OUTER HOUSE, COURT OF SESSION

[2024] CSOH 35

PD300/21

OPINION OF LORD WEIR

In the cause

TOMMY LEE CRUICKSHANKS

Pursuer

against

GLASGOW CITY COUNCIL

Defenders

Pursuer: Khurana KC; Balfour+Manson LLP
Defenders: Pugh KC, Blair; Harper MacLeod LLP

26 March 2024

Introduction

[1] The pursuer in this action is the father of AB ("the child"), who died on 25 August 2018. He seeks damages from the defenders arising from the child's death while in a kinship placement approved by the defenders. By interlocutor dated 24 August 2023, the court appointed the action to a debate. It also reserved an eight day diet of proof commencing on 26 November 2024 against the possibility that the defenders were unsuccessful in seeking decree of dismissal. Having now heard parties' submissions at the debate, this opinion contains my decision on the arguments advanced before me.

Factual basis for the pursuer's claim

[2] The factual basis for the pursuer's claim is contained in statements 4 and 5 of the amended record dated December 2023. What follows is necessarily a precis of more detailed averments. In short, on 25 August 2018, the child, then aged 10 months, was living with his grandmother Agnes Kerr pursuant to a kinship care placement approved by the defenders. On that date, and in circumstances which are not precisely known but believed to be as a result of her being hungover and asleep at the material time, Mrs Kerr's adult daughter Kayleigh Kerr had responsibility for the child's care. At some point, Kayleigh Kerr placed the child in a bathtub and then left him unattended and unsupervised by anyone. The child drowned in the bathtub.

[3] The pursuer avers that he repeatedly raised with the defenders, before it happened, safety concerns about the child being placed with Agnes Kerr and whether she was a fit and proper person to care for him. These concerns, which related to Agnes Kerr's chronic misuse of alcohol and care of her own children (including Kayleigh Kerr), were not acted upon. It was, in any event, incumbent on the defenders to undertake a variety of assessments in terms of the Looked After Children (Scotland) Regulations 2009 ("the 2009 Regulations") in advance of placing the child in Mrs Kerr's kinship care. An appropriate kinship assessment would have confirmed the issues of concern raised by the pursuer as well as the fact that the child was being cared for by strangers in Mrs Kerr's absence and/or an inexperienced and unsuitable carer in the person of Kayleigh Kerr. Despite this, the defenders discontinued support visits provided by an organisation called Cordia.

Legal basis for the pursuer's claim

[4] The pursuer's claim is expressed to be based on the fault at common law of Agnes Kerr *et separatim* the defenders' social workers, and, on the hypothesis that she was solely responsible for the child's death, the fault of Kayleigh Kerr. Three distinct cases can be discerned. In the first place, the failures ascribed to Mrs Kerr relate to her care and supervision of the child when under her care and control, the delegation thereof to Kayleigh Kerr, and her unfitness to care for, and supervise, the child while asleep and/or through alcohol consumption. In particular the duties of Mrs Kerr are expressed thus:

> "It was Mrs Kerr's duty to take reasonable care for the safety and wellbeing of the child. It was her duty to protect the child from real and immediate risks to his safety. It was her duty to supervise the child at all material times when under her care and control. It was not open to her to delegate care and control of the child to a third party without prior consent. Esto it was, it was her duty to ensure that any arrangements she made were consistent with her own duties to the child as aforesaid."

[5] Mrs Kerr is not convened as a defender. Rather, in circumstances where (i) the child was looked after by the defenders under section 17(6) of the Children (Scotland) Act 1995; (ii) the defenders chose to place the child in Agnes Kerr's sole care; (iii) the defenders chose what monitoring of, and support for, that placement would be given; (iv) the defenders funded the placement, and (v) the placement was not one which involved appropriate and lawful delegation of responsibility by the state to a kinship carer in circumstances otherwise permitted by the 2009 Regulations, it is averred that the defenders retained substantial control over, and responsibility for, the child's care and welfare. Accordingly, the defenders are vicariously liable for Agnes Kerr's negligence. Secondly, the pursuer contends (by amendment which was allowed by the court during the course of the procedure roll discussion) that, notwithstanding that the defenders treated Agnes Kerr only as his kinship carer, the defenders knew or ought to have known by the time of the child's death that

Kayleigh Kerr was playing a substantial caregiving role "to the extent that she was, in effect, a joint carer for the child". The defenders, expressly or tacitly, approved of her involvement and are vicariously liable for her negligence in leaving the child unsupervised in the bath. Finally, the pursuer avers that the defenders are directly liable for the consequences of placing the child in Agnes Kerr's care, particularly by reason of the failure of social workers to properly assess the placement and/or review its suitability.

