Hilary Term
[2016] UKSC 6
On appeal from: [2014] CSIH 76

JUDGMENT

Kennedy (Appellant) *v* Cordia (Services) LLP (Respondent) (Scotland)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

10 February 2016

Heard on 19 October 2015

Appellant
Frank Burton QC
Ian Mackay QC
Euan G Mackenzie
(Instructed by Digby Brown LLP)

Respondent
Andrew Smith QC
Jillian Martin-Brown

(Instructed by Glasgow City Council)

LORD REED AND LORD HODGE: (with whom Lady Hale, Lord Wilson and Lord Toulson agree)

1. This appeal from the Court of Session arises from an accident of an everyday kind, but raises a number of issues of practical importance relating to the Personal Protective Equipment at Work Regulations 1992 ("the PPE Regulations") (SI 1992/2966) and the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations") (SI 1999/3242), to employers' liability at common law, and to expert evidence in this field.

The accident

2. The appellant, Miss Kennedy, was employed by the respondents, Cordia (Services) LLP ("Cordia"), as a home carer in Glasgow. Cordia are wholly owned by Glasgow City Council, and provide home care services on its behalf. Those services were previously provided by the Council itself. Miss Kennedy's principal duty was to visit individuals in their homes and to provide them with personal care.

3. At about 8 pm on 18 December 2010 Miss Kennedy was required to visit an elderly lady, Mrs Craig, who was terminally ill and incontinent, at her home in order to provide her with palliative and personal care. The visit was one of a series of visits carried out by Miss Kennedy during her shift. She travelled to Mrs Craig's house after visiting another client.

4. There had been severe wintry conditions in central Scotland for a number of weeks prior to that date, with snow and ice lying on the ground. Miss Kennedy was driven to the house by a colleague, who parked her car close to a public footpath leading to the house. The footpath was on a slope, and was covered in fresh snow overlying ice. It had not been gritted or salted. Miss Kennedy was wearing flat boots with ridged soles. After taking a few steps along the footpath, she slipped and fell to the ground, injuring her wrist.

Risk assessments and precautions

5. Cordia were aware of the risk that their home carers might slip and fall on snow and ice when travelling to and from clients' houses in winter. On average, four such accidents had been reported to them, or to their predecessors the Council, during each year since 2005. During 2010 there were 16 such accidents. Cordia were

also aware of the snowy and icy conditions on the night in question, as those conditions had persisted for weeks.

6. In 2005 the Council carried out a risk assessment in relation to home care services and client care. It covered risks involved in "travelling to and from work locations". The assessment noted the risk of sprains, cuts, broken limbs, fractures and head injuries from slips and falls in inclement weather. The current preventive and protective measures were noted as being the provision of a hazard awareness booklet and instruction on appropriate footwear. The risk was assessed, using the risk rating scale appended to the guidance document "Guide to Occupational Health and Safety Management Systems" published by the British Standards Institution (BS 8800:2004). The resultant assessment was that the risk was "tolerable", on the basis that the severity of harm, and its likelihood, were respectively categorised under the scale as "harmful" and "highly unlikely". The assessment of the risk as "tolerable", in terms of the British Standard, implied that it had been reduced to the lowest level that was reasonably practicable, and that no additional controls were required.

7. A further risk assessment was carried out by Cordia in July 2010. It did not expressly consider the risk of injury from slips and falls in inclement weather, but was otherwise in similar terms to the 2005 assessment. Neither assessment considered the possible provision of personal protective equipment ("PPE"), such as non-slip attachments for footwear.

8. Miss Kennedy underwent an induction programme of a kind which usually included a discussion of slips and falls on ice in winter, and the importance of wearing appropriate footwear. A hazard awareness booklet provided to employees stated that extra care should be taken when walking to and from work locations in inclement weather, and that staff should ensure that safe adequate footwear was worn. What constituted safe adequate footwear was left to the judgment of the individual employee.

The evidence of the expert witnesses

9. Evidence was led on behalf of Miss Kennedy, under objection, from a consulting engineer, Mr Lenford Greasly. His qualifications included a degree in engineering and a diploma in safety and hygiene. He was a chartered member of the Institute of Safety and Health, and an associate member of the UK Slip Resistance Group. He was a former member of the Health and Safety Executive, in which he had worked as an Inspector of Factories. He had held senior management positions in industry, in areas including health and safety. He had worked for many years as an engineering consultant advising companies on health and safety, including carrying out slip testing and advising on the adequacy of risk assessments. He had carried out or revised between 50 and 100 risk assessments.

10. In a report which he had prepared, Mr Greasly referred to the relevant legislation and to advice published by the HSE, including advice concerning reducing the risk of slips on ice and snow by providing anti-slip footwear. In that regard, there was advice to consider finding out what footwear other similar businesses were using and whether it worked. Mr Greasly's report described various types of anti-slip attachment which had been available for some years at a modest cost, and which were said to increase grip in icy conditions. He cited several published papers reporting on research into the slipperiness of footwear on icy and other surfaces, and the effect on slip-resistance of using different types of sole and different types of attachment. These included an American study which showed a reduction in falls of 90% among elderly people who wore attachments sold under the trade name Yaktrax. He described his own experience of using Yaktrax, and said that he had found them helpful in increasing traction in icy conditions. His report also included evidence that a number of employers whose staff had to work outdoors in snow and ice had provided them with anti-slip attachments. They included Royal Mail and a number of local authorities. He concluded that such attachments reduced the risk of slipping on snow or ice, and that Cordia could have investigated the adequacy of such devices and provided Miss Kennedy with them. At para 4.9, he stated:

> "[Cordia] made a risk assessment but the identified preventative measures relied exclusively on the employee, via information and instruction, when dealing with inclement conditions."

11. In a supplementary report, Mr Greasly noted the information which had been provided by Cordia about the number of home carers who slipped and fell on snow and ice each year. In the light of that information, he referred to the PPE Regulations, stating at paras 3.11-3.12:

> "3.11. The Personal Protective Equipment at Work Regulations 1992 address the supply and use of PPE. At regulation 4(1) it states 'Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.'
>
> 3.12. The risk of slipping on ice and snow was not controlled by other means, the controls that [Cordia] indicate were undertaken were informative; the risk of slipping on slippery surfaces (as identified by [Cordia]) remained."

12. Mr Greasly also referred to further published research. He concluded that the research showed that the use of appropriate anti-slip devices would help to avoid slips and falls. He expressed the opinion that, had Miss Kennedy worn such devices then, on the balance of probabilities, the risk of her falling on ice and snow would have been reduced and might have been eliminated. He also included information that at least six Scottish local authorities (including one to which he had referred in his earlier report) provided their home carers with anti-slip attachments, although in two cases the practice had been introduced after 2010.

13. Mr Greasly expanded upon his reports in his oral evidence. He explained how, in engineering terms, anti-slip attachments reduced the risk of slipping. Asked whether the wearing of such attachments would have any effect in the conditions experienced by Miss Kennedy, he replied that it ought to, as it would increase grip. In cross-examination, he is recorded as having assented to the suggestion that he could not say whether Yaktrax would have made any difference to Miss Kennedy on the occasion in question. In re-examination, however, he expressed puzzlement at that answer, and said that it was likely to have reduced and maybe eliminated the risk. More generally, he accepted that different types of device were more or less effective in different conditions. The provision of such equipment would however reduce the risk. It was for the employer to determine the particular device which was most suitable.

14. Mr Greasly was critical of the omission from the 2010 risk assessment of a consideration of slips and falls in inclement weather. He was also critical of the categorisation of the risk of slipping and falling as "tolerable".

15. Evidence was led on behalf of Cordia from their health and safety manager, Miss Rodger, who had prepared the 2005 risk assessment on the basis of the British Standard and had been responsible for the preparation of its 2010 successor. She was questioned, in particular, about the categorisation of the risk of slipping and falling as "tolerable" rather than "substantial". In terms of the British Standard, the latter categorisation would have led to the conclusion that work should not be started until the risk had been reduced, and that considerable resources might have to be allocated to reduce the risk.

