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## **Revisiting the liability of fire services**

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*The author considers the significance of the Inner House decision in A J Allan (Blairnyle) Limited v Strathclyde Fire Board [2016] CSIH 3, the latest in a line of cases involving the potential liability of the fire service. Not only is the case an important one in relation to the potential liability of firefighters (and public authority liability more generally), but it also considers the increasingly important role of policy in determining the scope of any duty of care.*

### **Introduction**

The “floodgates” fear is a policy consideration which often features in the judicial determination as to the existence or scope of a duty of care in a given set of circumstances. The classic articulation of the courts’ concern in this regard is perhaps that of Cardozo C J in *Ultramares Corporation v Touche* (1931) 255 NY 170 (at 179) where he warned against “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” Policy considerations may appear in many guises (e.g. the cost to the public purse, the risk of emergence of defensive practices) but essentially all such considerations address the issue of whether the imposition of a duty of care in any given set of circumstances will do more harm than good. Policy has played an increasingly important role in the duty enquiry in recent years and its ascendancy in the overall determination of the duty issue is clearly articulated in the recent Inner House decision in *AJ Allan (Blairnyle) Limited v Strathclyde Fire Board*.

The case is also important because it lays to rest any continuing doubt that the law in Scotland differs from that in England in relation to the potential liability of fire services and similar authorities. When faced with a stark choice as to whether to follow the Scottish authority of *Burnett v Grampian Fire and Rescue Services* 2007 SLT 61 or the English Court of Appeal decision in *Capital & Counties plc v Hampshire County Council* [1957] QB 1004, (both of which involved the liability of fire services) the Inner House unanimously chose the latter course.

### **The competing authorities**

Before considering the alleged facts and the opinions in *AJ Allan*, it

is useful to set out briefly details of the key authorities which relate to the liability of fire authorities. Judges can hardly be said to have spoken with one voice on this issue. *Capital & Counties (supra)* was a decision of the English Court of Appeal and was described in *AJ Allan* by Lord Drummond Young (at para.66) as “the case that contains the most detailed discussion of the delictual liability of a fire authority.” Four appeals were heard together and while the Court of Appeal held that there could be liability in situations where the fire service attended a fire and made matters worse, it also held (in relation to the third of the four appeals) that there was no liability where the fire service attended and dealt with a fire and that fire subsequently reignited and caused property damage. In *Burnett (supra)*, on the other hand, Lord Macphail declined to follow *Capital & Counties*, and held that liability could arise in the latter situation. In *Burnett*, the fire service had attended and attempted to extinguish a fire in the flat beneath the pursuer’s flat in Aberdeen. It failed properly to extinguish the fire, which continued to smoulder in the void between the two flats. The fire subsequently reignited and caused damage to the pursuer’s flat. Lord Macphail took the view that the fire service had undertaken responsibility - it had taken control of the investigation of the state of the pursuer’s flat and, in response to the defender’s argument that the alleged failures were merely “sins of omission”, Lord Macphail asserted that Scots law did not draw a distinction between acts and omissions such as was drawn in English law. His Lordship considered it fair, just and reasonable to impose upon the defender a duty to take all reasonable steps not only to extinguish the fire but also to establish whether circumstances existed which if not eliminated constituted a risk of reignition of the fire or its extension to the flat above. While *Burnett* is consistent with *obiter dicta* of Lord Macfadyen in the earlier Scottish decision in *Duff v Highlands and Islands Fire Board* 1995 SLT 1362, it was departed from in the recent case of *Mackay v Scottish Fire and Rescue Service* 2015 SLT 342.

### **A J Allan (Blairnyle) Limited and another v Strathclyde Fire Board –the alleged facts of the case**

The first pursuers in the action, AJ Allan (Blairnyle) Limited, were the owners of a farmhouse in Gartocharn. The second pursuer was a director of the aforementioned company. He lived in a caravan but made use of the farmhouse kitchen. On 31 October 2008, there was a fire involving the Rayburn stove in the

farmhouse kitchen and a chimney. The second pursuer called the fire brigade. Firefighters arrived at the scene and, having apparently extinguished the blaze, left at about 3pm. In the early hours of the following morning, the fire reignited and the farmhouse burned down. The pursuers sought damages from the defenders in negligence. They averred that the fire reignited as a result of smouldering rotten timbers in the roof space. They asserted that once the fire appeared to be extinguished, the firefighters ought to have used a thermal imaging camera to locate any questionable areas and ought to have maintained a regular check on the farmhouse to ensure that the fire was truly extinguished.

The facts averred in *AJ Allan*, as narrated above, were remarkably similar to those in the third case in *Capital & Counties* (which is discussed in more detail, below) and to those in *Burnett*. Indeed, the fire board acknowledged that the instant case was indistinguishable on its facts from *Burnett*.

### **Decision at first instance in A J Allan**

The case came to debate on the procedure roll before Lord Brailsford. His Lordship held that the pursuers had pled a relevant case. (See [2014] CSOH 135; 2014 GWD 29-568). The general statutory duties imposed upon the defenders by the Fire (Scotland) Act 2005 were not inconsistent with the existence of a common law duty of care to the pursuers. The defenders were acting pursuant to a general statutory duty but the common law duty of care did not arise therefrom. Rather, it arose from the assumption of responsibility for tending to the fire situation. The situation as pled fell squarely within the category of case described and anticipated in *Gorringe v Calderdale MBC* [2004] 1 WLR 1057. The tripartite test in *Caparo Industries PLC v Dickman*, [1990] 2 AC 605 was satisfied (foreseeability, proximity and fairness). Essentially, therefore, the Lord Ordinary followed Lord Macphail's decision in *Burnett, supra*. The Fire Board reclaimed.