[6] It is the defenders' submission, in relation to each of the three cases advanced, that the pleadings are irrelevant and insufficient to justify proof before answer, and that the case should be dismissed without enquiry.

Submissions for the defenders

Vicarious liability

[7] Determining vicarious liability involved a two-stage process. The court must first consider whether the parties are in a relationship the nature of which is such that it would be proper for the defenders to be liable for the negligent individual's party. Secondly, the court must consider whether there is a sufficiently proximate connection between that relationship and the wrongful act *Various Claimants* v *Barclays Bank plc* [2020] AC 973, para [1]). The focus in the instant case was on the first stage, in relation to which the question was whether the negligent party was carrying on business on their own account or whether they were an employee or in a relationship "akin to employment" (*Barclays Bank,* para [27]). Addressing that question required consideration of the features of the relationship that were similar to, or different from, a contract of employment (*BXB* v *Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953, para [58]). The core idea behind vicarious liability appeared to be that the employer (or quasi-employer), who is

taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost, or risk, of the wrong committed by that person in the course of those activities (*BXB,* para [58]). Although the issue of "control" had diminished in importance, a lack of even a vestigial degree of control would point against imposing vicarious liability (*Various Claimants* v *Catholic Child Welfare Society* [2013] 2 AC 1, para [21]). An informed approach to vicarious liability in this case involved recognising the distinction identified in the case law between the position of kinship carers and foster parents (*Armes* v *Nottinghamshire County Council* [2018] AC 355; *DJ* v *Barnsley Metropolitan Borough Council* [2023] EWHC 1815 (KB)). Thus, in *DJ*, the court considered that there were a number of features missing from the relationship between a local authority and kinship carers which were otherwise present in the ordinary fostering relationship. For example, kinship carers were not recruited by the local authority, nor were they trained for the role of foster parents.

[8] Against that background the pursuer's pleadings afforded no basis upon which to impose vicarious liability on the defenders for the acts or omissions of either Agnes Kerr or, alternatively, Kayleigh Kerr. Mrs Kerr was providing care in the interests of the family and not as part of a local authority enterprise (*Armes,* para [87]). The fact that the child was subject to local authority supervision was irrelevant. There were no averments to justify the conclusion that Mrs Kerr stood in a relationship with the defenders akin to that of an employee. Kayleigh Kerr happened to be the daughter of a kinship carer and was, or appeared to be, providing care for the child in that context. She was not subject to any agreement with the defenders where the child's care was concerned, nor was she remunerated or trained by them. The defenders did not exercise even a vestigial control over her actions. There was (even after amendment) no averred basis for the conclusion that

the defenders were vicariously liable for the acts and omissions of Kayleigh Kerr on the basis of any relationship akin to employment. The action, so far as directed against the defenders on the basis of vicarious liability for the actions of Agnes Kerr and Kayleigh Kerr, should not be admitted to probation.

Fault of Agnes Kerr

[9] The foregoing complications aside, there was in any event no basis in the pleadings to justify the conclusion that Agnes Kerr breached any duty of care to the child. The averred duties (set out above) were too broad in scope. While the existence of a duty to ensure that the child was subject to adequate supervision was acknowledged that did not connote constant surveillance (*Harris* v *Perry and others* [2009] 1 WLR 19). The duty went no further than ensuring that the child was subject to such supervision as was necessary to restrict the risk to which he might otherwise be exposed to an acceptable level (*Harris,* para [34]). There were, however, no averments to the effect that it was reasonably foreseeable to Mrs Kerr that supervision by Kayleigh Kerr, who was herself an adult, created an unacceptable level of risk to the child. Accordingly, the averments that Mrs Kerr breached her duty of care to the child were irrelevant and ought not to be admitted to probation.