16. Miss Rodger accepted that a slip could produce injuries which were properly categorised as "harmful", such as fractures and head injuries, and also accepted, in the light of the annual statistics referred to in para 5 above, that it was "a dead cert" that someone was going to fall on snow and ice. She accepted that the risk involved in the activity being carried out by Miss Kennedy on the occasion in question was therefore "substantial", in the absence of measures to control the risk. She also accepted that it would be apparent to any employer, applying his mind to this activity on the day in question, that there was a substantial risk of injury, in the absence of

controls. She nevertheless maintained that the advice to wear safe and adequate footwear reduced the risk as far as was reasonably practicable. She confirmed that Cordia had not given any consideration to the provision of footwear or attachments.

The proceedings in the Outer House

17. Miss Kennedy commenced proceedings in the Court of Session, and the case proceeded to a proof restricted to the issue of liability. The Lord Ordinary, Lord McEwan, found Cordia liable under the PPE Regulations, the Management Regulations, and the common law: [2013] CSOH 130.

18. The Lord Ordinary accepted Miss Kennedy's evidence, including her evidence that, if provided with attachments for her boots, she would have worn them on the night in question. He commented that it was of some importance that she and her colleague were under an urgent and important duty to an elderly sick lady.

19. He also accepted the evidence of Mr Greasly, which he regarded as consistent: in particular, he did not consider that what he said in cross-examination had departed from his evidence in chief or in re-examination. His summary of Mr Greasly's evidence included the following passages:

> "16. He then looked at the risk assessments. Agreeing in general with the later evidence of Miss Rodger, he said account had to be taken of controls to overcome hazards before any rating could be arrived at. However, he said that in his opinion the measures specified did not reduce the risk. Personal Protective Equipment (PPE) should have been provided. He was critical of the omission of 'inclement weather' in [the 2010 risk assessment]. Such weather did not cease to be a hazard and simply to rate the risk as 'tolerable' did not take account of changes in the risk when seriously adverse weather could and did occur that winter. This risk could be eliminated altogether by not going to the house, but accepting the need to go, the *employer* (his emphasis) should choose and supply the correct footwear which was available at that time. That was not done. …
>
> 20. Being asked again about research papers he said some were surveys and some were lists. He agreed that icy and snowy surfaces varied and shoe attachments varied in their reaction to these. He described in detail how Yaktrax performed and how he had used his own set for 18 months in

> snow and ice. He said that they reduced the risk although there was no one answer to the problem. Everyone still had to take care. Had he done a risk assessment for Miss Kennedy's job he would have assessed the risk as likely and the severity as harmful. It was for the employer to find out what PPE was best and in his opinion they should have provided Yaktrax or some other type of fitting.
>
> 21. ... under reference to the [British Standard], he said that the assessment of the risk should have been 'substantial'. Slipping and falling could give a variety of serious injuries. What the employer had to do was reduce or eliminate the risk. That would have been done if Yaktrax had been provided."

20. The Lord Ordinary repelled an objection which had been made to Mr Greasly's evidence on the ground that he did not have any relevant special skill, experience or learning. In that regard, the Lord Ordinary had earlier commented that Mr Greasly had detailed knowledge of the correct approach to compiling risk assessments, and was justified in the conclusion he drew from the published papers. In dealing with the objection, he stated at para 43:

> "His [Mr Greasly's] many general qualifications are listed in his two reports ... He has given evidence on many occasions. He is a member of a group with particular interests in slipping at work. He demonstrated a detailed knowledge of a number of international papers on the subject of slipping and personal protective equipment relating to footwear. The real issue is whether he was in a position to provide expertise in areas of health and safety at work which would not be within the knowledge of the court. In my view he clearly has the qualifications and gives such evidence here. He will be treated therefore as an expert witness."

21. Having dealt with objections to the evidence, the Lord Ordinary then stated his findings on the evidence. In the light of the evidence of Mr Greasly, he made the following findings:

> "47. The following emerges. He had been to the locus. The conditions required some form of shoe 'add on'. Yaktrax was but one model available on the market at the time (it should be noted that Miss Kennedy's case does not depend solely on Yaktrax. She said she would have worn an 'add on' if she had been given one).

> 48. Importantly I accept his criticism of the risk assessments given in his evidence (see para 4.9 of [the first report, quoted in para 10 above]) and he was clear in his evidence and reports that regulation 4 [of the PPE Regulations] was also breached (see eg paras 3.11 and 3.12 in [the supplementary report, quoted in para 11 above]). He spoke to the availability of a number of devices to fit to footwear at the relevant time. It is not necessary to dwell at any length on the various studies or indeed to express my own view of them. In my opinion they present a consistent picture with the American one being particularly helpful."

22. The Lord Ordinary was critical of the reliability of Miss Rodger's evidence. He stated that her evidence lacked a clear explanation of her conclusion that the risk of home carers slipping was tolerable rather than substantial. He commented that her failure to consider the provision of PPE had resulted in the breach of duty in all areas.

23. Considering first the Management Regulations, on the basis that a risk assessment was logically anterior to the taking of safety precautions, the Lord Ordinary concluded that both assessments had been unsatisfactory. Given Miss Rodger's acceptance that a fall on ice was likely and that any resultant injury could be harmful, the risk should have been assessed as substantial rather than tolerable. The precautions in place, in the form of advice to wear safe and adequate footwear, were inadequate. There was no specific advice as to what might constitute such footwear, and no checking or assessment of what was worn. In those circumstances, the risk assessment had not been "suitable and sufficient", as required by regulation 3(1).

24. Considering next the PPE Regulations, the Lord Ordinary concluded that in the light of Mr Greasly's evidence about the availability of relatively simple precautions to reduce the risk, and the absence of any consideration of PPE by Cordia, it could not be said that the risk had been adequately controlled by other means which were equally or more effective. There was therefore a breach of regulation 4(1).

25. Considering next the common law, the Lord Ordinary stated:

> "72. For the same reasons I find [Cordia] also liable at common law. In the face of an obvious and continuing risk they provided no safe footwear. There is no evidence they checked what was being worn. There was no evidence of any system of working or reporting in when staff had to go out in the extreme weather and walk on snow and ice."

The proceedings in the Inner House

26. The Lord Ordinary's decision was reversed by an Extra Division of the Inner House (Lady Smith, Lord Brodie and Lord Clarke): [2014] CSIH 76; 2015 SC 154. The Extra Division considered that the Lord Ordinary had erred in five respects.

27. First, in relation to Mr Greasly's evidence, Lord Brodie, giving the leading judgment, stated that he should not have been allowed to give the evidence summarised by the Lord Ordinary at paras 16, 20, 21, 47 and 48 of his opinion, quoted at paras 19 and 21 above. The Lord Ordinary "abdicated his role as decision-maker". The dispute that had to be resolved was "something … the Lord Ordinary was fully equipped to do without any instruction or advice; it was squarely within his province as judicial decision-maker. No additional expertise was required". Health and safety was not an area of expertise, since it was not a recognised body of science or experience. The other members of the court agreed. Lord Clarke commented that the Lord Ordinary's approach was simply to accept that the evidence of Mr Greasly determined the question for him. Paragraph 43 of the Lord Ordinary's opinion (quoted at para 20 above) demonstrated a shifting of his responsibility for deciding the issues before him to Mr Greasly.

28. Secondly, a failure to comply with the Management Regulations could not be a direct cause of injury. The regulations did not impose any duty to take precautions. Lady Smith considered that Cordia's risk assessment had in any event complied with the regulations, but did not explain her reasons for reaching that conclusion. The other members of the Extra Division did not express any opinion on the question.

29. Thirdly, regulation 4(1) of the PPE Regulations did not apply to the circumstances of the accident. The regulations were concerned with risks to which workers were exposed which were created or increased by the nature of their work. But the risk to which Miss Kennedy was exposed was not of that kind. This point was explained most clearly by Lord Clarke. Like Lord Brodie and Lady Smith, he construed the regulations as being concerned with risks caused by the nature of the task performed by the employee. He regarded that task, in the case of Miss Kennedy, as being confined to the administration of care to her clients, and not as encompassing her journeys to their homes. On that basis, he considered that the carrying out of Miss Kennedy's duties as a home carer did not create the risk of her slipping somewhere en route to carrying out those duties because of ice or snow on that route. The regulations were in his view designed to deal with risks in circumstances where the employer had a degree of control over the employee, the place of work and the performance of the task which had to be carried out. The risk of Miss Kennedy's slipping on ice and snow, on the other hand, was not materially

different from that to which any member of the public was exposed when making their way around Glasgow for whatever reason at the relevant time.

