessary to assess the potential hazards and their magnitude, to discover whether the criterion of "safety" has been met. Secondly, the discussion in *Baker* is largely concerned with the historical application of statutory standards, at a time when knowledge of the causes of deafness had been less clear than it subsequently became. For this reason the majority opinions of Lords Mance and Dyson are largely concerned with whether the safety standards imposed by section 29(1) are absolute or relative: in other words, whether contemporary standards of safety could apply to past events see: Lord Mance at paragraphs 64 et seq and Lord Dyson at paragraph 111. That is in itself an interesting and potentially difficult question, but it has no bearing on cases such as the present, where there is no suggestion that standards have changed during the time frame that is involved.

[123] Thirdly, a significant part of the discussion in *Baker* concerns the relevance of foreseeability to the statutory test laid down in section 29(1): see Lord Mance at paragraphs 68-76 and Lord Dyson at paragraphs 121-122. The majority of the court held that reasonable foreseeability was relevant to the question of whether a place of work was "safe", in addition to being relevant to the defence based on reasonable practicability. In so doing, they appear to have rejected the analysis of section 29(1) in Scottish cases, notably *Mains* v

Uniroyal Engelbert Tyres Ltd, 1995 SC 518. In the latter case an Extra Division, following a considerable number of earlier cases, decided that reasonable foreseeability was not relevant to the question of whether a workplace was safe for the purposes of section 29: see Lord Sutherland at 522-528 and Lord Johnston at 532-537. The decision in *Mains* is of course binding on this court. In cases where there is a conflict between a decision of the Inner House and an English decision in the United Kingdom Supreme Court on a similar matter, it is normal to look for points of distinction in order to follow the interpretation of the law that seems likely to prevail in the long term. The decision in *Baker*, however, was by a bare majority, and the case includes powerful dissenting opinions from Lords Kerr and Clarke; in this connection I would draw particular attention to the reasoning of Lord Clarke at paragraphs 200-204.

[124] Furthermore, in my view the arguments advanced by the Extra Division in *Mains* (and adopted by Lord Clarke at paragraphs 200-204 of his opinion in *Baker*) are highly persuasive. In the first place, if a requirement of reasonable foreseeability is to be implied into the primary duty in section 29(1), to keep workplaces "safe", it is difficult to understand what the section adds to the common law. If so, the purpose of enacting the section is far from obvious. In the second place, section 29 includes an express requirement of reasonable practicability as a defence to liability. This requirement is express, and if the intention had been to impose a requirement of reasonable foreseeability Parliament would surely have done so expressly. In the third place, the discussion in the majority opinions in *Baker* is largely concerned with the question of whether the concept of safety is absolute or relative. It is possible, however, to accept that there is a degree of historical relativity in the concept but still to hold that, at any given moment, the standard of safety is objective. Consequently, if objectively there is a risk to the safety of employees, the employer is under a duty to eliminate that risk, to the extent

that it is reasonably practicable to do so. That is wholly in accordance with the general policy of modern health and safety legislation, which is to eliminate risks whenever that is practicable.

[125] In the fourth place, the reasoning of the majority in *Baker* largely proceeds on the basis that "safe" and "dangerous" are antonyms: see Lord Clarke at paragraph 203. That is no doubt true as a matter of language, but it does not follow that they are equivalent but opposite as a matter of substance. If a workplace is "safe", that means that there are no dangers that are sufficiently material to constitute a significant risk to employees. If there is a single "danger" of sufficient materiality, however, that means that the workplace is not "safe". Thus "safe" implies no "dangers", whereas "dangerous" only requires a single danger. For this reason I think that "safe" and "dangerous" should not be treated as functionally equivalent terms. In the fifth place, the approach taken by the majority in *Baker* may be based in some measure on the view that an undue burden is not to be placed on employers: see the very brief concurring opinion of Lord Saville at paragraph 136. This ignores, however, the fundamental economic analysis that applies to injured employees. The cost of injuries to employees is properly regarded as a cost of production, and it is invariably dealt with through the use of employer's liability insurance. On that basis, the notion of an "undue burden" is irrelevant. The cost will be met by insurance and passed on to customers. That will apply to all enterprises producing the good or service in question. If one particular enterprise has a poor safety record, it may of course require to pay higher insurance premiums, but that is merely a consequence of its own defective safety regime.

[126] For present purposes, however, it is unnecessary to reach any concluded view on the construction of section 29. This case is concerned with the construction of section 53(1) of the Fire (Scotland) Act 2005, which is based on the general scheme of the Framework Directive

and is fundamentally different in important respects from earlier United Kingdom health and safety legislation, including the Factories Act 1961. Section 53(1) is result-based, according to its terms. Consequently, if the safety of an employee is not ensured, there is prima facie liability under the subsection, subject only to the defence that taking precautions was not reasonably practicable. That is fundamentally different from section 29 of the Factories Act 1961, and is rather paralleled by the statutory provisions, sections 2 and 3 of the Health and Safety at Work etc Act 1974, that were considered in *Chargot*. When a statutory duty requires that result should be "ensured", I find it impossible to understand how reasonable foreseeability can be relevant. What matters is the result, not whether it could be foreseen. That is not to say that reasonable foreseeability is irrelevant to provisions such as section 53(1), but in my opinion it is only relevant at the stage of the defence, that the employer did everything that was reasonably practicable to protect employees' safety.

[127] In the present case the Lord Ordinary held, relying on dicta from both *Chargot* and *Baker*, that for the purposes of the primary obligation in section 53(1), the risk to be guarded against must be a material risk to safety, and must be a foreseeable risk. She held that the risk disclosed in evidence was not foreseeable, and that accordingly there was no breach of the primary obligation in section 53(1). I agree that under section 53(1) the risk must be material; that is the clear import of *Chargot*, and there are obvious reasons for requiring a minimum threshold of seriousness before a risk can be taken into account in determining employer's liability. I do not agree, however, that the risk must be a "foreseeable" risk. If that were so, the safety regime contained in section 53 and other provisions formulated in accordance with the Framework Directive would add relatively little to the common law. That would appear to negate the fundamental purpose of enacting such provisions: to improve standards of safety in the workplace and to ensure that those who are injured at work receive proper

compensation, in accordance with the fundamental principles that I have already discussed. Furthermore, as already indicated, I do not think that foreseeability is relevant if a state of affairs must be "ensured".

[128] The Lord Ordinary further held that the duty in section 53(1) is informed by subsections (2) and (3) of the same section. Subsection (2) requires, in summary, that an employer should carry out a risk assessment in respect of harm caused by fire in the workplace and take such fire safety measures as are necessary to comply with subsection (1). Subsection (3) provides that, when a risk assessment is undertaken under subsection (2), the assessment must be reviewed in accordance with specified regulations and the employer must take the fire safety measures necessary to comply with the duty imposed by subsection (1). In my opinion the Lord Ordinary's view on this matter is not correct. First, subsection (1) is the primary safety provision in section 53, and is expressed in a form that corresponds to a great deal of other safety legislation, now largely based on the Framework Directive. In these circumstances it is difficult to understand why that subsection should not be construed in accordance with the decided cases on provisions of health and safety legislation that are similar in form to subsection (1), notably *Chargot*. Secondly, the duties in subsections (2) and (3) are in my view designed to fulfil a different purpose from subsection (1). Subsection (1) contains the primary obligation to ensure safety, and will normally only be relevant if an actual injury, or at least a danger, is caused by fire. Subsections (2) and (3), by contrast, are designed to ensure that the employer carries out and implements regular risk assessments, to prevent danger from fire from arising. Thirdly, while a risk assessment may be important in determining whether the defence based on reasonable practicability is made out, it is not in any way conclusive, and is not accorded any particular status in assessing reasonable practicability.

[129] On the foregoing analysis, I am of opinion that the primary requirement that an employee must establish in proceedings based on section 53(1), that an employer has failed to ensure the safety of employees in respect of harm caused by fire in the workplace, is satisfied in the present case. The threat to the pursuer was caused by a fire. He perceived the primary threat as smoke rather than the fire itself, as he had been instructed that smoke presented a greater danger to those in the vicinity of a fire than flames or heat. In my opinion it is obvious that smoke is a serious danger, and consequently the existence of large quantities of smoke in a workplace is a threat to the safety of employees caused by fire. I accordingly disagree with the Lord Ordinary's conclusion on the question of whether a breach of the primary duty in section 53(1) has been established. In my opinion such a breach has clearly been established, and foreseeability is irrelevant to that question.

Reasonable Practicability

[130] The next question is whether or not it was reasonably practicable to protect employees such as the pursuer from the threat of fire, and in particular smoke, in the situation that occurred at the time of the incident on 23 March 2009. The Lord Ordinary held that, if the primary requirement of section 53(1) had been satisfied, the defenders had discharged the onus of establishing that it was not reasonably practicable for them to do more than they did in respect of means of egress. I agree with the latter conclusion, for the following reasons.

[131] As I have indicated, I am of opinion that it is at the stage of considering the reasonable practicability of taking precautions that the question of foreseeability becomes relevant. If something cannot be foreseen, on the ordinary use of language it cannot be reasonably practicable to do anything about it. This has been accepted in previous cases, for example *Mains* v *Uniroyal Engelbert Tyres Ltd*, *supra*, where at page 528 Lord Sutherland quoted with

approval earlier statements of the law by Lord Cameron in *Gillies* v *Glynwed Foundries Ltd*, 1977 SLT 97, a case on section 28 of the 1961 Act:

> "The idea of 'reasonable practicability' necessarily implies that a balance should be struck between the degree and quality of risk of injury in the circumstances arising out of the appearance and presence of an object on the factory floor against the expenditure of time, effort and money in providing measures to eliminate or materially reduce that risk. If such a balance is to be struck…, then it is impossible to eliminate wholly the element of foreseeability from the assessment of the degree and nature of the risk of injury involved as a consequence of an object reaching the floor and becoming an obstacle to passage, and thereafter in reaching a decision as to the practicability and reasonableness in the circumstances of adopting measures designed to eliminate or at least materially lessen the risk in question… [Y]ou must be in a position to make an informed forecast of the incidence and nature of the risk to be guarded against and of the probable effectiveness of the preventive measures you will require to adopt in order to discharge your statutory duty".