Direct liability of the defenders

[10] The pleaded case against the defenders directly was also irrelevant. What befell the child was beyond the scope of the harm from which the defenders could reasonably be said to be under a duty to protect him (cf. *Meadows* v *Khan* [2022] AC 852, para [28]). The essence of the case against the defenders was that they were negligent in allowing the child to be placed with Agnes Kerr given her history of problematic drinking. But the real criticism was

that Mrs Kerr delegated the care of the child to Kayleigh Kerr and there were no pleadings to the effect that the defenders had a duty to protect the child from her supervision (or lack of it). In that context, the defenders' decision to place the child in Mrs Kerr's care was no different to the failure of the doctor to identify the condition of the mountaineer's knee, to take Lord Hoffman's well-known example from *South Australia Asset Management Corporation* v *York Montague Ltd* [1997] AC 191. In any event, as a matter of legal causation, the effective cause of the child's death was not anything that the defenders did, or did not do, but the intervening actions of Kayleigh Kerr in placing him in the bath and leaving him unsupervised (cf. *Knightley* v *Johns* [1982] 1 WLR 349 at 368 per Stephenson LJ). Those actions were not reasonably foreseeable consequences of any purported failure by the defenders to have regard to Agnes Kerr's history of alcohol misuse when deciding to place the child in her care.

Submissions for the pursuer

[11] Senior counsel for the pursuer submitted that the court should allow proof before answer on the whole pleadings. The test to be applied at this stage was whether the pursuer's averments, assuming them to be true and on their most favourable view, were incapable in law of supporting the claim (*Bruce* v *Brown* 2011 Rep L R 127), and must necessarily fail (*Jamieson* v *Jamieson* [1952] AC 525). The court's assessment should be undertaken in accordance with the spirit of chapter 43 procedure and Practice Note No 2 of 2003, and the necessarily abbreviated nature of the pleadings.

[12] Each of the defenders' challenges to the pursuer's pleadings rested on an assumption that the child was being cared for under a kinship placement. There was, however, uncertainty as to the exact nature of the placement, and in particular whether it was an

approved placement in terms of regulation 10 of the 2009 Regulations such that the defenders had statutory obligations of (broadly) assessment and review of the kind averred in statement 5. In short, the defenders were inviting the court to conclude that the nature of the particular placement was "self-defeating of the pursuer's claim" without the court being in a position to assess what the nature of the placement was. On that critical matter evidence would require to be led.

Vicarious liability

[13] None of the cases relied on by the defenders supported their proposition that there can never be vicarious liability in the context of a kinship care placement. *Armes* did not authoritatively address any scenario of care beyond that of employed foster carers. *DJ* was a case on its own facts (which were agreed) and did not decide that by its nature a kinship placement could never give rise to vicarious liability.

[14] The defenders' own averments in answer 5 disclosed a level of involvement and control in the inception of the placement and its ongoing assessment and support that distinguished the case from the circumstances examined in *DJ*. In short, enquiry was necessary in order to establish the nature of the placement before any concluded view could be reached on whether the defenders were vicariously liable for Agnes Kerr's acts or omissions. Resolution of that matter was also material to the question whether there was also vicarious liability for Kayleigh Kerr. If the court accepted that there were sufficient averments to justify proof before answer on the former (or that it at least required to hear evidence) then it ought not to determine conclusively the issue of vicarious liability relative to Kayleigh Kerr.

Direct liability of the defenders

[15] The pursuer's averments in relation to the duties owed by the defenders' social workers met the requirements for a relevant case under *Hunter* v *Hanley* 1955 SC 200. On the matter of the scope of the defenders' duty of care, public authorities could come under a common law duty to protect someone from harm where they had assumed such a responsibility (*Poole Borough Council* v *GN* [2019] UKSC 25). The pursuer's case was that the defenders had assumed a duty of care for the child in circumstances where he had become a looked-after child and they were making decisions about his care. The scope of the duty assumed by the defenders ought not to be viewed in the abstract but would be shaped by the factual circumstances surrounding the child's placement and the extent to which the defenders were subject to duties imposed by the 2009 Regulations (which could only be known after the facts surrounding the placement were established). The defenders were reading into the decision in *Meadows* more than it could reasonably be expected to bear. In any event, unlike in the instant case, consideration of the issue of scope of duty in *Meadows* proceeded on an agreed factual basis. Finally, on the matter of whether the actions of Kayleigh Kerr amounted to a *novus actus interveniens* the decision in *Knightly* v *Johns* relied on by the defenders was eloquent of the necessity for establishing the facts before reaching any concluded view. In that respect, the defenders themselves averred, in answer 5, that the exact circumstances leading to the child's death are not known and not admitted by the defenders.