### **The Inner House –submissions of parties**

In the Inner House, the Board submitted that the action, as pled, was irrelevant. While the fire board owed a duty of care to the public at large, including the pursuers, the *scope* of that duty was restricted in that it was a duty to take reasonable care not to make

things worse, in other words not to inflict a fresh injury. The Board had not made matters worse, nor had it inflicted a fresh injury. As the fire service was not liable in damages if it failed to attend a fire, it would be “unprincipled” to suggest that a fire service which attended and sought to extinguish a fire could be liable in damages. An analogy could be drawn with rescuers: there was no general duty to rescue, and if a rescuer made a negligent rescue attempt but did not negligently cause fresh injury, he incurred no liability. The Board therefore submitted that, in law, there were no duties of the scope contended for by the pursuers. Reliance was placed on *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, *Capital & Counties (supra)* and *Michael v Chief Constable of South Wales Police* [2015] AC 1732.

The pursuers, on the other hand, submitted that they had pled a relevant case and were entitled to proof. Their case was based on ordinary principles of common law negligence. The facts, as averred, disclosed an “assumption of responsibility” and a “relationship of proximity” between the parties, such as gave rise to a common law duty of care. There could be circumstances in which the fire service owed both broad duties to the public and specific duties to individuals. Support for the pursuers’ position was sought from a trilogy of Scottish cases: *Burnett (supra)* (which was said to be “entirely in point”); *Duff (supra)*; and *Gibson v Orr* 1999 SC 420.

### **Decision of the Inner House**

The reclaiming motion was heard by an Extra Division comprising Lady Paton, Lady Dorrian and Lord Drummond Young. It was held unanimously that the reclaiming motion should be allowed and that the action should be dismissed as irrelevant. All three judges delivered a full opinion. Lady Paton’s opinion is found in paras.1-37 of the court’s judgment. Under reference to the Fire (Scotland) Act 2005, her Ladyship observed (at para.12) that the Board was a statutory body subject to a “general public law duty to make provision for efficient fire-fighting services.” It was also clothed with certain statutory powers to enable it to deal with fires and other emergencies. No statutory duty was owed to private individuals such as might generate a private claim for damages nor did a private common law duty of care arise from the general public law duty.

Lady Paton observed, however, that emergency services, including fire, police, and ambulance, had, in certain circumstances, been held liable in damages to private individuals

*for negligence* in the performance of their duties. She identified a number of matters arising from the relevant authorities. The first matter was the development in the judicial approach to the nature and scope of any liability on the part of public authorities to individuals who make private claims in respect of the authorities' alleged negligence in the performance of their public duties. In 1941, "a clearly defined and fairly restricted approach" was evident in *East Suffolk Rivers Catchment Board (supra)*. There, a high tide broke the sea wall of the River Deben and the respondents' dairy farm land was flooded. The statutory drainage board attempted, rather unskillfully, to deal with the flooding. There, Viscount Simon LC stated (at 84-85):

"It is not, of course, disputed that if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages ... But ... nothing of this sort happened ... the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskillfully, were endeavouring to counteract. Supposing, for example, that after the appellants had made their first unsuccessful attempt they had decided to abandon their efforts altogether, the respondents could have had no legal claim against them for withdrawing, even though the result might have been to leave the respondents' land indefinitely flooded. ..."

Similarly Lord Romer explained (at 102):

"...Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing."

Lady Paton observed that subsequent decisions tended to favour the finding of liability on the part of public bodies. *Anns v Merton London Borough Council* [1978] AC 728 provided an example of this more expansive approach. That decision was overturned, however, in *Murphy v Brentwood District Council* [1991] 1 AC 398. There then followed a policy-based reversion to a more restrictive approach which is evident in the decision of the House of Lords in *Mitchell v Glasgow City Council* 2009 SC (HL) 21 and in the decision of the Supreme Court in *Michael (supra)*. In both cases

the need for a careful approach to the liability of public authorities was emphasised, particularly in view of the possible financial burden which private claims might have upon the limited resources of public authorities.

Lady Paton went on to endorse the view of Turner J in *Furnell v Flaherty* [2013] EWHC 377 (QB) to the effect that there were two circumstances in which a public body might now incur liability to an individual for negligence in the English courts, namely (a) where the careless acts of the defendant have left the claimant in a worse position than if it had done nothing at all and (b) where there has been an assumption or attachment of responsibility. Situations where public service bodies had created an unnecessary danger, or had unnecessarily caused damage or injury included the first and second cases in *Capital & Counties (supra)*. There, fire officers attending a fire in block A, turned off the sprinkler system. This resulted in the fire going out of control and spreading not only in block A but also to other blocks B and C. Relationships giving rise to an assumption of responsibility included those in which a duty to take positive action typically arose: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient.