30. In any event, as it appeared to the Extra Division, on the Lord Ordinary's findings the risk of slipping was adequately controlled. There was little evidence as to the likely efficacy of unspecified attachments over the range of underfoot conditions that Miss Kennedy could have been expected to encounter. It could not even be said on the evidence that wearing attachments would have made any material difference on the pathway on which Miss Kennedy fell.

31. The Extra Division were also critical of the Lord Ordinary's statement that the direction of the law was to level safety upwards. Lord Brodie remarked that the Lord Ordinary had cited no authority for his observation, while Lord Clarke asked whether the Lord Ordinary's words were meant to reflect an aspect of public policy or some supposed legal principle, and commented that they betrayed a failure to recognise that the law did not impose on an employer a generalised duty to ensure the safety of his employees.

32. Fourthly, in relation to the common law case, it was said that the Lord Ordinary had failed to address the necessary basic questions identified by Lord President Dunedin in *Morton v William Dixon Ltd* 1909 SC 807, 809:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either - to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or - to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

It could not be said that either requirement of Lord Dunedin's formula was satisfied. The Lord Ordinary had also failed to consider whether it would be fair, just and reasonable to find there to be a duty of care of the scope contended for, in accordance with *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618. Had he done so, he could not have failed to reject the contention that Cordia were under a common law duty to determine what their competent adult employees should wear on their feet when negotiating the streets of Glasgow.

33. Fifthly, it was said that the Lord Ordinary was not entitled to find Cordia liable, in any event, because he had made no finding that the wearing of attachments "would necessarily" have prevented Miss Kennedy's fall. He had, it was said, not

taken a view on the passages in the cross-examination of Mr Greasly in which he conceded that he could not say that Yaktrax would have made any difference.

Mr Greasly's evidence

34. We shall begin by considering the issues arising in relation to Mr Greasly's evidence. The use of expert witnesses, who in Scottish practice have traditionally been described as skilled witnesses, can provide significant benefits to the court in determining legal disputes. There is a degree of commonality of approach between jurisdictions which adopt similar methods of fact-finding. Thus Scots law has drawn on the experience of other jurisdictions both as to the admissibility of skilled evidence and in relation to the duties of expert witnesses.

35. There are also concerns about the use of skilled witnesses, some of which may have lain behind the Extra Division's approach in this case. Walker and Walker, in *The Law of Evidence in Scotland*, 4th ed (2015) (at para 16.3.11), record concerns about the excessive use of experts in litigation in other jurisdictions, and refer to Lord Cullen's proposal to restrict the number of skilled witnesses in his Review of Outer House Business in 1995. More recently, the Law Commission of England and Wales in its report, *Expert evidence in criminal proceedings in England and Wales*, Law Com No 325 (2011), has recorded concerns (i) that an expert witness might have an excessive influence on lay fact finders, (ii) whether in criminal cases the defence will have the resources to test the underlying basis of an expert's evidence and (iii) that experts may not achieve the impartiality for which their role calls. In our view, judges who frequently decide civil cases should through their experience be less likely than juries to be unduly influenced by skilled witnesses, but an advocate in a civil case may face difficulties in testing the evidence of an expert unless assisted by expert advice. The need to regulate such evidence remains.

36. In this case, the Extra Division's principal concerns about Mr Greasly's evidence were that he had expressed opinions on what Cordia should have done that involved questions of law, which it was the task of the court to decide and that, in any event, most of his evidence was unnecessary: see para 27 above. Lord Clarke in his concurring opinion expressed concerns, more generally, about the unnecessary proliferation of allegedly expert reports in personal injury cases. The Extra Division articulated their more general concern in their finding (in para 4 of Lady Smith's opinion, paras 15 and 16 of Lord Brodie's opinion and para 40 of Lord Clarke's opinion) that the health and safety practice of employers could not be the subject matter of expert evidence, either because it was a legal question within the knowledge of the court or because it was not a recognised body of science or experience, which was suitably acknowledged as being useful and reliable, and which could properly form the basis of opinions capable of being subjected to forensic evaluation. Counsel for Cordia conceded at the outset of this appeal that so

general an assertion was not correct and accepted that health and safety practice could properly be the subject of expert evidence. We think that that concession was correctly made.

37. Before expressing our views on Mr Greasly's evidence in this appeal, we look at expert evidence more generally to provide the context for our conclusions. The case law on the Scots law of evidence to which counsel referred included both civil and criminal cases. We refer to both in this judgment but are mindful that the Scots law of criminal evidence, including expert evidence in criminal trials, lies within the competence of the High Court of Justiciary and not this court. In this judgment therefore the criminal cases only provide context for our consideration of the law of evidence in civil cases.

The evidence of skilled witnesses

38. In our view four matters fall to be addressed in the use of expert evidence. They are (i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation. The first is the most directly relevant in this appeal. But the others also arise out of either the parties' submissions or the Extra Division's concerns and we address them briefly.

(i) Admissibility

39. Skilled witnesses, unlike other witnesses, can give evidence of their opinions to assist the court. This gives rise to threshold questions of the admissibility of expert evidence. An example of opinion evidence is whether Miss Kennedy would have been less likely to fall if she had been wearing anti-slip attachments on her footwear.

40. Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue. An example of such evidence in this case is Mr Greasly's evidence of the slope of the pavement on which Miss Kennedy lost her footing. There are no special rules governing the admissibility of such factual evidence from a skilled witness.

41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold

questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. There are many examples of skilled witnesses giving evidence of fact of that nature. Thus *Dickson on Evidence*, Grierson's ed (1887) at section 397 referred to *Gibson v Pollock* (1848) 11 D 343, a case in which the court admitted evidence of practice in dog coursing to determine whether the owner or nominator of a dog was entitled to a prize on its success. Similarly, when an engineer describes how a machine is configured and works or how a motorway is built, he is giving skilled evidence of factual matters, in which he or she draws on knowledge that is not derived solely from personal observation or its equivalent. An expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact.

42. It is common in Scottish criminal trials for the misuse of drugs for the Crown to adduce the evidence of a policeman who has the experience and knowledge to describe the quantities of drugs that people tend to keep for personal use rather than for supply to others. Recently, in *Myers, Brangman and Cox v The Queen* [2015] UKPC 40; [2015] 3 WLR 1145, the Judicial Committee of the Privy Council approved of the use of police officers, who had special training and considerable experience of the practices of criminal gangs, to give evidence on the culture of gangs, their places of association and the signs that gang members used to associate themselves with particular gangs. In giving such factual evidence a skilled witness can draw on the general body of knowledge and understanding in which he is skilled, including the work and literature of others. But Lord Hughes, in delivering the advice of the Board at para 58, warned that "care must be taken that simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise." To avoid this, the skilled witness must set out his qualifications, by training and experience, to give expert evidence and also say from where he has obtained information, if it is not based on his own observations and experience.

43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46-47 stated:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b)

> whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;

(ii) whether the witness has the necessary knowledge and experience;

(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.

45. *Assisting the court*: It is for the court to decide whether expert evidence is needed, when the admissibility of that evidence is challenged. In *R v Turner* [1975] QB 834, a case which concerned the admissibility of opinion evidence, which Professor Davidson cites in his textbook on *Evidence* (2007) at para 11.04, Lawton LJ stated at p 841:

> "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

In *Wilson v Her Majesty's Advocate* 2009 JC 336, which also concerned opinion evidence, the High Court of Justiciary, in an opinion delivered by Lord Wheatley, stated the test thus (at para 58):

> "[T]he subject-matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience."

