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Russell, Eleanor

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Eleanor J Russell
Glasgow Caledonian University

The author considers the recent case of Glasgow City Council v First Glasgow (No 1) Ltd *2020 S.L.T. 75 in which the question arose as to whether a reference giver owed a duty of care-not to the subject or recipient of the reference-but rather to a third party. As will be seen, that question, which presented the court with a novel situation, would be answered in the negative.*

Introduction

The issue of the existence of a duty of care in negligence litigation is often a non-contentious one. Indeed, the question of duty of care will often be a matter of concession (as it might be, for example, in the case of injury sustained in a road traffic or industrial accident). Where the existence of a duty of care is admitted, the argument may revolve instead around whether the duty was breached, whether the breach (if established or admitted) caused the pursuer's loss, whether the losses suffered were too remote or, indeed, whether any relevant defences might apply.

There are, however, situations in which the existence of a duty of care is very much a live issue and, in some such situations, establishing a duty of care is less than straightforward. The question of whether a duty exists in a given situation is a question of law for the courts to determine. Of course, policy considerations will be influential and the courts will be mindful of the warning articulated by Cardozo C.J. in *Ultramares Corporation v Touche* (1931) 255 NY 170 at 179 against "liability in an indeterminate amount for an indeterminate time, to an indeterminate class."

The recent Outer House decision in *Glasgow City Council v First Glasgow* (No 1) Ltd 2020 S.L.T. 75 provides an interesting illustration of the difficulty which might arise in attempting to establish a duty of care in a novel situation. The matter of whether a reference-giver owes a duty of care to the subject or, indeed, to the recipient of the reference had previously been subject to judicial determination but the question of whether a reference giver owes a duty of care to *a third party* who is neither the subject nor recipient of the reference has not previously received judicial attention. That novel situation is the one which would confront the court in *Glasgow City Council v First Glasgow (No 1) Ltd.*

Background

Readers will be familiar with the tragic events which unfolded in the city centre of Glasgow on 22 December 2014 when a bin lorry owned and operated by Glasgow City Council ran out of control, leaving a number of dead and injured pedestrians in its wake. At the relevant time, the lorry was being driven by the council's employee, Harry Clarke, who is said to have suffered a loss of consciousness at the wheel of the lorry. One of the casualties of the incident was Stephanie Tait. Following Ms Tait's death, various members of her family raised actions against Glasgow City Council. The council was advised that the actions were unlikely to be successfully defended and settlements were reached. The council sought to recover a contribution to those damages and expenses from Mr Clarke's previous employer, First Glasgow, in terms of the

Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. Section 3(2) of that Act entitles one wrongdoer "to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded." The council averred that Mr Clarke had previously been employed by First Glasgow as a driver. It was further alleged that, while in the employment of First Glasgow, Mr Clarke had lost consciousness whilst driving a bus on 7 April 2010. That episode, it was averred, was similar to that suffered on 22 December 2014. The defenders, First Glasgow, did not disclose that fact to the council in its written reference which, it was averred, would have been obtained by the council prior to its employment of Clarke. (The reference document had subsequently been lost.) Clarke was thus permitted to continue to drive a vehicle whereas he would not have been permitted to do so had the previous fainting episode been disclosed. The council averred that it was the defenders' duty either not to provide a reference or to provide a reference which was accurate. In either event, Clarke would not then have been employed as a driver by the council and the accident in 2014 would not have occurred.

The debate

The case came to debate before Lord Ericht. Having reviewed a number of key authorities (including *Farstad AS v Enviroco Ltd* 2010 S.C. (U.K.S.C.) 87), Lord Ericht was in little doubt that, in order for the 1940 Act to apply, both parties (namely Glasgow City Council and First Glasgow) must be liable to the injured party. Having disposed of that first issue, Lord Ericht posited the second question for determination in the following terms, namely "whether as a matter of law, in the circumstances of this case, a previous employer who gives a reference to a new employer can be liable in negligence to a third party who is injured by the employee during the course of his new employment" (at para.24). Put shortly, did First Glasgow owe the deceased, Ms Tait, a duty of care?