Lady Paton then alighted upon a second matter, namely the similarity between the circumstances of the instant case and those of the third case in *Capital & Counties*, (the London Fire Brigade case). There, a deliberate explosion was created on wasteland near the plaintiffs' industrial premises. Burning debris scattered across a wide area and small fires broke out. The fire brigade was summoned but, by the time fire officers arrived, the fires had already been extinguished and there was no visible evidence of any continuing conflagration. Fire officers left the scene about 20 minutes after the initial explosion without inspecting the plaintiffs' premises. Later that evening a fire broke out at the plaintiffs' premises, which were severely damaged. The plaintiffs alleged negligence against the fire authority's employees in failing adequately to inspect the wasteland and the premises, and failing to ensure that all fires and risk of further fires in the vicinity had been eliminated before leaving. The Court of Appeal held that the fire brigade was not liable in respect of the plaintiffs' loss. The following guidance was provided (at 1030 *per* Stuart Smith L.J.):

“[T]he fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood

the message, got lost on the way or run into a tree, they are not liable.”

Later in the court’s judgment, Stuart Smith L.J. said (at 1038):

“[A] fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation.”

The Court of Appeal’s conclusion was approved by the House of Lords in *Gorringe (supra)* and its approach was not criticised when discussed in the Supreme Court in *Michael*.

A further matter arising from the authorities was the marked divergence between Scottish and English lines of authority in the context of the potential liability of a fire brigade. The Scottish Outer House decisions of *Duff*, *Gibson*, and *Burnett* criticised and departed from important aspects of the English authorities. Certain averments of alleged negligence in the Scottish cases were held relevant for proof in circumstances where an English court would probably have struck the cases out as irrelevant. Lady Paton concluded (at para.26) that “the carefully developed, policy-based, more restrictive approach currently approved and adopted by the Supreme Court must be followed by the Scottish courts (contrary to the views expressed in the Outer House in *Duff*, *Gibson*, and *Burnett*, but in keeping with a recent opinion of Lord McEwan in *Mackay v Scottish Fire and Rescue Service* 2015 SLT 342.)”

Her Ladyship reached that conclusion for a number of reasons.

First, she did not accept that the fire service “assumed responsibility” on the basis of answering a 999 call or attending the scene of a fire or taking steps to extinguish a fire or to save lives or property. Rather, those actions represented the fire service carrying out its statutory functions and public duty. Such actions did not constitute the undertaking of responsibility which would give rise to a duty of care on an orthodox common law basis.

Secondly, whether one was concerned with the *existence* or *scope* of a duty of care, account had to be taken of general policy considerations, such as those expressed (under reference to *Stovin v Wise* [1996] AC 923) by Lord Toulson JSC in *Michael* (at para.110):

“ ..it is one thing for a public authority to provide a service at the public expense, and quite another to require the public to pay compensation when a failure to provide the service has resulted in a loss. Apart from possible cases involving

reliance on a representation by the authority, the same loss would have been suffered if the service had not been provided in the first place, and to require payment of compensation would impose an additional burden on public funds.”

Lord Toulson had further observed in *Michael* that the courts’ refusal to impose a private law duty on the police to safeguard victims of crime (except in cases of representation and reliance) did not involve according any special treatment to the police. The approach was entirely consistent with the manner in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples could be found in relation to financial regulators, planning authorities and highway authorities. To impose liability on the police in such circumstances, would, in Lord Toulson’s view, “have potentially significant financial implications” (at para.122). His Lordship continued (at para.122):

“The costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two ...”

Those observations, in Lady Paton’s view, were equally applicable to the fire service. Moreover, her Ladyship observed (at para.28) that it would be “unfortunate if a defensive approach were to be adopted by the fire service as a result of an appreciation that their efforts might be followed by actions for damages.”

Lady Paton considered that analogies with the provision of medical/ ambulance services were inapt. Once the relationship of doctor / hospital and patient exists, a duty to take reasonable care to effect a cure is owed -not merely a duty to prevent further harm. The police and fire services’ primary obligation, on the other hand, was to the public at large.

In addition, there was no general duty to rescue. If a rescuer makes a negligent rescue but does not negligently create a fresh injury, then he incurs no liability in damages (*Capital & Counties*). The fire service, with its statutory powers and duties, had been held not to be liable if it fails to attend a fire. It would be unprincipled therefore to suggest that a fire service which did attend a fire and sought to extinguish it could be held liable for its actions, other than in circumstances where it negligently inflicted fresh injury.

Finally, the line of English authority relevant to the liability of public

bodies including fire services (*East Suffolk Rivers Catchment Board* in 1941 to *Michael* in 2015) was well-established and of considerable authority. It would be unfortunate to adopt a different approach north of the border.

Lady Paton concluded that, in the present case, the fire service owed a duty of care to the general public, including the pursuers, but that duty was to take care not negligently to add to the damage which the pursuers would have suffered if the fire service had done nothing; in other words, not negligently to inflict a fresh injury. No breach of that duty was said to have occurred. Further, the averments did not disclose circumstances which could properly be characterised as an “assumption of responsibility” by the defenders. Contrary to the views expressed by Lord Macphail in *Burnett*, Lady Paton did not consider it to be fair, just or reasonable to impose upon the fire service a duty of care of the scope contended for by the pursuers. The case, as pled, was accordingly irrelevant, and fell to be dismissed. In reaching that conclusion, Lady Paton disapproved of the Scottish authorities of *Duff*, *Gibson*, and *Burnett*. In none of those cases did the relevant court have the benefit of the guidance given by the House of Lords and the Supreme Court respectively in *Mitchell* and *Michael*. Moreover, in Lady Paton’s view, the relevant expression of opinion in *Duff* was brief and *obiter*, and gave too wide a definition of the scope and content of the duty owed to the public. Her Ladyship was unable to agree with a number of the views expressed by Lord Macphail in *Burnett* while the reasoning in *Gibson* did not accord with the line of authority from *East Suffolk Rivers Catchment Board* to *Michael*.