For my part, I agree entirely with those comments, which appear to me to represent common sense.

[132] For the defence in section 53(1) and other similar sections to apply, the employer must establish on a balance of probabilities that it was not reasonably practicable to ensure the safety of employees in respect of harm caused by fire; more precisely, the employer must establish that was not reasonably practicable to protect against the particular harm suffered by the injured employee. That inevitably involves striking a balance. On one hand consideration must be given to the magnitude of the risk presented by fire: the degree of likelihood that fire will break out and spread, how quickly it might spread, the extent to which it might generate smoke, and the seriousness of the likely consequences if fire does break out. On the other hand must be placed the cost and difficulty of taking precautions to prevent fire from breaking out, to prevent it from spreading if it does break out, by extinguishing it or otherwise, and to provide means of escape for employees who may be affected by the fire. In the present case the last of those factors is particularly important. In relation to the magnitude of the risk presented by fire, it is perhaps obvious that if a fire is not controlled the danger is

both obvious and serious. Moreover, the danger arises not only from the flames of the fire itself but also from smoke issuing from the fire.

[133] On the facts of the present case, I am of opinion that the defenders have established on a balance of probabilities that they had done all that was reasonably practicable to ensure the pursuer's safety in respect of harm caused by fire. I reach this conclusion for the following reasons. First, at the stage that the works had reached, the risk of fire was low. The defenders had hot work procedures which were available at the time of the fire. On the day in question, however, no hot work was proceeding. The actual causes of the fire were obscure; the POI report recorded that its cause was unknown. Hot work, discarded cigarettes and internal lighting were all excluded as potential causes in that report. The provisional conclusion in the report was that the ultimate cause of the fire was likely to have been either a chemical reaction within the absorber chamber or some form of human agency. The risk of fire from chemical reactions had been assessed as high during the construction phase, but that had passed and the last application of chemicals had been three months before the incident, and it had taken place under highly controlled conditions. The report further concluded that deliberate human agency was unlikely. These factors taken together suggested a low risk.

[134] Secondly, the defenders had a health and safety plan in operation at the time of the incident. The plan is described by the Lord Ordinary, and involved daily site inspections and records of inter alia any fire hazards that arose. To the extent that hazards did arise, action was taken. Records were kept of any potential hazards on site, and weekly meetings were held which involved the health and safety personnel of all of the contractors on site. Control was exercised over hot work through a hot work permit system, and when such work was performed a fire watcher accompanied the tradesman in order to look out for any source of ignition and to put out sparks using a fire extinguisher and fire blanket. Regular fire alarm

drills were held, and fire extinguishing equipment was maintained. Finally, in extreme cases a cherry-picker was available on site which could be used to rescue workers; that is in fact how the pursuer was rescued. Thus substantial means were in place to eliminate the risk of fire.

[135] Thirdly, the pursuer's positive case was largely based on the proposition that there was only one means of egress from the scaffolding where he was working; that, it was said, was why he came to be trapped without an escape route. The defenders, by contrast, contended that there were at least two routes that could be used to leave the absorber: one in the form of a staircase at the south-east point of the absorber and the other through an alternative staircase to the north, accessed by a somewhat complex route. The Lord Ordinary concluded that two routes were available off the absorber, as contended for by the defenders. She held that the smoke had developed and spread rapidly from the north, and that as it blew across the northern half of the absorber the pursuer's route in that direction was cut off. Consequently the existence of a second means of egress from the north side of the absorber was not causally relevant to the pursuer's predicament. Nevertheless, the fact that two routes existed is a factor that an employer would be entitled to take into account in determining whether all reasonably practicable precautions had been taken; providing two means of egress is an elementary but important safety precaution.

[136] Fourthly, the Lord Ordinary considered the travel distances to places of safety and relying on the evidence of Mr Sylvester-Evans, concluded that the distances on the structure complied with guidance on travel distances given in the relevant documents, HSG 168. Both parties agreed that that was the relevant standard. This by itself is an indication that the defenders took reasonable steps to combat foreseeable risks. Fifthly, rescue equipment was available on site. In addition to the cherry-picker that rescued the pursuer, he was attended

by an on-site rescue team, which was provided with breathing apparatus to avoid the effects of the smoke. Thus rescue measures (provided by Scottish Power) were in place, and these in fact proved effective in rescuing the pursuer before either flames or smoke did him any physical harm. That is I think a matter of some significance in assessing whether all reasonable precautions had been taken.

[137] Counsel for the pursuer placed particular stress on the fact that no risk assessment conforming to section 53(2) was available. I agree that in these circumstances it must be assumed that there was no risk assessment dealing with the danger of fire at the time and in the location of the accident. Nevertheless, the absence of risk assessment is not fatal to proving that all reasonably practicable precautions had been taken. The existence of an assessment is clearly of great assistance in establishing the statutory defence, but it is merely a factor in determining whether all reasonably practicable precautions have been taken.

[138] Overall, the steps that were taken by the defenders were in my opinion all that could reasonably be expected in order to deal with the foreseeable risk of fire. The smoke produced by the fire spread particularly rapidly and trapped the pursuer so that he was unable to make use of either of the available escape routes. He was, however, ultimately rescued using the systems that had been put in place, within a short space of time.

[139] Finally, I should record that I agree with your Lordships that the Lord Ordinary was correct in upholding the objection to evidence of bases for liability that were not prefigured on record, and in rejecting the argument that such an objection was inconsistent with the procedures for personal injury litigation under Chapter 43 of the Rules of Court. The passages quoted by your Lordships from *Nimmo* v *Alexander Cowan Ltd*, *supra*, and *Gibson* v *BICC & Co Ltd*, *supra*, are directly in point. The need to give notice requires that something must be said

about each ground of liability that is to be relied on, albeit that what is said under the Chapter 43 procedure may be fairly brief.

Section 53(2) and (3) of the Fire (Scotland) Act 2005

[140] Section 53(2) and (3) of the 2005 Act require an employer to carry out a risk assessment of the workplace in respect of harm caused by fire, to review the assessment in accordance with statutory guidance, and to take such fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1). Once it is held that there has been no breach of the obligation in section 53(1), however, any deficiency in the preparation or implementation of a risk assessment ceases to be causally significant, as all that the assessment would have required has been done. For that reason the pursuer's case under section 53(2) and (3) must fail.

Construction (Design and Management) Regulations 2007

[141] The pursuer's alternative case is based on regulation 40(1) of the Construction (Design and Management) Regulations 2007. This provision requires that, where it is necessary in the interests of the health and safety of any person on a construction site, a sufficient number of suitable emergency routes and exits shall be provided to enable any person to reach a place of safety quickly in the event of danger. In relation to this duty, regard must be had to the factors enumerated in regulation 39(2) of the same Regulations. In the present case, on the Lord Ordinary's findings, I am of opinion that a sufficient number of suitable emergency routes and exits were provided. For that reason I am of opinion that the pursuer's claim under this regulation must fail.

Psychiatric Injury

[142] In view of the court's decision on the defence based on reasonable practicability, it is unnecessary to consider whether the injury sustained by the pursuer, which was essentially psychiatric in nature and not associated with actual physical injury, was recoverable. I have some sympathy with the views expressed by Lord Brodie on this matter. In short, the pursuer was under threat of physical injury from the fire and smoke, and it was the fear of that physical injury that resulted in the psychiatric harm. Ultimately, however, I have come to the view that it is not necessary to reach a concluded decision on this aspect of the case; anything that might be said could only be obiter.

Conclusion

[143] For the foregoing reasons I agree that the reclaiming motion should be refused and that the court should adhere to the decision of the Lord Ordinary to assoilzie the defenders.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 75
PD2285/11

Lord Brodie
Lord Drummond Young
Lord Glennie

OPINION OF LORD GLENNIE

in the Reclaiming Motion

by

MELVILLE DOW

Pursuer and reclaimer

against

AMEC GROUP LIMITED

Defenders and respondents

Pursuer and reclaimers: Di Rollo QC, Blessing; Thompsons
Defenders and respondents: Shand QC, McConnell; Morton Fraser LLP

28 November 2017

Introduction

[144] The pursuer sues his former employers ("AMEC") for chronic post-traumatic stress disorder ("PTSD") said to have been suffered by him as a result of a fire on 23 March 2009 on Absorber Unit 3 at the Longannet Power Station. He sustained no physical injury. After a proof lasting some 11 days, and detailed submissions thereafter, the Lord Ordinary (Wolffe), by interlocutor dated 16 December 2016, rejected the pursuer's claim and granted decree of absolvitor.

[145] In this reclaiming motion (appeal), the pursuer appeals against that interlocutor. He contends that the Lord Ordinary erred both in fact and in law, but the main attack on her decision is that she erred in law. The respondent, AMEC, has served a cross-appeal seeking to uphold the decision of the Lord Ordinary on an additional ground on which the Lord Ordinary did not express a concluded view.

The Relevant Facts in Outline

[146] At the date of the incident the pursuer was 52 years old. He was employed by AMEC on the Longannet Power Station site as a labourer, working on an absorber (or flue gas desulphurisation) unit under construction at the Longannet Power Station.

[147] The purpose of such a unit is to remove or reduce the amount of sulphur in the gas emissions from the power station as part of an initiative to generate cleaner or, at least, less polluting energy. The process relies on the chemical reaction achieved by combining alkaline seawater with acidic flue gases in order to produce pH neutral emissions. This involves the construction of a large concrete box structure, known as "the chamber", in the immediate vicinity of the Longannet Power Station. The chamber, together with the external features on the structure, comprised the absorber. In operation the chamber would be sealed. Gas emissions from the power station would be pumped into the bottom of the sealed chamber through an inlet duct. The gases would rise up and, once treated, would be removed via the outlet duct. The gases would then be directed to the chimney to the west of the chamber. In the meantime, large volumes of seawater would be pumped to the top of the chamber. Through a series of pipes with branched arms (or splays), the seawater would be sprayed onto polypropylene "packing material" to wet it. As the gases rose up through the wet packing material, the desired chemical reaction would take place. The seawater flowing down

through this packing material would then be pumped away. In normal operation the chamber would effectively be a sealed concrete box filled with sea water, to which no worker would require to have internal access. Situated above the concrete chamber was the gas heat exchanger, a cylindrical structure of about 18 m in diameter which rotated on a central shaft when in operation. The circular cover to this gas heat exchanger, referred to as "the flange", was situated on the sloping roof of the chamber, the area from which the pursuer was rescued.