The pursuers sought a proof before answer, asserting that it could not be said at this stage that no duty of care was owed. The defenders' position, on the other hand, was that, when giving a reference, an employer did not owe a duty of care to "anyone with whom that employee might interact whilst working with the new employer" (at para.22). That, it was said (at para.14), in a passage which brings to mind Cardozo C.J.s warning, "would amount to a duty of care to at least the entire population of and any visitors to Glasgow at any point during the anticipated working life of Clarke."

Discussion

It was established in the landmark decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd.* [1964] A.C. 465, that, in certain circumstances, a reference giver may owe a duty of care to the *recipient* of the reference. There, a favourable credit reference was provided by the defendants (who were bankers) to the plaintiffs in respect of one of the defendants' customers. The plaintiffs relied on the reference and became advertising agents for the subject of the reference, a company named Easipower. Easipower was not, in fact, creditworthy and the plaintiffs suffered pure economic loss following Easipower's liquidation. The House of Lords held that a duty of care would arise where there was an assumption of responsibility for the accuracy of the

statement by its maker coupled with knowledge (actual or imputed) that the statement would be relied upon by its recipient. It should be stressed that undertaking of responsibility and reliance are pivotal to *Hedley Byrne* liability. (On the facts in *Hedley Byrne*, there was found to be no undertaking of responsibility by the defendants owing to their use of a disclaimer.)

It is also well established that a reference giver may incur liability to the *subject* of the reference: *Spring v Guardian Assurance plc* [1995] 2 A.C. 296. There, a "kiss of death" reference provided by his former employer thwarted the plaintiff's attempts to obtain further work in the insurance industry. The House of Lords held that an employer who provides a reference in respect of an employee to a prospective future employer owes a duty of care to the employee in respect of the preparation of the reference and would be liable in respect of economic loss suffered as a result of the negligent preparation of the reference. Lord Goff observed (at p.319) that "references are part of the currency of the modern employment market" and the employee relies upon the employer to exercise due care and skill in the preparation of the reference before making it available to the recipient. His Lordship continued (at p.319): "it seems to me that all the elements requisite for the application of the *Hedley Byrne [1964] A.C. 465* principle are present." Lord Goff added (at p.324): "I do not think that we may fear too many ill effects from the recognition of the duty. The vast majority of employers will continue, as before, to provide careful references. But those who, as in the present case, fail to achieve that standard will have to compensate their employees or former employees who suffer damage in consequence. Justice, in my opinion, requires that this should be done; and I, for my part, cannot see any reason in policy why that justice should be denied." Lord Lowry viewed the "possibility that some referees will be deterred from giving frank references or indeed any references… as a spectre conjured up by the defendants to frighten your Lordships into submission" (at p.326). Lord Slynn stated (at p.336): "Even if it is right that the number of references given will be reduced, the quality and value will be greater and it is by no means certain that to have more references is more in the public interest than to have more careful references."

It should be noted that both Lord Slynn (at p.336) and Lord Woolf drew a distinction between cases where the reference is given by an (ex) employer and where it is given by someone who has a mere social acquaintance with the subject of the reference. Lord Woolf stated (at p.345): "In the latter situation all that the person who is the subject of the reference may be able to rely on is the fact that the referee gave the reference. That I can well understand may not be considered sufficient to create the required degree of proximity."