[16] In all the circumstances the court should allow a proof before answer on the whole pleadings.

Analysis and decision

[17] The pleadings in this case proceed under chapter 43 of the Rules of Court. The procedure envisaged is one which encourages brevity and simplicity in pleading (Rule 43.2; Practice Note No. 2 of 2003). Consistent with that landscape, the pursuer submitted that the defenders' arguments rested on the identification of technical defects in relation to the pursuer's pleadings which the court should be slow to entertain. Given, however, the very full arguments which I heard, I am not convinced that that is an accurate characterisation of the defenders' submissions which amounted to a fundamental attack on (i) the assertion of vicarious liability for the acts and/or omissions of Agnes Kerr and Kayleigh Kerr, and (ii) the existence of a duty of care on the part of the defenders in the circumstances averred to protect the child from the kind of harm which befell him within his placement.

[18] It is necessary to give consideration to those issues in turn.

Vicarious liability

[19] The principal authorities relied on by the defenders to support their contention that no issue of vicarious liability arises are largely from the jurisdiction of England and Wales. They are not technically binding on me. They are, however, of high authority and entitled to considerable respect. Indeed, senior counsel for the pursuer did not take any real issue with the principles which the defenders derived from those authorities (in particular, *Catholic Child Welfare Society*, *BXB*, and *Barclays Bank plc*). Rather, the essence of the pursuer's reply was that those principles could not properly be applied without a full enquiry into the circumstances in which the kinship placement was established in the first place and the extent to which the defenders assessed its suitability in advance, and following its inception.

[20] The relationship that gives rise to vicarious liability in the vast majority of cases is that of employer/employee under a contract of employment. In *Catholic Child Welfare Society* Lord Phillips identified (para [35]) five incidents of the relationship that, for reasons of public policy, made it fair, just and reasonable to impose vicarious liability. They were: (i) the employer is more likely to have the means to compensate the victim than the employee, and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity, will have created the risk of the tort being committed by the employee, and (v) the employee will, to a greater or lesser degree, have been under the control of the employer.

[21] Plainly, the position is not so clear-cut where Agnes Kerr and Kayleigh Kerr are concerned. But, as the defenders acknowledge, the law on vicarious liability has been "on the move" in recent years (*Catholic Child Welfare Society*, para [19]). It is clear that the circumstances in which vicarious liability might arise are not confined to those involving an employer/employee relationship. Thus, in *Armes*, the UK Supreme Court considered the issue of whether a fostering relationship was "akin to employment" such that a local authority would be vicariously liable for torts committed by foster parents against a claimant who was in their immediate care. In the particular circumstances of that case the Supreme Court (by a majority) found the local authority to be vicariously liable for the abuse perpetrated by foster parents who were unrelated to the claimant. Lord Reed JSC found the relationship between the local authority and the tortfeasors to be analogous to that of employer/employee in that it bore a number of the hallmarks of such a relationship (the foster carers having been recruited and trained by the local authority, and who were

considered to have provided care to the child as an integral part of the local authority's organisation of its child care services (para [59])). Lord Reed, in deference to Lord Hughes' dissenting views in the same case, also gave this important proviso (paras [71]-[72]):

> "[71] It is important to emphasise that the decision that vicarious liability should be imposed in the present case is based on a close analysis of the legislation and practice which were in force at the relevant time, and a balancing of the relevant factors arising from that analysis, some of which point away from vicarious liability, but the preponderance of which support its imposition. Applying the same approach, vicarious liability would not have been imposed if the abuse had been perpetrated by the child's parents, if the child had been placed with them, since the parents would not have stood in a relationship with the local authority of the kind described in *Cox's* case; even if their care of the child might be described as having been approved by the local authority, and was subject to monitoring and might be terminated, nevertheless they would not have been recruited, selected or trained by the local authority so as to enable it to discharge its child care functions. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose.
>
> [72] It would not be appropriate in this appeal to address the situation under the law and practice of the present day, on which the court has been addressed, and which would also require a detailed analysis. It is sufficient to say that…the court would not be likely to be readily persuaded that the imposition on a local authority of vicarious liability for torts committed by parents, or perhaps other family members, was justified…"