46. Most of the Scottish case law on, and academic discussion of, expert evidence has focused on opinion evidence to the exclusion of skilled evidence of fact. In our view, the test for the admissibility of the latter form of evidence cannot be strict necessity as, otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. There may be circumstances in which a court could determine a fact in issue without an expert collation of relevant facts if the parties called many factual witnesses at great expense and thus a strict necessity test would not be met. In *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, the United States Supreme Court referred to rule 702 of the Federal Rules of Evidence, which in our view is consistent with the approach of Scots law in relation to skilled evidence of fact. The rule, which Justice Blackmun quoted at p 588, states:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

47. The advantage of the formula in this rule is that it avoids an over-rigid interpretation of necessity, where a skilled witness is put forward to present relevant factual evidence in an efficient manner rather than to give an opinion explaining the factual evidence of others. If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it.

48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare *ipse dixit*" carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated *ipse dixit* carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers*

(South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA 352, 371:

> "[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

49. In *Davie* the Lord President at p 40 observed that expert witnesses cannot usurp the functions of the jury or judge sitting as a jury. Recently, in *Pora v The Queen* [2015] UKPC 9; [2016] 1 Cr App R 3, para 24, the Judicial Committee of the Privy Council in an appeal from New Zealand, stated:

> "It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case."

Thus, while on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court, expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert.

50. *The witness's knowledge and expertise*: The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge

and understanding of the relevant expertise: *Myers, Brangman and Cox* (above) at para 63.

51. *Impartiality and other duties*: If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible: *Toth v Jarman* [2006] EWCA Civ 1028; [2006] 4 All ER 1276, paras 100-102. In *Field v Leeds City Council* [2000] 1 EGLR 54, the Court of Appeal upheld the decision of a district judge, who, having ordered the Council to provide an independent surveyor's report, excluded at an interim hearing the evidence of a surveyor whom the Council proposed to lead in evidence on the ground that his impartiality had not been demonstrated. It is unlikely that the court could make such a prior ruling on admissibility in those Scottish procedures in which there is as yet no judicial case management. But the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence.

52. The Scottish courts have adopted the guidance of Cresswell J on an expert's duties in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 in both civil and criminal matters: see Lord Caplan in *Elf Caledonia Ltd v London Bridge Engineering Ltd* September 2, 1997 (unreported) at pp 225-227 and *Wilson v Her Majesty's Advocate* (above) at paras 59 and 60. We quote Cresswell J's summary (at pp 81-82) omitting only case citations:

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
>
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
>
> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

53. In *Wilson v Her Majesty's Advocate* (at paras 59 and 60) the High Court of Justiciary quoted the first four duties and added the requirement that an expert witness "should in particular explain why any material relevant to his conclusions is ignored or regarded as unimportant." In *Elf Caledonia Ltd*, Lord Caplan quoted Cresswell J's guidance more fully. In our view, Cresswell J's guidance should be applied in the Scottish courts in civil cases, making such allowance as is necessary to accommodate different procedures. It is implicit that the seventh duty applies only in relation to items to which the opposite party does not already have access.

54. *Reliable body of knowledge or experience*: What amounts to a reliable body of knowledge or experience depends on the subject matter of the proposed skilled evidence. In *Davie v Magistrates of Edinburgh* the question for the court was whether blasting operations in the construction of a sewer had damaged the pursuer's building and the relevant expertise included civil engineering and mining engineering. In *Myers, Brangman and Cox*, as we have said, the subject matter was the activities of criminal gangs; a policeman's evidence, which was the product of training courses and long term personal experience as an officer serving with a body of officers who had built up a body of learning, was admitted as factual evidence of the practices of such gangs.

55. In many cases where the subject matter of the proposed expert evidence is within a recognised scientific discipline, it will be easy for the court to be satisfied about the reliability of the relevant body of knowledge. There is more difficulty where the science or body of knowledge is not widely recognised. Walker and Walker at para 16.3.5 refer to an obiter dictum in Lord Eassie's opinion in *Mearns v Smedvig Ltd* 1999 SC 243 in support of their proposition that:

> "A party seeking to lead a witness with purported knowledge or experience outwith generally recognised fields would need to set up by investigation and evidence not only the qualifications and expertise of the individual skilled witness, but the methodology and validity of that field of knowledge or science."

56. We agree with that proposition, which is supported in Scotland and in other jurisdictions by the court's refusal to accept the evidence of an expert whose methodology is not based on any established body of knowledge. Thus in *Young v Her Majesty's Advocate* 2014 SLT 21, the High Court refused to admit evidence of "case linkage analysis" because it was the subject of only relatively recent academic research and a methodology which was not yet sufficiently developed that it could be treated as reliable. See also, for example, *R v Gilfoyle* [2001] 2 Cr App R 5, in which the English Court of Appeal (Criminal Division) refused to admit expert evidence on "psychological autopsy" for several reasons, including that the expert had not embarked on the exercise in question before and also that there were no criteria by reference to which the court could test the quality of his opinions and no substantial body of academic writing approving his methodology. The court also observed that the psychologist's views were based on one-sided information and doubted that the assessment of levels of happiness or unhappiness was a task for an expert rather than jurors.

(ii) Making sure that the expert performs his or her role

57. It falls in the first instance to counsel and solicitors who propose to adduce the evidence of a skilled witness to assess whether the proposed witness has the necessary expertise and whether his or her evidence is otherwise admissible. It is also their role to make sure that the proposed witness is aware of the duties imposed on an expert witness. The legal team also should disclose to the expert all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction, viz the court's concerns about one-sided information in *R v Gilfoyle*. The skilled witness should take into account and disclose in the written report the relevant factual evidence so provided.

(iii) Policing the performance of an expert's duties

58. It is not the normal practice of the Scottish courts to hold preliminary hearings or proofs on the admissibility of the evidence of skilled witnesses. Considerations of cost and practicability may often make such a course unattractive. Where the court has significant powers of case management, as in certain actions based on clinical negligence or relating to catastrophic injuries (Rules of the Court of Session 1994 as amended ("RCS") Chapter 42A), commercial actions (RCS Chapter 47), and intellectual property actions (RCS Chapter 55), a judge can address concerns about the evidence in the report by a skilled witness at a case management hearing and discuss with counsel how they are to be resolved. Wider opportunities for such case management in personal injury actions are likely to result from the implementation of Lord Gill's Civil Courts Review.

59. In many cases it may not be possible to iron out all difficulties before the proof. A party may object to part or all of a skilled witness's evidence at the start and during the course of a proof, as occurred in this case. In the absence of objection, the judge should, when assessing whether and to what extent to give weight to the evidence, test the evidence to ascertain that it complies with the four considerations which we have set out in para 38 above and is otherwise sound. In *McTear v Imperial Tobacco Ltd* 2005 2 SC 1, para 5.17 Lord Nimmo Smith usefully described the judge's role in these terms:

> "[I]t is necessary to consider with care, in respect of each of the expert witnesses, to what extent he was aware of and observed his function. I must decide what did or did not lie within his field of expertise, and not have regard to any expression of opinion on a matter which lay outwith that field. Where published literature was put to a witness, I can only have regard to such of it as lay within his field of expertise, and then only to such passages as were expressly referred to. Above all, the purpose of leading the evidence of any of the expert witnesses should have been to impart to me special knowledge of subject-matter, including published material, lying within the witness's field of expertise, so as to enable me to form my own judgment about that subject-matter and the conclusions to be drawn from it."

Lord Brodie referred to this passage in his opinion at para 11. It is not necessary in this appeal to determine how far a court should have regard to published material put to or cited by a skilled witness which is not within his or her core expertise. Much may depend on the nature of the expert's area of practice, which may or may not involve some working knowledge of related disciplines, and on the centrality of

the published material to the matter which the court has to decide: see, for example, *Main v McAndrew Wormald Ltd* 1988 SLT 141 and, on the analogous question of a medical practitioner consulting another specialist, *M v Kennedy* 1993 SC 115.