[148] The incident occurred when the pursuer was, with others, carrying out snagging works on the external parts of the absorber. The absorber was a complex structure externally, with a number of ducts and walkways at different levels. It is unnecessary to describe them in any detail. There was also some scaffolding but, at the time of the incident, construction was essentially complete and most of the scaffolding had been taken down. The absorber was in the process of being prepared for commissioning and, on the morning of the fire, one of the pumps had been activated and a large amount of seawater had been pumped into the absorber chamber.

[149] The fire broke out in the afternoon of 23 March 2009. A Panel of Inquiry was established by Scottish Power, the owners and operators of the power station. It issued an interim report but no final report was ever produced. That interim report concluded that the fire probably took hold inside the chamber of the absorber. However, the cause of the fire was unknown. There was no hot work or other activity going on, and the interim report excluded hot work, discarded cigarettes, tarpaulin and internal lighting within the chamber as possible causes of the fire. Although the polypropylene packing material was found by testing to be combustible (and there was no evidence led at proof to suggest that the defenders or Scottish Power were aware of its combustibility at the time) it would have required exposure to a naked flame for a period of approximately 8 – 20 seconds before it would ignite. There was no

naked flame in the vicinity. The provisional conclusion reached in the interim report was that the root cause of the fire was likely to be attributable either to a chemical reaction within the absorber chamber or to some form of unintentional human agency, direct or indirect. The Lord Ordinary records that there was no challenge to the conclusions contained in the interim report. She found that the outbreak of fire was not reasonably foreseeable at the stage which the construction had reached.

[150] When the fire started, or at least when he first became aware of the smoke, the pursuer was on the sloping roof, at (or possibly just above) the level of a walkway situated at a height of about 21 metres off the ground, on the west face of the structure at or towards the north west corner. At that level there were, on the findings of the Lord Ordinary, two means of egress either to ground level or to a place of safety. One was a permanent metal stair fixed to the southernmost part of the east face of the absorber ("the south-east stair") which led from the walkway to ground level. There was no dispute about this. As to the other, the Lord Ordinary found it proved on balance of probabilities that there was a means of egress on or near the north face of the structure, though its precise location was a matter of conjecture. In his submissions before us, Mr Di Rollo made it clear that this finding of fact about the existence of a second means of escape was not accepted by the pursuer, but he accepted that he could not seek to persuade us to reverse it and substitute a finding to the contrary. So we must proceed on the basis that there were two means of egress from the structure at the level at which the pursuer was found when the fire broke out and the smoke was first noticed. However, although it clearly featured as an important point during the proof, the question of whether there was one means of escape or more than one does not ultimately matter, since the Lord Ordinary found as a fact that the smoke developed so fast and spread so thickly that it cut off any escape route that entailed going through it. The west face was the only face of the

absorber clear of smoke. The smoke quickly reached the area to the west and south of the pursuer, and prevented him going further in that direction. Without going through the smoke he would have been unable to access the southeast stair (by any route). He was also unable to reach any route off the absorber located to the north that required him to pass through the valley. In short, as the Lord Ordinary found, the smoke would have prevented the pursuer from reaching any escape route or means of egress other than one positioned close to him on the west face.

[151] Cut off from all routes of escape, the pursuer (understandably) began to panic and fear for his life. He, or a fellow worker seeing his predicament, shouted for a cherry picker to come and take him to safety. Quite separately a rescue team, using masks and breathing apparatus, found their way through the smoke to reach the pursuer. They attached an oxygen canister to his face to protect him from the smoke, and were on the point of leading him back, suitably protected, through the smoke to one of the exit routes, from which he would have been able to make his escape, when the cherry picker arrived in response to the earlier shouts for help. The pursuer was able to climb onto the cherry picker and escape in this way rather than through the smoke.

[152] The pursuer was rescued within 13 minutes of the discovery of the fire. The emergency rescue system put in place by AMEC and/or Scottish Power worked. The pursuer escaped unharmed, physically at least; but as a result of his experience of being trapped (however briefly) by the smoke and fire and in fear of his life, with no apparent means of escape, he faced practical and emotional difficulties amounting to a condition of chronic PTSD. Although the Lord Ordinary finds causation to be established, it is not entirely clear whether the pursuer's psychiatric injury resulted generally from his presence on the absorber in the fire or specifically from any shortcomings in the way in which his exposure to the fire

was managed by AMEC. On one view of the case that might have given rise to difficulties, but in view of the decision I have reached in this appeal I consider that these difficulties do not require to be addressed.

The Case before the Lord Ordinary – Pleadings, Objections and Rulings on Procedure and Substantive Law

[153] The pursuer's case on record was that the defenders were in breach of various statutory duties imposed on them. Although a number of different provisions were mentioned in the pleadings, the only provisions relied upon in this court were section 53 of the Fire (Scotland) Act 2005 and Regulation 40 of the Construction (Design and Management) Regulations 2007 ("the 2007 Regulations"). No common law negligence case was advanced.

[154] Statement 4 of the Summons narrated the circumstances of the incident, including the rescue and the pursuer's apprehension prior to his rescue that he would die. This general account was followed by the averment that "as a result of the said accident the pursuer suffered loss, injury and damage". There then followed a passage which, because of the significance which attached to it at the proof, I should quote in full:

> "Prior to the fire there had been exits at a number of sides to the building. At the time of the fire the only way to exit the roof was to use stairs at the east side of the building. It was impossible to use those stairs to exit the roof due to the smoke and fire."

The reference to the stairs at the east side of the building was a reference to what has been referred to earlier as the southeast stair. The case made by the pursuer in this passage was that this was the only exit from the level at which the pursuer was working when he became aware of the fire. As noted above, the Lord Ordinary did not accept this case on the evidence before her. She found that there was at least one other means of escape from that level, probably somewhere towards the north face of the absorber though she could not be precise.

She also found that even if there had been other exit routes from that level they would have been of no assistance to the pursuer because the thick smoke would have prevented him getting to them.

[155] The averment that there was only one exit from the level at which the pursuer found himself when he became aware of the fire, and the absence of any other specific averment of fault, had important consequences both for the conduct of the proof and for the identification of the issues which, in the view of the Lord Ordinary, fell to be decided.

[156] So far as concerns the conduct of the proof, objections were taken by Ms Shand QC, on behalf of the defender, when Mr Di Rollo QC, for the pursuer, sought to lead evidence about a number of matters which were not mentioned in the pursuer's pleadings, including (a) the cause of the fire, (b) alleged inadequacies in the defenders' risk assessments, (c) an alleged lack of safety measures, such as dilution systems, signage (of fire escapes), fire alarms, personal safety equipment, and personal safety instructions and (d) an alleged lack of adequate training to the pursuer and others in the workforce as to how to act in the event of fire and other emergencies. The objections were taken essentially on the basis that there was no record for any case to which such evidence was relevant. After hearing extensive argument on the point, and taking account also of an "undertaking" given at an earlier stage during an amendment procedure, the Lord Ordinary upheld the objections and ruled, in effect, that the only positive case open to the pursuer was that which appears from the passage quoted above, namely that there was only one means of escape from the level where the pursuer was working at the time of the fire. That case failed, in her opinion, both on the facts (because there was at least one other exit from that level) and as a matter of causation (because even if there had been other exits the pursuer would not have been able to get to them because of the smoke). But the consequence of the Lord Ordinary's ruling was that,

although Mr Di Rollo could cross-examine the defenders' witnesses about the reasonable practicability of certain precautions which might have been taken, he was not able to lead evidence in support of a positive case on any of these matters.

[157] The pleading point also carried over to the substantive issues decided by the Lord Ordinary. In short, the Lord Ordinary took the view that the effect of the statutory provisions relied upon, and in particular section 53 of the 2005 Act, read in the light of the case law, including the decision of the Supreme Court in *Baker* v *Quantum Clothing Limited* [2011] 1 WLR 1003, was that it was for the pursuer to make specific averments of fault directed against the defenders and/or the system in place at the time, and it was only if such averments were made good that any onus shifted to the defenders to prove that it was not reasonably practicable for them to have done better. In the event, therefore, since the only specific criticism made by the pursuer on record was the allegation that there was only one means of exit from the level on which the pursuer found himself at the time of the fire, the pursuer's case failed without the need for any full investigation of whether it was reasonably practicable for the defenders to have prevented the fire and/or to have protected employees such as the pursuer from danger in the event of a fire.

[158] In light of her conclusion that the pursuer's case failed by reason of his failure to prove that there was only one exit route and/or that the provision of other exit routes from that level would have made any difference, the Lord Ordinary did not need to go on to reach any concluded view on the defenders' argument that the 2005 Act did not give a right of action to the pursuer for psychiatric injury suffered by him in the absence of physical injury. The Lord Ordinary dealt with this in a "Coda" at the end of her Opinion and expressed the provisional view that there were several difficulties or "shortcomings" in that argument.

The Appeal to this Court – Submissions

[159] Mr Di Rollo argued that the Lord Ordinary had been wrong in her approach both to the pleadings and to the substantive law. He submitted that, on the proper construction of section 53(1), once it was established that the pursuer had suffered harm caused by fire, the burden shifted to the employer to establish that it had not been reasonably practicable to avoid that harm. Separately, in terms of section 53(2) and (3) it was incumbent on the employer to prove that he had carried out and kept under review an appropriate risk assessment and had taken such measures identified by that assessment as were necessary to comply with his duty in section 53(1) to keep the employee safe from harm caused by fire. In terms of Regulation 40 of the 2007 Regulations, there was a duty on the employer to ensure that there were sufficient suitable emergency routes and exits to enable employees to reach a place of safety. It was true that the pursuer had pled a specific case about the number of exits or escape routes at the relevant level, but that did not in any way lessen the burden on the defenders to establish that they had provided a sufficient number of them. If the pursuer could not reach a place of safety because he could not get to an emergency exit or escape route, it followed that the defenders had not provided a sufficient number in the right places. It did not matter that the pursuer was only prevented from getting to the escape route because of the smoke; that only went to demonstrate that the defenders had not complied with their Regulation 40 duty.