Lord Goff, in *Spring*, expressly reserved his opinion as to whether the reference giver owed a duty of care to the *recipient* of the reference, pointing out that that was a fact sensitive issue. His Lordship stated (at p.320): "[I]t does not necessarily follow that, because the employer owes such a duty of care to his employee, he also owes a duty of care to the recipient of the reference. The relationship of the employer with the recipient is by no means the same as that with his employee; and whether, in a case such as this, there should be held (as was prima facie held to be so on the facts of the *Hedley Byrne* case itself) a duty of care owed by the maker of the reference to

the recipient is a point on which I do not propose to express an opinion, and which may depend on the facts of the particular case before the court."
The courts therefore have previously addressed–at the highest judicial level- the issue of the duty of care which a reference giver might owe to the subject and recipient of a reference.
Returning to the present case, Lord Ericht observed (at para.27) that the court was being asked to take a further step and to find that there was a duty of care owed to a *third party* who was neither the subject nor the recipient of the reference. This, Lord Ericht warned (at para.27), was "an exercise which must be approached with great care." The pursuers' case here was that the giver of a reference had failed to warn the recipient of the reference about potential physical danger to third parties. His Lordship turned his attention to cases where the courts had considered whether there was a duty to warn of physical danger and whether there was a duty of care towards third parties in respect of physical harm. *Mitchell v Glasgow City Council* 2009 S.C. (H.L.) 21 arose following a fatal attack by one council tenant upon another. The aggressor had previously threatened to kill the deceased and the council had convened a meeting with the assailant as it was considering taking eviction proceedings against him. It was following that meeting that the fatal attack took place. The widow and daughter of the deceased sought damages from the council on the basis of its failure to warn the deceased of the risk which he faced. The action failed. Lord Hope stated (at para.15): "[F]oreseeability of harm is not of itself enough for the imposition of a duty of care….Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, 192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning." The second point made by Lord Hope, under reference to *Maloco v Littlewoods Organisation Ltd* 1987 S.C. (H.L.) 37, is that the law does not normally impose a positive duty on a person to protect others. In other words, it does not impose liability for pure omissions. The third point made by Lord Hope (again under reference to *Maloco*) is that the law does not impose a duty to prevent a person being harmed by the criminal act of a third party based simply upon foreseeability. Lord Hope continued that, in road traffic accident and industrial injury cases, a duty of care is owed not simply because loss is reasonably foreseeable but because of the relationship of proximity between the parties. In such cases there is no need to embark on an analysis of whether it is fair, just and reasonable for damages to be recovered. However, "cases of [Mitchell's] kind which arise from another's deliberate wrongdoing cannot be founded simply upon the degree of foreseeability. If the defender is to be held responsible in such circumstances it must be because…the situation is one where it is readily understandable that the law should regard the defender as under a responsibility to take care to protect the pursuer from that risk" (at para.20). The *Caparo* test (see discussion below) was held not to have been satisfied in the circumstances of *Mitchell* and no duty to warn was established. Lord Hope said this (at para.29):
"The situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that

there was a relationship of proximity but that a duty to warn was within the scope of that relationship. But it is not suggested in this case that this ever happened ... I would conclude therefore that it would not be fair, just or reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking...I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk."

Having analysed *Mitchell*, Lord Ericht alighted upon an examination of *Thomson v Scottish Ministers* 2013 S.C. 628; 2013 S.L.T. 1069. There, a prisoner was released on short term leave from prison, during which time he murdered a childhood friend. The mother of the deceased sought damages in respect of decisions taken by the Scottish Prison Service (SPS). She averred that the SPS owed her daughter a duty of care not to release prisoners on short term leave if they presented a real and immediate danger to the public. Her action was dismissed as irrelevant by the Lord Ordinary and that decision was affirmed by the Inner House. The Lord Justice-Clerk (Carloway) observed (at para.49): "Each of the elements of foreseeability and proximity are necessary, if not sufficient, ingredients for the imposition of a duty of care. Policy considerations inform both of these two discrete but interlinked elements."