(iv) Economy in litigation

60. In recent years there have been many statements of concern in many jurisdictions about the disproportionate cost of civil litigation. Scotland is no exception. Those concerns include the use of expert witnesses. In the responses to consultation in the Scottish Civil Courts Review some respondents, including the Scottish Legal Aid Board, expressed their concern about the increased reliance on experts in litigation and the consequent cost (Report of the Scottish Civil Courts Review (2009) vol 1, chapter 9, para 64). The latter concern was also discussed in the Taylor Review of Expenses and Funding of Civil Litigation in Scotland (2013), chapter 3, paras 59-95. Cordia in this case challenge what they describe in their written case as "the largely uncontrolled proliferation of experts".

61. Case management offers a means by which the court can encourage parties to avoid leading evidence on matters which are not contentious, for example by agreeing a statement of fact which explains background matters, which are not the subject of written pleadings, to the court. There may be matters which can readily be agreed, thereby allowing parties' experts to concentrate on contentious matters. Solicitors with expertise in personal injury actions may use such statements as the basis for agreed evidence in other actions and thereby save expense. Where that is not possible, a court which has case management powers may require experts to exchange opinions, confer and prepare a report which identifies matters of agreement and reasons for any continued disagreement. It can also ascertain the scope for joint instruction of a single expert, and (where it possesses the necessary powers) can exclude expert reports and evidence. Courts also possess powers in relation to expenses which can be used to discourage the excessive use of expert evidence. Nothing that we say in this judgment questions the legitimacy of the underlying concern about reducing the expense of litigation.

Expert evidence in this case

62. With those general comments we turn to Mr Greasly's evidence in this case. We have summarised his qualifications and his evidence in paras 9 to 14 above.

63. There were matters in Mr Greasly's reports to which Cordia did not take exception. Lord Brodie acknowledged that there were matters of fact which were admissible, such as his description of the locus, including his measurements of the gradients, and his evidence of availability on the market of anti-slip attachments to

footwear. But there were other factual matters which were admissible because they were relevant and might assist a judge, and against which Cordia did not persist in their challenge in this court. They included:

(i) information on the prevention or reduction of risks of tripping and slipping from publications by the Construction Industry Research and Information Association, by the HSE and from the HSE website;

(ii) research literature on the effectiveness of different types of footwear and devices to resist slipping and on the circumstances in which people suffer falls;

(iii) HSE guidance on the PPE Regulations which provided evidence of good health and safety practice in relation to dangers posed by the weather when people have to work out of doors; and

(iv) the practices of named public bodies in providing their employees working out of doors with anti-slip devices.

Cordia maintained their challenge to his evidence of the effect of Yaktrax, based on his own use of them, and his oral explanation of how anti-slip attachments reduced the risk of slipping, which was based on his knowledge of engineering. But these were also factual matters, which he had the experience and qualifications to describe. In our view, the Lord Ordinary did not err in admitting all of this factual evidence.

64. Similarly, it was relevant to the court's task to hear evidence on health and safety practice in complying with the Management Regulations and the PPE Regulations. The expansion of the statutory duties imposed on employers in the field of health and safety has given rise to a body of knowledge and experience in this field, which, as we explain later in this judgment, creates the context in which the court has to assess an employer's performance of its common law duty of care. The Lord Ordinary was entitled to accept Mr Greasly's experience in carrying out and advising his clients on risk assessments as a proper basis for his giving of such evidence.

65. The Extra Division had two other major criticisms of Mr Greasly's evidence. One was that he was inadmissibly giving his opinion on matters of law. The other, which was based on the well-known dictum of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, 402, a case of solicitor's negligence, was

that an expert's opinion of what he would have done in the circumstances did not assist the court, and was therefore inadmissible.

66. The former objection may properly be made to Mr Greasly's statements that it was for Cordia to consider the range of footwear and attachments that were available (main report para 3.74) and that it was for Cordia to take steps to reduce the risk as far as was reasonably practicable (main report para 4.11). They appear at first sight to be statements of opinion on Cordia's legal duty, which would not be admissible before lay fact finders and should be avoided. An experienced judge however could readily treat the statements as the opinions of a skilled witness as to health and safety practice, based on the Management Regulations and the PPE Regulations and on HSE guidance, and make up his own mind on the legal question. The Lord Ordinary (at para 48 of his opinion) interpreted passages in Mr Greasly's supplementary report as expressing an opinion that Cordia had breached their statutory duty. If that were a correct interpretation of what Mr Greasly had said, those passages of his evidence were not admissible. But, as we shall explain, that does not undermine the Lord Ordinary's decision, because he applied his own mind to the central legal issues.

67. We are not persuaded by the latter objection. There may be cases where the opinion of a professional as to what he or she would have done in a given circumstance is of only limited weight in the court's assessment of a claim for professional negligence, as in *Hett, Stubbs*. But we see no reason why the Lord Ordinary should not have found helpful the reasoned view of a person experienced in carrying out risk assessments on the rating of risks within a risk assessment. Cordia assessed the risk of injury such as sprains or fractures when travelling to and from work locations to be "tolerable", applying a British Standard with which a judge might not be familiar but which was relevant to a consideration of proper practice. Mr Greasly opined that in wintry conditions the risk should have been assessed as "substantial". His evidence provided a basis for the Lord Ordinary to weigh up the opposing views when deciding whether Cordia had suitably and sufficiently evaluated the risks and identified the measures needed to protect health and safety. We have difficulty in seeing how Miss Kennedy's counsel could have presented her case on these matters by legal submissions alone.

68. Mr Greasly not only collated the factual material to which we have referred but also gave opinion evidence on how the relevant risk assessment should have been carried out. The Lord Ordinary held (in para 43 of his opinion) that Mr Greasly had the necessary experience to give such evidence about health and safety at work. In our view the circumstances of this case are therefore materially different from *Hawkes v Southwark London Borough Council* (unreported) 20 February 1998 in which Aldous LJ was critical of the plaintiff for calling an expert engineering witness unnecessarily.

69. When Cordia responded to an invitation from this court to submit a note identifying the specific passages in Mr Greasly's reports to which they objected, they identified passages which raised the issues which we have discussed above. They also objected to several statements of the obvious, such as that anti-slip attachments with spiked steel projections must help increase traction in snow and ice and so reduce the risk of slipping. But these statements were a small part of Mr Greasly's narrative and are not objectionable. It would be different if the sum and substance of an expert's report were blindingly obvious. Such a report would be inadmissible because it would not assist the court.

70. In summary, the Extra Division erred in treating much of the factual material in Mr Greasly's report as inadmissible on the basis that it was not skilled evidence that assisted the court. The Extra Division also erred in excluding his evidence on how he would have carried out the risk assessment. As we have said, his expressions of opinion as to what Cordia should have done were capable of being interpreted as legal opinions that Cordia had breached statutory regulations and thus objectionable. But the Lord Ordinary applied his own mind to the legal questions which he had to decide: see our discussion of this part of his opinion in paras 21-25 above.

71. As in this case, it may on occasion be expedient to instruct a witness with general health and safety experience to give skilled evidence on a specific question of health and safety practice which he or she may not have encountered in the past. Such a witness may have to conduct research into how the particular risk might have been reduced or avoided. Whether or not the witness has sufficient experience and knowledge to give skilled evidence is a matter which can be explored either through case management or in cross-examination.

72. In this case Mr Greasly included in his evidence material, which his instructing solicitors had provided to him, relating to the practices of other employers obtained from freedom of information requests. The solicitors themselves did not give evidence. In such circumstances, it is, as a matter of fairness, incumbent on the solicitors to disclose to the skilled witness and to the other parties in the litigation the relevant material which they have assembled, whether or not it supports their case. It is not clear in this case whether there was any undisclosed material.

73. We observe that in this case there was no suggestion that Miss Kennedy's advisers had adopted an uneconomic approach to the litigation. Her proof consisted of two witnesses: herself and Mr Greasly.

The Framework Directive

74. We turn next to the issues of substantive law which are raised in the appeal. Before considering the regulations which were relied upon, it is helpful to consider their background in EU law, partly because the regulations have to be construed as far as possible so as to give effect to EU law, and also in view of the Extra Division's criticism of the Lord Ordinary's remarks about the direction of the law being to level safety upwards.