[160] Further, the Lord Ordinary was wrong to prevent the pursuer leading evidence on matters which were not specifically referred to in the pursuer's pleadings. This was a case falling within Chapter 43 of the Rules of Court. It was not incumbent upon the pursuer to do more than refer to the fact of injury caused by fire. The fact that the pleadings criticised the number of escape routes from that level did not confine the issues to that point. Fair notice of

the whole ambit of the pursuer's case was given by referring to the statutory provisions under which the claim was brought.

[161] The pursuer's case in outline was simply this. He had become trapped at a height on a burning structure and was unable to escape. He had to be rescued. Although he was physically unharmed, the experience was deeply traumatising for him. It triggered the onset of PTSD. In those circumstances the pursuer had established a breach of section 53 of the 2005 Act. It was for the defenders to prove that there was nothing reasonably practicable which they could have done to prevent this harm. They had not done that. The defenders had failed to ensure, so far as was reasonably practicable, the safety of their employee in respect of harm caused by fire in the workplace. Further, the defenders had failed in their duty under Regulation 40 of the 2007 Regulations to provide a sufficient number of suitable emergency routes and exits to enable any person to reach a place of safety quickly in the event of danger. The Lord Ordinary had found that there were (at least) two means of egress. But even if that were so in ordinary conditions, neither was available to the pursuer in the conditions in which he found himself after the outbreak of the fire; and the provision of more than one means of escape did not entitle the defenders to say that they had complied with their duties under Regulation 40 if they could not in fact be used as a means of escape in the event of fire.

[162] The Lord Ordinary had approached the matter on the basis that it was for the pursuer to prove in what respect the defenders were at fault. As a result, she had focused on the averments in the pleadings about there being only one means of egress. This was wrong as a matter of law. The 2005 Act imposed a regime of strict liability subject to the defence of lack of reasonable practicability: see *Cairns* v *Northern Lighthouse Board* 2013 SLT 645 per Lord Drummond Young at paragraph [43]. The duty on employers under section 53(1) was to

ensure the safety of their employees in respect of harm caused by fire in the workplace. That was subject to the defence that it was not reasonably practicable to ensure their safety in all circumstances. The burden was on the defenders to make out that case, not on the pursuer to negative it. Similarly under Regulation 40 the duty was on the employers to provide a sufficient number of suitable emergency routes and exits. The pursuer had established that in the circumstances of this particular fire there were no emergency routes or access available to him. In those circumstances he did not have to prove anything further. It was for the defenders to set up and prove any relevant defence. In approaching the matter on the basis that the pursuer needed to show that the defenders were at fault in respect of the number of means of egress available to the pursuer in the circumstances in which he found himself, the Lord Ordinary had erred in law.

[163] In addition, the pursuer founded on the obligation placed on the defenders in terms of sections 53(2) and 54(2) to carry out a risk assessment so as to identify any risks to the safety of their employees in respect of harm caused by fire in the workplace. Such a risk assessment was directly relevant to the question raised in section 53(1) of what was "reasonably practicable". Mr Di Rollo accepted that this included an element of foreseeability, but that depended upon a risk assessment having been carried out and appropriate fire safety measures taken in accordance with what that assessment had shown to be necessary. The employers could not come along *ex post facto*, in the absence of having carried out a risk assessment at the appropriate time, and advance a case that it was not reasonably practicable for them to have taken certain steps. The absence of a risk assessment was fatal to the defenders' defence.

[164] In answer to Mr Di Rollo's submissions, Ms Shand adopted the approach taken by the Lord Ordinary. I do not propose to rehearse those submissions at this stage. She also

developed her submissions that neither the 2005 Act nor the 2007 Regulations on their proper construction imposed civil liability where the only injury caused to the employee was psychiatric rather than physical.

Discussion

[165] I deal with this matter by looking first at the pursuer's statutory case under section 53(1) of the 2005 Act. I then consider the pleading issue. Although, inevitably, the two issues are related, since pleadings follow the law, they do raise different issues, and I deal with them separately to avoid unnecessary confusion between them. I then deal with the separate arguments that arise under section 53(2) and (3) of the 2005 Act and under Regulation 40 of the 2007 Regulations. Finally, I turn to consider what, if anything, need be said about the argument raised by the defenders that no civil liability attaches where the only injury suffered by the pursuer was psychiatric rather than physical.

The Claim under Section 53(1)

(i) Relevant Provisions

[166] I start by considering the claim under section 53(1) of the Fire (Scotland) Act 2005. Part 3 of the Act deals with "Fire Safety". Chapter 1 under Part 3 identifies "Fire Safety Duties". The relevant provisions are sections 53-57, the latter sections helping to provide the context in which section 53 falls to be understood. These provide, so far as is material, as follows:

> "**53 Duties of employers to employees**
>
> (1) Each employer shall ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire in the workplace.

(2) Each employer shall –

(a) carry out an assessment of the workplace for the purposes of identifying any risks to the safety of the employer's employees in respect of harm caused by fire in the workplace;

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1).

(3) Where under subsection (2)(a) an employer carries out an assessment, the employer shall –

(a) in accordance with regulations under section 57, review the assessment; and

(b) take in relation to the workplace such of the fire safety measures as are necessary to enable the employer to comply with the duty imposed by subsection (1). …

54 Duties in relation to relevant premises

(1) Where a person who has control to any extent of relevant premises the person shall, to that extent, comply with subsection (2).

(2) The person shall –

(a) carry out an assessment of the relevant premises for the purpose of identifying any risks to the safety of relevant Persons in respect of harm caused by fire at the relevant premises; and

(b) take in relation to the relevant premises such of the fire safety measures as in all the circumstances it is reasonable for a person in his position to take to ensure the safety of relevant persons in respect of harm caused by fire in the relevant premises. …

55 Taking of measures under section 53 or 54: considerations

(1) Subsection (2) applies where under section 53(2)(b) or (3)(b) or 54(2)(b) or (5)(b) a person is required to take any fire safety measures.

(2) The person shall implement the fire safety measures on the basis of the considerations mentioned in subsection (3).

(3) Those considerations are –

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combating risks at source; …

57 Risk assessments: power to make regulations

(1) The Scottish Ministers may make regulations about the carrying out of assessments and reviews under sections 53 and 54.

(2) Regulations under subsection (1) may in particular make provision for in connection with -

(a) specifying matters which persons must take into account when carrying out of assessments and reviews in relation to substances specified in the regulations;

(b) specifying other matters which persons must take into account when carrying out of assessments and reviews;

(c) requiring persons to carry out assessments and reviews before employing persons of a description so specified;

(d) requiring persons in such circumstances as may be so specified to keep records of such information as may be so specified; and

(e) specifying circumstances in which reviews must be carried out."

[167] There is a definition of the term "Fire Safety Measures" in Schedule 2 to the Act. This provides as follows:

"SCHEDULE 2
FIRE SAFETY MEASURES

1 Subject to paragraph 2, the fire safety measures are –

(a) measures to reduce the risk of –

(i) fire in the relevant premises; and

(ii) the risk of the spread of fire there;

(b) measures in relation to the means of escape from relevant premises;

(c) measures for securing that, at all material times, the means of escape from relevant premises can be safely and effectively used; …"

[168] Section 69 of the 2005 Act, in Part 3, Chapter 3, "Miscellaneous", deals with the question of civil liability for breach of statutory duty in the following way:

> "**69 Civil liability for breach of statutory duty**
>
> (1) Subject to subsection (2), nothing in this Part shall be construed as conferring a right of action in any civil proceedings (other than proceedings for recovery of a fine).
>
> (2) Breach of a duty imposed on an employer by virtue of this Part shall, in so far as it causes damage to an employee, confer a right of action on that employee in civil proceedings."

It is by virtue of this section that the present claim is brought. The application of this section to a claim for damages for psychiatric injury in the absence of any physical injury is the subject of the cross-appeal.

(ii) Relevant Case Law

[169] As was observed in *Nimmo* v *Alexander Cowan & Sons Limited* 1967 SC (HL) 79, a considerable number of statutes and regulations prescribe steps which an employer must take to promote the safety of persons working in factories or other work premises. In some cases the duty is absolute; in others it is qualified in one way or another by reference to the question of whether it was impracticable (or not reasonably practicable) to comply with the duty. There is a great variety in the drafting of such provisions, giving rise to the question of where the onus lies in such cases in civil proceedings arising out of a workplace accident to which the provisions apply.

[170] *Nimmo* v *Alexander Cowan* decided this question in relation to section 29(1) of the Factories Act 1961, the relevant part of which provided that any workplace "shall, so far as is reasonably practicable, be made and kept safe for any person working there." The case came

to the House of Lords on appeal from Scotland. In his pleadings, the pursuer had, in effect, done no more than aver that the place at which he had to work was not made and kept safe for his working there. The defender's plea to the relevancy of that case was sustained both by the Lord Ordinary and by the First Division. By a majority the House of Lords allowed the pursuer's appeal. The pursuer had to aver and prove that the workplace was not made and kept safe for persons working there; but, he having done this, it was for the defenders to aver and prove, by way of excuse, that they had made it safe so far as was reasonably practicable: see in particular per Lord Guest at page 103, Lord Upjohn at pages 105-6 and per Lord Pearson at page 115.