His Lordship stated that the courts should analyse the particular circumstances of a specific case by reference to the category into which it fell and, in *Thomson,* that category was liability of public custodians for the criminal actions of those in their care. Having analysed the cases in that category, the Lord Justice-Clerk stated (at para.56):

"In order to succeed, the pursuer must establish a special relationship which exposed the deceased to a particular risk of damage as a result of negligence by the defenders in the context of that relationship (ie *Dorset Yacht Co*, Lord Diplock at 1070) or, put in another way, that she was the subject of a special or distinct risk as a consequence of the defender's actions (ie the majority in *Couch* v *Attorney General* at para [112]). Where there is an immediate risk to a person's life as a consequence of a third party's predictable activity, it may not be necessary to identify a particular class of persons beyond those under immediate threat (eg *O'Dwyer* v *Chief Constable, Royal Ulster Constabulary*, at 412)."

It should be noted that the deceased in *Thomson* was not in a special relationship with the SPS nor was she at any distinct or special risk as a result of its actions. There was no proximity between the deceased and the SPS. The Inner House rejected the pursuer's argument that the Lord Ordinary had looked at proximity in isolation. Foreseeability had been conceded by the defenders. As far as fairness, justice and reasonableness were concerned, these were "already ingrained in the defining principles which apply to this category of case" (per Lord Carloway at para.57). His Lordship eschewed the need (at para.57) "for a court to revisit these elements separately in every case in such a well-known and understood category." His Lordship went on to say (at para.59) that "if liability were to be imposed upon the SPS on such a tenuous basis as is advanced, it would potentially render the SPS and perhaps also the Parole Board open to claims from any person who became a

victim of a prisoner released before the mandatory date of his/her liberty. Such a regime would have potentially serious consequences for the proper functioning of both these institutions in the care and rehabilitation of prisoners and hence to society as a whole."

Lord Ericht went on to examine *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 where there had been further reference to certain categories of previous cases in which liability had been established. In relation to negligent statements, Lord Bridge in *Caparo* distinguished between liability to the recipient of a statement and liability to a third party. His Lordship stressed that, in order to satisfy the proximity requirement, the defendant must have known that his statement would be communicated to the plaintiff specifically in connection with a particular transaction and that the plaintiff would be likely to rely on it for the purpose of deciding whether to enter that transaction. It was, of course, in the context of *Caparo*, that the so-called "tripartite test" was articulated by Lord Bridge, namely foreseeability, proximity, and fairness, justice and reasonableness. (It has subsequently been stated that "the idea that the *Caparo* case established a tripartite test is mistaken": Lord Reed in *Robinson v Chief Constable of West Yorkshire* [2018] A.C. 736 (at para.28) under reference to *Michael v Chief Constable of South Wales Police* [2015] A.C. 1732). In *Robinson,* Lord Reed stated that public authorities, like private individuals and bodies, generally owe no duty of care to individuals to prevent them from being harmed by third parties. Limited exceptions existed however including "where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied" (para.37). Lord Reed continued that, in determining whether a duty of care existed, courts would normally follow the precedents but, where the existence of a duty of care has not previously been determined, the courts will consider the closest analogies with a view to maintaining coherence of the law and avoiding inappropriate distinctions. They will also weigh up the reasons for and against the imposition of liability, in order to decide whether the imposition of a duty of care would be just and reasonable. Lord Mance stated (at para.83):

"[I]t is unnecessary in every claim of negligence to resort to the three-stage analysis (foreseeability, proximity and fairness, justice and reasonableness) identified in *Caparo*...There are well-established categories, including (generally) liability for causing physical injury by positive act, where the latter two criteria are at least assumed. The concomitant is that there is, absent an assumption of responsibility, no liability for negligently omitting to prevent damage occurring to a potential victim."