In her concurring opinion, Lady Dorrian rejected the pursuers’ argument that *East Suffolk Rivers Catchment Board* was limited to cases where the authority was vested with a statutory *power*. Its reasoning applied equally to target duties expressed at a high level of generality (as in the instant case). The courts in *Capital & Counties* and *Michael* had concluded that the duties imposed upon the fire and police authorities, respectively, were duties owed to the public at large. In *Capital & Counties*, the Court of Appeal determined that by taking control the senior officer did not undertake a voluntary assumption of responsibility to the owner of the premises on fire. In *Michael*, (which involved a police failure to answer a call) the core duty of the police was said not to involve the kind of close or special relationship necessary for the imposition of a private law duty. *Capital & Counties* was not restricted, as the pursuers argued, to situations where the fire

service failed to attend. Rather, it extended to cases where the fire service took action to fight the fire, so long as its intervention did not make the situation worse. The third scenario in *Capital & Counties* was identical to the circumstances of *AJ Allan* and there was no indication in *Michael* that the Supreme Court thought that the conclusion in *Capital & Counties* was other than correct. As for the argument that the law of Scotland was explained in *Duff*, *Burnett* and *Gibson*, rather than *Michael*, Lady Dorrian observed that the principles underlying the reasoning in *Michael* were the same as those which underpin the law of Scotland in this area. The reasoning in *Michael* had relied upon the Scottish cases of *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37 and *Mitchell v Glasgow City Council* 2008 SC 351. It had repeatedly been stated that the law on this matter was the same in both jurisdictions. The discussion of *Duff* and *Burnett* in *Michael* impliedly questioned the validity of the reasons given in *Burnett* for declining to follow *Capital & Counties*.

Lady Dorrian highlighted (at para.48) “[t]he difficulty in confining the duty in circumstances such as the present.” The same point had arisen in *Capital & Counties* where, her Ladyship said, “[t]he submission was that the duty might extend to a whole district which was at risk if the fire got out of hand. In other words, in negligently failing to extinguish the fire at Pudding Lane, [the fire service] would be responsible for the destruction of St Paul’s Cathedral.”

Lady Dorrian observed that *Gibson* could be distinguished on several grounds. That case concerned the liability of the police for failing to provide a warning of a serious road hazard (a collapsed bridge). Lord Hamilton’s rejection of the suggestion that the duties of the police were owed to the public at large therefore occurred in the context of the police exercising their *civil* function in relation to road traffic operations rather than in the context of their core duty to prevent and detect crime. In addition, taking control of and then abandoning a known hazard was analogous with a situation where the authority created the damage or made the situation worse. Finally, there could be identified only a limited class of individuals at particular risk from the hazard in *Gibson*. As far as *Duff* was concerned, Lord Macfadyen’s observations were *obiter*, and shortly stated. The case was decided before *Capital & Counties* and *Gorringe*. *East Suffolk Rivers Catchment Board* had been distinguished on the basis that it concerned statutory powers rather than duties, a distinction which Lady Dorrian found unconvincing given the broad nature of the statutory duties

involved. As regards *Burnett*, part of the basis upon which Lord Macphail declined to follow *Capital & Counties* was that Scots law did not draw a distinction between acts and omissions comparable to that drawn in England. In *Mitchell*, however, Lord Reed (in the Inner House) recognised that both Scots and English law exhibited a general reluctance to impose affirmative duties to protect others. His views were endorsed in the House of Lords by Lord Hope (at para.34). Lord Hope also stated (at para.25) that: “the law of liability for negligence has developed on common lines both north and south of the border”.

Similarly, in *Michael* it was said (at para.97 *per* Lord Toulson):

“It is one thing to require a person who embarks upon an action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.”

Against that background, Lady Dorrian concluded that the duties incumbent upon the fire service in the instant case were restricted in scope, liability being limited to the situation where the intervention created a new danger or made the situation worse. Lord Macphail’s observations in *Burnett* relating to the importance to be attached to the control exercised by the fire board over the fire site (at para.69) did not take account of the observations in *Capital & Counties* (at 1036) that the reason for conferral of such control was “for the benefit of the public generally where there may be conflicting interests.” Lady Dorrian declared herself unable to agree with Lord Macphail’s conclusion in *Burnett*.

Finally Lady Dorrian observed that the ambulance cases did not assist the pursuers. The role of the ambulance service differed from that of the police and fire services. Once a call had been accepted by an ambulance, the service undertook to deal with a named individual at a specific address. The resulting relationship was “highly personal”. The same did not apply to the fire service. The duty prayed in aid in the instant case remained to the public at large, even if the primary beneficiary might be an individual householder.