75. Article 153 of the Treaty on the Functioning of the European Union requires the EU to support and complement the activities of the member states in a number of fields, including "improvement in particular of the working environment to protect workers' health and safety", and permits the European Parliament and Council to adopt Directives for that purpose. It is clear from the case law of the Court of Justice that article 153, and in particular the concepts of "working environment", "safety" and "health", are not to be interpreted restrictively: see, for example, *United Kingdom v Council of the European Union* (Case C-84/94) [1996] ECR I-5755, para 15.

76. It was under the predecessor of article 153, namely article 118a of the EEC Treaty, that the Council adopted Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work ("the Framework Directive"). In the preamble, the recitals refer repeatedly to improving safety and health in the working environment, and to harmonising the relevant national laws, so that competition is not at the expense of safety and health. As the Lord Ordinary correctly stated, safety is to be levelled upwards.

77. As we shall explain, the Framework Directive provides a basis for "daughter" Directives addressing particular aspects of health and safety at work. It is necessary to refer to only a few of the articles of the Framework Directive itself. Article 1(1) states that the object of the Directive is to introduce measures to encourage improvements in the safety and health of workers at work. To that end, according to article 1(2), it contains general principles and general guidelines for the implementation of those principles. Article 1(3) provides that the Directive is without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work. Under article 4(1), member states are required to take the necessary steps to ensure that employers and others are subject to the legal provisions necessary for the implementation of the Directive.

78. Article 5(1) provides that the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. Article 5(4) permits

member states to provide for the exclusion or limitation of employers' responsibility "where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

79. Article 6(1) provides that, within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, and shall "aim to improve existing situations."

80. Article 6(2) sets out the general principles of prevention which are to form the basis of the measures taken under paragraph 1. They include:

> "(a) avoiding risks;
>
> (b) evaluating the risks which cannot be avoided;
>
> ...
>
> (h) giving collective protective measures priority over individual protective measures; and
>
> (i) giving appropriate instructions to the workers."

These principles are fundamental to the panoply of "daughter" Directives, and to the legislation transposing them into domestic law. Where possible, risk is to be avoided rather than reduced; means of collective protection are to be preferred to means of individual protection (such as PPE); and merely giving instructions to the workers is to be the last resort.

81. Another fundamental principle is the assessment of risk. That principle is set out in article 6(3)(a), and is especially relevant to the present case. It requires the employer to "evaluate the risks to the safety and health of workers", and provides that "Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must:- assure an improvement in the level of protection afforded to workers with regard to safety and health".

82. Finally, in relation to the Framework Directive, article 16(1) requires the Council to adopt individual Directives in the areas listed in the annex, including "personal protective equipment". In terms of article 16(3), the provisions of the Framework Directive are to apply in full to all the areas covered by the individual Directives, without prejudice to more stringent or specific provisions contained in those Directives.

The PPE Directive

83. One of the individual Directives, within the meaning of article 16 of the Framework Directive, is Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace ("the PPE Directive"). It again has its legal basis in article 118a of the EEC Treaty.

84. Article 1 explains that the Directive lays down minimum requirements for PPE used by workers at work. PPE is defined by article 2(1) as meaning "all equipment designed to be worn or held by the worker to protect him against one or more hazards likely to endanger his safety and health at work, and any addition or accessory designed to meet this objective." Article 3 lays down a general rule that "Personal protective equipment shall be used when the risks cannot be avoided or sufficiently limited by technical means of collective protection or by measures, methods or procedures of work organization." Article 6(1) requires member states to ensure that rules are established for the use of PPE, and refers to the annexes to the Directive as a guide. Annex I includes the risk of "slipping, falling over" in a specimen risk survey table for the use of PPE. Annex II sets out a non-exhaustive guide list of items of PPE, including "Removable spikes for ice, snow or slippery flooring." Annex III sets out a non-exhaustive guide list of activities and sectors of activity which may require the provision of PPE, including, under the category of weatherproof clothing, "Work in the open air in rain and cold weather."

The Management Regulations

85. The Management Regulations are intended primarily to implement the Framework Directive. Regulation 3(1) provides:

> "Every employer shall make a suitable and sufficient assessment of -
>
> > (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work;
>
> …
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions …"

86. The statutory provisions referred to in regulation 3(1) are those contained in Part I of the Health and Safety at Work etc Act 1974 ("the 1974 Act") and regulations made under section 15 of that Act: see section 53(1). Both the Management Regulations and the PPE Regulations were made under section 15 of the 1974 Act.

87. Regulation 4 of the Management Regulations provides that where an employer implements any preventive and protective measures, he shall do so on the basis of the principles specified in Schedule 1 to the Regulations. Those principles are derived from article 6(2) of the Framework Directive and are in almost identical terms.

88. In relation to civil liability, section 47(2) of the 1974 Act provided at the relevant time, prior to its amendment by section 69 of the Enterprise and Regulatory Reform Act 2013, that breach of a duty imposed by health and safety regulations (ie regulations made under section 15) "shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise." Regulation 22 of the Management Regulations, as it stood at the relevant time, provided that breach of a duty imposed on an employer by the Regulations did not confer a right of action in any civil proceedings in so far as the duty applied for the protection of a third party (ie someone other than an employee). The Regulations therefore contained no bar to liability towards an employee, subject to the requirement imposed by section 47(2) that the breach of duty "causes damage".

89. The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in the case of *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] ICR 719. Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, 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. We respectfully agree.

The application of the Management Regulations in the present case

90. As we have explained, the Extra Division did not consider closely whether Cordia had complied with their duties under the Management Regulations, or reach any conclusion on that question. This court should however do so. It is clear from the evidence that Miss Kennedy was exposed to a risk to her health and safety whilst she was at work, namely the risk of slipping and falling on snow and ice while travelling between clients' houses. That risk was obvious as a matter of common sense, and was in any event within Cordia's knowledge, given their previous experience of the incidence of home carers suffering such accidents each year. The risk was identified, in general terms, in the 2005 risk assessment. Although it was not explicitly addressed in the 2010 risk assessment, risks of that general nature were again identified.

91. Considering the risk of slipping in accordance with the general principles set out in Schedule 1 to the Regulations, and adopted from article 6(2) of the Framework Directive, it could not be avoided: for wholly understandable reasons, it was Cordia's position that the individuals who were dependent on the services of the home carers had to be visited if at all possible. The risk therefore had to be evaluated and addressed in accordance with those principles, which set out a hierarchical order in which the measures necessary to protect health and safety should be considered.

92. Was there, then, a sufficient evaluation of the risk, and of the necessary measures? In relation to these matters, the Lord Ordinary's conclusion was based on findings which he was entitled to make on the evidence, and on a proper understanding of the law. As he noted, the risk of a home carer slipping on snow or ice while at work, on the way to a client's home, was accepted to be likely - "a dead cert", as Miss Rodger put it. It was also accepted that the injuries which might be sustained included fractures and head injuries, and were therefore potentially serious. No consideration, however, was given to the possibility of individual protective measures, before relying on the measure of last resort, namely giving appropriate instructions to employees. Even then, the instructions given, in the form of advice to wear appropriate footwear, provided no specification of what might be appropriate. In these circumstances, the Lord Ordinary was entitled to conclude that there had been a breach of regulation 3(1).

The PPE Regulations

93. The PPE Regulations are intended to implement the PPE Directive. Regulation 2(1) defines "personal protective equipment" ("PPE") as meaning all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects him against one or more risks to his health or safety, and any addition or accessory designed to meet

that objective. We should record that no reliance has been placed in these proceedings on regulation 3(2), which excludes the application of the regulations in respect of PPE which is "(d) personal protective equipment used for protection while travelling on a road within the meaning (in England and Wales) of section 192(1) of the Road Traffic Act 1988, and (in Scotland) of section 151 of the Roads (Scotland) Act 1984".

94. Regulation 4(1) is particularly relevant to the present case. It provides:

> "Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective."

95. In terms of regulation 4(3), as amended, PPE is not suitable unless, amongst other things, "(a) it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn", and "(d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk".