[22] I accept for present purposes that determining vicarious liability involves consideration of the two-stage test for such liability described by Lord Burrows, following a review of the main 21st century authorities, in *BXB* (see para [58]). Stage 1 is concerned with the relationship between the defender and the negligent party. Stage 2 is concerned with the link between the negligent act or omission and that relationship. Since it was accepted by the defenders that the arguments in the present case turn on the stage 1 assessment, the primary question raised is whether the relationship between the defenders and Agnes Kerr and/or Kayleigh Kerr can be regarded as "akin to employment" (*BXB*, para [58](ii); *Barclays Bank plc*, para [27]).

[23] Determining whether a relationship is "akin to employment" requires consideration of the features of the relationship that are similar to, or different from, a contract of employment. Features to consider may include: whether the work is paid for in money or in kind, how integral to the organisation is the work carried out by the negligent party, the extent of the defenders' control over the negligent party in carrying out the work, whether the work is being carried out for the defenders' benefit or in furtherance of its aims, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the role fits (*BXB, supra.*). In *DJ*, to which I was referred by the defenders, Lambert J acknowledged that there may also be a distinction to be drawn between the position of foster parents recruited by a local authority and family members acting as kinship carers. The relationship under consideration involved the claimant and his uncle and aunt, with whom the claimant was placed under a voluntary care arrangement that in due course became a foster care placement. However, I also agree with Lambert J's observations about paras [71] and [72] of *Armes* which merit quotation:

> "[30] Paragraphs [71] and [72] of Armes, when read together do not define categories of foster carers for the purpose of understanding whether the local authority will or will not be vicariously liable for their tortious acts (or omissions). Lord Reed is not prescriptive, even in respect of parents, saying only that the court would not be 'likely' to be 'readily persuaded' to impose vicarious liability for tortious conduct.
>
> [31] The question is whether there is a sufficiently sharp line between the activity of foster carers and the local authority such that vicarious liability is not justified. There may be very little room for doubt in the case of 'ordinary' foster parents. There may be a very large measure of doubt in the case of foster parents who are parents. But whether there is such a demarcation will lie in understanding, as best one can, the '*details of the relationship*' as described by Lady Hale in *Barclays Bank* at [27] to see whether, when whittled down, the relationship is one akin to employment. I do not therefore find that the question of the imposition of vicarious liability (or not) in this context can be resolved by reference simply to the relationship between the claimant and [the claimant's uncle and aunt]."

[24] In *DJ* it was ultimately held on the evidence (none of which was disputed between the parties, and much of which appears to have been left to the court to range over unassisted by them) that the claimant's uncle and aunt were engaged in an activity which was more aligned to that of parents raising their own child and that the activity was sufficiently distinct from that of the local authority exercising its statutory duty. The local authority was therefore not vicariously liable for the sexual abuse perpetrated by the uncle. By a similar process of reasoning the defenders submit that no relevant basis has been pled for importing vicarious liability in respect of the acts or omissions of Agnes Kerr and/or Kayleigh Kerr.

[25] One feature of the English jurisprudence cited to me on this aspect of the case is that they were substantially decided after evidence had either been led or agreed. Plainly that is not the position in the instant case. Moreover, it is apparent that the majority decision in *Armes*, which favoured the imposition of vicarious liability, was based on a close analysis of the legislation and practice which were in force at the relevant time, and a balancing of the relevant factors arising from that analysis. No such analysis was afforded to this court during the course of the discussion. That may reflect a point emphasised during the pursuer's submissions to the effect that there was uncertainty as to the status of the placement with which this case is concerned. On might have thought that its status ought not to be a matter of difficulty standing the defenders' admission that the child was in her care in terms of a placement approved by the defenders (answer 2). But difficulty there is. Specifically, there seems to me to be uncertainty as to whether the placement was one approved under regulation 10 of the 2009 Regulations. That may explain the somewhat puzzling averment in statement 2 that at the material time "[the child] was in the care of Agnes Kerr, his maternal grandmother, in a kinship placement *purportedly* approved by the