At the outset of his concurring opinion, Lord Drummond Young emphasised that the dispute related to the *scope* of the fire service’s duty of care, not its existence. While the Lord Ordinary had held that the fire board was under a duty to take reasonable care to extinguish all traces of fire in the premises, Lord Drummond Young did not consider that the duty extended that far.

Two reasons were proffered for that conclusion. First, there was no liability for pure omissions (*Maloco (supra)* (at 75-76); *Michael* (at para.97)). Secondly, policy considerations relating to the nature of a fire authority and the circumstances under which it operates militated against the imposition of liability.

In relation to the first issue, namely that pure omissions do not sound in damages, Lord Drummond Young observed that a fire service normally attempts to control and extinguish sources of danger that have been caused by others or by the forces of nature. The police (in relation to their function of preventing and detecting crime) also deal with the wrongdoing (or threats thereof) of third parties. A failure by such an authority will not amount to a positive act but merely an omission to deal with a situation created by others or by natural forces. There is no general duty to prevent a third party or natural forces from causing harm. While an omission *in the course of active conduct* may be actionable (e.g. a driver who omits to keep a proper lookout), without such active conduct there is generally no liability. If there is no liability for inaction, the logical corollary is that there can be no liability for acting negligently, provided that the ultimate result is no worse than would have occurred without intervention. The rule that there is no liability for pure omissions is not absolute, however. Lord Drummond Young identified four exceptions to it, as follows.

(1) If the defender does act and makes matters worse, liability may ensue, as discussed in *East Suffolk Rivers Catchment Board*. There the damage was caused by acts of nature, not by the board's intervention. *East Suffolk* was followed in *Capital & Counties* where liability was established in the first two appeals because the authority had made matters worse by turning off the sprinkler system. (2) Where the defender is in control of the wrongdoer, he may be under a duty to control the wrongdoer's actions (*Dorset Yacht Co Ltd v Home Office* [1970] AC 1004). Similarly, where the defender is in control of a situation that presents a danger to others, the fact of control carries responsibility to take reasonable steps to avoid the danger of harm. (In *Gibson (supra)* police constables took charge of a situation involving a collapsed bridge. They placed warning cones on the north side of the bridge but failed to do anything on the south side. A car approaching from the south fell into the river. All but one of its occupants perished. Liability was established. Lord Hamilton remarked that the case could be regarded as one where

the necessary proximity was brought into existence through an assumption of responsibility. (3) Liability for a failure to act may be imposed where there has been an undertaking of responsibility on the part of the defender to safeguard the pursuer (the principle established in *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465.) Fiduciary or contractual relationships may give rise to this sort of liability. (4) In some cases where acts of a third party harm the pursuer, liability for failing to act may be imposed on the defender because of the relationship between the defender and the pursuer (e.g. parent and child, school and pupil and employer and employee.)

Lord Drummond Young considered both *Capital & Counties* and *Michael* in some detail.

His Lordship observed that the Court of Appeal in *Capital & Counties* had concluded that the fire brigade was not under a common law duty to answer the call for help. If a fire authority did, however, answer the call for help, liability could only arise under one of the exceptions to the rule that there is no liability for pure omissions. It could not be said however that the fire brigade owed a duty of care to the owners of the afflicted or neighbouring properties once it had arrived at the fire ground and started to fight the fire on the basis of a sufficient relationship of proximity created by an assumption of responsibility and reliance. A fire brigade did not assume responsibility to deal with fires. Its duty was owed to the public at large to prevent the spread of fire, and that might involve a conflict between the interests of various owners of premises. The analogy given was that during the great fire of London the Duke of York required to blow up a number of houses not yet affected by fire in order to create a fire break. In asserting any such duty as a result of an undertaking, it was impossible to identify to whom any duty might be owed. The owner of the afflicted property would not be sufficient, because neighbouring premises could also be affected by a fire. The duty would have to extend, potentially at least, to an entire town or district on the basis that that was the extent of the potential risk but that was too wide a responsibility to generate a sufficient relationship of proximity. Unless there was an increase in the danger, there could be no liability. An analogy was drawn with a rescuer (at page 1037):

“It is not clear why a rescuer who is not under an obligation to attempt a rescue should assume a duty to be careful in effecting the rescue merely by undertaking the attempt. It would be strange if such a person were liable to the

dependants of a drowning man who but for his carelessness he would have saved, but without the attempt would have drowned anyway.”

In Lord Drummond Young’s opinion, the analogy with a rescuer was a logical extension of the principle that there is no liability for pure omissions unless matters are made worse. A rescuer should not be taken to undertake responsibility to use due skill and care merely on account of attempting the rescue. That was the basis on which the third claim in *Capital & Counties* failed (owing to lack of sufficient proximity) and that claim was indistinguishable from the present one.

Lord Drummond Young went on to observe that in Scotland a different view had been proffered in *Duff and Burnett*. In *Michael*, however, Lord Toulson had identified a key feature of the reasoning in *Burnett* as being the claim that Scots law draws no distinction between acts and omissions. Yet, precisely such a distinction had been central to the reasoning of the House of Lords in *Mitchell* (a Scottish appeal). That, in Lord Drummond Young’s view, was “a clear criticism of the decision in *Burnett*” (at para.73).