96. Regulation 6 imposes a further duty to carry out a risk assessment. In terms of regulation 6(1), before choosing any PPE which by virtue of regulation 4 he is required to ensure is provided, an employer must ensure that an assessment is made to determine whether the PPE he intends will be provided is suitable. In terms of article 6(2), the assessment must include, among other things:

> "(a) an assessment of any risk or risks to health or safety which have not been avoided by other means;
>
> (b) the definition of the characteristics which personal protective equipment must have in order to be effective against the risks referred to in sub-paragraph (a) of this paragraph, taking into account any risks which the equipment itself may create;
>
> (c) comparison of the characteristics of the personal protective equipment available with the characteristics referred to in sub-paragraph (b) of this paragraph."

97. Finally, in relation to the provisions of the PPE Regulations, the Extra Division considered the Lord Ordinary's approach to be inconsistent with regulations 8 and 10. Regulation 8 provides:

> "Where an employer or self-employed person is required, by virtue of regulation 4, to ensure personal protective equipment is provided, he shall also ensure that appropriate accommodation is provided for that personal protective equipment when it is not being used."

Regulation 10 provides, so far as material:

> "(1) Every employer shall take all reasonable steps to ensure that any personal protective equipment provided to his employees by virtue of regulation 4(1) is properly used. ...
>
> (4) Every employee and self-employed person who has been provided with personal protective equipment by virtue of regulation 4 shall take all reasonable steps to ensure that it is returned to the accommodation provided for it after use."

The application of the PPE Regulations in the present case

98. As we have explained, the Lord Ordinary was entitled to find that there had been a failure to carry out a suitable and sufficient risk assessment. Such an assessment would have involved specific consideration of the possibility of individual protective measures to reduce the risk of home carers slipping and falling on snow and ice. Had that possibility been considered, the Lord Ordinary found that a number of devices were available which would have been suitable to reduce the risk. Since none was provided, it followed that there was a breach of regulation 4(1) of the PPE Regulations.

99. The Extra Division put forward a number of arguments in support of their conclusion that the Regulations had no application in the circumstances of the present case. First, they pointed out that regulation 4(1) is concerned with risks to which employees are exposed "while at work". They inferred that the risks in question must be created or increased by the nature of the work. Lord Brodie considered that this construction was consistent with article 1(1) of the Framework Directive, which described the object of the Directive as being to introduce measures to encourage improvements in the safety and health of "workers at work". Similarly, article 1(1) of the PPE Directive stated that the Directive laid down minimum

requirements for PPE used by "workers at work". Reliance was also placed on the reference in article 2(1) to "hazards likely to endanger his safety and health at work", and to the general rule set out in article 3, quoted in para 84 above. Lord Brodie said that he took from this language that the concern of the PPE Regulations was the risks to which the worker was exposed at work which arose specifically from that work, as opposed to risks to which a worker might be exposed in the same way as members of the public. It was in the former circumstances that the employer might be supposed to have the requisite knowledge and means to control the risk through the hierarchy of measures set out in article 6(2) of the Framework Directive and Schedule 1 to the Management Regulations.

100. We do not find these arguments persuasive. An employee is "at work", for the purposes of both the Management Regulations and the PPE Regulations, throughout the time when she is in the course of her employment: section 52(1)(b) of the 1974 Act. The point is illustrated by the facts of *Robb v Salamis (M & I) Ltd* [2006] UKHL 56; 2007 SC (HL) 71; [2007] ICR 175. Miss Kennedy in particular, as a home carer, was "at work" when she was travelling between the home of one client and that of another in order to provide them with care. Indeed, travelling from one client's home to another's was an integral part of her work. The meaning of the words "while at work" in regulation 4(1) of the PPE Regulations (and of the equivalent words, "whilst they are at work", in regulation 3(1) of the Management Regulations) is plain. They mean that the employee must be exposed to the risk during the time when she is at work, that is to say, during the time when she is in the course of her employment. They refer to the time when she is exposed to the risk, not to the cause of the risk.

101. That conclusion as to the construction of the Regulations would not be affected even if, as the Extra Division considered, the Directives were to be construed as having a narrower application. As article 1(3) of the Framework Directive makes clear, the Directives do not exclude the adoption of national measures which provide greater protection. The PPE Directive in particular "lays down minimum requirements": article 1(1). It has been noted in earlier cases that the domestic Regulations are in some respects of wider scope than the Directives (see, for example, *Hide v The Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545; [2014] ICR 326).

102. But the Directives are not in any case confined to risks arising specifically from the nature of the activities which the worker carries out, as opposed to risks arising from the natural environment to which the worker is exposed while at work. Article 5(1) of the Framework Directive requires the employer to ensure the safety and health of workers "in every aspect related to the work." Article 5(4) makes it clear that the employer's obligations are not confined to risks arising from matters within his control: member states are permitted to exclude or limit employers' responsibility only "where occurrences are due to unusual and unforeseeable

circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care." The obligation imposed by article 6(3)(a) applies to all risks to the safety and health of workers: *Commission of the European Communities v Italian Republic* (Case C-49/00) [2001] ECR I-8575, para 12. As we have explained, Annex II to the PPE Directive includes "Removable spikes for ice, snow" in its non-exhaustive guide list of items of PPE, while Annex III includes "Work in the open air in rain and cold weather" in its non-exhaustive guide list of activities and sectors of activity which may require the provision of PPE.

103. As we have explained, the Extra Division also considered the Lord Ordinary's approach to be inconsistent with regulations 8 and 10 of the PPE Regulations. We do not agree. Regulation 8 requires the employer to ensure that appropriate accommodation is provided for the PPE when it is not being used. Lord Brodie reasoned that, since the employer could only make accommodation available in places or situations where he could exercise control, regulation 8 suggested that the risks with which the Regulations were concerned were similarly confined. With respect, that does not follow. Protective clothing, for example, often has to be provided precisely because the employer cannot control the places or situations in which the clothing is to be worn (as, for example, in *Henser-Leather v Securicor Cash Services Ltd* [2002] EWCA Civ 816 and *Taylor v Chief Constable of Hampshire Police* [2013] EWCA Civ 496; [2013] ICR 1150). It also has to be borne in mind that there may be situations in which the most appropriate place for PPE to be accommodated when it is not in use will be in the employee's home or vehicle. In such a situation, the employer might fulfil its duty under regulation 8 by arranging with the employee for the PPE to be accommodated there.

104. So far as regulation 10 is concerned, it requires the employer to take all reasonable steps to ensure that any PPE provided to his employees is properly used, and is returned to the accommodation provided for it after use. The Extra Division appear to have considered that it would be difficult to apply or enforce those obligations in situations where the risk was not created by the nature of the task carried out by the employee. We do not share that concern. Evidently, the implications of a duty to take all reasonable steps depend on the circumstances. Where, for example, the PPE is intended to be used in situations where the employee cannot reasonably be subject to immediate supervision, the duty to take all reasonable steps will not require such supervision, but may be satisfied by less onerous measures, such as adequate training and instruction.

105. There remains the Extra Division's conclusion that there was in any event no obligation to provide PPE in the present case, since on the Lord Ordinary's findings the risk of slipping was adequately controlled by other means which were equally or more effective, as required by regulation 4(1) of the PPE Regulations. In that regard, the Extra Division considered that there was little evidence as to the likely

efficacy of attachments over the range of underfoot conditions that Miss Kennedy could have been expected to encounter.

106. We are unable to reconcile the Extra Division's conclusion with the Lord Ordinary's findings. In relation to the exception to regulation 4(1), he noted that the onus was on the employer to establish that the exception was made out. He found, in the first place, that the evidence about the precautions in place, in the form of training, was vague and unsatisfactory. As he commented, that in itself showed that the precautions taken could not be regarded as "adequate control by other means". Furthermore, he accepted Mr Greasly's evidence about the availability of PPE which would reduce the risk. His reasoning reflects the evidence and a proper understanding of the law. The evidence established that anti-slipping attachments were available at a modest cost; that they were used by other employers to address the risk of their employees slipping and falling on footpaths covered in snow and ice; that there was a body of research demonstrating that their use reduced the risk of slipping in wintry conditions; and that Mr Greasly's own experience was that the attachments which he had used had made a difference. His evidence, which the Lord Ordinary accepted, was that, had Miss Kennedy worn such devices, on a balance of probabilities the risk of her falling on ice and snow would have been reduced and might have been eliminated. As against that, Cordia had given no consideration to the matter. In those circumstances, we can see no basis in the Lord Ordinary's findings, or in the evidence, for finding that the exception in regulation 4(1) had been made out.