Having conducted the aforesaid analysis of the case law, Lord Ericht proceeded to note that the existence of the duty of care contended for by the pursuer in the instant case had not previously been the subject of decision. The case did not fall within, nor was it analogous to, one of the categories of cases previously decided. Accordingly, Lord Ericht addressed the matters of foreseeability, proximity, and fairness, justice and reasonableness (per *Caparo*) together with the matter of assumption of responsibility. While the test of foreseeability was met in Lord Ericht's view, that was insufficient for the imposition of a duty of care (see Lord Hope in *Mitchell v Glasgow City Council* 2009 SC (HL) 21 at para.15). Significantly, however, the reference giver was not in a relationship of proximity with the injured person. Lord Ericht stated (at

para.41):
“The injured person is not injured by the giver of the reference. The injured person is not the recipient of the reference. The injured person is not injured by the recipient of the reference. The injured person is not aware that the reference has been given. The injured person is not aware of what the reference says. The injured person has not relied on the reference in any way. The injured person has not taken the reference into account in deciding to be in central Glasgow that day. The relationship is far less proximate than that in *Mitchell*, where the court held that there was no duty of care despite the defender being the landlord of both the injured party and the attacker and the defender being aware of prior threats.”
Turning to the matter of fairness, justice and reasonableness, Lord Ericht took the view that this criterion was not established. Noting that a good reference is of assistance to both the job hunter and the potential employer, his Lordship stated (at para.42):
“The giver of a reference naturally has in mind the individual who is the subject of the reference and the recipient of the reference. The giver of the reference does not naturally have in mind all the persons who will come into contact with the employee during the course of his new employment. In the case of the driver of a bin lorry, that would include not only the driver’s co-workers but also any member of the public who was out on the streets of Glasgow at any time on any day when Mr Clarke’s route took him to that same street.”
In an echo of Cardozo C.J.’s warning about potentially limitless liability in *Ultramares Corporation v Touche* (1931) 255 NY 170, Lord Ericht warned of the possible deleterious consequences of imposing a duty to third parties (at para.42):
“It could be expected that employers, reluctant to expose themselves to the unpredictable risk of such extensive potential liability to such a great number of unknown persons, might no longer be prepared to give references, in which case the benefits to employees and employers of the availability of references would be lost.”
In this passage of his opinion, Lord Ericht, in support of his view, invokes wide policy issues notably the risk of defensive practices emerging and the benefit of references being lost. Of course, the employment of wide policy considerations to justify a refusal to impose a duty of care has been a feature of many significant decisions in the field of negligence. *Mitchell* (discussed above) stands out as a prime example. There, Lord Hope said that the implications of the imposition of a duty to warn upon the council would be “complex and far reaching” (at para.27). His Lordship went on to state that the imposition of a duty to warn would give rise to practical difficulties and might “deter social landlords from intervening to reduce the incidence of antisocial behaviour” (at para.28). Lord Hope continued (at para.28): “Defensive measures against the risk of legal proceedings would be likely to create a practice of giving warnings as a matter of routine. Many of them would be for no good purpose, while others would risk causing undue alarm or reveal the taking of steps that would be best kept confidential.”
Public policy was also central to the decision in *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53. There, the mother of the last victim of the Yorkshire Ripper sued the Chief Constable in negligence for the failure to apprehend the

Ripper before he killed her daughter. The Ripper was alleged to have committed several offences of murder and attempted murder against young women in the area in similar circumstances in the years before the deceased's murder. The question of law to be addressed by the House of Lords was whether individual members of a police force, in the course of carrying out their functions of controlling crime, owed a duty of care to individual members of the public who might suffer injury through the actions of criminals. The answer to that question was a resounding “no”. Quite apart from the lack of proximity (the deceased being at no special distinctive risk), Lord Keith of Kinkel stated that the action was precluded by considerations of public policy. The imposition of liability might result in the police carrying on their function of investigating and suppressing crime “in a detrimentally defensive frame of mind” (at p.63).

(See also Lord Brown of Eaton-under-Heywood's observations in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 A.C. 225 (at para.133) concerning the “desirability of safeguarding the police from legal proceedings which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating crime.”)