[171] That the law applicable to clauses in this form is as set out in the speeches of the majority in *Nimmo* v *Alexander Cowan* has been accepted in a number of subsequent cases decided at the highest level. *Nimmo* v *Alexander Cowan* was decided on the basis of averments made on the pleadings. In other cases, such as *Jenkins* v *Allied Ironfounders Ltd* 1970 SC (HL) 70 (a case on section 28(1) of the Factories Act 1961) and *Gibson* v *BICC & Co* 1973 SC (HL) 15 (Regulation 7(1) of the Construction (General Provisions) Regulations 1961), the issue was considered after proof, and the question before the House of Lords concerned the question of onus, and its relevance, at a stage when all the evidence had been led. Nonetheless, there was no dispute about the fundamental principle that once the pursuer had established that the workplace was not safe, it was for the defender to prove that it was not reasonably practicable for him to have made it safe: see for example the remarks of Lord Reid at page 21, of Viscount Dilhorne at pages 26 – 27 and of Lord Kilbrandon at page 36. Subsequent cases in the House of Lords and the United Kingdom Supreme Court have confirmed this: see *R* v *Chargot Ltd (trading as Contract Services)* [2009] 1 WLR 1 (a criminal case for contravention of sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974) per Lord Hope at

paragraphs 17-21, and *Baker* v *Quantum Clothing Group Ltd* [2011] 1 WLR 1003 (section 29(1) of the Factories Act 1961) per Lord Mance at paragraphs 76 - 78. The same approach has also been applied at domestic level in the Outer House by Lord Macfadyen in *Hall* v *City of Edinburgh Council* 1999 SLT 744 (Regulation 4(1)(a) of the Manual Handing Operations Regulations 1992) at page 5, and by Lord Drummond Young in *Cairns* v *Northern Lighthouse Board* 2013 SLT 645. The claim in *Cairns* was brought under Regulation 5 of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 (SI 1997/2962) which provided, so far as material, as follows:

> "(1) The employer shall ensure the health and safety of workers and other persons so far as is reasonably practicable, [having regard to certain principles] …"

That provision takes essentially the same form as section 29 of the Factories Act 1961. Lord Drummond Young summarised the case law on provisions in this form in the following way at paragraph 26:

> "[26] The effect of regulation 5 is to impose a strict duty to ensure the health and safety of workers, subject to the defence of reasonable practicability. A great deal of health and safety legislation follows that structure. The construction of such provisions was considered in *R* v *Chargot Ltd* [2009] 1 WLR 1, a case on sections 2 and 3 of the Health and Safety at Work etc Act 1974. Those sections imposed a duty on the employer 'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his employees' and to 'conduct his undertaking such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety'. The wording thus follows fairly closely that used in regulation 5. The analysis of such a duty is described by Lord Hope at paragraph 17:
>
> > 'The first issue is to determine the scope of the duties imposed on the employer .... In both subsections the word "ensure" is used. What is he to ensure? The answer is that he is to ensure the health and safety at work of all his employees, and that persons not in his employment are not exposed to risks to their health and safety .... [The duties] prescribe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words "so far as is reasonably practicable". If that result is not achieved the employer will be in breach of statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it'.

> In paragraph 18, after an analysis of remarks of Lord Reid in *Nimmo* v *Alexander Cowan & Sons Ltd*, 1967 SC (HL) 74, Lord Hope states that 'It is the result that these duties prescribe, not any particular means of achieving it'".

I agree with that analysis. Though it may be possible to quibble with the use of the word "strict" to describe a duty which is subject to a statutory defence of reasonable practicability, the effect of a provision in this form is to impose a duty on the employer to do whatever is prescribed (be it health and safety, or safety from harm caused by fire, or whatever) and, if the result is not achieved, to put the burden on the employer, if he wishes to avoid civil or criminal liability for breach of statutory duty, to show that he did all that was reasonably practicable to achieve that result. The wording of section 53(1) of the 2005 Act, with which this case is concerned, follows a similar pattern. The employer is to ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of harm caused by fire. The safety of his employees in respect of harm caused by fire is the result which must be achieved. The duty is not absolute; it is qualified by the words "so far as is reasonably practicable". But if his employees are not in fact made safe in respect of harm caused by fire, then to avoid liability for breach of statutory duty he will have to show that it was not reasonably practicable for him to have done more to achieve that result than was in fact done.

[172] The Lord Ordinary took a rather different view of the effect of section 53(1). She did so, as I understand it, on two different bases.

[173] First, she considered the duty imposed by subsection (1) of section 53 in light of the obligations imposed on the employer by subsections (2) and (3), and came to the conclusion that the obligations in those latter subsections "inform the content of the duty in section 53(1)". The 2005 Act did not require an employer to put in place all safety measures in Schedule 2 in all circumstances. Rather, having carried out an assessment (and reviews of that assessment) as required by section 53(2)(a) and 53(3)(a), the employer was under an

obligation, in terms of paragraph (b) of each of those subsections, to take such fire safety measures as were shown by the assessment or the review to be necessary. In those circumstances it was not sufficient for the pursuer to assert and prove that his safety was compromised by his being exposed to harm caused by fire in the workplace, leaving it for the defenders to show that they had done all that was reasonably practicable to avoid that situation. Nor was it enough for the pursuer to prove that the defenders did not take one or more of the fire safety measures set out in Schedule 2. What the pursuer had to prove was (a) that the employer had failed to take one or more particular fire safety measures which were shown to have been necessary by a risk assessment, and (b) that that failure to take the fire safety measure in question caused the claimant harm from the fire when it occurred. She justified this approach by saying that, looking at the matter more generally, if a risk assessment was undertaken, that would identify the risks of harm posed by fire and the particular fire safety measures necessary for the employer to undertake to enable him to discharge his duty under section 53(1). He would have to take the fire safety measures identified by the assessment as being necessary. The kind of strict liability contended for by the pursuer, based on the word "ensure" in that subsection (and in the case law to which I have referred) was "not necessary to achieve this result". And, further, that interpretation accommodated subsections (2) and (3) which were integral to the proper construction of section 53(1).

[174] I am not persuaded that this interpretation of the effect of section 53(1) is correct. It seems to me that the duty set out in subsection (1) is not qualified by those set out in subsections (2) and (3). The duty set out in subsection (1) is couched in terms the effect of which has now been clearly established in case law going back just short of 50 years. It is unlikely that the Scottish Parliament, in enacting the Fire (Scotland) Act 2005, would have

been unaware of the meaning attributed by the courts to provisions in this form. If the only duty placed on the employer by section 53 of the Act is to carry out (and periodically review) an assessment of the workplace for the purpose of identifying risks to the safety of his employees in respect of harm caused by fire, and to take such fire safety measures as are shown by that assessment and/or review to be necessary, there would be no need to have included subsection (1) at all, since that duty is sufficiently contained within subsections (2) and (3). On a proper construction of that section, so it seems to me, the safety of the employer's employees is protected in, in effect, two different ways, each of which serves a different purpose. In terms of subsection (1), the employer is under a duty to ensure the safety of his employees in respect of harm caused by fire, and if the employee is injured by fire or otherwise exposed to harm caused by fire, then the employer is liable unless he can show that he did all that was reasonably practicable to prevent it. In practice the question of liability under section 53(1) is only likely to arise if the employee is actually injured or his safety is actually imperilled by fire in the workplace. So subsection (1) is likely to bite only in circumstances where injury or other harm has occurred. Subsections (2) and (3), on the other hand, place on the employer a continuing obligation to carry out an assessment of the workplace and to keep that assessment under review. In terms of section 57, the Scottish Government may make regulations about the assessments and reviews to be carried out under those subsections. Section 55 sets out a number of considerations relevant to the implementation of the fire safety measures required as a result of the assessments and reviews carried out under those subsections. The particular value in placing duties on the employer in terms of subsections (2) and (3) is that compliance with those duties can be monitored by inspection on a regular or continuing basis. It is not just a matter of waiting until an injury or some other harm occurs and then investigating to see whether that injury or harm could have

been avoided – the requirement in subsections (2) and (3) for risk assessments to be carried out, kept under review and acted upon by the taking of measures identified as necessary, serves a vital purpose in helping to avoid exposure to risks and informing what steps may be required to be taken to achieve this purpose: see per Lord Reed and Lord Hodge in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at paragraph 89. It may well be that, in the event of injury or harm to an employee, the question of reasonable practicability will be heavily influenced, if not determined, by the assessments and reviews carried out under subsections (2) and (3), and by the other considerations brought into account by sections 55 and 57 of the Act; but this does not mean that the duty placed on the employer under section 53(1) is a duty to do no more than is required under those subsections as and when assessments or reviews carried out in accordance with those subsections require steps to be taken. The terms of subsections (2) and (3) do not, in my opinion, qualify the separate obligation placed upon the employer by section 53(1) and the interpretation placed upon a provision in those terms by the decided cases. If an employee is injured or otherwise harmed by fire in the workplace, it is for the employer to show, if he wishes to avoid liability, that he did all that was reasonably practicable to avoid the risk of that injury or harm or that there was nothing reasonably practicable that could have been done.

[175] The second matter which appears to have influenced the Lord Ordinary's interpretation of section 53(1) was the decision of the Supreme Court in *Baker* v *Quantum Clothing Group Limited*. From that decision, read together with certain remarks of Lord Hope in *Chargot*, the Lord Ordinary concluded that the risk to be guarded against in terms of a provision such as is to be found in section 53(1) must be a material risk to safety and "must be a foreseeable risk"; and it must arise out of the business or undertaking engaged in by the employer.

> "Adapting this to the language of section 53, the duty is to ensure the safety of an employee in respect of material and foreseeable harm caused by fire in the workplace. The duty does not extend to ensuring against nonmaterial or unforeseeable risk of harm caused by fire in the workplace": see paragraph [250].

The Lord Ordinary considered that although in certain cases the fact that an accident occurred "will speak for itself" and show that a certain state of affairs existed which permitted the accident to occur, thereby shifting the onus onto the defender to show that he took all steps reasonably practicable to avoid that state of affairs and thereby prevent the accident, in many cases, even involving injury, that will not be enough. In some cases, of which this case was one, the mere fact of the injury having happened does not prove that a dangerous or unsafe state of affairs existed. In such cases, and in the present case,

> "it is not necessarily enough for the pursuer to succeed for him simply to prove that a fire occurred and that he was injured … It is therefore incumbent upon the pursuer to identify and prove the particular failures on the part of the defenders that had the result that the defenders had failed to ensure the pursuer's safety from harm caused by fire. What, in other words, did the defenders fail to do that resulted in his exposure to an unacceptable level of harm from fire?": see paragraph [251].

The Lord Ordinary concluded that, in terms of the pleadings, the only failure identified was the failure to provide more than one means of egress from the relevant level on the absorber. This allegation failed on the facts; the Lord Ordinary found that there was a second means of egress, to the north of the absorber. In those circumstances the claim based upon the breach of section 53(1) of the Act failed.