*Michael* concerned the potential liability of a police force on receipt of a 999 call. The caller had reported threats by her former partner to kill her but the police response was delayed and by the time the police arrived, she had been murdered. It was held that English law did not as a general rule impose liability on a defendant for injury or damage to the person or property of a claimant caused by the conduct of a third party, (*Maloco, supra*). The fundamental reason for such an approach was that the common law did not, in general, impose liability for pure omissions. Lord Toulson observed (at paras.114-115):

“It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.”

In addition, if the police, upon their intervention, owed a duty of care to (potential) victims of crime, difficulties would arise as to the range of responsibility involved - potentially the duty would be owed to almost anyone who claimed to be a victim. That difficulty

underscored the fact that the duty of the police for the preservation of the peace was owed to members of the public at large, and did not involve the kind of closer special relationship (“proximity” or “neighbourhood”) required for the imposition of a private law duty of care. Moreover, the imposition of liability on the police to compensate victims of violence on the ground that the police should have prevented it would have potentially significant financial implications. Thus, Lord Drummond Young observed, the reasoning in *Michael* in relation to the police could be said to mirror the reasoning in *Capital & Counties* in relation to the fire service.

Lord Drummond Young went on to observe that, in *Michael*, Lord Toulson had addressed certain general issues of public policy in relation to the imposition of liability in negligence on public authorities. In particular he had regard to the danger of a virtually unlimited duty and the possible financial implications. In *Capital & Counties*, on the other hand, the Court of Appeal had based its decision on the absence of proximity, and was generally unpersuaded by considerations of public policy. “This distinction” Lord Drummond Young said (at para.76) “may well reflect the state of development of the law in 1997 as against 2015.” In *Capital & Counties* the court approached the scope of the duty of care of the fire service on the basis of the tripartite analysis in *Caparo* (foreseeability, proximity and whether it was fair just and reasonable to impose a duty of a given scope (i.e. policy)). Foreseeability of damage was a necessary but not a sufficient condition. Lord Drummond Young continued (at para.77):

“[I]t has come to be recognized that proximity together with foreseeability cannot, by themselves, provide a universal solution to every question involving the existence and scope of a duty of care. Instead policy must also be taken into account. It is this, I think, that is meant by the expression “fair, just and reasonable” in Lord Bridge’s formulation in *Caparo*. Proximity points to the closeness in fact of the relationship, and also to the question, which underlies the decision in *Capital & Counties*, of whether the relationship of the defender is with a small group of persons or the public generally. But policy introduces wider considerations. Moreover, it has in my view come to be recognized that proximity and policy cannot be looked at separately: they form parts of a single evaluative exercise which is designed to determine whether a duty of care exists and, if so, what its scope is. To the extent that *Capital &*

*Counties* proceeds on the basis of proximity alone, without regard to questions of policy, I consider that it reflects the state of the law in 1997, when the tripartite test in *Caparo* was treated as providing a general scheme for the analysis of duties of care. Assuming foreseeability, the next question was whether proximity existed. If it did, the third question was whether there were policy considerations that tended to negative or limit the scope of such a duty of care. Today, however, it has come to be seen that proximity and policy are interdependent; except in established cases it is impossible to say that proximity exists without evaluating the relevant policy considerations. In a sense a finding that there is proximity is a statement of a result. The notion of proximity does not, except at a very general level, give much guidance as to how that result is reached; that is where policy is important.”

Lord Drummond Young observed that relevant policy considerations can take different forms and will vary from case to case. It was considerations relevant to the liability of public authorities which were important in the present case. One such consideration was the need to avoid indeterminate liability: the need to keep delictual liability under reasonable control was an important factor in considering the liability of a public authority that operates for the benefit of the entire public. The potential liability of the fire service was extremely wide and might involve sharp conflicts given that the interests of members of the public may conflict. For example, a fire may break out in one property and threaten to spread along a row of properties. As a preventative measure, the fire service may consider it necessary to demolish the property adjacent to the fire in order to spare properties further along the row. In such circumstances the warning in *Ultramares Corporation supra*, was of relevance and care must be taken to avoid indeterminate liability.

Furthermore when a public authority is found to be negligent, liability to pay compensation falls on the public purse and there is a danger that potential liability for negligence may inhibit the authority's performance of its public functions, resulting in further hidden costs to the public. Moreover, it is generally economically desirable that the costs of any particular activity should fall on the participants. For example, in relation to commercial activities the costs will be passed on to customers. If, however, a public authority is liable for the costs of an incident, those costs will fall on the general public rather than the participants. In Lord Drummond

Young's view, these constituted grounds for restricting the liability of public authorities. Lord Drummond Young identified two further factors of possible relevance in claims against the emergency services. The first was the complexity of the operational demands that are made on such services. More than one emergency may arise at the same time, and difficult decisions will require to be taken as to the allocation of resources among them. It would be "inherently undesirable that decisions of this nature should be the subject of negligence claims" (para.81). The second relevant factor was the difficulty in dealing with an emergency where rapid action was required on the basis of incomplete information. Any potential liability must reflect that fact.