defenders" in terms of that regulation. The defenders admit that the child was subject to a kinship placement approved by them, but there is no express admission that the placement was made under regulation 10. That is potentially significant because, if it was, then, in treating the arrangements made for the child as a kinship placement, the defenders would become subject, and require to give practical effect, to certain duties in terms of Parts V and X11 of the 2009 Regulations. Those duties would include entering into a written agreement with the carer regarding the matters and obligations contained in Schedule 5 to the 2009 Regulations and any other matters and obligations as the defenders considered appropriate (regulation 12), and also reviewing the kinship care arrangements and visiting the child (regulations 45 and 46). In this context, the terms of Schedule 5 to the 2009 Regulations may be of particular significance. The matters and obligations referred to include (i) the support and training to be given to the kinship carer (paragraph 1); (ii) procedure for review of the placement (paragraph 2) and (iii) the financial arrangements which are to exist between the local authority and the kinship carer (paragraph 3(b)).

[26] In the final analysis, I do not read the case law as going so far as to exclude vicarious liability in all cases where kinship carers are concerned. The most that can be said is that the court might be slow to find that it would arise in the context of arrangements in which family members are involved in the care of a looked-after child. It is not for the court at this stage to determine finally whether the relationship between the defenders and the Kerrs was "akin to employment" but rather whether on a proper consideration of the pleadings the pursuer will inevitably fail to prove that it was. In the instant case the pursuer has the disadvantage of being one step removed from whatever arrangements were put in place. But the answer to the question whether the defenders ought to be held vicariously liable for the acts and/or omissions of Agnes Kerr and Kayleigh Kerr is embedded in the

arrangements which were put in place, and in the absence of evidence on what they were I am not prepared to hold, at least at this stage, that the pursuer is bound to fail in his attempt to assert that they should be so. The defenders mounted a strong challenge to the imposition of vicarious liability and relied on the underlying policy considerations evident in the case law for restricting the circumstances in which it ought to be where children under local authority care are concerned. The pursuer's case on vicarious liability may, in the final analysis, be difficult to sustain. But whether that is so ought properly to be resolved after the facts have been established.

[27] That same uncertainty answers, for the time being at least, the defenders' attack on the case of fault against Agnes Kerr. The submission was to the effect that, having regard to the nature of the relationship between Agnes Kerr and the child, the averred duties were too broad in scope. Specifically, the submission rests on the assumption that Agnes Kerr ought to be regarded *in loco parentis.* I agree with the submission of the pursuer that the question whether she was, or was not, *in loco parentis* cannot be divorced from the nature, terms and circumstances of the placement. Absent clarity on the nature of the placement, as previously discussed, it is not a given that Agnes Kerr owed to the child the same duty of care as a reasonable and prudent parent would owe to their children just because she happened to be a member of the child's family. The cautionary observations of Lord Hutton in *Barrett* v *Enfield London Borough Council* [2001] 2 AC 550 (at p587) about children suing their parents for decisions made during their upbringing which could subsequently be shown to be wrong, and of Lord Phillips in *Harris* about the absence of any duty to ensure "constant surveillance", must be considered in that light.

[28] During argument the defenders made the point that, whilst there are averments to the effect that it was reasonably foreseeable that, in being drunk, Agnes Kerr would not be

able to supervise the child, it does not follow that it was reasonably foreseeable to her that supervision by Kayleigh would pose a risk to the child. I am unsympathetic to this submission in circumstances where it appears on the pleadings (statement 4) that the circumstances of Kayleigh Kerr coming to be responsible for bathing the child are unknown to the pursuer (beyond a belief that Agnes Kerr was hungover and asleep at the material time). That uncertainty is apparent from the averment (statement 4) that "[t]he child was left unattended and unsupervised by either Kayleigh Kerr or Mrs Kerr in the bath tub for several minutes." These uncertainties seem to me to justify the view that the circumstances in which Kayleigh Kerr had care of the child both during the subsistence of the placement, and at the time when the tragic events of 25 August 2018 unfolded, require to be established before a concluded view can be reached on whether the duties ascribed to Agnes Kerr are too broad in scope.