[176] I have no difficulty with that part of the Lord Ordinary's analysis which points to the need for the risk to be guarded against to be a material risk to safety which arises out of the business or undertaking engaged in by the employer. Nor, in general, do I have any difficulty with her analysis that the risk to be guarded against must be foreseeable. Where I differ from the Lord Ordinary, however, is in the application of this analysis to the present case. The observations of Lord Mance in *Baker* v *Quantum Clothing* were directed to a situation where, at

the time of the events giving rise to the claim, there was no real appreciation of the risk of noise induced hearing loss. The claim was brought both at common law and under section 29(1) of the Factories Act 1961 which provided, in short, that every workplace "shall, so far as is reasonably practicable, be made and kept safe for any person working there". The Supreme Court held, by a majority, that the claim failed both at common law and under the statute. So far as concerns the claim for breach of statutory duty, the claim failed because, at the time of the occurrence of the relevant events, there was no appreciation that damage might be caused in this way. The majority held that safety, for the purposes of section 29(1) was a "relative" concept which had to be judged according to the general knowledge and standards of the time and by reference to what might reasonably have been foreseen by a reasonable and prudent employer: see generally paragraphs 62-82. That made sense, because the idea of the employer taking such steps as are reasonably practicable to avoid the danger necessarily requires him to have some understanding of the foreseeable risks. Just as the concept of safety is relative, so too is that of danger or harm. There, too, foreseeability plays its part, but only in the broadest sense of that term. Applied to this case, the duty under section 53(1) is a duty to ensure, so far as is reasonably practicable, the safety of the employer's employees in respect of (foreseeable) harm caused by fire in the workplace. But there is no difficulty here, of the type that existed in *Baker*, in foreseeing that harm of whatever kind may be caused by fire in the workplace. The source of the danger will include fire and smoke, possibly chemical reactions and toxic fumes, and possibly too the difficulties of escape. The possible harm to an employee from fire may be difficult to predict, but it will include burning or asphyxiation and other injuries, both physical and psychological, connected therewith. The obligation to ensure the safety of his employees in respect of harm caused by fire is an obligation to protect against the whole gamut of dangers to which such a fire may

give rise. When an employee, at his workplace, suffers injury of whatever kind from the fire and the smoke, that fact does speak for itself, because there should not be fire or smoke at his workplace putting him at risk. In my opinion the Lord Ordinary read more into the decision in *Baker* than is warranted. As I read her Opinion, the Lord Ordinary understood the remarks in *Baker*, along with those in *Chargot*, to mean that both the particular injury and the mechanism by which the particular injury or exposure to injury occurs must be foreseeable before this can amount to a danger against which the employer requires to take all steps reasonably practicable to protect the employee. To my mind this interpretation of *Baker* and *Chargot* is not justified. Were it to be applied generally it would have the practical effect of reversing the decision in *Nimmo* and subsequent cases, notwithstanding that *Nimmo* was expressly referred to in those cases with approval (see, for example, *Chargot* at paragraph 18 and *Baker* at paragraph 76) or at least without any hint that it was no longer good law.

[177] For all these reasons I consider that the Lord Ordinary was wrong in her analysis of the substantive law relative to this ground of liability. The pursuer had made out a case sufficient to place the onus on the defenders to show that they had done everything reasonably practicable to avoid exposing the pursuer to harm from fire in the workplace. The burden lay on the defenders to show that they had taken all steps reasonably practicable to avoid exposing the pursuer to harm and/or that there were no further steps which were reasonably practicable and could have protected the pursuer. I shall come back to consider where this leads to in terms of the outcome of these proceedings after having considered the pleading point which the Lord Ordinary decided against the pursuer.

(iii) The Pleading Point

[178] I have already set out in paragraph [11] the relevant parts of the pursuer's pleadings

relative to the allegations of fault on the part of the defenders. In summary, after a general narration in Statement 4 of the events as they occurred, and an averment that as a result of the accident the pursuer suffered loss, injury and damage, the pursuer makes a specific allegation of fault in respect of the insufficiency of the means of exiting the sloping roof on which he was working at the time of the fire. It is alleged that there was only one way to exit the roof, and that was by the southeast stair. Statement 6 avers that the claim is based on the defenders' breach of statutory duty. Nothing more is said about the basis of liability. It was against this background that at the proof Ms Shand QC objected, on the basis that there was no record for it, to the leading of evidence on behalf of the pursuer as to other safety aspects and as to the cause of the fire. The Lord Ordinary upheld that objection. She held that, as part of the requirement for a party to give fair notice of his claim, the pursuer had to specify the ground of fault. She relied upon a passage from the speech of Lord Kilbrandon in *Gibson* (at page 35) to support the proposition that a pursuer who wished to call evidence that it was reasonably practicable for the defenders to have taken particular steps to avoid the risk of the injury which occurred had to give notice of that case in his pleadings. In her view that summary of the rules of pleading remained good law and was applicable to personal injury cases notwithstanding the requirements of Chapter 43 for pleadings in such cases to be brief.

[179] Mr Di Rollo criticised that approach as being wholly unsuited to personal injury litigation under Chapter 43. I disagree. The requirement on a party to give fair notice of any positive case that he intends to make, and in particular of any case on which he intends to lead evidence, is well-established. It was established long before cases such as *Nimmo* and *Gibson*, but is helpfully explained in those cases under reference to the shifting onus of proof in claims for breach of statutory provision of the type with which this case is concerned. In *Nimmo*,

Lord Reid (who dissented on the substantive point) expressed the rule about pleading in this way (at page 97):

> "This matter is not a mere technicality. It has important practical consequences. If the respondents are right, the pursuer must not only aver in general terms that it was reasonably practicable to make the place safe – such an averment without more would be lacking in specification – he must also make sufficient positive averments to give notice to the defender of the method of making the place safe which he proposes to support by evidence. But if the appellant is right, he can simply wait for the evidence which the respondents would have to lead to discharge the onus on them to show that it was not reasonably practicable to make the place safe, and then cross-examine the respondents' witnesses in any relevant way he chooses. **He would only have to make positive averments if he intended to lead evidence that some particular method of making the place safe could have been adopted by the defenders**." (Emphasis added)

The point was raised again in *Jenkins* v *Allied Ironfounders Ltd*. It is unnecessary to consider the facts of the case. Lord Guest, who formed part of the majority, said this (at page 46):

> "*Nimmo* was a case concerned with the stage of relevancy, when the pleadings were being considered. It decided that, if the pursuer made no averments as to the practicability of measures to keep his working place safe under section 29(1) of the Factories Act, 1961, the onus is on the defenders to aver and prove that they had made it safe, so far as reasonably practicable. **In this situation the pursuer would be precluded from leading evidence as to how the working place could be made safe, although he could no doubt cross examine the defenders' witnesses to show that the measures suggested by him were reasonably practicable**. …" (Emphasis added)

The point was touched on again in *Gibson*. It is sufficient to quote the following passage in the speech of Lord Kilbrandon (at pages 35-36), responding forcibly to the criticisms made by Lord Diplock:

> "There is really no mystique about Scottish rules of pleading. If a pursuer wishes to call substantive evidence of practical methods, he must give notice of them, since the defenders must be in a position to have in readiness witnesses who may refute that evidence in the course of their proof of impracticability. …
>
> My Lords, if I have rightly apprehended the rules of pleading in these cases as they now stand in consequence of the decision of your Lordships' House in *Nimmo*, they do not seem to be open to serious criticism. Pursuers are for the most part advised by experts, although it is in the nature of things that their facilities are often not as wide as those available to employers. These experts may advise that a certain safety measure has been neglected. **In such a case, the pursuer must specify that neglect as part of**

> **his grounds of fault if he wishes to lead evidence about it.** But if no such specific ground is alleged, or if, being alleged, it fails of being proved, that does not affect the onus incumbent on the defenders of proving that it was impracticable to make a dangerous place of work reasonably safe, nor is the pursuer's counsel inhibited from challenging the evidence given by defender's witness by asking him about the practicability of any method which that witness may expressly, or impliedly by ignoring it, have repudiated." (Emphasis added)

This is the passage quoted by the Lord Ordinary in her Opinion. This line of cases decided in the House of Lords leaves the position free from doubt as regards the requirement on a pursuer, who alleges a particular ground of fault, to give fair notice of that point in his pleadings. Lord Diplock, who had earlier described the Scottish system of pleading in somewhat unflattering terms, considered that this rule resulted in "a highly capricious method of ascertaining the truth" (see at page 28); but the justification for such a rule is not difficult to follow. As Lord Kilbrandon pointed out, unless the pursuer gives notice of any criticism he intends to make, on which he intends to lead evidence, the defender is unable to have witnesses ready to advise on the point and, if appropriate, refute that evidence in the course of their evidence.

[180] Mr Di Rollo argued that this strict approach to pleading did not apply to cases brought under Chapter 43 of the Rules of Court. That is wrong. It has been clearly established in case law that, while elaborate pleading is discouraged and there is no requirement to set out full specification of everything that is sought to be proved, Chapter 43 does not relieve a party from the requirement to give fair notice in his pleadings of the case which he requires the other side to meet: see *Weir* v *Robertson Group (Construction) Ltd* 2006 Rep LR 114 and *McGowan* v *W & JR Watson Ltd* 2007 SC 272 at paragraph [13]. So I reject this argument.