Fundamental to such decisions is that the imposition of a duty of care in a given situation would, to borrow the words of Lord Templeman in *Hill* (at p.65), “do more harm than good”.

Lord Ericht further observed that denying the existence of a duty occasioned no unfairness or prejudice to the injured party as he or she could recover from the person who was the employer at the time at which the injury was suffered (as indeed, had happened in the instant case).

Finally, Lord Ericht took the view that there had been no assumption of responsibility by the reference giver for the safety of the injured party upon which reliance had been placed. His Lordship restated the general principle enunciated by Lord Reed in *Robinson*, to the effect that private individuals owe no duty of care towards individuals to prevent them being harmed by the conduct of a third party. The exception was where a person has assumed responsibility for an individual’s safety on which the individual has relied. This was not such a case. Lord Ericht continued (at para.43):

“There require to be limits on the scope of those to whom the giver of a reference assumes responsibility. In my opinion, the safety of third parties whom the subject of a reference may come across in the course of his new employment falls outwith that limit. The reference is being given for the benefit of the subject and the new employer. The injured person, being entirely unaware of the existence and the contents of the reference, has not in any way relied on it. It cannot be said that by granting a reference which makes no mention of an extremely broad class of members of the public and of which the members of the public were unaware, that the defenders have assumed responsibility to these members of the public.”

Lord Ericht concluded that no duty of care was owed to the deceased by First Glasgow. Accordingly, section 3 of the 1940 Act did not apply and the council’s action to recover damages and expenses from Mr Clarke’s former employer, First Glasgow, was dismissed.

Concluding Remarks

Given that the duty of care which a reference giver might owe to the subject and recipient of the reference had already attracted judicial analysis, (in *Spring* and *Hedley Byrne* respectively), it was perhaps only a matter of time before the courts would be called upon to consider whether a duty of care might be owed by the reference giver to a *third party*. This "novel" issue has now been comprehensively addressed in the opinion of Lord Ericht in *Glasgow City Council v First Glasgow (No 1) Ltd*.

The case is "novel" because it poses a question which has not hitherto been answered: what, if any, legal liability might a reference giver incur to third parties in respect of injury caused by the employee during the course of his new employment? The answer to that question, at least in the circumstances of the particular case, was "none." Lord Ericht's opinion makes clear that the question could not be answered simply through the mechanism of foreseeability. While his Lordship considered the criterion of foreseeability to be satisfied, the requisite proximity of relationship between the reference giver and the deceased was notably absent. Fairness, justice and reasonableness also militated against the imposition of a duty. Simply put, the imposition of a duty would do more harm than good in the present circumstances. The "cost" of liability is undoubtedly a concern in any area of negligence law and that "cost" -whether it be financial or of another nature (e.g. the emergence of defensive practices) –has been a significant factor in many cases in which the courts have declined to recognise a duty of care (see e.g. *Mitchell* and *Hill,* discussed above). In the instant case, too, Lord Ericht identified certain adverse consequences which might ensue if the ambit of negligence were to be extended in the manner contended for by the pursuer. The potential for employers to refuse to give references owing to a fear of incurring extensive liability to many unknown persons was a "cost" which the court was simply not prepared to countenance. Significantly, the refusal to recognise a duty by the reference giver would not leave the deceased's family members with no form of redress as they would be able to recover compensation from the council. Finally, Lord Ericht held that there was no assumption of responsibility and concomitant reliance in the instant case.

By way of final comment, it can be said that in view of the underlying policy concern that the scope of liability in negligence must be restricted, it is perhaps unsurprising that the Outer House dismissed the council's action against the defender. The potential for very wide ranging liability if a duty was recognised in the particular circumstances of this case was clear. It is worth emphasising, however, that Lord Ericht was careful to posit the question about the reference giver's duty to a third party under reference to "the circumstances of this case" (see para.24). It is not entirely inconceivable that a different factual matrix may generate a different outcome. Developments in this area will therefore be awaited with interest.