Direct case against the defenders

[29] The defenders contend that the duties averred by the pursuer are irrelevant from the point of view of both (i) the scope of the defenders' duty of care in the circumstances, and (ii) the issue of legal causation.

[30] So far as relevant for present purposes, I draw from the authorities cited the following principles. For the pursuer to establish liability it will not be enough to show that but for the defenders' decision to place the child in Agnes Kerr's care the child would not have drowned (*South Australia Asset Management Corporation*). On a claim in negligence a defender is only liable in damages in respect of losses of a kind which fall within the scope of its duty of care. The law has regard to the actual nature of the damage which the pursuer has suffered when it determines the scope of that duty (*Meadows*, para [33]). Public

authorities do not owe a duty of care merely because they have statutory powers or duties even if, by exercising their statutory functions, they could prevent a person from suffering harm. But they may come under a common law duty to protect from harm in circumstances where the principles applicable to individuals or bodies would impose such a duty, for example where the authority has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation (*Poole Borough Council*, paras [65], [72]). The principle of assumption of responsibility is a wide one, and whether such a responsibility has been assumed will require an examination of the particular facts to see whether there is an express or implied undertaking of responsibility (see eg *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465, pp 528-529 and 530, per Lord Devlin).

[31] Against that legal framework the defenders invited the court to the view that, although the pursuer's case was that the defenders were negligent in placing the child with Agnes Kerr given her history of problematic drinking, the substance of the criticism was that Agnes Kerr delegated the care of the child to Kayleigh Kerr. Absent any averments that the defenders had a duty to protect the child from the care provided by Kayleigh Kerr, the child was in no different a position to that of the unfortunate mountaineer with the injured knee in *South Australia Asset Management Corporation.* I quite recognise that a possible outcome in this case may be one in which that analysis turns out to be correct. But I am not persuaded that I can reach a concluded view at this stage. I agree with the pursuer that the scope of the defenders' duties does not exist in the abstract, and that whether they assumed responsibility for protecting the child from the kind of harm which befell him will require an examination of the legal status and terms of the placement, and the roles of the parties to it, as well as where Kayleigh Kerr stood relative to it (if anywhere). In reaching that view I

have had regard to what senior counsel for the pursuer submitted about the extent to which kinship placements may vary in both character and circumstance (cf. The Scottish Parliament's Briefing on Kinship Care (4 November 2016) quoted in paragraph 9 of the pursuer's note of arguments). For reasons previously traversed, this is a case where the status and terms of the kinship placement with Agnes Kerr are unclear. The facts ought, therefore, to be established before the scope of the defenders' duty of care is determined. I therefore decline at this stage to give effect to the defenders' submission that the scope of duty question must be answered in the negative and the direct action against the defenders dismissed.

[32] Finally, I can deal briefly with the submissions bearing upon the question whether the actions of Kayleigh Kerr comprised a *novus actus interveniens.* It is uncontroversial that where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender then no liability will attach (*Hughes* v *Lord Advocate* 1963 SC (HL) 31 at p.38 per Lord Reid). The question to be asked is whether the whole sequence of events is a natural and probable consequence of the act or omission and a reasonably foreseeable result of it. The answer must be dictated by common sense rather than logic on the facts and circumstances of each case (*Knightley* v *Johns.* pp 366-367 per Stephenson LJ). It would appear from the pleadings, at both statement 5 and answer 5, that the circumstances in which Kayleigh Kerr came to be responsible for the care of the child are largely unknown to both the pursuer and the defenders. I am not therefore prepared to form any concluded view as to whether her involvement, whatever it was, amounted to something new or unexpected. Having determined that, in respect of the other arguments skilfully advanced on behalf of the defenders, the court ought to hear evidence then it seems to me that this issue ought to be treated in the same way.

[33] It follows that I am not prepared to determine on the pleadings that the chain of legal causation has been broken such that the case directed against the defenders' social work department ought to be dismissed.

Disposal

[34] In the result, I will allow parties a proof before answer on the whole of the pleadings as now amended. Dates have previously been reserved for such a hearing. All questions of expenses are reserved meantime.