[181] Of course, the same rule applies to the defenders if they seek to establish that they took all steps reasonably practicable to keep the pursuer safe. This they did. By way of illustration of how they set out their case, it is convenient to refer to Answer 4, where, having averred that

there were other exits which the pursuer could have used, the defenders made the following averments

> "The Absorber was around twenty eight metres high and around fourteen metres square. It was encircled by two steel walkways. One was at a height of approximately twenty one metres, the other was at a height of approximately twenty eight metres. The defenders had carried out risk assessments of their operations at the site. They had prepared a health and safety plan. That plan had been prepared in 2006. It was revised approximately once a year. The last revisal to the plan prior to the accident was carried out on 18 March 2009. The plan contained a specific section detailing fire precautions. The defenders implemented the fire precautions identified in the plan. They took all reasonably practicable steps to prevent fire breaking out. They designated the site as a no smoking area. Contravention of that rule would result in a person's site access pass being removed. They enforced a system whereby anyone doing 'hot work' required a permit to do that. They arranged for some of their employees to act as fire watchers to look for signs that hot work might be in danger of causing a fire. They had provided fire extinguishing equipment including fire extinguishers and fire blankets. They had that equipment serviced on an annual basis. There was an onsite fire alarm. The alarm was tested on a weekly basis. Fire drills were carried out approximately once every six months. The equipment was serviced in early March 2009. They provided the pursuer with training. On 6 and 7 September 2007 he underwent a training course on site safety. That training course had an expiry date in September 2010. He attended training courses 'FGD Safe Start' and 'SP Refresher' on 9 January 2008. He underwent 'Standby Man' training on 25 April 2008. He attended FGD Safe Start training in January 2009. On 20 February 2009 the pursuer attended a toolbox talk on the site 'Fire Emergency Evacuation Plan'. On 4 March 2009 the pursuer completed a refresher induction questionnaire. That questionnaire contained a number of questions about what the pursuer ought to do in the event of a fire at the site. The defenders organised sufficient emergency access and egress routes. There were multiple access and egress routes at the Absorber. One was through a main stairway at the southeast corner of the Absorber. That stairway could be accessed by following the walkway around the Absorber. The walkway could be followed in either a clockwise or an anticlockwise direction. Another was a stairway at around the northwest corner of the Absorber. It was also possible to exit by using the scaffold at the north side of the Absorber. An OPUS rescue team was based at the site. The defenders funded that team, which had a staff of around a dozen and was present any time that the defenders' employees were working at the site. The defenders organised for some of their employees to act as fire marshals. Those employees were tasked with taking charge of an identified number of their fellow workers and accounting for them at muster points in the event of fire. That would allow the defenders to identify any unaccounted for workers. The cause of the fire is unknown. A number of workers used the scaffold to exit the Absorber after the fire broke out. After the fire broke out arrangements were made to assist the pursuer in exiting the building. An OPUS team made its way up the main stairway. The team members met with the pursuer. They gave him oxygen. They assisted him with exiting the Absorber. The cherry picker used to facilitate the pursuer's rescue had been provided

> by the defenders and was operated by one of their employees. The OPUS team then exited the Absorber by the main stairway. There were around forty workers based on the Absorber at the time the fire broke out. Every worker apart from the pursuer exited the Absorber using the exit routes identified above. No other workers were trapped or injured."

This is all brought together in Answer 6 where, after a general denial of liability and a statement that the pursuer's averments are irrelevant and lacking in specification, the defenders say this:

> "Explained and averred that the defenders took all reasonably practicable steps to ensure the pursuer's safety. It is not possible, far less reasonably practicable, to ensure that all exit routes from a building remain smoke free in the event of a fire."

It may be that the averments in Answer 4 go into too much detail for a Chapter 43 case. But at least they give notice to the pursuer of the case to be made by the defenders. If the pursuer had wanted to lead evidence to show failures in respect of fire safety measures, or of other shortcomings relevant to the cause of the fire or the exposure of the pursuer to risk, he could and should have done so in his pleadings.

[182] I would uphold the Lord Ordinary's decision on this point.

(iv) Assessment of the Facts

[183] As already noted, the Lord Ordinary rejected the pursuer's claim that there was only one exit route from the position the pursuer found himself in when he first became aware of the smoke. Although that finding was challenged, it was not suggested that it was open to this court to overturn it. The Lord Ordinary also held, in effect, that even if she was wrong about that, it would not have made any difference because the smoke would have prevented the pursuer reaching any other exit route. That positive case advanced by the pursuer therefore failed and it is not suggested that it can succeed before us.

[184] That still leaves open the question whether the defenders have established that it was not reasonably practicable for them to have done more to ensure the pursuer's safety from the risk of harm caused by fire. On this it was accepted that the onus lay on the defenders. The Lord Ordinary dealt with this essentially on an *esto* basis, there being no need (on her analysis) for any finding on this point once she had rejected the pursuer's legal case on the operation of section 53(1). On my analysis of that section the matter is live and has to be decided; but the findings of fact made by the Lord Ordinary on this point are entitled to the same respect as if she had regarded them as essential to her decision.

[185] The Lord Ordinary dealt with this part of the case at paragraphs [255]-[258] of her Opinion under reference to a more detailed discussion at paragraphs [132]-[166]. She held, as a matter of law, that the question whether steps to prevent the fire or keep the pursuer safe from harm caused thereby were reasonably practicable necessarily involved a degree of foreseeability: see *Baker*. She understood Mr Di Rollo to accept this and he did not appear to adopt a different position before us. The Lord Ordinary concluded that the outbreak of fire was not reasonably foreseeable with the consequence that the defenders could not fairly be criticised for not having anticipated it and taken steps to prevent it.

[186] As to other matters relevant to what steps were reasonably practicable, the Lord Ordinary summarised the evidence on the various points at paragraphs [256]-[257] of her Opinion under reference to Ms Shand's submissions. This was broadly to the following effect. It was not reasonably foreseeable that dense smoke would issue from the very start of any fire and would spread so quickly and to such an extent that persons on the walkway on the west face of the absorber would not have time to get to an exit unless that exit was situated on the west face itself and nowhere else. The defenders had taken all reasonably practicable steps to prevent the occurrence of fire. The evidence established that the risk of fire was low. The

defenders operated a hot work procedure which was in place on the day of the fire. There was a hot work permit system. Hot work, when done, was done with a fire watcher in attendance, whose job was to look out for any ignition source and to put out sparks using a fire extinguisher and fire blanket. But, in any event, hot work was not a cause of the fire. There were fire extinguishers on the absorber. There were regular fire alarm drills every Friday. Fire extinguishing equipment was maintained. There was a Health and Safety plan which had, as part of its operation, a system of Safety, Health and Environmental inspections. There were daily site inspections by Mr Richardson, the defenders' health and safety administrator, or by one of his colleagues. Records were kept of any site hazards including fire hazards and action was taken in respect of any problems identified. Employees on-site were encouraged to pick up on any safety issues as they went about their work and to report any hazards. There were weekly meetings between the health and safety personnel of all the contractors on site. There were regular AMEC audits from higher up the managerial tree than Mr Richardson. The site was designated a no smoking area and disciplinary action was taken to enforce that rule.

[187] The Lord Ordinary accepted the evidence of the defenders as summarised in the preceding paragraph. She recorded that the evidence was not in fact challenged. She came to the conclusion that had she found there to have been a *prima facie* breach of section 53(1) of the 2005 Act, she would nonetheless have held that the defenders had discharged the onus on them of showing that it was not reasonably practicable for them to have done more than they did in respect of means of egress. As to other matters, such as the alleged lack of signage, the alleged lack of training and instruction, the alleged lack of a specific fire risk assessment for the construction phase, and the alleged lack of any adequate alarms, while the Lord Ordinary did not make any finding as to whether those were established, she did find that having

regard to the extreme rapidity of the development and spread of the smoke it was unlikely that any breach of those duties would have had any causal significance. Those are findings of fact. While those findings were not accepted by the pursuer, subject only to the caveat discussed in the next two paragraphs, it was not suggested that they were findings of fact with which we could legitimately interfere.

[188] The caveat made by Mr Di Rollo was this. He submitted that the defenders had not carried out any or any adequate risk assessment in terms of section 53(2) or (3) of the 2005 Act. If they had carried out an adequate risk assessment and had performed the work identified in that risk assessment as being necessary to ensure the safety of their employees from harm caused by fire on the absorber, then they would (or might) have been able to satisfy the onus of establishing that they had done all that was reasonably practicable to prevent their employees from being exposed to the risk of injury or damage resulting from fire. On the other hand, if the defenders had not carried out any adequate risk assessment, or were unable to prove the terms of any assessment which they had carried out, then they would be unable to show that they had done everything reasonably practicable. Under reference to the judgment of Lords Reed and Hodge in *Kennedy* v *Cordia* at paragraph 89, he submitted that to assess the adequacy of the steps actually taken without considering the adequacy of the risk assessment carried out was to put the cart before the horse, since the risk assessment was meant to be the exercise by which the employer examined and evaluated all of the risks entailed in his operations and took steps to remove or minimise those risks. The most logical way to approach the question as to the adequacy of the precautions taken by an employer and to assess whether he had taken all steps reasonably practicable to remove or minimise the risks was through a consideration of the suitability and sufficiency of the risk assessment and a comparison of the steps taken with those recommended in that risk assessment. The

absence of any such risk assessment meant that the defenders could not succeed in showing that they had taken all steps reasonably practicable to prevent or minimise the risk.

[189] I accept the importance of a suitable and sufficient risk assessment. Whenever an obligation is placed on an employer to take such steps as are reasonably practicable to avoid a particular danger, it surely goes without saying that the employer must carry out an assessment of the risks in order to identify what needs to be done to remove or minimise those risks. In the present case the obligation to carry out an appropriate assessment and to keep it under review is not only a matter of common sense but is enshrined in section 53 of the 2005 Act. That section emphasises the importance of risk assessments in the safety regime mandated by the Scottish Parliament. It does not follow, however, that in the absence of a risk assessment an employer will never be able to establish that the steps which he took to remove or minimise the risks to his employees were well directed and were the best that it was reasonably practicable for him to take. It is open to an employer, even in the absence of a risk assessment having been carried out, to prove what steps he took, why he took them, and that they were suitably focused and well directed. The absence of a risk assessment may be a disadvantage to him in seeking to persuade a court that he did all that was reasonably practicable. But ultimately the court has to decide whether the employer did or did not take such steps as were reasonably practicable to remove or minimise the risks. The absence of an appropriate risk assessment is not a bar to the employer proving his case. It is simply one factor, albeit an important one. In the present case the Lord Ordinary accepted the defender's evidence which, as she noted, was not challenged. She also found that given the speed at which the fire and the smoke developed, the sort of measures under discussion in this chapter of evidence would not have made any difference. And one must not overlook the fact that, ultimately, the system or systems put in place by the defenders to ensure the safety of

their employees actually worked. Although for a relatively short time (though it will have seemed much longer to him) the pursuer was trapped by the smoke and was unable to make his way to any escape route, the backup system put in place by the defenders and/or by Scottish Power, who operated the power station, meant that he was rescued within 13 minutes of the smoke first being noticed. In those circumstances it is not obvious that one should be looking to see what went wrong in terms of the steps taken to keep the pursuer safe from harm caused by fire. The problem was the outbreak of the fire, and in the circumstances of this case the focus of any relevant enquiry must surely be on the cause of the fire itself, and the steps taken by the defenders to prevent its outbreak. But on this point the Lord Ordinary found it established that the cause of the fire was unknown, that the fire could not have been foreseen and that the defenders were not at fault in failing to prevent it. Those findings prevent any finding of liability under this head.