Common law liability

107. It may be helpful at the outset to address a general point arising from the opinions of the Extra Division. They contain numerous comments to the effect that it is unreasonable to suggest that Miss Kennedy's employer should have provided her with special footwear designed to reduce the risk of her slipping and falling, since she was in the same position as any other member of the public travelling on foot in wintry conditions. It was in that context that the Extra Division stressed the "necessary basic questions" identified by Lord President Dunedin in *Morton v William Dixon Ltd*, and referred to the *Caparo* test: see para 32 above.

108. One can understand the Extra Division's concern that the law should not be excessively paternalistic. Miss Kennedy was not, however, in the same position as an ordinary member of the public going about her own affairs. It was her duty, as someone employed by Cordia as a home carer, to visit clients in their homes in different parts of the city on a freezing winter's evening despite the hazardous conditions underfoot. Unlike an ordinary member of the public, she could not choose to stay indoors and avoid the risk of slipping and falling on the snow and ice. Unlike an ordinary member of the public, she could not choose where or when she went.

She could not keep to roads and pavements which had been cleared or treated. She could not decide to avoid the untreated footpath leading to Mrs Craig's door. Unlike an ordinary member of the public, she was obliged to act in accordance with the instructions given to her by her employers: employers who were able, and indeed obliged under statute, to consider the risks to her safety while she was at work and the means by which those risks might be reduced. In those circumstances, to base one's view of the common law on the premise that Miss Kennedy was in all relevant respects in the same position as an ordinary member of the public is a mistake.

109. Furthermore, the common law relating to employers' liability was not definitively stated by Lord Dunedin in *Morton v William Dixon Ltd*. As long ago as 1959, Lord Keith of Avonholm devoted his speech in *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 to the clarification of Lord Dunedin's dictum. He observed that the ruling principle was that an employer was bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to that principle (a point which had earlier been made, in relation to Lord Dunedin's dictum, by Lord Normand in *Paris v Stepney Borough Council* [1951] AC 367, 382 and by Lord Reid in *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, 571, amongst others). He added that Lord Dunedin could not have intended to depart from or modify that fundamental principle. Both in that case and in *Brown v Rolls Royce Ltd* 1960 SC (HL) 22; [1960] 1 WLR 210 Lord Keith emphasised that Lord Dunedin was laying down no proposition of law.

110. The context in which the common law of employer's liability has to be applied has changed since 1909, when *Morton v William Dixon Ltd* was decided. As Smith LJ observed in *Threlfall v Kingston-upon-Hull City Council* [2010] EWCA Civ 1147; [2011] ICR 209, para 35 (quoted by the Lord Ordinary in the present case), in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in *Fytche v Wincanton Logistics plc* [2004] UKHL 31; [2004] ICR 975, para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.

111. It follows that the employer's duty is no longer confined to taking such precautions as are commonly taken or, as Lord Dunedin put it, such other

precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not in themselves obvious. A less outdated formulation of the employer's common law duty of care can be found in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 WLR 1003, para 9.

112. In the present case, Cordia were aware of a history of accidents each year due to their home carers slipping on snow and ice, and they were aware that the consequences of such accidents were potentially serious. Quite apart from the duty to carry out a risk assessment, those circumstances were themselves sufficient to lead an employer taking reasonable care for the safety of its employees to inquire into possible means of reducing that risk.

113. Had such inquiries been made, or a proper risk assessment carried out, the implication of the evidence accepted by the Lord Ordinary is that Cordia would have learned that attachments were available, at a modest cost, which had been found to be effective in reducing the risk, and had been provided by a number of other employers to employees in a similar position. In those circumstances, the Lord Ordinary was entitled to conclude that Cordia were negligent in failing to provide Miss Kennedy with such attachments.

114. It is necessary only to add that the familiar threefold test set out by Lord Bridge of Harwich in *Caparo* is not relevant in this context, as counsel for Cordia acknowledged. That test is concerned with the imposition of a duty of care in novel circumstances. There is no doubt that an employer owes a duty of care towards its employees. The question in the present case is not whether a duty of care existed, but whether it was fulfilled.

Causation

115. It remains to consider the Extra Division's conclusion that the Lord Ordinary was not entitled to find Cordia liable in the absence of any explicit finding that Miss Kennedy's injury had been caused by any breach of duty on their part. The question is not, of course, whether Miss Kennedy's injury would necessarily have been prevented: as in other civil contexts, the matter has to be decided on a balance of probabilities.

116. The Lord Ordinary made no express findings in relation to causation, other than that he accepted Miss Kennedy's evidence that she would have used anti-slip attachments if they had been provided to her. The question therefore is whether, in the light of the other findings which were made, the only reasonable inference which

could be drawn was that Cordia's breach of their duties caused or made a material contribution to Miss Kennedy's accident.

117. So far as the Management Regulations are concerned, the breach of regulation 3(1) resulted in a failure to provide protective equipment, in breach of the PPE Regulations. The issue of causation therefore turns on the consequences of the latter breach.

118. So far as the PPE Regulations are concerned, the finding that there was a breach of regulation 4(1) implies that there was a failure to ensure that "suitable" equipment was provided. As we have explained, equipment is "suitable" only if "so far as is practicable, it is effective to prevent or adequately control the risk or risks involved": regulation 4(3)(d). It follows from that definition that the equipment need not necessarily prevent the risk, but it must, as a minimum, adequately control the risk so far as is practicable. The concept of suitability thus contains a causal component. The Regulations do not define "adequately", but it can be inferred from the EU legislation (including the requirement under article 5(1) of the Framework Directive that the employer shall have a duty to ensure the safety and health of workers) that a risk will not be adequately controlled unless injury is highly unlikely. Bearing in mind that the PPE Regulations should not be construed in such a way as to reduce pre-existing levels of protection, that conclusion is also supported by case law on the previous domestic law. For example, in the case of *Rogers v George Blair & Co Ltd* (1971) 11 KIR 391, which concerned the duty to provide "suitable" goggles under section 65 of the Factories Act 1965, Salmon LJ stated at p 395:

> "The protection, to be suitable, need not make it impossible for the accident to happen, but it must make it highly unlikely."

119. It follows that where an employee has been injured as a result of being exposed to a risk against which she should have been protected by the provision of PPE, and it is established that she would have used PPE if it had been provided, it will normally be reasonable to infer that the failure to provide the PPE made a material contribution to the causation of the injury. Such an inference is reasonable because the PPE which the employer failed to provide would, by definition, have prevented the risk or rendered injury highly unlikely, so far as practicable. Such an inference would not, of course, be appropriate if the cause of the accident was unconnected with the risk against which the employee should have been protected.

120. In the present case, there was no suggestion that it would not have been practicable to provide equipment which was effective to prevent or adequately control the risk or risks involved, and the evidence of Mr Greasly was to the contrary effect. In the circumstances, the only inference which could reasonably have been drawn was that the breach of regulation 4(1) had caused or materially contributed to

the accident, and that Cordia were therefore liable to Miss Kennedy under the PPE Regulations.

121. If, on the other hand, the Lord Ordinary's finding of a breach of regulation 4(1) of the PPE Regulations is left out of account, and one focuses solely upon his finding of a breach of a common law duty of care, then the position in relation to causation is more problematical. Given that the Lord Ordinary accepted Mr Greasly's evidence about the slip resistance of the attachments which he had experienced using, it might perhaps have been inferred as a matter of common sense that Cordia's failure to provide such attachments was a material cause of Miss Kennedy's accident (cf *Drake v Harbour* [2008] EWCA Civ 25, para 28). It cannot, however, be said that the Lord Ordinary would necessarily have reached that conclusion. His opinion does not contain any explicit consideration of the matter, or articulate any conclusion. In those circumstances, it is difficult to maintain that there was a proper foundation for his decision that Cordia were liable in damages at common law. That conclusion is however of no practical significance, given that Cordia are liable in any event under the 1992 Regulations.

Conclusion

122. For these reasons, we would allow the appeal.