Lord Drummond Young went on to observe that while the fire service and police had, in *Capital & Counties* and *Michael*, been held to be subject to relatively restricted duties of care, this approach had not been extended to the ambulance service: *Kent v Griffiths*, [2001] QB 36. There were two reasons for this. First, the ambulance service operates as part of the health service and provides services equivalent to those provided by medical staff; this distinguished it from the police and fire service. Secondly, the ambulance service normally deals with patients on an individual basis and the risk of conflict among commitments is accordingly reduced. The police and fire services, on the other hand, owe their primary duties to the public at large in relation to the prevention and detection of crime and outbreaks of fire respectively. The liability of the ambulance service could not therefore provide a good guide to the liabilities of the fire service.

Lord Drummond Young concluded that good reasons existed for restricting the duty of care incumbent on the emergency services. The solution adopted was based on the fact that the emergency services generally act to deal with situations that are not of their own making. As a result, the common law rule against liability for pure omissions applied, subject to its various exceptions. Thus where the emergency service makes matters worse than would have been the case had it not intervened, liability exists (*Capital & Counties*.) The other exceptions may present greater difficulties in individual cases. Thus where the fire service attends a fire and begins to fight it, it might be argued that it has "taken control" of the situation, or has assumed some form of responsibility to the owners of the afflicted or neighbouring properties. Policy considerations became important at this stage. When it fights a fire, the fire service's primary duty remains to the public as a whole. The interests of various proprietors may

conflict. The fire service is usually dealing with a hazard created by others or by the forces of nature, in an emergency situation and with incomplete information. In Lord Drummond Young's opinion, it could not be said that the fire service is in a situation of "control" when it is fighting a fire, rather it is seeking to achieve control. That was the situation in the instant case.

Lord Drummond Young proceeded to examine the Scottish authorities. In *Duff*, Lord Macfadyen had (*obiter*), distinguished *East Suffolk* on the ground that the authority there was exercising a mere power whereas in *Duff* the fire board was acting under a statutory duty. Lord Drummond Young rejected that argument on the authority of *Gorringe* where it was held that the existence of statutory powers and duties was not relevant to common law negligence. In *Duff*, Lord Macfadyen held (again *obiter*) that, by attending and fighting a chimney fire, the authority placed itself under a duty to the owners of the property and neighbours to exercise reasonable care to extinguish the fire. That, Lord Drummond Young observed, was contrary to the decision in *Capital & Counties*.

As far as Lord Macphail's opinion in *Burnett* was concerned, it proceeded on a misunderstanding of the notion of pure omission. His analysis failed to recognize the underlying nature of the work of the fire service, namely dealing with situations created by others or by the forces of nature. That is why any failure to act by the fire service should properly be characterized as a pure omission; there is in general no duty to act to prevent damage caused by third parties or by the forces of nature. It also explains why, if a member of the emergency services or other rescuer intervenes and does so negligently, there will be no liability unless the result is worse than would have occurred without intervention. Lord Macphail had also indicated in *Burnett* that in carrying out its statutory functions the fire service had created a relationship between itself and the pursuer sufficient to give rise to a duty of care at common law. In Lord Drummond Young's opinion, however, for such a duty to arise, one of the four exceptions to the general rule of non-liability for pure omissions must be engaged.

Lord Macphail in *Burnett* had been critical of the reasoning in *Capital & Counties*, stating that he did not understand the role of proximity in that case. It had been said that there was insufficient proximity for the creation of a general duty of care to the property owner but nevertheless sufficient proximity to give rise to a duty not to make matters worse. Lord Drummond Young considered

that there was some force in that criticism and stated (at para.89):  
“[T]he reasoning in *Capital & Counties* proceeds almost entirely on the basis of proximity, whereas it has, I think, now been accepted that policy must play a part as well as proximity, and that is certainly how I would prefer to analyze the position of the fire service and other emergency services. As a matter of policy, I would prefer to say that a duty is owed by the fire service but, for reasons of policy, the scope of that duty is confined to cases where matters are made worse by intervention.”

Lord Macphail had also observed that *East Suffolk* had not been followed in Scotland (so far as it restricted liability to making matters worse) but that, in Lord Drummond Young’s view, did not render the underlying principle unsound. The principle was based on the fact that the damage tackled by an emergency service is normally caused by someone else or by the forces of nature. Moreover, Lord Macphail’s observation that it was arguable that, when a fire brigade was fighting a fire, it owed a duty not to the public at large but to the limited class of those whose lives or property were endangered, would be dependent on holding that the fire brigade had taken control of the situation or had undertaken responsibility. Such a conclusion should normally be resisted, in Lord Drummond Young’s view, because there is no “control” in any proper sense. Lord Macphail also indicated that it might be appropriate to say that the pursuer was dependent on the fire service for the protection of his property against damage or destruction by fire. Acting as firefighters of ordinary competence, the firefighters should have sought possible causes of reignition. The problem with that analysis, in Lord Drummond Young’s opinion, was that it assumed that there was a duty to act to deal with a hazard that had been caused by the actings of a third party or the forces of nature.

As far as *Gibson* was concerned, Lord Drummond Young observed that the police there took control of a situation in such a way that a duty of care was assumed. That analysis might apply to work performed by the police in controlling traffic or dealing with hazards on the roads (as was the case in *Gibson*), but would not normally apply to work performed in the prevention and detection of crime.