(v) Conclusion on the Claim under Section 53(1)

[190] It follows that, albeit for different reasons, I consider that the Lord Ordinary was right to reject the pursuer's claim based upon an alleged breach of section 53(1) of the 2005 Act.

The Claim for Breach of Section 53(2) and (3)

[191] I have already set out the relevant provisions. Put short, sections 53(2) and (3) require the employer to carry out an assessment of the workplace for the purposes of identifying any risks to the safety of his employees in respect of harm caused by fire in the workplace; they require the employer to review that assessment from time to time in accordance with regulations made under section 57; and they require the employer to take in relation to the

workplace such of the fire safety measures as are necessary to enable him to comply with the duty imposed by section 53(1). The duty on the employer is absolute. There are no excuses.

[192] The Lord Ordinary heard evidence from Mr Richardson on this point. He spoke to what the Lord Ordinary described as the defenders' health and safety regime. The evidence from Mr Richardson is summarised in the Lord Ordinary's Opinion at paragraphs [132]-[166]. As already noted, Mr Richardson was, at the time, the defenders' health and safety administrator. He eventually went on to become a health and safety manager. He spoke to the defenders' health and safety regime, to the risk assessments carried out by the defenders and to the permit to work systems operated by them. He described features of the defenders' on-site policies, such as the role of a fire watch, someone to assist a welder and keep a lookout for the inadvertent start of a fire caused by welding work, and the no smoking policy on site which was enforced with a yellow card system. He also spoke to various Fire Prevention documents such as "Fire Prevention SHE Procedure 11" dated 8 January 2007, which was not in itself a risk assessment but bore to be general guidance produced by the defenders setting out the approach to be adopted in order to comply with governmental and statutory requirements for fire safety risk assessments. He spoke to the "Construction Phase Health and Safety Plan", fourth issue, dated 18 March 2009, less than one week before the fire. It related to the construction and integration of the three absorbers into the Longannet power station. Section 14 of that document dealt with risk assessments. Mr Richardson confirmed in his evidence that risk assessments were used to assess risks on site, but it was a dynamic process, informed by a system for reporting and logging problems as they were identified, together with details of the issue and how to deal with it and, when completed, the remedial work undertaken. Section 17 of the Construction Phase Health and Safety Plan concerned SHE (Safety, Healthy Environment) audits and inspections to be undertaken throughout the

project to ensure a high standard as regards health, safety and environmental matters. The scheduled audits included fire protection and prevention, and covered matters such as the provision of alternative means of escape in the event of fire. Section 18 of the same document dealt with a number of site emergency procedures. These would be discussed with all personnel at induction. It provided also for specified regular trial emergency evacuations and test alarms. Mr Richardson spoke to the defenders' "Emergency Response Plan", third issue, dated 28 February 2008, which demonstrated the implementation of what had been set out in section 17 of the Construction Phase Health and Safety Plan. It had to dovetail with Scottish Power's own procedures for the power station. He explained that scaffolding changed regularly in the course of construction of the absorber and it was not possible to give more detailed information about means of egress and access during this period other than to tell employees to use the shortest route, which would be different for workmen in different areas. Mr Richardson also explained the "permit to work" system operated by the defenders. Before certain types of work would be undertaken, an application had to be made to the defenders for a permit to work. The application included a risk assessment of the proposed work. Mr Richardson accepted in cross-examination that the documents did not contain a fire risk assessment relating to the construction phase. He accepted that non-process fires in buildings were outwith the scope of the FGD [ie the absorber] Fire Risk Assessment and that that assessment did not relate to the construction phase of the project. In terms of a note to which he was referred, which suggested reconsidering the requirement for a deluge system within the absorber, he pointed out that the absorber itself worked as a deluge, involving the spraying of seawater into the chamber, and he could not see what a deluge system would add to what was already in place. Mr Richardson was taken to a number of other documents which I need not identify in detail.

[193] The high point of the case for the pursuer was Mr Richardson's acceptance that none of the defenders' documents put to him in the course of his evidence constituted fire risk assessments covering the construction phase of the project. However, he accepted that the defenders were required to have one, and said that he had in fact seen a fire risk assessment for the construction phase though he could not say where it was now because he had not been employed by the defenders for some time. He rejected the suggestion that there was an increased risk of fire at the commissioning stage. The pumps, which it was suggested posed an increased risk of fire, were situated over 1 km away from the absorber and did not pose a fire risk. The commissioning exercise entailed pumping water into a concrete box and did not present an increased risk of fire.

[194] As the Lord Ordinary pointed out, there was no cross-examination of Mr Richardson intended to suggest that there was some specific deficiency as regards the defenders' safety procedures on site. It was not put to him that the lack of a fire risk assessment relating to the construction phase resulted in any particular omission of a relevant safety procedure or precaution, much less one of any causal consequence for the pursuer. Nor was it put to him that the number or location of the means of escape was inadequate or insufficient.

[195] Mr Richardson's evidence was the only factual evidence on this topic. Expert evidence was given but, for reasons already discussed, the Lord Ordinary ruled much of that given by the pursuer's expert to be inadmissible. In light of that, there was little effective challenge to Mr Richardson. On the strength of his evidence it is possible to say that there ought to have been a fire risk assessment relating to the construction phase, though in reality this would be a document which changed day by day as construction developed and scaffolding was added or removed. To that extent it is arguable that the defenders were in breach of the obligation under section 53(2)(a) or (3)(a) to carry out a risk assessment pertaining to the workplace as it

existed from day to day or to keep it under review, though it is unnecessary to decide this point. The critical thing, however, is that it was not suggested to Mr Richardson, nor was it suggested to us in argument, that the lack of a fire risk assessment relating to the construction phase resulted in any particular omission of a safety procedure or the failure to take some necessary or desirable step which would or might have been relevant in a causal sense to what happened.

[196] In those circumstances the claim for breach of section 53(2) and (3) must fail.

The Claim for Breach of Regulation 40 of the 2007 Regulations

[197] This matter can be dealt with briefly. Regulation 40 of the 2007 Regulations is the only part of the 2007 Regulations relied on for present purposes. It provides, so far as material, as follows:

> "40. **Emergency routes and exits**
>
> (1) Where necessary in the interests of the health and safety of any person on a construction site, a sufficient number of suitable emergency routes and exits shall be provided to enable any person to reach a place of safety quickly in the event of danger.
>
> (2) An emergency route or exit provided pursuant to paragraph (1) shall lead as directly as possible to an identified safe area.
>
> (3) Any emergency route or exit provided in accordance with paragraph (1), and any traffic route giving access thereto, shall be kept clear and free from obstruction and, where necessary, provided with emergency lighting so that such an emergency route or exit it may be used at any time. …"

[198] Unlike the duty imposed by section 53 of the 2005 Act, the obligation to provide emergency routes and exits is expressly qualified, first by the words "where necessary" and, secondly, by the fact that the test of what number is "sufficient" and what emergency routes and exits are "suitable" is linked to an assessment of what is necessary to enable a person to

reach a place of safety quickly in the event of danger. This, therefore, is a case where the obligation imposed on the employer is expressly linked to the question of what is reasonably foreseeable as being necessary in the event of danger.

[199] As the Lord Ordinary indicates in her Opinion, the only matter put in issue by the pursuer in his pleadings was the number of emergency routes and exits, not their suitability. The pursuer's case on the pleadings was simply that there was only one such exit and that that was not sufficient. That case was rejected on the evidence by the Lord Ordinary who found as a fact that there was more than one exit from the level at which the pursuer found himself at the time of the fire. That is fatal to the pursuer's case as pled.

[200] Before us Mr Di Rollo developed a submission to the effect that if, when faced with the danger presented by the fire and the smoke, the pursuer could not reach an emergency route or exit by which he could get to a place of safety, it followed necessarily that there were insufficient emergency routes or exits and that the defenders were in breach of the obligations under Regulation 40. When asked whether this meant that even if there had been 20 or 30 emergency routes or exits from that part of the absorber on which the pursuer found himself, but the pursuer could not reach them because he was confined by the dense smoke to a very narrow area, that meant that there was not a sufficient number of suitable emergency routes and exits on the site, Mr Di Rollo replied in the affirmative. That, to my mind, is an absurd proposition. The question of what number is "sufficient" and, in a case where this is relevant, whether they are "suitable", must depend upon an assessment made of the foreseeable circumstances in which emergency routes and exits will be required.

[201] Regulation 40(1) is not drafted in the same way as section 53(1) of the 2005 Act. It does not prescribe a result to be achieved subject only to the defence, if it is not achieved, that the employer has done all that was reasonably practicable to achieve it. Rather it places on the

employer an obligation to ensure the provision of emergency routes and exits in sufficient numbers and of suitable design and placement to meet the reasonably foreseeable need for a person to escape to a place of safety quickly in the event of danger. If a case is to be advanced that the employer was in breach of this obligation, it requires the pursuer to plead that he failed in some element of this task, whether by failing properly to identify what was needed or failing to provide that which was clearly required. No case of that sort is advanced here, nor was there any evidence which might have supported it.

[202] For these reasons I consider that this part of the pursuer's claim must also fail.

The Cross Appeal and/or Respondents' Notice

[203] The cross appeal raises an important point of principle. However, if, as I understand to be the case, your Lordships share my view as to the outcome of the pursuer's appeal, the cross appeal is academic. I have read with care the thorough analysis of the issue presented by your Lordship in the chair. However, without intending to suggest any disagreement with that analysis, I consider that it would be better to leave the point to be decided, if it ever has to be decided, when it is essential to do so for the purpose of resolving the outcome of the case.

Disposal

[204] For the reasons set out above I agree with your Lordships that we should refuse the pursuer's appeal and adhere to the interlocutor of the Lord Ordinary, reserving all questions of expenses.