In *Mitchell*, the action proceeded against a local authority in respect of a fatal assault perpetrated by one of the authority’s tenants against another tenant. It was held that the law did not impose a positive duty to protect others against harm inflicted by a

third party. The decision was therefore consistent with the approach taken in *Capital & Counties* and *Michael*. Lord Hope, delivering the leading opinion in *Mitchell*, adopted the *Caparo* tripartite approach, which test, he emphasized, should be directed not merely to whether a duty of care existed but also to its *scope*. It was accepted in *Mitchell* that the local authority owed duties to its tenant in relation to matters such as the state of the property and the common parts but it did not extend so far as protecting the tenant from harm threatened by a third party. Lord Hope emphasized that something more than foreseeability was required for liability. No single general principle could provide a practical test of universal application. The whole circumstances of the case required to be examined in determining whether a duty of care should exist, and if so what its scope should be. Lord Hope suggested that public policy should govern the scope of any duty of care. Lord Drummond Young expressed his agreement with that approach (at para.93). He further observed that Lord Brown in *Mitchell* had placed a similar emphasis on policy in considering whether it was appropriate that any landlord who is aware of a dispute involving one of its tenants should owe a duty of care to protect the tenant's safety. *Mitchell* therefore could be seen as "supporting the view that policy is of vital importance in determining the scope of a duty of care and that policy must be applied on an essentially casuistic basis" (para.93).

Lord Drummond Young added two final observations. First, the issue in *AJ Allan* related to damage to property. Although in a number of English cases it had been said that no distinction could be drawn between injury to the person and damage to property, such an approach troubled Lord Drummond Young. His view was that a distinction might properly be drawn between injury to the person and damage to property. The latter is usually covered by insurance whereas the former is not. More importantly, the life, health and safety of the individual possess a greater moral significance than the security and integrity of any property. Lord Drummond Young expressed his hope that in an appropriate case the law might develop in such a way that, at least in clear cases where action can be taken without danger to the rescuer, the officers of a public service such as the fire service or police are obliged to take action to rescue persons in danger. Although this would require a further exception to the general rule that there is no liability for a pure omission, Lord Drummond Young expressed the view that policy considerations should prevail over a

mechanical application of the rule. Such a result had been achieved in both French and German law.

The second (and closing) observation of Lord Drummond Young was his emphasis on the importance of policy in this area. In a passage which merits full quotation, his Lordship stated (at para.97):

“The main development in the law of negligence over the last 25 years or so has perhaps been a recognition that the notion of proximity is limited in its usefulness, and that the question of whether there is sufficient to give rise to a duty of care of a given scope must depend ultimately on policy considerations. Thus an evaluative exercise is required, which takes account both of proximity, in the narrower sense of physical or causal connection, and policy considerations that are specific to the type of case under consideration. The result is that, as Lord Bridge stated in *Caparo* (at page 618), “the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognizable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes”. Those varying situations, perhaps many in number, will determine the policy considerations that should govern the existence and scope of any particular duty of care. Such development may be incremental and by analogy with established categories, as suggested by Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, at 43-44. Thus the past may guide the future. The critical point is that rules derived from existing case law should not be applied mechanically to new situations: instead it should be asked whether, as a matter of policy directed to the specific situation under consideration, a new analysis is required. The result would be a law of negligence that was less unified than in the past but which dealt more fairly with individual cases. That would in my opinion be a desirable development.”

## **Conclusion**

Given the apparent tension between some of the Scottish and English authorities it was perhaps only a matter of time before the issue of the potential liability of firefighters in negligence was thoroughly ventilated in the Inner House. A direct challenge to the authority of the Outer House decision in *Burnett* appeared inevitable and an opportunity to marshal such an attack presented

itself to the defenders in *AJ Allan*. That attack was to prove ultimately successful before the Inner House where the restricted scope of the duty owed by fire services was clearly articulated by all three judges.

The decision of the Inner House to dismiss the action is not altogether surprising, particularly in view of the Court of Appeal's decision in *Capital & Counties* and the implied criticisms of the reasoning in *Burnett* which have been evident at the highest judicial level. Indeed it has been said that "[t]he Scottish cases of *Duff* and *Burnett* ..have not attracted the approval of the Supreme Court and seem to sit uneasily with *Mitchell*." (*Mackay* (supra) per Lord McEwan at para.33). It was also said there (at para.37) that the Supreme Court's decision in *Michael* was "a clear brake on the creeping extension of liability on public bodies unless clearly justified on the facts of the case and binding authorities."

The Inner House in *AJ Allan* has now made a welcome and unanimous statement concerning the direction of the law in relation to the liability of fire services. Any doubt that the law in Scotland differs from that in England is dispelled.

The most striking element of the judgment in *AJ Allan* is perhaps its emphasis on the increasing importance of policy in judicial decision making in relation to the scope of the duty of care. Policy considerations are closely examined, most notably in the opinion of Lord Drummond Young. In his view, proximity and policy cannot be looked at in isolation but rather form parts of a single evaluative exercise. They are, to use his Lordship's terminology, "interdependent". The policy considerations which are pertinent in any given case will be specific to the type of situation in question. At the heart of the Inner House's judgment in *AJ Allan* is the underlying policy concern that the scope of liability in negligence of the emergency services must be restricted. Unless matters are made worse by intervention or a sufficient relationship of proximity can be said to exist on account of an undertaking of responsibility, it now seems unlikely that emergency services will incur liability in negligence. *AJ Allan* is therefore a decision which will be greeted enthusiastically by fire and police services across the country.